

UNIVERSAL JURISDICTION

IMPROVING THE
EFFECTIVENESS OF
INTERSTATE COOPERATION

**AMNESTY
INTERNATIONAL**



Amnesty International Publications

First published in 2009 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

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Index: IOR 53/004/2009
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

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IMPROVING THE EFFECTIVENES OF STATE COOPERATION

A shorter version of this Amnesty International statement was delivered by Christopher Keith Hall, Senior Legal Adviser, International Justice Project, at the Fourth International Expert Meeting on War Crimes, Genocide and Crimes against Humanity of Interpol in Oslo, Norway, 18 to 20 May 2009.

Ten years ago, with the adoption of the Rome Statute of the International Criminal Court and the arrest of former head of state Augusto Pinochet Ugarte in London, we saw a dramatic conceptual shift in the world's approach to crimes under international law, such as genocide, crimes against humanity, war crimes, torture and extrajudicial executions. This conceptual shift made possible some of the first effective steps since the Second World War to prevent and punish these crimes.

Despite previous attempts to criminalize these horrors, such as the adoption of the 1949 Geneva Conventions, their 1977 Protocols and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and to prosecute them in certain regions through *ad hoc* international criminal courts, the world continued for half a century to see them as only political and diplomatic events to be solved by politicians and diplomats, not as crimes to be investigated by police and prosecuted by prosecutors, just as they would with other serious crimes, such as money laundering, trafficking in persons, securities fraud, drug trafficking and terrorist crimes. However, as a result of this conceptual shift, we have seen dramatic progress over the past decade, including such steps as incorporation in criminal codes of crimes under international law, national investigations and prosecutions of such crimes and increasing cooperation between police and prosecutors, as evidenced by the Fourth International Expert Meeting on Genocide, War Crimes and Crimes against Humanity here today.

Our organization believes that if we are to make similar dramatic progress in improving the effectiveness of inter-state cooperation in national investigations and prosecutions based on universal jurisdiction we will need to have a conceptual shift from the current individual chance model to a shared responsibility model of international justice.

Chance arrival of suspects or victims in a particular state has been one of the main triggers for the use of universal jurisdiction. An important catalyst for the use of universal jurisdiction has been what might call the embarrassment factor. It is usually shocking, both for the state where the suspected criminal is freely walking its streets and for victims and their families who encounter the torturer on the street. Sadly, however, all too often it has not been embarrassing to the state where the suspect is found and that state, for one reason or another, has given the suspect a safe haven from international justice, even when the worst imaginable crimes.

Centuries ago, this problem led to the development of the *aut dedere aut punire* (extradite or punish) principle based on the ground that the state where the suspect was found by chance should not have the option in such a situation to do nothing, in effect giving the suspect a safe haven from justice. It either had to hand over the suspect to another state able and willing to try the suspect, or, if unwilling to do so for any of a host of reasons, it had to prosecute the suspect itself.

We have moved well beyond the concept of extradite or punish, however, to that of *aut dedere aut judicare* (extradite or try), which, in a further refinement in a series of treaties, beginning with the 1970 Hague Convention and the 1971 Montreal Convention, is now better described in line with due process as: extradite or submit the case to the competent authorities for prosecution.¹ This principle meant that when the crime was committed abroad by a foreigner against another foreigner, the state where the suspect was found would necessarily exercise universal jurisdiction if it did not wish to extradite the suspect to another state. Since 1949 with the adoption of the Geneva Conventions, the principle is a triple alternative permitting the state where the suspect is found to surrender the suspect to an international criminal court in lieu of extradition.

However, the limitations of this classical approach to universal jurisdiction from the perspective of an effective global system of international justice with respect to the investigation and prosecution at the national and international level of crimes under international law have long been apparent. Of course, national courts exercising universal jurisdiction will only be able to try a small, but still very significant number of cases.²

If universal jurisdiction is seen, as some scholars and governments see it, as limited to the situations where the *aut dedere aut judicare* principle applies, then its value as a tool of international justice will be limited to bringing to justice those perpetrators whom chance brings to the state's shores, whether on shopping trips for arms or more personal items, in an airport transit lounge or in flight from the countries where they committed their crimes.

These examples are not to be belittled, but often states where the suspects are found do not have effective laws in place permitting police to investigate or prosecutors to prosecute, do not have police and prosecutors who are trained and experienced in the investigation and prosecution of such crimes or do not have access to witnesses or to material and

¹ Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) (http://untreaty.un.org/unts/1_60000/24/40/00047980.pdf), The Hague, 15 Dec. 1970 (entered into force 14 Oct. 1973); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) (<http://untreaty.un.org/English/Terrorism/Conv3.pdf>), 23 September 1971 (entered into force 26 January 1973).

² In this respect, national courts exercising universal jurisdiction are like international criminal courts, which will never be able under current models to be able to bring to justice more than a fraction of one per cent of the tens of thousands of persons around the world responsible for crimes under international law.

documentary evidence in their own countries or through effective mutual legal assistance treaties or arrangements with the countries that do. Even when all these factors are present, the police and prosecutors may have insufficient time to act because they will receive information that a person suspected of crimes under international law is coming to visit or to change planes only hours or days before the person is due to arrive and then that person leaves a few hours or days later, usually leaving insufficient time to open an investigation and to issue an arrest warrant based on probable cause.

The individual chance model can also encompass the situation where a state has not only fulfilled its obligations to define crimes under international law as crimes in its penal code, but has also followed the 1949 Geneva Convention model, which permits any state party to seek the extradition of a person suspected of grave breaches, even if that suspect has never been in territory subject to its jurisdiction, provided only that the requesting state “has made out a *prima facie* case”.³ When such states permit victims who happen to be present or those acting on their behalf to initiate criminal prosecutions or the investigating judges and prosecutors take their responsibilities under international law seriously, they can initiate investigations and, if there is sufficient admissible evidence, prosecutions of crimes under international law on behalf of the international community.

However, the individual chance model is unsatisfactory since, by its very nature, it depends on the accidental presence of a suspect or the law and procedure of state permitting it to act without such presence and action by victims or those acting on their behalf or public spirited prosecutors. Despite the progress of the past decade, there have been only a limited number of investigations and prosecutions based on universal jurisdiction and in a relatively limited number of countries. Just as with other crimes of international concern, such as recent piracy cases demonstrate, no small group of states can be expected to take on the responsibility of investigating and prosecuting such crimes all alone.

What can be done? States must decide – and police and prosecutors can take steps on their own initiative to hasten the process – to move towards what Amnesty International calls the shared responsibility model for the investigation and prosecution of crimes under international law. This means that states must recognize that crimes under international law are attacks on the entire international community requiring it to work together in a common effort, as envisaged by the 1949 Geneva Conventions, to deny perpetrators of such crimes a safe haven anywhere. Such a global effort will require not only the contribution of international criminal courts, but also action by national courts in the states where the crimes occurred, the suspects’ states and other states on the basis of universal jurisdiction.⁴ The

³ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, Art. 49; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, Art. 50; Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Art. 129; Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, Art. 146.

⁴ As the court made clear in the *Eichmann* case half a century ago, when national courts try persons for crimes under international law, they are not enforcing their own national law, but acting as agents of the

scope of such a global action plan to fight crimes under international law is too broad to discuss today. Amnesty International will be developing proposals in the near future outlining the elements of such a global action plan to end impunity. Today, this paper will simply highlight a three of numerous suggestions about how inter-state cooperation could be improved in one small, but essential, part of that effort: universal jurisdiction cases.⁵

First, police in each state – without waiting for law reform - should begin to develop a global crime map of genocide and other crimes under international law, perhaps starting with situations of current or recent armed conflict, supplemented by global evidence, resource and law maps. This project can build upon information shared by other police forces and other information provided by non-governmental organizations. It could be facilitated by a new unit or arrangement in the Interpol secretariat dealing exclusively with crimes under international law, as well as by the creation of special police and prosecution units. The Nordic initiative mentioned this morning is an encouraging regional development.

The purpose of this mapping exercise initially would not be an effort to document every crime and to name every suspected criminal around the world, but to lay the foundation for a global cooperative law enforcement strategy to go on the offensive against genocide and other crimes under international law, just as if they were other serious crimes, such as trafficking in persons or terrorist acts. These four different maps (crime, evidence, resources and law) would permit groups of national police forces from different countries, working with prosecutors, to develop a series of joint, targeted investigations aimed to build international dossiers, using evidence gathered in more than one country, which can stand up in court. These dossiers would then support the issuance of sealed arrest warrants that could be issued by any national court able to exercise universal jurisdiction effectively in fair trials without the possibility of the death penalty and implemented by any state whenever the

international community to enforce international law:

“Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.”

Attorney General of Israel v. Eichmann, 36 Int'l L. Rep. 277, 304 (Israel Sup. Ct. 1962).

⁵ For some of the previous suggestions made by Amnesty International to Interpol and to the European Union regarding improving inter-state cooperation in the investigation and prosecution of crimes under international law, see: Statement to Interpol in Ottawa, June 2007: *Universal jurisdiction: Improving the effectiveness of state cooperation*, AI Index: IOR 53/006/2007 (<http://www.amnesty.org/en/library/info/IOR53/006/2007/en>); Statement to European Union, 20 November 2006: *European Union: Using universal jurisdiction as a key mechanism to ensure accountability*, AI Index: IOR 61/013/2007 (<http://www.amnesty.org/en/library/asset/IO61/013/2007/en/dom-IO610132007en.pdf>); Statement to Interpol in Lyon, 16 June 2005: *Universal jurisdiction: The challenges for police and prosecuting authorities in using it*, AI Index: IOR 53/007/2007, June 2005 (<http://asiapacific.amnesty.org/library/Index/ENIOR530072007?open&of=ENG-385>).

suspect left the state where the crimes occurred or the suspect's own state.

As Amnesty International announced at the last Interpol Expert Meeting in Ottawa, the organization has begun publishing the *No safe haven* series of papers on universal criminal and civil jurisdiction which document law and practice in all 192 UN member states, which will contribute to a global law map. The first four are on Bulgaria, Germany, Spain and Sweden.⁶

Second, states must create special immigration screening units to identify visa applicants and persons who are in territory subject to their jurisdiction who are suspected of committing crimes under international law. However, the primary purpose of such screening units must not be to exclude or to deport such persons, which usually has ended in impunity. Instead, the screening should be to identify persons who should be investigated and prosecuted and to ensure that this information is transmitted to police and prosecutors in their own states and in other states, provided that this information will not lead to human rights violations such as the death penalty, unfair trials or torture or other ill-treatment.

Third, states should begin drafting a new multilateral treaty providing for effective extradition and mutual legal assistance with respect to crimes under international law, subject to effective safeguards against human rights violations, such as the death penalty, unfair trials and torture or other ill-treatment.

Amnesty International hopes that one of the conclusions of this Expert Meeting will be to recommend that police and others take steps to move toward a shared responsibility model to end the scourge of crimes under international law that continue to be committed with alarming frequency as we speak.

⁶ Bulgaria (<http://www.amnesty.org/en/library/info/EUR15/001/2009/en>); Germany (<http://www.amnesty.org/en/library/info/EUR23/003/2008/en>); Spain (<http://www.amnesty.org/es/library/info/EUR41/017/2008/es>); and Sweden (<http://www.amnesty.org/en/library/info/EUR42/001/2009/en>).

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