ENDING IMPUNITY:

DEVELOPING AND IMPLEMENTING A GLOBAL ACTION PLAN USING UNIVERSAL JURISDICTION

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INTRODUCTION

"Voices that denied the need for justice seem to have disappeared. There is now growing support for the idea that justice must be factored into post-conflict strategies in order for peace to be sustainable."

Secretary-General Ban Ki-moon, 26 September 2009[1]

This brief report is published on the eve of the discussion on universal jurisdiction in the Sixth Committee of the United Nations (UN) General Assembly which is scheduled to begin on 20 October 2009. In the report, Amnesty International urges the Sixth Committee to begin to consider how the UN, international criminal courts, regional intergovernmental organizations and states could best begin to develop and implement, in close and transparent consultation with civil society, a global action plan to end impunity, including universal jurisdiction as one essential tool of international justice.[2] In this connection, Amnesty

[1] *Honouring Geneva Conventions, Secretary-General Says Debate 'No Longer between Peace and Justice but between Peace and What Kind of Justice',* U.N. Doc. SG/SM/12494, L/T/4417, HR/5002, 26 September 2009.

[2] The discussion was scheduled at the request of Tanzania on 29 June 2009 (A/63/237/Rev.1) on behalf of the Assembly of the African Union, which decided at its meeting in Sirte, Libya in July 2009, to request that the Chairperson of the African Union ensure that the question of supposed abuse of universal jurisdiction was "exhaustively discussed at the level of the United Nations Security Council and the General Assembly, as well as the European Union". Decision on the abuse of the principle of universal jurisdiction, Doc. Assembly/AU/11(XIII), Assembly/AU/Dec. 243(XIII) Rev.1, 3July 2009 (http://www.africa-union.org/root/au/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%20267%20(XIII)%20_E.PDF). In that decision, the African Union Assembly claimed "that there has been blatant abuse of the Principle of Universal Jurisdiction particularly by some non-African States",

International welcomes the statement on 14 October 2009 by African Union and European Union ministers, in which they "underlined their commitment to fighting impunity at the national, regional and international level in conformity with the principles of international law".[3]

In this report, the organization explains the critically important role that universal jurisdiction has been playing as part of the emerging international system of justice in denying safe havens, not just to perpetrators of terrorist crimes, but also to those responsible for the worst imaginable crimes in the world: genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances. It also outlines the essential elements that need to go into the development and implementation of a global action plan using universal jurisdiction.

Part I briefly identifies the scale of the impunity gap around the world. Part II first defines universal jurisdiction and the related, but distinct, principle *aut dedere aut judicare* (extradite or prosecute). Then it explains the part that universal jurisdiction can play in ending that impunity. The final section of this part seeks to dispel certain myths and correct various misconceptions concerning universal jurisdiction that have arisen among the general public, some members of the press, a few scholars and some governments.

In Part III, Amnesty International calls upon the UN, international criminal courts, regional intergovernmental organizations and all member states to develop, in close and transparent consultation with civil society at all stages, a comprehensive, long-term global action plan to end impunity for crimes under international law. That plan should include, as an essential component, strengthening existing universal jurisdiction legislation or enactment of new legislation and vigorous use of that legislation to investigate and, where there is sufficient admissible evidence, prosecute such crimes wherever and whenever they occur, regardless of the rank of the perpetrator. The effort to meet this crime threat to the entire international community should receive the same resources and commitment it devotes at the international and national levels to meet other global crime problems, such as terrorist crimes; organized crime, including drug trafficking, trafficking in persons and illegal trafficking in arms; and piracy.

The discussion in the Sixth Committee offers an opportunity for the legal advisers of foreign ministries to begin consideration of Amnesty International's recommendations and how best to implement them. This occasion is simply the starting point for a long-term effort to end

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expressed "its deep concern that indictments have continued to be issued in some European States against African leaders and personalities" and, therefore, called for the "immediate termination of all pending indictments", reiterated "its conviction on the need for an international regulatory body with competence to review and/or handle complaints or appeals arising out of abuse of the Principle of Universal Jurisdiction by individual States" and called upon "concerned States to respect International Law and particularly the immunity of state officials when applying the Principle of Universal Jurisdiction". *Ibid*. The UN General Assembly included the topic of universal jurisdiction on its agenda for the 61st session and then referred this legal issue to its Sixth Committee.

[3] 13th Africa-EU Ministerial Troika Meeting, Addis Ababa, 14 October 2009, p. 14 (http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/er/110576.pdf).

impunity for the worst possible crimes in the world.

I. THE GLOBAL IMPUNITY GAP

"Hopes for human rights rose with the end of the Cold War but were dashed by the explosion of ethnic conflicts and implosion of states that unleashed a spate of humanitarian emergencies, marked by massive and vicious human rights abuses. Meanwhile, corruption, poor governance, and widespread impunity for human rights violations reigned supreme in many parts of the world."

Amnesty International Report 2008[4]

Tens of millions of people around the globe have been the victims of genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances since the Second World War. Crimes under international law have been committed both by government officials and persons acting at their instigation or with their consent or acquiescence and by members of armed opposition groups. As described below, for more than six decades, only a handful of those responsible have been brought to justice in international courts or in national courts in the states where the crimes occurred or in the suspects' own states. However, as described below in Part II, this impunity gap has also been addressed by other states, acting as agents of the international community to enforce international law, exercising universal jurisdiction. The use of universal jurisdiction in turn has acted as a catalyst in territorial states and the suspects' states to encourage them to begin to fulfil their responsibilities to investigate and prosecute.

Impunity gap in Africa. In the past few decades, millions of Africans have been the victims of genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances. However, there is a huge impunity gap. Only a few states where the crimes occurred or whose nationals have committed crimes abroad have brought any of those responsible to justice, most notably the Central African Republic, Democratic Republic of the Congo, Ethiopia, Mali and Rwanda. In addition, three international criminal courts - the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court - all established as the result of initiatives and strong support from Africa, have tried only a handful of the tens of thousands of persons responsible for these crimes.[5]

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[4] Amnesty International, *Report 2008* (http://www.amnesty.org/en/library/asset/POL10/002/2008/en/c7caa9d9-2ca0-11dd-bcd2-ff211e7307f7/pol100022008eng.pdf).

[5] The most recent information published by the International Criminal Tribunal for Rwanda (ICTR) – which is being prematurely shut down - indicates that since it was established in November 1994, it has

Impunity gap in the Americas. Tens of thousands of people in the Americas were victims of extrajudicial executions, enforced disappearances and torture from the mid-1950sto the mid-1980s amounting to crimes against humanity, war crimes and, possibly, genocide. After decades of impunity in the states where the crimes occurred, a number of states, including Argentina, Bolivia, Chile, Peru and Suriname, have been investigating and prosecuting hundreds of the thousands of persons suspected of committing some of these crimes. Despite this progress, almost none of the perpetrators of these appalling crimes have ever been brought to justice. Moreover, in some states in the region, amnesties or statutory limitations for these crimes remain in effect.

Impunity gap in Asia and the Pacific. Millions of people have been murdered, "disappeared" or tortured in certain countries in Asia and the Pacific since the end of the Second World War. However, with rare exceptions, such as the internationalized courts in Cambodia and Timor Leste, the states where these crimes have occurred have not investigated and prosecuted any of these war crimes and crimes against humanity. Nevertheless, the Extraordinary Chambers in the Courts of Cambodia has limited the number of suspects to be tried to a handful and the Special Panels for Serious Crimes in Dili, Timor Leste was prematurely shut down, despite 400 outstanding arrest warrants. Moreover, in the past few weeks, executive officials in one state released a suspect without any statutory or judicial authorization and in another, a person suspected of grave breaches of the Geneva Conventions and torture was permitted to leave the state even though he was under investigation by the police.

Impunity gap in Europe. There is a similar impunity gap in Europe, as a result of failures by police and prosecutors in European states where such crimes have been committed or whose nationals are responsible for crimes abroad to bring to justice those responsible for such crimes committed in European countries, such as Bosnia and Herzegovina, Croatia, Montenegro, Russia (Chechnya) and Serbia. However, there have been a number of important steps in recent years to try a very limited number of suspects in some of these countries. The

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indicted Hutu extremists and their supporters for genocide, crimes against humanity and war crimes in connection with the murder, rape and other crimes of more than 800,000 people. As of 4 August 2008, the Trial Chamber had issued judgments regarding a total of 36 persons; two individual cases were referred to France for trial based on universal jurisdiction; trials were in progress against 19 persons; three persons were awaiting trial; one fugitive was under arrest and awaiting transfer to the ICTR; and the Appeals Chamber had issued judgments regarding 25 persons. The ICTR has not indicted any members of the Rwandan Patriotic Front. ICTR, Thirteenth Annual Report, U.N. Doc. A/63/209, S/2008/514, 4 August 2008.

Since the Special Court for Sierra Leone was established in 2002, it has indicted 13 of the thousands of persons responsible for war crimes and crimes against humanity since 1996. Eight of those indicted have been tried (three of them still in the appeal phase), one is on trial, three died and one is still at large. In the seven years since the Rome Statute of the International Criminal Court entered into force, the International Criminal Court has issued 13 arrest warrants and one summons with regard to three situations which were referred by the Central African Republic, Democratic Republic of the Congo and Uganda, and the situation in Darfur, which was referred by the Security Council. One person is on trial. Three named in arrest warrants are in detention awaiting trial and the rest remain at large. One appeared in response to the summons. International Criminal Court, Situations and cases (http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/).

International Criminal Tribunal for the former Yugoslavia – which is prematurely being shut down - has convicted more than 58 persons for such crimes,[6] and the seriously flawed international panels in Kosovo have tried some persons for such crimes,[7] but tens of thousands of other persons responsible for such crimes remain at large in their own states with complete impunity.[8]

Impunity gap in the Middle East. There have been countless victims of war crimes and crimes against humanity in the Middle East over the past few decades. Despite the establishment of one internationalized criminal court, the Special Tribunal for Lebanon, which is limited to trials of a handful of persons suspected of ordinary crimes connected to once incident rather than for crimes under international law, there have been almost no criminal investigations and prosecutions in the states where these crimes occurred or in the suspects' own states, at least that were consistent with the right to fair trial and excluding the death penalty. For example, most recently, the continuing failure of the authorities to conduct prompt, thorough, independent and impartial criminal investigations and, where there was sufficient admissible evidence, to prosecute such crimes committed in Gaza and neighbouring areas of Israel was recently documented by a United Nations mission.[9]

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[6] *Key Figures of ICTY Cases*, 14 September 2009 (http://www.icty.org/sections/TheCases/KeyFigures).

[7] Amnesty International, *Serbia (Kosovo): The challenge to fix a failed UN justice mission*, AI Index: EUR 70/001/2008, 29 January 2008 (http://www.amnesty.org/en/library/asset/EUR70/001/2008/en/fb7999b8-c298-11dc-ac4a-8d7763206e82/eur700012008eng.pdf).

[8] See, for example, Amnesty International, *'Whose justice?: The women of Bosnia and Herzegovina are still waiting*, AI Index: EUR 63/06/2009, 30 September 2009 (http://www.amnesty.org/en/library/asset/EUR63/006/2009/en/6330934f-d46e-4943-b32b-b3962095173a/eur630062009en.pdf); Morten Bergsmo, ed., *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Forum for International Criminal and Humanitarian Law, International Peace Research Institute, Oslo, No. 4, 2009 (http://www.prio.no/upload/FICHL/090326%20FICHL%20Publication%20Series%20No.%204%20(2009)%20(criteria).pdf); Morten Bergsmo, Kjetil Helvig, Ilia Utmelidze and Gorana Žagovec, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, Forum for International Criminal and Humanitarian Law, International Peace Institute, No. 3, 2009 (http://www.prio.no/Research-and-Publications/Publication/?oid=48595356).

[9] United Nations Fact Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009 (http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf).

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II. THE ROLE OF UNIVERSAL JURISDICTION IN ADDRESSING THE IMPUNITY GAP

"The jurisdiction to try crimes under international law is universal."

Attorney General of the State of Israel v. Eichmann, 36 Int'l L. Rep. 5, 26 (Dist. Ct. Jerusalem 12 December 1961)

One important tool to help close the impunity gap resulting from the limited jurisdiction and capacity of international criminal courts and the unwillingness or inability of states where the crimes occurred or the suspects' own states genuinely to investigate and, where there is sufficient admissible evidence, to prosecute is universal jurisdiction. The essential role of universal jurisdiction in enforcing international criminal law was recognized six decades ago when the drafters of the 1949 Geneva Conventions required each state party to those treaties to search for and bring to justice in its courts those responsible for grave breaches of those treaties. As documented in a September 2001 Amnesty International study of state practice at the international and national level in 125 countries, international law permits states to exercise universal jurisdiction over three types of crimes:

- ordinary crimes under national law (such as murder, assault, rape and abduction),
- crimes under national law of international concern (such as hijacking, hostage taking and terrorist bombing), and
- crimes under international law (such as genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearance).[10]

[10] Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002 – 018/2001, September 2001. Available at: www.amnesty.org and as CD-ROM.This 722-page study was the first global study of universal jurisdiction since the Harvard Research in International Law in 1935. This study is now being expanded to include universal civil jurisdiction and the results are being published in the *No safe haven* series of papers on each of the 192 UN member states. The first four papers have been published: Bulgaria (http://www.amnesty.org/en/library/info/EUR15/001/2009/en); Germany (http://www.amnesty.org/en/library/info/EUR23/003/2008/en); Spain (http://www.amnesty.org/es/library/info/EUR41/017/2008/es) (Spanish only); and Sweden

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The first section of Part II defines universal jurisdiction and the related, but distinct, *aut dedere aut judicare* (extradite or prosecute) principle. The second section then explains the role that universal jurisdiction can play in ending that impunity. The final section of this part seeks to dispel certain myths and correct various misconceptions concerning universal jurisdiction that have arisen among the general public, some members of the press, a few scholars and some governments.

A. THE DISTINCTION BETWEEN UNIVERSAL JURISDICTION AND THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*)

As Amnesty International explained in its September 2001 global study, universal jurisdiction and the obligation to extradite or prosecute (*aut dedere aut judicare*) are two related, but conceptually distinct, rules of international law.[11]

1. DEFINITION OF UNIVERSAL JURISDICTION

Universal jurisdiction is the *ability* of the court of any state to try persons for crimes committed outside its territory which are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests.[12] Sometimes this rule is called permissive universal jurisdiction. This rule is now indisputably part of customary international law, although it is also reflected in treaties, national legislation, police investigations, prosecutions and jurisprudence concerning crimes under international law, ordinary crimes of international concern and ordinary crimes under national law. When a national court is exercising jurisdiction over conduct amounting to crimes under international law or ordinary crimes of international concern committed abroad, as opposed to conduct simply amounting to ordinary crimes, the court is not seeking to enforce the forum state's own law or impose its own cultural values. Instead, it is acting as an agent of the international community enforcing international law.

2. DEFINITION OF THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*)

In contrast, the distinct, but closely related, principle *aut dedere aut judicare*, usually translated as "extradite or prosecute", is the obligation of a state where a person suspected of a crime is located, if it does not extradite that person, to submit the case to its competent authorities for the purpose of prosecution. The reason for that principle is that states must deny a safe haven to persons found in territories subject to their jurisdiction who are alleged to be responsible for crimes, including crimes under national law of international concern and crimes under international law. Instead, to avoid complicity in these crimes they must submit the cases of

(http://www.amnesty.org/en/library/info/EUR42/001/2009/en). A book analyzing the results of this expanded and updated study will be published at a future date.

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[11] Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/003/2001, September 2001, Ch. One (Definitions), p.11.

[12] The International Law Commission has adopted an identical approach in its working definition of universal jurisdiction. Preliminary report on the 'Obligation to extradite or prosecute ('aut dedere aut judicare')', A/CN.4/571, by Zdzislaw Galicki, Special Rapporteur, International Law Commission, Fifty-eighth session, Geneva, 1May-9 June and 3 July- 11 August 2006, para. 19. In addition, the same definition is followed in the International Bar Association's *Report of the Task Force on Extraterritorial Jurisdiction*, 2008, p.151 (http://www.ibanet.org/Publications/publications_books.aspx).

such persons to their prosecuting authorities for the purpose of prosecution, regardless of their nationality, unless such persons are extradited to another state or surrendered to an international criminal court. When the crime was allegedly committed abroad by a foreigner against another foreigner, the obligation to extradite or prosecute would necessarily include universal jurisdiction.[13] Of course, the *aut dedere aut judicare* principle can also apply to cases based on other forms of jurisdiction.

B. THE ROLE OF UNIVERSAL JURISDICTION IN ENDING IMPUNITY

Universal jurisdiction is simply one small, but essential, component of the emerging international system of justice, along with international and internationalized criminal courts and the courts in territorial states and the suspects' own states. However, universal jurisdiction can make at least three important contributions to international justice:

- Permit or require states to prosecute suspects who are in the state where the court is located or in territory subject to its jurisdiction (forum state) – or who are expected to be planning to visit - who are not being investigated or prosecuted genuinely elsewhere or who have not been investigated and prosecuted genuinely elsewhere;

- permit states to share the responsibility for investigating and prosecuting crimes under international law by transferring suspects from overburdened states to other

[13] The contemporary phrase *aut dedere aut judicare* literally means "either surrender (or deliver) or try (or judge)". However, it is usually described as an obligation to extradite or prosecute and that is how it is identified in this report. The phrase is a modern adaptation of the phrase *aut dedere aut punire* (surrender or punish) used by Hugo Grotius in *De Jure Belli ac Pacis,* Bk. II, Ch. XXI, §§ IV-VI, and, before him, by Covarruvias (1512-1574). The modern version is designed to be more consistent with the fundamental principle of criminal law of the presumption of innocence. The contemporary formulation does not fully reflect this principle, since the duty to prosecute - as opposed to the duty to investigate - arises only at the point when the prosecutors have sufficient admissible evidence. It would be better to use the phrase *aut dedere aut prosequi* (extradite or prosecute), as used by a leading commentator, although this phrase still does not capture all the nuances of the duty. *See generally* Marc Henzelin, *Le Principe de l'Universalité en Droit Pénal International: Droit et Obligation pour les États de Poursuivre et Juger selon le Principe de l'Universalité*, Bâle/Genève/Munich: Helbing & Lichtenhahn et Bruxelles: Bruylant 2000.

The principle is more accurately reflected in the obligation in provisions of various treaties, such as Article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requiring that the state where the suspect is located, if it does not extradite that person, to submit the case to its competent authorities for the purpose of prosecution. If the decision not to prosecute was taken on impermissible grounds which were inconsistent with the independence of the prosecutor or if the legal proceedings were taken with the purpose of shielding the suspect from criminal responsibility, the obligation to extradite would remain, unless the state where the person was located could obtain that evidence through mutual legal assistance, for example by video conferencing. Of course, if another state had sufficient admissible evidence, and the requested state where the suspect was located did not, the obligation to extradite would also still remain. The above history of these phrases and their rationales is based in part on accounts in a number of sources, including: M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* 3-5, (Dordrecht/Boston/London: Martinus Nijhoff Publishers 1995); M. Cherif Bassiouni, "The Sources and Content of International Criminal Law: A Theoretical Framework", in M. Cherif Bassiouni, ed., *International Criminal Law* 3, 5, Ardsley, New York: Transnational Publishers, Inc. 2nd. ed. 1999; Henri Donnedieu de Vabres, *Introduction à l'étude du droit pénal international: essai d'histoire et de critique sur la compétence criminelle dans les rapports avec l'étranger* 183, Paris: Sirey 1922; Henzelin, *supra,* 98.

states; and

- act as a catalyst for prosecutions in the courts located in the places where the crimes were committed or in the suspects' own states.

Prosecution of suspects found in the forum state or who are expected to visit. The oldest and most well-known contribution that universal jurisdiction can make to international justice is to investigate and, where there is sufficient admissible evidence, prosecute foreigners found in the forum state who have committed crimes abroad. Almost invariably, the very presence of the suspect in the forum state demonstrates that the territorial state or the suspect's own state is unable or unwilling genuinely to investigate or prosecute the suspect. This failure is usually confirmed when the territorial state or the suspect's own state fails to seek the suspect's extradition. Without the ability of forum state to investigate and prosecute, there is a risk of impunity. In addition, when the forum state requires presence of the suspect only a sufficient time before trial, it can open an investigation as soon as it receives information that the suspect may be planning to visit, thus increasing the chances that the forum state's law enforcement authorities can, if there is sufficient admissible evidence, issue an arrest warrant the moment the suspect enters that state.

Sharing the responsibility of investigation and prosecution. As noted in Part III of this paper, states are beginning to move toward the shared responsibility model of law enforcement with regard to global crime threats such as terrorist crimes, transnational organized crime and piracy, including through the use of universal jurisdiction. Amnesty International has been urging that states adopt a similar shared responsibility model with regard to genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearance.[14] One way that universal jurisdiction can form an important component of that shared responsibility approach is for states to accept, as they are increasingly doing in piracy cases, suspects arrested by other states with a view to opening criminal investigations and, where there is sufficient admissible evidence, to prosecute them, where the arresting states provide essential material and financial resources. Such an approach would permit universal jurisdiction to become a far more effective component of a global anti-impunity strategy by encouraging national law enforcement units to develop regional or international responses to regional or global crimes, without relying solely on the chance arrival of suspects in a forum state.

The catalytic impact of universal jurisdiction. Although national police and prosecutors have been able to investigate and prosecute only a relatively small number of the tens of thousands of persons suspected of crimes under international law in the past six decades using universal jurisdiction, these criminal investigations and prosecutions have had a catalytic effect on national investigations and prosecutions in the states where the crimes were committed or the suspects' own states far beyond the individual cases. For example,

[14] Amnesty International made this recommendation most recently at Interpol's Fourth International Expert Meeting on Genocide, War Crimes and Crimes against Humanity, held in Oslo, 18 to 20 May 2009. Amnesty International, *Universal jurisdiction: Improving the effectiveness of interstate cooperation in universal jurisdiction cases*, AI Index: IOR 53/004/2009, October 2009.

after the House of Lords determined that the United Kingdom could extradite former President Augusto Pinochet Ugarte of Chile to Spain, investigations and prosecutions became possible or dramatically increased in Argentina, Chile and elsewhere in the Southern Cone of South America of persons suspected of torture, extrajudicial executions and enforced disappearances. Similar results have been seen in other countries where the crimes occurred or the suspects' own countries after national police opened criminal investigations, judges issued arrest warrants or prosecutors commenced prosecutions based on universal jurisdiction, such as Chad and Guatemala.

C.KEY FEATURES OF THIS ESSENTIAL TOOL OF INTERNATIONAL JUSTICE

Explaining a few key features of universal jurisdiction may help to dispel a number of unfortunate myths and to correct certain misconceptions about universal jurisdiction have arisen in recent years. This section addresses five points:

(1) certain fundamental elements of universal jurisdiction;

(2) ratification by all states of treaties providing for universal jurisdiction;

(3) implementation of these treaties by most states in national law;

(4) the responsible exercise by police, prosecutors and judges in a significant number of countries on five continents with respect to crimes committed all over the world; and

(5) the ability of states to exercise universal civil jurisdiction and their use of this jurisdiction.

1. CERTAIN FUNDAMENTAL ELEMENTS OF UNIVERSAL JURISDICTION

Three fundamental elements of universal jurisdiction are of particular importance.

a. Under certain circumstances states are obliged to exercise universal jurisdiction

In some instances, states are not merely permitted, but *required*, to exercise universal jurisdiction to avoid becoming safe havens for criminals. As noted above, crimes under international law, such as genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances, just like ordinary crimes and crimes under national law of international concern, such as terrorist crimes, are subject to universal jurisdiction. In some instances, such as grave breaches of the 1949 Geneva Conventions and the 1977 Protocol; torture, as defined in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture); and enforced disappearances, as defined in the 2006 International Convention on the Protection of All Persons from Enforced Disappearance, treaties expressly require states to submit cases for the purpose of prosecution unless they extradite the suspects to another jurisdiction. However, there is growing support for the view that states may no longer provide a safe haven to persons in jurisdictions subject to their jurisdiction suspected of any crime under international law - no matter where the crime occurred. Instead it is increasingly recognized that they must, to avoid complicity in these crimes, either exercise jurisdiction over such persons, extradite them to states able and willing to do so in fair proceedings without the death penalty or surrender them to an international criminal court.

b. The state which opens a criminal investigation first should have priority, unless it is not able and willing to investigate and prosecute genuinely

In the unlikely event that more than one state claimed priority to investigate and prosecute a suspect for the same crimes under international law based on the same conduct (, the state with custody seeking first to exercise universal jurisdiction or any other extraterritorial principle would normally have a better claim than the territorial state or the suspect's own state to act on behalf of the international community.[15] The presence of the suspect outside the territorial state and the suspect's own state creates a presumption that the authorities of these states are not acting with due diligence to investigate and prosecute. Failure to transmit an extradition request would be compelling evidence that the territorial state was not serious.[16] Such priority for the forum state with custody of the suspect is subject to the proviso, however, that when it seeks to exercise its sovereignty, its judicial system must not conduct sham proceedings or proceedings designed to shield the suspect from justice. The forum state must be able and willing to investigate and prosecute in accordance with international law and standards for fair trial without the death penalty or other cruel, inhuman or degrading treatment or punishment.

c. States acting as agents of the international community can act when a foreign trial has been a sham or unfair

As with most other public international law, enforcement and sanctions for violations of international criminal law rest almost exclusively with national authorities. In most instances, when law enforcement authorities in the state where the crimes occurred or the suspect's state fail to investigate and, where there is sufficient admissible evidence, to prosecute, there is no international court with the jurisdiction or the capacity to step in. Therefore, it is essential for other states, which share the responsibility to investigate and prosecute such crimes, acting as agents of the international community, to be able and willing to step in if the first trial was unfair, a sham or was held with the purpose of shielding a suspected perpetrator of his or her criminal responsibility under international law.

Such action is fully consistent with the fundamental principle of *ne bis in idem*,[17] which applies solely within a single jurisdiction and does not preclude law enforcement authorities

[15] Amnesty International is aware of only a handful of cases so far, most of which were resolved with the territorial state agreeing to cooperate with the state having custody which had opened a criminal investigation first.

[16] For example, Chile never sought the extradition of former President Augusto Pinochet Ugarte from the United Kingdom when he was arrested there in October 1998. Indeed, Chile could not have done so as the crimes with which he was charged were covered by the Amnesty Law that he himself had issued (*Decreto Ley 2.191*, published in the Official Gazette on 19 April 1978).

[17] See, for example, International Covenant on Civil and Political Rights, art. 14 (7); American Convention on Human Rights, art. 8 (4); Additional Protocol I, art. 75 (4) (h); Statute of the International Criminal Tribunal for the former Yugoslavia, art. 10 (1); Statute of the International Criminal Tribunal for Rwanda, art. 9 (1); UNTAET Reg. 15/2000, sect. 11; Statute of the Special Court for Sierra Leone, art. 9; Extraordinary Chambers Law, art. 33 new.

from investigating and prosecuting when the proceedings in the other jurisdiction were a sham or held with the purpose of shielding a suspect from justice.[18] The only exceptions to this jurisdictional limit to the scope of this principle are with respect to international courts. for example, article 20 (2) of the Rome Statute prohibits the trial of anyone who has been acquitted or convicted by the international criminal court and article 20 (3) bars the court from trying anyone previously tried by another court of crimes within its jurisdiction, except when the previous proceedings were designed to shield the person or were unfair.[19]

2. ALL STATES HAVE RATIFIED TREATIES PROVIDING FOR UNIVERSAL JURISDICTION AND MOST HAVE PROVIDED FOR SUCH JURISDICTION IN NATIONAL LAW

As discussed below, all states have ratified treaties requiring or providing for universal jurisdiction. Most of them have also authorized their courts to exercise universal jurisdiction over one or more crimes.

a. Every state has ratified treaties providing for universal jurisdiction

Every state has recognized in treaties that national courts are permitted and, in some instances, required to exercise universal jurisdiction over certain crimes. As of 1 October 2009, 194 states are parties to the 1949 Geneva Conventions and 168 states are parties to 1977 Additional Protocol I. Both treaties require states parties to exercise universal jurisdiction with regard to persons suspected of grave breaches, which are war crimes committed in international armed conflict, unless they extradite them to another state party.[20] As of the same date, 146 states have ratified the 1984 Convention against Torture,

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[18] The Human Rights Committee concluded more than two decades ago that Article 14 (7) of the ICCPR "does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State." *A.P. v. Italy*, No. 204/1986, 2 November 1987, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 67, UN Doc. CCPR/C/OP/2, UN Sales No. E.89.XIV.1. This was also recognized during the drafting of Article 14 (7) of the ICCPR. See Marc J. Bossuyt, *Guide to the* "Travaux Préparatoires" *of the International Covenant on Civil and Political Rights*, Dordrecht: Martinus Nijhoff, 1987, pp. 316-318; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Kehl am Rhein: N.P. Engel, 1993, pp. 272-273; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Oxford: Clarendon Press, 1991.

[19] Rome Statute, art. 20 (2) and (3).

[20] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Geneva: International Committee of the Red Cross and Cambridge: Cambridge University Press, 2005, p. 606 ("The right of States to vest universal jurisdiction in their national courts over war crimes in no way diminishes the obligation of States party to the Geneva Conventions and States party to Additional Protocol I to provide for universal jurisdiction in their national legislation over those war crimes known as 'grave breaches'"). Canada, in a report to the International Law Commission stated:

> "*Universal jurisdiction*. Where crimes are so serious and on such a scale that they can justly be regarded as an attack on the international legal order, the principle of universality provides jurisdiction for offences anywhere in the world. For example, the 1949 Geneva Conventions and the 1977 Additional Protocol provide for mandatory universal jurisdiction over grave breaches and require a party to either bring alleged offenders before its courts or else surrender them to another party for trial. In addition, piracy, serious violations of the laws and customs of war, crimes against

which requires them to extradite or submit cases of persons found in territory subject to their jurisdiction suspected of torture. The majority of states have also recognized in treaties that universal jurisdiction is permitted for piracy[21] and *apartheid*.[22] In addition, 81 states have signed and 15 ratified the 2006 International Convention for the Protection of All Persons from Enforced Disappearances (not yet into force), which contains an *aut dedere aut judicare* obligation.

The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1979 International Convention against the Taking of Hostages and not less than 20 other treaties of universal scope also provide for the obligation to extradite or prosecute which, as explained, in some cases necessarily include universal jurisdiction.[23]

In the Inter- American system, at least four treaties provide for the obligation to extradite or prosecute, including universal jurisdiction,[24] and three treaties so provide in Africa. [25]

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humanity and genocide are generally recognized as subject to the universality principle".

Internatiional Law Commission, The obligation to extradite or prosecute (aut dedere aut judicare), A/CN.4/612, 6 March 2009, para. 36).

[21] UN Convention on the Law of the Sea (http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 10 Dec. 1982 (entered into force 16 Nov. 1994), arts. 101 (Definition of piracy), 105 (Seizure of a pirate ship or aircraft) (as of 1 October 2009, 159 states were parties); In its report to the International Law Commission, the Russian Federation stated that: "[i]s a party to the United Nations Convention on the Law of the Sea, article 105 of which establishes universal criminal jurisdiction with regard to piracy" (International Law Commission, The obligation to extradite or prosecute (aut dedere aut judicare), A/CN.4/599, 30 May 2008, p.12). Convention on the High Seas (http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf), 29 April 1958 (entered into force 29 Sept. 1962), arts. 19 (authorizing seizure of pirate ships or aircraft on the high seas), 15 (defining piracy)(as of 1 October 2009, 63 states were parties).

[22] International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) of 30 November 1973 entry into force 18 July 1976, in accordance with article XV, available at: http://www.unhchr.ch/html/menu3/b/11.htm. As of 1 October 2009, 107 states were parties. In its report to the ILC Russia declared: "In addition, the Russian Federation is a party to a number of international treaties which contain the principle of universal jurisdiction, though not in connection with the non-extradition of alleged offenders. These include the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973." *Ibid*, para.36).

[23] See: Amnesty International, *International Law Commission: The obligation to extradite or prosecute (*aut dedere aut judicare*)* (AI Index: IOR 40/001/2009), 3 February 2009 (http://www.amnesty.org/en/library/info/IOR40/001/2009/en).

[24] Convention to Prevent and Punish the Acts of Terrorism taking the Forms of Crimes against Persons and Related Extortion that are of International Significance, 1971, art. 5; Inter-American Convention to Prevent and Punish Torture, 1985, art. 12; Inter-American Convention on International Traffic in Minors, 1994, art. 9; Inter-American Convention on the Forced Disappearance of Persons, 1994, arts. IV and VI.

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b. Approximately two thirds of all states have provided for universal jurisdiction in their national law

The 2001 Amnesty International study of state practice at the international and national level involving concluded that the following states on every continent had provided for universal jurisdiction in their national legislation over one or more crimes to some extent, including: Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Barbados, Belarus, Belgium, Belize, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Dominica, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Federal Republic of Yugoslavia, Fiji, Finland, France, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guyana, Honduras, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia (The former Yugoslav Republic of), Malawi, Malaysia, Malta, Mauritius, Moldova, Monaco, Mongolia, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Seychelles, Sierra Leone, Singapore, Slovak Republic, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tadjikistan, Timor Leste, Trinidad and Tobago, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam, and Zimbabwe.[26]

c. States are expanding, not contracting, the scope of universal jurisdiction

In the decade since adoption of the Rome Statute and the *Pinochet* judgment by the House of Lords in the United Kingdom, a significant number of states have either strengthened their legislation to provide for universal jurisdiction over crimes under international law, enacted new legislation providing for such jurisdiction or drafted legislation with universal jurisdiction over such crimes. For example, the United States of America enacted legislation in 2007 and 2008 providing for universal jurisdiction for genocide and enlisting child soldiers.[27] In 2003, Burundi authorized its courts to exercise universal jurisdiction over genocide, crimes against

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[25] Convention for the Elimination of Mercenarism in Africa, 1977, art. 8; Convention on the Prevention and Combating of Terrorism, 1999, art. 6(1)(a)); Convention on Preventing and Combating Corruption, 2003, art. 13(1) (c)).

[26] Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, Ch. 4A, AI Index: IOR 53/006/2001; Ch, 4B, IOR 53/007/2001; Ch. 6, IOR 53/009/2001; Ch. 8, 011/2001/2001; Ch. 10, IOR 53/012/2001; Ch. 11, IOR 53/013/2001; Ch. 12, IOR 53/014/2001, September 2001 (all available at: www.amnesty.org).

[27] Genocide Accountability Act of 2007, 21December 2007, Pub. L. No: 110-151 (http://www.govtrack.us/congress/billtext.xpd?bill=s110-888); Child Soldiers Accountability Act of 2008, 3 October 2008, Pub. L. No: 110-340 (http://www.govtrack.us/congress/billtext.xpd?bill=s110-2135).

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humanity and war crimes.[28] The 2007 new Penal Code of Panama[29] and the 2008 Act on the Punishment on Crimes under the Jurisdiction of the International Criminal Court of the Republic of Korea,[30] provide for universal jurisdiction for genocide, crimes against humanity and war crimes. Likewise, 2000 Canada's Crimes against Humanity and War Crimes Act[31] and the 2001 Germany's Code of Crimes against International Law[32] both provide for universal jurisdiction over these three crimes.

In addition, recent national legislation in countries such as Albania,[33] Argentina,[34] Azerbaijan,[35] Bosnia and Herzegovina,[36] Cape Verde,[37] Colombia,[38] El Salvador,[39] Estonia,[40] Finland,[41] Georgia,[42] Kazakhstan,[43] Kenya,[44] Macedonia,[45] Montenegro,[46] Namibia,[47] Peru,[48]

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[28] *Loi No. 1/004 du 8 mai 2003 portant repression du crime de genocide, des crimes contre l'humanité et des crimes de guerre*, art. 24.

[29] *Código Penal de Panamá, Ley No.14 de 18 de Mayo de 2007, art. 19*.

[30] Law 8719 of December 21, 2007, art. 3.

[31] See http://www.international.gc.ca/court-cour/war-crimes-guerres.aspx?lang=eng.

[32] Available at http://www.bmj.bund.de/files/-/408/Englische_Fassung.pdf.

[33] Criminal Code, as amended by Law No. 9686, 26 February 2007, art. 7/a.

[34] *Ley 26.200 (Ley de Implementación del Estatuto de Roma de la Corte Penal Internacional)*, 5 January 2007, art. 4 ("aut dedere aut judicare").

[35] 2005 Criminal Code of the Azerbaijan Republic, arts. 12 (3) and 13 (3).(http://www.legislationline.org/download/action/download/id/1658/file/4b3ff87c005675cfd74058077132.htm).

[36] 2003 Criminal Code of Bosnia and Herzegovina, available at: www.nottingham.ac.uk/law/hrlc/international-criminal-justice-unit/implementation-database.php .

[37] Penal Code, art. 4.

[38] *Código Penal, Ley 599/2000,* of 24 July 2000, Article 16(6) available at: www.ramajudicial.gov.co/csj_portal/Min/l5992000.htm.

[39] *Código Penal de El Salvador, Decreto legislativo 1030*, of 27 April 1997, art. 10; available at: www.csj.gob.sv/leyes.nsf/ed400a03431a688906256a84005aec75/29961fcd86828634062 56d02005a3cd4?OpenDocument.

[40] Penal Code, of 6 June 2001, as amended (19 May 2004, entered into force 1 July 2004 - RT I 2004, 46, 329), art. 7 (1).

[41] Penal Code of Finland, 39/1889, as amended, sect. 8 (see also sect. 7) (www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf.

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Portugal,[49] Serbia, and Uruguay[50] has been adopted – often as part of the Rome Statute implementation process – providing for universal jurisdiction.

States are including universal jurisdiction provisions in draft legislation, primarily to implement the Rome Statute. For example, the bill implementing the Rome Statute in Brazil, submitted by the Presidency to the Congress, provides that when a foreigner suspected of genocide, crimes against humanity or war crimes is found in its territory Brazilian law will apply, unless an extradition request by a state or surrender to the International Criminal Court is granted.[51] Draft implementing legislation in Burkina Faso would authorize national courts to exercise universal jurisdiction over persons found in its territory suspected of genocide, crimes against humanity and war crimes.[52] Draft legislation which is under consideration in

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[42] Article 6 (2), The Criminal Code of Georgia, amendments, art. 6 (2) (available at http://www.nottingham.ac.uk/shared/shared_hrlcicju/Georgia/Law_on_Amendments_to_the_Criminal_Code.pdf).

[43] Law No. 167 of 16 July 1997 of the Republic of Kazakhstan, Criminal Code of the Republic of Kazakhstan, available at: www.legislationline.org/upload/legislations/25/c8/ca1cfb8a67f8a1c2ffe8de6554a3.htm.

[44] International Crimes Act 2008 (https://sa.amnesty.org/kenyalaw/klr_app/,DanaInfo=www.kenyalaw.org+frames.php),in force for crimes committed on or after 1 January 2009.

[45] Criminal Code of the Republic of Macedonia, art. 119 (available at www.legislationline.org/legislation.php?tid=1&lid=6272).

[46] Criminal Code, art. 137 (Applicability of criminal legislation of Montenegro to a foreigner who commits a criminal offence abroad) (Official Gazette of the Republic of Montenegro No.70/2003, and Correction, No. 13/2004), available at: www.legislationline.org/legislation.php?tid=1&lid=6221.

[47] Geneva Conventions Act, Act No. 15, 2003, sect. 2 (1).

[48] *Código Penal de Perú*, of 8 April 1991, art. 3 (Available at: http://spij.minjus.gob.pe/CLP/contenidos.dll?f=templates&fn=default-codpenal.htm&vid=Ciclope:CLPdemo).

[49] *Lei n.º 31/2004 (Adapta a legislação penal portuguesa ao Estatuto do Tribunal Penal Internacional, tipificando as condutas que constituem crimes de violação do direito internacional humanitário), 17.ª alteração ao código penal.*

[50] *Ley 18.026 (Ley de cooperación con la Corte Penal Internacional en materia de lucha contra el genocidio, los crímenes de guerra y de lesa humanidad), art. 4 (2).*

[51] *Projeto de Lei, Dispõe sobre o crime de genocídio, define os crimes contra a humanidade, os crimes de guerra e os crimes contra a administração da justiça do Tribunal Penal Internacional(2008), art.128. O art. 7o do Decreto-Lei nº 2.848, de 7 de dezembro de 1940 (Código Penal, Parte General).*

[52] *Modèle de loi type de mise en oeuvre du Statut de Rome au Burkina Faso, art. 15.*

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Comoros would also provided national courts with universal jurisdiction over these three crimes under international law.[53] A bill is being considered in the Republic of the Congo which would authorize the exercise of universal jurisdiction over the same crimes under international law.[54] Draft legislation for the Democratic Republic of the Congo (DRC) will extend existing universal jurisdiction provisions to include genocide, crimes against humanity and war crimes.[55] Legislation has been introduced in the Philippines Congress which would provide for universal jurisdiction over these three crimes.[56] A bill amending the Penal Code of Switzerland, already passed by its Federal Council, provides for the duty to try a suspect before national courts in those cases of crimes committed abroad – regardless of the nationality of the alleged perpetrator or the victim - when the suspect is found in Switzerland and is neither extradited to another state nor surrendered to an international criminal court whose jurisdiction Switzerland has recognized.[57] A bill is pending in the Uganda Parliament which would expand existing universal jurisdiction to include genocide, crimes against humanity and war crimes.[58] Two bills are pending in the United States Congress which would give US courts universal jurisdiction over trafficking in persons and certain crimes against humanity.[59] Amnesty International is also aware of other states which have prepared drafts, which still remain confidential, incorporating universal jurisdiction.

3. POLICE AND PROSECUTORS ARE EXERCISING UNIVERSAL JURISDICTION RESPONSIBLY TO END IMPUNITY

a. Police and prosecutors on five continents have opened criminal investigations or begun prosecutions based on universal jurisdiction

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[53] *Avant projet de loi de mise en oeuvre du Statut de Rome, art. 15.*

[54] *Avant projet de loi portent mise en oeuvre du Statut de Rome en Republique du Congo, art. 14.*

[55] *Proposition de Loi de mise en œuvre du Statut de Rome de la Cour pénale internationale, Mars 2008, art. 16*; see also *Proposition de loi modifiant et complétant le Code Penal, le Code de Procedure Pénale, le Code de l'Organisation et de la Compétence Judiciaires, le Code Judiciaire Militaire et le Code Pénal Militaire en vue de la mise en oeuvre du Statut de Rome de la Cour Penale Internationale, Nyabirungu Mwene Songa et Crispin Mutumbe Mbuya, Exposé des motifs.*

[56] An act defining and penalizing crimes against international humanitarian law, genocide and other crimes against humanity, organizing jurisdiction, designating special courts, and for related purposes, reconciled version as of 9 October 2009. This bill is expected to be signed into law by the President in the near future.

[57] *Projet de Loi fédérale Projet portant modification de lois fédérales en vue de la mise en oeuvre du Statut de Rome de la Cour pénale internationale, art. 264m* (www.ejpd.admin.ch/etc/medialib/data/sicherheit/gesetzgebung/internationaler_strafgerichtshof.Par.0015.File.tmp/entw-f.pdf).

[58] A bill for an Act entitled The International Criminal Court Act, 2006, arts. 7, 8 and 9.

[59] Senators Durbin and Coburn Introduce Human Trafficking Bill, 27 June 2007 (http://durbin.senate.gov/record.cfm?id=277872); Crimes Against Humanity Act of 2009, introduced in Senate 24 June 2009, S 1346 IS, 111th Congress, 1st Sess. (http://thomas.loc.gov/cgi-bin/query/z?c111:S.1346.IS:).

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Since the Second World War, police and prosecutors in at least 18 states have opened criminal investigations based on universal jurisdiction and trials have taken place in almost all of these states: Australia, Austria, Belgium, Canada, Denmark, France, Finland, Germany, Israel, the Netherlands, New Zealand, Norway, Spain, Senegal, Sweden, Switzerland, the United Kingdom and United States have exercised universal jurisdiction. Courts in some states have used universal jurisdiction provisions when their nationals were victims of crimes abroad committed by foreigners as an additional ground to passive personality jurisdiction, such as Sweden.[60] In addition, the African Union in 2006 mandated "the Republic of Senegal to prosecute and ensure that Hissène Habré [the former President of Chad] is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial".[61] As an example of the increasing adoption of the shared responsibility model of enforcement of international criminal law, Senegal, the African Union and the European Union are negotiating an agreement concerning resources for the criminal proceedings against the former President.[62] There is no convincing evidence that national police and prosecutors in any of these cases, all in far away countries, have acted frivolously or from any political motives in opening investigations or prosecutions. Instead, the evidence suggests that they have acted independently and impartially in a disinterested fashion. Indeed, the majority of cases where they have received information concerning crimes under international law

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[60] *Prosecutor v. Arklov*, Stockholm District Court, December 18 2006, Case No. B 4084-04, p. 11..

[61] Decision on the Hisséne Habré case and the African Union, Doc. Assembly/AU/3 (vii), available at: http://www.africa-union.org/root/au/Conferences/Past/2006/July/summit/doc/Decisions_and_Declarations/Assembly-AU-Dec.pdf.

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[62] As the International Court of Justice recently noted, "Senegal stated that it had seised the African Union in order to obtain the financial support and mutual judicial assistance required for the organization of the trial". International Court of Justice, *Case concerning questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, Request for the indication of provisional measures, Order, 28 May 2009, para. 36. See also Africa en Ligne, "Chadian protest group slams Senegal for not prosecuting ex-president Habre", 24 September 2009 (reporting that the European Union "has reportedly proposed to put 2 million euros at the disposal of Senegal to try Habre".) (http://www.afriquejet.com/news/africa-news/chadian-protest-group-slams-senegal-for-not-prosecuting-ex-president-habre-2009092535429.html). African Union and European Union ministers recently

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> "welcomed the decision of the African Union to make a token contribution to the revised budget of the trial and encouraged the Senegalese authorities, together with the AU, to rapidly agree on the contribution of Senegal to the reduced budget. They further welcomed the organisation of the proposed Donors' Round Table and invited all partners, particularly the European Union and its Member States as well as other partner countries and institutions to support this process and participate in the Donors Round table that will be organised in Dakar, Senegal in the last quarter of 2009."

13th Africa-EU Ministerial Troika Meeting, Addis Ababa, 14 October 2009, p. 14 (http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/er/110576.pdf).

committed abroad they have declined to open formal investigations or prosecutions. Moreover, all cases in which have been instituted by victims denied justice at home, courts have carefully scrutinized the complaints and have often declined to let investigations or prosecutions proceed.

b. Universal jurisdiction is used to investigate and prosecute crimes committed in all regions of the world

Criminal investigations or prosecutions have been instituted around the globe since the Second World War with regard to crimes committed in all regions of the world. In almost all instances, there had been no criminal investigation or prosecution in the state where the crimes occurred or in the suspect's own state. For example, such investigations or prosecutions involved crimes committed in the following states or by their nationals: Afghanistan, Argentina, Belarus, Bosnia and Herzegovina, Chad, Chile, China, El Salvador, Gaza, Germany, Guatemala, Iraq, Israel, Rwanda, Serbia, Sri Lanka, Timor Leste and United States of America. Moreover, in most instances, the complaints were made by the victims themselves after they had repeatedly failed to obtain justice in the place where the crimes occurred or in the suspect's own state. Of course, not all these investigations led to trials and many of the investigations were terminated because they did not produce sufficient admissible evidence for a prosecution. In other cases, even in those where there was sufficient admissible evidence for a prosecution, prosecutions were not commenced simply because of improper obstacles in the national law of the forum state, such as according immunity to officials or former officials suspected of crimes under international law, dual criminality requirements, *ne bis in idem* provisions and political interference.

It is important to note that often cases characterized in the press or even by some governments as involving universal jurisdiction are based instead on passive personality because they involve nationals of the forum state who are victims of crimes committed against them by foreigners abroad. For example, the *Rosa Kabuye* case in France involved two French citizens who were victims of murder in 1994.

III. THE NEED FOR A GLOBAL ACTION PLAN USING UNIVERSAL JURISDICTION TO END IMPUNITY

"So much is possible if we work together. Together, we are here to take risks, to assume the burden of responsibility, to rise to an exceptional moment, to make history. This year, of all years, asks no less."
Secretary-General Ban Ki-moon, 23 September 2009[63]

The effort to meet the global threat that crimes under international law pose to the entire international community should receive the same resources and commitment it devotes at the international and national levels to meet other global crimes, such as terrorist crimes; organized crime, including drug trafficking, trafficking in persons, illegal trafficking in arms; and piracy. As noted in the first section of Part III, the international community has responded at the international and national levels to each of these global crime threats with huge resources and commitment, including a wide range of practical measures, such as adoption of treaties providing for universal jurisdiction, often including *aut dedere aut judicare* (extradite or prosecute) obligations; establishment of inter-governmental organization bodies or multi-state working groups; adoption of strategic plans; facilitation of advice on drafting of implementing legislation; training; and reporting requirements.

Universal jurisdiction cannot be discussed in isolation from other methods to enforce international justice or other global crime problems. Therefore, in the second section of Part III, Amnesty International urges the Sixth Committee when discussing universal jurisdiction to do so in the context of the urgent need to develop and implement a comprehensive, long-term global action plan to end impunity, involving action at the international, regional and national level. It urges the Sixth Committee to begin discussing how best such a plan could be developed, building upon the excellent, but much more limited, Joint Strategic Plan with regard to the rule of law, which has just begun to be implemented by the UN Rule of Law Resource and Coordination Group, supported by the Rule of Law Unit.

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[63] Secretary-General Ban Ki-moon, Report to the United Nations - "Now Is Our Time", 23 September 2009 (http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=587).

A PRELIMINARY NOTE ON THE INTERNATIONAL COMMUNITY'S RESPONSES TO OTHER GLOBAL CRIME THREATS

It is important to place Amnesty International's recommendation that the international community begin developing a comprehensive, long-term action plan to end impunity in the context of the international community's response to other serious global crime threats. First, important lessons can be learned from the experience of responding to those threats. Second, it demonstrates the scale of resources and the commitment that are needed to address such threats. Indeed, given the scale of the crimes under international law committed since the Second World War and the almost total impunity that still exists for the perpetrators of such crimes, a strong case can be made for devoting even greater resources to bringing to justice those responsible for them.

Terrorist crimes. The UN General Assembly, acting on behalf of the entire international community, responded to terrorist attacks in the past two decades, by adopting the United Nations Global Counter-Terrorism Strategy.[64] This Strategy is "a unique instrument to enhance national, regional and international efforts to counter terrorism", marking "the first time that all Member States of the United Nations have agreed to a common strategic and operation framework to fight terrorism".[65] The Strategy rests on four pillars of action, involving measures to: address the conditions conducive to terrorism, prevent and combat terrorism, build state capacity to prevent and combat terrorism and strengthen the UN role in that regard and to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism.[66] In adopting the Strategy, the General Assembly implemented the 2005 World Summit Outcome, which had urged it to develop "without delay" the elements of such a strategy identified by the UN Secretary-General "with a view to adopting and implementing a strategy to promote comprehensive, coordinated and consistent responses, at the national, regional and international levels, to counter terrorism".[67]

The Strategy adopted included numerous elements upon which a comprehensive, long-term action plan to end impunity could be fashioned. For example, such elements include the convening of a high-level conference under the auspices of the UN to formulate an international response to terrorism, integrating human rights into all aspects of the strategy, work on three levels (national, regional and international), involvement of civil society, support for victims of terrorism, drafting of one or more treaties concerning extradition and mutual legal assistance, denial of safe havens and bringing to justice persons "on the basis of the principle of extradite or prosecute", addressing financing and money laundering,

[64] U.N. G.A. Res. 60/288 and Annex (Plan of Action), 20 September 2006.

[65] UN Action to Counter Terrorism, Background Note, United Nations Global Counter-Terrorism Strategy, Peace and Security Section, Department of Public Information, DPI/2439B/Rev.4, March 2009.

[66] *Ibid.*

[67] U.N. G.A. Res. 60/1 (2005 World Summit Outcome), 16 September 2005.

establishment of a database, facilitation of assistance with regard to the drafting of necessary legislation, capacity building in states and sharing of best practices with regional organizations.[68] In addition, the Security Council has established a Counter-Terrorism Committee and a Counter-Terrorism Task Force to develop a global response to terrorist crimes, which also includes universal jurisdiction as a key component, as well as advisory services and a reporting mechanism to facilitate exchanges of information between states and monitoring of responses at the national level.

Transnational organized crime, including drug trafficking, trafficking in persons and illegal trafficking in arms. In addition to adopting a treaty and two protocols, each including universal jurisdiction provisions, to address these transnational crimes, the UN has taken a number of steps to address these crimes on a global basis.[69] For example, the Conference of the Parties to the United Nations Convention against Transnational Organized Crime and its Protocols meets annually, has established working groups on the implementation of the Convention and its Protocols, sends questionnaires to states parties and publishes the responses. More specifically, with regard to trafficking in persons, the United Nations Office on Drugs and Crime, together with the United Nations High Commissioner for Refugees, UNICEF, UNICRI, UNIFEM, the International Labour Organization, the International Office of Migration and the Office of the High Commissioner for Human Rights, has adopted an International Framework for Action to Implement the Trafficking in Persons Protocol.[70]

Piracy. On 2 June 2008, the UN Security Council stated that it was "[g]ravely concerned by the threat that acts of piracy and armed robbery against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, the safety of commercial maritime routes and to international navigation", urged

> "all States to cooperate with each other, with the IMO and, as appropriate, with the relevant regional organizations in connection with, and share information about, acts of piracy and armed robbery in the territorial waters and on the high seas off the coast of Somalia, and to render assistance to vessels threatened by or under attack by pirates or armed robbers, in accordance with relevant international law"

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[68] U.N. G.A. Res. 60/288 and Annex (Plan of Action), 20 September 2006.

[69] UN Convention against Transnational Organized Crime, U.N. G.A. Res. 55/25, 15 Nov. 2000 (http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, U.N. G.A. Res. 55/25, 15 Nov. 2000, Annex II; Protocol against the Illicit Manufacturing of of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, U.N. G.A. Res. 55/255, 8 June 2001 (http://treaties.un.org/doc/Treaties/2001/05/20010531%2011-11%20AM/Ch_XVIII_12_cp.pdf).

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[70] United Nations Office on Drugs and Crimes, International Freamework for Action to Implement the Trafficking in Persons Protocol (2009).

and urged them to take a broad range of other joint measures. [71] Since then it has adopted three more resolutions responding to this particular regional component of the global crime problem.[72] A Contact Group on Piracy off the Coast of Somalia (CGPCS) has been established, which has met at the UN Headquarters in New York and elsewhere.

The International Maritime Organization (IMO) has taken a robust approach at both the international and national level to the increasing threat of piracy to shipping in numerous regions of the world.[73] For example, with regard to piracy in waters off the coast of Somalia, states adopted the Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden at a high-level meeting convened by IMO in January 2009.[74] This Code recognizes the extent of the problem of piracy and armed robbery against ships in the region and, in it, the signatories declare their intention to cooperate to the fullest possible extent, and in a manner consistent with international law, in the repression of piracy and armed robbery against ships, to share and report relevant information through a system of national focal points and information centres, to interdict ships suspected of engaging in acts of piracy or armed robbery against ships, to ensure that persons committing or attempting to commit acts of piracy or armed robbery against ships are apprehended and prosecuted and to facilitate proper care, treatment, and repatriation of victims of acts of these crimes. As part of their adoption of a shared responsibility model, certain states in the region, including Kenya, the Seychelles and Yemen, as well as some entities in Somalia, have agreed to receive suspected pirates with a view to investigating and, if appropriate, prosecuting them and the states which have captured the suspects have provided technical assistance to the receiving states to do so.

B. THE ELEMENTS OF A COMPREHENSIVE, LONG-TERM ACTION PLAN TO END IMPUNITY, INCLUDING UNIVERSAL JURISDICTION

Of course, developing and implementing a long-term global action plan to end impunity for crimes under international law such as genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances cannot be done overnight. The number of crimes and perpetrators is simply too great. However, scale of the attack on the international community and its fundamental values calls for a long-term commitment to investigate and prosecute such crimes building upon the experience and lessons to be learned from the responses to other serious crimes that threaten the entire international

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[71] U.N. S.C. Res.1816 (2008).

[72] U.N. S. C. Res. 1838 (2008), 1846 (2008), 1851 (2008).

[73] The IMO has adopted numerous resolutions and directives regarding piracy in the past four years far too numerous to cite here (http://www.imo.org/home.asp?topic_id=1178). In addition, to the Somalia response, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia (RECAAP), was concluded in November 2004 by 16 countries in Asia, and includes the RECAAP Information Sharing Centre (ISC) for facilitating the sharing of piracy-related information.

[74] IMO, High-level meeting in Djibouti adopts a Code of Conduct to repress acts of piracy and armed robbery against ships, 30 January 2009 (http://www.reliefweb.int/rwarchive/rwb.nsf/db900sid/EGUA-7NSU4A?OpenDocument).

community. As explained below, Amnesty International is not in this paper proposing a detailed plan to be adopted immediately. Instead, it is simply urging that the Sixth Committee immediately begin discussing how such a plan, using universal jurisdiction, could best be developed at the international, regional and national levels and then to implement it.

Respect for human rights. It goes without saying that the first and most important lesson to be drawn from responses to other global crime threats is that the response to crimes under international law – indeed, to *any* crimes - must be solidly founded on the rule of law and respect for human rights if it is to be effective. Investigations must be prompt, thorough, independent and impartial and fully consistent with international law and standards. Prosecutions must scrupulously respect the right to a fair trial and the interests of victims.

The catalytic role of the UN. There are a variety of ways such a plan could be developed. However, based on previous experience, perhaps the most promising might well be for the UN Secretary-General, working with appropriate UN bodies and agencies, and states, to develop, in transparent consultation with civil society around the world, a comprehensive long-term global action plan to end impunity for crimes under international law, including genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances.

Building upon the UN Joint Strategic Plan on the rule of law. The proposed global action plan to end impunity could build upon the recent excellent initiative to adopt the Joint Strategic Plan with regard to rule of law, which has just begun to be implemented by the UN Rule of Law Resource and Coordination Group, supported by the Rule of Law Unit. However, it would be significantly different in conception and scale. The UN Joint Strategic Plan on rule of law is primarily a plan of action for the UN itself. It has three aims: (1) "to strengthen coherence, quality and coordination of policy and guidance within the Organization"; (2) "to implement the common approach at the national level"; and "to reinforce global action for the rule of law at the national and international levels"[75] Although a guidance "note on transitional justice is being prepared" as one of a series of other guidance notes which "outline[] the principles and framework for a common United Nations approach, so as to increase system-wide effectiveness", the Joint Strategic Plan is primarily designed to guide the UN's own activities with regard to rule of law issues generally. In addition, the Joint Strategic Plan was developed in consultation with government leaders, rather than with regional intergovernmental organizations and civil society.

The global action plan to end impunity on three levels. In contrast, the comprehensive, long-term global action plan to end impunity which Amnesty International is urging should be developed and implemented would not be limited to action by the UN, but, like the UN Global Counter-Terrorism Strategy, would seek to mobilize the UN, international criminal courts, regional intergovernmental organizations and states with a view to ensuring that new treaties on extradition and mutual legal assistance are adopted; these and other relevant treaties are universally ratified and implemented in legislation and then enforced. The action plan would be developed in consultation with civil society and regional intergovernmental organizations, not just with government leaders.

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[75] *Deputy Secretary-General, Briefing General Assembly, Spells Out Principal Aims, of Joint Strategic Plan for Strengthening Rule of Law Worldwide*, U.N. Doc. DSG/SM/472, L/3149, 2 October 2009. The Joint Strategic Plan has not yet been posted on the UN Website.

Action by the UN. Such an action plan should include the following steps, among others:

- Convening a conference or series of conferences or beginning some other form of consultation with states, regional intergovernmental organizations, international criminal courts and civil society.
- UN bodies calling upon all UN members to ratify and implement promptly and effectively:
    - Rome Statute of the International Criminal Court;
    - Agreement on Privileges and Immunities of the International Criminal Court;
    - Protocols I and II to the Geneva Conventions;
    - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol;
    - International Convention for the Protection of All Persons from Enforced Disappearance; and
    - Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.
- Facilitating the drafting of a multilateral treaty on extradition and mutual legal assistance to address gaps and weaknesses in current multilateral and bilateral treaties with regard to crimes under international law.
- Rather than drafting model legislation, calling upon member states to draft, in transparent consultation with civil society, legislation ensuring that they can investigate and, where there is sufficient admissible evidence, prosecute anyone suspected of committing crimes under international law, regardless when or where the crimes were committed and regardless of rank.
- Facilitating technical assistance in the drafting of legislation and improving the effectiveness of investigations and prosecutions at the national level.
- Calling upon member states, which have the primary duty to investigate and prosecute crimes under international law, to do so.
- Strengthening Interpol efforts with regard to persons responsible for genocide, crimes against humanity and war crimes.[76]
- Defending the use of universal jurisdiction in all fora, including the UN General Assembly, Security Council and Human Rights Council.
- Urging regional intergovernmental organizations to adopt comprehensive, long-term action plans to end impunity.[77]

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[76] Statement to Interpol in Ottawa, June 2007: *Universal jurisdiction: Improving the effectiveness of state cooperation*, AI Index: IOR 53/006/2007 (http://amnesty.org/en/library/asset/IOR53/007/2007/en/dom-IOR530072007en.html);Statement to Interpol in Lyon, 16 June 2005**:** *Universal jurisdiction: The challenges for police and prosecuting authorities in using it*, AI Index: IOR 53/007/2007, June 2005 (http://asiapacific.amnesty.org/library/Index/ENGIOR530072007?open&of=ENG-385).

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[77] Amnesty International has made detailed recommendations to the European Union about steps it should take in the fight against impunity. See, for example, its statement to the European Union, 20 November 2006, *European Union: Using universal jurisdiction as a key mechanism to ensure accountability*, AI Index: IOR 61/013/2007.

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Action by international criminal courts. In addition to supporting investigations and prosecutions by such courts, the global action plan to end impunity would facilitate positive complementarity, particularly by the International Criminal Court to encourage states to be able and willing genuinely to investigate and prosecute crimes under international law. The Office of the Prosecutor has made positive complementarity - encouraging states to fulfil their responsibilities to investigate and prosecute genuinely genocide, crimes against humanity and war crimes – a central part of its strategy.[78] Similarly, the President and other Judges of the International Criminal Court have spent a considerable amount of their time in promoting international justice around the world.

Action by regional intergovernmental organizations. At the regional level, intergovernmental organizations, including the African Union, Commonwealth, *Comunidade dos Países de Língua Portuguesa*, Community of Portuguese Speaking States (CPLP), Council of Europe, East African Community (EAC), European Union, Economic Community Of West African States (ECOWAS), Francophonie, League of Arab States, Organization of American States, and Southern African Development Community (SADC) should develop, in transparent consultation with civil society, comprehensive long-term regional action plans to end impunity for crimes under international law, including genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances. Such action plans should include the following elements, among others:

- Where this has not yet been done, signing a cooperation agreement with the International Criminal Court and any other international or internationalized criminal court;
- Where this has not yet been done, encouraging states to ratify and implement promptly and effectively regional treaties concerning crimes under international law, including:
    - European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes;
    - Inter-American Convention to Prevent and Punish Torture;
    - Inter-American Convention on International Traffic in Minors;
    - Inter-American Convention on the Forced Disappearance of Persons,.
- Where this has not yet been done, drafting regional conventional instruments

[78] See, for example, the recent statement by the Office of the Prosecutor that "the Office has adopted a *positive approach* to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation". Office of the Prosecutor, Report on Prosecutorial Strategy, 14 September 2009, The Hague (http://www.icc-cpi.int/NR/rdonlyres/699AA4B3-E8C2-4E41-9EFA-EBA503BDBF7F/143694/OTP_ProsecutorialStrategy20060914_English.pdf), p. 5.

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repressing human rights violations and providing for inter-state cooperation and judicial assistance;

- Convening regional conferences or beginning some other form of consultation with states, regional intergovernmental organizations, international criminal courts and civil society in view to develop a strategy to fight against impunity;

Action by states at the national level. At the national level, each state should develop, in transparent consultation with civil society, a national comprehensive long-term action plan to end impunity for crimes under international law, including genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances. Such action plans should include the following elements, among others:

- Where this has not yet been done, ratifying and implementing promptly and effectively the treaties listed above, as relevant;
- Drafting, in transparent consultation with civil society, legislation ensuring that the competent authorities can investigate and, where there is sufficient admissible evidence, prosecute anyone suspected of committing crimes under international law, regardless when or where the crimes were committed and regardless of rank.
- Giving priority to the court in the state that initiated the criminal investigation or prosecution first, unless the second state can demonstrate that the first state is unable or unwilling to investigate and prosecute in a fair trial, without torture or other ill-treatment or the death penalty, and that it is able and willing to do so.
- Drafting, in transparent consultation with civil society, legislation ensuring that the competent authorities can investigate and, where there is sufficient admissible evidence, prosecute anyone suspected of committing crimes under international law, regardless when or where the crimes were committed and regardless of rank.
- Treating every suspect or accused equally and not establishing special procedures for summoning, arresting or trying persons based on their status. In particular, not recognizing assertions that national officials and former national officials are immune from prosecution for crimes in a foreign state for crimes under international law.
- Defending the use of universal jurisdiction in all fora, including the UN General Assembly, Security Council and Human Rights Council and regional intergovernmental organizations.

CONCLUSION

Amnesty International hopes that Sixth Committee discusses universal jurisdiction as one essential tool in a broader effort to end impunity. In particular, it urges the Sixth Committee to begin to consider how the UN, international criminal courts, regional intergovernmental organizations and states can best develop and implement in transparent consultation with civil society, a comprehensive, long-term action plan to strengthen measures, including through the use of universal

jurisdiction, to end once and for all impunity for genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearance.