

UNIVERSAL JURISDICTION OVER CPP-NPA ACTION AGAINST REJECTIONISTS: BARANGAY SAN VICENTE IN FOCUS*

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I. BACKGROUND

Barangay San Vicente is a remote village in the 5th class municipality of San Narciso, Quezon. The barangay's center is about 24 kilometers away from the town center, accessible via dirt road that is impassable following heavy rains. It has a population of 1,542 with 268 households. The main source of livelihood is agriculture, mainly coconut farming. About 98% of households live as share tenants, surviving through a 60%-40% sharing arrangement, wherein 60% of coconut harvest goes to the landowner. Tenants shoulder the cost of production.¹

In response to the plea of farmers of San Vicente, San Narciso, Quezon, the Task Force Bondoc Peninsula (TFBP)² conducted a Humanitarian Mission last September 18, 2003 in Sitio Centro, San Vicente. The farmers claimed to have experienced a series of atrocities and harassments by the New People's Army (NPA) and goons headed by Erwin Esguerra, son-in-law of landlord Juanito Uy. The politically-influential Uy

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¹ TASK FORCE BONDOK PENINSULA, *LIVING DANGEROUSLY IN SAN VICENTE: A HUMANITARIAN MISSION REPORT ON AGRARIAN REFORM AND HUMAN RIGHTS SITUATION IN BARANGAY SAN VICENTE, SAN NARCISO, QUEZON, PHILIPPINES 1* (2003).

² TFBP is composed of Amnesty International-Pilipinas; Balay, Inc.; Foodfirst Information Action Network (FIAN-Philippines); Malayang Katipunan ng mga Maliliit na Magniniyog ng San Narciso (MAKAMMASA); Quezon Association for Rural Development and Democratization Services (QUARDDS), Ugnayan ng mga Nagsasariling Organisasyon sa Kanayunan (UNORKA); Partnership for Agrarian Reform and Rural Development Services, Inc. (PARRDS); Philippine Ecumenical Action for Community Empowerment Foundation, Inc. (PEACE); AKBAYAN! (Citizens' Action Party); and the National Anti-Poverty Commission-Youth and Students Sectoral Council (NAPC-YS).

family is recognized as the only family owning vast portions of the barangay, estimated to be 3,500 hectares.³

Based on interview with particular victims and field observation, the following factual circumstances were determined:

1. Farmers were helplessly subjected to a series of harassment incidents perpetuated in various instances by the goons and kin of the influential landowner as well as members of the New People's Army. The Mission probed eight cases that affected 14 farmers. The cases are as follows:

- (i) "ambush"
- (ii) destruction of farmer's koprasan
(used for cooking coconut meat)
- (iii) firing at a farmer's house
- (iv) forcible harvesting of coconut
in land tilled by a farmer
- (v) frustrated murder
- (vi) abuse of power/coercion
- (vii) verbal life threats
- (viii) burning a farmer's house.

2. A farmer-leader was brutally murdered while his family is being harassed and suffers psychologically. The leader was Raymundo "Teteng" Tejino, killed by members of the NPA, who linked him to military intelligence.

3. Displaced and immobile, farmer-victims and their families continue to live in poverty and literally fear for their lives. They can no longer farm on regular basis, thus affecting their source of income necessary to provide food on the table and send their children to school.

4. Farmer-victims want justice, agrarian reform, and peace. They want to be indemnified for the damages done to their properties. They want the perpetrators brought to justice. Most of all, they demand agrarian reform in the lands they till.⁴

³TFBP, *supra* note 2.

⁴ *Id.*

From January-April 2004 alone, TFBP was able to document two (2) cases of robbery, four (4) cases of harassments, and one (1) case of frustrated murder and another case of consummated murder--all occurring in Barangay San Vicente. These exclude other similar cases that have been reported in the previous year, all of which were imputed to the NPA's southern Quezon unit dubbed as the Maria Theresa de Leon Command. In an article⁵ authored by Francis Isaac some of these incidents were detailed as follows:

On 4 February 2003 local peasant leader Raymundo "Teteng" Tejino was assassinated by armed men belonging to the New People's Army for his alleged involvement in the military's barangay intelligence network. Ka Teteng's widow Luzviminda recounted that on the day of his murder, communist guerillas came to their home and accosted her husband outside of their house. A gunshot was heard five minutes later which was then followed by a series of shots. Tejino was soon found sprawled in his own backyard with a leaflet piled on top of his corpse.

In the said statement signed by the Maria Theresa de Leon Command, the perpetrators asserted that the "death sentence" was carried out as a punishment for Ka Teteng's counterrevolutionary activities resulting in one (1) NPA casualty during an armed encounter with government forces on May 2002. The paper further remarked that:

[S]a (sic) ilalim ng maria teresa de leon command. (sic) ay pinarusahan ng kamatayan, si Remundo Tejino (sic), ng barangay san juan san narciso quezon. (sic) dahil sa pagpapagamit nito. (sic) sa tropa ng 74th ib pa. (sic) at masugid na ahite (sic) ng nasabing tropa...si tejeno (sic) ay napatunayan din nakabilang (sic) sa tinatawag na barangay intelligence net work (sic). naging (sic) utak din ito sa pagpapakobkub. (sic) sa unit ng bhb. (sic) na kinamatay ni kasamang lawin. (sic) sa resulta ng labanan. (sic) ng bhb⁶ at afp. (sic) noong mayo. (sic) 2002.⁷

⁵ CPP-Landlord Collaboration Against Agrarian Reform in Bondoc Peninsula. 22 July, 2004.

⁶ BHB refers to the Bagong Hukbong Bayan, Tagalog nomenclature of the New People's Army.

⁷ Maria Theresa de Leon Command for South Quezon-New People's Army, Pahayag Mula sa Partido Komunista ng Pilipinas/Bagong Hukbong Bayan (unpublished statement).

In its properly punctuated English translation, the statement would read as such:

Under the Maria Theresa de leon Command, death penalty is hereby imposed on Reymundo Tejino of Barangay San Juan, San Narciso, Quezon due to his collaboration with the 74th Infantry Battalion of the Philippine Army and for being an active agent of the said contingent. It has also been proven that Tejino was part of their barangay intelligence network and primarily responsible for an attack on a BHB unit which led to the death of Comrade Lawin after intense fighting between the BHB and the AFP. (translation by the Francis Isaac)

Ka Teteng's wife and other kin have denied the charges that he was a military asset, claiming that contrary to NPA propaganda, the former has even earned the ire of the military for being a vocal leader of the *Samahan ng mga Malayang Magsasaka sa Sitio Libas* (SMMSL/Association of Free Farmers in Sitio Libas). Rather, they see the murder as a result of the perceived tactical alliance between the NPA and the highly influential Uy family who have bitterly opposed Tejino's attempt to subject a portion of their 3,500-hectare landholding under the government's Comprehensive Agrarian Reform Program (CARP).

The travails of the Tejino family did not end with Teteng's demise. For shortly after lodging a case blotter with the local police, Luzviminda also began receiving frequent "invitations" from NPA guerillas for clarification and questioning.

Teteng's murder was soon followed by another case of abuse when two (2) NPA guerillas—one of whom was identified only as Ka Ruben of Sitio Cabungahan, Brgy. Busukbusukan, San Narciso—ordered Felizardo "Do" Benitez (president of the *Samahan ng mga Magbubukid sa Sitio Centro* or SMSC—a local farmer organization) to "desist from the struggle for land reform, or risk his life."⁸ They further admitted of killing Tejino and warned Benitez that he may soon follow suit if he does not heed their advice.

⁸ TASK FORCE BONDOC PENINSULA, LIVING DANGEROUSLY IN SAN VICENTE: A HUMANITARIAN MISSION REPORT ON AGRARIAN REFORM AND HUMAN RIGHTS SITUATION IN BARANGAY SAN VICENTE, SAN NARCISO, QUEZON, PHILIPPINES 12 (2003).

A similar incident also occurred on 10 September 2003 wherein seven (7) NPA insurgents, after failing to find Benitez, confronted fellow tenant Efren Binalla and instructed him to tell the former that he only has five (5) days to end his campaign or he will be expelled from Quezon. They further remarked that the kind of agrarian reform Benitez is fighting for was a sham and that the certificate of land ownership awards (CLOAs) issued by the government cannot be considered as authentic land titles. The guerillas did not also fail to spare Binalla from their verbal assault, informing him to immediately disassociate himself from Benitez lest he too meets a similar fate.

Even the Yuletide spirit failed to dampen the bellicose mood of the NPA, as three (3) of its guerillas entered the abode of Alberto "Bonggo" Bitong—coordinator of the Samahan ng mga Magsasaka sa Sitio Culisan (SAMCU/Association of Farmers in Sitio Culisan)—on the morning of 12 December 2003 and told him to end his campaign for agrarian reform or he will never make it to the New Year.

Then came his narrow escape from death on the evening of 29 March 2004 when 10 NPA members attempted an ambush by blocking all regular exit-points as he was attending a baptismal rite in the nearby sitio of Bagaya. Thanks to a piece of information passed to him by a friend, he was able to elude detection and escaped into the night, unseen and unharmed.

Benitez's vice-president, Deolito Empas also experienced NPA harassment on 2 April 2004 when two (2) sons of identified NPA member Bobong Becamon came into his house and told him to go with them to an undisclosed location. Politely declining their demand, the two men left; but Becamon soon appeared and partook of Empas' morning meal, placing his magnum .357 beside him. He then reiterated his sons' instructions; but Empas replied that he cannot leave without any of his relatives accompanying him. The guerilla agreed and Empas hurriedly left for his brother's house. His relatives, however, advised him not to go with Becamon and he left San Narciso that same night. The following day, several NPA militants entered his home and rummaged through his things—practically turning his house inside out.

Then on 18 January 2004 came the NPA's failed attempt on Dioscoro "Junior" Tejino's life—younger brother of Teteng and incumbent

president of SMMSL. According to Tejino, at around 6:00AM, four (4) NPA guerillas (two of whom were identified as Ricardo Rodrigo a.k.a. Ka Ricky and Irene "Ka Monique" Reñon) entered into his house after first firing a warning shot, apparently with the intention of finally eliminating him.

Able to jump out of his house on time, the rebels were unable to find anyone except for his five-year old son Joshua. Rodrigo then poked his M16 rifle on the child and ordered him to crawl out of the house. A neighbor's timely pleading caused NPA guerillas to cease what they were doing to the child.

It must be reiterated that the farmers who are being victimized were once sympathizers of the CPP—followers who strictly adhered to the NPA's brand of politics until disagreements over strategy and their boycott campaigns forced them to strike out on their own.

II. PURPOSE

The primary concern is to examine the applicability of universal jurisdiction, keeping in mind the related doctrines of individual and command responsibility as well as rules on armed groups in internal conflict in international law, to the allegations of CPP-NPA action against rejectionists in Barangay San Vicente. These entail a look into treaty law, customary international law and jurisprudence relevant to this particular situation.

III. A BRIEF REVIEW OF RELATED DOCTRINES

A. ARMED GROUPS IN INTERNAL ARMED CONFLICTS⁹

A key feature of internal conflicts is the widespread violation of humanitarian and human rights by armed groups, from rebel movements to private militias. With the proliferation of weapons, especially small arms and land mines, and the erosion of state control, threats to human security are increased both as people are the direct targets of violence, and as a result of

⁹ Claude Bruderlein, *The Role of Non-State Actors in Building Human Security: The Case of Armed Groups in Intra-State Wars* (2000), available at http://www.humansecuritynetwork.org/docs/report_may2000_2.c.php (last updated October 30, 2006).

the organized crime and random violence which occurs in these chaotic conditions. Armed groups are certainly not accountable for all violence perpetrated against civilians, but their presence among civilians plays a definite role in blurring the dividing line between combatants and non-combatants, the basic concept on which humanitarian protection rests.

In this context, the main characteristics of armed groups can be described as follows:

1) A basic command structure:

The combatants are organized according to a unitary command structure and follow its instructions. The commanders have at least a minimum of control over the conduct of the combatants, particularly regarding the group's behavior toward civilians.

2) The use of violence to achieve political ends

The group is engaged in a political struggle, that is, an attempt to redefine the political and legal basis of the society through the use of violence. Violence is often employed not as a military tactic aiming for a takeover, but as a means to render the political status quo unsustainable. Violence in this context can take innumerable forms, particularly toward civilians, including killing, raping, kidnapping, torture, extortion, attacks on crops or water sources, local markets, and toward civilian infrastructures such as attacks on schools, administrative offices, ambushes on commercial roads, power lines, etc. Combatants often engage in parallel criminal activities, using force to extract resources for their own benefits, through extortion, drug trafficking, illegal timber or diamond trade, etc. The extent to which combatants are allowed to engage in independent criminal activities is a fair indicator of the degree of control of the leadership over the group.

3) Independence from state control

The issue of state control is often problematic. The degree of the control of the leadership over the conduct of the combatants remains a key indicator of the independence of the group.

B. INDIVIDUAL AND COMMAND RESPONSIBILITY

Quite apart from his responsibility to conduct military operations under national and international rules and regulations, a commander may also be criminally liable if war crimes are committed by him or those under his command. Liability is clear if the commander commits a war crime himself or assists in some way in its commission, but very often his responsibility will be less sharply defined because he will be remote from the scene of the crime or from those who have committed it.¹⁰

1) Individual Responsibility

Commanders are responsible for the orders they give and so if the orders are unlawful they are as responsible in law as those who carry out the orders.¹¹

2) Command Responsibility

Even if he does not order his subordinates to commit the unlawful acts, a commander is liable if he knew, or ought to have known, of them and failed to take steps to prevent them.¹²

IV. UNIVERSAL JURISDICTION

A. UNIVERSAL JURISDICTION AND THE AUT DEDERE AUT JUDICARE RULE

Universal jurisdiction is the ability of the court of any state to try persons for crimes committed outside its territory which are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests.¹³ This rule, as shown in the succeeding

¹⁰ A.P.V. Rogers, *Command Responsibility Under the Law of War* (1999), available at http://www.lcil.cam.ac.uk/lectures/lecture_papers.php.

¹¹ The Dostler Trial, Volume I, *Law Reports of Trials of War Criminals*, UN War Crimes Commission, HMSO, I WCR 22 (1946-49); General Dostler was found guilty of having ordered the illegal shooting of fifteen prisoners of war.

¹² The Yamashita Trial, IV WCR 35 (Feb. 4, 1946); as confirmed by Additional Protocol I to the 1949 Geneva Conventions, Art. 86, ¶ 2.

¹³ MENNO T. KAMMINGA, FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENCES, COMMITTEE ON INTERNATIONAL HUMAN RIGHTS

discussion, is now part of customary international law, although it is also reflected in treaties, national legislation and jurisprudence concerning crimes under international law, ordinary crimes of international concern and ordinary crimes under national law.

Under the related *aut dedere aut judicare* (extradite or prosecute) rule, a state may not shield a person suspected of certain categories of crimes. Instead, it is required either to exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime.¹⁴

The International Law Commission, which has incorporated the *aut dedere aut judicare* rule in the 1996 Draft Code of Crimes against the Peace and Security of Mankind (1996 Draft Code of Crimes) has explained the principle and its rationale as follows:

The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present. The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition. The custodial State is in a unique position to ensure the implementation of the present Code by virtue of the presence of the alleged offender in its territory. Therefore the custodial State has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction. The obligation to extradite or prosecute applies to a State which has custody of 'an individual alleged to have committed a crime.' This phrase is used to refer to a person who is singled out, not

LAW AND PRACTICE, INTERNATIONAL LAW ASSOCIATION, LONDON CONFERENCE 2000 (FINAL ILA REPORT).

¹⁴ M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* 3-5 (Dordrecht/Boston/London: Martinus Nijhoff Publishers 1995); M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in M. Cherif Bassiouni, ed., *International Criminal Law* 3, 5 (Ardsley, New York: Transnational Publishers, Inc. 2nd. ed. 1999).

on the basis of unsubstantiated allegations, but on the basis of pertinent factual information.¹⁵ (*underscoring supplied*)

The International Law Commission noted that the duty either to prosecute or extradite would depend on the sufficiency of the evidence.¹⁶

B. ORIGIN OF UNIVERSAL JURISDICTION

The doctrine of universal jurisdiction arose out of the international resolve to abolish slavery and piracy and in connection with the laws of war. This principle has been recognized under international law since the establishment of the International Military Tribunal of Nuremberg, which had jurisdiction over crimes against humanity regardless where they had been committed. The principles articulated in the Nuremberg Charter and Judgment were recognized as international law principles by the UN General Assembly in 1946.¹⁷

1) Treaty Law

There are several multilateral conventions adapted that authorize the exercise of universal jurisdiction. Among these include the Bustamante Code 1928, Montevideo Treaty 1940, Single Convention on Narcotics Drugs, as amended by its Protocol 1961, Psychotropic Drug Convention 1971, International Convention on the Suppression and Punishment of the Crime of Apartheid 1974, Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1971, Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1973, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons 1977, Convention to Prevent and Punish the Acts of Terrorism 1978, Convention on the Prevention of Taking of Hostages 1979, Nuclear Material Protection Convention 1980, Maritime Navigation Safety Convention 1988, Mercenaries Convention 1989, Crimes against United Nations and associated personnel - the 1994 Convention, the 1997 and 1999 Conventions on Terrorist Bombings and Financing of Terrorism and 2000 Transnational Crime Convention.

¹⁵ 1996 Draft Code of Crimes, Commentary to Article 8, ¶ 3. International Law Commission, Report of the International Law Commission on the Work of its Forty-Eighth Session, 51 U.N. G.A.O.R. Supp. (N.10) at 9, U.N. Doc. A/51/10 (1996).

¹⁶ *Id.*, ¶¶ 4 & 5.

¹⁷ Resolution 95 (I).

There are also regional treaties recognizing the principle of universal jurisdiction including the 1977 European Terrorism Convention, the Organization of American States (OAS) 1971 Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and the Related Extortion that are of International Significance and the Organization of African Unity (OAU) Convention for the Elimination of Mercenaries in Africa in 1972.

2) Jurisprudence

The *Lotus Case*¹⁸ held that:

[I]n the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation in whose jurisdiction he may come... Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operation is high seas, which is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry and is treated as an outlaw, as the enemy of all mankind – *hostis humanis generis* – whom any nation may in the interest of all capture and punish.¹⁹ (*underscoring supplied*)

In the case of *Kuroda v. Jalandoni*,²⁰ the Supreme Court upheld the constitutionality under Article 2 (3) of the Constitution of 1935 of the exercise of territorial jurisdiction over the former Commander in Chief of the Japanese Imperial Forces in the Philippines between 1943 and 1944 who had been charged with having unlawfully disregarded and failed "to discharge his duties as such commander to control the operations of members of his command, permitting them to commit brutal atrocities and other high crimes against noncombatant civilians and prisoners of the Imperial Japanese Forces, in violation of the laws and customs of war". The commander had been charged by a Military Commission convened by the Chief of Staff of the Armed Forces of the Philippines, pursuant to Executive Order No. 68, which established a National War Crimes Office

¹⁸ S.S. *Lotus Case* (Fr. v. Turk.), 1927 P.C.I.J. Ser. A, no. 10 (Sep. 7).

¹⁹ *Id.*, Dissent of Judge Moore.

²⁰ 83 Phil. 171, 177 (Sup.Ct. 1949).

and prescribed rules and regulations governing the trial of persons accused of war crimes.

The Supreme Court stated:

In accordance with the generally accepted principles of international law of the present day, including the Hague Convention and significant precedents of international jurisprudence established by the United Nations, all those persons, military or civilian, who have been guilty of planning, preparing or waging a war of aggression and of the commission of crimes and offences consequent thereto, in violation of the laws and customs of war, of humanity and civilization, are held accountable therefor. Consequently, in the present promulgation and enforcement of Executive Order No. 68, the President of the Philippines has acted in conformity with the generally accepted principles and policies of international law which are part of our Constitution. *(underscoring supplied)*

The Supreme Court expressly rejected the contention that the military commission had no jurisdiction to try the commander for acts committed in violation of the Hague Convention of 1907 and the 1929 Geneva Convention relative to the Treatment of Prisoners of War because the Philippines had not signed the first and had only signed the latter in 1929. It explained:

It cannot be denied that the rules and regulations form part of and are wholly based on the generally accepted principles of international law Such rules and principles, therefore, form part of the law of our nation even if the Philippines was not a signatory to the conventions embodying them, for our Constitution has been deliberately general and extensive in its scope and is not confined to the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory. *(underscoring supplied)*

C. CRIMES AGAINST HUMANITY

1) Crimes Against Humanity Defined

Crimes against humanity are inhumane acts that attack, not just the individual, but, by their very nature, humanity itself. As the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia

(Yugoslavia Tribunal) declared in the Erdemovic case in 1996, crimes against humanity are:

serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their very extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity.²¹ (*underscoring supplied*)

2) Crimes Against Humanity as *Jus Cogens* and *Erga Omnes*

Crimes against humanity and the norms which regulate them form part of *jus cogens* (fundamental norms). As such, they are peremptory norms of general international law which, as recognized in the Vienna Convention of the Law of Treaties,²² cannot be modified or revoked by treaty or national law. Article 53 of the Vienna Convention provides that:

[A] preeminent 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. (*underscoring supplied*)

As an eminent authority explained,

Jus cogens refers to the legal status that certain international crimes reach, and obligation *erga omnes* pertains to the legal implications arising out of a certain crime's characterization as *jus cogens* Sufficient legal basis exists to reach the conclusion that all of

²¹ Prosecutor v. Erdemovic, Sentencing Judgment, Case No. IT-96-22-T ¶ 28 (Trial Chamber I, 29 November 1996).

²² 1969.

these crimes [including torture, genocide and crimes against humanity] are parts of the *jus cogens*.²³ (*underscoring supplied*)

The International Court of Justice recognized in *Barcelona Traction, Light and Power Company Ltd.*, Judgment²⁴ that the prohibition in international law of certain acts, is an obligation *erga omnes*, which is a duty all states have a legal interest in ensuring is fulfilled:

[A]n essential distinction should be drawn between the obligations of a State toward 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 an interest of a legal nature in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character. (*emphasis supplied*)

As a function of the fact that crimes against humanity are *erga omnes*, a natural consequence is that all states are under an obligation to prosecute and punish crimes against humanity and to cooperate in the detection, arrest, extradition and punishment of persons implicated in these crimes. It is currently widely recognized that all states are under the obligation to try or extradite persons suspected of committing crimes against humanity under the principle of *aut dedere aut judicare*.²⁵ A violation of international law results in case of failure to fulfill this obligation.

²³ M. Cherif Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes", *Law & Contemp. Prob.*, 25 (1996), pp. 63, 68.

²⁴ *Barcelona Traction, Light and Power Company Ltd. (Belg. v. Spain)*, ICJ, 1972 Report, p. 32, ¶¶ 33-34 (July 24, 1964).

²⁵ M. Cherif Bassiouni, *Crimes against Humanity* (Dordrecht/Boston/ London: Martinus Nijhoff Publishers 1992) pp. 499-508; Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press 4th ed. 1991) p. 315.

The international community, in July 17 1998, reaffirmed the fundamental obligations of every state to bring to justice at the national level those responsible for crimes against humanity, genocide and war crimes and to exercise its jurisdiction over those responsible for these crimes. As indicated in the Preamble of the Statute of the International Criminal Court, the states parties affirmed "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation", determined "to put an end to impunity for the perpetrators of these crimes" and recalled "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."²⁶

D. UNIVERSAL JURISDICTION OF CRIMES AGAINST HUMANITY

In 1973, the UN General Assembly declared that all states have extensive obligations to cooperate with each other in bringing to justice those responsible for crimes against humanity wherever these crimes occurred and must not take any measures which would be prejudicial to these obligations. These obligations include:

3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.

4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.

5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.

6. States shall co-operate with each other in the collection of information and evidence which would help to

²⁶ Rome Statute of the International Criminal Court, Preamble, ¶¶ 4-6.

bring to trial the persons indicated in paragraph 5 above and shall exchange such information.

8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest extradition and punishment of persons guilty of war crimes and crimes against humanity.²⁷ (*underscoring supplied*)

1) Treaty Law

Crimes against humanity recognized by international law include the practice of systematic or widespread murder, torture, forced disappearances, deportation and forcible transfers, arbitrary detention and persecutions on political or other grounds.

Each of these crimes against humanity have been recognized as crimes under international law in international conventions or other international instruments, either expressly or as other inhumane acts, including:²⁸

- Declaration of France, Great Britain and Russia on 24 May 1915 (stating that those responsible for "crimes against humanity and civilization", including massacres of civilians, would "be held responsible");
- Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented to the 1919 Preliminary Peace Conference (murder and massacres, systematic terrorism, torture of civilians, internment of civilians under inhuman conditions);
- Article 6 (c) of the Charter of the International Military Tribunal at Nuremberg (1945) (Nuremberg Charter) (murder, deportation and other inhumane acts and persecutions);

²⁷ UN Principles of international co-operation in the detection, arrest extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by the General Assembly in Resolution 3074 (XXVIII) of December 3, 1973.

²⁸ <http://web.amnesty.org/web/web.nsf/pages/Ujbome>.

- Allied Control Council Law No. 10 (1946) (murder, deportation, imprisonment, torture and other inhumane acts and persecutions);
- Article 6 (c) of the Charter of the International Military Tribunal for the Far East (1946) (murder, deportation and other inhumane acts and persecutions);
- Article 2 (10) of the Draft Code of Offences against the Peace and Security of Mankind (1954) (murder, deportation and persecutions);
- Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (1993) (murder, deportation, imprisonment, persecutions and other inhumane acts);
- Article 3 of the International Criminal Tribunal for Rwanda (1994) (murder, deportation, imprisonment, persecutions and other inhumane acts);
- Article 18 of the UN Draft Code of Crimes against the Peace and Security of Mankind (1996) (murder, torture, persecution, arbitrary imprisonment, arbitrary deportation or forcible transfer of population, forced disappearance of persons and other inhumane acts); and
- Article 7 of the Statute of the International Criminal Court (1998) (murder, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, persecution, enforced disappearance of persons and other inhumane acts).

2) Customary Law

Crimes against humanity are recognized under international customary law.²⁹ As the UN Secretary-General made clear in his report to

²⁹ Article VI (c) of the International Law Commission's Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (1950); Brownlie, *supra*, 562

the Security Council on the establishment of the International Criminal Tribunal for the former Yugoslavia, which has jurisdiction over crimes against humanity:

[T]he application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.³⁰

He also stated that "[t]he part of conventional international humanitarian law which has beyond doubt become part of international customary law includes the Nuremberg Charter."³¹

The Security Council expressly stated when it established the International Criminal Tribunal for the former Yugoslavia in Resolution 827³² that it approves the report of the Secretary-General.

a) State Practice

State practice as an element of customary law must be "both extensive and virtually uniform".³³ Approximately 95 states have enacted legislation which would permit their courts to exercise universal jurisdiction over persons suspected of at least some crimes against humanity, such as murder, torture or rape, in certain circumstances.³⁴ Such legislation generally falls into one or more of five main models: express authorization to exercise universal jurisdiction over crimes against humanity, universal jurisdiction over ordinary crimes which may amount to crimes against humanity, universal jurisdiction over crimes defined or listed in treaties, universal jurisdiction over crimes under customary international law or general principles of international law and direct incorporation of international law. Among these states are Belgium,³⁵ Bolivia,³⁶ Brazil,³⁷

³⁰ Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704 ¶ 34, May 3, 1993.

³¹ *Id.*, ¶ 35.

³² 1993.

³³ *North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.), ICJ Reports, ¶ 74 (Feb. 20, 1969).

³⁴ <http://web.amnesty.org/library/index/engior530092001?OpenDocument>.

³⁵ Under the Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions (*Moniteur Belge*, 5 août 1993), Belgian courts have universal jurisdiction over violations of

Canada,³⁸ Chile,³⁹ Colombia,⁴⁰ Costa Rica,⁴¹ Denmark,⁴² Ecuador,⁴³ El Salvador,⁴⁴ France,⁴⁵ Germany,⁴⁶ Guatemala,⁴⁷ Honduras,⁴⁸ Israel,⁴⁹

the four Geneva Conventions of 1949 and their Protocols. In addition, Belgian courts are considered to have jurisdiction over crimes against humanity under customary law. See Luc Reydam, "De Belgische wet ter bestrafing van inbreuken op het internationaal humanitair recht: een papieren tijger?", 7 *Zoeklicht* (1998) p. 4. In addition, Loi 13 avril 1995, art. 8, loi relative aux abus sexuels à l'égard des mineurs provides for universal jurisdiction over crimes against minors.

³⁶ The Bolivian Penal Code (Article 1 (7)) provides that national courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them.

³⁷ The Brazilian Penal Code (Article 7) provides that national courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them.

³⁸ Section 7 (3.71) of the Canadian Criminal Code provides for universal jurisdiction over non-Canadians found in Canada for conduct outside Canada that constitutes a crime against humanity or a war crime if the conduct would have constituted an offence in Canada had it been committed in Canada.

³⁹ Article 5 of the Chilean Constitution recognizes as limits on sovereignty the respect for law which are inherent in the person and provides that the authorities have the duty to promote and respect rights guaranteed by treaties ratified by Chile which are in force. The Supreme Court of Justice of Chile has recognized under Article 5 the possibility of the direct application of the provisions of international treaties to which Chile is a party and which are in force (Judgment of 10 September 1988, Pedro Enrique Poblete Cordoba, ¶¶ 9 & 10). Chile is a party to the Inter-American Convention to Prevent and Punish Torture, which it ratified on 30 September of 1988. Article 12 of that treaty provides for universal jurisdiction over persons suspected of torture. Chile has also signed the Inter-American Convention on Forced Disappearance of Persons on 10 June 1994. Article IV provides for universal jurisdiction over this crime under international law and Chile is obliged under international law to refrain from acts which would defeat the object and purpose of the Convention pending a decision on ratification (Vienna Convention on the Law of Treaties, Art. 18). Chile has also ratified the Convention against Torture on 23 September 1989, which provides for universal jurisdiction in Article 5.

⁴⁰ The Colombian Penal Code (Article 15 (6)) provides that Colombian courts have jurisdiction over crimes committed abroad by foreigners against other foreigners, when the person presumed responsible is within Colombian territory.

⁴¹ The Costa Rican Penal Code (Article 7) states that national courts, independently of the place of the event and the nationality of the person presumed responsible, have jurisdiction to judge according to national law the crime of genocide and any crimes against human rights according to treaties accepted by Costa Rica or by its Penal Code.

⁴² Article 8 (5) of the Danish Penal Code gives the courts jurisdiction to try those responsible for certain crimes when Denmark is bound to do so by treaty (see Marianne Holdgaard Bukh, "Prosecution before Danish Courts of Foreigners Suspected of Serious Violations of Human Rights or Humanitarian Law", 6 *Eur. Rev. Pub. L.* (1994), p. 339).

⁴³ The Ecuadorean Penal Code (Article 5) provides that national courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when international treaties or conventions establish this jurisdiction.

⁴⁴ The Penal Code of El Salvador (Article 9) provides the competence of national courts to exercise jurisdiction over crimes committed abroad, when they are considered crimes of international significance according to international treaties or conventions.

⁴⁵ On 6 January 1998, the Cour de Cassation held in the *Wenceslas Munyeshyaka* case that France has universal jurisdiction under the French Law 96-432 of 22 May 1996 over genocide and crimes against humanity.

⁴⁶ Article 6 (1) of the German Penal Code provides that German criminal law applies to acts of genocide committed abroad. Article 6 (9) of the German Penal Code provides that German criminal law

Mexico,⁵⁰ Nicaragua,⁵¹ Norway,⁵² Panama,⁵³ Peru,⁵⁴ Spain,⁵⁵ Switzerland,⁵⁶ Uruguay,⁵⁷ and Venezuela.⁵⁸

applies to conduct, including conduct abroad, which Germany is obliged to prosecute under a treaty to which it is a party.

⁴⁷ The Guatemala Penal Code (Article 5 (5)) provides that national courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them.

⁴⁸ The Honduran Penal Code (Article 5 (5)) provides that courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them, or when principles of international permit courts to exercise such jurisdiction.

⁴⁹ The Israeli Nazi and Nazi Collaborators (Punishment) Law, 5710/1950, Sections 1 and 3, which prohibit certain crimes, including crimes against humanity, have been interpreted as applying to acts committed outside Israel by non-Israeli citizens. See discussion below of Attorney-General of the Government of Israel v. Eichmann, 36 Int'l L. Rep. 18, 50 (Isr. Dist. Ct. - Jerusalem), aff'd, 36 Int'l L. Rep. 277, 299 (Isr. Sup. Ct. 1962).

⁵⁰ Mexican Penal Code (Código Penal para el Distrito Federal en materia de Fuero Común y para toda la República en materia de Fuero Federal, art. 6) provides that courts have jurisdiction to try those crimes under international treaties imposing this obligation on Mexico.

⁵¹ The Penal Code of Nicaragua (Article 16 (3) (f)) provides for universal jurisdiction, inter alia, over crimes of piracy, slave commerce, racial discrimination and genocide.

⁵² Section 12 (4) of the Norwegian Criminal Code provides that, "Unless it is otherwise specially provided or accepted in an agreement with a foreign State, Norwegian criminal law shall be applicable to acts committed: . . . (4) abroad by a foreigner when the act either" (a) constitutes murder, assault and certain other crimes under Norwegian law or (b) "is a felony also punishable according to the law of the country in which it is committed, and the offender is resident in the realm or is staying therein".

⁵³ The Panamanian Penal Code (Article 10) provides that courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the offence was established by international treaties or conventions ratified by Panama.

⁵⁴ The Peruvian Penal Code (Article 2) provides that courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them.

⁵⁵ Article 65 of the 1985 Judicial Power Organic Law (Ley Orgánica del Poder Judicial, Ley orgánica 6/1985) gives Spanish courts jurisdiction over acts committed outside Spain where the conduct would violate Spanish law if committed in Spain or violates obligations under international treaties. Article 23 (4) of this law gives Spanish courts jurisdiction over other offences which international treaties require Spain to prosecute, including genocide, terrorism and where treaties require Spain to prosecute such crimes (see "The Criminal Procedures against Chilean and Argentinian Repressors in Spain: A Short Summary" (Revision One), 11 November 1998, Derechos Human Rights, <http://www.derechos.org>).

⁵⁶ Article 6bis of the Code pénal suisse gives the courts universal jurisdiction over crimes committed outside the territory which Switzerland is obliged to prosecute under a treaty, such as torture. See Switzerland's Initial Report to the UN Committee against Torture, UN Doc. CAT/C/5/Add.17, ¶ 52. Article 109 of the Code pénale militaire (Violations of the Laws of War) provides that it is a crime for anyone to act "contrary to the provisions of any international agreement governing the laws or the protection of persons and property, or . . . in violation of any other recognized law or custom of war". Article 2 (9) extends the application of the Code to civilians and members of foreign armed forces, even if they commit the crimes abroad during an international armed conflict and have no link to Switzerland. Article 108 (1) provides for the application of Articles 109 to 114 to international armed conflict; Article 108 (2) extends their application to non-international armed conflict (See Andreas R. Zeigler, "In re G.", 92 Am. J. Int'l L. (1998), pp. 78, 79).

Another source that can show state practice, or at the very least a customary international law at its nascent stage, of universal jurisdiction over crimes against humanity is the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind.⁵⁹ Relevant provisions are quoted herein:

Article 1

Scope and application of the present Code

x x x

2. Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law. (*underscoring supplied*)

x x x

Article 8

Establishment of jurisdiction

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article. (*underscoring supplied*)

Article 9

Obligation to extradite or prosecute

⁵⁷ The Uruguayan Penal Code (Article 10 (7)) provides that courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them.

⁵⁸ The Venezuelan Penal Code (Article 4 (9)) provides that courts have jurisdiction to try and punish crimes against humanity committed abroad, by nationals or foreigners, when they are in Venezuelan territory.

⁵⁹ Text adopted by the Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report (A/48/10), which also contains commentaries on the draft articles, will be published in Yearbook of the International Law Commission, 1996, vol. II (2).

Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in articles 17, 18, 19 or 20 is found shall extradite or prosecute that individual. (*underscoring supplied*)

Article 10

Extradition of alleged offenders

1. To the extent that the crimes set out in articles 17, 18, 19 and 20 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.
3. State Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.
4. Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party.

x x x

PART II

CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 18

Crimes against humanity

A crime against humanity means any of the following acts, when committed in a systematic manner OR on a large scale and

instigated or directed by a Government or by any organization or group:

- a) murder;
- b) extermination;
- c) torture;
- d) enslavement;
- e) persecution on political, racial, religious or ethnic grounds;
- f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
- g) arbitrary deportation or forcible transfer of population;
- h) arbitrary imprisonment;
- i) forced disappearance of persons;
- j) rape, enforced prostitution and other forms of sexual abuse;
- k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm. (underscoring supplied)

b) *Opinio Juris*

State practice, by itself, does not confirm the existence of an international custom. Such act must also "be carried in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."⁶⁰ Evidence of this *opinio juris* as an element of customary law can be established from statements made by government officials recognizing such norm as obligatory.

There have been a number of statements by governmental officials or extradition requests approved by executive officials which demonstrate that their states recognize that national courts have universal or extraterritorial jurisdiction over crimes against humanity, genocide, torture or war crimes, including:⁶¹

Belgium: The Minister of Foreign Affairs, Erik Derycke, stated in a television interview that "the British and

⁶⁰ North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), ICJ Reports, ¶ 77 (Feb. 20, 1969).

⁶¹ <http://web.amnesty.org/web/web.nsf/pages/Ujhome>.

Spanish authorities have the right to arrest the former Chilean dictator Pinochet."⁶²

Canada: On 27 November 1998, the Foreign Minister of Canada, Lloyd Axworthy, welcomed the judgment of the House of Lords in the Pinochet case two days before, noting that it "makes clear the global dimension of this challenge and our collective responsibility to address this issue."⁶³

France: The French Minister of Justice, Elisabeth Guigou, stated that she believed that former General Pinochet had a case to answer in France and would send extradition requests to the United Kingdom if they are approved by French courts.⁶⁴

Luxembourg: Jacques Poos, the Foreign Minister of Luxembourg, said on 31 October 1998 that Luxembourg may seek General Pinochet's extradition. Sweden: On 25 November 1998, the Minister for Foreign Affairs, Anna Lindh, welcomed the House of Lords judgment, saying: "It is good that yet another step has been taken in a process that may lead to Pinochet being brought to justice in Spain."⁶⁵

United Kingdom: The Secretary of State, Jack Straw, on 9 December 1998, issued an order to a magistrate authorizing the magistrate to proceed with a hearing on a request for extradition to Spain for acts amounting to crimes against humanity and torture committed in a third country.⁶⁶

United States: In 1997, after reports that Pol Pot, the head of the Khmer Rouge, had been taken into custody by

⁶² "Interview met Minister van Buitenlandse Zaken Erik Derycke over de arrestatie van Pinochet", VRT-TV1, 1900, 22 October 1998.

⁶³ Address by the Honourable Lloyd Axworthy to the International Conference on Universal Rights and Human Values - A Blueprint for Peace, Justice and Freedom", Edmonton, 27 November 1998.

⁶⁴ "Pinochet Gets Bail - But Stays under Police Guard in Hospital", PA News, 30 October 1998, mfl 301659 OCT 98; AFP, "Londres et Madrid statuent sur le sort du général Pinochet", Le Monde, 29 October 1998, p. 4.

⁶⁵ Ministry of Foreign Affairs Press Release, November 25, 1998.

⁶⁶ Order to the Chief Metropolitan Stipendiary Magistrate or other designated Metropolitan Stipendiary Magistrate sitting at Bow Street, December 9, 1998.

other members of the Khmer Rouge, the United States Secretary of State, Madeline Albright, and other high-level United States officials pressed states like Denmark and Canada to accept custody with a view to a possible trial either by an international criminal tribunal for Cambodia or, if this proved impossible to establish, by their national courts.⁶⁷ Although Pol Pot died before arrangements could be made to transfer him to any national jurisdiction outside Cambodia, these efforts by the Secretary of State and other high-level officials are strong evidence that the United States believes that national courts have universal jurisdiction over crimes against humanity. The former Foreign Minister of Australia, Gareth Evans, stated that Australia would have been a suitable venue for a trial of Pol Pot.⁶⁸

3) Jurisprudence

The *Eichmann Case* remains the most important case regarding the prosecution of an individual on the basis of human rights violation in international law. In 1961, Israel tried and convicted Adolf Eichmann of crimes against humanity committed in Germany during the Second World War based in part on universal jurisdiction. The District Court of Jerusalem stated:

The State of Israel's 'right to punish' the accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source . . .⁶⁹

On appeal, the same conclusion was reached by the Israeli Supreme Court:

[T]here is full justification for applying here the principle of universal jurisdiction since the international character of 'crimes

⁶⁷ Mark Kennedy & Giles Gherson, "Canada in a spin over U.S. request", *The Ottawa Citizen*, June 14, 1997, p. A3.

⁶⁸ *The Independent*, July 30, 1997.

⁶⁹ *Attorney General of Israel v. Eichmann*, 36 Int'l L. Rep. 18, 50 (Isr. Dist. Ct. - Jerusalem 1961), *aff'd*, 36 Int'l L. Rep. 277 (Isr. Sup. Ct. 1962).

against humanity' . . . dealt with in this case is no longer in doubt
. . . .⁷⁰

Numerous scholars including F. A. Mann have concluded that this case was a proper exercise of universal jurisdiction by a national court over crimes against humanity.⁷¹

In the case of *Filartiga vs. Pena-Irala*,⁷² the United States Court of Appeals assumed jurisdiction over a claim where both parties are nationals of Paraguay and the act of torture complained of took place out of the United States. Brought under the Alien Tort Claims Act, the claim was admissible in the view that prohibition against torture was considered part of the law of nations.

In a fairly recent case, French courts had an opportunity to apply the doctrine of universal jurisdiction. The French Cour d'Appel (Court of Appeal) recognized the existence of the fundamental rule of international law of universal jurisdiction in the Barbie Case when it noted that

[B]y reason of their nature, the crimes against humanity with which Barbie is indicted do not simply fall within the scope of French municipal law, but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign.⁷³

After the establishment of the International Criminal Tribunal for the former Yugoslavia in 1993, a number of courts have exercised universal jurisdiction over crimes under international law including Germany where there have been at least six criminal investigations or prosecutions of persons charged with crimes committed in the territory of the former Yugoslavia. In one case, the Supreme Court of Germany (Bundesgerichtshof) held that a Bosnian Serb could be prosecuted in Germany for genocide committed in Bosnia and Herzegovina. He was subsequently surrendered to the International Criminal Tribunal for the

⁷⁰ Id., 299.

⁷¹ F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 113-1 RECUEIL DES COURS p. 95, n. 188 (1964).

⁷² 630 F.2d 876.

⁷³ *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, Cour de Cassation (Chambre Criminelle), Judgment, 6 October 1983 (summarizing decision of Cour d'Appel), 78 Int'l L. Rep. 128.

former Yugoslavia and convicted.⁷⁴ Other states that exercised universal jurisdiction in similar crimes include Austria, Denmark, Netherlands, Sweden and Switzerland.⁷⁵

After the establishment of the International Criminal Tribunal for Rwanda in 1994, a number of prosecutors opened criminal investigations in different states concerning crimes against humanity, genocide or war crimes which occurred in Rwanda, including prosecutors in Belgium, France and Switzerland.⁷⁶

The prosecution of General Pinochet is yet another case applying universal jurisdiction. A number of national courts are reported to have determined that they, or other national courts, have universal jurisdiction over acts in other countries which amount to crimes against humanity or torture, including:⁷⁷

Belgium: In November 1998, a Brussels investigating magistrate, Daniel Vandermeersch, declared that he had jurisdiction to open a criminal investigation against former General Pinochet following the submission of a complaint by six Chileans.⁷⁸

Spain: A Spanish judge has opened criminal investigations against former General Pinochet concerning crimes committed in Chile involving victims of Spanish, Chilean and other nationalities and a criminal investigation against the members of the Argentinian military junta concerning crimes committed during the military government.

Switzerland: A Geneva prosecutor has opened a criminal investigation of former General Pinochet concerning the death of person with Chilean and Swiss nationality. A Swiss court has requested the extradition of former Admiral and deputy military junta member Emilio

⁷⁴ Prosecutor v. Tadic, Judgment, Trial Chamber, Case No. IT-94-1 (May 7, 1997).

⁷⁵ <http://web.amnesty.org/web/web.nsf/pages/Ujhome>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Belga/Belgian Press Agency, November 6, 1998.

Massera in December 1998 for kidnapping a person with Chilean and Swiss nationality in Argentina in 1977.

E. UNIVERSAL JURISDICTION OF WAR CRIMES

At present, there is very little doubt that any state may exercise universal jurisdiction over most war crimes, whether committed during international or non-international armed conflict. The prohibition of war crimes is now part of *jus cogens* and an obligation *erga omnes* on all states to enforce. War crimes subject to universal jurisdiction encompass certain serious violations of international humanitarian law during international armed conflict, including both crimes defined under customary international law and those defined in treaties like grave breaches of the Geneva Conventions and Protocol I.

Traditionally, the term "war crimes" was limited to wars between states, however, it is now considered to embrace certain serious violations of international humanitarian law during non-international armed conflict, including serious violations of Common Article 3 of the Geneva Conventions,⁷⁹ certain serious violations of Protocol II⁸⁰ and some other conduct which, if it had been committed during an international armed conflict, would constitute war crimes.⁸¹

⁷⁹ Common Article 3 of the Geneva Conventions prohibits the following acts when committed during a non-international armed conflict against "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause":

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

⁸⁰ Protocol II requires: respect for certain fundamental guarantees of protected persons (Article 4); humane treatment of persons whose liberty has been restricted (Article 5); respect for the right to fair trial with respect to crimes related to the armed conflict (Article 6); humane treatment of wounded, sick and shipwrecked persons (Article 7); searching for wounded, sick and shipwrecked persons (Article 8); protection of medical and religious personnel and medical units and transports (Articles 9, 10 and 11); respect for the Geneva emblems (Article 12); protection of the civilian population and individual civilians (Article 13); protection of objects indispensable to the survival of the civilian population (Article 14); protection of works and installations containing dangerous forces (Article 15); protection of cultural objects and places of worship (Article 16); and no forced movement of civilians (Article 17).

⁸¹ Principles of international humanitarian law which apply in all conflicts, whether international or non-international, include the following:

With the establishment of the Yugoslavia and Rwanda Tribunals and the adoption of the Rome Statute, it has now been generally recognized that violations of international humanitarian law during non-international armed conflict are war crimes entailing individual criminal responsibility.

As a consequence of the recognition of violations of international humanitarian law in non-international armed conflicts as war crimes, they are now subject to universal jurisdiction - like any other war crime. Leading scholars in the field have agreed with this view. Theodor Meron, a member of the United States government delegation at the Rome Diplomatic Conference, concluded in 1995:

Many serious violations of common Article 3 and Geneva Protocol II, as well as other significant norms of the Geneva Conventions, though not explicitly listed as grave breaches, are of universal concern and subject to universal condemnation. These are crimes *jure gentium* [under the law of nations] and therefore all states have the right to try the perpetrators. This right can be seen as an analogue, *mutatis mutandis*, of the prerogative of all states to invoke obligations *erga omnes* against states that violate the basic rights of the human person.⁸²

- the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited (XXth International Conference of Red Cross and Red Crescent Societies, Res. XXVIII (1965); U.N. G.A. Res. 2444(XXIII) (1968);

- it is prohibited to launch attacks against the civilian population as such (XXth International Conference of Red Cross and Red Crescent Societies, Res. XXVIII (1965); U.N. G.A. Res. 2444(XXIII) (1968); U.N. G.A. Res. 2675(XXV) (1970));

- in the conduct of military operations during armed conflicts, a distinction must be made between persons actively taking part in the hostilities and civilian populations (XXth International Conference of Red Cross and Red Crescent Societies, Res. XXVIII (1965); U.N. G.A. Res. 2444(XXIII) (1968); U.N. G.A. Res. 2675(XXV) (1970));

- in the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to the civilian populations (U.N. G.A. Res. 2675(XXV) (1970));

- dwellings and other installations that are used only by civilian populations should not be the object of military operations (U.N. G.A. Res. 2675(XXV) (1970));

- places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations (U.N. G.A. Res. 2675(XXV) (1970));

- civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity (U.N. G.A. Res. 2675(XXV) (1970)); and

- the Declaration of principles for international humanitarian relief to the civilian population in disaster situations in Resolution XXVI of the XXIst International Conference of the Red Cross and Red Crescent Societies (1969) shall apply in situations of armed conflict (U.N. G.A. Res. 2675(XXV) (1970).

- violation of some of these principles, as well as others, are expressly recognized as war crimes in Article 8 (2) (c) of the Rome Statute.

⁸² Theodor Meron, *International Criminalization of Internal Atrocities*, 89 Am. J. Int'l L. 554, 576 (1995).

Another indication of such acceptance is the ILC's Draft Code of Crimes which provides that:

x x x

Article 8
Establishment of jurisdiction

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.
(underscoring supplied)

x x x

Article 20
War crimes

Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner OR on a large scale: *(underscoring supplied)*

x x x

(f) any of the following acts committed in violation of international humanitarian law applicable in armed conflict not of an international character:

- (i) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (ii) collective punishments;
- (iii) taking of hostages;
- (iv) acts of terrorism;
- (v) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (vi) pillage;
- (vii) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly

constituted court, affording all the judicial guarantees which are generally recognized as indispensable. (underscoring supplied)

Also in July 2000, the International Law Association endorsed the conclusion of its Committee on Human Rights Law and Practice that:

Gross human rights offences in respect of which states are entitled under international customary law to exercise universal jurisdiction include . . . war crimes [as defined in Article 8 of the Rome Statute].⁸³

Since war crimes are subject not only to universal jurisdiction but also to an extradite or prosecute obligation, those committed in non-international armed conflict should be treated the same way. The duty to extradite or prosecute is embodied in the ILC Draft Code.

x x x

Article 9

Obligation to extradite or prosecute

Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in articles 17, 18, 19 or 20 is found shall extradite or prosecute that individual.

x x x

Similarly, the UN Commission on Human Rights in 1999 reminded all parties to the armed conflict in Sierra Leone, which was largely a non-international one at the time, that all countries were under an obligation to search for persons alleged to have committed or to have ordered to be committed certain violations of international humanitarian law (hostage-taking, willful killing and torture or inhuman treatment of persons not taking an active part in hostilities) and to bring such persons, regardless of their nationality before their own courts.⁸⁴

⁸³ International Law Association, Res. 9/2000, adopted at the 69th Conference, London, July 25-29, 2000.

⁸⁴ UN Comm'n Hum. Rts Res. 1999/1 of April 6, 1999.

F. PRINCETON PRINCIPLE ON UNIVERSAL JURISDICTION

The most recent development in the subject of universal jurisdiction brought about by the 9/11 attacks to the United States, the relevant portions of the Princeton Principle are quoted herein:

Principle 1 -- Fundamentals of Universal Jurisdiction

1. For purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.

2. Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such judicial body. (*underscoring supplied*)

Principle 2 -- Serious Crimes Under International Law

1. For purposes of these Principles, serious crimes under international law include:

- (1) piracy;
- (2) slavery;
- (3) war crimes;
- (4) crimes against peace;
- (5) crimes against humanity;
- (6) genocide; and
- (7) torture.

2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law. (*underscoring supplied*)

V. CONCLUSION

Several questions need examination to determine the applicability of the doctrines discussed to the factual circumstances attending the situation in Barangay San Vicente.

Is there an existing internal conflict? Is the CPP-NPA an armed group involved in such internal conflict? How can the acts of the CPP-NPA against the rejectionists be characterized? Can command responsibility come into play to impute liability to those in the higher echelon of the CPP-NPA chain of command? Can universal jurisdiction be properly invoked?

Internal conflicts are those occurring within state boundaries rather than between formally-constituted governments. In the situation involving Barangay San Vicente, there is no doubt that the conflict is an internal one as no foreign state, is involved.

Juxtaposing the discussed criteria for armed groups, the CPP-NPA can be characterized as such. First, it has a basic command structure ranging from the foot soldier in the geographical command units to the chairman. Second, the CPP-NPA has resorted to violence to put into effect its political ends and prevent the application of the CARP in Barangay San Vicente. Among the acts of violence perpetrated include killing of a civilian, attempts on the life of several others, attack on the farmers' crops, as well as various incidents of intimidation and threats to the civilian population. Lastly, state control is absent. Given the historical foundation and ideological inclinations of the CPP-NPA, there is no question that they, in general, and these actions, in particular, are not under state control.

These acts can be characterized as a crime against humanity as they are acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health and/or dignity. The killing of one leader, the attempts on the life of others, the destruction of the "*koprasan*," the forced harvesting of a farmer's crop, the impediment for farmers to regularly till their land and the various forms of threat they are being subjected to, are all perils to their lives, liberty and well-being. As Article 18 of the ILC's Draft Code of Crimes Against the Peace and Security of Mankind puts it, it is a systematic or large-scale act instigated by a group. The disjunctive *or* used in the language of the Draft Code to separate the requirements of large scale and systematic commission of such

acts qualifies the San Vicente incident as a crime against humanity even in the instance it fails to satisfy the large-scale requirement.

Some of the acts even fall under Common Article 3 of the Geneva Conventions and Article 20 of the Draft Code governing war crimes, which may be committed even in an internal conflict. Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment; outrages upon personal dignity, in particular humiliating and degrading treatment; pillage; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognized as indispensable are considered violations of international humanitarian law.

Given its structure, the doctrine of command responsibility can be properly invoked to impute liability to those in the higher rung of chain of command despite not being the actual and direct perpetrators the crime. Having established that the acts are indeed punishable under international law, the doctrine of individual responsibility could be employed to those who directly ordered their commission.

Without disregard to the violations of and liability under international law, recourse to municipal laws and domestic courts could be available to the actual perpetrators and commanders of the acts who are in the country. This, however, may prove difficult to put in effect as regards the leadership of the CPP-NPA who are not in Philippine soil. But with the application of universal jurisdiction and the inclusion by the Princeton Principle of war crimes, crimes against peace and crimes against humanity as among the serious crimes under international law calling for universal jurisdiction, those liable for the acts can be prosecuted wherever they may be found – providing an available recourse to the victims in Barangay San Vicente in seeking redress and attributing liability to the violations they suffered and continue to suffer in the arms of their former allies.