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News, Background and Comment on Chemical and Biological Weapons Issues

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CRIMINALIZATION OF BIOLOGICAL AND CHEMICAL ARMAMENT

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This special issue of the Bulletin is devoted to the Harvard Sussex *Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological or Chemical Weapons*. We reprint the text of the Draft on pages 6-9 below. The Harvard Sussex Program has been advocating international criminalization of biological and chemical armament for many years. Here we explain why, and also how. There is additional detail in the two chronologies presented on pages 10-29 and 36-40 below. The first chronology records changes in the political and legal environment within which our activity has been situated. The second chronology is about our efforts to engage civil society. It is limited to the published record and does not display our private networking activities.

Back in January 1993, when the Convention on the Prohibition of Chemical Weapons (the 'CWC') was opened for signature, a world free of chemical and biological weapons no longer looked impossible. The 1925 Geneva Protocol had outlawed the initiatory use of both chemical and biological weapons. All that remained to be done, it seemed, was to expand the BWC – the 1972 Convention on the Prohibition of Biological and Toxin Weapons – so as to bring it up to the new international standards of openness, cooperation and compliance-assurance to which the CWC avowedly aspired. Such indeed was the objective of the VEREX process of 1992-93, soon to be carried forward in work on a BWC protocol by a newly mandated BWC Ad Hoc Group. Yet at that same time it was also becoming evident that biological weapons were no longer regarded in all quarters as abhorrent, useless and therefore fit only for outlawry. The increasingly accepted realization that the old Soviet Union had been in flagrant violation of the BWC since its inception, the findings of UNSCOM that Iraq had been acquiring biological weapons as well as the chemical weapons it had used against Iran, and, as South Africa moved out of apartheid, the growing exposure there of Project Coast, all of this and more pointed to the proliferation, not the suppression, of biological weapons.

So, to us in HSP the arms-control route was losing its pre-eminence as the way forward on bioweapons. We could not yet tell what the CWC might bring for chemical weapons because its implementation would not actually begin until April 1997. We therefore initiated, in mid-1995, a project specifically on BW anti-proliferation. We began it by canvassing the views of governmental officials, including defence scientists and security specialists, on questions we thought required

answers if effective antiproliferation policies were to be devised. From this we soon realised that the problem of bioweapons could be resolved only through an approach that integrated several different measures operating at different levels, one being multilateral arms control. Though that is a commonplace view today, recalling the considerations that led our project to it is helpful here. Matthew Meselson, Co-Director of HSP, and I summarized them in a paper we submitted to a private Pugwash workshop in December 1995. What we wrote then we would, for the most part, write again today. Here it is, published for the first time (the 'BW' stands for 'biological warfare'):

This workshop needs no reminder of the danger of biological weapons as widely accessible instruments of immense potential for terror and mass killing, both in war and in the hands of sub-state parties. Yet, it is remarkable that despite the fact that the knowledge and the materials required to make devastating biological weapons have been accessible and affordable to a large number of states for nearly half a century; despite assessments by various intelligence organizations throughout this period that some states have produced or are seeking biological weapons; despite the well-known biological-weapons programs of the US, the UK and Canada before 1970 and the Soviet program that appears to have continued beyond the 1980s; and despite Iraq's secret production of anthrax bombs and

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the Aum cult's interest in Ebola hemorrhagic fever before the nerve gas attacks in Matsumoto and in the Tokyo subway — during the past half-century, with its many wars and other conflicts, there has been no established episode of biological warfare or devastating act of biological terrorism. Why not?

The design of effective policies and measures for dealing with the threat of BW weapons requires an integrated enquiry and analysis — one that takes into account not only the accessibility and attributes of possible BW weapons, their means of delivery and the possibilities and limitations of protection against them, but also the factors that determine the presence or absence of the *intent* to acquire them. A lack of such enquiry and analysis leaves policy prey to misleading anecdotal information and to the adoption of measures inappropriately imitative of measures developed to deal with quite different threats, for example nuclear ones, and to programs that may be more responsive to bureaucratic, political and commercial pressures than to the menace of biological weapons. This paper represents a draft outline of issues and questions such an analysis should address. It is an outline in need of discussion and revision: needs that Pugwash Workshops are intended to serve.

Seldom considered in specialist discussions of the BW problem but nevertheless of fundamental importance to it are certain general conditions of international and social relations that may promote so extreme a measure as the acquisition of BW weapons. Careful examination of these conditions must be part of any overall analysis; so should awareness of where such conditions prevail. They include:

- Instability and perceived inequity of international and social relations, as they foster extremes of hostility, fanaticism and alienation. These conditions are particularly relevant to the possible terrorist acquisition and use of BW weapons. Peacemaking, as presently promoted in the Middle East, Bosnia and Northern Ireland may do as much to avert terrorist BW as will national and international police measures more specifically directed at the problem.
- Perceptions of extreme national insecurity, leading to interest in weapons of mass destruction for purposes of strategic deterrence.
- Aggressive expansionism. While it may be partly rooted in the factors listed above, aggressive expansionism in its most virulent form requires collective deterrence. An extremely grave situation would arise if aggressive expansionism were combined with a serious threat of BW, a situation so dangerous as to merit the most careful advance consideration and discreet international consultation so as not to be completely unprepared in case such a contingency arises.

Operating in opposition to conditions that might promote interest in having BW weapons, there are both internal and external influences that disfavor their acquisition. Each deserves careful research and analysis. In balanced combination, facilitated and enhanced by soundly-based national and international policies and measures, they can form a formidable nexus of self-restraint, disincentive and deterrence. They include at least the following:

- self-imposed restraint and renunciation, based on personal aversion or moral scruple;

- self-interest, to avoid provoking the proliferation of BW weapons to others;
- a disinterest resulting from perceived mismatch between the capabilities of BW weapons and recognized military requirements;
- a disinterest resulting from lack of assimilation of what might be called the culture of BW and the allied and overlapping culture of chemical weapons;
- disincentive, resulting from perceived effectiveness of the anti-biological protection of potential target populations;
- deterrence, including the perceived likelihood and costs of political, economic, penal or military sanctions; and
- inaccessibility of requisite knowledge and materials: factors of low and declining importance for a state determined to acquire BW weapons, but possibly more relevant to the activities of sub-state groups in countries with effective policing.

If successful, the projected analysis should be able to provide effective guidance in dealing with specific policy questions that national and international officials and other responsible individuals actually encounter. The analysis should therefore be designed from the outset with specific policy questions in mind. These might include:

- What priority should be given to averting the acquisition and use of BW weapons? How should such priority be determined in specific cases? If the possessor or perpetrator is the enemy of an enemy? An ally?
- In what circumstances should deterrence be explicit, implicit, unilateral or multilateral? What forms of deterrence could be counterproductive? What forms of deterrence would threaten minimal harm to innocent parties but would nevertheless be credible?
- What international sanctions are desirable and are available or should be made available for what BW-related infractions of international law?
- How should a state or the international community respond to a BW attack if the attacker is known? Only suspected? Unknown?
- What kinds of information and intelligence can detect and characterize BW weapons programs? What are the more relevant indicators and caveats? How can detection of BW programs be enhanced by international cooperation?
- How might publicity for BW-related concerns, policies and activities actually create dangerous interest in the possibilities of BW weapons? How can this be minimized?
- What are the realistic goals and limitations of BW defense for military forces? For civilian populations?
- How can states demonstrate the lack of a BW weapons program?
- What aspects of a BW defensive program should be kept secret? What should not be kept secret? How should arguments for secrecy be weighed against arguments for transparency? If secrecy is necessary, how can it be made non-provocative?
- What types of work should be out of bounds for a BW defensive program?
- What parts of a BW defensive program can be made international?

- *What forms of civilian oversight and accountability are appropriate for a BW defensive program?*
- *What can be accomplished by denial and licensing regimes? How can their effectiveness be measured? Should an enhanced BWC attempt to restrict access to sensitive materials and track their movements? If so, how?*
- *How should the BWC next be strengthened? A dedicated inspectorate to investigate allegations of use? Short-notice on-site investigations of suspicious activities? Short-notice on-site visits to validate declarations? And if so, declarations of what? Political or economic sanctions for non-membership?*

A point to be stressed, in conclusion, is the danger of pursuing solutions to one part of the problem that may impede or preclude solutions to other parts.

Our paper was, in effect, an outline for a large questionnaire-based programme of research and study that could usefully engage many people around the world, both in government and in civil society. We had by then decided whereabouts within the scheme HSP might most productively situate its own future work. The policy question of international sanctions against violators of bioweapons-related international law seemed most to fall within our interests and our research and publication capacities. We had been struck by how, with the ending of the Cold War, progress in international criminal law was no longer being blocked solely by superpower rivalry. This encouraged us to float a proposal for sanctions via bioweapons criminalization. We did so in an editorial on the impending Fourth BWC Review Conference that we published in the March 1996 issue of *Chemical Weapons Convention Bulletin* (as this Bulletin was then called):

[T]here is one worthwhile measure for strengthening the treaty that, if accorded a place on the [Review Conference] agenda, should command wide agreement. That measure would require all parties to the proposed protocol to have domestic legislation criminalizing BW.

Devastating biological weapons are within the reach of non-state entities and even individuals. Yet the BWC, like most international treaties, imposes its obligations on states, not on individuals or on commercial, political or other non-state organizations. Making individuals and groups who commit acts prohibited by the Convention subject to criminal penalties requires domestic legislation.

Criminalizing BW under domestic law can provide a direct and unambiguous threat of criminal prosecution and punishment to deter terrorist and irresponsible groups and individuals from producing and trafficking in biological weapons. Moreover, it can increase the vigilance and authority of governments in combatting such activities, and can facilitate international legal coöperation and coöordinated action to detect and deal with them.

True, Article IV of the BWC does require states parties to “take any necessary measures to prohibit and prevent” actions in violation of the BWC anywhere under their jurisdiction. But this stops short of requiring states to have penal legislation. Each state party is left to decide for itself whether to criminalize BW.

All three previous BWC Review Conferences have urged states parties to provide the UN with information about their “necessary measures”. So far, fewer than 40 of the

135 states parties have done so and the information thus declared is highly variable. Some, including the US, the UK and the Russian Federation, have enacted domestic legislation making it a crime to develop, produce, acquire or transfer biological weapons. But many others have no such law.

The Chemical Weapons Convention does have such a criminalizing provision. Article VII.1(a) of the CWC requires each state party to prohibit natural and legal persons under its jurisdiction from undertaking any activity prohibited by the Convention, “including enacting penal legislation with respect to such activity”. The value of such legislation is apparent, for example, in the case of Japan, which enacted its CWC implementing legislation only after the nerve gas attacks at Matsumoto and Tokyo. Had such a law been in place beforehand, the police would have had clear authority to investigate earlier indications that the Aum Shinrikyo cult was seeking chemical weapons, and might then have averted the loss of life and terrorization of the public that ensued.

Considering that the 160 signatories of the CWC, comprising a wide diversity of governments, legal systems and traditions, have agreed on a legally binding provision to criminalize chemical weapons, it is certainly appropriate for the states parties to the BWC to do so for biological ones.

For now, the need is to bring the anti-BW regime up to the same standard of domestic prohibition as provided for in the CWC. But for the longer term, thought should be given to seeking international agreement that using or knowingly aiding in the production, acquisition or use of biological weapons is a crime under international law. Those who do such things could then be exposed to the threat of indictment and prosecution by an international court, either an ad hoc tribunal or, should it come into existence, an international criminal court. That would place criminal responsibility where it really belongs, with individuals high or low who perpetrate such crimes against humanity.

Thus expressed, our proposal to insert the sanction of individual accountability into the existing inter-state legal regime came in two variants: a domestic criminalization variant whereby BWC states parties would agree that the Article IV “necessary measures” should include penal legislation; and an international criminalization variant whereby a new international crime (of biological armament) would be established by a new international treaty that would enable an individual perpetrator of that offence to be held accountable in an appropriate court of law – any individual, regardless of nationality or other status. Much work would clearly be needed in order to flesh out the proposal, especially in its international variant.

A basic question was whether the approach should continue to be confined to bioweapons or whether it should be applied to other categories as well, especially chemical weapons. Prior to 1972, the prohibitions of conventional international law did not differentiate biological and chemical weapons, as, for example, in the 1925 Geneva Protocol, which outlaws use of both categories alike. Perhaps this reflected the underlying taboo that the Protocol and its antecedent agreements had codified, in which case fragmentation of the norm, as by separating out bioweapons, might weaken it. There had been good reason for doing so when the BWC was under negotiation, but that reason had been neither technological

nor legal, and conclusion of the CWC two decades later showed that the largely political pressure for the separation was ephemeral. Better, we thought, that our criminalization initiative should bring the two categories back together again.

From a legal standpoint, the international variant of our proposal had several complexities, some of which arose in areas where legal opinion was in a state of flux. For example, should it not be some form of *universal* jurisdiction that we advocated for the new offence of CBW armament or was responsibility for indictment and prosecution to lie solely with an international court and not with national courts? Again, did our emphasis on the accountability of all individuals mean that there would be no impunity for serving heads of state or, more particularly, for their officials? So we sought the assistance of people far more skilled and experienced in law than we could pretend to be, and, happily, we received it. Eventually, in the December 1998 issue of *The CBW Conventions Bulletin*, we felt able to publish our international criminalization proposal in the form of a worked-out draft international treaty. We introduced the draft with the following explanation:

Any development, production, acquisition or use of biological or chemical weapons is the result of decisions and actions of individual persons, whether they are government officials, commercial suppliers, weapons experts or terrorists. The international conventions that prohibit these weapons, the BWC and the CWC, being directed primarily to the actions of states, address the matter of individual responsibility to only a limited degree.

Article IV of the BWC requires each state party to prohibit the development, production, stockpiling, acquisition and retention of biological weapons anywhere within its territory. Article VII of the CWC requires each state party to enact penal legislation applicable to acts committed in the territory of that state and also to acts committed by its nationals anywhere.

However the BWC and the CWC do not attempt to make the development, production, possession or use of biological and chemical weapons an international crime for which states establish jurisdiction over prohibited acts regardless of the place where they are committed or the nationality of the offender; nor do these treaties contain provisions dealing with the extradition of suspects.

Neither are these deficiencies remedied by the provisions applicable to biological and chemical weapons in the Convention for the Suppression of Terrorist Bombings, opened for signing in January 1998, or in the Statute of the International Criminal Court signed in Rome in July 1998. The Bombing Convention does not apply to the activities of military forces in the exercise of their official duties or to internal state acts C such as the use of CBW weapons by a leader against a population within his own state. Nor does the scope of either of these agreements extend beyond the actual use of CBW weapons to include, as do the BWC and the CWC, their development, production and possession.

What is needed is a new treaty, one that defines specific acts involving biological or chemical weapons as international crimes, like piracy or aircraft hijacking, obliging states either to prosecute or extradite offenders who are present in their territory. Treaties defining international crimes are based on the concept that certain crimes are particularly dangerous or abhorrent to all and

that all states therefore have the right and the responsibility to combat them. Certainly in this category, threatening to the community of nations and to present and future generations, are crimes involving the weaponization of disease or poison and the hostile exploitation of biotechnology.

The Harvard Sussex Program, with advice from an international group of legal authorities, has prepared a draft convention that would make certain acts involving biological and chemical weapons crimes under international law. The proposed convention would make it an offence for any person, regardless of official position, to order, direct or knowingly to participate or render substantial assistance in the development, production, acquisition, stockpiling, retention, transfer or use of biological or chemical weapons or to threaten the use of such weapons or to create or retain facilities intended for the production of such weapons. Any person who commits any of the prohibited acts anywhere would face the risk of apprehension, prosecution and punishment or of extradition should that person be found in a state that supports the proposed convention.

The proposed convention would oblige each state party: (i) to establish jurisdiction with respect to the specified crimes extending to all persons in its territory, regardless of the place where the offence is committed or the citizenship of the offender, and (ii) to prosecute or extradite any such offender found in its territory or any other place under its jurisdiction. Decisions regarding sentencing, including consideration of the severity of the offence and of any mitigating circumstances, are left to individual states parties.

The same obligations, to establish criminal jurisdiction and to extradite or adjudicate, aut dedere aut judicare, are included in international conventions now in force for the suppression and punishment of international crimes including aircraft hijacking and sabotage (1970; 1971), crimes against internationally protected persons (1973), hostage taking (1979), theft of nuclear materials (1980), torture (1984) and crimes against maritime navigation (1988).

The proposed convention defines biological and chemical weapons as they are defined in the BWC and the CWC, on the basis of the general purpose criterion C and its definitions of prohibited acts are modeled closely on the definitions in these treaties. Commission of a prohibited act is defined as a crime only if committed "knowingly" and it is an admissible defence that the accused person "reasonably believed" that the conduct in question was not prohibited. The proposed convention also includes provisions requiring states parties to cooperate in investigations and to provide legal assistance to one another in the adjudication of offences.

One way forward would be for a group of states to submit the proposed convention or a similar draft in the form of a resolution for consideration by the UN General Assembly, seeking its referral to the UNGA Sixth (legal) Committee for negotiation of an agreed text. If the negotiated text receives the commendation of the General Assembly, the convention may then be opened for signature and ratification, leading to its entry into force. Adoption and widespread adherence to such a convention would create a new dimension of constraint against biological and chemical weapons by applying international criminal law to hold individual offenders responsible and punishable wherever

they may be and regardless of whether they act under or outside of state authority. Such individuals would be regarded as hostes humani generis, enemies of all humanity. The norm against chemical and biological weapons would be strengthened, deterrence of potential offenders would be enhanced, and international cooperation in suppressing the prohibited activities would be facilitated.

That explanation led into the text of the Harvard Sussex Draft Convention itself, which has since been published in several other places and in all six of the official UN languages. Although it has nineteen articles, it is a simple document with two main elements: language establishing specified acts of CBW armament or use as international crimes; and provisions requiring states parties either to prosecute or to extradite any offenders that might be found on their territory, regardless of nationality or status. So, for any such persons – whether presidents, defence ministers, soldiers, company officers, anyone — the parts of the world to which they could safely travel in the future, whether for reasons of business, pleasure, health or anything else, would shrink. Such is the main operative sanction our proposal would create.

The problem of effectively launching our Draft Convention into the real world of practical politics has been exercising us ever since. We went to some lengths to ensure that people in the US and UK governments knew about the proposal, not least by involving some of them in the processes of producing the Draft Convention. Tacit support (and constructive criticism) was what we were seeking in Washington and Whitehall, not actual US or UK sponsorship of the proposal, for we believed that such sponsorship would destroy the proposal by alienating support for it in the countries that would most matter. Hence our suggestion of the UNGA Sixth Committee route. To promote this possibility we spent much time in New York during 1999 explaining what we had in mind to senior officials in the UN Secretariat and in the missions of particular UN member states, especially those of what was then known as the H8. Our New York efforts were greatly assisted by the Council on Foreign Relations. We made similar expeditions later to Geneva, The Hague and South Africa. We believed that the potential acceptability of the Draft Convention was becoming evident.

By 2001, however, the international political environment was changing to the point where a CBW criminalization initiative from the UN General Assembly would no longer have any immediate chance of success even if we and our allies did succeed in stimulating one. So we thought to try for EU sponsorship instead, and began, in June 2001 (when the BWC protocol negotiation in Geneva was breaking down), making further representations in The Hague and then in other European capitals as well. In January 2002, thanks to the Netherlands, our Draft Convention was referred to the EU Council's Working Party on International Public Law (COJUR), and COJUR agreed to transmit the Draft Convention to capitals along with the positive comments that member-state delegations had made on it, recommending more detailed discussion at a later meeting. Shortly thereafter the UK government observed in a memorandum to Parliament that the Harvard Sussex Draft Convention was a measure it "would be ready to see taken forward as part of international efforts to counter the threat posed by CBW proliferation". HSP had by then also secured an endorsement of its initiative

from the OPCW Technical Secretariat, and was working hard with others* to create a coalition of non-governmental organizations that would actively promote the suppression of bioweapons: a coalition that might therefore generate wide civil-society support for international criminalization.

In the United States meanwhile, the incoming administration of President George W Bush had been reviewing bioweapons policy options, including alternatives to pursuit of the BWC protocol, and had come up with criminalization as a possible initiative. It did so in the form of an attenuated version of the national criminalization that HSP had proposed during the Clinton administration, the Bush administration now eschewing altogether the international variant. This eventually led, in April 2004, to UN Security Council resolution 1540, a measure that applied to chemical and other weapons of mass destruction as well as to bioweapons but which would criminalize WMD activities only by 'non-state actors'. It rested on the proposition that new international law – in this case law obliging all states to enact domestic penal legislation that would prevent terrorists engaging in WMD armament on their territories — could indeed be created by the UN Security Council. In parts of the world, therefore, 1540 is seen as an unlawful mode of criminalization.

The Iraq War had in any case by now destroyed all immediate prospect of the European Union leading the way towards a form of CBW criminalization more soundly rooted in international law. Work on the Harvard Sussex Draft Convention had now to concentrate on advancing the acceptability among jurists of the law that it sought to create. A detailed legal Commentary on the Draft has been the chief instrument of this activity. In its current form, the Commentary is in its seventeenth draft.

In course of time, the discord and disruptions in international relations caused by the Iraq War, not least in regard to weapons of mass destruction, will perhaps have faded to the point where HSP efforts to promote that EU initiative may be worth resuming. The 2007 Treaty of Lisbon (which entered into force in December 2009) has in the meanwhile restructured the machinery whereby the EU interfaces with the outside world. HSP is now trying to understand what the full implications of this might be for progress on its Draft Convention, seeking how best to update and brief its network of contacts in Brussels and associated capitals. Once we are satisfied that the political environment is favourable, our plan is to convene an international conference that will bring together policy makers, jurists and exponents of the Draft Convention. Until that happens, our priority is to ensure that our networks, our Draft Convention plus its associated explanatory and other documents, and our research resources are ready to go at short notice. That we have come as far as we have is due primarily to the several charitable foundations that have supported our work at Harvard and Sussex universities. Latterly the Carnegie Corporation of New York has been our most consistent and generous supporter. We thank them most warmly.

* Initially, alongside HSP, The Sunshine Project, the Bradford University Department of Peace Studies and the Federation of American Scientists, later joined by BASIC, the Geneva Forum, VERTIC and the Hamburg Research Group for Biological Arms Control. The end-product was the BioWeapons Prevention Project (BWPPP).

DRAFT CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF DEVELOPING, PRODUCING, ACQUIRING, STOCKPILING, RETAINING, TRANSFERRING OR USING BIOLOGICAL OR CHEMICAL WEAPONS

The present draft of the proposed convention, below, was prepared by a working group consisting of James Crawford (Cambridge University), John Dugard (Leiden University), Philip Heymann (Harvard University) and the directors of the Harvard Sussex Program (Matthew Meselson and Julian Robinson). It is based on an earlier HSP draft and on discussions at HSP workshops held in January 1997 at Harvard University and, in association with the Common Security Forum, at the University of Cambridge Lauterpacht Research Centre for International Law in May 1998 .

PREAMBLE

The States Parties to this Convention,

Recalling that States are prohibited by the Geneva Protocol of 1925, the Biological Weapons Convention of 1972 and the Chemical Weapons Convention of 1993, and other international agreements, from developing, producing, stockpiling, acquiring, retaining, transferring or using biological and chemical weapons, and that these prohibitions reflect a worldwide norm against these weapons;

Recognizing that any development, production, acquisition or use of biological or chemical weapons is the result of the decisions and actions of individual persons, including government officials, and that these activities are within the capability not only of States but also of other entities and of individuals;

Affirming that all persons and entities should be prohibited from engaging in these activities, and should be subject to effective penal sanctions, thereby enhancing the effectiveness of the Geneva Protocol, the Biological Weapons Convention and the Chemical Weapons Convention;

Reaffirming that any use of disease or poison for hostile purposes is repugnant to the conscience of humankind;

Considering that biological and chemical weapons pose a threat to the well-being of all humanity and to future generations;

Resolving that knowledge and achievements in biology, chemistry and medicine should be used exclusively for the health and well-being of humanity;

Desiring to encourage the peaceful and beneficial advance and application of these sciences by protecting them from adverse consequences that would result from their hostile exploitation;

Determined, for the sake of human beings everywhere and of future generations, to eliminate the threat of biological and chemical weapons;

Have agreed as follows:

ARTICLE I

1. Any person commits an offence who knowingly:
 - (a) develops, produces, otherwise acquires, stockpiles or retains any biological or chemical weapon, or transfers,

- directly or indirectly, to anyone, any biological or chemical weapon;
- (b) uses any biological or chemical weapon;
- (c) engages in preparations to use any biological or chemical weapon;
- (d) constructs, acquires or retains any facility intended for the production of biological or chemical weapons;
- (e) assists, encourages or induces, in any way, anyone to engage in any of the above activities;
- (f) orders or directs anyone to engage in any of the above activities;
- (g) attempts to commit any of the above offences;
- (h) threatens to use biological or chemical weapons.

ARTICLE II

1. Nothing in this Convention shall be construed as prohibiting activities that are permitted under:
 - (a) the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, of 10 April 1972, or
 - (b) the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Paris on 13 January 1993,or that are directed toward the fulfillment of a State's obligations under either Convention and are conducted in accordance with its provisions.
2. In a prosecution for an offence set forth in Article I, it shall be a defence that the accused person reasonably believed that the conduct in question was not prohibited under this Convention.
3. It is not a defence that a person charged with an offence set forth in Article I acted in an official capacity, under the orders or instructions of a superior, or otherwise in accordance with internal law.

ARTICLE III

For the purposes of the present Convention:

1. **Biological weapons** means:
 - (a) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in

quantities that have no justification for prophylactic, protective or other peaceful purposes;

(b) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

2. **Chemical weapons** means the following, together or separately:

(a) toxic chemicals and their precursors, except where intended for:

(i) industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;

(ii) protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;

(iii) military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;

(iv) law enforcement including domestic riot control purposes.

as long as the types and quantities are consistent with such purposes.

(b) munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;

(c) any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

3. **Toxic chemical** means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

4. **Precursor** means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system, that is to say, the precursor which plays the most important role on determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.

5. **Person** means any natural person or, to the extent consistent with internal law as to criminal responsibility, any legal entity.

ARTICLE IV

Each State Party shall adopt such measures as may be necessary:

(a) to establish as criminal offences under its internal law the offences set forth in Article I;

(b) to make those offences punishable by appropriate penalties which take into account their grave nature.

ARTICLE V

1. Each State Party to this Convention shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article I in the following cases:

(a) when the offence was committed in the territory of that State or in any other place under its jurisdiction as recognized by international law;

(b) when the alleged offender is a national of that State;

(c) when, if that State considers it appropriate, the alleged offender is a stateless person whose habitual residence is in its territory;

(d) when the offence was committed with intent to harm that State or its nationals or to compel that State to do or abstain from doing any act;

(e) when the offence involved the intentional use of biological or chemical weapons and a victim of the offence was a national of that State;

(f) when the offence involved the intentional use of biological or chemical weapons against any persons, irrespective of their nationality.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article I in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to Articles VII and VIII.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law, including any internal law giving effect to Article I.

4. Jurisdiction with respect to the offences set forth in Article I may also be exercised by any international criminal court that may have jurisdiction in the matter in accordance with its Statute.

ARTICLE VI

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence as set forth in Article I may be present in its territory, a State Party shall take such measures as may be necessary under its internal law to investigate the facts contained in the information.

2. If it is satisfied that the circumstances so warrant, a State Party in the territory of which an alleged offender is present shall take that person into custody or shall take such other measures as are necessary to ensure the presence of that person for the purpose of prosecution or extradition.

3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:

(a) communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a

stateless person, the State in the territory of which that person habitually resides;

(b) be visited by a representative of that State;

(c) be informed of that person's rights under subparagraphs (a) and (b);

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, provided that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.
5. When a State Party, pursuant to the present Article, has taken a person into custody, it shall promptly notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with Article V, paragraph 1, subparagraphs (a) through (e), and, if it considers it advisable, any other interested States Parties, of the fact that such person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 of the present Article shall promptly inform those States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

ARTICLE VII

1. The offences set forth in Article I shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include those offences as extraditable offences in every extradition treaty subsequently 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, if it decides to extradite, consider this Convention as the legal basis for extradition in respect of the offences set forth in Article I. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in Article I as extraditable offences as between themselves subject to the conditions provided by the law of the requested State.
4. The offences set forth under Article I shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with paragraph 1, subparagraphs (a) through (e) of Article V.
5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in Article I shall be deemed to be modified as between

State Parties to the extent that they are incompatible with this Convention.

ARTICLE VIII

The State Party in the territory of which the alleged offender is found shall, if it does not extradite such person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

ARTICLE IX

1. States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article I, including assistance in obtaining evidence at their disposal which is necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their internal law.
3. States Parties may request technical assistance from competent international bodies in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article I.

ARTICLE X

None of the offences set forth in Article I shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

ARTICLE XI

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in Article I or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

ARTICLE XII

States Parties shall cooperate in the prevention of the offences set forth in Article I, particularly by:

- (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories;
- (b) exchanging information and coordinating the taking of administrative and other measures as appropriate to prevent commission of those offences.

ARTICLE XIII

1. Each State Party shall inform the Secretary-General of the United Nations of the legislative and administrative measures taken to implement this Convention. In particular, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established under its internal law in accordance with paragraph 3 of Article V. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.
2. Each State Party shall, in accordance with its national law, promptly provide to the Secretary-General of the United Nations any relevant information in its possession concerning:
 - (a) the circumstances of any offence over which it has established its jurisdiction pursuant to paragraph 1 or paragraph 3 of Article V;
 - (b) the measures taken in relation to the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.
3. The State Party where an alleged offender is prosecuted shall communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.
4. Each State Party shall designate a contact point within its government to which other States Parties may communicate in matters relevant to this Convention. Each State Party shall make such designation known to the Secretary-General.

ARTICLE XIV

Any dispute between States Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice.

ARTICLE XV

1. Ten years after the entry into force of this Convention, or earlier if it is requested by a majority of Parties to the

Convention by submitting a proposal to this effect to the Secretary-General of the United Nations, a Conference of States Parties shall be held at [Geneva, Switzerland], to review the operation of the Convention with a view to assuring that the purposes of the preamble and the provisions of the Convention are being realized.

2. At intervals of seven years thereafter, unless otherwise decided upon, further sessions of the Conference may be convened with the same objective.

ARTICLE XVI

1. This Convention shall be open for signature by all States from [DATE] until [DATE] at United Nations Headquarters in New York.
2. This Convention is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.
3. This Convention shall be open to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE XVII

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the [NUMBER] instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the [NUMBER] instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

ARTICLE XVIII

The Articles of this Convention shall not be subject to reservation.

ARTICLE XIX

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at United Nations Headquarters in New York on [DATE].

CONTEXT OF THE HARVARD SUSSEX DRAFT CONVENTION: A CHRONOLOGY OF EVENTS DURING 1996 THROUGH 2010

Nicholas Dragffy

The Harvard Sussex Draft Convention would make it a crime under international law for any person, regardless of official position, to develop, produce, acquire, stockpile, retain, transfer, or use biological or chemical weapons; to assist, encourage, induce, order, or direct anyone to engage in any such activities; or to threaten or engage in preparations to use such weapons. To do so, the Draft Convention would provide national courts with extensive jurisdiction – including, to a limited extent, universal jurisdiction – over such crimes and remove the defence of state immunity in relation thereto. This chronology sets out developments relevant to the international criminalization of CBW since the Draft Convention was conceived in 1996. The focus is on state behaviour concerning applicable and developing legal concepts. A second chronology (pp 36-40 below) describes the emergence of the Draft Convention into civil society.

With regard to universal jurisdiction and state immunity, the chronology focuses primarily on developments in Belgium, France, Germany, Spain and the United Kingdom. Each of these states has passed legislation conferring universal jurisdiction on its courts, and in each state both victims and non-governmental organizations have filed lawsuits on universal jurisdiction grounds. Each state accords varying degrees of control to the executive branch over universal jurisdiction prosecutions and trials, dependent on how they structure their criminal processes. Although focusing on events only since 1996 may serve as a logical point of departure and help with concision, the chronology should nonetheless be viewed in the context of relevant preceding events, e.g., cases such as *USA -v- Fawaz Yunis*, 1991, where the US Court of Appeals for the District of Columbia recognized universal jurisdiction in relation to aircraft hijacking.

Universal jurisdiction is applied by national courts to prosecute individuals accused of acts which, under either international conventions or customary international law, have been identified as constituting international crimes, e.g., crimes against humanity, genocide, war crimes, torture, hijacking and piracy. Following the end of the Second World War a number of states recognized the principle of universal jurisdiction; however, its scope was somewhat limited owing to the political landscape during the Cold War. The situation started to change during the late 1970s and the 1980s in response to atrocities committed in Africa, Asia, and Latin America; as southern Europe and Latin America underwent transition from authoritarian to democratic rule; and as some states discovered that former Nazis accused of violating international criminal law were present on their territory. Depending on a state's constitution, national implementing legislation recognizing the crimes as being subject to universal jurisdiction may be necessary. Where an international crime is alleged to have been committed, a national court will have jurisdiction over the case *per se*, regardless of the territory where the alleged crime took place, the nationality of the alleged perpetrator or

victim, or of any deleterious effect on the national interest of the state where proceedings are initiated. Unless specifically excluded by international law, the exercise by a court of universal jurisdiction must respect such legal doctrines as immunity for incumbent high-ranking foreign officials, the prohibition against double-jeopardy, and the double criminality requirement. More often than not, national law will also require that the accused be present on the territory of the state where the prosecution takes place. The Geneva Protocol 1925, the Biological Weapons Convention 1972, and the Chemical Weapons Convention 1993 only address individual responsibility in relation to the misuse of CBW to a limited extent. The Draft Convention aims to capitalize on the increased political willingness since the end of the Cold War to adopt both national and international measures to enhance international criminal justice. The Harvard Sussex Draft Convention would complement the existing regime by creating a comprehensive and unified system for the prosecution and punishment of individuals accused of offences involving CBW and by removing any jurisdictional inconsistencies that currently exist between states.

The chronology only covers developments relative to international tribunals inasmuch as they offer some context to the prosecution of international crimes at the national level. In the early 1990s the United Nations Security Council created *ad hoc* tribunals with jurisdiction over international crimes committed in the former Yugoslavia and Rwanda, and subsequently authorized the government of Sierra Leone to establish a similar tribunal. Such tribunals, however, have limited territorial, personal, and temporal jurisdiction. The Rome Statute of the International Criminal Court was adopted in 1998 and entered into force in 2002. Unlike the Draft Convention, which establishes an entirely decentralized universal jurisdictional framework, none of these tribunals had, or presently have, specific jurisdiction over offences relative to chemical and biological weapons. Moreover, the International Criminal Court has jurisdiction exclusively over the employment of "poison or poisoned weapons" or "asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" in international armed conflicts. In May 2010, the Review Conference of the Rome Statute adopted a resolution that classified these acts as war crimes where committed in conflicts not of an international character, but only where "committed as part of a plan or policy or as part of a large-scale commission of such crimes". In contrast, the Draft Convention criminalizes the use of chemical and biological weapons *per se*. In addition, the Rome Statute only applies to the actual use of such weapons and does not expressly treat the use of biological weapons as a war crime.

In April 2004 the United Nations Security Council adopted resolution 1540 in response to concern regarding the potential misuse by terrorists of chemical, biological or nuclear weapons. Events relating to resolution 1540 are covered by the chronology

only where they offer some useful political context in which to view attitudes towards the international criminalization of CBW. This is because although there are some areas of overlap, in effect resolution 1540 does not require states parties to the Biological Weapons Convention or the Chemical Weapons Convention to adopt measures over and above their existing obligations under these treaties with regard to offences committed by individuals. Resolution 1540 seeks to strengthen national criminal law as opposed to creating international criminal law, thereby leaving a series of issues open to

interpretation by national courts. For example, it does not address the situation where an offence is alleged to have been committed by persons acting in an official capacity or under the orders of a superior. It also contains no provisions relating to extradition, legal assistance, protection of the accused, etc. Unlike resolution 1540, the Harvard Sussex Draft Convention would avoid any concerns regarding legitimacy by respecting each state's sovereignty in deciding whether to become a party in accordance with international law as it pertains to treaties.

Fuller citations of publications noted in these chronological records can be found in the Selective Bibliography on pages 41-44.

11 March 1996 The Harvard Sussex Program on CBW Armament and Arms Limitation (HSP) publishes an editorial by HSP Co-Directors Matthew Meselson and Julian Perry Robinson on 'Criminalizing BW' in Issue 31 of HSP's quarterly *Chemical Weapons Convention Bulletin*. On proposals to strengthen the BWC at the Fourth Review Conference in November 1996 by way of a protocol on verification, Meselson and Robinson say: "[T]here is one worthwhile measure for strengthening the treaty that, if accorded a place on the agenda, should command wide agreement. That measure would require all parties to the proposed protocol to have domestic legislation criminalizing BW... For now, the need is to bring the anti-BW regime up to the same standard of domestic prohibition as provided for in the CWC. But for the longer term, thought should be given to seeking international agreement that using or knowingly aiding in the production, acquisition or use of biological weapons is a crime under international law."

28 March 1996 In Madrid, the Audiencia Nacional (national criminal court) receives a lawsuit filed against a number of former and current officials of the Argentinean military, alleging a series of international criminal acts – including crimes against humanity and torture – committed both before and after the military coup in Argentina in March 1976. Although the lawsuit – which is filed by the Progressive Association of Spanish Prosecutors – includes thirty-five Spanish citizens among the thousands of alleged victims, it relies on the principle of universal jurisdiction to extend its scope beyond acts allegedly committed solely against Spanish citizens. Judge Baltasar Garzón Real, a high-profile investigating judge, is subsequently assigned to the case. {Denuncia, Asociacion Progresista de Fiscales de Espana 28 Mar} [Note: Under Article 23.4 of the Judiciary Act 1985 Spanish courts have jurisdiction over genocide and any other offences committed outside of Spanish territory, whether by Spanish or non-Spanish citizens, where international agreements demand their prosecution, e.g., torture and grave breaches of the Geneva Conventions of 1949 and their Additional Protocols I and II].

On 15 January 1997, the Argentinean government rejects a request by Judge Garzón for it to submit evidence to him, alleging that Argentinean courts have exclusive jurisdiction over the matter. {Texto del apartado no 8, Ministerio de Relaciones Exteriores Argentino 15 Jan}

On 25 March 1997, Judge Garzón issues an international arrest warrant against former leader of Argentina General Leopoldo Fortunato Galtieri.

On 10 October 1997, Judge Garzón orders the interrogation – and subsequently the arrest – of former Argentinean navy captain Adolfo Scilingo following his arrival in Madrid four days previously. {Roht-Arriaza, *The Pinochet Effect* 2005} Whilst in Argentina, Scilingo had informed a journalist that the navy had killed some two thousand of the people that it had kidnapped and tortured by throwing them naked and unconscious from aeroplanes into the River Plate estuary between Argentina and Uruguay. {Verbitsky, *El Vuelo* 1995} Judge Garzón also issues international arrest warrants against ten other defendants, including the former head of the navy, Emilio Massera. {108/96-G Audiencia Nacional 10 Oct}

4 July 1996 In Madrid, a lawsuit is filed in the Audiencia Nacional against former Chilean leader General Augusto Pinochet Ugarte and a number of his associates, alleging responsibility for acts of genocide and terrorism committed in Chile between 1973 and 1990. The lawsuit – filed by the Progressive Association of Spanish Prosecutors and joined by the President Allende Foundation {Garces in *Jueces Para La Democracia* 1997} – highlights the number of alleged victims who were Spanish citizens, but also invokes the principle of universal jurisdiction in extending its remit to include alleged Chilean victims. {Denuncia, D.M. Miravet [...] 4 Jul} Judge Manuel Garcia Castellón is subsequently assigned as investigating judge in the case. Although the US authorities later co-operate with the investigation, Chile refuses to recognize Spanish jurisdiction over the matter. {Roht-Arriaza, *The Pinochet Effect* 2005} [See also 28 March 1996]

13-14 January 1997 In Cambridge, Massachusetts, HSP convenes an international workshop on *Criminalization of Biological and Chemical Weapons*. Its purpose is to discuss a preliminary version of the Harvard Sussex Draft Convention, introducing it to a broader spread of lawyers than that hitherto consulted, including governmental officials and members of the International Law Commission.

23 May 1997 In Germany, the Higher Regional Court of Bavaria acquits Bosnian Serb Novislav Djajic of genocide, but finds him guilty of fourteen counts of aiding and abetting murder and one count of attempted murder during the Balkan War. The court prosecuted Djajic in accordance with the universal jurisdiction provisions under the German Criminal Code relating to genocide and grave breaches of the Fourth Geneva Convention of 1949. {BayObLG, Urt. V-3 St 20/96, 23 May}

September 1997 In Scotland, the Lord Advocate initiates the prosecution of Sudanese doctor Mohammed Ahmed Mahgoub, who is accused of having participated in the torture of a Sudanese citizen in Sudan some years previously. In accordance with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984, Section 134(1) of the Criminal Justice Act 1988 provides UK courts with universal jurisdiction over the crime of torture. In Scotland, the Lord Advocate exercises the power under the Act to initiate a prosecution. Subsequently, however, the Lord Advocate withdraws the prosecution on the grounds of insufficient evidence. {Bindman in *Justice for Crimes Against Humanity* 2003}

26 January 1998 The Argentinean government issues an executive order stating that Argentinean courts have exclusive jurisdiction over alleged criminal acts carried out by former and current Argentinean military officials. The order confirms an earlier statement of intent made by the government in relation to the recent filing in Spain of a lawsuit against Argentinean military officials for their involvement in alleged violations of international criminal law [see 28 March 1996]. {Decreto 111/98, Audiencia Nacional 26 Jan}

16 October 1998 In Madrid, the Audiencia Nacional issues an international arrest warrant against former Chilean leader General Augusto Pinochet Ugarte and, following consultation with UK police, orders his pre-trial detention. Pinochet arrived in the UK the previous month to undergo surgery on his back. The order is made in connection with a lawsuit filed some two years previously in which Pinochet and others are alleged to have been responsible for genocide and terrorism committed in Chile between 1973 and 1990 [see 4 July 1996]. The lawsuit was originally assigned to Judge Manuel Garcia Castellón, but Judge Baltasar Garzón Real has since taken over the investigation. {Sumario 19/97 16 Oct} The UK police subsequently serve Pinochet with an arrest warrant after the UK Home Office informs the investigating magistrate that the case does not give rise to diplomatic immunity. {Roht-Arriaza, *The Pinochet Effect* 2005} Following Pinochet's arrest, political leaders in both the UK and Spain conclude that the best course of action is to leave the matter to the courts to decide. {Sugarman in *Journal of Spanish Cultural Studies* 2002 vol 3}

4 November 1998 In Madrid, the Court of Appeals of the Audiencia Nacional dismisses appeals by the Prosecutor in the case against former Argentine navy captain Adolfo Scilingo [see 28 March 1996]. In addition to disputing a number of decisions made by Judge Baltasar Garzón Real, the Prosecutor had also disputed the court's jurisdiction in the case. {Rollo de apelacion 84/98, 4 Nov}

The next day, the Court of Appeals restates its reasoning in dismissing the same appeals by the Prosecutor in the case against former Chilean leader Augusto Pinochet Ugarte [see 4 July 1996 and also 16 October 1998]. {Rollo de apelacion 173/98, 5 Nov}

6 November 1998 In Brussels, the Tribunal de Première Instance (High Court) rules that it has the jurisdiction to consider a lawsuit, filed by a number of Chilean exiles living in Belgium, against former Chilean leader General Augusto Pinochet Ugarte as under customary international law the allegations made could constitute crimes against humanity. The ruling comes some three weeks after a Spanish investigating judge issued an international arrest warrant against

Pinochet and ordered his pre-trial detention in the UK pending extradition proceedings [see 16 October 1998]. {*Revue de Droit Pénal et de Criminologie* 1999, at 278, 290} The Prosecutor decides not to appeal the decision. {Vandermeersch in *Journal of International Criminal Justice* 2005 vol 3} [See also 4 November 1998] [Note: In addition to Belgium and Spain seeking the extradition of Pinochet, Switzerland and France also submit requests for his extradition on 11 and 13 November 1998 respectively. {*The Pinochet Papers* 2000, pp 183-187}]

24 November 1998 In Paris, the Tribunal de Grande Instance (High Court) receives a lawsuit filed against Democratic Republic of the Congo President Laurent-Désiré Kabila, during his visit to France, for his alleged responsibility in the carrying out of torture. The lawsuit was filed by the Fédération Internationale des Droits de l'Homme and the Ligue des Droits de l'Homme. The Prosecutor subsequently dismisses the lawsuit on the grounds that Kabila's direct responsibility for the alleged acts of torture could not be proven, and that it was unclear whether the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984 could be applied against current heads of state. {www.fidh.org Jun 2005}

22 December 1998 HSP publishes the Harvard Sussex Draft Convention in what is expected to be its final form {*The CBW Conventions Bulletin* no 42}.

10 February 1999 The Belgian parliament adopts an amendment to the existing statute on universal jurisdiction, the effect of which is to extend the jurisdiction of Belgian courts to cover genocide and crimes against humanity. In accordance with Article 27 of the Rome Statute of the International Criminal Court 1998, the amendment also removes the defence of state immunity. {Loi relative a la répression des violations graves de droit international humanitaire 10 Feb} The existing statute, which was adopted by parliament on 16 June 1993, conferred on Belgian courts jurisdiction over grave breaches of the Geneva Conventions of 1949 and their Additional Protocols I and II, regardless of where, or by whom, the crimes were committed. {Loi du 16 juin 1993 relative a la répression des infractions graves aux Conventions internationales de Genève} Belgium became a signatory to the Rome Statute – which is not yet in force – on 10 September 1998. {Reydams in *Criminal Law Forum* 2000 vol 11}

Five months later, Belgium ratifies the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984. Some two years thereafter, the Belgian parliament adopts a statute giving Belgian courts jurisdiction over offences committed outside Belgium in cases where an international convention would require that Belgium undertake prosecution. With the adoption of this statute Belgian courts are now conferred with universal jurisdiction over the crime of torture. {Kerstens in *The Age of Apology: Facing Up to the Past* 2009}

24 March 1999 In the UK Parliament, the House of Lords holds that, in relation to requests made for the extradition of former Chilean leader Augusto Pinochet Ugarte to Spain [see 16 October 1998] and Belgium [see 6 November 1998], amongst others, the rule of double criminality demands that the alleged offences must have been crimes under UK law at the time they were committed, as opposed to at the time the request for extradition was made. On this basis therefore, Pinochet could be extradited only in relation to allegations of torture, or complicity in torture, committed after

8 December 1988, being the date on which the Criminal Justice Act 1988 [see also September 1997] entered into force, which implemented the relevant provisions of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984. The House of Lords rejected Pinochet's claim to immunity from prosecution under the State Immunity Act 1978, on the grounds that the Torture Convention does not protect former heads of state with immunity. {R v. Bartle [...] and R v. Evans [...] 24 Mar} The ruling by the House of Lords follows a previous ruling by it that was invalidated owing to the subsequent discovery that Lord Hoffmann, one of the presiding judges, had a conflict of interest in the case. That ruling had also authorized the Home Secretary to proceed with extradition proceedings, albeit on a less restrictive interpretation of the law.

On 15 April 1999, UK Home Secretary Jack Straw issues a second authorization to proceed with extradition proceedings against Pinochet in relation to the alleged offences of torture and conspiracy to commit torture. {*The Pinochet Papers* 2000, p 373}

On 8 October 1999, Bow Street Magistrates Court rules that the conditions for extraditing Pinochet have been met and returns the matter to Straw for his decision. {*The Pinochet Papers* 2000, pp 397-403} In the intervening period since the House of Lords had made its ruling, however, the political climate changed in a number of respects with, for example, Spanish Prime Minister José María Aznar stating that he did not want "Spain to become an International Criminal Tribunal" {Urbano, *Garzón, El Hombre Que Veía Amanecer* 2000}, and the Chilean government giving assurances that the Chilean courts would try Pinochet if he was returned to Chile. {Roht-Arriaza *The Pinochet Effect* 2005}

On 11 January 2000, Straw announces that a medical report now indicates that Pinochet is unfit to stand trial and that no purpose would therefore be served in extraditing him. {*The Pinochet Papers* 2000 p 411} Six days thereafter, the Spanish government informs the UK government that it will accept this decision. However, the Belgian government – which is the most outspoken of the four European states [see 6 November 1998] requesting the extradition of Pinochet in criticizing the announcement – announces that it is prepared to take the case to the International Court of Justice. {Roht-Arriaza, *The Pinochet Effect* 2005} The Belgian government, however, subsequently decides to limit its actions to challenging Straw's decision through the UK courts by requesting access to the medical report in question. This request is granted by the High Court some five weeks after Straw made the announcement. {*The Pinochet Papers* 2000, p 417}

On 2 March 2000 – notwithstanding protests from Belgium, a number of human rights organizations, and the judge investigating Pinochet in Spain [see 16 October 1998] – Straw announces the termination of the extradition proceedings against Pinochet. {*The Pinochet Papers* 2000, p 481} The next day, Pinochet leaves the UK on an aeroplane bound for Chile. {London *Guardian* online 4 Mar}

1 April 1999 In London, the Old Bailey sentences Anthony Sawoniuk to life imprisonment after a jury finds him guilty of two counts of murder in connection with the deaths in 1942 of two Jewish women in Belarus, when he worked for the local police under the authority of the German occupying forces. {Hirsch in *Social & Legal Studies* 2001, vol 10} Sawoniuk had been living in the UK since 1946. In 1994, UK police commenced an inquiry into allegations in 1994 – some six years after his name appeared on a list of potential war criminals compiled by the then Soviet Union – and charged

him in September 1997. {BBC online 1 Apr} The case against Sawoniuk is the first case brought under the War Crimes Act 1991 to have reached a verdict. Subsequently, the Court of Appeal upholds his conviction. {2000 WL 473} [Note: The War Crimes Act 1991 provides UK courts with jurisdiction over persons in the UK charged with murder, manslaughter, and culpable homicide committed in Germany, or territory under German occupation – between 1 September 1939 and 5 June 1945 – but only where the alleged offender was on 8 March 1990, or has since become, a UK resident].

30 April 1999 In Karlsruhe, Germany, the Federal Court of Justice (Supreme Court) upholds a ruling made some eighteen months earlier by the Higher Regional Court of Düsseldorf to convict Bosnian Serb Nicola Jorgic for, amongst other things, genocide and murder. Jorgic was sentenced to life imprisonment for the offences. The court had primarily based its jurisdiction on the universal jurisdiction provision relating to genocide, as set out under the German criminal code (*Strafgesetzbuch*). {Judgment in *Neue Zeitschrift für Strafrecht* 1999, p 396}

On 12 December 2000, the Constitutional Court upholds the ruling, leaving open the question as to whether it was necessary for there to have been a legitimizing link between the defendant and Germany, e.g., long-term residency. {Judgment in *Juristen-Zeitung* 2001, p 975}

12 August 1999 At UN headquarters, the Secretary-General transmits to the General Assembly a report on the work of the Advisory Board on Disarmament Matters. With regard to biological weapons, one of the observations made in the report includes that additional measures "could usefully supplement the future verification regime, including a code of conduct for scientists and criminalization of the threat or use of biological weapons". {A/54/218, 12 Aug}

2 December 1999 In Madrid, the Audiencia Nacional receives a lawsuit filed against former *de facto* President of Guatemala Efraín Ríos Montt and seven other Guatemalan officials, alleging their involvement in, amongst other things, genocide, torture and murder between 1962 and 1996. The lawsuit, which is filed by Nobel peace prize winner Rigoberta Menchú Tum, focuses on killings that took place in the Spanish embassy in January 1980, and the murders of a number of priests, some of whom were Spanish citizens. Nonetheless, it relies on the principle of universal jurisdiction with regard to the allegations in general. The lawsuit is subsequently assigned to Judge Guillermo Ruíz Polanco. {*Diligencias previas* 331/99, Audiencia Nacional, 27 Mar 2000}

January 2000 In Paris, the Tribunal de Grande Instance receives a lawsuit filed against Laurent Bucybaruta for his alleged role in organizing the 1994 genocide in Rwanda. Bucybaruta, who occupied a number of leadership positions in Rwanda, is subsequently released after having been placed in pre-trial detention. The lawsuit is filed by Fédération Internationale des Droits de l'Homme and the Ligue des Droits de l'Homme. The case comes nearly five years after a lawsuit was filed against Wenceslas Munyeshyaka, a Rwandan priest accused of genocide and crimes against humanity in Rwanda in 1994. Munyeshyaka is released together with Bucybaruta after having also been placed in pre-trial detention. {www.fidh.org Jun 2005} As of December 2010, both cases remain pending notwithstanding interventions by the Cour de Cassation (Supreme Court) in relation to

Munyeshyaka, {Cour de Cassation, 96-82491, 6 Jan 1998} the European Court of Human Rights in June 2004, {Cour Européenne des Droit de l'Homme, 46621/99, 8 Jun} and the International Criminal Tribunal for Rwanda in November 2007. {ICTR-05-87-I, 20 Nov} [See also 24 November 1998]

11 April 2000 In Brussels, the Tribunal de Première Instance issues an international arrest warrant *in absentia* against Democratic Republic of the Congo Minister for Foreign Affairs Abdulaye Yerodia Ndombasi for alleged offences constituting grave breaches of the Geneva Conventions of 1949 and its Additional Protocols, and with crimes against humanity. The investigating judge bases the court's jurisdiction on the provisions of the recently amended statute on universal jurisdiction, which gives Belgian courts universal jurisdiction over a number of crimes under international law [see 10 February 1999]. {Vandermeersch in *Journal of International Criminal Justice* 2005, vol 3} The lawsuit – filed in January 1999 by Belgian and Congolese nationals who had sought refuge in Belgium – accuses Yerodia of broadcasting speeches inciting racial hatred against Tutsi residents in the Democratic Republic of the Congo since 1997, and more specifically in August 1998. The arrest warrant is subsequently circulated internationally via Interpol. {ICJ judgment 14 Feb 2002}

17 October 2000 In The Hague, the Democratic Republic of the Congo submits a request to the International Court of Justice to declare that Belgium should revoke the international arrest warrant issued against Democratic Republic of the Congo Minister for Foreign Affairs Abdulaye Yerodia Ndombasi some six months previously [see 11 April 2000]. In essence, the claim argues that, in its purported exercise of universal jurisdiction, Belgium has violated the “principle that a State may not exercise its authority on the territory of another State” and 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”.

On 14 February 2002, the International Court of Justice rules in favour of the Democratic Republic of the Congo and orders Belgium to cancel the warrant. It bases its ruling not on the matter of applicability of universal jurisdiction, but rather on the basis of immunity of high-ranking government officials under customary international law. In this regard, the court concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of their time in office they enjoy full immunity from criminal prosecution when travelling abroad. {ICJ judgment 14 Feb 2002} Nevertheless, a number of separate and dissenting opinions do discuss in what circumstances universal jurisdiction would be applicable, e.g., piracy, hijacking and genocide.

7-9 February 2001 In The Hague, the OPCW hosts an *International Symposium on Cooperation and Legal Assistance for Effective Implementation of International Agreements*, which brings together around two hundred individuals from OPCW delegations, governments, international organizations, research institutes, universities and industry. HSP is among the organizational and institutional sponsors. The symposium addresses a range of issues relating to the ways in which the undertaking in paragraph 2 of CWC Article VII (to cooperate with and assist other states parties in the implementation of Article VII) can be implemented. {OPCW S/251/2001} A number of presentations are made on case studies from actual investigations, arrests, transfers of

prisoners, evidence-gathering and extraditions. {Kellman in *International Enforcement Law Reporter* Jun 2001, vol 17 no 6} HSP Co-Director Matthew Meselson presents the Harvard Sussex Draft Convention. The proceedings of the symposium are published the following year.

21 February 2001 In Karlsruhe, Germany, the Federal Court of Justice (Supreme Court) upholds a ruling made some fifteen months earlier by the Higher Regional Court of Düsseldorf to convict Bosnian Serb Maksim Sokolovic of aiding and abetting genocide, unlawful detention and battery. The court also rules that it is inclined to dispense with any requirement for a legitimatizing link between the case and Germany. The Higher Regional Court had sentenced Sokolovic to nine years imprisonment. {3 StR 372/00, 21 Feb} The court also partially reverses a ruling made some thirteen months previously by the Higher Regional Court of Bavaria, which had sentenced Bosnian Serb Djudj Kusljic to life imprisonment after convicting him of, amongst other things, genocide and murder. The Federal Court of Justice instead convicts Kusljic of, amongst other things, aiding and abetting genocide and murder. {3 StR 244/00, 21 Feb} In both cases the lower courts had prosecuted the defendants in accordance with the universal jurisdiction provisions under the German criminal code (Strafgesetzbuch) relating to genocide and grave breaches of the Fourth Geneva Convention of 1949. [See also 30 April 1999]

May 2001 In the USA, the *Georgetown Public Policy Review* publishes an interview with HSP Co-Director Matthew Meselson on the threat of bioterrorism and deterring any such threat, which includes an analysis of the Harvard Sussex Draft Convention. Asked about the response received thus far to the Draft Convention Meselson says “We are trying through contacts to reach leaders in several countries that are liked in the world”. [See also 7-9 February 2001]

8 June 2001 In Brussels, following a trial lasting some seven weeks, a jury finds Alphonse Higanro, Consolata Mukangango, Vincent Ntezimana and Julienne Mukabutera (‘The Butare Four’) guilty of having committed war crimes in Rwanda in 1994. The Cour d’Assises sentences the defendants to between twelve and twenty years imprisonment. {Reydams in *Criminal Law Forum* 2000, vol 11} The Ministry of Justice had directed the head of the Brussels Office of the Prosecutor to launch an official judicial investigation after relatives of alleged Rwandan and Belgian victims had filed lawsuits against the defendants in various Belgian municipalities. Rwanda both supported and facilitated the judicial investigation. The investigating judge deferred proceedings to the International Criminal Tribunal for Rwanda with regard to similar allegations made against Ferdinand Nahimana, Georges Ruggiu, Théoneste Bagosora, Bernard Ntuyahga, Elie Ndayambaje, and Joseph Kanyabashi, only the last two of whom had been present in Belgium. {Reydams in *Journal of International Criminal Justice* 2003, vol 1} The charges brought against the Butare Four are the first to be brought under Belgium’s 1993 universal jurisdiction statute (as amended) [see 10 February 1999].

14 June 2001 In Paris, the Prosecutor dismisses a lawsuit filed against former commander-in-chief of the Algerian army General Khaled Nezzar for his alleged involvement in a series of international crimes, on the grounds that Nezzar had fled France after the Prosecutor had initiated the investigation. The lawsuit had been filed seven weeks

previously by, amongst others, the family of an Algerian man who died whilst in detention in Algeria. {Groupe d'action judiciaire de la FIDH [...] Jun 2005}

10 October 2001 US Assistant Secretary of State for Arms Control Avis Bohlen addresses the UN General Assembly First Committee during its general debate. She relates US thinking on alternatives to the BWC Protocol, which the US rejected in July 2001. Much of her statement is on biological weapons, particularly the danger of them falling into terrorist hands: "There is intense concern that some of these terrorists and criminals may continue to seek to acquire and use weapons of mass destruction. This gives the international community important and persuasive reasons to redouble our non-proliferation and arms control efforts. We must also strengthen other mechanisms intended to ensure that toxic and dangerous materials remain under appropriate control and are used solely for legal and constructive purposes. The United States Government is actively examining these questions, and we would welcome ideas and views of others on how best to achieve these goals." She continues: "This possibility must give new urgency to our efforts to combat the threat of biological weapons – and by weapons I mean here biological agents used with lethal intent. A first step must be to strengthen the norms against use of biological weapons, to make clear and doubly clear that this form of terrorism, like all others, is unacceptable. We believe that the international community ... must equally clearly state that any use of biological weapons - whether by a state, an organization or an individual - would be a crime against humanity to which the international community will respond. We must also make clear that transfer of BW and other toxins to those who would use them is similarly unacceptable."

On the negotiations to draft a protocol to the BWC, she states the following: "Last July, we made clear that we could not support the protocol, because the measures that were proposed to enforce the ban against possession and development are neither effective or equitable – and given the inherent properties of biological products it seems all but certain that they can never be made so. This continues to be our view. But in addition, the events of September 11 have reinforced our view that the priority focus must be on use. The international community must here and now state our abhorrence of use, as suggested above; we must all strengthen our national laws criminalizing use and transfer, and we must all agree that use and transfer are crimes to which our many mutual treaties of extradition would apply. We must give ourselves the means to question and challenge in the event of suspected use."

Bohlen has the following to say on the CWC: "It is essential that Chemical Weapons Convention (CWC) member states put in place national laws and other regulations that help to keep materials for making chemical weapons out of unauthorized hands and ensure effective prosecution of those who make or use chemical weapons." {US Mission to the UN, press release no 137(01) 10 Oct}

6 November 2001 In the US Senate, the Technology, Terrorism and Government Information Subcommittee of the Judiciary Committee holds a hearing on *Germs, Toxins and Terror: The New Threat to America*. In his testimony on the available options for strengthening the BWC following the recent rejection by the USA of the draft protocol, policy analyst of the RAND Corporation John Parachini refers to the fact that "less than half" of CWC parties have fulfilled their obligations in implementing national legislation to criminalize CW-related activities at the individual level. He

adds: "The international community must urge CWC state parties to pass the required legislation. The Harvard Sussex Program on CBW Armament and Arms Limitation has proposed an international accord criminalizing possession, transfer and use of chemical and biological weapons by individuals. In essence, this draft convention provides the international legal framework to prosecute anyone, from the terrorist to the head of state, who uses chemical or biological weapons. The initiative seeks to fill a gap in [the] existing international legal framework."

20 November 2001 In Geneva, during the national statement of Switzerland to the 5th BWC Review Conference, Ambassador Christian Faessler observes that the Conference "should eventually recommend a first set of concrete measures to strengthen the Convention, measures that are rapidly put into effect". He goes on to say: "In particular, Switzerland welcomes propositions to criminalize activities prohibited by the Convention. In this respect, we suggest to elaborate an international legal instrument, which obliges States Parties to enact penal legislation at national levels." Faessler adds: "Switzerland remains attached to the idea of multilateral and legally binding instruments to strengthen the Convention. The disarmament policy of Switzerland favors universal and non-discriminatory international agreements over purely political understandings and unilateral measures."

6 December 2001 From OPCW headquarters, the Technical Secretariat publishes the Winter/December 2001 issue of *OPCW Synthesis*, which includes an article by HSP Co-Director Matthew Meselson on 'CBW Criminalisation and Universal Jurisdiction'.

23 January 2002 In Meaux, France, the Prosecutor requests that an investigation be opened against Republic of the Congo President Denis Sassou N'Guesso together with three other Congolese officials in relation to a lawsuit filed some six weeks previously by a number of non-governmental organizations before the Prosecutor of the Tribunal de Grande Instance, Paris, alleging the defendants' involvement in, amongst other things, arbitrary detentions and torture. These acts are said to have been committed against displaced persons who had returned to the Congo via Brazzaville under an agreement made with the United Nations High Commissioner for Refugees to create a humanitarian corridor. {Cour de Cassation 04-87245, 10 Jan 2007 and 07-86412, 9 Apr 2008} As of December 2010, the case remains pending.

On 9 December 2002, the Republic of the Congo institutes proceedings against France before the International Court of Justice, claiming, among other things, that the unilateral exercise of universal jurisdiction by the French courts violates its national sovereignty, as enshrined under the Charter of the United Nations. {ICJ, [...] Republic of the Congo v France 9 Dec}. On 16 November 2010, the Court removed the case from its General List, at the request of the Republic of the Congo. {ICJ press release 17 Nov}

31 January 2002 In Brussels, the Netherlands delegation to the Public International Law Working Group (also known as COJUR) of the Council of the European Union tables a proposal based on the Harvard Sussex Draft Convention on CBW criminalization. Delegates agree to transmit the proposal back to their capitals along with the positive comments made by a number of delegations. It is further agreed that the proposal will be discussed in more detail at a later meeting.

16 April 2002 In Brussels, following the recent ruling by the International Court of Justice [see 17 October 2000], the Court of Appeals annuls the charges brought against Democratic Republic of the Congo Minister for Foreign Affairs Abdulaye Yerodia Ndombasi for alleged offences constituting grave breaches of the Geneva Conventions of 1949 and its Additional Protocols, and with crimes against humanity [see 11 April 2000]. In its ruling, the Court of Appeals states that the Belgian statute on universal jurisdiction [see 10 February 1999] is applicable only where the defendant is actually on Belgian territory.

On 20 November 2002, the Cour de Cassation (Supreme Court) overturns the ruling and returns the case to the Court of Appeals. {Winants in *Leiden Journal of International Law* 2003, vol 16}

29 April 2002 The UK Foreign Office releases its Green Paper on *Strengthening the Biological and Toxin Weapons Convention: Countering the Threat from Biological Weapons*. On the issue of criminalization, the document states: "The UK, our EU partners, the US and academics in a number of countries have identified a range of measures that could be deployed to strengthen the Convention... These potential measures include: [...] a new Convention on Criminalisation of CBW... [T]here are already proposals, developed initially in the academic community, for a new Convention that introduces criminal responsibility for any individual indicted for violating the prohibitions in the [BWC] or the [CWC]. States would be obliged to prosecute or extradite indicted individuals. For the UK, consideration of extradition to states outside the EU could be considered. Existing UK legislation, the Biological Weapons Act 1974 and the Chemical Weapons Act 1996, already provides for penal legislation for violation of the BTWC and CWC by individuals in the UK and abroad." {CM 5484}

6 May 2002 US Under-Secretary of State for Arms Control and International Security John Bolton transmits to United Nations Secretary-General Kofi Annan a letter stating that the USA "does not intend to become a party" to the Rome Statute of the International Criminal Court 1998, which has not yet entered into force, and that the USA has "no legal obligations" arising from its signature on 31 December 2000. Explaining the decision in a speech to the Center for Strategic and International Studies, Washington DC, Under-Secretary for Political Affairs Marc Grossman says: "The Rome Statute creates a prosecutorial system that is an unchecked power... We believe that in order to be bound by a treaty, a state must be party to that treaty. The ICC [International Criminal Court] asserts jurisdiction over citizens of states that have not ratified the treaty. This threatens US sovereignty... We believe that the ICC is built on a flawed foundation. These flaws leave it open for exploitation and politically motivated prosecutions... [T]he President believes that he has no choice but to inform the United Nations, as depository of the treaty, of our intention not to become a party to the Rome Statute of the International Criminal Court."

Three months later, US President George W Bush signs into law the American Service-Members' Protection Act 2002, also known as the 'Hague Invasion Act'. {Human Rights Watch 2 Aug 2002} The Act includes provisions that prohibit US cooperation and intelligence sharing with the ICC, restrict US participation in United Nations peacekeeping, and prohibit military assistance to most countries that ratify the Statute. The Act also authorizes the President to use "all means necessary and appropriate" to free any US or allied personnel detained by, or on behalf of, the ICC.

13 May 2002 In Brussels, the Presidency of the European Union makes a declaration on the recent decision by the USA not to ratify the Rome Statute of the International Criminal Court 1998 [see 6 May 2002]. The declaration includes the following statement: "While respecting the sovereign rights of the United States, the European Union notes that this unilateral action may have undesirable consequences on multilateral Treaty-making and generally on the rule of law in international relations... The European Union is also concerned at the potentially negative effect that this particular action by the United States may have on the development and reinforcement of recent trends towards individual accountability for the most serious crimes of concern to the international community and to which the United States shows itself strongly committed." {EU Council, doc no CL02-018EN, 13 May}

26 June 2002 In Brussels, the Court of Appeals dismisses a lawsuit against Israeli Prime Minister Ariel Sharon, Brigadier General Amos Yaron and others for allegedly being responsible for the murder of more than nine hundred civilians in the Lebanese refugee camps of Sabra and Chatila in September 1982. The lawsuit had been filed twelve months previously by twenty-three Lebanese and Palestinian alleged victims. The court upholds the decision of the investigating judge by interpreting Belgian law as requiring the presence of the defendants on Belgian territory before any judicial investigation could proceed on the basis of universal jurisdiction [see also 16 April 2002]. In this case, none of the defendants were on Belgian territory. {www.law.kuleuven.be/jura}

Six months later, the Belgian government reaches a cross-party agreement under which pending cases involving universal jurisdiction will be distinguished from future cases, with the former continuing as before and the latter subject to a stricter system. This compromise agreement aims at placating, on the one hand, non-governmental organizations and human rights activists who want universal jurisdiction to be strengthened, and, on the other hand, Israel and the USA who had been exerting strong diplomatic pressure against any such move. The measure subsequently passes the Senate, but stalls in the House of Representatives owing to increasing opposition to the basic concept of universal jurisdiction. {Verhaeghe in *International Prosecution of Human Rights Crimes* 2007}

30 June 2002 In Berlin, the Bundestag adopts a statute on a code of crimes against international law (Völkerstrafgesetzbuch), which provides universal jurisdiction to German courts over genocide, crimes against humanity, and war crimes. {Sections 1 and 6-12} The purpose of the law is to ensure that Germany complies with the Rome Statute of the International Criminal Court 1998, which will enter into force on 1 July 2002. {Gropengießer and Kreicket in *Nationale Strafverfolgung Völkerrechtlicher Verbrechen* 2003, vol 1} Previously, under the German criminal code (Strafgesetzbuch) defendants would be charged with crimes such as murder under German law in conjunction with international agreements – e.g., the Genocide Convention 1948 Geneva Conventions 1949 and additional Protocol I – which would provide the courts with universal jurisdiction. {Sections 6.1, 6.9 and Section 220(a)} [Note: The German code on court constitution (Gerichtsverfassungsgesetz) establishes immunity for diplomats and state representatives on official visits to Germany, and recognizes the principle of sovereign immunity under international law. {Sections 18-20} As regards procedure, the German code on criminal procedure (Strafprozessordnung)

states that where an alleged offence occurs outside of German territory, the Prosecutor can dismiss the case even after formal proceedings have commenced, if such proceedings would harm Germany or other important public interests. In addition, for offences regulated by the Völkerstrafgesetzbuch, the Strafprozessordnung authorizes the Prosecutor to refrain from prosecution if the alleged offender is not in or expected to be in Germany; if the offence is being prosecuted by an international criminal court or by a state territory on which the alleged offence was committed; or if the alleged offence was committed by, or against, one of the other state's nationals. The Strafprozessordnung establishes that the Prosecutor can dismiss a case on these grounds at any stage, even after formal proceedings have been launched. {Section 153} For alleged offences involving universal jurisdiction, as regulated by the Strafgesetzbuch and the Völkerstrafgesetzbuch, the Federal Prosecutor – who is subject to the control and direction of the Federal Minister of Justice – decides whether to launch formal proceedings or to dismiss them once they have commenced. {Gerichtsverfassungsgesetz, Sections 142 and 147}}

1 July 2002 The Rome Statute of the International Criminal Court 1998 enters into force following its 75th ratification. In a statement UN Secretary-General Kofi Annan says: "The entry into force of the [Statute] is an historic event. It reaffirms the centrality of the rule of law in international relations. It holds the promise of a world in which the perpetrators of genocide, crimes against humanity and war crimes are prosecuted when individual States are unable or unwilling to bring them to justice." {UN doc SG/SM/8293, 1 Jul} [See also 6 May and 13 May 2002]

9 July 2002 In London, there is a meeting at the Royal United Services Institute for Defence Studies on *Bio-Chem Weapons and Terrorism: International Law, Prevention and Enforcement Issues*. The purpose of the meeting is to encourage understanding and support for the concept of bio-criminalization and to propose a package of measures to be adopted by the resumed session of the 5th BWC Review Conference in November 2002. This package would include the establishment of two expert groups to study bio-criminalization issues: one under the aegis of the BWC, and one under the UN General Assembly Sixth (Legal) Committee. Attending the meeting are a number of UK governmental, academic and non-governmental organization experts and representatives from a number of London-based international organizations. Addressing the meeting is Barry Kellman of DePaul University.

18 November 2002 The UK Foreign Office transmits to the House of Commons Foreign Affairs Select Committee a memorandum on CBW criminalization, which refers to the Harvard Sussex Draft Convention. It is sent, following a request by the Committee further to its review of the Foreign Office's Green Paper on *Strengthening the Biological and Toxin Weapons Convention: Countering the Threat from Biological Weapons* [see 29 April 2002]. The memorandum states: "[The HSP] draft builds on existing legal precedents and international agreements and has been considered by officials since it was first launched in the late 1990s. It was one of the measures especially identified in the Green Paper as a possible option and it remains one that the government would be ready to see taken forward as part of international efforts to counter the threat posed by CBW proliferation. We are also aware of a similar but more ambitious proposal developed by Professor Barry Kellman, a US

academic from DePaul University College of Law [see also 9 July 2002]. However, this proposal contains some concepts that are problematic, which make it less attractive." As regards the International Criminal Court having jurisdiction over a biological weapons attack by individuals not linked to any state, the memorandum states: "[T]errorism is not itself a crime under the [ICC] Statute. Given the difficulty in arguing that such an attack would have taken place in the context of an armed conflict, it is hard to see how such conduct could fall within the scope of war crimes under the ICC Statute. Moreover, although crimes against humanity can take place outside of an armed conflict, they must be part of a systematic attack furthering State or organisational policy. Thus it may be difficult to establish that isolated acts of terrorism constitute crimes against humanity under the ICC Statute."

January 2003 The US journal *Terrorism and Political Violence* {Winter 2002} publishes a 'Draft Model Convention on the Prohibition and Prevention of Biological Terrorism' by Barry Kellman of DePaul University College of Law. The Draft Model Convention criminalizes the hostile use of biological agents by defining prohibited conduct and requiring states to establish criminal jurisdiction and to co-operate against such conduct; requires that states establish a licensing system for legitimate biological activities that involve listed pathogens; establishes an international mechanism to promulgate bio-safety and bio-security standards for listed pathogens; and strengthens international information gathering and analysis capabilities with a view to identifying illegal activity.

12 February 2003 In Brussels, the Cour de Cassation (Supreme Court) partially reverses the decision of the Court of Appeals in the case against, amongst others, Israeli Prime Minister Ariel Sharon [see 26 June 2002], which had dismissed a lawsuit on the grounds that the defendants were not on Belgian territory. The court rules that the presence of the defendants in Belgium is not a precondition for the commencement of formal proceedings for crimes under the Belgian statute on universal jurisdiction [see 10 Feb 1999]. Nonetheless, it holds that under customary international law, Ariel Sharon is conferred with immunity from universal jurisdiction. {Decision NP.02.1139.F, 12 Feb 2003} Israel subsequently withdraws its ambassador from Belgium in protest at the ruling. {Walley in *Yearbook of International Humanitarian Law* 2002, vol 5}

19 February 2003 In Paris, Peter Tatchell of the UK-based Zimbabwe Association files a lawsuit against Zimbabwean President Robert Mugabe, who is visiting the country to attend a Franco-African summit, alleging his involvement in torture. The Deputy Prosecutor subsequently dismisses the lawsuit on the grounds that as a serving head of state, Mugabe is immune from prosecution. {PeterTatchell.net}

25 February 2003 In Madrid, the Supreme Court rules by an 8-7 majority that Spanish courts do not have universal jurisdiction over allegations of genocide in a case brought against Guatemalan general and former *de facto* President Efraín Ríos Montt and seven other Guatemalan officials [see 2 December 1999]. The reasons given by the court are that the Genocide Convention 1948 does not establish the principle of universal jurisdiction; there were no indications that the alleged offenders were on Spanish territory or that Spain had denied their extradition; and the alleged genocide did not affect a Spanish national interest. The court also holds

that Spanish courts have jurisdiction over the crime of torture, but only where committed against Spanish citizens in Guatemala. {No de recurso 803/2001 No de resolución 327/2003, 25 Feb 2003} The ruling follows a challenge made by the Public Prosecutor in January 2000, challenging the jurisdiction of the Audiencia Nacional to investigate the case. {Diligencias previas 331/99, 27 Mar 2000}

18 March 2003 In Belgium, seven Iraqi citizens and a non-governmental organization file a lawsuit against former US President George H W Bush, former US Defense Secretary Richard Cheney, former Chairman of the US Joint Chiefs of Staff Colin Powell and former US Commander General Norman Schwarzkopf, alleging their responsibility for war crimes committed as a result of the bombing of two civilian shelters in Baghdad on 12 February 1991, which killed 403 people. Formal proceedings in the case were, in fact, opened on 31 May 2001 by two individuals and a non-governmental organization. {Cour de Cassation, P.03.1216.F 23 Sep 2003}. In response to the filing of the lawsuit Belgian Foreign Minister Louis Michel says that the case illustrates a serious problem with the Belgian statute on universal jurisdiction [see 10 Feb 1999], in that there are insufficient safeguards against its misuse for political or persecutory purposes. {*Le Soir*, 19 Mar} Meanwhile, a spokesperson for the Foreign Ministry adds: "This case proved that there is something wrong with the genocide law.... The government wants to change the law [see also 26 June 2002]." {*The New York Times* online 1 Apr} US Secretary of State Colin Powell subsequently informs the Belgian government that Belgium is risking its status as a diplomatic capital and as host of the NATO headquarters. {Ratner in *American Journal of International Law* 2003, vol 97}

23 April 2003 The Belgian parliament passes an amendment to its statute on universal jurisdiction [see 10 February 1999] which establishes explicitly the immunity defence based on a person's official capacity. The move follows previous statements made by the government that it planned to tighten the applicability of its statute on universal jurisdiction [see 26 June 2002] and further international criticism of the statute, most recently following the filing of complaints against former senior US governmental and military officials [see 18 Mar 2003]. The amendment – which will enter into force on 7 May 2003 – still allows alleged victims to initiate criminal proceedings as civil parties if personally harmed by the violation, but only if the crime is committed on Belgian territory; the alleged perpetrator is a Belgian national; the alleged perpetrator is present on Belgian territory; or the victim is Belgian or has lived in Belgium for at least three years. In cases where none of these links exist, criminal proceedings could only be initiated at the request of the Federal Prosecutor. The amendment also establishes that the Minister of Justice can, in consultation with the Council of Ministers, bring the alleged crimes to the attention of the state where the crime had allegedly been committed and to the attention of the alleged perpetrator's state of nationality or the state where he or she was found. In the event that a court in one of these states should then opt to exercise jurisdiction, the Cour de Cassation (Supreme Court) will – on a request to do so by the Federal Prosecutor – divest the Belgian courts of jurisdiction. Moreover, provided the victim is not a Belgian national and the alleged crime is not committed on Belgian territory, and provided also that the alleged perpetrator is a national of a state that criminalizes the serious violations of humanitarian law, the Minister of Justice can – in consultation

with the Council of Ministers – bring the alleged crimes to the attention of such State. In this case, the Cour de Cassation will again, following a request by the Federal Prosecutor, declare the Belgian courts divested of jurisdiction. For cases already pending before investigating judges, the amendment provides that decision relating to jurisdiction be made following consultation with the Court of Appeals. {Loi modifiant la loi du 16 juin 1993 relative a la repression des violations grave du droit international humanitaire et l'article 144 ter du Code judiciaire, 23 Apr 2003}

14 May 2003 In Brussels, in accordance with the recently amended statute on universal jurisdiction [see 23 April 2003], a complaint is filed with the Federal Prosecutor against Commander of US and UK forces in Iraq General Tommy Franks and Commander of the 3rd US Marine Battalion of the 4th Regiment Colonel Bryan P McCoy, for alleged war crimes committed during and after the US-led invasion of Iraq.

Six days later, the Belgian Council of Ministers brings the matter to the attention of the US authorities in accordance with the recently amended statute on universal jurisdiction [see 23 April 2003]. Subsequently, in accordance with a decision taken by the Council of Ministers, the Federal Prosecutor dismisses the complaint on the grounds that there are insufficient grounds for the initiation of formal proceedings. The petitioners subsequently appeal against the decision of the Federal Prosecutor – as provided for under the amended statute – and request the Constitutional Court to declare whether the relevant provision of the amended statute violates the Belgian Constitution with regard to equality before the law, the prohibition of discrimination and the separation of powers. {www.law.kuleuven.be/jura}

10 June 2003 In Brussels, the Court of Appeals rules that in the case brought a year previously against Israeli Prime Minister Ariel Sharon and Brigadier General Amos Yaron [see 26 June 2002 and 12 February 2003], Sharon, as Israeli Prime Minister, has immunity from prosecution, but proceedings against Yaron can go ahead. The ruling follows the recent amendment of the Belgian statute on universal jurisdiction [see 23 April 2003]. {www.law.kuleuven.be/jura}

Two days later, US Secretary of Defense Donald Rumsfeld announces that the USA will refuse to pay for a new NATO headquarters building in Belgium and will consider preventing US officials from travelling to meetings in Belgium unless Belgium further amends its laws on universal jurisdiction. "Belgium appears not to respect the sovereignty of other countries," says Rumsfeld. {DefenseLink 12 Jun} Shortly thereafter, noting that the statute has "ushered in a manifestly abusive political use of this law", Belgian Prime Minister Guy Verhofstadt says that the Belgian government will seek to make further amendments to limit its remit to cases with direct links to Belgium. {Belgian parliament doc 510103/001, 23 Jul}

10 June 2003 In Madrid, Judge Baltasar Garzón Real orders the detention of former Argentinean navy officer Ricardo Miguel Cavallo in connection with a lawsuit filed against a number of former and current officials of the Argentinean military for alleged violations of international criminal law before and after the military coup in Argentina in March 1976 [see 28 March 1996]. {*The New York Times* online 30 Jun} Previously, an international arrest warrant had been issued against Cavallo, who was subsequently arrested in

Mexico in August 2000 {Suprema Corte de Justicia [Mexico], Amparo en Revisión 140/2002} before being extradited to Spain in June 2003. [See also 4 November 1998]

On 29 February 2008, the Spanish government authorizes the extradition of Cavallo to Argentina following a request to do so by his defence team on 31 October 2005. The request was made on the grounds that Cavallo faces the same charges in Argentina for which he was extradited to Spain, where he has since remained in detention. {El Consejo de Ministros aprobo la extradición de Ricardo Cavallo a la Argentina, 29 Feb} As of December 2010, the case against Cavallo in Argentina remains open.

5 August 2003 The Belgian parliament adopts a new statute on universal jurisdiction, which introduces even greater limitations on the extraterritorial jurisdiction of Belgian courts than those introduced some three months previously [see 23 April 2003]. The move follows continued international pressure on Belgium to further tighten its laws on universal jurisdiction, and a statement by Belgian Prime Minister Guy Verhofstadt that the Belgian government would indeed seek to do so [see 10 June 2003]. {Loi relative aux violations graves du droit international humanitaire, Article 27} Under the new law – which enters into force on 7 August 2003 – individuals can only be prosecuted based on universal jurisdiction for war crimes, crimes against humanity, and genocide where they have become Belgian citizens or residents of Belgium since such offence has been committed. The statute also removes the right previously vested in alleged victims and non-governmental organizations to initiate formal proceedings as civil parties, and establishes that only the Federal Prosecutor can do so. {Reydam's in *Journal of International Criminal Justice* 2003, vol 1} A transitional provision also states that unless at least one of the petitioners is a Belgian national or resident, and unless an official investigative act has taken place in the case, any proceedings initiated before an investigating judge must be sent by the Federal Prosecutor to the Prosecutor before the Court of Cassation (Supreme Court), who in turn must request the court to divest Belgian courts of jurisdiction over the case. {Loi relative aux violations graves du droit international humanitaire, Article 29}

24 September 2003 In Brussels, the Cour de Cassation (Supreme Court) divests Belgian courts of jurisdiction over the cases against Israeli Prime Minister Ariel Sharon and Brigadier General Amos Yaron [see 10 June 2003], {Decision NP.03.1217.F} and against former US President George H W Bush and others [see 18 March 2003], {Decision NP.03.1216.F} in accordance with the recently adopted statute amending Belgium's laws on universal jurisdiction [see 5 August 2003]. The court also divests Belgian courts of jurisdiction over a number of pending cases, including those against Cuban President Fidel Castro {Vandermeersch in *Journal of International Criminal Justice* 2005, vol 3} and Rwandan President Paul Kagame {David in *Yearbook of International Humanitarian Law*, 2005, vol 8}. The ruling is based on a transitional provision of the statute which states that unless at least one of the petitioners is a Belgian national or resident, and that unless an official investigation has been undertaken in the case, the Federal Prosecutor must send any lawsuit filed with an investigating judge to the Prosecutor, before the Cour de Cassation, who in turn is obliged to ask the court to divest Belgian courts of jurisdiction. {Loi relative aux violations graves du droit international humanitaire, Article 29, 5 Aug 2003} Meanwhile, the Court of Appeals rules that following the

adoption of the new statute it can no longer consider an appeal against the dismissal by the Federal Prosecutor of the lawsuit against Commander of US and UK forces in Iraq General Tommy Franks and Commander of the 3rd US Marine Battalion of the 4th Regiment Colonel Bryan P McCoy [see 14 May 2003]. {www.law.kuleuven.be/jura}

14 January 2004 In London, Bow Street Magistrates Court dismisses an application for an arrest warrant against Zimbabwean President Robert Mugabe on the grounds that as an incumbent head of state he is protected from prosecution under the State Immunity Act 1978. The dismissal follows an earlier such dismissal against US President George W Bush. {Application for Arrest Warrant, 14 Jan, per District Judge Workman}

Four weeks later, the same court rejects an application for an arrest warrant against Israeli Defence Minister Shaul Mofaz for his involvement in alleged acts of wilful killing and destruction of property contrary to the Fourth Geneva Convention 1949. The court rules that as defence minister Mofaz should enjoy the same immunity from prosecution as a foreign minister so as to enable him to carry out his duties effectively. These duties invariably would demand undertaking foreign travel. {Application for Arrest Warrant, 12 Feb, per District Judge Pratt}

28 April 2004 At UN headquarters, following weeks of consultations, the Security Council unanimously adopts a resolution on the proliferation of weapons of mass destruction to non-state actors. Despite opposition from Pakistan and others, resolution 1540 – which was sponsored by France, Romania, Russia, Spain, the UK and the US – is adopted under Chapter VII of the UN Charter, potentially allowing for military enforcement of its provisions. Resolution 1540 affirms that the proliferation of nuclear, biological and chemical weapons and their means of delivery constitute a threat to international peace and security. All 191 United Nations member states are required “in accordance with their national procedures” to “adopt and enforce appropriate effective laws which prohibit any non-state actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes”. All member states are additionally required to “take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials”. The resolution defines “related materials” as “materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery”. It also establishes a Security Council Committee – to be constituted by all members of the Security Council – which will report on its implementation. Within six months member states must submit a first report on steps taken, or planned, to implement the resolution nationally. The resolution stresses that none of the obligations contained therein “shall be interpreted so as to conflict with or alter the rights and obligations of State Parties to the Nuclear Non-Proliferation Treaty, the [CWC] and the [BWC] or alter the responsibilities of the International Atomic Energy Agency or the [OPCW]”. The resolution does not require BWC or CWC member States to go beyond adopting measures over and above their existing obligations under these treaties with regard to the commission of relevant offences.

[Note: In this regard, resolution 1540 falls short in several respects of the obligations that would be established by the Harvard Sussex Draft Convention. First, the resolution seeks to strengthen national criminal law, rather than to create international criminal law. Secondly, it requires that States “in accordance with their national procedures, shall adopt and enforce appropriate effective laws,” but unlike Article V(1)(a-f) of the Harvard Sussex Draft Convention, it does not set out provisions pertaining to jurisdiction. Thirdly, in contrast to the Harvard Sussex Draft Convention, resolution 1540 contains no provision dealing with matters of extradition, legal assistance, protection of the accused, etc. Fourthly, the resolution only applies as against non-state actors, while the Harvard Sussex Draft Convention applies additionally to those acting in an “official capacity, under the orders of a superior, or otherwise in accordance with internal law”. Unlike an international convention which would create a comprehensive international regime criminalizing the misuse of chemical and biological weapons, resolution 1540 can only have normative force where the *opinio juris* and state practice of a sufficient number of States acting in accordance with the terms of the resolution indicate that its terms have crystallized into customary international law.

17 May 2004 In Brussels, the Council of the European Union adopts without discussion the following statement on non-proliferation: “The EU is fully committed to the implementation of the UN Security Council resolution 1540 [see 28 April 2004] on non-proliferation, which, *inter alia*, recognizes the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security.” {EU Council press release 9211/04, 17 May}

25-26 June 2004 In Ireland, an EU-US ‘Declaration on the Non-Proliferation of Weapons of Mass Destruction’ – which supports recent non-proliferation initiatives such as UN Security Council resolution 1540 [see 28 April 2004] – is one of two declarations adopted at an EU-US summit meeting. Attending the meeting at Dromoland Castle, outside Dublin, is US President George Bush, the President-in-office of the European Council, Taoiseach Bertie Ahern, and European Commission President Romano Prodi.

28-29 June 2004 In Istanbul, a statement issued following a meeting of the heads of state and government of the twenty-six NATO countries, underlines the importance of the BWC and CWC, and refers to NATO’s “strong support” for UN Security Council resolution 1540 [see 28 April 2004]. {NATO press release 96, 28 Jun}

8 November 2004 US Principal Deputy Assistant Secretary of State for Nuclear Proliferation Andrew Semmel sets out the US perspective with regard to UN Security Council resolution 1540 [see 28 April 2004] during the Asia-Pacific Nuclear Safeguards and Security Conference in Sydney. Semmel says: “Since 9/11, the United States has looked through fresh eyes at the nonproliferation ‘toolbox’... [A] clear gap remains between the global consensus about the threat of WMD proliferation and concrete action on the ground... While not a proliferation panacea, UNSC 1540 helps close this gap... It places a premium on establishment of legal and regulatory measures at the national level. It seeks to build capacity from the bottom up rather than attempting to impose it from above... Though Resolution 1540 has been structured

under Chapter VII, we do not envision ‘enforcement’ as a role for the [1540] Committee... We of course will revisit this view if it becomes evident that countries are not taking their 1540 obligations seriously or are ignoring their responsibility to put in place the legal and regulatory infrastructure required under the resolution.”

2 December 2004 At UN headquarters, the General Assembly adopts the United Nations Convention on Jurisdictional Immunities of States and of Their Property. Although the treaty (which, as of December 2010, is still not in force) does not relate to criminal acts it does, with some exceptions, provide for immunity from prosecution for state officials.

31 January-4 February 2005 In London, at the International Maritime Organization, the Legal Committee’s intersessional working group on the review of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation convenes for its second session. The draft protocol being negotiated by the group is intended to criminalize the transportation by ship of weapons of mass destruction. The group agrees to incorporate mention of UN Security Council resolution 1540 [see 28 April 2004] into its preamble. {IMO doc LEG/SUA/WG.2/4, 9 Feb}

11 February 2005 In Karlsruhe, Germany, the Federal Prosecutor dismisses a lawsuit – filed two months previously by the Center for Constitutional Rights and four Iraqi citizens – against US Defense Secretary Donald Rumsfeld and other US officials, alleging their responsibility in forty-four cases of abuse at Abu Ghraib prison in Iraq and four additional cases of alleged abuses in detention at other locations in Iraq. The dismissal by the Federal Prosecutor comes just two days before Rumsfeld is due to arrive in Germany to attend a Security Conference in Munich. {Jessberger in *International Prosecution of Human Rights Crimes 2007*} The Federal Prosecutor states that universal jurisdiction, as provided for under the German code of crimes against international law (*Völkerstrafgesetzbuch*) [see 30 June 2002], should only be relied upon as a basis of prosecution when neither the country where the offence took place or whose nationals were perpetrators or victims of the alleged offence, nor a competent international court is prosecuting the case. According to the Federal Prosecutor there were no indications that the US authorities would not investigate and prosecute the alleged abuses in this case. {Decision in *Juristen-Zeitung 2005*, p 311}

18 March 2005 In Madrid, the Supreme Court upholds a decision by the Court of Appeal to dismiss a lawsuit filed against former Chinese President Jiang Zemin and another top official alleging their involvement since the 1990s in the genocide and torture of people who belonged to or sympathized with China’s Falun Gong group. The court bases its ruling on that made by the Supreme Court some two years previously in the Guatemalan Generals case [see 25 February 2003], i.e. that the alleged offenders were not present on Spanish territory and that the alleged offence did not affect a Spanish national interest. The lawsuit was rejected by the investigating judge when it was filed by a group of alleged victims some two years previously. {Tribunal Supremo doc 345/2005, 18 Mar}

23 March 2005 In Brussels, the Constitutional Court rules that provisions in the amended statute on universal jurisdiction [see 5 August 2003] that eliminate the

power of civil parties to launch formal criminal proceedings, and the lack of an appeal against the decision of the Federal Prosecutor in such situations, do not disproportionately infringe the rights of the victims as their purpose is to establish a centralizing and coordinating body to start formal proceedings with respect to such crimes. The Court also states that it is reasonable to put the sole responsibility for this decision on the Federal Prosecutor when the grounds for opening formal proceedings is based on whether they would be in the interest of a good administration of justice, and in respect of the international obligations of Belgium. The request for the review of the provisions was filed thirteen months previously by the Belgian human rights non-governmental organizations Ligue des Droit de l'Homme and the Liga voor Mensenrechten, following the rejection by the Federal Prosecutor of a lawsuit against Commander of US and UK forces in Iraq General Tommy Franks and Commander of the 3rd US Marine Battalion of the 4th Regiment Colonel Bryan P McCoy [see 14 May 2003]. These two organizations had argued that the provisions violated Article 10 (equality before the law) and Article 11 (non-discrimination) of the Belgian Constitution and Article 6 of the European Convention of Human Rights 1950 (right to a fair trial). {Cour d'Arbitrage doc 62/2005, 23 Mar}

19 April 2005 In Madrid, the Audiencia Nacional sentences former Argentine Captain Adolfo Scilingo [see 4 November 1998] to a total of 640 years imprisonment after having convicted him of crimes against humanity, participating in illegal detention, and torture. {Sentencia 16/2005, 19 Apr} By the time Scilingo went to trial in December 2004, the Argentinean government no longer opposed the prosecution of former and current members of its military involved in the 1976 military coup there [see 26 January 1998]. In addition, the Spanish Office of the Prosecutor had declared a policy of non-opposition to prosecutions based on universal jurisdiction. The case against Scilingo is the only case involving universal jurisdiction over international crimes to have actually gone to trial in Spain. {Amnistia Internacional 19 Apr}

On 18th July 2007, the Supreme Court reduces Scilingo's sentence to a maximum of twenty-five years imprisonment after partially reversing his conviction. {Sentencia 798/2007, 1 Oct}

20 May 2005 In Washington DC, the embassy of the Holy See sends a diplomatic memorandum to the US Department of State requesting that Pope Benedict XVI – formerly Cardinal Joseph Ratzinger – be granted immunity from prosecution in relation to a lawsuit filed against him in the District Court for the Southern Division of Texas, Houston. {AP 17 Aug} The three claimants to the lawsuit allege that the Pope conspired to cover up sex abuse committed against them as minors by Juan Carlos Patino-Arango – currently a fugitive from justice – at St Francis de Sales Church in Houston during the mid-1990s. The lawsuit cites a letter dated 18 May 2001 from Ratzinger to bishops around the world, stating that “grave” crimes such as the sexual abuse of minors would be handled by his congregation and that the proceedings of special church tribunals handling the cases were subject to “pontifical secret”. {AP 20 Sep}

Six days later, citing the First Amendment, lawyers for the Pope file a motion with the court requesting it to dismiss the lawsuit on the grounds that proceeding with it would “invite court intrusion into the internal affairs of the Roman Catholic Church.” {AP 17 Aug}

24 June 2005 In Karlsruhe, Germany, the Federal Prosecutor dismisses a lawsuit filed some eighteen months previously by the German Association Falun-Dafa and forty other complainants against former Chinese President Jiang Zemin and other members of the Chinese government, for their alleged role in genocide, crimes against humanity, torture, and other crimes as a result of the repression against adherents of the practices and beliefs of the Falun-Dafa (or Falun-Gong) group in China. Amongst other things, the Federal Prosecutor states that Jiang Zemin, as a former head of state, is immune from prosecution under international law. {Strafanzeige gegen Jian Zemin [...] doc 3 ARP 654/03-2} [See also 11 February and 18 March 2005]

29 June 2005 In Brussels, a jury finds Rwandan businessmen Samuel Ndashykirwa and Etienne Nzabonimana guilty of war crimes, i.e. the murder and attempted murder of Rwandan citizens in Rwanda in April 1994. Ndashykirwa is sentenced to ten years and Nzabonimana to twelve years imprisonment. Both defendants were residing in Belgium at the time of their arrests in 2002. {www.ulb.ac.be} [See also 8 June 2001 and 24 September 2003]

1 July 2005 In Gard, France, a court sentences Ely Ould Dah, an intelligence lieutenant from Mauritania, to ten years imprisonment after finding him guilty *in absentia* of the torture during 1990-1991 of members of Mauritania's military suspected of having incited a coup d'état. {Le Monde 2 Jul} Previously, in August 1998, Ould Dah, then captain in Mauritania's army, travelled to France for military training. {European Court of Human Rights doc 13112/03, 17 Mar 2009} The lawsuit against Ould Dah was filed in June 1999 by the Fédération Internationale des Ligues des Droit de l'Homme and the Ligue des Droit de l'Homme. Following a request by the Prosecutor for a judicial investigation, an investigating judge ordered that Ould Dah be placed in pre-trial detention. However, the Court of Appeals subsequently released him under judicial control after a note from the French Minister of Foreign Affairs to the Prosecutor, stressing the dangers of deteriorating French-Mauritanian relations. {Libération 29 Sep 1999} After Ould Dah fled France in April 2000, an investigating judge issued an arrest warrant against him, {Le Monde 9 Apr 2000} and on 25 May 2001 indicted him for the alleged offences. {Cour d'assises 99/14445, 25 May} Ould Dah is the first individual to be tried in France on the basis of universal jurisdiction. [Note: Under the French code on criminal procedure, offences committed outside of French territory can be prosecuted and tried by French courts in cases where French law applies or where an international convention gives jurisdiction to French courts over a case. French courts have jurisdiction over genocide, crimes against humanity, and war crimes under the jurisdiction of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, if the alleged offenders are on French territory. In this regard, torture is the only core international crime subject to universal jurisdiction in France that is not restricted to a certain geographical location].

18 July 2005 In London, following a retrial, the Old Bailey (Central Criminal Court) sentences Afghan Faryadi Sarwar Zardad to twenty years imprisonment after a jury found him guilty of torture and hostage taking. Following the withdrawal of the Soviet Union from Afghanistan, Zardad, who controlled a checkpoint on the route between Kabul and Pakistan between 1992 and 1996, was said to have terrorized, tortured, imprisoned, and blackmailed civilians using the route.

Zardad sought asylum in the UK in 1996 after the Taliban came to power in Afghanistan. He was arrested in 2003 and was put on trial in 2004. {www.trial-ch.org} It is the first case involving universal jurisdiction to have gone to trial under the Criminal Justice Act 1988 [see also September 1997]. BBC News Online quotes Attorney General Lord Goldsmith, who prosecuted the case under the Act, as saying that the UK decided to prosecute Zardad on the grounds that his alleged crimes were so “merciless” and such “an affront to justice” that they could be tried in any country. {BBC 19 Jul} [Note: Section 134(1) of the Criminal Justice Act 1988 provides the UK with universal jurisdiction with respect to the crime of torture, as required under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984]. [See also September 1997]

11 September 2005 In London, former Israeli commander Major General Doron Almog avoids arrest by refusing to leave his aeroplane and returning to Israel within two hours of landing at Heathrow airport. A district judge had previously issued a secret arrest warrant against Almog for his alleged involvement in war crimes contrary to the Geneva Conventions, in connection with his having ordered the demolition of 59 Palestinian houses in 2002. The application for the warrant had been made by a group of alleged Palestinian victims of the operation. *The (London) Guardian* subsequently reports having seen police documents stating that the police refused to stop Almog fleeing the UK because they feared any attempt to stop him would lead to a shoot-out at the airport. {*Guardian* online 19 Feb 2008}

Four months later, *The Guardian* reports that following pressure from the Israeli government, the UK government is considering changes that would prevent citizens from seeking arrest warrants against individuals suspected of having committed war crimes and torture. {*Guardian* online 3 Feb 2006} As of December 2010, no such changes have been introduced. [Note: The Geneva Conventions Act of 1957 – as amended by the Geneva Conventions (Amendment) Act 1995 – establishes the universal jurisdiction of the UK courts over grave breaches of the Geneva Conventions and Additional Protocol I].

19 September 2005 In Belgium, an investigating judge issues an international arrest warrant against former Chadian President Hissène Habré in relation to a lawsuit filed some five years previously alleging crimes against humanity, torture, war crimes and other human rights violations in connection with allegations of the summary execution of 40,000 people between 1982 and 1990. Subsequently, the Belgian authorities request Senegal to extradite Habré, who has been in exile there since being ousted from power in 1990. Senegal, however, refuses the request.

Ten months later, at the request of the African Union, Senegal agrees to try Habré in Senegal. Habré is subsequently placed under house arrest. {www.trial-ch.org}

On 16 February 2009, Belgium files proceedings against Senegal with the International Court of Justice, demanding that Senegal either prosecute Habré or extradite him to Belgium for trial. In this case, the Belgian authorities adopt the position that Belgium’s jurisdiction over the case is not based on universal jurisdiction, but rather on the principle of passive personality. {ICJ Application 16 Feb}

19 September 2005 The US Department of Justice files a brief with the District Court for the southern district of Houston, Texas, stating that a lawsuit brought against Pope Benedict XVI should be dismissed on the grounds that as head of state of the Holy See he enjoys immunity from prosecution [see 20 May 2005]. In the brief, Assistant Attorney

General Peter Keisler says that prosecuting the Pope is “incompatible with the United States’ foreign policy interests”. He adds that US courts have previously been bound by such “suggestion of immunity” motions submitted by the government. {AP 20 Sep} One such example was the dismissal of a lawsuit filed in Texas in 1994 against Pope John Paul II after the government had filed a similar brief.

23 September 2005 OPCW Director-General Rogelio Pflirter says, in an interview published in *Arms Control Today*, that he believes the adoption of United Nations Security Council resolution 1540 [see 28 April 2004] to have been “an extremely positive development”. He adds: “By stating obligations that are identical to our own convention, it demonstrates that our convention is very much an up-to-date document and quite relevant in the efforts against terrorism, which quite clearly constitutes a major priority.”

26 September 2005 In Madrid, the Constitutional Court reverses the decision by the Supreme Court in the Guatemalan Generals case [see 25 February 2003], ruling that the “principle of universal jurisdiction prevails over the existence of national interests”. It holds that the decision by the Supreme Court had violated the people’s and the private prosecutor’s right to effective judicial protection as established under the constitution. {Sentencia 237/2005} The ruling by the Constitutional Court is supported by Cándido Conde-Pumpido, who was appointed Fiscal General del Estado (Chief of the Office of the Prosecutor) following a change of government on 17 April 2004. Conde-Pumpido was one of the Supreme Court judges who had voted in favour of pure universal jurisdiction in the case. {*Persona y Derecho*, 2004 vol 51}

On 7 July 2006, the Audiencia Nacional formally charges six Guatemalan officials – including Efraín Ríos Montt and Óscar Humberto Mejía – with the alleged international crimes set out in the lawsuit [see 2 December 1999]. {*Jurist Legal News and Research*, 8 Jul}

19 October 2005 In Madrid, Judge Santiago Pedraz Gómez issues international arrest warrants against three US military officers for alleged war crimes in connection with opening fire on a hotel in Baghdad on 8 April 2003, which killed Spanish journalist José Manuel Couso Permy and Ukrainian journalist Taras Protsyuk. {Audiencia Nacional 99/2003-10, 19 Oct} Couso’s family filed the lawsuit with the Audiencia Nacional in May 2003. {Audiencia Nacional, 27 May 2003}

On 11 December 2006, the Supreme Court reverses a decision by the Court of Appeals which had granted an appeal by the Prosecutor to dismiss the case on the grounds that Spanish courts did not have jurisdiction. {No de resolución 1240/2006, 11 Dec}

8 November 2005 In London, Bow Street Magistrates Court refuses to issue an arrest warrant against Chinese Trade Minister Bo Xilai for alleged violations of international criminal law, arguing that as part of an official delegation to the UK, he enjoys immunity from prosecution [see also 14 January 2004]. {Application for Arrest Warrant, 8 Nov, per District Judge Workman}

30 November 2005 In Vienna, the Forum for Security Cooperation of the Organization for Security and Cooperation in Europe adopts a ‘decision’ – during its plenary meeting – on “supporting the effective implementation” of United Nations Security Council resolution 1540 [see 28 April 2004]. {Doc FSC.DEC/7/05/Corr.1, 30 Nov}

On 30 November 2006, the Forum adopts a 'decision' "supporting national implementation" of the resolution. {Doc FSC.DEC/10/06, 30 Nov}

16 December 2005 At UN headquarters, the General Assembly adopts *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. The aim of the guidelines is to provide the victims of human rights or humanitarian law abuses with access to judicial redress regardless of who is the alleged perpetrator. {Doc A/RES60/147, 21 Mar 2006}

10 January 2006 In Madrid, the Court of Appeals reverses the decision of an investigating judge to dismiss a lawsuit filed against seven former Chinese officials – including the former President of China Jiang Zemin and former Prime Minister Li Peng – for allegedly participating in genocide in Tibet. The Audiencia Nacional had previously dismissed the lawsuit – which was filed on 28 June 2005 by, amongst others, the Madrid-based Committee to Support Tibet – on 5 September 2005. The ruling by the Court of Appeals is based on that made by the Constitutional Court in the Guatemalan Generals case [see 26 Sep 2005]. {Rollo de apelacion 196/05, 10 Jan} [See also 18 March and 24 June 2005]

On 5 June 2006, the Audiencia Nacional commences its investigation of the case. *The* (London) *Independent* quotes Liu Jianchao, a spokesman for the Chinese Foreign Ministry, as saying that China opposes any interference in its internal affairs, including on Tibet issues, and describes the investigation as "sheer fabrication". {*Independent* online 7 Jun}

On 9 April 2009, investigating judge Ismael Moreno requests that the Chinese government question Jiang Zemin and six other defendants in connection with their alleged involvement in genocide and torture in Tibet since 1950. {*El País* 5 May}

23 March 2006 In Karlsruhe, Germany, the Federal Prosecutor dismisses a lawsuit against former Minister of Internal Affairs of Uzbekistan Zokirjon Almatov for his alleged responsibility for acts of torture and crimes against humanity committed in Uzbekistan by police and security forces since the mid 1990s. The lawsuit was filed some three months previously by eight Uzbeks, who were supported by Amnesty International and Human Rights Watch. At that time Almatov had arrived in Germany to receive medical treatment. In dismissing the case, the Federal Prosecutor refers to the fact that the alleged offences occurred prior to the entry into force of the German code of crimes against international law (*Völkerstrafgesetzbuch*) [see 30 June 2002], and that Almatov was no longer on German territory and his return was unlikely. {Zappala in *Journal of International Criminal Justice* 2006, vol 4} [See also 24 June 2005]

27 April 2006 At UN headquarters, the Security Council unanimously passes a resolution to extend the mandate of the 1540 Committee – which was created by resolution 1540 [see 28 April 2004] – until 27 April 2008. The current mandate is due to expire in one day's time. {Resolution 1673}

12 June 2006 In Luxembourg, the Council of the European Union adopts a 'joint action' that sets out its support for the implementation of United Nations Security Council resolution 1540 [see 28 April 2004]. The document states that the Council will finance projects aimed at "raising awareness" of the requirements related to

resolution 1540 and "the importance of this international non-proliferation instrument". {2006/419/CFSP} [See also 30 November 2005]

On 14 May 2008, in Brussels, the Council adopts another 'joint action' the purpose of which is to further support projects aimed at implementing resolution 1540. {2008/368/CFSP}

14 June 2006 In the UK, the House of Lords upholds an earlier decision by the Court of Appeal to dismiss – in accordance with State Immunity Act 1978 – a claim under civil law against the government of Saudi Arabia for aggravated and exemplary damages for alleged assault and battery, trespass to the person, false imprisonment and torture carried out in Saudi Arabia between March and May 2001. The case is subsequently referred to the European Court on Human Rights. {HL, Jones –v– Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya.

5 April 2007 In Karlsruhe, Germany, the Federal Prosecutor dismisses a second [see 11 February 2005] lawsuit against former US Defense Secretary Donald Rumsfeld and others, for alleged abuses committed at Abu Ghraib prison in Iraq and Guantanamo Bay. The Federal Prosecutor bases the dismissal on the earlier dismissal, adding that the alleged offenders were not present in Germany, nor were they expected to be in the future, and that for a prosecution to take place investigations would first have to occur in Iraq and the USA, which was unlikely. The lawsuit had been filed some six months previously by the Center for Constitutional Rights, together with a number of non-governmental organizations and individuals. {Doc 3 ARP 156/06-2, 5 Apr} The Higher Regional Court of Stuttgart subsequently upholds the decision of the Federal Prosecutor following an appeal by the petitioners. {Doc 5-Ws21/09, 21 Apr 2009} [See also 23 March 2006]

5 July 2007 In Brussels, a jury finds Bernard Ntuyahaga guilty of war crimes for the murder and attempted murder of ten Belgian peacekeepers and an undetermined number of Rwandans in Rwanda in 1994 when he was a major in the Rwandan army. He is sentenced to twenty years imprisonment. {www.ulb.ac.be} Ntuyahaga had surrendered himself to the Belgian authorities in Brussels in March 2004.

Seven months later, the Cour de Cassation (Supreme Court) dismisses an appeal by Ntuyahaga against his conviction. {www.trial-ch.org} [See also 29 June 2005]

12 July 2007 In Strasbourg, France, the European Court of Human Rights rejects an appeal by former member of the Bosnian Serb army Nicola Jorgic against his earlier conviction in Germany for a number of international crimes committed during the conflict in the former Yugoslavia [see 30 April 1999]. The German court had primarily based its jurisdiction on the universal jurisdiction provision relating to genocide as set out under the German criminal code (*Strafgesetzbuch*) [see also 30 June 2002]. {ECHR judgment 74613/01}

20-24 August 2007 In Geneva, in the margins of the 2007 BWC Meeting of Experts, HSP gives a presentation on the Harvard Sussex Draft Convention.

22 October 2007 In Madrid, the Constitutional Court overturns a ruling by the Supreme Court to dismiss a complaint brought against former Chinese President Jiang Zemin and another senior official, in relation to allegations of genocide and torture committed during the alleged persecution since the 1990s of people who belonged to, or sympathized

with, China's Falun Gong group [see 18 March 2005]. The Constitutional Court bases its ruling on the same grounds as those that it set out when it overruled the Supreme Court in the lawsuit brought against members of the Guatemalan military [see 26 September 2005]. {Sentencia 227/2007} [See also 24 June 2005 and 10 January 2006]

16 November 2007 In Paris, the Prosecutor dismisses a lawsuit brought against former US Defense Secretary Donald Rumsfeld for allegedly authorizing, ordering, and inciting the commission of crimes of torture in Guantanamo Bay and Iraq. The lawsuit was filed some three weeks previously by, amongst others, Fédération Internationale des Droits de l'Homme and the Ligue des Droits de l'Homme while Rumsfeld was visiting France. {www.fidh.org 25 Oct 2007} The Prosecutor states that the Ministry of Foreign Affairs had indicated that heads of state and ministers of foreign affairs continue to have immunity from criminal prosecution in relation to the undertaking of official acts even after they have left office. {www.fidh.org 16 Nov} [See also 5 April 2007]

13 March 2008 In France, a judicial investigation is opened against Agathe Kanziga Habyarimana, the widow of Rwandan President Juvénal Habyarimana for her alleged participation, organization, and direction of the genocide in Rwanda in the 1990s. The lawsuit was filed some thirteen months previously by the non-governmental organization Collective of Civil Parties for Rwanda. {www.trial-ch.org 13 Mar} [See also January 2000 and 5 July 2007]

On 2 March 2010, Habyarimana is arrested in France only days after French President Nicholas Sarkozy said, during a visit to Rwanda, that France would find those persons suspected of having committed genocide in Rwanda who are now living in France. {Canwest News Service 2 Mar} As of December 2010, Habyarimana is still fighting a request by the Rwandan authorities for her extradition to Rwanda to face prosecution for genocide.

25 April 2008 At UN headquarters, the Security Council passes a resolution that extends the mandate of the 1540 Committee, which was created by resolution 1540 [see 28 April 2004], until 25 April 2011. The current mandate will expire in two days time. {S/RES/1810} [See also 27 April 2006]

10 June 2008 The French Senate unanimously adopts a bill that limits the exercise of universal jurisdiction by French courts over claims relating to crimes against humanity, genocide, and war crimes if all of the following conditions are satisfied: the alleged offender must become a French resident after the offence was committed; the offences must be recognized as such by the state where they occurred or the state in question must be a party to the Rome Statute of the International Criminal Court 1998; only the Prosecutor, as opposed to individuals and non-governmental organizations acting as civil parties, can initiate formal proceedings; and the Prosecutor may initiate formal proceedings only if no other international or national jurisdiction requests the submission or extradition of the alleged offender. {Session 107, 2007-2008}

8 July 2008 At UN headquarters, 1540 Committee Chairman Jorge Urbina informs the Council that full implementation of resolution 1540 by all states will take time and that once this has been accomplished, "vigilance and innovation will be needed to maintain effective policies". {UNSC S/2008/493, 30 Jul} [See also 25 April 2008]

5 August 2008 In Madrid, Judge Santiago Pedraz Gómez opens an investigation into allegations of crimes against humanity against Chinese Defence Minister Lian Guanglie, Chinese Minister of State Security Geng Huichang, and five other Chinese officials in relation to the use of force in early 2008 against Tibetan civilians which resulted in 203 deaths, thousands injured and subsequent illegal detentions. The lawsuit was filed by, amongst others, the Madrid-based Committee to Support Tibet. {242/2008-10, 5 Aug}

On 5 May 2009, Judge Pedraz requests authorization from the Chinese government to interrogate Lian Guanglie, Geng Huichang and four of the other defendants. {*El País* 5 May} Following this request, the Chinese government informs the Spanish government that it should take "immediate and effective measures" leading to rapid dismissal of the case in order "to avoid possible obstacles and damages to the bilateral relations between China and Spain". {*El País* 7 May}

15 December 2008 In Bas-Rhin, France, a trial court sentences Khaled Ben Said to eight years imprisonment after convicting him *in absentia* of complicity in, amongst other things, torture. {Cour d'Assises [...] CA 08/36} Zoulaikha Majouhbi, who filed the lawsuit, claimed that Ben Said had participated in her torture and interrogation at a Tunisian police station – where he was the head – in October 1996. The French police summoned Ben Said in November 2001 – following a request by the Prosecutor to investigate the case – who since May 2001 had been based in Strasbourg as Vice-Counsel of Tunisia. In response, Ben Said invoked his status as a diplomat to refuse the summons and shortly thereafter fled the country. In January 2002 the Prosecutor initiated a formal investigation by an investigating judge, and in February 2002 the investigating judge issued an indictment against Ben Said, notwithstanding a request by the Prosecutor for the case to be dismissed. {www.fidh.org}

Two days later, Tunisia condemns the ruling. {*Libération*, 17 Dec} Ben Said is the second [see 1 July 2005] individual to be tried in France based on universal jurisdiction.

29 January 2009 In Madrid, Judge Fernando Andreu Merelles opens an investigation against former Israeli Defence Minister Binyamin Ben-Eliezer, former Chief of Staff of Defence Moshe Ya'alon, former Commander of the Israeli Air Force Dan Halutz, and five other Israeli officials for their alleged role in war crimes. {Audiencia Nacional 157/2.008, 29 Jan} The lawsuit – which was filed on 24 June 2008 by a group of six Palestinians – alleges that an Israeli air raid on Al Daraj in Gaza on 22 July 2002, the purpose of which was to assassinate suspected Hamas commander Sala Shehadeh, killed fifteen civilians and injured around 150 more. {www.derechos.org 24 Jun 2008} According to *The Guardian* (London), Israeli officials have refused to provide information requested by the Audiencia Nacional since the filing of the lawsuit. {*Guardian* online 29 Jan} In response to the opening of proceedings, the Israeli government makes an official protest to the Spanish government. Spanish Minister of Foreign Affairs Miguel Ángel Moratinos assures Israel that the government will endeavour to minimize the impact of the investigation. {*El Confidencial* 30 Jan} BBC News Online subsequently reports a statement issued by the Israeli government describing the proceedings as "unacceptable". {BBC 25 Jun 2009}

4 May 2009 In Madrid, Judge Velasco Núñez rules that the exercise of universal jurisdiction by the Audiencia Nacional is subsidiary and limited to cases where

any country better positioned to investigate and prosecute an alleged offence indicates that it has no plan to do so. {Doc 134/2009} The ruling is made in relation to a lawsuit filed two months previously by a Spanish non-governmental organization against six former US government officials, including former Attorney General Alberto R Gonzales, for allegedly being responsible for, amongst other things, the torture and inhumane treatment of protected persons in armed conflict who are detained at Guantanamo Bay. {www.trial-ch.org 17 Mar} Judge Velasco says that before deciding whether to initiate an investigation he will despatch a commission to the USA to determine whether the alleged offences will be investigated there and, if appropriate, prosecuted and, if so, by what authority and means. {Doc 134/2009} The Chief Prosecutor before the Audiencia Nacional, Javier Zaragoza, had applied for the lawsuit to be dismissed on the grounds that the defendants did not have decision-making authority; that the lawsuit did not set out specific allegations meaning that an investigation into US policies would be required which would be contrary to criminal procedure; and that the petitioners had failed to demonstrate that they had first taken the case to the jurisdiction in the best position to try it, in accordance with the principle of subsidiarity. {Audiencia Nacional doc150/09, 27 Apr} Despite his previous support for the principle of universal jurisdiction [see 26 September 2005] Fiscal General del Estado (Chief of the Office of the Prosecutor) Cándido Conde-Pumpido refers to the lawsuit as “fraudulent” and says that admitting it would amount to converting universal jurisdiction into “a toy in the hands of people who want to be at the centre of attention” [see also 26 September 2005]. {*El País* 18 Apr}

25 June 2009 The Spanish Congress of Deputies approves an amendment to Article 23 of the Judiciary Act 1985 so as to limit instances in which national courts can exercise universal jurisdiction. {*El Confidencial* 25 Jun} The move follows an agreement reached some weeks earlier on the matter between the government and opposition parties, {*El País* 19 May} and the adoption by the Congress of Deputies of a resolution promoting the urgent reform of the provision. {Resolucion 39 in *Boletín Oficial de las Cortes Generales* 26 May} It also follows international criticism of the exercise of universal jurisdiction by Spanish courts, most recently by China [see 5 August 2008] and Israel [see 29 January 2009]. {BBC online 25 Jun} Article 23.4 confers on Spanish courts jurisdiction over genocide and any other offence committed outside of Spanish territory, whether by Spanish or non-Spanish citizens, where international agreements require their prosecution. Under amended Article 23.4, Spanish courts cannot assert universal jurisdiction unless either the accused is on Spanish territory, or there is another relevant link between Spain and the alleged offence. It also prevents Spanish courts from asserting universal jurisdiction if the case is being investigated or prosecuted by an international tribunal or by another state with jurisdiction. Similarly, amended Article 23.4 requires the dismissal of cases based on universal jurisdiction where it is shown that an international tribunal, or another state having jurisdiction over the matter, has initiated proceedings. Article 23.4 expressly includes crimes against humanity among those over which Spanish courts can assert universal jurisdiction, and its enabling clause makes specific reference to conventions on international humanitarian law and the protection of human rights.

On 15 October 2009, the Senate approves the bill with minor amendments, which the Congress of Deputies accepts. The law enters into force three weeks later. {Ley Organica 1/2009, 3 Nov} [Note: Since entry into force, Article 23.4 now also establishes that Spanish courts can exercise jurisdiction where the victims are Spanish nationals.]

30 June 2009 In Madrid, the Court of Appeals of the Audiencia Nacional divests the investigating judge of jurisdiction in the case against former Israeli Defence Minister Binyamin Ben-Eliezer and others for their alleged role in war crimes [see 29 January 2009]. The ruling follows an appeal by the Prosecutor for dismissal of the case on the grounds that Israel is in the process of investigating the incident following an appeal by the Prosecutor. It comes just five days after the Congress of Deputies adopted an amendment limiting the exercise of universal jurisdiction by Spanish courts [see 25 June 2009]. {AP 30 Jun}

On 13 April 2010, the Supreme Court upholds the ruling of the Court of Appeals. {AP 13 Apr}

14 July 2009 In Madrid, the Court of Appeals of the Audiencia Nacional orders the dismissal of a case against three US military officers alleging their responsibility for war crimes, which killed a Spanish and Ukrainian journalist [see 19 October 2005]. {Judgment 144/2009} The ruling results from consultations between the Court of Appeals and Judge Santiago Pedraz Gómez following the recent adoption by the Congress of Deputies of an amendment limiting the exercise of universal jurisdiction by Spanish courts [see 25 June 2009].

On 30 October 2009 the family of José Manuel Couso Permuy, the Spanish journalist who was killed, announce their intention to appeal the ruling to the Supreme Court. {www.josecouso.info 30 Oct} [See also 30 June 2009]

14 August 2009 In the UK, responding to the June 2009 Foreign Affairs Committee report *Global Security: Non-Proliferation*, Foreign Secretary David Miliband says: “Unfortunately we have not detected a broad enough constituency amongst other states in support of a Criminalisation Convention; however, we would be prepared to look at this again if it became clear that other states saw utility in taking this idea forward. The UK has taken action instead through the Biological Weapons Act, the Chemical Weapons Act and the Anti-Terrorism Crime and Security Act which include provision for UK nationals to be prosecuted for committing offences overseas. Until such time as there is more support for a Criminalisation Convention, the UK will focus on encouraging other states to make similar provisions in their national legislation. Also, implementation of [United Nations Security Council resolution] 1540 [see 28 April 2004] is helping to ensure that states adopt and enforce appropriate legislation to prosecute individuals engaged in criminal activities involving biological or chemical weapons.” {CM 7692}

17 November 2009 In Germany, the alleged leader of a Hutu militia in Rwanda, Ignace Murwanashyaka, and his deputy, Straton Musoni, are arrested following the issuing of an arrest warrant against them for their alleged participation in crimes against humanity and war crimes violations of international humanitarian law. The move follows pressure for the men to be brought to justice by, amongst others, the Rwandan government and the United Nations. This is the first case that will be tried on the basis of universal jurisdiction under the code of crimes against international law (*Völkerstrafgesetzbuch*) [see 30 June 2002]. {*Der Spiegel* 18 Nov} [See also 5 April 2007]

20-25 November 2009 In The Hague, the Working Group for Review Conference of the Rome Statute of the International Criminal Court 1998 meets and considers a series of amendments to the Statute, including ones relating to Article 8, so as to expand the jurisdiction of the court with respect to chemical and biological weapons. An amendment proposed

by Austria, Argentina, Belgium, Bolivia, Bulgaria, Burundi, Cambodia, Cyprus, Germany, Ireland, Latvia, Lithuania, Luxembourg, Mauritius, Mexico, Romania, Samoa, Slovenia and Switzerland defines “employing poison or poisoned weapons” and “employing asphyxiating, poisonous or other gases, and all analogous liquids or devices” as constituting war crimes in conflicts not of an international character. An amendment proposed by Argentina, Belgium, Bolivia, Burundi, Cambodia, Cyprus, Ireland, Latvia, Luxembourg, Mauritius, Mexico, Romania, Samoa and Slovenia defines “using agents toxins, weapons, equipment and means of delivery as defined by and in violation of the [BWC]” and “using chemical weapons or engaging in any military preparations to use chemical weapons as defined by the [CWC]” as constituting war crimes in both armed conflicts and conflicts not of an international character. These latter two amendments are revised to read “employing the agents, toxins, weapons, equipment and means of delivery as defined by the [BWC]” and “employing chemical weapons as defined by the [CWC]”. {Doc ICC-ASP/8/20} Meanwhile, Dutch Foreign Minister Maxime Verhagen, and Justice Minister Ernt Ballin, transmit a letter to the Dutch parliament setting out their support for the proposed amendments. {Deutsche Presse-Agentur 6 Nov} The Review Conference is scheduled to take place in Kampala, Uganda from 31 May to 11 June 2010.

26 November 2009 In Madrid, Judge Fernando Andreu Merelles rules that the recently amended statute on universal jurisdiction [see 25 June 2009] does not bar proceedings authorized by international agreements ratified by the Spanish government. The ruling is made in connection with a lawsuit filed by two individuals against a number of Iraqi soldiers and police officers, acting under the orders of Lieutenant General Abdol Hossein Al Shemmari, who were allegedly responsible for indiscriminate violence against unarmed civilians in the Ashraf Camp in Iraq in July 2009, which allegedly resulted in numerous deaths and injuries. The Prosecutor had requested that the Audiencia Nacional dismiss the lawsuit in accordance with the terms of the amended statute, in that the alleged offenders were not in Spain, the alleged victims were not Spanish nationals, there was no other relevant link between the alleged offence and Spain, and the petitioners had not provided Iraqi authorities with the opportunity to undertake an investigation of the case. Judge Andreu holds that, notwithstanding these requirements Spanish courts do have jurisdiction on the basis of Article 146 of the Fourth Geneva Convention 1949 (protection of civilian persons in time of war). He notes, however, that the amended statute clearly establishes the principle of subsidiarity as pointed out by the Prosecutor. Therefore, he orders that a commission be despatched to Iraq to determine the likelihood of judicial proceedings going ahead there before deciding whether or not to admit the lawsuit. {Audiencia Nacional 21/2009, 26} [See also 14 July 2009]

12 December 2009 In London, Westminster Magistrates Court issues an arrest warrant against former Israeli Foreign Minister Tzipi Livni for her involvement in alleged war crimes committed during Operation Cast Lead in the Gaza strip in 2008 and 2009. A lawsuit against Livni was filed by a number of Palestinian alleged victims of the operation. {London *Guardian* online 14 Dec}

Two days later the arrest warrant is revoked upon it becoming apparent that Livni had not entered the UK. {*Haaretz* 14 Dec} The Israeli Foreign Ministry subsequently denounces the issuing of the warrant as “cynical”, while Livni herself describes it as “an abuse of the British legal system”. {BBC online 15 Dec} Meanwhile, the UK Foreign Office issues the following statement: “The UK is determined to do all it can to

promote peace in the Middle East and to be a strategic partner of Israel. To do this, Israel’s leaders need to be able to come to the UK for talks with the British government. We are looking urgently at the implications of this case.” {London *Guardian* online 14 Dec}

Five days later, *The* (London) *Guardian* reports an unidentified senior UK Foreign Office source as saying that in response to the issue of the arrest warrant the Foreign Office is now considering amending the law so that in future the approval of the attorney-general would be required before an arrest warrant could be issued. The source is quoted as saying: “No one is talking about removing universal jurisdiction, but it’s an anomaly that a magistrates court can issue an arrest warrant before a prosecutor has even said there is a case to prosecute. There need to be safeguards.” Meanwhile, *The Guardian* quotes UK Prime Minister Gordon Brown as saying he is “completely opposed” to the arrest warrant having been issued against Livni. {*Guardian* 17 Dec}

On 5 January 2010, UK Attorney-General Baroness Scotland says that the UK is “looking urgently” at ways of amending UK law so as to avoid the future possibility of an arrest warrant being issued against high-ranking Israeli officials visiting the UK. Speaking at the Hebrew University of Jerusalem Baroness Scotland says that “Israel’s leaders should always be able to travel freely to the UK”. According to *The Guardian*, the statement by Baroness Scotland follows a decision the previous week by the Israel Defence Force to cancel a visit to the UK by a group of senior officers after UK officials were unable to offer assurances against the possibility of their being arrested on possible war crimes charges. The group had been invited by the British Army to a meeting on military co-operation. {*Guardian* 6 Jan}

On 16 January 2010, *The* (London) *Guardian* publishes the following letter by a group of more than ninety members of parliament, lawyers, academics and others: “We reject any attempt to undermine the judiciary’s independence and integrity. A judge who finds sufficient evidence of a war crime must have power to order the arrest of a suspect, subject to the usual rights to bail and appeal... The power to arrest individuals reasonably suspected of war crimes anywhere in the world should they set foot on UK soil is an efficient and necessary resource in the struggle against war crimes, and must not be interfered with... We urge the government to state clearly that it will not alter the law on universal jurisdiction and will continue to allow victims of war crimes to seek justice in British courts.” Meanwhile, *The Guardian* quotes an unidentified spokesman for the Ministry of Justice as saying that the government is “urgently” looking at the possibility of transferring the power to issue warrants from magistrates to the attorney-general. [See also 11 September 2005]

16 December 2009 At United Nations headquarters, the General Assembly adopts, without vote, a resolution on ‘the scope and application of the principle of universal jurisdiction’. The resolution “requests the Secretary-General to invite member states to submit, before 30 April 2010, information and observations on the scope and application of the principle of universal jurisdiction, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice.” It also requests the Secretary-General “to prepare and submit to the General Assembly, at its sixty-fifth session, a report based on such information and observations”. The resolution also requests that the Sixth Committee continue its consideration of the scope and application of universal jurisdiction, without prejudice to the consideration of related issues in other forums of the United Nations.

27 January 2010 In Madrid, Judge Baltasar Garzón Real rules that the recently amended statute on universal jurisdiction [see 25 June 2009] does not divest the Audiencia Nacional of jurisdiction over an investigation against a number of US officials allegedly responsible for committing war crimes and torture against a Spanish citizen, a Spanish resident, a Lebanese, and a Moroccan, in Guantanamo Bay. Judge Garzón bases his ruling on the grounds that there exists a link between the alleged offence and Spain because one of the alleged victims is a Spanish national, and that all four of the alleged victims had previously been investigated by Spanish authorities for allegedly being members of al-Qaeda. Judge Garzón commenced his investigation into the case on 27 April 2009. {Audiencia Nacional 150/2009} [See also 26 November 2009]

26 February 2010 In Madrid, Judge Santiago Pedraz Gómez dismisses a lawsuit filed in the Audiencia Nacional against Chinese Minister of Defense Lian Guanglie, Chinese Minister of State Security Geng Huichang, and five other Chinese officials alleging crimes against humanity in relation to the use of force in Tibet in early 2008 [see 5 August 2008], on the grounds of their not being a relevant link between Spain and the alleged offences as required under the amended statute on universal jurisdiction [see 25 June 2009]. {242/2008, 27 Feb} [See also 27 January 2010]

3 March 2010 UK Prime Minister Gordon Brown says that the government is considering changes to the procedures under which arrest warrants are issued on private applications for offences over which UK courts claim universal jurisdiction. There has recently been international criticism of the issuing of such arrest warrants, most recently by Israel with respect to the arrest warrant issued against Israeli Foreign Minister Tzipi Livni [see 12 December 2009]. In an op-ed published in the London *Daily Telegraph*, Brown says: "Britain will continue to take action to prosecute or extradite suspected war criminals – regardless of their status or power... This is why the UK was among the first countries in the world to put in place legislation providing for universal jurisdiction over torture, hostage taking and grave breaches of the Geneva Conventions... The only question for me is whether our purpose is best served by a process where an arrest warrant for the gravest crimes can be issued on the slightest of evidence... As we have seen, there is now significant danger of such a provision being exploited by politically-motivated organisations or individuals who set out only to grab headlines knowing their case has no realistic chance of a successful prosecution... Men and woman can then be held in prison on the basis of 'information', when the serious nature of such cases means that in any event they can only proceed to prosecution with the consent of the Attorney General... There is already growing reason to believe that some people are not prepared to travel to this country for fear that such a private arrest warrant – motivated purely by political gesture – might be sought against them... There is a case now, therefore, for the evidential basis on which arrest warrants can be allowed to be tougher and for restricting the right to prosecute the narrow range of crimes falling under universal jurisdiction to the Crown Prosecution Service alone... [W]e will consult on our proposals to improve the system, with my full intention to legislate as soon as possible... Britain remains absolutely committed to upholding the principles of universal jurisdiction. And where individuals or organisations have genuine grounds for allegations that any of the offences in question have been committed we encourage them to bring forward evidence to the police... But by bringing the risk of arrest into closer alignment with the risk of prosecution, our

system of universal jurisdiction can be stronger. For it would be clear that we only bring cases based on evidence of sufficient strength to convince the Director of Public Prosecutions that there is a credible case."

4 March 2010 In the UK House of Commons, Justice Secretary Jack Straw announces that the government has postponed amending UK law to restrict the power of magistrates to issue arrest warrants against visiting senior government officials until after the UK general election on 6 May 2010 [see 12 December 2009]. On the subject more generally, Straw says: "The Government [...] have concluded that there is a case for restricting to the CPS [Crown Prosecution Service] the right to prosecute this narrow range of universal jurisdiction offences, in circumstances where the offence is alleged to have been committed outside the United Kingdom by a person who is not a British national. The effect of this change – which would require legislation – would be that in such cases it would no longer be possible for anyone other than the CPS (or the Law Officers) to obtain an arrest warrant. This would ensure that action is taken only where the expert and independent investigators and prosecutors in the police and CPS are confident that there is a realistic likelihood of a successful prosecution... We remain absolutely committed to upholding the principles of universal jurisdiction, so that there can be no impunity for those suspected of such grave offences. What we propose is wholly consistent with those principles, and would bring us into line with the practice of a number of our European and North American partners... The Government recognise that this is a controversial issue, involving as it does the long-standing right of private prosecution. Therefore, rather than legislating now, we are going to seek views on the proposals we are minded to make." {*Hansard* vol 506 no 50 cols 117-120 WS} *The (London) Guardian* reports that the opposition Conservative Party is also in favour of the proposed amendment to the law. It further reports that more than 110 members of parliament have now signed an early day motion opposing any such amendment [see 16 January 2010]. {*Guardian* 5 Mar} [See also 3 March 2010]

3 April 2010 *The (London) Guardian* publishes a legal opinion by Geoffrey Robertson, formerly an appeal judge at the UN Special Court for Sierra Leone, on the merits of the UK courts applying universal jurisdiction to prosecute Pope Benedict XVI when he visits the country in September 2010, for his alleged involvement in covering up sex abuse within the Catholic Church in the USA, Ireland, Germany and Norway. Robertson writes: "[T]he Holy See can no longer ignore international law, which now counts the widespread or systematic sexual abuse of children as a crime against humanity. The anomalous claim of the Vatican to be a state – and of the pope to be a head of state and hence immune from legal action – cannot stand up to scrutiny... [T]he papal states were extinguished by invasion in 1870 and the Vatican was created by fascist Italy in 1929... The notion that statehood can be created by another country's unilateral declaration is risible: Iran could make Qom a state overnight, or the UK could launch Canterbury on to the international stage... This claim could be challenged successfully in the UK and in the European Court of Human Rights."

The next day, the Associated Press quotes Robertson as saying: "Unlike in the United States, where the judges commonly uphold what the executive says, the British courts don't accept these things at face value." However, the Associated Press quotes David Crane, former chief prosecutor at the Sierra Leone war crimes tribunal, as saying that it would be difficult to implicate the Pope in any criminal act and that "at this point, there's no liability at all". Meanwhile, Jeffrey

Lena, the lawyer who previously succeeded in claiming head of state immunity for Pope Benedict in sex abuse cases in the USA [see 19 September 2005], says: "Those who would claim that 'universal jurisdiction' could be asserted over the Pope appear to completely misunderstand the sorts of violations, such as genocide, which are required to assert such jurisdiction." {AP 4 Apr}

Ten days later, BBC News Online reports Professor Richard Dawkins as saying he "whole-heartedly" supports an initiative led by author and journalist Christopher Hitchens to have the Pope arrested for "crimes against humanity" when he visits the UK. The BBC also reports that Geoffrey Robertson and solicitor Mark Stephens are considering the possibility of either requesting the Crown Prosecution Service to initiate criminal proceedings against the Pope, launch their own civil action, or refer the case to the International Criminal Court. {BBC 13 Apr}

17 May 2010 In the USA, lawyers for the Holy See file a motion with the District Court for Western Kentucky requesting that a lawsuit against the Holy See be dismissed. The lawsuit was filed in 2004 by three plaintiffs who alleged that as children they were sexually abused by priests in Louisville from 1928 until the 1970s, and that the Catholic Church had deliberately sought to conceal the abuse. In its motion, the Holy See claims, amongst other things, that it is not responsible for the individual behaviour of bishops because it does not pay them, nor are their day-to-day activities controlled by the Pope. {*Washington Times* online 18 May} [See also 19 September 2005 and 3 April 2010]

21 May 2010 The US Department of Justice files a brief with the Supreme Court stating that the administration supports a claim by the Holy See to state immunity. The Supreme Court is currently considering an appeal by the Holy See against a ruling by the Court of Appeals for the Ninth Circuit, which ordered that the immunity of the Holy See be lifted in a lawsuit brought by a man who claims that as a minor in the 1960s he was sexually abused by a priest from Oregon. The lawsuit, filed in 2002, cites the Holy See and several other parties as defendants and argues that the Holy See should be held responsible for having transferred the priest in question to Oregon to continue his work, notwithstanding previous accusations that he had been involved in the abuse of children in Chicago and Ireland. In the brief, the office of the Solicitor General states that the court was wrong in ruling that the Foreign Sovereign Immunities Act 1976 did not apply to the case. Agence France-Presse quotes the brief as saying that the court's decision "does not merit plenary review", and that the Supreme Court should "vacate the judgment" of the court of appeals. {AFP 25 May} [See also 17 May 2010]

26 May 2010 In the UK House of Commons, UK Foreign Secretary William Hague says that the new coalition government is examining ways to amend the law to remove the power of magistrates to issue arrest warrants against high-ranking government officials visiting the UK [see also 4 March 2010]. Hague says: "[W]e will now examine how to deal with the totally unsatisfactory situation that has had the effect of barring Israeli politicians [see 12 December 2009], among others, from visiting the UK without weakening our commitment to hold accountable those guilty of war crimes. We will report to the House in due course." {*Hansard* vol 510 no 6 col 184W} *The (London) Guardian* subsequently quotes unidentified "sources" as saying that the announcements by Hague follow intense pressure from the USA and Israel. {*Guardian* 31 May}

Two months later, Justice Secretary Kenneth Clarke announces that the government plans to introduce legislation – as soon as parliamentary time allows – that will require the consent of the Director of Public Prosecutions to be sought before an arrest warrant can be issued in respect of an offence of universal jurisdiction. Clarke says: "Our commitment to our international obligations and to ensuring that there is no impunity for those accused of crimes of universal jurisdiction is unwavering. It is important, however, that universal jurisdiction cases should be proceeded with in this country only on the basis of solid evidence that is likely to lead to a successful prosecution – otherwise there is a risk of damaging our ability to help in conflict resolution or to pursue a coherent foreign policy." {Justice Ministry press release 22 July 2010}

Some five months later, an unidentified spokesman for UK Prime Minister David Cameron is quoted in the press as saying that universal jurisdiction was "something the government is moving quickly to change so we don't have this situation where members of the Israeli government could be threatened with arrest warrants if they come to the UK". {*London Metro* 4 Nov}

28 May 2010 At United Nations headquarters, the 2010 Review Conference of the Parties to the Treaty of the Non-Proliferation of Nuclear Weapons (NPT) adopts a 'Final Document' – on the last day of its four-week meeting – which includes the endorsement of a regional conference on the establishment of a Middle East zone free of weapons of mass destruction. On this subject, the document states: "The Conference reaffirms the importance of the Resolution on the Middle East adopted by the 1995 Review and Extension Conference and recalls the affirmation of its goals and objectives by the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons... The Conference regrets that little progress has been achieved towards the implementation of the 1995 Resolution on the Middle East... The Conference recalls the reaffirmation by the 2000 Review Conference of the importance of Israel's accession to the Treaty and the placement of all its nuclear facilities under comprehensive IAEA safeguards. The Conference reaffirms the urgency and importance of achieving universality of the Treaty. The Conference calls on all States in the Middle East that have not yet done so to accede to the Treaty as non-nuclear-weapon States so as to achieve its universality at an early date... The Conference emphasizes the importance of a process leading to full implementation of the 1995 Resolution on the Middle East. To that end, the Conference endorses the following practical steps: (a) The Secretary-General of the United Nations and the co-sponsors of the 1995 Resolution, in consultation with the States of the region, will convene a conference in 2012, to be attended by all States of the Middle East, on the establishment of a Middle East zone free of nuclear weapons and all other weapons of mass destruction, on the basis of arrangements freely arrived at by the States of the region, and with the full support and engagement of the nuclear-weapon States... The Conference emphasizes the requirement of maintaining parallel progress, in substance and timing, in the process leading to achieving total and complete elimination of all weapons of mass destruction in the region, nuclear, chemical and biological." {NPT/CONF.2010/50}

Following adoption of the document, US National Security Advisor General James L Jones issues the following statement: "Despite our agreement to the final document, we have serious reservations about one aspect of the Middle East resolution it contains. The final document includes an agreement to hold a regional conference in 2012 to discuss issues relevant to a Middle East zone free of weapons of

mass destruction (WMD) and their delivery systems. The United States has long supported such a zone, although our view is that a comprehensive and durable peace in the region and full compliance by all regional states with their arms control and nonproliferation obligations are essential precursors for its establishment. Just as our commitment to seek peace and security of a world without nuclear weapons will not be reached quickly, the US understands that a WMD free zone in the Middle East is a long-term goal... The proposed regional conference, to be effective, must include all countries of the Middle East and other relevant countries. The United States will insist that this be a conference for discussion aimed at an exchange of views on a broad agenda, to include regional security issues, verification and compliance, and all categories of weapons of mass destruction and systems for their delivery. The conference would draw its mandate from the countries in the region in recognition of the principle that states in the region have sole authority regarding any WMD free zone in the Middle East... To ensure the conference takes into account the interests of all regional states, the United States has decided to co-sponsor the conference, along with the UK, Russia, and the UN Secretary General. Together, we will identify a host for this conference and an individual to facilitate its preparation. In addition, we will insist that the conference operate only by consensus by the regional countries, to include agreement on any possible further discussions or follow-up actions, which will only take place with the consent of all the regional countries... The United States will not permit a conference or actions that could jeopardize Israel's national security. We will not accept any approach that singles out Israel or sets unrealistic expectations. The United States' long-standing position on Middle East peace and security remains unchanged, including its unshakeable commitment to Israel's security... In this respect, the United States deplores the decision to single out Israel in the Middle East section of the NPT document... The failure of the resolution to mention Iran, a nation in longstanding violation of the NPT and UN Security Council Resolutions which poses the greatest threat of nuclear proliferation in the region and to the integrity of the NPT, is also deplorable... As a cosponsor charged with enabling this conference, the United States will ensure that a conference will only take place if and when all countries feel confident that they can attend. Because of gratuitous way that Israel has been singled out, the prospect for a conference in 2012 that involves all key states in the region is now in doubt and will remain so until all are assured that it can operate in a unbiased and constructive way. {US White House 28 May}

According to BBC News Online, an unidentified senior Israeli official dismisses the document as "hypocrisy". The official is quoted by the BBC as saying: "Only Israel is mentioned, while the text is silent about other countries like India, Pakistan and North Korea, which have nuclear arms, or even more seriously, Iran, which is seeking to obtain them." {BBC 29 May}

1 June 2010 The US Supreme Court unanimously rules that the Federal Sovereign Immunities Act applies only in relation to states and their agencies and "does not address an official's claim to immunity". The ruling comes in relation to the case brought by a group comprising non-governmental organizations and alleged victims against Mohamed Ali Samantar, who was defence minister and prime minister of Somalia in the 1980s and early 1990s, for his alleged role in such human rights abuses as torture and summary execution. The Supreme Court points out that its ruling is narrow in scope and that when a district court reconsiders the case the defendant may well have recourse

to other legal claims of immunity under common law. {Samantar -v- Yousuf *et al* [...] no 08-1555}

10 June 2010 In Kampala, Uganda, during the ongoing Review Conference of the Rome Statute of the International Criminal Court 1998 – which is taking place from 31 May through 11 June 2010 – states parties adopt, by consensus, a resolution amending Article 8 of the Statute so as to define war crimes as including "employing poison or poisoned weapons" and "employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" in conflicts not of an international character [see also 20-25 November 2009]. The preamble to the resolution states that these crimes "are serious violations of the laws and customs applicable in armed conflict not of an international character, as reflected in customary international law".

Article 9 of the Rome Statute states: "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties." In this regard, the resolution also states that the following shall be added to the Elements of Crimes:

Article 8 (2) (e) (xiii) War crime of employing poison or poisoned weapons Elements

1. *The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.*
2. *The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.*
3. *The conduct took place in the context of and was associated with an armed conflict not of an international character.*
4. *The perpetrator was aware of factual circumstances that established the existence of an armed conflict.*

Article 8 (2) (e) (xiv) War crime of employing prohibited gases, liquids, materials or devices Elements

1. *The perpetrator employed a gas or other analogous substance or device.*
2. *The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.*
3. *The conduct took place in the context of and was associated with an armed conflict.*
4. *The perpetrator was aware of factual circumstances that established the existence of an armed conflict.*

The resolution notes that amendments are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5, of the Rome Statute, which states: "Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory." {RC/Res.5}

5 July – 6 August 2010 In Geneva, during the second part of its sixty-second session, the International Law Commission considers a report by its Secretariat entitled “Survey of multilateral conventions which may be of relevance for the Commission’s work on the topic ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’: Study of the Secretariat”. The report, dated 26 May 2010, “aims at assisting the Commission by providing information on multilateral conventions which may be of relevance to its future work on the present topic”. The Commission had also considered the report during the first part of the session, which was held from 3 May to 4 June. [Note: In 2005, at its fifty-seventh session, the Commission decided to include the topic ‘the obligation to extradite or prosecute (*aut dedere aut judicare*)’ in its current programme of work, and to appoint Zdzislaw Galicki as its Special Rapporteur. Since that date, Galicki, has submitted four reports (UN documents: A/CN.4/571, A/CN.4/585 (and Corr. 1), A/CN.4/603 and A/CN.4/L.774). During this time, it has also received comments and information from governments.]

29 July 2010 In Germany, the Federal Prosecutor indicts Onesphore Rwabukombe on, amongst others, charges of genocide and incitement to commit genocide in Rwanda in 1994. As with the case brought against alleged Rwandan war criminals Ignace Murwanashyaka, and his deputy, Straton Musoni [see 17 November 2009], this case is being brought under the code of crimes against international law (Völkerstrafgesetzbuch) [see 30 June 2002]. {www.generalbundesanwalt.de, accessed 17 Feb 2011}

29 July 2010 At United Nations headquarters, Secretary-General Ban Ki-moon transmits to the General Assembly his report on ‘on the scope and application of universal jurisdiction’, in accordance with General Assembly resolution 64/117 [see 16 December 2009]. The report summarizes the responses of the following 44 member states (192 UN member states had been invited to respond) to the request for information and observations: Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bolivia, Bulgaria, Cameroon, Chile, China, Costa Rica, Cuba, Cyprus, the Czech Republic, Denmark, El Salvador, Estonia, Ethiopia, Finland, France, Germany, Iraq, Israel, Italy, Kenya, Kuwait, Lebanon, Malaysia, Malta, Mauritius, the Netherlands, New Zealand, Norway, Peru, Portugal, Rwanda, Slovenia, South Africa, South Korea, Sweden, Switzerland, Tunisia and the USA. {A/65/181}

9 August 2010 In France, Article 689-11 of the French Criminal Procedure Code enters into force, which establishes four limitations to the exercise of universal jurisdiction by French courts with regard to genocide, crimes against humanity, and war crimes. Firstly, the alleged perpetrator must become a resident in France after the crime. Secondly, the crimes have to be established by the State where they took place (double criminality requirement) or the

State in question has to be a party to the ICC Statute. Thirdly, only the prosecutor – and not the victim or NGOs as civil parties – can launch formal criminal procedures. Fourthly, the prosecutor may initiate formal proceedings only if no other international or national jurisdiction requests the submission or extradition of the alleged offender. The provision now provides the courts with universal jurisdiction only under very restrictive conditions, with increased control being conferred on the executive over prosecutions. {Loi 2010-930} France ratified the Rome Statute in June 2000, however, hitherto its full implementation under the French legal system was stymied owing to, amongst other things, disagreements between different political actors and human rights NGOs on whether universal jurisdiction should be extended to offences that come under the jurisdiction of the International Criminal Court, and, if so, under what conditions. {Sulzer in *International Prosecution of Human Rights Crimes*, 2007} Until entry into force of Article 689-11, torture was the only core international crime subject to universal jurisdiction in France that was not restricted to a certain geographical location [see 1 July 2005]. Article 689-2 of the French Criminal Procedure Code establishes that any person guilty of torture can be prosecuted and tried if, as required by article 689-1, that person is present in France. In addition, in implementation of UN Security Council resolutions, French courts have jurisdiction over genocide, crimes against humanity, and war crimes under the jurisdiction of, respectively, the ICTY and the ICTR, if the alleged offenders are present in France. {Loi 95-1, 2 Jan 1995; Loi 96-432, 22 May 1996}

13-14 October 2010 At United Nations headquarters, the Sixth Committee of the General Assembly considers ‘the scope and application of the principle of universal jurisdiction’ in accordance with General Assembly resolution 64/117 [see 16 December 2009]. The Committee considers the report of the UN Secretary-General on the matter [see 29 July 2010] and hears statements made by around fifty member states (including the Non-Aligned movement, the Rio Group and the African Group), as well as the observer delegation of the International Committee on the Red Cross.

11 November 2010 At United Nations headquarters, the Sixth Committee of the General Assembly adopts without a vote a draft resolution {A/C.6/65/L.18} on ‘the scope and application of the principle of universal jurisdiction’. Under the draft resolution, the General Assembly would “invite member states and relevant observers, as appropriate, to submit, before 30 April 2011, information and observations on the scope and application of universal jurisdiction, including, where appropriate, information on the relevant applicable international treaties, their domestic legal rules and judicial practice”. It would also request the Secretary-General “to prepare and submit to the General Assembly, at its sixty-sixth session, a report based on such information and observations”. The Sixth Committee would also be requested to continue its consideration of the matter. [See also 16 December 2009]

The following month, the General Assembly adopts the resolution without a vote. {A/RES/65/33 of 6 Dec}

THOUGHTS ON THE HARVARD SUSSEX DRAFT CONVENTION FROM A LEGAL PERSPECTIVE

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“[C]rimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced ... individuals have international duties which transcend the national obligations of obedience imposed by the individual state”.¹ Made some sixty years ago, this famous statement of the International Military Tribunal at Nuremberg encapsulates the core objective behind the Draft Convention – that is, to acknowledge that it is human agents who develop or use CBW, whether in the name of the state or not, and it is those human agents who need to be deterred and, if necessary, prosecuted.

In framing breaches of the CBW prohibitions as international crimes, the Draft represents a fundamental legal shift, raising a number of important questions about how it fits into the existing international legal framework; the nature and significance of international criminality and the way in which this Draft fits into evolving international criminal law, in particular the doctrine of immunity. This Comment reflects on those questions, showing why it is appropriate that CBW misuse should be recognised as a “crime against international law”, thus engaging individual responsibility as a matter of international law, while maintaining the existing system of imposing responsibility on states. The Comment goes on to draw out some of the complications that such a move would entail in terms of the over-arching legal frameworks. My conclusion is that despite the (legal and political) need to refine certain aspects of the Draft, it is an important step forward and, by its adoption, states would contribute to consolidating the norm against biological and chemical weapons.

The Draft’s relationship with the existing legal framework

Both the Biological Weapons Convention (BWC) and the Chemical Weapons Convention (CWC) prohibit *states* from engaging in the development, production, stockpiling and use² of CBW. While both are aimed at state obligations, they impose an obligation on states parties to criminalise related activities in their territory and under their jurisdiction.³ This Draft Convention, acknowledging that CBW are not developed or used by “abstract entities” but rather by people, takes that obligation a step further and makes it a crime, as a matter of international law, for anyone to engage in the proscribed activities. In other words, while the existing treaties impose an obligation on states to punish proscribed activities as a matter of their domestic law, this Draft Convention creates an international crime and consequently the obligation to punish

is expanded in scope. Seen in this way, this Draft Convention strengthens and supplements the already existing prohibitions on states arising in the existing multilateral treaty framework.

The relationship with Security Council Resolution 1540 (2004) is more complex. Unanimously adopted by the Security Council on 28 April 2004, the Resolution requires states to refrain from providing any support to non-State actors that attempt to acquire WMD.⁴ It goes on to require states to adopt and enforce domestic laws prohibiting any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use WMD.⁵ In adopting the Resolution, the Council stated that it was acting under Chapter VII of the United Nations Charter – this means that the Resolution is binding law for all states.⁶ The Resolution establishes a Committee to monitor compliance with its terms and has been reaffirmed by the Council in 2006 and 2008.⁷

On one view, the substantive obligations on those states already party to the CWC or the BWC do not change with the passing of SCR1540. States parties to the treaties are already obliged to prohibit all persons from developing or manufacturing those weapons or from transferring the precursors. Indeed, the Resolution itself provides that the obligations it sets out should not be interpreted so as to conflict with states’ obligations under the CWC or BWC.⁸ On another view, however, SCR1540 makes a fundamental shift and undermines, rather than complements, the multi-lateral treaty regime.

First, the Resolution introduces an unnecessary hierarchy into the CBW prohibitions, particularly as they relate to the criminal law. The Resolution is aimed at the actions of non state actors only, defined in the Resolution as being an “individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution”. Thus, the Resolution in effect creates a situation where there are two levels of obligation on states. The first is within the existing CBW multilateral regime, whereby states have a general criminalisation obligation. Under those treaties, no-one, whether an agent of the state or not, can use CBW. The second level of obligation, arising from the Resolution, is directed only at non-State actors. Clearly, this limitation was necessary because the Resolution applies to nuclear weapons and materials as well as CBW and some states (notably the permanent members of the Security Council) still reserve their right to use nuclear weapons in certain circumstances. While that distinction might be understandable, it introduces a hierarchy within states’ obligations to criminalise proscribed activities. The use of

CBW by non-state actors has been singled out for particular opprobrium. This is undesirable because it implicitly weakens the universal norm against use of CBW, regardless of the offender.

A second way in which the Resolution can be seen to undermine the existing multi-lateral regime is that it takes away any sense of voluntary multilateralism. The Resolution was prepared and tabled by the United States, on behalf of all the Council's permanent members. Drawing on the Chapter VII powers of the Security Council, criminalizing the use or manufacture of WMD (by non-State actors) becomes a mandatory obligation on all states, regardless of whether they have become parties to the Chemical Weapons Convention or the Biological Weapons Convention. We may applaud this – and many in civil society did – because of a desire to criminalise the use of these weapons but the political cost of doing so in this particular way is that the multilateral regimes are sidelined and therefore devalued. For states with these obligations to criminalise already in force, there is now an additional mandatory reporting requirement to a Committee of the Security Council. Taken out of context, this can be seen only as an additional administrative task, but the reality is that this sidelines the existing multilateral system. In taking this approach, the sponsors of the Resolution have attempted to avoid the disarmament/non proliferation debate, which admittedly has stifled progress and development within the multilateral system. However, in doing so, they have created a resistance to the idea of further criminalisation. A number of states have expressed concern about this legislative attempt by the Council and although it has been twice affirmed by the Council since, the issue of the legitimacy deficit of the Resolution, and its criminalisation agenda have not, and are not likely to fade.⁹

The Draft Convention has the potential to ameliorate some of the political sensitivities around the Resolution and reaffirm the broader legitimacy of the multilateral treaty framework. Being a multilateral initiative, it avoids the legitimacy concerns and allows those states which support the criminalisation effort, but which do not want to concede the legitimacy of the Council on this point, to proceed with the criminalisation project. The Draft is also removed from the “war on terror”, applying as it does to all persons, not simply non-state entities. Seen in this light, the Draft Convention, although initiated prior to SCR1540, may become a bridge between it and the existing treaty framework.

The criminalisation function of the Draft Convention

The second important legal issue arising from the Draft is how it shifts the criminalisation framework from using domestic law prohibitions to creating an international criminal sanction. As matters stand, CBW use is criminalised within the domestic law of each of the states parties to the Chemical and Biological Weapons Conventions. This is a similar approach to many of the “suppression treaties” whereby states agree to proscribe a particular activity within their domestic laws, such as counterfeiting, corruption, drug prohibition, or financing of terrorism to mention a few.¹⁰ The Draft Convention moves away from that model, and looks towards creating an international criminal regime. Is it appropriate that CBW proscribed activities be classed as international crimes rather

than simply “treaty” or “suppression” crimes? In my view, it is appropriate as the following discussion will show.

In any society, certain acts will be sanctioned as a matter of criminal law – those acts may vary among different societies, but will generally reflect the values of that particular society. In international society, reflecting its diversity, there are very few “international crimes”. It is generally accepted that genocide, war crimes and crimes against humanity are all international crimes, although even then there is debate about the precise contours of each crime.¹¹ Beyond that, there is debate about what crimes fall within the rubric “international crimes”.

In examining the debate around the scope of “international criminal law” proper, some common threads and points of agreement can be discerned.¹² First, the prohibition should be found in treaty and customary law. Second, the prohibition should protect, or aim to protect, a value considered important by the whole international community. Third, there should be a universal interest in repressing the crime. All three of these are satisfied in the present case.

First, CBW are condemned and prohibited by treaty law. In fact, the first treaty provision – the Strasbourg Agreement of 27 August 1675 between France and Germany – not only agreed to prohibit the use of poisoned bullets, but to severely punish any soldier using such munitions – an early example of criminalisation.¹³ The 1899 Hague Declaration (IV,2) Concerning Asphyxiating Gases called on the contracting powers to “abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases”.¹⁴ The Geneva Protocol 1925 recognised that the “use in war of asphyxiating, poisonous or other gases ... has been justly condemned by the general opinion of the civilized world”. The Chemical Weapons Convention 1993 absolutely forbids the use, development, production, stockpiling, acquisition or retention of chemical weapons,¹⁵ while the States Parties to the Biological Weapons Convention similarly renounced biological weapons.¹⁶ In the context of international armed conflict, the Rome Statute includes “employing poison or poisoned weapons” and “employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” as war crimes.¹⁷

CBW are also prohibited as a matter of customary international law.¹⁸ The ICRC Customary International Law Study, drawing from national statements and military manuals, concludes that the use of CBW is prohibited both in international and non-international armed conflict.¹⁹ The International Criminal Tribunal for the Former Yugoslavia (ICTY), relying on statements condemning the use of chemical weapons against Kurds in Halabja, determined that customary law prohibits any use of chemical weapons.²⁰

There is also strong evidence of the second characteristic of an international crime – that the prohibition should be aimed at protecting a value of the international community. The number of states parties to both Chemical and Biological Weapons Convention is testament to that value. Catherine Jefferson and Richard Price have shown how there is a “taboo” around these weapons.²¹ In spite of the legitimacy concerns around SCR1540, its unanimous adoption reflects the seriousness of the prohibition. The third characteristic of an international crime – the difficulty of suppressing a crime

domestically, is also satisfied in this instance. The way in which CBW are developed and the consequences of their use, makes it difficult, if not impossible to suppress the crime domestically. This is particularly difficult with CBW because of the dual use nature of their precursors. Any meaningful suppression regime would have to operate internationally to be effective.

On the basis of the foregoing, it seems clear that the prohibition against CBW meets the threshold of international criminality. Agreement on and adoption of the Draft Convention by states would confirm that view, as well as strengthen the claim to inherent international criminality.

The 'official capacity defence' in the Draft

Reflecting the increasing complexity of international criminal law and detailed nature of the Draft Convention, there are many technical legal issues that could be raised in the present context. Perhaps the most important and difficult one is that which relates to immunity or, to use the language of the Draft, the official capacity defence.

Article II(3) of the Draft Convention provides that:

It is not a defence that a person charged with an offence set forth in Article I acted in an official capacity, under the orders or instructions or a superior, or otherwise in accordance within internal law.

There are a number of difficulties with this provision. The first is that it rolls into one paragraph several different ideas. The first part of the paragraph, although couched in the language of a defence, is actually dealing with the question of immunity, whereas the remainder of the paragraph is indeed dealing with criminal law defences. Using the language of "defence", as in "official capacity defence" in this context is misleading because what is at issue is the question of immunity, not defence. The distinction is not merely linguistic. A defence is a matter raised by an accused, which may absolve the person because either the elements of the crime have not been made out or because there is some justification for the action that absolves them from responsibility. An example is the defence of compulsion, sometimes known as duress, in which there is a threat of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance to the doing of criminal acts. In other words, even if the allegations are true, there are circumstances at play such that legal liability ought not attach. By contrast, immunity addresses the question whether a particular Court or Tribunal has the ability to hear the case at all, that is, whether the courts of one state have the competence to judge the actions of another state, or the senior officials of another state. It is not about liability (or exceptions to when liability will lie), but rather about whether a particular court has competence to determine wrong-doing or liability. These two very different ideas ought not be collapsed down into a single provision.

Even if the provision is split up, the terminology needs to change in order to properly reflect the legal distinction between "defences" and "immunity". Article 27, Rome Statute for the International Criminal Court 1998 might provide a basis on which language might be drafted. Article 27 provides:

Irrelevance of official capacity

1. *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*
2. *Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*

This type of language might form the basis for a modified Article II(3) in the Draft Convention.

However, the difficulties with Article II(3) go deeper than the need to split it off from "real" defences and/or reframe the point in the language of immunity. In my view, consideration should be given to deleting the references to either "official capacity defence" or "immunity" from the Convention completely. To justify this position, it is necessary to delve into the current state of international law on immunity.

Historically, it was well settled in international law that the courts of one sovereign state had no competence to judge the actions of another state, or the senior officials of other states. Over the past thirty years, this so-called doctrine of absolute immunity evolved to accommodate the realities of commercial activities between states and so the law became that immunity should not shield a state from being held responsible for its commercial, as opposed to state, functions.²² In 1999, the international law on immunity appeared to undergo a seismic shift when the House of Lords ruled in *Pinochet* that the former dictator could not resist an extradition request by Spain on the basis of Chile's sovereign immunity.²³ With seven different judgments in the case, it is not possible to discern a single basis for this result, but it can be said that, in general terms, the Lords were of the view that, in the case of torture, which was a serious international crime, immunity ought not shield those responsible from accountability.

The Commentary to the Draft Convention draws on this "human rights exception" to justify the "official capacity exception" in Article II(3). However, that approach does not take into account the complexities of the law, in particular post-Pinochet developments. First, there has been what might be termed as a retreat from Pinochet. Two years after *Pinochet*, in 2002, the International Court of Justice in the *Arrest Warrant Case* upheld immunity for current heads of states and foreign ministers in the context of war crimes.²⁴ While the cases can be distinguished on the basis that the *Arrest Warrant Case* involved an incumbent foreign minister, and *Pinochet* involved a former state official, nevertheless, the result in the International Court signals an unwillingness to further break down immunity. In 2004, the General Assembly adopted the United Nations Convention on Jurisdictional Immunities of States and of Their Property.²⁵ While that treaty (which is not yet in force) specifically does not deal with criminal proceedings,²⁶ the tenor of the treaty is deferential towards immunity. That is, the treaty's framework

is that it allows for immunity, subject to certain exceptions and there are concerns that it could create the assumption that states remain immune.²⁷ In 2006, the House of Lords returned to the immunity for torture question in *Jones*, but this time upheld immunity and refused to allow proceedings against Saudi Arabia and its officials for claims for damages for severe and systematic torture.²⁸ Again, as a technical matter, this case can be distinguished from *Pinochet* (*Pinochet* involved criminal proceedings while *Jones* was a tort claim), but taking a broader view, it seems clear that there is an abundance of caution around any expansion of what we might term “the Pinochet precedent”.

A second reason for caution in relying on the “Pinochet precedent” to justify the immunity clause is that the proscribed activities in this Draft Convention may not meet the threshold of the human rights exception, if indeed the exception exists at all. There seems to be agreement that immunity can be challenged, or attempt to be challenged, only in the context of the most serious breaches of international norms so-called “jus cogens prohibitions”.²⁹ Torture is clearly one of those and possibly, on the basis of the pleadings in the *Arrest Warrant Case*, grave breaches of the Geneva Conventions. In *Democratic Republic of Congo v Rwanda*, the International Court of Justice held that the prohibition of genocide has the status of jus cogens. However, how much further the notion of jus cogens can be stretched is unclear. It is certainly debatable as to whether the CBW prohibitions would fall within it. Indeed, it may be that one of the enduring effects of this Draft Convention would be to elevate the prohibition to the level of a jus cogens prohibition.

The Commentary to the Draft Convention provides several examples where the international community has explicitly removed the possibility of a claim of immunity in criminal proceedings – the Nuremberg trials, the ad hoc criminal tribunals for the former Yugoslavia and for Rwanda, as well as the Rome Statute. It uses these examples to further support the immunity provision in Article II(3). However, these examples are not relevant because they all involve international tribunals – whether created by the Security Council, by international treaty or by some form of other international agreement. By contrast, the Draft Convention is dealing with the competence of domestic courts to consider allegations of wrong-doing. While it is true that the distinction between international tribunals and domestic courts is fiercely contested, the fact remains that this seems to be the law as it stands today. The removal of immunity in an international tribunal does not support a legal claim to non-immunity in a domestic court.

Taking into account all the difficulties canvassed above, in my view, the Draft Convention should remain silent on the immunity issue. This is not intended as an apology for the existence of state immunity (though there are important and valid reasons for the continued existence of immunity). Nor do I rely on a realist “states will never accept it” approach. Rather, the proposal that the Convention ought to be silent on

the point of immunity, is made in order to side-step the current fraught debate on immunity and not fall foul of it. Rather, a silent treaty may better allow the treaty to be able to accommodate international law as it evolves.

Notwithstanding the indications of a retreat from *Pinochet* as outlined above, there are indications that the law is, if not evolving, then certainly under continual pressure to evolve. This is a debate that will not go away. Pressure is evident not just at the level of civil society and human rights activism, but also at a state level. In 2005, the General Assembly adopted a document entitled “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, the aim of which is to provide ‘those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice ... irrespective of who may ultimately be the bearer of responsibility for the violation’.³⁰ This is particularly relevant in the present case, because the use of weapons may (although not necessarily) be used in a conflict situation. Perhaps of most significance are the declarations made by Norway, Sweden and Switzerland when ratifying the Convention on Jurisdictional Immunities. All three states declared that their ratification of the Convention is without prejudice to any future international development in the protection of human rights. In other words, they acknowledged that the law was evolving and they did not want the effect of the treaty to curtail that development. Finally, in courts around the world, there are repeated and constant attempts to break down the immunity barrier to finding accountability for gross breaches of human rights. The *Jones* case mentioned above, is now before the European Court on Human Rights and there are a number of cases pending before the International Court of Justice raising questions of immunity.

If the Draft Convention is silent on immunity, then any emerging customary international law that would exclude immunity, would be read into the treaty. In this way, the same outcome would be achieved. If the provision stays in the Draft, it may prove to be the stumbling block for states which are not yet prepared to make that shift.

Conclusion

It may seem that the international community of states is quite some time away from adopting this type of criminalization treaty. Nonetheless, in putting it forward, HSP has made an important contribution. The Draft Convention has the potential to strengthen the existing prohibitions against CBW; ameliorate the political tensions around the Security Council action in the area and, most importantly, enhance the norm against the use of CBW. We are living in an era of increasing accountability for the commission of international crimes as well as increasing calls for security against weapons of mass destruction. This genuine multilateral approach, straddling both those worlds, is the logical next step towards those goals.

Notes

- ¹ Nuremberg IMT: Judgment and Sentence *American Journal of International Law*, vol 41 (1947) at 172 and 221.
 - ² For the prohibition of use of biological weapons, see below note 16.
 - ³ Article VII, CWC and Article IV, BWC.
 - ⁴ Para 1. A more detailed synopsis of the Resolution as it relates to chemical weapons is provided by Lisa Tabassi, "A note on United Nations Security Council Resolution 1540 (2004)" *The CBW Conventions Bulletin* no 64 (June 2004), pp 12-13.
 - ⁵ Para 2.
 - ⁶ Article 25, UN Charter.
 - ⁷ SC Resolution 1673 (2006) and SC Resolution 1810 (2008).
 - ⁸ Para 5.
 - ⁹ Dunworth, "The New Multilateralism?" paper presented to the New Zealand National Consultative Committee on Disarmament, May 2006. Fry, "Dionysian Disarmament: Security Council Weapons of Mass Destruction Coercive Disarmament Measures and their Legal Implications" *Michigan Journal of International Law*, vol 29 (2007-2008) p 197.
 - ¹⁰ See Boister, "'Transnational Criminal Law'?", *European Journal of International Law*, vol 14 (2003) no 5, pp 953-76.
 - ¹¹ While the precise content of these crimes is a matter well beyond the scope of this comment, it is sufficient to note for present purposes that the use of CBW may fall within these core crimes where other criteria are met. For war crimes, see Article 8(2)(b)(xvii) and (xviii) Rome Statute of the International Criminal Court 1998. For discussion on genocide and crimes against humanity, see Lisa Tabassi and Erwin van der Borcht, "Chemical Warfare as Genocide and Crimes Against Humanity" *The CBW Conventions Bulletin* no 74 (December 2006), pp 36-44, discussing the van Anraat and Anfal cases.
 - ¹² See for example, Cassese, *International Criminal Law* (2nd ed 2008 OUP), 11-12.
 - ¹³ Jean Pascal Zanders, "International Norms Against Chemical and Biological Warfare" *Journal of Conflict and Security Law*, vol 8 (2003) no 2, at 391 and 394.
 - ¹⁴ Zanders, above, note 5, p 395.
 - ¹⁵ Article 1, CWC.
 - ¹⁶ Article 1, BWC. "Use" is not explicitly prohibited in the treaty, but in 1996, at the Fourth Review Conference, the States Parties clarified their understanding that the treaty does prohibit use.
 - ¹⁷ Article 8(2)(b)(xvii) and (xviii), Rome Statute.
 - ¹⁸ See generally, Lisa Tabassi, "Impact of the CWC: Progressive Development of Customary International Law and Evolution of the Customary Norm Against Chemical Weapons" *The CBW Conventions Bulletin* no 63 (March 2004), pp 1-7.
 - ¹⁹ International Committee of the Red Cross, *Customary International Humanitarian Law* (2005), Rules 73 & 74.
 - ²⁰ Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), paras 120-123.
 - ²¹ Catherine Jefferson, *The Taboo of Chemical and Biological Weapons: Nature, Norms and International Law*, Sussex DPhil Dissertation (2009), and Richard Price, *The Chemical Weapons Taboo* (1997).
 - ²² *Trendtex Trading Corporation v Central Bank of Nigeria* 64 ILR 111.
 - ²³ *Ex Parte Pinochet No 3* 119 ILR 135.
 - ²⁴ *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium) ICJ Reports (2002)
 - ²⁵ The treaty was recommended to the Assembly by the Sixth Committee (UN Doc A/59/508 (Nov 30 2004))
 - ²⁶ Para 2, General Assembly Resolution 59/38.
 - ²⁷ See for example the discussion by Lorna McGregor, "State Immunity and Jus Cogens" *International and Comparative Law Quarterly* vol 55 (2006) p 437.
 - ²⁸ *Jones v Saudi Arabia* 129 ILR 717.
 - ²⁹ McGregor, "State Immunity and Jus Cogens" 55 *International and Comparative Law Quarterly* vol 55 (2006) p 437.
 - ³⁰ GA Res. 60/147, 16 Dec. 2005, Principle 3(c).
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THE HARVARD SUSSEX DRAFT CONVENTION IN CIVIL SOCIETY: A CHRONOLOGY OF REPORTED EVENTS DURING 1997 THROUGH 2010

Nicholas Dragffy

Fuller citations of publications noted in these chronological records can be found in the Selective Bibliography on pages 41-44.

3-6 December 1997 In Como, Italy, there is a forum on *Possible Consequences of the Misuse of Biological Sciences*. The event is organized by the Landau Network-Centro Volta – with support from the Italian government, the Region of Lombardy and the municipality of Como – to inaugurate the activities of the new UNESCO International School of Science for Peace. Participating in the proceedings are around sixty people from Croatia, France, Germany, Israel, Italy, Russia, Sweden, Switzerland, the UK and the USA. Among the papers presented and discussed is one by HSP Co-Director Matthew Meselson setting out the idea that is soon to underpin the Harvard Sussex Draft Convention.

26 February 1998 From London, *Nature* carries the following news report: “Academics concerned with arms control are floating preliminary proposals for a treaty that would make it an international crime for any individual to help a state to develop biological weapons.” The report then quotes HSP Co-Director Matthew Meselson thus: “Our idea is to try to find a means to hold individuals responsible. These could be heads of state or they could be the so-called ‘evil professors’ willing to help another country develop biological weapons.”

15 April 1998 The *Washington Post* carries an op-ed by Philip Heymann, Matthew Meselson and Richard Zeckhauser arguing for international criminalization of biological and chemical armament through negotiation of a new international treaty.

1-2 May 1998 In the UK, at the University of Cambridge, HSP organizes at the Lauterpacht Research Centre for International Law an international workshop on the *International Criminalization of Biological and Chemical Weapons*. It is the second such meeting aiming to expose a broader range of lawyers, including governmental officials and members of the International Law Commission, to the evolving Harvard Sussex Draft Convention.

28 November 1998 The impending publication of the Harvard Sussex Draft Convention is announced in Geneva at a private workshop of the Pugwash Study Group on Implementation of the CBW Conventions. There is close discussion of the purpose of the Draft Convention, of the way it has been drafted, and of plans for its future. The Study Group, which comprises defence and academic scientists, governmental officials, diplomats and non-governmental people, all of them specialists in aspects of chemical or biological warfare, meets in private twice a year. There are typically 30-60 participants from 13-20 countries. Anonymized reports from each such workshop are published in *Pugwash Newsletter* and on the HSP and Pugwash websites

22 December 1998 The Harvard Sussex Draft Convention is published by HSP in what is expected to be its final form.

4 February 1999 In New York City, the Council on Foreign Relations hosts a breakfast roundtable on *Criminalizing Chemical and Biological Weapons under International Law* so that HSP co-director Matthew Meselson may present the Harvard Sussex Draft Convention. The initial response is by Hannelore Hoppe, chief of the WMD branch in the UN Department of Disarmament Affairs. Presiding is Ruth Wedgwood. The 95 participants include representatives of 25 UN missions. Next day the Council hosts a private lunchtime roundtable on the Draft Convention, the participants including the Permanent Representatives of Belgium, Denmark, Norway, Russia, Slovenia and Thailand.

May 1999 The Spring 1999 issue of the *Michigan Journal of International Law* includes two articles that, in passing, take up aspects of the Harvard Sussex Draft Convention. One, by Michael Scharf, director of the Center for International Law and Policy of the New England School of Law, reproduces the Draft Convention and situates it within current jurisprudence on domestic assertion of universal jurisdiction. The other article, by Barry Kellman of DePaul University College of Law, observes: “This proposal marks a significant advance in treatment of catastrophic terrorism, but it is limited in two important respects: 1) it applies only to biological weapons terrorism and not the full range of activities that could inflict catastrophic harm; and 2) it does not specify the full range of legal modalities that States should adopt to enforce its proscriptions.”

15 May 1999 In Noordwijk, the Netherlands, HSP makes a private progress report on the Harvard Sussex Draft Convention to the Pugwash Study Group on Implementation of the CBW Conventions [see 28 November 1998] at its eleventh workshop. The subsequent discussion focuses on the limited overlap between the Draft Convention and the newly agreed Rome Statute of the International Criminal Court.

25 September 1999 In Geneva, HSP makes a private progress report on the Harvard Sussex Draft Convention to the Pugwash Study Group on Implementation of the CBW Conventions at its twelfth workshop.

11 November 1999 In the USA, the Hoover Institution publishes *The New Terror: Facing the Threat of Biological and Chemical Weapons*, a volume based on the Institution’s first National Security Forum, which had been held a year previously. It includes an article by Michael Scharf [see May 1999] that

discusses the Harvard Sussex Draft Convention among other means for enforcing the ban on biological/chemical weapons and for deterring their use. Scharf observes that although the Draft Convention “should not be viewed as a panacea”, it would “certainly help close the gap between the international law prohibiting BCW and the enforcement of that law”.

January 2000 The US journal *Comparative Strategy* publishes an article by Paul Schulte of the UK Ministry of Defence that notes the Harvard Sussex Draft Convention in the following terms: “It is also worth identifying a few wildcard proposals to catalyze efforts against CBW, of which I am aware but which I do not necessarily endorse [...] the proposal of the Harvard Sussex CBW Project for a convention to criminalize individual involvement in acquisition as well as use of CBW. This would become an extraditable offence, even for nationals of non-signatory states.”

8 April 2000 In Oegstgeest, the Netherlands, HSP makes a private progress report on the Harvard Sussex Draft Convention to the Pugwash Study Group on Implementation of the CBW Conventions at its thirteenth workshop.

18 November 2000 In Geneva, HSP makes a private progress report on the Harvard Sussex Draft Convention to the Pugwash Study Group on Implementation of the CBW Conventions [see 28 November 1998] at its fourteenth workshop. During the subsequent discussion complementarities are noted between the Draft Convention, which aims to promote individual accountability for acts of CBW armament, and professional codes of conduct potentially applicable to individual life scientists.

8 February 2001 In Washington DC, addressing a meeting on *The United Nations and Regime Compliance: Prospects and Challenges* – which is organized by the Monterey Institute Center for Nonproliferation Studies as part of its 2001 briefing series – United Nations Under Secretary-General for Disarmament Affairs Jayantha Dhanapala makes the following comments on the international criminalization of weapons of mass destruction: “There is also a question of individual culpability in the case of non-compliance with WMD regimes. The international criminal court might be looked at as possible means to enhance compliance with WMD treaties. There are talks about the criminalization of biological weapons. It can have a deterrent value in terms of ensuring compliance. Similarly, we can take it one step further with regard to other regimes and make non-compliance a culpable offense. In order to make individuals responsible for their actions, nation states will have to translate non-compliance of international law into an offense. Although in the case of export controls, the penalties have not always matched the offenses and detection was not always very efficient, some exploration of individual culpability may help with compliance. This may be the case especially with regard to sub-national groups acting without the knowledge of states. It will give a stronger control internationally on violations of WMD treaties.”

17 April 2001 In Washington DC, the Monterey Institute Center for Nonproliferation Studies convenes a meeting on *Bioterrorism: Legal Initiatives for Prevention/Deterrence* as part of its 2001 briefing series. The meeting is addressed by Barry Kellman of DePaul University College of Law and Susan Spaulding from the National Commission on

Terrorism. In his presentation, Kellman says: “[I]nternational legal initiatives must include the criminalization of the release of pathogens with intent to cause harm. In addition, the unauthorized possession, trans-national movement of weapons agents, precursors and critical equipment as well as the provision of material, financial or intellectual support in the endeavor should be a crime. Regulation of pathogens and critical equipment should cover the ‘registration’ of the legal possession or use of regulated items, prohibit transfers to unregistered persons, and require the tagging or tracing of equipment.” Kellman also suggests that there should be much closer cooperation between international organizations such as Interpol, the World Health Organization and the World Customs Organization.

May 2001 The *Georgetown Public Policy Review*, in its Spring 2001 issue, carries a Feature Interview on bioterrorism with HSP Co-Director Matthew Meselson, who responds in detail to questions about the Harvard Sussex Draft Convention — its origins, purpose and prospects.

12 June 2001 In one of the few US journals that specialize in CBW affairs, namely *ASA Newsletter*, Barry Kellman [see May 1999] writes about international criminalization of bioterrorism, and once again refers to the Harvard Sussex Draft Convention. He observes that making biological terrorism an international crime “would clearly establish a powerful norm and, more important, would facilitate detection and interdiction” – it would mean that “the capabilities of trans-national law enforcement institutions such as Interpol and the World Customs Organization may be invoked”. In this regard, Kellman says that the Draft Convention “goes far toward satisfying” these points, but “fails to provide mechanisms to detect illegal B-T preparations (leaving that responsibility to States)”.

Some months later, in an article appearing in *The Nonproliferation Review*, Kellman writes: “A primary incentive for characterizing [WMD] proliferation as an international crime, therefore, is to enable decision-makers to take advantage of law enforcement mechanisms without undue obstacles... More specifically, established principles can identify behaviour as an international crime, and identifying criminal conduct triggers important law enforcement tools.”

23 June 2001 In Oegstgeest, the Netherlands, HSP makes a private progress report on the Harvard Sussex Draft Convention to the Pugwash Study Group on Implementation of the CBW Conventions at its fifteenth workshop. Efforts to translate the Draft Convention into the Arabic, Chinese, French, Russian and Spanish languages are now beginning.

25 June 2001 The San Diego *Union-Tribune* publishes an interview with HSP Co-Director Matthew Meselson on technological advances in the life sciences, on the associated risk from bioterrorism, and on how the Harvard Sussex Draft Convention could be an important step forward in addressing these issues. This is one of several such newspaper interviews.

24 November 2001 In Geneva, HSP makes a private progress report on the Harvard Sussex Draft Convention to the Pugwash Study Group on Implementation of the CBW Conventions at its sixteenth workshop. The discussion turns on impacts that the 11 September terrorist attacks on the United States may have on prospects for the Draft Convention.

6 December 2001 From OPCW headquarters, the Technical Secretariat publishes the Winter/December 2001 issue of *OPCW Synthesis*, which includes an article by HSP Co-Directors Matthew Meselson and Julian Robinson on 'CBW Criminalisation and Universal Jurisdiction'.

January 2002 The American Academy of Arts and Sciences publishes an article in its *Bulletin* by HSP Co-Director Matthew Meselson on 'International Criminalization of Chemical and Biological Weapons', which includes discussion of the Harvard Sussex Draft Convention.

30 January 2002 Reacting to the suspension of the Fifth BWC Review Conference on 7 December 2001, which was a consequence of the collapse in July of the negotiation for a BWC verification protocol, HSP publishes an editorial in *The CBW Conventions Bulletin* on the potential of international criminal law and sanctions to reinforce the Biological Weapons Convention as, for example, through the Harvard Sussex Draft Convention.

29 March 2002 From Washington DC, *Science* publishes an editorial by the president of the Lawyers Alliance for World Security, Ambassador Thomas Graham, on 'Biological Weapons and International Law', which refers to the Harvard Sussex Draft Convention in discussing the restraints on the possession and misuse of biological weapons that "may already exist" under customary international law.

April 2002 The US Arms Control Association publishes an article by Jonathan Tucker and Raymond Zilinskas, both of the Monterey Institute of International Studies Center for Nonproliferation Studies, which notes that the Harvard Sussex Draft Convention "could serve as a starting point for the negotiation of a multilateral treaty setting legal guidelines for the prosecution of those who acquire and use biological weapons". The purpose of this *Arms Control Today* article is analysis of the nine measures proposed by the United States at the adjourned fifth BWC Review Conference [see 30 January 2002] as an alternative to the projected BWC verification protocol.

15 April 2002 In Rome, Daniel Feakes of HSP gives a presentation on the 'National Legal Mechanisms and the Establishment of an International Criminalization System' at a workshop on *The Possible Use of Biological Weapons by Terrorist Groups: Scientific, Legal and International Implications*. The workshop – which is held at the Istituto Diplomatico Mario Toscano – is organized by the International Centre for Genetic Engineering and Biotechnology and the Landau Network–Centro Volta with the support of the Italian Ministry for Foreign Affairs. The paper is subsequently published in the proceedings of the workshop by the International Centre for Genetic Engineering and Biotechnology.

14-17 May 2002 In Warrenton, Virginia, there is a workshop on *Biological Terrorism: An International Criminal Law Approach*, which is organized by Barry Kellman of DePaul University College of Law. Presentations made include one by HSP Co-Director Matthew Meselson on the Harvard Sussex Draft Convention and one by Kellman on his 'Draft Model Convention on the Prohibition and Prevention of Biological Terrorism'. The workshop follows the publication by the *Harvard Journal of Law and Public Policy* of an article by Kellman on

'An International Criminal Law Approach to Bioterrorism', which refers to the Harvard Sussex Draft Convention in proposing a combination of national criminal law and international regulatory standards to counter the threat from bioterrorism. According to Kellman, international regulations are necessary since national criminal law does not lend itself to the pursuit of alleged offenders that operate in a state that lacks law enforcement capabilities or that is unwilling to cooperate. He argues that international regulations are also necessary so as to establish what would be considered legitimate and illegitimate acquisition or possession of prohibited materials, and by whom.

15 June 2002 In Oegstgeest, the Netherlands, HSP makes a private progress report on the Harvard Sussex Draft Convention to the Pugwash Study Group on Implementation of the CBW Conventions [see 28 November 1998] at its seventeenth workshop. Warnings are raised during the subsequent discussion about the possible risks involved in treating biological and chemical weapons together in a single instrument of law, and also about the present (but subsequently remedied) lack of involvement of the OPCW in the project.

27 September 2002 In the UK, HSP Co-Director Julian Perry Robinson makes a presentation on the Harvard Sussex Draft Convention at a Wilton Park conference on *Preventing the Proliferation of Chemical and Biological Weapons*. {Wilton Park report no 686}

9 November 2002 In Geneva, HSP makes a private progress report on the Harvard Sussex Draft Convention to the Pugwash Study Group on Implementation of the CBW Conventions at its eighteenth workshop. How best to carry forwards the indications of interest in the Draft Convention on the part of some governments, notably the British, Dutch and Swiss, dominates the subsequent discussion.

April 2003 In the United States in its Spring 2003 issue, the *Journal of Transnational Law & Policy* carries an article on combating the threat of bioweapons by Timothy Gilman, who is both a doctoral candidate in the Georgetown Law Center and an MPH candidate in the Johns Hopkins School of Public Health. Among other approaches, the article considers the Harvard Sussex Draft Convention. It concludes that the "ideal" policy response to the threat "would be to combine the CWC-type inspection regime from the BWC protocol with an expanded Australia Group type restriction on equipment and a Harvard Sussex type universal criminalization".

May 2003 In the UK, *Science in Society* publishes an article by geneticist Mae-Wan Ho on bioterrorism. The article had been stimulated by the SARS epidemic, and makes reference to the Harvard Sussex Draft Convention as a means for keeping "good science out of the hands of ill-intentioned people".

26-28 June 2003 In Budapest, Hungary, Caitríona McLeish of HSP presents a paper on 'Global governance of CBW: Criminalization and its impact on state and non-state actors' at a conference on *Global Tensions and Their Challenges to Governance of the International Community* organized by the International Studies Association and the Central and East European International Studies Association. The paper proposes that the Harvard Sussex Draft Convention could add an additional layer of constraint with regard to individual criminal responsibility and jurisdiction under the BWC and CWC.

8 November 2003 In Geneva, HSP makes a private progress report on the Harvard Sussex Draft Convention to the Pugwash Study Group on Implementation of the CBW Conventions at its twentieth workshop. This notes the constructive contact that had been made with the International Criminal Court in the person of its chief prosecutor.

May 2004 In the USA, the *Duke Journal of Comparative and International Law* publishes an article by David Fidler of the Indiana School of Law, which states that the Harvard Sussex Draft Convention is a “development involving the law enforcement approach”. The article, ‘International Law and Weapons of Mass Destruction: End of the Arms Control Approach?’, adds: “Targeting individuals in the manner the Harvard/Sussex proposal envisions reveals the differences between the law enforcement approach and the traditional arms control approach.”

4 December 2004 In Geneva, HSP makes a private progress report on the Harvard Sussex Draft Convention to the Pugwash Study Group on Implementation of the CBW Conventions at its twenty-first workshop.

January 2005 In the USA, *The Fletcher Forum of World Affairs* publishes the Harvard Sussex Draft Convention together with a commentary by HSP Co-Directors Matthew Meselson and Julian Perry Robinson. The article also notes the current status of the Draft Convention with regard to governments and the European Union.

March 2005 The University of Pittsburgh Medical Center, Center for Biosecurity publishes, in its *Biosecurity and Bioterrorism: Biodefense Strategy, Practice, and Science*, an article on reducing the risk of bioterrorism by adopting a harmonized international regime that strengthens biosecurity. In the article Ronald Atlas of the University of Louisville and Judith Reppy of Cornell University address the relevance of the Harvard Sussex Draft Convention, having concluded that “restricting possession of potential bioweapons material to only peaceful purposes must be the international legal norm”.

16 April 2005 In Oegstgeest, the Netherlands, HSP makes a private progress report on the Harvard Sussex Draft Convention to the Pugwash Study Group on Implementation of the CBW Conventions at its twenty-second workshop.

11-13 September 2006 In Brighton, UK, at the fortieth anniversary conference of SPRU — Science and Technology Policy Research, University of Sussex, Cairiona McLeish of HSP and SPRU colleague Paul Nightingale present a joint paper on ‘Biosecurity and the governance of science’, in which they discuss the concept of international criminalization of CBW. An expanded version of the paper is later published in *Research Policy*.

16-19 May 2007 In the UK, HSP speaks of the Harvard Sussex Draft Convention at a Wilton Park conference on *CBRN Terrorism: Mapping the Threat*.

20 August 2007 In Geneva, in the margins of the 2007 BWC Meeting of Experts, HSP, in the person of Advisory Board member Graham Pearson, makes a presentation on the Harvard Sussex Draft Convention.

19 September 2008 In the UK, at the University of Bath, Daniel Feakes of HSP discusses the Harvard Sussex

Draft Convention in his presentation at a two-day international workshop, ‘Towards a Framework Convention on Biochemical Controls: Addressing Conceptual and Practical Issues’. The presentation sets the Draft Convention into its broader regime context.

19 November 2008 In the UK House of Commons, the Foreign Affairs Committee, which is conducting an inquiry into *Global Security: Non-Proliferation*, takes oral evidence on CBW. Daniel Feakes of HSP is one of three witnesses and had drawn attention to the Harvard Sussex Draft Convention in his prior written evidence.

29 November 2008 In Geneva, HSP makes a private progress report on the Harvard Sussex Draft Convention to the Pugwash Study Group on Implementation of the CBW Conventions at its sixteenth workshop. During the discussion there is emphasis on the value of developing the concept of individual criminal responsibility in response to challenges arising from advances and convergences within chemistry and biology.

26-27 March 2009 In The Hague, a Clingendael Workshop on *Implementation of UN Security Council resolution 1540 [see 28 April 2004] at the national level: promotion of best practices and policy and technical co-ordination and co-operation* takes place at the Netherlands Institute of International Relations. Among its 40-odd participants is Catherine Jefferson of HSP, who reports later that the discussions had been valuable in reassessing the Harvard Sussex Draft Convention in the light of its changing legal and political context. In particular:

- Given the challenges of improving 1540-related coordination, how might the Draft Convention support existing initiatives?
- Will the Draft Convention be able to build upon existing infrastructures (such as the contact points within governments) without creating additional reporting burdens or drains on resources?
- How might the Draft Convention be perceived as beneficial to states for whom CBW criminalization is not a priority?

14 June 2009 The UK House of Commons Foreign Affairs Committee, reporting out on its inquiry into *Global Security: Non-Proliferation* [see 19 November 2008] includes the following in its report: “The Harvard-Sussex Program on Chemical and Biological Weapons has proposed that, in addition to the provisions of the CWC and BTWC which are directed at States, the enforcement of both conventions could be strengthened by the introduction of a new treaty which criminalised CBW activities at the individual level. This proposal was supported by our witnesses, Nicholas Sims and Daniel Feakes. Mr Feakes noted that the proposal had previously received the support of the Government, expressed during our predecessor Committee’s inquiry into the 2002 Biological Weapons Green Paper... We [...] recommend that the Government should commit to press for a new convention criminalising chemical and biological weapons at the individual level.”

30 September – 2 October 2009 At UN headquarters, there is a conference on the *Comprehensive Review on the Status of Implementation of Resolution 1540*. The purpose of the conference – which was convened on the recommendation of 1540 Committee Chairman Jorge Urbina – is to assess the evolution of risks and threats, address specific critical issues, and identify possible new approaches for implement-

ing the resolution. Participating in the event are delegates from thirty-five countries and nineteen groups, including the OPCW and IAEA. On day two of the conference, Catherine Jefferson of HSP presents a paper on 'The Harvard Sussex Draft Convention as a complement to Resolution 1540' at a civil society event organized by the Stanley Foundation. The paper argues the continued relevance of international CBW criminalization as a means of assisting member states in implementing aspects of their legal obligations pertaining to resolution 1540, and how it would assist in removing jurisdictional inconsistencies between states.

11 November 2009 Malcolm Dando of the University of Bradford, UK, devotes his column in the on-line edition of *Bulletin of the Atomic Scientists* to an opportunity for the ICC Rome Statute review conference in Uganda next year. Entitling his column 'Bringing increased biological and chemical weapons provisions to the ICC', he observes that this objective, insofar as it could bring about international criminalization of CBW, could also be achieved through the Harvard Sussex Draft Convention, which he describes.

5 December 2009 In Geneva, HSP makes a private progress report on the Harvard Sussex Draft Convention to the Pugwash Study Group on Implementation of the CBW Conventions at its thirtieth workshop. During the discussion there is again emphasis on the value of developing the concept of individual criminal responsibility given the growth of new

science and technology and the attendant challenges of verifying compliance with the existing CBW treaty regime.

28 January 2010 On the HSP website, the page devoted to the international criminalization project has now been expanded and updated. It now includes texts of the Harvard Sussex Draft Convention in Arabic, Chinese, French, Russian and Spanish, as well as in English; the current version of the Commentary to the Draft Convention; and a set of Briefing Papers:

- *Why is international criminalization of CBW needed?*
- *How does the Draft Convention complement existing initiatives?*
- *How does the Draft Convention relate to counter-terrorism?*
- *International criminalization FAQ.*

23 July 2010 In the UK, HSP convenes a planning meeting to prepare for an international symposium that will examine the Harvard Sussex Draft Convention in the light of gaps in the existing regime for suppressing CBW, having regard also to changed approaches to arms control, to the role in it of civil society, and to evolving international humanitarian and criminal law. The symposium is subsequently scheduled to take place at the University of Sussex on 11 February 2011.

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The boxed items below are all available on the Web at www.hsp.sussex.ac.uk

Harvard Sussex Draft Convention (HSDC)

In Arabic, Chinese, English, French, Spanish and Russian, also available at pages 6-9 above

Legal Commentary on the HSDC

Draft Legal Commentary to the Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring, or Using Biological or Chemical Weapons, version 17 (2010), 52 pp.

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Why is international criminalization of BCW needed? HSDC Briefing Paper, No. 1, 2010.

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HSP is an inter-university collaboration seeking to insert the traditions, practice and benefits of scholarship into the formation of public policy on issues involving chemical and biological weapons. It supports efforts to eliminate these weapons globally and to promote effective governance of 'dual use' technologies applicable to them. University-based research and publication, other forms of international communication, constructive association with people in policy-making and policy-shaping circles, and training of young people are the means HSP uses to these ends. HSP has accordingly nurtured widespread networks for information, discourse, study and consensus-building on CBW that engage scientists and other scholars with one another and with officials of governmental and intergovernmental bodies.