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# **UNIVERSAL JURISDICTION:**

## **The duty to enact and enforce jurisdiction -**

### **Chapter Fourteen**

#### **(Overcoming obstacles to implementing universal jurisdiction)**

As discussed below, there are a number of different types of legal, practical and political obstacles to the exercise of universal jurisdiction. Most states still have not enacted any legislation permitting their courts to exercise universal jurisdiction over war crimes, crimes against humanity, genocide, torture, extrajudicial executions or “disappearances”. All the universal legislation which does exist could be improved. Where legislation is in place, implementation is often hampered by inadequate knowledge of universal jurisdiction in the legal system, lack of political will or even political interference with the exercise of such jurisdiction.

Courts often face practical and legal problems in obtaining evidence or extradition of suspects. Some countries, contrary to international law, respect amnesties, pardons and similar measures of impunity or immunities of officials. However, as explained below, each of these obstacles can be overcome.

#### **I. Absence of any legislation or inadequate legislation**

Although almost two-thirds of all states have national legislation permitting their courts to exercise universal jurisdiction over certain conduct committed abroad amounting to one or more of the following crimes: war crimes, crimes against humanity, genocide, torture, extrajudicial executions or “disappearances”. However, few of these states have legislation covering all of these crimes. In every state where such provisions do exist, they fall short in certain respects, thus posing the danger that persons responsible for the worst crimes in the world could travel to or even reside in those states with complete impunity. It is beyond the scope of this paper to do a comprehensive survey of the defects in the legislation providing for universal jurisdiction. The universal jurisdiction database is to maintain and update information on such legislation and Amnesty International hopes to be able to provide detailed recommendations over the coming years to particular countries for strengthening their legislation. What follows in this section are simply some examples of the types of problems with the approaches of states which have attempted to fulfill their responsibilities under international law (in contrast to those which have no legislation at all), but still need to do more to ensure that their legislation does not inadvertently lead to impunity. Recommendations for action are included in Chapter Fifteen, which are based in part on the organization’s *14 principles on the effective exercise of universal jurisdiction*, May 1999 (AI Index: OR 53/01/99).



### **A. Failure to define the crime or the punishment in national law**

One of the most common problems in many states, whether they follow a monist or a dualism approach to international law,<sup>1</sup> has been the failure to define crimes under international law as crimes in the national criminal code and to specify the punishments applicable under national law.

#### **1. Problems with three legislative models**

These problems are particularly an issue in states which have followed the legislative models which provide national courts with jurisdiction generally over offences defined in treaties or over offences which treaties require states to investigate and punish. They are also a problem in those states with legislation giving courts jurisdiction over crimes under customary international law or defined under general principles of law. However, these problems also apply to legislation expressly providing courts with jurisdiction over specific crimes defined in treaties or customary law.

Many national courts are willing to give direct effect in *civil* litigation to international law. However, since the trials in military courts after the Second World War came to an end, national courts appear now to be less willing to do so in *criminal* cases, even in jurisdictions adhering to a monist view of international law, except to the extent that international law prohibits the national court from acting. Courts are concerned that, without precise definitions in the national criminal code of the crimes and punishments, prosecutions would be inconsistent with the fundamental principle of legality (*nullum crimen, nulla poena sine lege*).<sup>2</sup> To some extent, this is surprising since the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal) and the International Criminal Tribunal for Rwanda (Rwanda Tribunal) have been able to prosecute effectively on the basis of crimes as defined under customary international law and generally in a manner which has been consistent with due process of law, although with respect to sentencing they take into account the general practice regarding prison sentences in the national courts of the former Yugoslavia and Rwanda.<sup>3</sup> To a great extent, the problems with the three models mentioned above have been avoided in states which have enacted Geneva Conventions Acts, including those which have amended them to include grave breaches of Protocol I and other violations of international humanitarian law. These acts often annex in schedules the texts of the provisions imposing criminal responsibility in these treaties (or the texts of the entire treaty) and specify the punishments to be applied.

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<sup>1</sup> See the introduction to Chapter One for the distinction between these two approaches.

<sup>2</sup> Menno T. Kamminga, *The Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, in International Law Association, *Report of the Sixty-Eighth Conference held at Taipei, Taiwan, Republic of China, 24-30 May 1998*, 563, 569 (London 1998).

<sup>3</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 24 (1); Statute of the International Criminal Tribunal for Rwanda, Article 23 (1).

## 2. Problems with reliance on constitutional provisions

Reliance on national constitutions or legislation that provide that international law, either conventional or customary, is part of national law, either automatically or after acceptance by the state, and generally overriding national legislation, sometimes is sufficient to permit courts to exercise universal jurisdiction over crimes under international law. It is not always clear, however, whether such provisions incorporate only the substantive criminal law provisions of treaties or also the procedural ones, such as those concerning universal jurisdiction, and often the answer will not be known until tested in a criminal investigation or prosecution.

In some of these states there are authoritative interpretations of executive officials, courts, scholars or international treaty monitoring bodies indicating that they are insufficient to permit a court to exercise universal jurisdiction. Therefore, in the absence of an authoritative judicial decision that courts may try foreigners or stateless persons suspected of conduct abroad amounting to a crime under international law, either directly under international law or for ordinary crimes, states with such provisions should enact legislation unequivocally providing for universal jurisdiction.

### B. Failure to define the crimes consistently with international law

For example, the definitions of torture in the *United Kingdom* and the *United States* are not consistent with the definitions in the Convention against Torture.<sup>4</sup>

### C. Failure to include all crimes

A similarly common weakness in national legislation providing for extraterritorial jurisdiction has been the failure to extend universal jurisdiction to all crimes under international law. The states which have universal jurisdiction over some crimes under international law, but not others, are far too numerous to mention here, but the following examples illustrate some of the limitations and problems. *Italy* has legislation enacted six decades ago which permits its military courts to exercise universal jurisdiction over a limited number of war crimes. The civilian Penal Code provides for universal jurisdiction over some ordinary crimes which could amount to crimes against humanity, but it does not provide for universal jurisdiction over torture. Its courts have been investigating crimes in Argentina, such as extrajudicial executions and “disappearance” during the 1970s, but they have considered that they are limited under national law to investigations of crimes committed against Italian victims under the passive personality principle. *Switzerland* gives its military tribunals universal jurisdiction over most

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<sup>4</sup> See Section 134 of the Criminal Justice Act 1988, (United Kingdom) (limiting scope to pain or suffering inflicted or instigated by a public official or person acting in a official capacity to do so “in the performance or purported performance of his official duties” or, where it was or consented or acquiesced to by such a person, that it have been done “in the performance or purported performance of his official duties”); Section 3(b) of the Title 18, United States Code, Section 2340 - 2340B (United States).

violations of international humanitarian law in both international and non-international armed conflict, but does not give either its military tribunals or its civilian courts universal jurisdiction over crimes against humanity (and it only extended such jurisdiction over genocide on 15 December 2000), although it gives civilian courts jurisdiction over crimes against Swiss nationals under the passive personality principle. These gaps led to the dropping of charges based on these crimes against one accused. They also precluded the court in the *Pinochet* case from entertaining complaints other than those involving victims who were Swiss nationals. Some of these gaps would be addressed by proposed legislation implementing the Rome Statute.

#### **D. Weak principles of criminal responsibility**

Most states do not include concepts such as superior responsibility for civilians with respect to crimes against humanity or conspiracy over genocide.

#### **E. Inappropriate defences**

The Nuremberg Charter, Yugoslavia Statute, Rwanda Statute and 1996 draft Code of Crimes all exclude the defence of superior orders, but permit such orders to be taken into account in mitigation of punishment. International human rights instruments also prohibit superior orders as a defence.<sup>5</sup> However, a number of countries appear to permit the defence of superior orders. In addition, legislation in the *United Kingdom* allows prohibited defences to the crime of torture.<sup>6</sup>

#### **F. Statutes of limitation (prescription)**

Some states still have statutes of limitation applicable to war crimes, crimes against humanity, genocide, torture and other crimes under international law. For example,

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<sup>5</sup> Nuremberg Charter, Art. 8; Allied Control Council Law No. 10, Art. 4; Yugoslavia Statute, Art. 7 (4); Rwanda Statute, Art. 6 (4); 1996 Draft Code of Crimes, Art. 5; Convention against Torture, Art. 2 (3) (“An order from a superior officer or a public authority may not be invoked as a justification for torture.”); UN Declaration on the Protection of All Persons from Enforced Disappearance, Art. 6 (1) (“No order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it.”). Although Article 33 of the Rome Statute permits a very narrowly circumscribed defence of superior orders for war crimes (but not genocide or crimes against humanity) in certain circumstances, this defence applies only to cases before the Court. The decision to include this defence in the Statute has been criticized, *see, for example*, Paolo Gaeta, *The defence of superior orders: The Statute of the International Criminal Court versus customary international law*, 10 Eur. J. Int’l L. 172 (1999), but one military expert has defended it as consistent with international law, without, however, discussing human rights law and standards. *See* Col. Charles Garraway, *Superior orders and the International Criminal Court: Justice delivered or justice denied*, Int’l Rev. Red Cross, No. 336, 785 (1999).

<sup>6</sup> Article 134 (4) of the Criminal Justice Act 1988 provides that “[i]t shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct” and Article 134 (5) provides that the lawfulness of the authority, justification or excuse is to be determined by national, not international, law. Such a defence is a clear violation of Article 2 (3) of the Convention against Torture, which provides that “[a]n order from a superior officer or a public authority may not be invoked as a justification of torture.”



**France** has a ten-year statute of limitations for war crimes which prevented the prosecution of Klaus Barbie, Paul Touvier and Maurice Papon for these crimes.<sup>7</sup>

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<sup>7</sup> *Code de procédure pénal* (Paris: Litec 1996/1997), art. 7, L. n. 1336, 16 déc. 1993, art. 7, L. n. 93-913, 19 juill. 1993.

However, it is now generally accepted that statutes of limitations for crimes under international law, such as war crimes, crimes against humanity and genocide, are prohibited under customary international law.<sup>8</sup> The General Assembly has called for the abolition of statutes of limitations for war crimes and crimes against humanity and the Rome Statute prohibits statutes of limitations for genocide, crimes against humanity, war crimes and, when a definition is agreed, aggression.<sup>9</sup> Statutes of limitation for torture in cases not amounting to a war crime or a crime against humanity are inconsistent with the *aut dedere aut judicare* obligation of states parties to the Convention against Torture in Article 7 (1), which admits of no exceptions. On 2 February 2001, the Ministry of Foreign Affairs of Mexico determined that national statutes of limitation did not apply to torture by expressly rejecting a finding to the contrary by a Federal District Judge, and permitting the extradition of a former Argentine military officer to Spain to face charges of torture (see Chapter Ten, Section II).

### G. Slow or inadequate arrest procedures

Some countries have slow or inadequate procedures for arrest arresting persons suspected of crimes under international law.

For example, the procedures for arresting persons suspected of such crimes in *France* in practice have proved to be too slow and cumbersome to permit effective action before a suspect can flee, in an era of easy access to aircraft when a matter of hours can

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<sup>8</sup> Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Armed Conflict: A Positivist View*, 33 Am. J. Int'l L. 302, 315 ("Imprescriptibility of war crimes, crimes against humanity and genocide may be considered part of customary international law."); Sergio Marchisio, *The Priebke Case before the Italian Military Tribunals: A Reaffirmation of the Principle of the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, 1 Y.B. Int'l Hum. L. 344 (1998); José Alejandro Consigli, *The Priebke Case before the Argentine Supreme Court*, 1 Y.B. Int'l Hum. L. 341 (1998).

The Belgian investigating magistrate (*juge d'instruction*) has explained:

"Prescription does not seem to be a principle of international criminal law and appears to be irreconcilable with the character of the offences. . . . Their imprescriptibility is inherent in their nature. Therefore, we find that, as a matter of customary international law, crimes against humanity cannot prescribe and that this principle is directly applicable in the domestic legal order."

English translation in Luc Reydam's, *International Decisions: In re Pinochet - Belgian Tribunal of First Instance Brussels*, 93 Am. J. Int'l L. 700, 703 (1999).

<sup>9</sup> G.A. Res. 2391 (XXIII) of 26 November 1968, adopting the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; Rome Statute, Art. 29 ("The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.").

For the rule prohibiting statutes of limitations for war crimes and crimes against humanity, see Amnesty International, *The International Criminal Court: Making the right choices - Part I*, Section VI.E.I 1997 (OR 40/01/97), Section VI.E.1. Although "[t]he majority of drafters of the Convention [on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity] appeared to have no difficulty in stressing its declaratory character[.]" the limited number of ratifications was due to inclusion of the crime of *apartheid* as a crime against humanity. Friedl Weiss, *Time Limits for the Prosecution of Crimes against International Law*, 53 Brit. Y.B. Int'l L. 163, 185-186 (1983). This objection has lost considerable force with the inclusion of *apartheid* as a grave breach under Article 85 (4) (c) of Protocol I and a crime against humanity under Article 7 (1) (j) of the Rome Statute.

be crucial. In addition to the problem in French law and jurisprudence mentioned in Chapter Four, Section II of requiring complainants to prove the presence of a suspect in the country before even a preliminary inquiry can be opened, procedures for arresting a suspect whose presence in France is announced by the suspect or reported in the press have proved to be ineffective in a recent case.

On Wednesday morning, 25 April 2001, several people filed a complaint (*plaints*) at the office of Francois Corder in the fourth section of the Office of the Paris Prosecutor (*la chetrum section du parquet de Paris*) alleging that General Haled Naysayer, the former Defence Minister and member of the High Committee of State (*Haut Comity d'etat*), who was in Paris that evening to promote his new book, was responsible for torture and death under torture. In the afternoon, the complaint was deemed admissible (*receivable*) and a preliminary inquiry (*anxiety preliminary*) was opened. The criminal investigation unit (*la brigade criminelle*) was to hear the complainants on Thursday to determine the general's status in France. Reportedly, no steps were taken at the preliminary investigation stage to place the suspect in investigative detention (*garde à due*), although requests apparently were made to the Ministry of Foreign Affairs and the Algerian embassy for information about the suspect's status, thus, probably alerting him at some point during the day to the preliminary inquiry.<sup>10</sup>

That evening, around midnight, after the book promotion, the suspect is reported to have left France on a specially chartered plane from Le Bourget Airport. The following day, after his departure, the preliminary investigation had determined that the suspect was not entitled to any official immunity and that he could be heard on the allegations. It was also decided that a formal investigation (*information*) could be opened and that an investigating magistrate (*juge d'instruction*) appointed who could issue an arrest warrant (*mandat d'amené*). An investigation was finally opened on 26 April 2001, more than half a day after the suspect had left.<sup>11</sup> As far as is known, no international arrest warrant has been sought or issued.

## II. Inadequate knowledge in criminal justice system

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<sup>10</sup> A temporary arrest at this stage of the proceedings is possible. *Code de procédure pénal* (Paris: Litec 1996/1997), art. 77. The failure to detain the suspect at this point was severely criticized. See, for example, *Fédération Internationale des Ligues des Droits de l'Homme, Algérie: Une fuite en forme d'aveu pour le Général Naysayer, Paris, Communiqué, 26 avril 2001*.

<sup>11</sup> This account is based on a number of sources, including the following press reports: *Claire Trénan, Un général algérien et la justice française, Le Monde, 26 avril 2001*; *José Garçon, Un général algérien épinglé à Paris : Plaintes pour tortures contre l'ex-ministre de la Defence, Libération, 26 avril 2001*; \_\_\_\_\_, *Paris laisse partir Haled Naysayer : Départ précipité du général malgré les plaintes pour tortures, Libération, 27 avril 2001*; *Antoine Comté, avocat des plaignants : "La France a ailed s obligations internationaux", Le Monde, 27 Avril 2001*.

It would be unfair to single out particular individuals for failings in the educational and legal systems of particular countries. However, the lack of awareness of, and training for, lawyers for victims, prosecutors and judges of legal opportunities has been a serious obstacle to initiating and conducting criminal prosecutions based on universal jurisdiction.<sup>12</sup> It is often difficult to locate up-to-date legal commentaries discussing universal jurisdiction or to obtain comprehensive collections of extradition or mutual legal assistance treaties in law libraries in many countries. The lack of public awareness concerning the purposes of universal jurisdiction has been identified as a factor in the limited interest of prosecutors to undertake universal jurisdiction investigations and prosecutions.<sup>13</sup>

### III. Lack of political will

#### A. Lack of political will to enact legislation

Even where international treaties such as the Geneva Conventions and the Convention against Torture expressly require states to enact legislation providing for universal jurisdiction, many states have yet to fulfill their obligations to do so. The factors responsible, which vary from country to country, include the slowness of parliamentary processes, inertia and low priority in comparison to other matters.<sup>14</sup>

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<sup>12</sup> Participants in the May 1999 International Council on Human Rights Policy meeting “time and again returned to the problem presented by the ‘knowledge gap’ which exists both within organisations advocating prosecutions, and among the relevant legal authorities (primarily prosecutors and judges). Within human rights organisations and victims groups, there is not enough expertise concerning the broad range of legal issues implicated in universal jurisdiction cases, in particular criminal law and procedure. At the same time, neither prosecutors nor judges are adequately trained to address the complex questions of international law which are an unavoidable part of universal jurisdiction prosecution.”

International Council on Human Rights Policy, *Thinking Ahead on Universal Jurisdiction: Report of a Meeting Hosted by the International Council on Human Rights Policy* 55 (Geneva, 6-8 May 1999). An expert on universal jurisdiction has explained that one of the reasons national courts are reluctant to exercise universal jurisdiction is that “[j]udges in national courts are usually not experts on international law and are often reluctant to rely heavily on it when rendering their decisions. In particular, they may not be fully aware of the rapid and profound changes in the international legal system that occurred in the latter half of the twentieth century, especially with respect to human rights and the consequent decline of traditional sovereign prerogatives.” Michael Byers, *The Law and Politics of the Pinochet Case*, 10 *Duke J. Comp. & Int’l L.* 415, 420-421 (2000).

<sup>13</sup> Participants in the May 1999 meeting organized by the International Council for Human Rights Policy emphasized the need for public education both for prosecutions and necessary legislative changes: “Participants stressed that without a broad public consensus supporting prosecutions, it would be difficult to obtain the legislative changes necessary for successful exercise of universal jurisdiction. Menno Kamminga noted that prosecutors, for understandable reasons, will generally have a limited view which leads them to focus on offences in their own jurisdiction. He stressed that only a major public relations campaign could convince prosecutors, and the public at large, of the need to expend resources to prosecute cases from abroad.” *Thinking Ahead on Universal Jurisdiction, supra*, n. 12, 56.

<sup>14</sup> Van den Wygaert, *Belgium: National Report*, 60 *Revue Internationale de Droit Pénal*, 153, 154-155 (1988) (noting in 1988 that draft legislation implementing the Geneva Conventions of 1949 had been pending since the early 1960s; it was ultimately enacted five years later in 1993).

## B. Lack of political will to implement legislation

Even when legislation exists permitting courts to exercise universal jurisdiction over crimes under international law, prosecutors and investigating judges (and political officials, when their approval is needed to initiate an investigation or prosecution) have often lacked the political will to investigate or prosecute crimes under international law committed abroad.

*Reluctance of prosecutors and investigating judges.* A Belgian court in the *Pinochet* case described the problem:

“National judicial authorities often give the impression that they are trying to evade prosecution of crimes against humanity instead of ascertaining whether they can prosecute them under international and national law.

. . . .

Concerning the enforcement of international humanitarian law, too, the risk is not that states may overstep their competence but rather that by looking for excuses to justify their alleged incompetence, they condone the impunity of the most serious crimes (which certainly goes against the *raison d'être* of international law.”<sup>15</sup>

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<sup>15</sup> *Pinochet* Case, Decision of the Tribunal of First Instance of Brussels, 6 November 1998, para. 3.3.3 (English translation in Luc Radomes, *Belgian Tribunal of First Instance (investigating magistrate), November 8 1998*, 93 Am. J. Int'l L. 700, 702 (1999)). The original text reads:

*“Les autorités judiciaires Dans Les différent Etats ont souvent Donne l'impression qu'en matière de crime contre l'humanité, elles recherchaient davantage Les motifs ou Les prétextes juridiques pour ne pas poursuivre de tels crimes plutôt que de vérifier Dans quelle mesure le droit international et le droit interne leur permettaient d'exercer de telles poursuites. . . . Or, en droit humanitaire, le risque ne semble pas tellement résider Dans le fait que Les autorités nationales outrepassent leur compétence pour justifier leur incompétence, laissant ainsi la Porte ouverte à l'impunité des crimes Les plus graves (ce qui est assurément contraire à la raison d'être des règles de droit international).”*

*Ordonnance, Dossier no. 216/98, Notices no. 30.99.3447/98, Tribunal de première instance, Arrondissement de Bruxelles, Cabinet du juge d'instruction, Damien Vandermeersch, 6 novembre 1998, al. 3.3.3* It is not clear if the date in the English translation is an error or the date the decision was published.

Prosecutors and investigating judges are demonstrating much greater willingness to undertake criminal investigations and prosecutions based on universal jurisdiction, particularly since the night of 16 October 1998 when the London Metropolitan Police arrested the former President of Chile pursuant to a provisional arrest warrant requested by Spain. However, there is still a marked reluctance by police, prosecutors and investigating judges to investigate and prosecute cases based on universal jurisdiction.<sup>16</sup> For example, doubts have been raised about the decision in May 1998 by a Scottish prosecutor in the *United Kingdom* to drop charges against of a Sudanese doctor living in Edinburgh shortly before trial on the ground of lack of evidence, despite considerable evidence provided by victims.

In 1994, *Switzerland* declined to open a criminal investigation of a Rwandese citizen, Félicien Kabuga, who was a major shareholder in *Radio Milles Collines*, of allegations that he was responsible for war crimes and genocide in Rwanda earlier that year. Instead of opening a criminal investigation to determine his guilt or innocence, it expelled him to Zaire.<sup>17</sup>

Subsequently, Switzerland did open three criminal investigations based on universal jurisdiction of persons suspected of war crimes, two of which led to trials and one to a transfer to the Rwanda Tribunal (see Chapter Four, Section II). However, in a case involving allegations that a former minister of interior of Tunisia was responsible for torture, after a preliminary investigation had been opened and the suspect could not be

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<sup>16</sup> One commentator has stated that a factor in the reluctance of national courts to exercise universal jurisdiction is because of

“the political implications following from one state’s assertion of jurisdiction over the national of another state for crimes having no apparent connection with the first state. Politicians and the public tend to be very attached to traditional concepts of sovereignty and may feel greatly affronted by what - to international lawyers - are legitimate applications of widely accepted rules of international law. As a result, governments, and perhaps judges, will weigh the often ambiguous benefits of enforcing international criminal law in a specific case against the very real costs that may result to their country’s political alliances, national security and trade.”

Byers, *supra*, n. 12, 421. A senior United States official noted the reluctance of one national prosecutor to open an investigation of Saddam Hussein and other senior Iraqi officials because of lack of custody and insufficient evidence. David Scheffer, *Opening Address, Universal Jurisdiction Conference, December 2000*, 35 *New Eng. L. Rev.* 233, 234 (2001).

<sup>17</sup> The lawyer for the victims argued that Switzerland had passive personality jurisdiction over these crimes under Article 5 of the *Code Pénal Suisse* (Swiss Penal Code) since an alleged victim was Swiss and universal jurisdiction under Articles 2 (9) and 108 (2) of the *Code militaire pénal Suisse* (Swiss Military Penal Code), the Geneva Conventions and Protocol II. *Association pour une Justice Internationale au Rwanda, Dossier de Presse/AJIR.1.DOC/08.09.94*. The *Procureur Général de la République et Canton de Genève*, Bernard Bertossa, did not receive the complaint in time to act, but determined that the case fell within the jurisdiction of the *Auditeur en chef* under military law. It is not clear whether the military prosecutor received the complaint before Kabuga was expelled on 18 August 1999. Federal Councillor Koller, the Head of the Federal Department of Justice and Police, did not deny that there was jurisdiction to open an investigation under Swiss law, but stated that “it was completely unclear to what extent Mr Kabuga could be made personally responsible for any crimes. The evidence required by a constitutional state to remand Mr Kabuga in custody was not fulfilled from the viewpoint of either international or national law”. However, “[i]n view of the known charges, the political authorities therefore felt it advisable to expel Mr Kabuga and his family as undesirable aliens.” Letter from Armin Walpen to Amnesty International’s Deputy Secretary General, 1 December 1994.

found, the Geneva prosecutor declined to seek an international arrest warrant (see Chapter Ten, Section II). The prosecutor explained:

“There is no reason to issue an international arrest warrant. He is suspected of a crime committed abroad. From the moment it is no longer sure that he is on Swiss territory, it is no longer a case for Swiss justice.”<sup>18</sup>

***Reluctance of political officials.*** In some countries, a political official makes the ultimate decision whether a criminal prosecution based on universal jurisdiction should proceed and they are often reluctant to permit an investigation or prosecution based on universal jurisdiction. The then United States Ambassador at Large for War Crimes Issues, David Scheffer, has complained:

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<sup>18</sup> *Pierre Hazan, Comment l'ex-ministre de l'intérieur tunisien a échappé à la justice genevoise, Le Temps, 21 février 2001.*

“I have found governments almost universally determined not to use the universal jurisdiction tools they have to prosecute. I have spent a good number of years seeking to encourage governments to exercise their powers under both domestic and international law in specific cases.”<sup>19</sup>

For example, in the *United Kingdom*, the Attorney General, a member of the Cabinet, refused several times to consent to a criminal prosecution of former President Pinochet, despite five extensive submissions of carefully documented allegations by victims concerning responsibility for torture and conspiracy to torture. In the year and a half between the arrest of the former president and the decision to let him return to Chile on the ground that he was mentally unfit to stand trial, there was no public statement by the Metropolitan Police indicating that they had agreed to the request to conduct an investigation of these allegations.

*Canada, Denmark, Israel, Spain* and other countries all were unwilling to exercise universal jurisdiction over Pol Pot, the leader of the Khmer Rouge, after he was captured, for crimes against humanity in the event he were to be extradited or otherwise transferred to their territories.<sup>20</sup> Similar resistance by *Germany* and *Italy* is reported with respect to the Kurdish leader, Ocalan, after he was found in their territories.<sup>21</sup>

*Austria* permitted Izzat Ibrahim al-Duri (also known as Al Doori), the Deputy Commander-in-Chief of the Armed Forces of Iraq and Vice-Chairman of Iraq’s Revolutionary Command Council, who was in Austria on a one-month visa to receive medical care at a hospital in Vienna, to leave the country after a criminal complaint had been filed against him alleging his responsibility for torture in Iraq. Peter Pilz, a member of the City Council of Vienna, filed a complaint with the competent Austrian public prosecutor’s office on 16 August 1999 alleging that Izzat Ibrahim al-Duri had committed torture. The public prosecutor instituted investigations against Izzat Ibrahim al-Duri. However, the Austrian Minister of Interior stated that since no international arrest warrant had been issued concerning Izzat Ibrahim al-Duri there had been no reason to deny him a visa. The Foreign Minister furthermore emphasised that Austria could not refuse a visa given that al-Duri was the vice head of government of a friendly nation with which Austria maintained diplomatic relations. Eventually, al-Duri, who had not been arrested during the prosecutor’s investigations, was permitted to leave the country on 18 August 1999.<sup>22</sup> As far as is known, no steps were taken to detain him or ensure his presence in the country for sufficient time to permit the commencement of criminal or extradition proceedings, as required by Article 6 (1) of the Convention against Torture.

#### **IV. Political interference with the exercise of jurisdiction**

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<sup>19</sup> Scheffer, *supra*, n. 16, 234.

<sup>20</sup> *Ibid.*, n. , 234-235.

<sup>21</sup> *Ibid.* (stating that “[t]he case of Ocalan was a fascinating exercise of reluctance and resistance by various European governments to prosecute even though it appeared very clear that universal jurisdiction principles could have been utilized in an appropriate domestic prosecution.”).

<sup>22</sup> For an account of this case, see entry on Austria in Chapter Ten, Section II.



One of the most serious problems preventing the exercise of universal jurisdiction is that the current international framework permits political officials to interfere with judicial decision-making. This problem arises in two ways. A related problem is the continued use of military, rather than civilian, courts to try cases involving crimes under international law.

#### **A. Political decisions on whether to investigate or prosecute**

National legislation giving courts universal jurisdiction often requires approval of one or more political officials, such as the cabinet in *Norway* or the Attorney General in the *United Kingdom*, to initiate a criminal investigation or prosecution based on universal jurisdiction. The United Kingdom has required that the Attorney General, a political official, approve a prosecution in England and Wales of a person suspected of torture.<sup>23</sup> The failure of the Attorney General to approve a prosecution of former President Augusto Pinochet during the year and a half that he was in England from 1998 to 2001 led to a perception that the failure to do so was based on political, not legal, considerations. Similarly, decisions in England and Wales whether to prosecute for grave breaches of the Geneva Conventions and of Protocol I are made by the Crown Prosecution Service, an independent prosecutor.

Unfortunately, the implementing legislation for the Rome Statute in England and Wales will end the role of the independent prosecutor in deciding whether to prosecute for grave breaches and provide instead that all decisions whether to prosecute for war crimes, crimes against humanity and genocide will be taken by the Attorney General. Although under English constitutional practice, the decision by the Attorney General is supposed to be taken on purely legal, not political, grounds, the perception that the public interest ground will be influenced by political considerations will remain.

Sometimes political officials are accused of preventing the exercise of universal jurisdiction by other means. For example, Antoine Comte, one of the lawyers representing two persons allegedly tortured in Algeria and the parents of a third person who reportedly died under torture in that country, claimed that *French* government officials had arranged for a specially chartered private plane to fly General Khaled Nezzar, a former Algerian defence minister and member of the High Committee of State (*Haut Comité de l'Etat*), from Paris at midnight on 25 April 2001 hours after a preliminary inquiry (*enquête*) had been opened and half a day before a formal investigation (*information*) was opened that might have led to his arrest.<sup>24</sup> The failure to arrest the general was criticized by human rights organizations and legal experts.<sup>25</sup>

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<sup>23</sup> Criminal Justice Act, § 135.

<sup>24</sup> *Antoine Comte, avocat des plaignants : "La France a oublié ses obligations internationales"*, *Le Monde*, 27 Avril 2001.

<sup>25</sup> See, for example, (FIDH), *Paris dans l'embarras après le départ du général Nezzar*, *Le Monde*, 27 Avril 2001 (obtainable from <<http://www.fidh.imagnet.fr/uindex.htm>>).

An intervention by the *United States* State Department in the arrest of a person suspected of torture prevented a judicial determination of whether the suspect had diplomatic immunity and whether any such immunity could prevent a prosecution for torture. Major Tomás Ricardo Anderson Kohatsu was detained by the Federal Bureau of Investigation at the airport in Houston, Texas on 9 March 2000 for possible arrest and prosecution for acts of torture. He is a Peruvian army officer who had been sentenced to eight years' imprisonment by a Peruvian military court in May 1997 for torturing Leonor La Rosa Bustamente, but the judgment was reversed on appeal by the Supreme Court of Military Justice. The suspect was subsequently released after the State Department intervened, apparently on the ground that he had a diplomatic passport.<sup>26</sup>

In many states, the prosecutor or investigating judge must prosecute a person suspected of a crime. However, in states where prosecutorial discretion is recognized for all or for certain classes of crimes, the decision of the prosecutor must be taken on purely neutral criteria applicable to all persons suspected of the same crime. The criteria spelled out in the guidelines for the Crown Prosecution Service in England and Wales are a useful model that states could adapt to their own legal systems when deciding whether to prosecute (for the text, see Introduction, Section VIA).

### **B. Political decisions on whether to extradite or cooperate**

In most countries, the permission of a political official, such as the Home Secretary in the *United Kingdom*, is required to arrest a person whose extradition is sought and, even if extradition is a matter for the court, the permission of a political official is required for the actual extradition.

### **C. Continued use of military courts**

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<sup>26</sup> According to one account, after Ricardo Anderson was detained, the Department of Justice consulted the Department of State and "Under Secretary of State Thomas R. Pickering decided that Major Anderson was entitled to immunity from prosecution as a diplomatic representative of his government present in the United States for an official appearance before an international organization" and, therefore, the Federal Bureau of Investigation allowed him to depart the United States on 10 March 2000. Sean D. Murphy, ed., *Immunity Provided Peruvian Charged with Torture, Contemporary Practice of the United States Relating to International Law*, 94 Am. J. Int'l L. 535, 536 (2000). See also Karen DeYoung & Lorraine Adams, *U.S. Frees Accused Torturer*, *Washington Post*, 11 March 2000; *State Dept. Helped Peruvian Accused of Torture Avoid Arrest*, *New York Times*, 11 March 2000.

A number of states, such as *Switzerland*, still use military courts to try persons - both military and civilian - for crimes under international law. Amnesty International has opposed the use of military courts for the trial of military and security forces accused of “disappearances” and extrajudicial executions.<sup>27</sup> Article 16 (2) of the UN Declaration on Disappearances provides that persons alleged to have been responsible for enforced disappearances “shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts.”<sup>28</sup> The Human Rights Committee has repeatedly expressed its concern about the use of military courts to try cases involving human rights violations.<sup>29</sup> The UN Commission on Human Rights has urged that human rights violations by civil defence forces be subject to trial in civilian courts.<sup>30</sup>

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<sup>27</sup> *Amnesty International’s 14-Point Program for the Prevention of “Disappearances”*, Point 11 (Prosecution) (“Trials should be in the civilian courts.”), in Amnesty International, *“Disappearances: and Political Killings: Human Rights Crisis of the 1990s - A Manual for Action*, 289, 291, February 1994, (AI Index: ACT 33/01/94); *Amnesty International’s 14-Point Program for the Prevention of Extrajudicial Executions*, Point 11 (Prosecution) (“Trials should be in the civilian courts.”). *Ibid.*, 292, 293.

<sup>28</sup> UN Declaration on the Protection of All Persons from Enforced Disappearance, *adopted* G.A. Res. 47/133, 18 December 1992. In addition, Article 14 states:

“Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force . . . .”

<sup>29</sup> Human Rights Committee, concluding observations on the fourth periodic report of Colombia, UN Doc. CPR/C/79/Add. 76, 1 April 1997, para. 34 (“The Committee also urges that all necessary steps be taken to ensure that members of the armed forces and the police accused of human rights abuses are tried by independent civilian courts and suspended from active duty during the period of investigation. To this end, the Committee recommends that the jurisdiction of the military courts with respect to human rights violations be transferred to civilian courts and that investigations of such cases be carried out by the Office of the Attorney-General and the Public Prosecutor. More generally, the Committee recommends that the new draft Military Penal Code, if it is to be adopted, comply in all respects with the requirements of the Covenant. The public forces should not be entitled to rely on the defence of “orders of a superior” in cases of violation of human rights.”); concluding observations on the second periodic report of Lebanon, UN Doc. CPR/C/79/Add. 78, 1 April 1997, para. 14 (“The Committee expresses concern about the broad scope of the jurisdiction of military courts in Lebanon, especially its extension beyond disciplinary matters and its application to civilians. It is also concerned about the procedures followed by these military courts, as well as the lack of supervision of the military courts’ procedures and verdicts by the ordinary courts. The State party should review the jurisdiction of the military courts and transfer the competence of military courts, in all trials concerning civilians and in all cases concerning the violation of human rights by members of the military, to the ordinary courts.”); concluding observations on the initial report of Uzbekistan, UN Doc. CPR/CO/71/UNB., 26 April 2001, para. 15 (“The Committee notes with concern that military courts have broad jurisdiction. It is not confined to criminal cases involving members of the armed forces but also covers civil and criminal cases when, in the opinion of the executive, the exceptional circumstances of a particular case do not allow the operation of the courts of general jurisdiction. The Committee notes that the State party has not provided information on the definition of “exceptional circumstances” and is concerned that these courts have jurisdiction to deal with civil and criminal cases involving non-military persons, in contravention of articles 14 and 26 of the Covenant. The State party should adopt the necessary legislative measures to restrict the jurisdiction of the military courts to trial of members of the military accused of military offences.”).

<sup>30</sup> UN Common Hum. RTS Res. 1994/67, 9 March 1994, para. 2 (recommending “that, whenever armed civil defence forces are created to protect the civilian population, Governments establish, where

A UN Sub-Commission Rapporteur has recently summarized the views of other inter-governmental organization bodies that military courts should not have jurisdiction over persons accused of serious human rights or humanitarian law violations.<sup>31</sup>

#### **V. Obtaining evidence**

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appropriate, minimum legal requirements for them, within the framework of domestic law, including the following: . . . (f) Offences involving human rights violations by such forces shall be subject to the jurisdiction of the civilian courts[.]”).

<sup>31</sup> *Rapport intérimaire relatif à “l’administration de la justice par les tribunaux militaires”, par Louis Joinet, E/CN.4/Sub.2/2001/WG.1/CRP.3, 6 août 2001.*

One commentator, reacting to the acquittal by a Swiss military tribunal of a person charged with war crimes in Bosnia and Herzegovina on the grounds of insufficient evidence, despaired of the possibility of trying cases based on universal jurisdiction, and concluded that “[t]he cultural differences, the geographic and temporal distance, the surviving witnesses; fear of testifying, and the chaotic circumstances at the time of the crimes make it extremely difficult to achieve that level of proof beyond a reasonable doubt normally expected to support a guilty verdict in criminal proceedings based on extraterritorial jurisdiction or a foreign component.”<sup>32</sup> Although these are serious problems, they have all been surmounted in other criminal proceedings, not only in Switzerland, but also in other countries and by international criminal tribunals, without infringing the rights of suspects and accused.<sup>33</sup>

#### **A. Absence of a special investigation and prosecution unit**

Experience has demonstrated that the investigation and prosecution of crimes under international law requires specialized legal knowledge of international law, just as tax evasion, securities fraud and crimes of sexual violence require specialized legal knowledge both among investigators and prosecutors. They also require special practical skills and experience in investigating and prosecuting crimes committed abroad, including evidence gathering, interviewing victims of crimes of sexual violence, witness protection, negotiation with other law enforcement agencies, language ability or translation and interpretation facilities.

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<sup>32</sup> Andreas R. Zeigler, *In re G.*, 92 Am. J. Int’l L. 78, 82 (1998).

<sup>33</sup> The Rapporteur of the International Law Association on universal jurisdiction noted in 1998 that “[a]ll cases that were tried on the merits until now were conducted essentially on the basis of eyewitness testimony” and in the majority of cases the accused were convicted. Kamminga, *1998 ILA Report, supra*, n. 2, 574.

Special units should be set up within police forces and prosecution offices (or units combining both), drawing upon the experience of the special units established in Australia, Canada, Ethiopia and the United Kingdom to investigate war crimes, crimes against humanity or other crimes under international law.<sup>34</sup> These units generally conducted thorough and effective investigations; their limited success in completing prosecutions should be seen as the result of other factors, such as weak legislation, restrictive jurisprudence and the evidentiary problems - particularly with respect to eye-witness testimony - half a century after the crimes occurred.<sup>35</sup>

The problems the absence of a special unit with specialized legal and practical knowledge are illustrated by the *Muvunyi* case in the *United Kingdom*. Although victims, the press and non-governmental organizations alleged that Lt.-Col. Tharcisse Muvunyi was responsible for genocide, torture and other crimes under international law in Rwanda, the Metropolitan Police reportedly informed those acting on behalf of the victims that they were taking legal advice on whether they were obliged to act with respect to crimes committed during a non-international armed conflict. They never opened an investigation into the allegations, but months later the Rwanda Tribunal requested Muvunyi's surrender and he was promptly arrested. Had a special unit existed, a decision could have been reached immediately on the jurisdictional question. Similarly, the slow pace of criminal investigations of cases based on universal jurisdiction in *Belgium* appears to have been in part the result of having no special unit devoted to crimes under international law.<sup>36</sup>

### **B. Absence or inadequacy of mutual legal assistance treaties and agreements**

Many of the underlying problems with respect to gathering evidence abroad are rooted in the inadequate system of mutual legal assistance treaties and agreements. First, there are only a few multilateral treaties and usually they have limited scope. Second, there is a complex patchwork of bilateral treaties or arrangements among more than 189 states, which leads to widely varying mutual legal assistance regimes. Third, these mutual legal

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<sup>34</sup> Participants at the May 1999 expert meeting organized by the International Council on Human Rights Policy noted that "most prosecutors do not have the in-depth knowledge of international human rights and humanitarian law required for universal jurisdiction prosecutions" and "may not be willing to devote limited resources to prosecutions that fall outside their traditional mandate". Therefore, they recommended that "the best way to address these concerns would be through the creation of specialised units for the prosecution of crimes subject to universal jurisdiction", citing both the Canadian model of a War Crimes and Crimes against Humanity Section within the Department of Justice and the special prosecution office established in Ethiopia to prosecute members of the Dergue. *Thinking Ahead on Universal Jurisdiction, supra*, n. 12, 59.

<sup>35</sup> See, for example, Menno T. Kamminga, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on Human Rights Law and Practice, International Law Association, London Conference 2000, 12-13 (obtainable from <<http://www.ila-hq.org>>).

<sup>36</sup> Lieve Pellens, a spokesperson for the Brussels Public Prosecutor's Office, has stated that her office did not have sufficient resources to handle recent complaints based on universal jurisdiction. Bart Crols, *Belgian magistrate launches probe against Saddam*, Refuters, 29 June 2001. The *procurer du Roi* (Public Prosecutor), Benoît Dejemepe, expressed a similar concern. BEGA, *Après Ariel Sharon, Saddam Hussein!*, *La Libre*, 29 June 2001.

assistance treaties provide a broad range of grounds of refusal which are inappropriate when crimes under international law are involved, including double criminality requirements, the political offence exception, *ne bis in idem* and statutes of limitation. These grounds are improper when the crimes are crimes under international law which the requesting state is seeking to prosecute on behalf of the international community. Fourth, determinations whether grounds for refusal exist are left to political officials - rather than courts - in the requested state to make. In the absence of an international monitoring mechanism for mutual legal assistance, a requested state should be able to refuse to provide such assistance to a state which it considers would not be able to afford the suspect a fair trial or protect the person from torture or might impose the death penalty. However, such decisions are best decided by a court, on the basis of law, rather than by a politician, on the basis of discretion.<sup>37</sup>

### **C. Problems in conducting investigations**

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<sup>37</sup> For a survey of these grounds for refusal, see Amnesty International, *The international criminal court: Making the right choices - Part III: Ensuring effective state cooperation*, November 1997 (AI Index: IOR 40/13/97), Section II.A.2. See also Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 New Eng. L. Rev. 399, 412-414 (2001) (making recommendations to remedy flaws in the existing international framework).

In many cases, neither the court, the prosecutor nor the accused will be able to conduct an on-site investigation. However, as described below in the following paragraphs, there are often alternative means of obtaining evidence which may be almost as effective. In those cases where the territorial state is willing to permit such investigations, it may require that the investigation be carried out solely by its own authorities - who may be implicated in the crimes - or carried out under their supervision. In addition to making such investigations less efficient than if they had been carried out directly by the investigators and prosecutors preparing the case, they may discourage witnesses from speaking to investigators. A similar problem has plagued the work of the Yugoslavia and Rwanda Tribunals and could limit the effectiveness of the International Criminal Court.<sup>38</sup> It will be essential for states to revise the existing international system of mutual legal assistance to permit investigators from the state exercising universal jurisdiction to conduct on-site investigations.

One way to address the problem for states exercising universal jurisdiction to address the practical problems in conducting investigations is for the international community to share the burden through a UN or other multilateral framework. For example, Amnesty International has recommended that the UN establish an independent international body of impartial professional investigators to conduct investigations of human rights violations or abuses or to assist national authorities in conducting such investigations. In addition to this mechanism, states exercising universal and other forms of extraterritorial jurisdiction could establish such an independent and impartial body themselves to conduct investigations or to assist national investigators by providing the necessary expertise and resources.

Either of the proposed approaches would have at least two advantages. First, each would enable small states with limited resources or expertise to fulfill their international responsibilities. Second, investigators in a UN body or a multilateral body might well be more acceptable to some national authorities than investigators from certain other states.

#### **D. Duty to cooperate**

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<sup>38</sup> For the background of this problem, see Amnesty International, *The international criminal court: Making the right choices - Part III, supra*, n. 36, Section II.B.1.



In addition to recognizing that they must cooperate with international criminal courts in the investigation and prosecution of crimes under international law such as genocide, crimes against humanity and war crimes,<sup>39</sup> states have repeatedly recognized that they have a duty to cooperate with each other in investigating and prosecuting crimes under international law, particularly genocide, crimes against humanity and crimes against humanity.<sup>40</sup> They have also expressly obliged themselves in treaties to cooperate with each other in the investigation and prosecution of crimes under international law, including war crimes<sup>41</sup> and torture.<sup>42</sup> These obligations are part of a broader, but still

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<sup>39</sup> For a compilation and analysis of the legislation of 20 of the states that have enacted laws providing for cooperation with the Yugoslavia and Rwanda Tribunals, see Amnesty International, *International criminal tribunals: Handbook for government cooperation*, August 1996 (AI Index: IOR 40/07/96) and its three supplements (AI Index: IOR 40/08/96, IOR 40/09/96 and IOR 40/10/96). A number of other states, including Georgia and Trinidad and Tobago, have since enacted such legislation. The states parties to the Rome Statute have agreed in Article 86 that they “shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”

<sup>40</sup> The UN General Assembly has on a number of occasions called upon all states to cooperate with each other in the investigation and prosecution of crimes against humanity (including genocide) and war crimes. *See, for example*, U.N. G.A. Res. 2583 (XXIV) of 15 December 1969 (drawing attention “to the special need for international action in order to ensure the prosecution and punishment of persons guilty of war crimes and crimes against humanity”); UN G.A. Res. 2712 (XXV) of 15 December 1970, para. 4 (“calls upon all States concerned to intensify their cooperation in the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity”); U.N. G.A. Res. 2840 (XXVI) of 18 December 1971 (declaring that it was “[f]irmly convinced of the need for international co-operation in the thorough investigation of war crimes and crimes against humanity . . . and in bringing about the detection, arrest, extradition and punishment of all war criminals and persons guilty of crimes against humanity who have not yet been brought to trial or punished”); U.N. Declaration on the Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, U.N. G.A. Res. 3074 (XXVIII) of 3 December 1973 (listing a broad range of measures of cooperation). Indeed, the General Assembly has affirmed that “refusal by States to co-operate in particular in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law”. U.N. G.A. Res. 2840 (XXVI) of 18 December 1971, para. 4. In addition, the states parties to the Rome Statute affirm in the Preamble that “the most serious crimes of international concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”

<sup>41</sup> In addition to the express obligations in the Geneva Conventions to prosecute or extradite persons suspected of grave breaches of those conventions, Article 88 of Protocol I (Mutual assistance in criminal matters) provides:

- “1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.
2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1 of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.
3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual legal assistance in criminal matters.”

emerging and fragmentary system of bilateral and multilateral commitments to cooperate with other states in the investigation and prosecution of ordinary crimes and crimes under national law of international concern.

### **E. Lack of cooperation in the foreign state**

Despite these extensive obligations of states to cooperate with each other, the courts and other authorities in the foreign state may sometimes be unwilling to cooperate for a variety of non-legal reasons, such as a restrictive view of sovereignty, unfamiliarity with international law or state-to-state cooperation, lack of independence or implication in the crimes. Such problems may arise not only in the territorial state, but also in other states where evidence is located, such as states which contributed personnel to a United Nations peace-keeping operation or another multinational operation in the territorial state.

There are a variety of solutions to this problem which have been used by national courts and by the Yugoslavia and Rwanda Tribunals. For example, given the usual scale of the crimes and the number of the victims, alternative sources of evidence are often available for many of the crimes. For example, although the Spanish investigating judge in the *Pinochet* case was not able to obtain cooperation in the Argentine and Chilean cases from the executive authorities in the territorial states, he was able to obtain voluminous evidence from official truth commissions in both states, as well as the testimony of hundreds of victims, information from police and prosecutors in other states conducting investigations of the crimes and information from certain non-governmental organizations. To the extent that executive authorities in the foreign state refuse to cooperate, it may be possible, as in the *Pinochet* case, for the investigators to obtain cooperation from judicial authorities in that state. In addition, persistence by the authorities of the forum state and diplomatic pressure to cooperate by other states may encourage cooperation. Such persistence by the Yugoslavia and Rwanda Tribunals has led to increased cooperation by both territorial states and states where evidence is located.

External pressure also led to cooperation by Chile in an investigation in its territory by Federal Bureau of Investigation investigators of the murder in Washington, D.C. of Orlando Letelier and Ronni Moffit.

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Thus, the absolute obligations to prosecute or extradite persons suspected of grave breaches in the Geneva Conventions override any less stringent obligations in Protocol I.

<sup>42</sup> Article 9 of the Convention against Torture provides:

“1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4 [prohibiting torture, attempted torture, complicity in torture and participation in torture], including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.”

Similarly, the London Metropolitan Police, which do not have a specialized unit to investigate crimes under international law committed since the Second World War, have relied heavily on experienced non-governmental organizations such as Redress and the Medical Foundation for the Care of Victims of Torture. One or both have helped them to obtain the names and addresses of witnesses willing to testify and to contact witnesses abroad, provided impartial background information on matters ranging from the political context to cultural or language issues, acted as liaison between the authorities and community groups in the territorial state, assisted in obtaining qualified translators and interpreters, identified appropriate experts and obtained expert legal opinions on questions of evidence and international and foreign law. They have also provided moral support and other assistance and other support to victims, witnesses and groups who have provided information. Redress has explained the unfamiliar legal procedures in the United Kingdom to victims and witnesses and kept them informed of developments in cases.<sup>43</sup> National victims groups in Chile and in Chad have performed similar functions in the *Pinochet* and *Habré* cases.

#### **F. Problems associated with witnesses**

There are several types of problems associated with witnesses, both those willing to cooperate and those who are not. These problems include immunities, privileges, perjury and ensuring a fair trial for the accused. However, each of these difficulties can usually be overcome.

Of course, it goes without saying that trials for persons accused of the worst possible crimes must be conducted with the greatest regard for the rights of the accused, not only because the opprobrium associated with the crimes will arouse passions in the press and the public which may make it difficult for the accused to obtain counsel and to be treated consistently with the right to be presumed innocent, but also because the legitimacy and acceptance of any verdict, whether a conviction or an acquittal, depends on the perception as well as the reality of a fair trial before an independent and impartial court. National courts will have to take effective steps, as they have in recent trials based on universal jurisdiction to ensure that the accused, in the same manner as the prosecution and victims, is able to obtain witnesses. The drafters of the Convention against Torture were well aware of this obligation when they decided to reinforce existing guarantees in international instruments, such as in Article 14 (3) (e) of the International Covenant on Civil and Political Rights (ICCPR), “[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him[.]” For example, Article 7 (2) of the Convention against Torture requires that in cases of persons suspected of torture the prosecution

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<sup>43</sup> A Steering Committee appointed by the United Kingdom Home Office to conduct a review of extraterritorial jurisdiction with a view to determining whether jurisdiction should be extended to include serious crimes, such as sex-tourism offences, by United Kingdom nationals overseas recognized the vital role which non-governmental organizations played in obtaining evidence, particularly those organizations which work with victims in the places where crimes occurred. Home Office Review of Extra-Territorial Jurisdiction, Steering Committee Report 28-9 (July 1996).

“shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.”<sup>44</sup>

In addition, Article 7 (3) requires that

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<sup>44</sup> Convention against Torture, Art. 7 (2). According to the leading commentary on the Convention against Torture,

“This means that the normal procedures relating to serious offences as well as the normal standards of evidence shall be applied. It is specifically indicated in the second sentence of paragraph 2 that the standards of evidence shall in no way be less stringent than those applicable in the cases referred to in article 5, paragraph 1. The lack of evidence may frequently be a serious obstacle to bringing proceedings in a country other than that in which the torture took place. It may be difficult to call witnesses and collect other evidence, in particular where the State in which the offences were committed is not willing to co-operate in investigating the case. The second sentence makes it clear, however, that although the principle of universal jurisdiction has been regarded as an essential element in making the Convention an effective instrument, there has been no intention to have the alleged offenders prosecuted or convicted on the basis of insufficient or inadequate evidence.”

J. Herman Burger & Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 138 (Dordrecht/Boston/New York: Martinus Nijhoff Publishers 1988).

“[a]ny person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.”<sup>45</sup>

It may be difficult for a national prosecutor in some circumstances to locate witnesses in another state. However, as in all the prosecutions based on universal jurisdiction so far, the prosecutor will be able to rely on victims’ groups, either in the territorial state, other states or in the state where the court is located to assist in locating witnesses. It has been claimed that it is too costly to transport witnesses from the territorial state to the state exercising universal jurisdiction, but with the increasing amount of transnational criminal and civil litigation in all types of cases, this is increasingly a cost which must be incurred in the ordinary course of many cases. As Lawrence Collins, Q.C., counsel for the Republic of Chile before the House of Lords in the *Pinochet* case, observed at a panel of the International Law Association on transnational litigation, there has been an “explosion” of such litigation in the last two decades of the 20<sup>th</sup> century.<sup>46</sup>

Indeed, forum states have been willing to transport witnesses to testify in criminal cases based on universal jurisdiction. For example, Belgium and Switzerland have transported witnesses from Rwanda so that they could testify at trials of persons accused of committing crimes in that country.<sup>47</sup>

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<sup>45</sup> Convention against Torture, Art. 7 (3).

<sup>46</sup> Lawrence Collins, Q.C., Partner, Herbert Smith, London, remarks at the panel, “Globalisation of Civil Disputes”, 28 July 2000, International Law Association, 69<sup>th</sup> Conference, London.

<sup>47</sup> Over 70 witnesses are reported to have been flown to Brussels for a trial of four Rwandans accused of war crimes that opened in April 2001. Approximately 60 witnesses, including some flown in from Rwanda, plus experts, testified in the trial of Fulgence Niyonteze in Lausanne in 1999. *Fati Mansour, La Justice militaire confirme la condamnation d’un notable rwandais, Le Temps, 28 avril 2001.*

As an alternative to transporting witnesses to the forum state, such costs, as well as fears for security, can be minimized by the use of video-conferencing facilities in the territorial state or in a neighbouring state. As in ordinary organized crime cases, witnesses predisposed to cooperate may need protection. In such cases, governments as a matter of course will provide security, relocate witnesses and their families and, if necessary, provide them with new identities. They should do no less in the case of far more serious crimes. Similarly, if witnesses are not willing to cooperate by travelling to the forum state, they can be encouraged to do so by providing testimony through video-conferencing,<sup>48</sup> or, if necessary, compelled to provide testimony through such facilities, subject to appropriate due process guarantees. It may be difficult to locate experienced and qualified translators and interpreters. Nevertheless, to some extent, expatriates from the territorial state may be able to assist in locating such persons or in doing some of the translation and interpretation themselves, subject to careful revision or monitoring. Courts will need to be sensitive to cultural differences in assessing eye-witness testimony by persons from other societies, but courts trying such cases appear to have made serious efforts to address this issue.<sup>49</sup>

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<sup>48</sup> Such procedures are expressly authorized for international criminal courts. Article 69 (2) of the Rome Statute provides:

“The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.”

Article 68 (2) permits the Chambers of the Court, “to protect victims and witnesses or an accused”, to “allow the presentation of evidence by electronic or other special means”.

Rule 71 *bis* of the Yugoslavia Rules states: “At the request of either party, a Trial Chamber may, in the interests of justice, order that testimony be received via video-conference link.” UN Doc. IT/32/Rev.17, *adopted* 17 November 1999. The Yugoslavia Tribunal has authorized the presentation of evidence through video-conferencing facilities. The Trial Chamber has expressly rejected a challenge to the presentation of evidence through video-conferencing facilities, finding that it did not violate the right of the accused in that case to confront the witness against him. *Prosecutor v. Delali*, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, Case No. IT-96-21-T (Trial Chamber, 28 May 1997), para. 14.

<sup>49</sup> See the description of the evaluation of such testimony by a Swiss military court trying a case involving war crimes in Rwanda. *N. [Fulgence Niyonteze], Le Tribunal militaire de cassation, jugement, 27 mai, 14-32.*

Another way that some of these difficulties can be surmounted, if some of the authorities in the territorial state, such as investigating judges in Chile in the *Pinochet* case, are willing to help or there is access to the territorial state where the government has collapsed, but a peace-keeping force is present in the territorial state, is for the forum state to send the prosecutor or investigating judge to the state. A *Belgian juge d'instruction* investigating crimes in Rwanda went on three visits to that country and one to Ghana and Togo. Before the *Swiss* trial of Fulgence Niyonteze for war crimes, the court visited Rwanda to interview witnesses unable or unwilling to appear in Switzerland.<sup>50</sup> In some cases, the territorial state may even permit part of the trial to take place in its territory, as in the *Sawoniuk* case where the judge and jury in a *United Kingdom* court sat for several days in Belarus at the sites of massacres during the Second World War.<sup>51</sup>

As described above in this sub-section, in many cases, non-governmental organizations and associations of victims will be able to provide the court with extensive assistance in locating witnesses, encouraging them to testify and providing necessary support.

If an uncooperative witness who is in the forum state asserts an immunity of his or her own state, that national immunity should not be recognized by the forum state in a trial involving crimes under international law (see discussion below of immunities in Chapter Fourteen, Section VIII). In addition, the territorial state can be urged to waive an immunity such as diplomatic immunity in the rare case when the witness is an ambassador accredited to the forum state or a head of state. Most countries recognize some privileges with regard to certain communications and documents, such as the confidentiality of lawyer-client communications concerning past actions and memoranda on legal strategy. However, to the extent that the witness asserts a privilege under his or her national law, the scope of that privilege, when crimes under international law are involved, should be measured in accordance with international standards. States should build on the work which has been done by the Preparatory Commission for the International Criminal Court with respect to privileges and develop international standards to govern privileges.<sup>52</sup> If perjury or other offences against the administration of justice by a witness are discovered while the witness is in the forum state, it will normally be possible for the judicial system to take effective action. If the offence is discovered after the departure of the witness, however, the ability of the forum state to

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<sup>50</sup> Fati Mansour, *Le maire rwandais jugé à Lausanne a bien commis des crimes de guerre*, *Le Temps*, 16 September 1999; Kamminga, *Final ILA Report*, n. 34, 24, 28; Damien Vandermeersch, *La répression en droit belge des crimes de droit international*, 68 *Int' Rev. Pen. L.* 1093, 1121-1122 (1997).

<sup>51</sup> See *National Decisions: UK: The Sawoniuk case*, 2 *Y.B. Hum. L.* (1999) (forthcoming). Military courts of the United Kingdom had always been able to sit overseas. A Scottish civilian court sat in the Netherlands to conduct the Lockerbie trial, although it was exercising territorial jurisdiction, based on a crime committed on an aircraft over Scotland, and the circumstances are probably unique.

<sup>52</sup> Report of the Preparatory Commission for the International Criminal Court, Addendum: Finalized Draft of the Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/INF/3/Add.1, Rule 73 (Privileged communications and information).

take effective measures will be limited and largely depend on the existence of bilateral or multilateral extradition agreements. States should build on the work which has been done by the Preparatory Commission in drafting rules concerning offences against the administration of justice to improve the existing arrangements among states.<sup>53</sup>

### **G. Difficulties concerning documentary and physical evidence**

There are a number of problems associated with documentary and physical evidence. These include authentication of documents, transport of physical evidence out of the state, excavation of graves, claims of national security and imbalances in power to obtain evidence between the prosecution and defence. Each of these problems can be surmounted in individual cases. However, it would be useful for states to adopt a multilateral treaty open to all states which would facilitate state cooperation with respect to mutual legal assistance in the investigation and prosecution of crimes under international law.

- ***Authentication of documents.*** In most cases where the investigating or prosecuting state and the requested state have a mutual legal assistance treaty or agreement, authentication of a document should pose few problems.
- ***Restrictions on export of items.*** Most states will have legal or regulatory prohibitions or limitations on the export of items such as weapons, military vehicles, bodies and chemicals, all of which could be crucial evidence in a criminal case. However, the experience of the Yugoslavia and Rwanda Tribunals, as well as of national courts in transnational crimes, such as drug trafficking, have shown that these problems can usually be resolved.
- ***Excavation of grave sites and other searches.*** In many states, it will not be possible to conduct excavation of grave sites and forensic examinations of bodies or searches of buildings without local permission. In cases where permission is granted, it may be possible to do so only by using local police or acting under their supervision. Nevertheless, these difficulties should not be overestimated. For example, even when the executive authorities in a state may be uncooperative, judicial authorities may be more willing to cooperate. In addition, alternative methods of investigation may be available, particularly in large-scale crimes. For example, satellite photos may be used to confirm that the site of an alleged massacre was dug up shortly after the event and recovered in a manner consistent with the account of a witness. However, states will need to improve the existing framework of mutual legal assistance with respect to crimes under international law.

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<sup>53</sup> *Ibid.*, Rules 162 to 172 (Offences and misconduct against the Court).



- ***National security evidence.*** Given the nature of the crimes, they will often involve matters of military strategy and tactics which will be related to national security. Nevertheless, national courts have been able to devise systems for trying cases involving the most sensitive information related to national security, such as espionage, to protect such information. They have even been able to do so with regard to persons who are suspected of carrying out their crimes in more than one state. Similarly, international courts have been able to do so as well, as in the *Blaski* case in the Yugoslavia Tribunal, and under Article 72 of the Rome Statute. To the extent that a territorial state (or other state where evidence is located) is cooperative with the forum state, it should be possible to reach an arrangement that fulfils the international duty to bring those responsible for crimes under international law to justice while taking account of legitimate national concerns regarding security; to the extent that the state where the evidence is located is uncooperative, the issue of national security will be no different from dozens of other problems.
- ***Imbalance in powers of prosecution and defence.*** In some cases, the prosecution will have greater resources and influence with authorities in other states than the defence with respect to travel, experts and cooperation, especially in when the evidence is located in another state or in the hands of a transitional government. In other situations, particularly with respect to evidence in the territorial state when the government is sympathetic to the accused, it may well be more difficult for the prosecution than the defence to locate evidence. The prosecution will not necessarily have the same powers and influence as international prosecutors. Within the limits required by due process, courts may fashion remedies to address the lack of cooperation, such as drawing inferences or dropping certain charges.

## VI. Absence or inadequacy of extradition agreements

There are many grounds in extradition agreements and legislation for requested states to refuse extradition.<sup>54</sup> Most of these grounds of refusal, including the prohibition of the extradition of nationals, double criminality requirements, advanced age, the political offence exception, *ne bis in idem*, statutes of limitation and general discretion, are not appropriate grounds when the crimes are crimes under international law which the requesting state is seeking to prosecute on behalf of the international community.<sup>55</sup>

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<sup>54</sup> For a survey of these grounds for refusal, see Amnesty International, *The international criminal court: Making the right choices - Part III, supra*, n. 36, Section IV.B.2. See also Broomhall, *supra*, n. 36, 414-415 (making recommendations to remedy flaws in the existing legal framework for extradition).

<sup>55</sup> The prohibition against the extradition of nationals (as opposed to foreigners) and the requirement of double criminality are rooted in concerns about the application of foreign national law, which may be different from national law and embody different values. However, this concern is irrelevant when the requesting state is exercising jurisdiction over crimes under international law. National courts have generally rejected claims that advanced age in and of itself is an appropriate ground

Other grounds for refusing extradition are factors which, as a general rule, should be considered by the courts (as opposed to the executive authorities) in the *requesting* - rather than the *requested* - state, such as fitness to stand trial. When these decisions, as in the *Pinochet* case, are left to *political officials* in the *requested state* to decide in secret on the basis of discretion, instead of the *courts* of the *requesting state*, in a fair and open process on the basis of legal criteria, the public perception of the fairness and integrity of the proceedings is undermined. In the absence of an international monitoring mechanism for extradition, a requested state should be able to refuse to extradite a person to a state which it considers would not be able to afford the suspect a fair trial or might impose the death penalty or other cruel, inhuman or degrading punishments. However, such decisions are best decided by a court, on the basis of law, rather than by a politician, on the basis of discretion.

## **VII. Amnesties and similar national measures of impunity**

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for not trying a person suspected of crimes under international law. The political offence exception does not apply to crimes under international law. The principle of *ne bis in idem* is limited to a prohibition of a second trial for the same conduct in the same jurisdiction. Statutes of limitation are not permissible for genocide, crimes against humanity, war crimes and certain other crimes under international law. It would defeat the goals of international justice if national authorities could, in their discretion, shield persons in their territory suspected of crimes under international law from international justice.

A number of states have given those responsible for war crimes, crimes against humanity, genocide, torture, extrajudicial executions and enforced disappearances impunity through amnesties, pardons and similar measures. However, national amnesties, pardons and similar national measures of impunity for the worst imaginable crimes not only have no place in an international system of justice, but also are prohibited under international law.<sup>56</sup> They are also inconsistent with the duty to bring to justice those responsible for such violations recognized in the Preamble to the Rome Statute.<sup>57</sup> They deny the rights of victims to justice.<sup>58</sup> Therefore, as explained in more detail below, such steps cannot

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<sup>56</sup> See generally Kai Ambos, *Impunity and International Criminal Law: A Case Study on Colombia, Peru, Bolivia, Chile and Argentina*, 18 Hum. Rts L.J. 1, 7 (1997); Douglass Cassel, *La Lucha Contra la Impunidad ante el Sistema Interamericano de Derechos Humanos*, in Martin Abregú & Juan Mendez, eds, *Libro Homenaje a Emilio Mignone* (San José, Costa Rica: Inter-American Institute of Human Rights 2001) (forthcoming); \_\_\_\_\_, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 L. & Cont. Prob. 191 (1996) [page proofs]; Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537 (1991); Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59 L. & Cont. Prob. 87 (1996) [page proofs]; Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law* (Oxford: Oxford University Press 1995); Simma & Paulus, *supra*, n.8, 315. For a minority dissenting view, see Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 Corn. Int'l L. J. 507 (1999); \_\_\_\_\_, *Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?*, 31 Tex. Int'l L. J. (1996).

<sup>57</sup> The states parties to the Rome Statute affirm “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”, determine “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes” and recall “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. Rome Statute, Preamble, paras 4 to 6.

<sup>58</sup> See UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 of 29 November 1985, Principle 4 (“Victims . . . are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.”). See, also, Articles 25 and 18 of the Joint Principles. Article 25 (Restrictions and Other Measures Relating to Amnesty) of those principles provides that “Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds: (a) The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations referred to in principle 18[.]” The first paragraph of Principle 18 (Duties of States with Regard to the Administration of Justice) recalls the obligation of states to bring to justice those responsible for such violations: “Impunity arises from a failure by States to meet their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such

prevent the courts of another state or an international criminal court from investigating and prosecuting persons suspected of such crimes. Indeed, for such reasons, Amnesty International has consistently opposed, without exception, amnesties, pardons and similar measures of impunity that prevent the emergence of the truth, a final judicial determination of guilt or innocence and satisfactory reparations to victims and their families.<sup>59</sup>

#### **A. Rejection of amnesties at the international level**

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violations.” In a similar vein, the Van Boven-Bassiouni Principles spell out the duty to prosecute (Principle 4) and the right of victims to “[j]udicial or administrative sanctions against persons responsible for the violations” (Principle 25 (f)), without any suggestion that an amnesty, pardon or similar measure of impunity would be permissible.

<sup>59</sup> See, for example, *Chile: Legal brief on the incompatibility of Chilean Decree Law N° 2191 of 1978 with international law - A document published jointly by Amnesty International and the International Commission of Jurists*, January 2001 (AI Index: AMR 22/002/01); *Sierra Leone: Ending impunity - an opportunity not to be missed*, July 2000 (AI Index: AFR 51/60/00); *Sierra Leone: Recommendations on the draft Statute of the Special Court*, November 2000 (AI Index: AFR 51/83/00); *Memorandum to the Select Committee on Justice [of South Africa]: Comments and Recommendations by Amnesty International on Promotion of National Unity and Reconciliation Bill*, 13 January 1995; *South Africa: No impunity for perpetrators of human rights abuses*, 29 July 1999 (AI Index: AFR 53/1099); *United Kingdom: The Pinochet case - universal jurisdiction and the absence of immunity for crimes against humanity*, January 1999 (AI Index: EUR 45/01/99).

Amnesties, pardons and similar measures of impunity have been rejected at the international level by the UN Secretary-General, the UN Security Council, the UN General Assembly, UN High Commissioner for Human Rights, the UN Commission on Human Rights, the Yugoslavia Tribunal, the Committee against Torture and the Human Rights Committee. In this regard, they have followed the lead of the 1993 World Conference on Human Rights, which stated that “[s]tates should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law.”<sup>60</sup>

### 1. The rejection of amnesties in Sierra Leone

The most striking example of the rejection of amnesties for crimes under international law at the international level is illustrated by the recent case of Sierra Leone. There, the *UN Secretary-General* concluded that “[t]he experience of Sierra Leone has confirmed that such amnesties do not bring about lasting peace and reconciliation.” In that situation, a peace agreement in July 1999 had given an amnesty for crimes under international law.<sup>61</sup> Shortly afterwards, on 30 July 1999, the Secretary-General commented on the amnesty provision of the peace agreement:

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<sup>60</sup> World Conference on Human Rights, Vienna Declaration and Programme of Action, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/23, 12 July 1993, para. 60.

<sup>61</sup> Article IX (PARDON AND AMNESTY) provided:

“1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.

2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.

3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.”

Sierra Leone peace accord, U.N. Doc. S/1999/777.

“The agreement provides for the pardon of Corporal Foday Sankoh and a complete amnesty for any crimes committed by members of the fighting forces during the conflict from March 1991 up until the date of the signing of the agreement . . . . I instructed my Special Representative to sign the agreement with the explicit proviso that the United Nations holds the understanding that the amnesty and pardon in article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”<sup>62</sup>

*The UN Security Council recalled the Secretary-General’s 30 July 1999 statement in August 2000 when it provided for the establishment of an international criminal tribunal for Sierra Leone, thus implicitly approving the action taken by the Secretary-General in disassociating the UN from the amnesty provisions.*<sup>63</sup>

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<sup>62</sup> Seventh Report of the Secretary-General on the United Nations, Observer Mission in Sierra Leone, U.N. Doc. S/1999/836, 30 July 1999, para. 7. Thus, the Secretary-General implicitly rejected the approach of the *UN Model Treaty on Extradition, which requires refusal of extradition if the person whose extradition is sought is immune from prosecution or punishment because of an amnesty, at least to the extent that the Model Treaty applies to crimes under international law. Indeed, as a footnote to Article 3 (e) indicates, states were concerned about the scope of this provision, and it suggests that “[s]ome countries may wish to make this an optional ground for refusal”.*

In the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000, para. 22 (footnote referring to Article 6 (5) of Protocol II omitted), the Secretary-General recalled that,

“[w]hile recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.”

In paragraph 24, he stated that

“[i]n the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:

‘An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 [crimes against humanity, violations of common Article 3 of the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law] of the present Statute shall not be a bar to prosecution.’

With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal jurisdiction of the Court within the pre-Lomé period has been removed.”

<sup>63</sup> The Security Council recalled that “the Special Representative of the Secretary-General

*The UN High Commissioner for Human Rights has stated in this context that she is*

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appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. . .". U.N. S.C. Res. 1315 (2000).

“particularly concerned . . . about the issue of amnesty laws. I stress that certain gross violations of human rights and international humanitarian law should not be subject to amnesties. When the United Nations faced the question of signing the Sierra Leone Peace Agreement to end atrocities in that country, the UN specified that the amnesty and pardon provisions in Article IX of the agreement would not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”<sup>64</sup>

The *UN Commission on Human Rights* agreed with the approach of the Secretary-General to the amnesty provisions in the Sierra Leone peace agreement and stated that it:

“[n]otes that the Special Representative of the Secretary-General entered a reservation, attached to his signature of the Lomé Agreement, that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law, and affirms that all persons who commit or authorize serious violations of human rights or international humanitarian law at any time are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice[.]”<sup>65</sup>

## 2. The rejection of amnesties in other situations

The *UN General Assembly* has opposed legislative and other measures of impunity with regard to crimes against humanity and war crimes.<sup>66</sup>

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<sup>64</sup> Mary Robinson, High Commissioner for Human Rights, *Forward*, in *The Princeton Principles on Universal Jurisdiction* 17 (Princeton, New Jersey: Program in Law and Public Affairs, Princeton University 2001).

<sup>65</sup> U.N. Doc. E/CN.4/RES/2000/24 of 18 April 2000, para. 2.

<sup>66</sup> *Principles of International Cooperation in the Detection, Arrest, Extradition*



National amnesties and pardons which prevent the emergence of the truth and accountability before the law would be a ground for the International Criminal Court to exercise its concurrent jurisdiction over crimes under Article 17 (2) (a) of the **Rome Statute**.<sup>67</sup> That article provides that in deciding whether a state is unwilling to exercise jurisdiction, the Court should determine whether “[t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court”.

A Trial Chamber of the **Yugoslavia Tribunal** in the *Furundzija* case stated:

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*and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, GA Res. 3074 (XXVIII) (1973), para. 8 (“States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.”).*

<sup>67</sup> As Kamminga has observed, “In the terms of Article 17 of the ICC Statute such amnesties [for political killings, torture and forced disappearances] could be an indication of ‘unwillingness or inability of the State genuinely to prosecute’; they would therefore not prevent the ICC from declaring a case inadmissible.” *Final ILA Report, supra*, n. 34, 15.

“It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition on torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, . . . would not be accorded international legal recognition.”<sup>68</sup>

The *Human Rights Committee* has expressed its concern about the incompatibility of amnesties in Argentina, El Salvador, France, Peru and Uruguay with the obligations of states parties under the International Covenant on Civil and Political Rights.<sup>69</sup>

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<sup>68</sup> *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T 10 (Trial Chamber 10 December 1998), para. 155.

<sup>69</sup> *The Committee has expressed its concern about various national amnesties for grave human rights violations. For example, it noted its “deep concern” over Uruguay’s Expiry Law, adopted in a popular referendum, preventing prosecution of police and military officials and requiring that pending prosecutions be dismissed, and it recommended that the law be amended to permit victims to have an effective remedy for human rights violations. Comments of the Human Rights Committee, Uruguay, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, U.N. Doc. CCPR/C/79/Add.19, 5 May 1993; Views of 19 July, 1994, Hugo Rodriguez, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (Uruguay). See also General Comment No. 20, U.N. Doc. No. CCPR/C/21/Rev.1/Add.3, 7 April 1992, para. 4, concerning torture.*

In addition to amnesties in Uruguay, it has criticized amnesties in **Argentina**: Observations of the Human Rights Committee - Argentina, U.N. Doc. CCPR/C/79/Add.46 (1995), *reprinted in* U.N. Doc. A/50/40 (1995), para. 146 (“ [T]he compromises made by the State party with respect to its authoritarian past, especially the Law of Due Obedience and Law of *Punto Final* and the presidential pardon of top military personnel, are inconsistent with the requirements of the Covenant.”), para. 153 (“The Committee reiterates its concern that Act 23,521 (Law of Due Obedience) and Act 23,492 (Law of *Punto Final*) deny effective remedy to victims of human rights violations, in violation of article 2, paragraphs 2 and 3, and article 9, paragraph 5, of the Covenant. The Committee is concerned that amnesties and pardons have impeded investigations into allegations of crimes committed by the armed forces and agents of national security services and have been applied even in cases where there exists significant evidence of such gross human rights violations as unlawful disappearances and detention of persons, including children. The Committee expresses concern that pardons and general amnesties may promote an atmosphere of impunity for perpetrators of human rights violations belonging to the security forces. Respect for human rights may be weakened by impunity for perpetrators of human rights violations.”); **Chile**: Concluding observations of the Human Rights Committee - Chile, U.N. Doc. CCPR/C/79/Add.104 (1999), para. 7 (“The Amnesty Decree Law, under which persons who committed offences between 11 September 1973 and 10 March 1978 are granted amnesty, prevents the State party from complying with its obligation under article 2, paragraph 3, to ensure an effective remedy to anyone whose rights and freedoms under the Covenant have been violated. The Committee reiterates the view expressed in its General Comment 20, that amnesty laws covering human rights violations are generally incompatible with the duty of the State party to investigate human rights violations, to guarantee freedom from such violations within its jurisdiction and to ensure that similar

violations do not occur in the future.”); **El Salvador:** Human Rights Committee - El Salvador, U.N. Doc. CCPR/C/79/Add.34, 21 September 1994, *reprinted in* U.N. Doc. A/49/40 (1994), para. 215 (“The Committee expresses grave concern over the adoption of the Amnesty Law, which prevents relevant investigation and punishment of perpetrators of past human rights violations and consequently precludes relevant compensation. It also seriously undermines efforts to re-establish respect for human rights in El Salvador and to prevent a recurrence of the massive human rights violations experienced in the past. Furthermore, failure to exclude violators from service in the Government, particularly in the military, the National Police and the judiciary, will seriously undermine the transition to peace and democracy.”); **France:** Observations of the Human Rights Committee - France, U.N. Doc. CCPR/C/79/Add.80, 4 August 1997, para. 13 (“The Committee is obliged to observe that the Amnesty Acts of November 1988 and January 1990 for New Caledonia are incompatible with the obligation of France to investigate alleged violations of human rights.”); **Haiti:** Comments by the Human Rights Committee - Haiti, U.N. Doc. CCPR/C/79/Add.49, 3 October 1995, *reprinted in* U.N. Doc. A/50/40 (1995), para. 230 (“The Committee expresses its concern about the effects of the Amnesty Act, agreed upon during the process which led to the return of the elected Government of Haiti. It is concerned that, despite the limitation of its scope to political crimes committed in connection with the coup d’état or during the past regime, the Amnesty Act might impede investigations into allegations of human rights violations, such as summary and extrajudicial executions, disappearances, torture and arbitrary arrests, rape and sexual assault, committed by the armed forces and agents of national security services. In this connection, the Committee wishes to point out that an amnesty in wide terms may promote an atmosphere of impunity for perpetrators of human rights violations and undermine efforts to re-establish respect for human rights in Haiti and to prevent a recurrence of the massive human rights violations experienced in the past.”); **Lebanon:** Concluding observations of the Human Rights Committee - Lebanon, U.N. Doc. CCPR/C/79/Add.78, 1 April 1997, para. 12 (“Such a sweeping amnesty may prevent the appropriate investigation and punishment of the perpetrators of past human rights violations, undermine efforts to establish respect for human rights, and constitute an impediment to efforts undertaken to consolidate democracy.”); **Peru:** Preliminary observations of the Human Rights Committee - Peru, U.N. Doc. CCPR/C/79/Add.67, 25 July 1996, para. 20; Concluding observations by the Human Rights Committee: Peru, U.N. Doc. CCPR/CO/70/PER, 15 November 2000, para. 9 (“The Committee deplores the fact that its recommendations on the 1995 amnesty laws have not been followed and reiterates that these laws are an obstacle to the investigation and punishment of the persons responsible for offences committed in the past, contrary to article 2 of the Covenant. The Committee is deeply concerned about recent information stating that the Government is sponsoring a new general amnesty act as a prerequisite for the holding of elections. The Committee again recommends that the State party should review and repeal the 1995 amnesty laws, which help create an atmosphere of impunity. The Committee urges the State party to refrain from adopting a new amnesty act.”).

The *Committee against Torture* has repeatedly criticized amnesties and recommended that they not apply to torture (see discussion below in Chapter Fourteen, Section VII.D).

### **B. Rejection at the regional level**

The *Inter-American Court of Human Rights* has found that amnesties in Honduras and Peru for crimes under international law violate the American Convention on Human Rights.<sup>70</sup> In the case of the Peruvian amnesty, the Court stated:

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<sup>70</sup> *Barrios Altos* Case, Inter-Amer. Ct. Hum. Rts, 20 March 2001 (Reparations)(not yet officially reported); *Loayza Tamayo* Case, Inter-Amer. Ct. Hum. Rts (Ser. C), Case No. 42, 27 November 1998 (Reparations), paras 165-171; *Castillo Paez* Case, Inter-Amer. Ct. Hum. Rts (Ser. C), Case No. 43, 27 November 1998 (Reparations), paras 98-108; *Velásquez Rodríguez Case*, Inter-Am. Ct. Hum. Rts (Ser. C), No. 4 (1988) (judgment), para. 174 (“The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”).

“In the Court’s judgment, the Amnesty Law enacted by Peru precludes the obligation to investigate and prevents access to justice. For these reasons, Peru’s argument that it cannot comply with the duty to investigate the facts that gave rise to the present Case must be rejected.”<sup>71</sup>

Similarly, the *Inter-American Commission on Human Rights* has found that have found that amnesties in Argentina, Chile, Colombia and Uruguay violate the Convention.<sup>72</sup> For example, in a case involving an amnesty by El Salvador, the Inter-American Commission, after reviewing its decisions on amnesties, stated:

“The IACHR has repeatedly stated that the application of amnesty laws that prevent access to justice in cases of serious human rights violations renders ineffective the obligation of states parties to respect the rights and freedoms recognized in the Convention and to guarantee their full and free exercise to all persons subject to their jurisdiction, without discrimination of any kind, as established in Article 1(1) of the American Convention. In fact, such laws remove the most effective measure for enforcing human rights, i.e., the prosecution and punishment of the violators.”<sup>73</sup>

### C. Rejection at the national level

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<sup>71</sup> *Loayza Tamayo Case*, *supra*, n. 69, para. 168.

<sup>72</sup> *Inter-American Commission on Human Rights* has repeatedly found that national amnesties violated human rights, including: **Argentina**: Report No. 24/92, 82nd Sess., OEA/ser.L/V/II.82, Doc. 24 (2 October 1992); Report N° 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina), 2 October 1992; **Chile**: Report N° 36/96, Case 10.843, 15 October 1996, para. 50; see also Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11.282, October 15, 1996, para. 50; Report N° 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705, April 7, 1998, para. 42 ; **Colombia**: Third Report on the Human Rights Situation in Colombia, OAS Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, para. 345; **El Salvador**: Report No. 26/92, 82nd Sess., OEA/ser.L/V/II.82, 24 September 1992; Report N° 136/99, Case 10.488 Ignacio Ellacuría S.J. et al., 22 December 1999, para. 200; Report N° 1/99, Case 10.480 Lucio Parada Cea et al., January 27 1999, para. 107; Report N° 26/92, case 10.287 (*Las Hojas massacre*), 24 September 1992, para. 6; **Uruguay**: Report No. 29/92, 82nd Sess., OEA/ser.L/V/II.82, Doc. 25 (2 October 1992); Report N° 29, 1992.

<sup>73</sup> Report N° 136/99, Case 10.488, *Ignacio Ellacuría S.J. et al.*, 22 December 1999, para. 200 (footnote omitted).

National legislation and courts have interpreted international law the same way. In particular, they have refused to recognize amnesties of foreign courts for crimes under international law. *Allied Control Council Law No. 10* provided that national amnesties for crimes against peace, war crimes and crimes against humanity could not bar prosecutions by the national military tribunals established by the Allies.<sup>74</sup> Indeed, the *House of Lords* permitted the Magistrate's Court to determine whether the extradition of the former President of Chile could proceed despite a national amnesty and a similar measure of impunity. A *trial court in Argentina* held that amnesties for crimes against humanity violated international law as incorporated in Argentine law.<sup>75</sup> A French investigating judge (*juge d'instruction*) "concluded that Chile's amnesty law had not deprived French courts of their jurisdiction to prosecute crimes committed against French citizens."<sup>76</sup> Another French judge has held that a Mauritanian amnesty which covered acts of torture had no legal effect in France and would not be recognized.<sup>77</sup> Some *peace agreements* have ruled out amnesties for violations of crimes under international law.<sup>78</sup>

#### **D. Prohibition for specific crimes**

As outlined below, this prohibition applies to war crimes, crimes against humanity, genocide, torture, extrajudicial executions, enforced disappearances and other grave violations of human rights.

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<sup>74</sup> Article II (5) of *Allied Control Council Law No. 10*, *supra*, n. 5, provided that no "immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment" for crimes against peace, war crimes or crimes against humanity.

<sup>75</sup> *Simon and Del Cerro* Case, Order of 6 March 2001, Case No. 8686/2000, *Juzgado Nacional en lo Criminal y Correccional Federal No. 4, Buenos Aires*. The order has been appealed to the Supreme Court.

<sup>76</sup> Brigitte Stern, *International Decisions: In re Pinochet - Tribunal de grande instance (Paris)*, 93 Am. J. Int'l L. 696, 699 (1999) (describing the rationale of the order in the case, which is not publicly available). However, in a recent case, a French court held that allegations of war crimes, including torture, involving a French general in Algeria could not be investigated because they were covered by a French amnesty law of 31 July 1968. *Fanck Johannès, Aussaresses : ouverture d'une enquête pour "apologie de crimes de guerre"*, *Le Monde*, 17 mai 2001. This decision is likely to be appealed.

<sup>77</sup> *Ely Ould Dah*, *Ordonnance, Tribunal de grande instance de Montpellier, N° du parquet : 99/14445, N° Instruction : 4/99/48, 25 mai 2001, § 4* (for the text of this portion of the decision, see Chapter Ten, Section II).

<sup>78</sup> *See, for example*, General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, Annex 7, Art. VI, 35, Int. Leg. Mat. 75, 118 (1996) (Dayton/Paris Peace Agreement) ("Any returning refugee or displaced person charged with a crime, other than a serious violation of international humanitarian law . . . or a common crime unrelated to the conflict, shall upon return enjoy an amnesty.").

**War crimes.** National amnesties and pardons which prevent the emergence of the truth and accountability for war crimes in international and non-international armed conflict are inconsistent with the duty to bring to justice those responsible for such crimes. Each state party to the Geneva Conventions of 1949 undertakes “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” of the Conventions.<sup>79</sup> Each state party is also under an obligation to bring such persons to justice in its own courts, to extradite them to another state party willing and able to do so or to transfer them to an international criminal court.<sup>80</sup> These obligations are *absolute* and no state may excuse another state from fulfilling them.<sup>81</sup> Moreover, states parties are required to repress *all* breaches of the Geneva Conventions, including those taking place in non-international armed conflict, not just grave breaches.<sup>82</sup> This is part of the fundamental undertaking by

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<sup>79</sup> First Geneva Convention, Art. 49, para. 1; Second Geneva Convention, Art. 50, para. 1; Third Geneva Convention, Art. 129, para. 1; Fourth Geneva Convention, Art. 146, para. 1.

<sup>80</sup> First Geneva Convention, Art. 49, para. 2; Second Geneva Convention, Art. 50, para. 2; Third Geneva Convention, Art. 129, para. 2; Fourth Geneva Convention, Art. 146, para. 2. The ICRC Commentary makes clear that the drafters of the Geneva Conventions envisaged that states could satisfy their duty to bring to justice those responsible for grave breaches by transferring suspects to an international criminal tribunal: “[T]here is nothing in the paragraph (First Geneva Convention, Art. 49, para. 2) to exclude the handing over of the accused to an international penal tribunal, the competence of which is recognized by the Contracting Parties. On this point the Diplomatic Conference declined expressly to take any decision which might hamper future developments of international law”. ICRC, *1 Commentary on the Geneva Conventions of 12 August 1949* (1952), p. 366.

<sup>81</sup> The common article provides: “No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave] breaches”. First Geneva Convention, Art. 51; Second Geneva Convention, Art. 52; Third Geneva Convention, Art. 131; Fourth Geneva Convention, Art. 148. The official commentary by the ICRC makes clear that this common provision removes any doubt that the duty to prosecute and punish the authors of grave breaches is “absolute”. ICRC, *1 Commentary on the Geneva Conventions of 12 August 1949*, 373 (1952).

<sup>82</sup> Under an article common to all four conventions, each state party is obliged to “take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches”. First Geneva Convention, Art. 49, para. 3; Second Geneva Convention, Art. 50, para. 3; Third Geneva Convention, Art. 129, para. 3; Fourth Geneva Convention, Art. 146, para. 3. States are expected to

each state party in common Article 1 of the Geneva Conventions “to respect and to ensure respect for the present Convention in all circumstances”. A national amnesty or pardon for breaches of the Conventions or the Protocols which are crimes under international law would violate this undertaking.<sup>83</sup>

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*enact legislation providing for punishment of such breaches, with appropriate penalties, to be imposed after judicial or administrative proceedings. ICRC, I Commentary on the Geneva Conventions of 12 August 1949, 368 (1952).*

<sup>83</sup> Article 6 (5) of Protocol II provides that “[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”. However, as Amnesty International has repeatedly pointed out to negotiators of peace agreements, such as the one in Sierra Leone in 1999 (*see* Amnesty International, *Sierra Leone: Ending impunity - an opportunity not to be missed*, July 2000 (AI Index: AFR 51/60/00)), *it is clear that this provision was intended to apply to political crimes, such as treason, or ordinary crimes, but not to serious violations of humanitarian law.*

*Commentators subsequently have confirmed this interpretation. According to Naomi Roht-Arriaza, “the placement of the article at the end of a section on penal prosecutions and the language on internees and detainees suggests the drafters were primarily interested in reintegrating insurgents into national life”. Roht-Arriaza, *Combating Impunity*, *supra*, n. 55, 91. Douglass Cassel has commented that “Article 6 (5) seeks merely to encourage amnesty for combat activities otherwise subject to prosecution as violations of the criminal laws of the states in which they take place. It is not meant to support amnesties for violations of international humanitarian law.” Cassel, *Lessons from the Americas*, *supra*, n. 55, 212.*

*An authoritative interpretation by the ICRC communicated in 1995 to the Prosecutor of the Yugoslavia and Rwanda Tribunals in 1995 and reiterated on 15 April 1997 states:*

*“Article 6 (5) of Protocol II is the only and very limited equivalent in the law of non-international armed conflict of what is known in the law of international armed conflict as ‘combatant immunity’, i.e., the fact that a combatant may not be punished for acts of hostility, including killing enemy combatants, as long as he respected international humanitarian law, and that he has to be repatriated at the end of active hostilities. In non-international armed conflicts, no such principle exists, and those who fight may be punished, under national legislation, for the mere fact of having fought, even if they respected international humanitarian law. The ‘travaux préparatoires’ of 6 (5) indicate that this provision aims at encouraging amnesty, i.e., a sort of release at the end of hostilities. It does not aim at an amnesty for those having violated international humanitarian law.”*

*Letter from Dr. Toni Pfanner, Head of the Legal Division, ICRC Headquarters, Geneva, to Douglass Cassel, quoted in *Lessons from the Americas*, *supra*, n. 55, 212.*



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The Inter-American Commission on Human Rights has also taken the position that Article 6 (5) of Protocol II does not permit amnesties for violations of international humanitarian law. Inter-Amer. Comm'n Hum. Rts, Third Report on the Human Rights Situation in Colombia, OAS Doc. OEA/Ser.L/V/II.102 Doct. 9 rev.1, 26 February 1999, para. 345.

There is increasing recognition by scholars, intergovernmental organization experts and national courts that states have a duty to prosecute or extradite persons responsible for *crimes against humanity*.<sup>84</sup>

**Genocide.** National amnesties and pardons which prevent the emergence of the truth and accountability for genocide are inconsistent with the duty to punish persons who have committed this crime. Every state party to the Genocide Convention undertakes “to prevent and to punish” genocide.<sup>85</sup> Article III of that convention provides that genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide “shall be punishable”. Under Article V, states parties undertake to enact the necessary legislation, including effective penalties, for these crimes.<sup>86</sup> Article VI requires states parties to bring those responsible for genocide to justice themselves or to transfer them to an international criminal court.<sup>87</sup> There are no exceptions.

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<sup>84</sup> See, for example, M. Cherif Bassiouni, *Crimes against Humanity in International Law* 492, 500-501 (Dordrecht: Martinus Nijhoff Publishers 1992); Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 7 *Leiden J. Int'l L.* 5, 8 (1994); Orentlicher, *supra*, n. 55, 2585, 2593; Joinet Principles, Arts 25 and 18; Van Boven-Bassiouni Principles, Principles 4 and 25 (f); *Simon and Del Cerro Case*, *supra*, n. 74.

<sup>85</sup> Genocide Convention, Art. I.

<sup>86</sup> *Id.*, Art. V (“The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.”).

<sup>87</sup> *Id.*, Art. VI (“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”).

**Torture.** The Convention against Torture imposes an absolute duty on each state party when a person suspected of torture, attempt to torture, complicity in torture or participation in torture is found in its territory, if it does not extradite the suspect, to “submit the case to its competent authorities for the purpose of prosecution”.<sup>88</sup> It does not provide for any exceptions to this absolute duty. The Committee against Torture has criticized amnesties in several countries, including *Azerbaijan, Croatia, Kyrgyzstan* and *Peru*, and recommended that they not apply to torture.<sup>89</sup> Similarly, the Human Rights Committee has criticized the use of amnesties for torture.<sup>90</sup>

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<sup>88</sup> Convention against Torture, Art. 7 (1). *That provision requires every state party “in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 [an act of torture] is found shall in the cases contemplated in article 5 [providing for territorial, active and passive personality and universal jurisdiction], if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution”.* There are no exceptions.

<sup>89</sup> Conclusions and recommendations of the Committee against Torture concerning the initial report of Azerbaijan, U.N. Doc. A/55/44, 17 November 1999, para. 68 (3) (expressing concern about “[t]he use of amnesty laws that might extend to the crime of torture” and para. 69 (c) (recommending that, “[i]n order to ensure that perpetrators of torture do not enjoy impunity, the State party . . . ensure that amnesty laws exclude torture from their reach”); Conclusions and recommendations concerning the second periodic report of Croatia, U.N. Doc. A/54/44, 17 November 1998, para. (expressing concern that “the Amnesty Act adopted in 1996 is applicable to a number of offences characterized as acts of torture or other cruel, inhuman or degrading treatment or punishment within the meaning of the Convention”); Conclusions and recommendations of the Committee against Torture concerning the initial report of Kyrgyzstan, U.N. Doc. A/55/44, 18 November 1999, para.74 (e) (expressing concern about “[t]he use of amnesty laws that might extend to torture in some cases”) and para. 75 (c) (recommending that, “[i]n order to ensure that the perpetrators of torture and ill-treatment do not enjoy impunity, the State party . . . ensure that amnesty laws exclude torture from their reach”); Conclusions and recommendations of the Committee against Torture concerning the third periodic report of Peru, U.N. Doc. A/55/44, 15 November 1999, para. 59 (g) (expressing concern about “[t]he use of, in particular, the amnesty laws which preclude prosecution of alleged torturers who must, according to articles 4, 5 and 12 of the Convention, be investigated and prosecuted where appropriate”) and para. 61 (d) (recommending that “[a]mnesty laws should exclude torture from their reach”).

<sup>90</sup> *The Human Rights Committee has stated, with regard to torture, that “amnesties are generally incompatible” with the duty of states parties under Articles 2 (3) (guaranteeing the right to a remedy) and Article 7 of the ICCPR (prohibiting torture), but it did not suggest any circumstances when an amnesty prior to a final judgment by a court for a breach of the non-derogable prohibition of torture would be compatible with Article 7. General Comment No. 20, U.N. Doc. No. CCPR/C/21/Rev.1./Add.3, 7 April 1992, para. 4.*

***Extrajudicial executions.*** The UN General Assembly stated more than a decade ago that governments had a duty to bring persons suspected of extrajudicial executions to justice.<sup>91</sup> It did not spell out any exceptions.

***Enforced disappearance of persons.*** The UN General Assembly expressly declared in 1992 that no one shall benefit from any amnesty or similar measure of impunity for enforced disappearances.<sup>92</sup> There are no exceptions.

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<sup>91</sup> Principle 18 of the UN Principles on the Effective Prevention and Punishment of Extra-legal, Arbitrary and Summary Executions provides: "Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed."

<sup>92</sup> Article 18 (1) of the UN Declaration on the Protection of All Persons from Enforced Disappearance, U.N. G.A. Res. 47/133, 18 December 1992, provides that persons who are alleged to have committed forced disappearances "shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction".

***Violence against women.*** The 1994 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women provides that states have duties to investigate and punish those who are responsible for violence against women.<sup>93</sup> It contains no provisions permitting amnesties or similar measures of impunity.

### VIII. Immunities

One obstacle to effective action to end impunity through universal jurisdiction has been the reluctance of states to respect the fundamental principle of international law that no official, no matter how high or how low, is immune with respect to crimes under international law such as war crimes, crimes against humanity, genocide and torture. Traditional immunities for heads of state, government officials and even diplomats were designed to protect officials abroad from civil suits and criminal prosecutions for ordinary crimes. They were not designed to give such officials suspected of crimes under international law immunity with respect to crimes under international law.

Indeed, these traditional rules were developed at a time when states were seen as absolutely sovereign and restrained only by rules of international law to which they gave their express or implied consent and when concepts of a reserved domain of internal affairs exempted from any external scrutiny for what governments did to their own people, even when the conduct today would constitute a war crime, crime against humanity, genocide or torture. However, at the dawn of a new millennium, after the two most costly wars in human history, the world is not the same place it was at the end of the 19<sup>th</sup> century when the rules of official immunity evolved. It is only in this broader context that the question whether any of the official immunities traditionally recognized in customary and conventional international law has any relevance to persons responsible for crimes that attack the very foundation of international law itself. A simple, mechanistic approach to this question is likely to lead national courts astray.

A careful examination of the value of the interests of states in facilitating the conduct diplomatic relations abroad by heads of state, government officials and diplomats and the imperative need to bring to justice those responsible for crimes against the international community and the fabric of international relations should lead to the conclusion that the requirements of international justice must prevail. As outlined below, the same rule should apply to all officials, whatever their rank, and the rule necessarily applies in national, as well as international, courts.

***The Nuremberg Charter and Judgment.*** The starting point is the fundamental rule of international law that official immunities do not bar individual criminal responsibility for crimes under international law, such as war crimes, crimes against humanity, genocide and torture. Since the adoption of the Nuremberg Charter, based on the precedent of the decision during the First World War to bring the Kaiser of Germany to justice, at a time when he was a serving head of state, it has been settled international law that official immunities do not bar

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<sup>93</sup> *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women*, OAS Doc. OEA/ser.L.V/II.92, Doc.31 rev.3 (1996), adopted 9 June 1994, entered into force 1995, Art. 7 (recognizing duties to pursue policies to punish and diligently to investigate and impose penalties for violence against women).

prosecution for crimes under international law. Article 7 of the Nuremberg Charter expressly provided: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." As Justice Robert Jackson, the United States Prosecutor at Nuremberg and one of the authors of the Charter, explained in his 1945 report to the President on the legal basis for the trial of persons accused of crimes against humanity and war crimes,

"Nor should such a defense be recognised as the obsolete doctrine that a head of State is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still 'under God and the law'".<sup>94</sup>

In its Judgment, the International Military Tribunal at Nuremberg declared: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".<sup>95</sup> The Nuremberg Tribunal went beyond the Charter by concluding that state immunities do not apply to crimes under international law:

*"It was submitted that . . . where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, [this contention] must be rejected. . . . The principle of international law, which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their*

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<sup>94</sup> Justice Robert H. Jackson, "Report to President Truman on the Legal Basis for Trial of War Criminals", 19 Temp. L.Q. 148. (1946).

<sup>95</sup> *Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) - Nuremberg 30<sup>th</sup> September and 1<sup>st</sup> October 1946*, 41 (Cmd. 6964, Misc. No. 12) (London: H.M.S.O. 1946).

official position in order to be freed from punishment in appropriate proceedings".<sup>96</sup>

The Nuremberg Tribunal made clear sovereign immunity of the state did not apply when the state authorized acts, such as crimes against humanity, which were "outside its competence under international law":

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<sup>96</sup> *Ibid.*, 41-42.

"[T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law".<sup>97</sup>

The Nuremberg Tribunal found that Karl Doenitz, was "active in waging aggressive war" from 1 to the surrender on 9 May 1945 as head of state of Germany, in part based on his order in that capacity to the Wehrmacht to continue the war in the East and he was convicted of Counts Two and Three of the indictment and sentenced to 10 year's imprisonment.<sup>98</sup>

*The Tokyo Charter and Tribunal.* Article 6 of the Charter of the International Military Tribunal for the Far East (1946) provided that the official position of the accused was not "sufficient to free such accused from responsibility for any crime with which he is charged". The Tokyo Tribunal reached a similar conclusion to that of the Nuremberg Tribunal when it declared that "[a] person guilty of such inhumanities cannot escape punishment on the plea that he or his government is not bound by any particular convention".<sup>99</sup> Although the Emperor of Japan was not charged with crimes against humanity, war crimes or crimes against peace by the Prosecutor of the Tokyo Tribunal, the decision not to prosecute him was not based on the belief

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<sup>97</sup> *Ibid.*, 42.

<sup>98</sup> *Ibid.*, 110, 131.

<sup>99</sup> B.V.A. Röling and Rüter, 2 *The Tokyo Judgment 1946-1948* (Amsterdam: University Press 1977).



that he was immune under international law as head of state, but was made "by the good grace of General Douglas MacArthur".<sup>100</sup>

***The consistent rejection of official immunities since the Second World War.*** The rejection of official immunities for crimes under international law has been consistent in every international instrument adopted on the subject. Article IV of the Convention for the Prevention and Punishment of the Crime of Genocide (1948); Principle III of the Principles of Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal (1950), Article 3 of the UN Draft Code of Offences against the Peace and Security of Mankind (1954), Article III of the Convention on the Suppression and Punishment of the Crime of Apartheid ("individuals . . . and representatives of a State"), Article 7 (2) of the 1993 Statute of the International Tribunal for the former Yugoslavia, Article 6 (2) of the 1994 Statute of the International Criminal Tribunal for Rwanda and Article 7 of the UN Draft Code of Crimes against the Peace and Security of Mankind adopted in 1996, as well as in Article 27 of the Statute for the International Criminal Court, adopted in Rome on 17 July 1998 by a vote of 120 in favour to only seven against, with 21 abstentions).

This rule applies to all officials, no matter how high or low, including serving and past heads of state, government ministers and even diplomats.

***The applicability of the rule in national courts.*** It is clear that this rule applies to national courts, as well as to international courts.

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<sup>100</sup> M. Cherif Bassiouni, *Crimes against Humanity*, *supra*, n.84,466; see also the view of B.V.A. Röling that the decision not to prosecute the Emperor was the result of a political, rather than a legal, decision by the American President, contrary to the wishes of Australia and the Soviet Union, in his book with Antonio Cassese, *The Tokyo Trial and Beyond* 40 (Cambridge: Polity Press 1994) (paperback edition).

First, incorporation in a statute of an international criminal court of a rule does not mean that the rule applies only to that court any more than any of the other principles of criminal responsibility or defences.

Second, nothing in the statutes of , which envisaged states continuing to play a major or primary role in prosecuting such crimes, suggests that those establishing the courts intended to reserve cases of officials for the international criminal courts. The Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, as well as the Rome Statute of the International Criminal Court, all envisage that states would continue to do the bulk of criminal investigations and prosecutions and did not establish separate rules of immunity for national courts to apply.

Third, international instruments have made clear that the rule against recognizing official immunities for crimes under international law applies just as strongly to criminal investigations and prosecutions in national courts as in international courts. For example, Allied Control Council Law No. 10, which governed national courts in Germany, included this rule. It expressly stated:

The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.”<sup>101</sup>

The International Law Commission included the rule of no official immunity in the 1954 Draft Code of Offences against the Peace and Security of Mankind and in the 1996 Draft Code of Crimes against the Peace and Security of Mankind, both of which were intended to be applied primarily by national courts. Article 3 of the 1954 Draft Code of Offences stated: “The fact that a person acted as Head of State or as responsible government official does not relieve him from responsibility for committing any of the offences defined in this Code”.<sup>102</sup> Article 7 of the 1996 Draft Code of Crimes provides: “The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.”<sup>103</sup>

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<sup>101</sup> Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January, 1946, 20 December 1945, Art. II (4) (a).

<sup>102</sup> Draft Code of Offences against the Peace and Security of Mankind, *in* Report of the International Law Commission (1954 ILC Report), 28 July 1954, 9 U.N. G.A.O.R. Supp. (No. 9) at 11, U.N. Doc. A/2693 (1954), Art. 3. The International Law Commission expressly stated that pending the establishment of an international criminal court, “a transitional measure might be adopted providing for the application of the code by national courts”. 1954 ILC Report, para. 58.

<sup>103</sup> Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eighth session 6 May-26 July 1996, 51 U.N. G.A.O.R. Supp. (No. 10), at 9, U.N. Doc. A/51/10 (1996).

Eminent international scholars have concluded that the principles of the Nuremberg Charter and Judgment, which include the principle that individuals notwithstanding their official position, even as head of state, are not immune for crimes against humanity, are part of international law.<sup>104</sup> Sir Arthur Watts, KCMG, Q.C., has concluded:

"The idea that individuals who commit international crimes are internationally accountable for them has become an accepted part of international law . . . . It can no longer be doubted that as a matter of general customary international law a Head of State will personally be liable to be called to account if there is sufficient evidence that he authorized or perpetrated such serious international crimes."<sup>105</sup>

The leading commentators on the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda have stated that "The Nuremberg precedent laid the foundation for the general recognition of the responsibility of government officials for crimes under international law notwithstanding their official position at the time of the criminal conduct."<sup>106</sup> They concluded that "[t]his fundamental principle is a cornerstone of individual responsibility for crimes under international law which by their very nature and magnitude usually require a degree of involvement on the part of high-level government officials."<sup>107</sup>

***No basis for different rules of official immunity in national courts.*** It does not make sense to have different rules of criminal responsibility depending on the happenstance of which court exercises jurisdiction. As noted above, one of the primary reasons for the rule permitting states to exercise universal jurisdiction over crimes under international law is that the absence of international criminal courts for many crimes, coupled with failure or refusal of territorial states to bring their own officials to justice, could lead to impunity if the national courts of other states could not exercise universal jurisdiction.

Which values should prevail?

- the interests of states in facilitating the conduct diplomatic relations abroad by heads of state, government officials and diplomats?

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<sup>104</sup> See Jennings & Watts, *supra*, 505, para. 148; Claude Lombois, *Droit pénal international* 142, 162 and 506 (Paris: Dalloz 1971); Georg Schwarzenberger, *2 International Law as Applied by International Courts and Tribunals* 508 (1968); see also André Huet & Renée Koering-Joulin, *Droit pénal international* 54-55 (Paris: Thémis 1994).

<sup>105</sup> Arthur Watts, *The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers*, 247-1 *Recueil des Cours* 9, 82-84 (1994).

<sup>106</sup> Virginia Morris & Michael P. Scharf, 1 *The International Criminal Tribunal for Rwanda* 246 (Irvington-on-Hudson, New York: Transnational Publishers, Inc. 1997).

<sup>107</sup> Morris & Scharf, *supra*, n. 106, 249.

- the imperative need to bring to justice those responsible for crimes against the international community and the fabric of international relations? The UN International Law Commission has explained why the rule that heads of state and public officials may be held criminally responsible when they commit crimes under international law is an essential part of the international legal system:

" . . . crimes against the peace and security of mankind often require the involvement of persons in positions of governmental authority who are capable of formulating plans or policies involving acts of exceptional gravity and magnitude. These crimes require the power to use or to authorize the use of the essential means of destruction and to mobilize the personnel required for carrying out these crimes. A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required for carrying out the crime, but also abuses the authority and power entrusted to him. He may, therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the [Draft Code of Crimes against the Peace and Security of Mankind] to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security."<sup>108</sup>

**Justice or convenience?** Assuming that a traditional immunity *ratione personae* were to apply to protect officials abroad from national prosecutions for crimes under international law, are national courts powerless? If states remain constrained by

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<sup>108</sup> 1996 Report of the International Law Commission, *supra*, 39.

traditional rules of immunity, how can they still further the course of international justice? Even under the traditional rules, both the host state and the sending state remain bound by other obligations to the international community.

***The duty of the host state.*** The host state must take certain preventive and repressive steps to further the course of justice. It would be consistent with international law and the imperative need to end impunity for crimes which undermine the international legal order to recognize that host states are under a duty not to facilitate immunity and must, therefore, engage in an in depth inquiry of all officials the sending state proposes to send before accepting the credentials of such officials. In any case where there are reasonable grounds to believe that the official intending to visit or to be received as a diplomat to request the sending state to conduct a prompt, thorough, independent and impartial investigation of the official before the host state accepts the official's credentials. It is axiomatic that acceptance of the presence of foreign officials in the nation's borders is always subject to the consent of the host state. It would undermine the fabric of international law to invite an official to visit when it was known - or there was reason to believe - that the official was likely to be responsible for crimes against the international community itself.

The responsibilities of the host state do not end there. If reasons to believe that the official is responsible for such crimes arise only after the arrival in the host state, then the host state should request the sending state to waive any immunity which may exist and to permit an investigation and - if there is sufficient admissible evidence - a prosecution in the host state, the sending state, a third state or an international criminal court

***The duty of the sending state.*** The sending state, of course, remains under a duty either to waive any official immunity or to investigate and - if there is sufficient admissible evidence - to prosecute the official itself or to permit another state or an international criminal court to do so. Therefore, it is appropriate for the sending state to accede to the above requests. The inconvenience in choice of representation abroad is far out-weighed by the need to ensure justice.

## **IX. Ineffective international monitoring**

One of the weaknesses in the current international system of justice regarding universal jurisdiction is that there is no effective monitoring at the international level of state enforcement of international criminal law. The Yugoslavia and Rwanda Tribunals will, to some extent, monitor investigations and prosecutions by national courts and ask them to defer proceedings if they are unfair or shams. The International Criminal Court will act pursuant to Article 17 of the Rome Statute when states are unable or unwilling genuinely to investigate or prosecute genocide, crimes against humanity and war crimes, but it will not generally monitor performance of states in enforcing international criminal law.

With regard to torture, the Committee against Torture is charged with monitoring the implementation by states parties of the Convention against Torture, including Articles 5, 6 and 7. However, the Committee has not been consistent in this regard and rarely addresses the failure of states to enact legislation providing for universal jurisdiction or to

amend ineffective legislation, although it has usually discussed questions related to enforcement.

Perhaps, if the Committee were to ensure that it addressed the question of universal jurisdiction in every examination of a state report and recommended to states in every case when they had no legislation or ineffective legislation that they comply with their obligations under Article 5 and when they failed to enforce such legislation that they comply with their obligations under Articles 6 and 7, states would take their responsibilities under the Convention more seriously. Moreover, states that enacted effective legislation and enforced it are more likely to extend the scope of the legislation to other crimes. It would also be helpful if the UN Special Rapporteur ensured that the annual report to the Commission on Human Rights include information with respect to each country on the extent to which they permit their courts to exercise universal jurisdiction.