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Universal jurisdiction
The challenges for police and prosecuting authorities

A longer version of the Amnesty International statement delivered by Christopher Keith Hall, Senior Legal Adviser, International Justice Project, at the Second International Expert Meeting on War Crimes, Genocide and Crimes against Humanity, 16 June 2005, Interpol, Lyon.

Amnesty International very much welcomes the invitation by Interpol to participate in this Second International Expert Meeting on War Crimes, Genocide and Crimes against Humanity. We understand that it is the first time that non-governmental organizations working on human rights have been asked to participate in such an expert meeting with Interpol. We can understand that there may have been some reluctance to do this in the past as much of the work of our organizations is directed at the conduct of police and prosecutors that falls short of their responsibilities under national or international law. However, both police and human rights organizations share the common goal of ensuring the rule of law in a manner fully consistent with the obligations of states to respect international human rights and humanitarian law.

Introduction

A. Role of Interpol

For more than a decade, Interpol has played an increasingly important role in assisting the efforts of international criminal courts, including the International Criminal Tribunals for the former Yugoslavia and for Rwanda, the internationalized panels in Kosovo, the Special Court for Sierra Leone and, most recently, the International Criminal Court to investigate crimes under international law.

However, such international criminal courts can only investigate and prosecute a handful of the thousands of persons suspected of committing crimes under international law each year, perhaps less than one percent of them. As the Preamble of the Rome Statute recognizes, states have the primary responsibility for investigating and prosecuting these crimes and “their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”. In particular, the Preamble recalls that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”, which includes all forms of criminal jurisdiction permitted under international law, including universal jurisdiction.

Therefore, our organization is particularly pleased that Interpol has decided to become more involved in helping national police and prosecuting authorities to investigate and prosecute crimes under international law, both with regard to investigations and prosecutions in the state where the crimes occurred and with regard to crimes committed outside such states. The First International Expert Meeting on War Crimes, Genocide and Crimes against Humanity (23 to 25 March 2004), the two Working Group Meetings on War Crimes, Genocide and Crimes against Humanity (21 to 22 July 2004 and 23 to 25 February 2005) and the Interpol General Assembly Resolution AG-2004-RES-17 of 7 October 2005 are all encouraging steps.

These developments, building upon efforts within the European Union and the extensive proposals by Redress and FIDH with regard to improving cooperation between police and prosecuting authorities in European Union member states in the investigation and prosecution of crimes under international law are particularly encouraging for a number of reasons. In some instances, police have not treated such crimes with the same degree of seriousness as they did other serious crimes, such as drug trafficking, trafficking in persons, child pornography and money laundering.

Today, our organization would like to inform you about work by our organization concerning the use of universal jurisdiction as one tool for states fulfilling their obligations to enforce international criminal law, to clarify some misconceptions concerning universal jurisdiction and to discuss some of the obstacles that police and prosecutors may face when using universal jurisdiction and some suggestions on how these obstacles could be overcome.

B. The role of Amnesty International with regard to universal jurisdiction

Amnesty International has been involved with universal jurisdiction in several ways. First, it has conducted a 722-page global study of the subject, published both on the organization's website and in the CD-ROM distributed at this expert meeting, examining state practice at the international and national level in 125 countries around the world, the first such study since 1935. The findings of that study have been largely confirmed by the recent International Committee of the Red Cross study of customary international humanitarian law. Second, the organization has intervened in litigation involving universal jurisdiction, either directly or indirectly, to explain its scope to international and national courts. For example, it provided a copy of a study of the subject to the Belgian government, which attached it to its submission to the International Court of Justice in the *Democratic Republic of the Congo v. Belgium* case, argued the scope of this rule of customary international law in the House of Lords in the *Pinochet* case and issued commentaries used by lawyers in the *Sabra and Chatila* case in Belgium. Third, it has published commentaries on national jurisprudence to be used in lobbying for law reform, including a recent paper on the flaws in Spanish jurisprudence, and staff members have written articles and contributed to books on the subject.

I. Facts and myths about universal jurisdiction

One of the most important findings of the Amnesty International study was that approximately 125 countries have legislation permitting their courts to exercise universal jurisdiction over conduct amounting to a crime under international law. This finding dispells one of the the most common myths found in academic literature: that only a handful of states have such legislation. A second finding is that in many countries, the legislation permits the exercise of universal jurisdiction over ordinary crimes under national law such as murder, assault, rape and kidnapping, disproving another common myth, that universal jurisdiction may only be exercised over the crimes under international law. The third finding, which will be addressed in a moment, is that almost all of that legislation is flawed in some respects. The fourth finding is that almost no states have an express requirement that a suspect be present – or have been present in the past – before the police or prosecuting authorities can open an investigation, obtain an indictment or request extradition, demonstrating beyond any doubt that, contrary to another common myth, there is no rule of customary international law requiring such presence. Thus, police and prosecuting authorities can take these actions before a suspect arrives or changes planes in their countries and states can accept, as requested by the Security Council, cases concerning Rwanda transferred by the International Criminal Tribunal for Rwanda. A final point is that it is a misconception that states exercising universal jurisdiction in the past decade have been seeking to impose their own moral values on other states or to exercise a neo-colonial influence over former colonies. On the contrary, as the Israeli Supreme Court explained more than four decades ago in the *Eichmann* case, national courts act in their capacity as guardians of international law and as agents for its enforcement when investigating and prosecuting genocide, crimes against humanity and war crimes.

II. Obstacles to the exercise of 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. Many of the obstacles mentioned below are a mix of legal, practical or political problems.

A. Legal obstacles in the forum state

1. 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", 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.

One of the most common problems in many states 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. In many states, the definitions of the crimes are not consistent with the definitions in the the Rome Statute or other international law. Often principles of criminal responsibility, such as the responsibility of commanders and superiors, are not defined in accordance with the strictest standards in international law and sometimes impermissible defences, such as superior orders, are permitted.

2. Statutes of limitation

A few states still retain statutes of limitation for crimes under international law, although such bars are no longer acceptable under international law. In addition, some states will respect foreign statutes of limitation for such crimes even when the forum state has no statute of limitations applicable to the crimes or has a longer one.

3. Slow or inadequate arrest procedures

Some countries have slow or inadequate procedures for arrest arresting persons suspected of crimes under international law, which have permitted persons to escape. One country has

required complainants to prove the presence of a suspect in the country before even a preliminary inquiry can be opened, thus increasing the risk of flight.

4. Recognition of foreign amnesties and similar national measures of impunity

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. They are also inconsistent with the duty to bring to justice those responsible for such violations recognized in the Preamble to the Rome Statute. They deny the rights of victims to justice. Therefore, such steps cannot 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.

5. 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 19th 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 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'".

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".(95) 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 official position in order to be freed from punishment in appropriate proceedings".

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":

> "[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".

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.

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

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.

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."

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". 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."

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. 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."

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." 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."

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?

- 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."

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 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.

B. Legal and practical deficiencies in the international system of state cooperation

As outlined below, there are significant legal and practical deficiencies in the international system of state cooperation in the investigation and prosecution of crimes under international law, including the numerous inappropriate obstacles to extradition of persons accused of such crimes, For these reasons, Amnesty International has proposed that two new multilateral treaties, one on extradition of persons for crimes under international law, subject to fair trial safeguards and safeguards against torture and ill-treatment and the use of the death penalty, should be drafted.

1. 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 192 states, which leads to widely varying mutual legal assistance regimes. Third, these mutual legal 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.

2. Problems in conducting investigations abroad

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.(38) 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.

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, 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. 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 and torture. These obligations are part of a broader, but still 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.

3. Lack of cooperation in the foreign state

Despite the 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.

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.(43) National victims groups in Chile and in Chad have performed similar functions in the *Pinochet* and *Habré* cases.

4. 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

> "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."

In addition, Article 7 (3) requires that

> "[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."

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 20th century.

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.

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, 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.

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. 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.

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. 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. 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 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.

5. 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.

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 *Blaskic* 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.

6. Absence or inadequacy of extradition agreements

There are many grounds in extradition agreements and legislation for requested states to refuse extradition. 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. 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.

C. Practical obstacles

1. Inadequate knowledge in criminal justice system

Many authorities are unfamiliar with their own universal jurisdiction provisions and relevant international law. 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.

2. 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.

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. 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.

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.

3. Obtaining evidence

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." 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.

D. Political obstacles in the forum state

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 political factors responsible, which vary from country to country, include the slowness of parliamentary processes, inertia and low priority in comparison to other matters. A major part of our organization’s efforts have been directed to addressing this problem.

1. Lack of political will to implement legislation

Even when legislation exists permitting courts to exercise universal jurisdiction over crimes under international law, police, 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.

2. Political interference with the exercise of jurisdiction

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.

Political decisions on whether to investigate or prosecute. National legislation giving courts universal jurisdiction often requires approval of one or more political officials to initiate a criminal investigation or prosecution based on universal jurisdiction. Sometimes political officials are accused of preventing the exercise of universal jurisdiction by other means. For example, in one country, government officials had arranged for a specially chartered private plane to fly a suspect out of the country hours after a preliminary inquiry had been opened and half a day before a formal investigation was opened that might have led to his arrest. In another country, ministry of foreign affairs officials intervened in the arrest of a person suspected of torture, preventing a judicial determination of whether the suspect had diplomatic immunity and whether any such immunity could prevent a prosecution for torture. The suspect was subsequently released after the officials intervened, apparently on the ground that he had a diplomatic passport.

Political decisions on whether to extradite or cooperate. In most countries, the permission of a political official 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.

III. Continued use of military courts

A number of states, still use military courts or military commissions (non-judicial executive bodies) 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. 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."The Human Rights Committee has repeated expressed its concern about the use of military courts to try cases involving human rights violations. The UN Commission on Human Rights has urged that human rights violations by civil defence forces be subject to trial in civilian courts. 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.

IV. 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.

Conclusion

The work of Interpol in this field is an important demonstration of the sea change in thinking since the Rome Diplomatic Conference and the arrest of a former President accused of widespread and systematic enforced disappearances, torture and extrajudicial executions in 1998. Since those events, genocide, crimes against humanity, war crimes, torture and other crimes under international law are no longer recognized as political and diplomatic incidents to be resolved by politicians and diplomats, but serious crimes to be investigated and prosecuted by police and prosecuting authorties anywhere in the world. We are pleased that Interpol will be playing an increasingly active role in repressing such crimes against the international community.