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UNITED KINGDOM:

The *Pinochet* case -

Universal jurisdiction and absence of immunity for crimes against humanity

This paper sets forth Amnesty International's position on three of the legal issues involved in the rehearing of the appeal to the House of Lords of the judgment by the English High Court of Justice, Queen's Bench Division on 28 October 1998 in the cases, *In the Matter of an Application for a Writ of Habeas Corpus ad Subjicendum (Re: Augusto Pinochet Ugarte)* and *In the Matter of an Application for Leave to Move for Judicial Review between: The Queen v. Nicholas Evans et al. (Ex Parte Augusto Pinochet Ugarte)*. The three issues which Amnesty International addresses in this paper are:

(1) the immunity under Chilean law and practice for certain crimes under international law committed since 1973, including crimes against humanity and torture;

(2) the scope of universal jurisdiction over certain crimes under international law, including crimes against humanity and torture, and

(3) the absence of immunity under international law of heads of state for certain crimes under international law, including crimes against humanity and torture.

This paper does not address the other issues in the case, such as the claim that a former head of state is immune from prosecution for crimes against humanity and other crimes under international law under the act of state doctrine, a corollary to the doctrine of state immunity. The act of state doctrine "cannot be pleaded as a defence to charges of war crimes, crimes against peace, or crimes against humanity" (Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (London and New York:Routledge 1997), p. 122). On 13 January 1999, Amnesty International was granted leave to intervene as a third party in the rehearing of the appeal of the High Court judgment, together with the family of William Beausire, who "disappeared" in Chile; Sheila Ann Cassidy, who was tortured in Chile; the Medical Foundation for the Care of Victims of Torture; the Redress Trust and the Association of Relatives of Disappeared Prisoners.

On 17 October 1998, while General Pinochet was on a visit to the United Kingdom, he was arrested based on a Spanish provisional arrest warrant, issued the day before at the request of a Spanish court, alleging that he had been responsible for the murder of Spanish citizens in Chile at a time when he was President of that country. On 22 October 1998 he was served with a second Spanish provisional arrest warrant alleging that he was responsible for systematic acts in Chile and other countries of murder, torture, "disappearance", illegal detention and forcible transfers. A Spanish

court, the *Audiencia Nacional*, on 29 October 1998 rejected a challenge by state prosecutors to the jurisdiction of the Spanish judiciary to try General Pinochet.

This Spanish case is only one of a number of cases which have been instituted in national courts against former General Pinochet. The Swiss government has sent an extradition request to the United Kingdom in the case of a person with Chilean and Swiss citizenship who was kidnapped in Buenos Aires, Argentina by members of DINA (Directorate of National Intelligence) of Chile, transferred to Chile and then “disappeared” in Chile. The French government has filed an extradition request in the cases of French nationals who “disappeared” or were killed in Chile. Other criminal proceedings have begun, or reportedly are planned, in national courts in Belgium, Italy, Luxembourg, Norway, Sweden and the United States of America.

The English High Court, in an opinion by Lord Chief Justice Bingham of Cornhill, stated with respect to the first Spanish provisional extradition warrant alleging murders of Spanish citizens in Chile that neither Spain nor the United Kingdom had criminal jurisdiction (Judgment, pp. 14-15). He also concluded that under English law a former head of state of a foreign country was “entitled to immunity as a former sovereign from the criminal and civil process of the English courts” with respect to systematic murder, torture, “disappearance”, illegal detention and forcible transfer committed outside the United Kingdom while he was head of state (Judgment, pp. 30). Justice Collins and Justice Richards agreed. Justice Collins rejected the argument that such crimes could never be part of the sovereign functions of a head of state:

“Unfortunately, history shows that it has indeed on occasions been state policy to exterminate or to oppress particular groups. One does not have to [l]ook very far back in history to see examples of that sort of thing having happened. There is in my judgment no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists.” (Judgment, Opinion of Justice Collins, p. 34)

On 25 November 1998, the House of Lords concluded in a three to two decision that a former head of state did not have immunity with respect to crimes against humanity (*R. v. Stipendary Magistrate ex parte Pinochet*). On 17 December 1998, the House of Lords set aside its decision of 25 November on the ground that one of the judges was linked to Amnesty International, which had intervened in the hearing, and scheduled a rehearing of the appeal before a new panel on 18 January 1999.

As explained below, there is no possibility of an effective and impartial criminal investigation or prosecution in Chile with respect to the crimes alleged in the French, Spanish or Swiss extradition requests. However, under long-settled rules of international law, any court may exercise universal jurisdiction over acts amounting to crimes against

humanity, such as widespread or systematic murder, torture, forced disappearance, arbitrary detention, forcible transfer and persecution on political grounds, and heads of state and former heads of state do not enjoy immunity under international law - whether in international or national courts - for crimes under international law, including crimes against humanity and torture.

In short, no sovereign state has the power under international law to *enact* national legislation providing immunity for any individual, including a head of state, from criminal or civil responsibility for crimes against humanity and no other state has the power to *recognize* such legislation. This follows from the

“increasing acceptance that rules of international law are the foundation upon which the rights of states rest, and no longer merely limitations upon states’ rights which, in the absence of a rule of law to the contrary, are unlimited. Although there are

extensive areas in which international law accords to states a large degree of freedom of action (for example, in matters of domestic jurisdiction), it is important that freedom is derived from a legal right and not from an assertion of unlimited will, and is subject ultimately to regulation within the legal framework of the international community.” (Sir Robert Jennings, QC & Sir Arthur Watts, KCMG, QC, 1 *Oppenheim’s International Law* (London and New York: Longman 9th ed. 1996), p. 12).

BACKGROUND TO THE CASE - THE WIDESPREAD AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS IN CHILE SINCE 1973 AMOUNTING TO CRIMES AGAINST HUMANITY

A. Conclusions by intergovernmental organizations and the Chilean government

The 11 September 1973 Chilean military coup, which overthrew the democratically elected government of Salvador Allende, heralded the implementation of a policy of systematic and widespread human rights violations under the government headed by General Augusto Pinochet. Thousands were detained without charge or trial, tortured, extrajudicially executed, “disappeared”, abducted or persecuted on political grounds. The international community was aware of the widespread and systematic policy of human rights violations implemented in the aftermath of the coup. In 1975 the UN General Assembly (GA Res. 3448 (XXX) of 9 December 1975) recognized the existence

of an institutionalized practice of torture, ill-treatment and arbitrary arrest. The UN Ad-Hoc Working Group on Chile established by the UN Commission on Human Rights in its Resolution 8 of 27 February 1975, together with the Inter-American Commission on Human Rights of the Organization of American States, extensively documented these systematic and widespread violations. In 1976, the UN Ad-Hoc Working Group on Chile concluded that cases of torture, as crimes against humanity, committed by the military government should be prosecuted by the international community (UN Doc. A/31/253, 8 October 1976, para. 511).

The systematic and widespread nature of these human rights violations has been officially recognized by the civilian government of Chile in its 1990 report to the UN Committee against Torture, a body of experts established under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) to monitor implementation of that treaty. *The Chilean National Commission on Truth and Reconciliation (Truth and Reconciliation Commission), established by President Patricio Aylwin pursuant to Supreme Decree 335 of April 1990, together with the Chilean Government's report to the Committee against Torture, concluded that the intelligence service, DINA, under the direct command of Augusto Pinochet, played a central role in the policy of systematic and widespread human rights violations in Chile. Similarly, they concluded that the DINA developed a variety of criminal tactics including killings and "disappearances" of individuals of Chileans and other nationalities, considered to be "enemies" of the military regime, in other countries. They found that these violations required intelligence coordination and planning at the highest levels of the state.*

In 1996 the Reparation and Reconciliation Corporation, which had been set up under the administration of President Aylwin in 1992 as a successor to the Truth and Reconciliation Commission, presented its final report. The Corporation officially recognized a further 123 "disappearances" and 776 extrajudicial executions or death under torture during the military period, in addition to those previously documented by

the Truth and Reconciliation Commission. Combined with the findings of the Truth and Reconciliation Commission this brought the number of “disappearances” to 1,102 and extrajudicial executions and death under torture to 2,095, making a total of 3,197 cases that were officially recognized by the Chilean state. The victims of these human rights violations included *real, potential or suspected ideological opponents of the military government.*

According to these reports, during the period 1973 to 1977, the DINA reported directly to General Pinochet through its Director, General Contreras. In February 1998 the former head of DINA told the Chilean Supreme Court that Augusto Pinochet was in overall command of its operations. General Pinochet was also head of the armed forces, which also played a role in carrying out the policy of widespread and systematic human rights violations (Pol. Corte: 30: 30.174–93 – Apelacion Sentencia).

B. The failure to tackle impunity in Chile

For quarter of a century victims of human rights violations in Chile and their relatives have campaigned for justice, as well as truth, with the support of lawyers, organizations and judges. As senior members of the Chilean Government and politicians have stated, the issue of human rights violations committed during the military government is an unresolved one.

Several mechanisms guaranteeing impunity have blocked effective judicial investigations and prosecutions of those responsible for violations of human rights during the military government in Chile. These included the 1978 Amnesty Decree and the parliamentary immunity granted by the 1990 Chilean Constitution. Moreover, even if these obstacles were removed, the role of the military courts would make the possibility of an effective and independent prosecution illusory.

1978 Amnesty Decree. In 1978, the military government of General Pinochet decreed an amnesty (Decree 2191) designed to shield those responsible for human rights violations committed between 11 September and 10 March 1978 from prosecution. This decree has made it impossible for the relatives to find the answers on the whereabouts of those “disappeared” and to obtain justice. Those responsible for committing human rights violations played a major role in dictating the terms of transition to civilian rule to ensure immunity from prosecution for human rights violators. Those seeking truth and justice have been sidelined, often violently. The Amnesty Law was declared constitutional by the Chilean Supreme Court on 28 August 1990. This

self-amnesty has effectively guaranteed up to now the impunity of those responsible for systematic and widespread human rights violations in Chile.

The Inter-American Commission on Human Rights has stated that the Chilean Amnesty Law is incompatible with the international obligations of the Chilean State under international law and considered that “the legal effects were part of a general policy of human rights violations in Chile” (Inter-American Commission on Human Rights, Report No. 25/98, para. 76; *see also* Inter-American Commission on Human Rights, Report No. 36/96).

The Human Rights Committee, a body of experts established under the International Covenant on Civil and Political Rights to monitor implementation of that treaty, also, considered this kind of amnesty law incompatible with the international obligations of states under the international human rights law (Views of 19 July 1994, Case Hugo Rodriguez, Communication 322/1988, UN Doc. CCPR/C/51/D/322/1988; Preliminary observations of the Human Rights Committee - Peru, 25 July 1996, UN Doc. CCPR/C/79/Add.67, para. 20; Observations of the Human Rights Committee - France, UN Doc. CCPR/C/79/Add.80, para. 13; Observations of the Human Rights Committee - Uruguay, UN Doc. CCPR/C/79/Add.19, para. 7, Observations of the Human Rights Committee - Argentina, UN Doc. CCPR/C/79/Add.46, para.10; Human Rights Committee - El Salvador, UN Doc. CCPR/C/79/Add.34, paras 7 and 12; General Comment No. 20, para. 15).

The Vienna Declaration and Programme of Action, adopted by states on 25 June 1993, during the UN World Conference on Human Rights, reaffirmed the need for states to “abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violation, thereby providing a firm basis for the rule of law” (UN Doc. A/CONF.157/23, para. 60).

The Chilean Constitution. The Chilean Constitution , which former General Augusto Pinochet was instrumental in drafting, included a system of Senators for life who, as parliamentarians, have complete immunity under Chilean law. Since Augusto Pinochet retired from the armed forces, he has been covered by parliamentary immunity in his capacity as a Senator for life. Under this immunity, and according to Article 58 of the Chilean Constitution, Augusto Pinochet cannot be tried under any charges brought against him. This parliamentary immunity which covers former General Pinochet also guarantees impunity of those responsible for systematic and widespread human rights violations and is also an obstacle to obtaining justice in Chile. Although the Chilean Constitution (Article 58) and the Penal Procedure Code (Articles 611 to 618) provide the possibility of lifting parliamentary immunity for the purpose of judicial procedures, this possibility is severely constrained in Chile under the current political situation and the strong influence of the military. Moreover, even if the parliamentary immunity could be lifted, the period between 1973 and 1978, when most of the systematic and widespread human rights violations were committed and which are the main crimes included in the extradition requests from European countries, would remain protected by the Amnesty Law provisions.

The role of military courts. In the hypothetical event that the Amnesty Law were repealed and the parliamentary immunity lifted, according to Chilean legislation it would be within the jurisdiction of a military tribunal to try former General Augusto Pinochet in relation to the human rights violations which were committed during his period as army commander (Articles 2 and 3 of the Code of Military Justice). The Inter-American Commission in its 1985 report on the Situation of Human Rights in Chile stated that military courts in Chile do not guarantee the right to justice and “the actions of these courts have served to provide a veneer legality to cover-up the impunity which the members of the Chilean Security Forces enjoy when they are found to be involved in flagrant violations of human rights” (Organization of American States document OAS/Ser.L/V/II.66, para. 180). The military legislation remains substantially unchanged and continues to be the source of impunity as established by the Special Rapporteur on Torture, Mr. [now Sir] Nigel Rodley, in his 1996 report to the Human Rights Commission (U.N. Doc. E/CN.4/1996/35/Add.2, paras 62, 68, 74 and 76).

The Human Rights Committee and the Inter-American Commission on Human Rights have repeatedly stated that the trial of members of the armed forces on human rights violations by military courts is incompatible with the States’ obligations under international law (Human Rights Committee: Concluding observations - Colombia, UN Doc. CCPR/C/79/Add.2, para. 5 and CCPR/C/79/Add.76, para. 18; Concluding observations - Brazil, UN Doc. CCPR/C/79/Add.66, para. 10; Concluding observations - Peru, UN Docs CCPR/S1519 and CCPR/C/SR1521; Concluding observations - Lebanon, UN Doc. CCPR/C/79/Add.78, para.14. Inter-American Commission on Human Rights, OEA/Ser.L./V/II.66, para. 139; OEA/Ser.L./V/II.84, Doc. 39 rev, 14 of October 1993; OEA/Ser.L./V/II.97, 28 September 1997) .

The Draft Declaration on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers (UN Doc. E/CN.4/Sub.2/1988/Add.1 and Add./Corr.1) (the Singhvi Declaration), stated in Article 5 (f) that the jurisdiction of military courts is limited to infractions of military discipline by members of the armed forces (*‘la compétence des tribunaux militaires se limite aux infractions d’ordre militaire commises par des membres des forces armées’*). The UN Commission on Human Rights, in its Resolution 1989/32, invited Governments to take into account the principles set forth in the draft declaration in implementing the Basic Principles on the Independence of the Judiciary.

The UN Declaration on the Protection of All Persons from Enforced Disappearance (adopted by the UN General Assembly in Resolution 47/133 of 18 December 1992) provides that persons alleged to have committed enforced disappearances “shall be tried only by the competent ordinary courts in each State, and not by any special tribunal, in particular military courts” (Article 16 (2)). The Inter-American Convention on the Forced Disappearance of Persons, which Chile signed on 10 June 1994, has a similar provision (Article IX).

In Chile there are currently 17 judicial investigations related to the findings of human remains in secret graves which could be those of victims of “disappearances” and on cases of other victims of human rights violations committed during the period of the military government (1973 -1990). However, if the relevant judicial authority establishes the criminal responsibility of Augusto Pinochet, the judicial procedures could be blocked either by his parliamentary immunity or by the application of the Amnesty Law.

As of 13 January 1999, Chile had not filed a request for the extradition from the United Kingdom of former General Pinochet.

I. ACTS ALLEGED IN THIS CASE WHICH AMOUNT TO CRIMES AGAINST HUMANITY

The widespread and systematic nature of the human rights violations which were committed under the military government in Chile between September 1973 and March 1990 constitute crimes against humanity under international law.

A. Crimes against humanity recognized in international treaties and other instruments

Crimes against humanity recognized by international law include the practice of systematic or widespread murder, torture, forced disappearances, deportation and forcible transfers, arbitrary detention and persecutions on political or other grounds. All of these crimes have been alleged in one or more of the three extradition warrants.

Each of these crimes against humanity have been recognized as crimes under international law in international conventions or other international instruments, either expressly or as other inhumane acts, including:

- *the Declaration of France, Great Britain and Russia on 24 May 1915 (stating that those responsible for “crimes against humanity and civilization”, including massacres of civilians, would “be held responsible”);*
- *Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented to the 1919 Preliminary Peace Conference (murder and massacres, systematic terrorism, torture of civilians, internment of civilians under inhuman conditions);*
- *Article 6 (c) of the Charter of the International Military Tribunal at Nuremberg (1945) (Nuremberg Charter) (murder, deportation and other inhumane acts and persecutions);*
- *Allied Control Council Law No. 10 (1946) (murder, deportation, imprisonment, torture and other inhumane acts and persecutions);*
- *Article 6 (c) of the Charter of the International Military Tribunal for the Far East (1946) (murder, deportation and other inhumane acts and persecutions);*
- *Article 2 (10) of the Draft Code of Offences against the Peace and Security of Mankind (1954) (murder, deportation and persecutions);*

- *Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (1993) (murder, deportation, imprisonment, persecutions and other inhumane acts);*
- *Article 3 of the International Criminal Tribunal for Rwanda (1994) (murder, deportation, imprisonment, persecutions and other inhumane acts);*
- *Article 18 of the UN Draft Code of Crimes against the Peace and Security of Mankind (1996) (murder, torture, persecution, arbitrary imprisonment, arbitrary deportation or forcible transfer of population, forced disappearance of persons and other inhumane acts); and*
- *Article 7 of the Statute of the International Criminal Court (1998) (murder, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, persecution, enforced disappearance of persons and other inhumane acts).*

Although the crime of enforced disappearance was not expressly mentioned in the Nuremberg Charter, Field Marshal Wilhelm Keitel was convicted of committing this crime, invented by Adolf Hitler in 1941, by the Nuremberg Tribunal (see Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) - Nuremberg 30th September and 1st October 1946, Cmd. 6964, Misc. No. 12 (London: H.M.S.O 1946), pp. 48-49).

B. Crimes against humanity as part of customary law

Crimes against humanity. Moreover, the acts alleged in the three extradition warrants are recognized as crimes against humanity under international customary law (*Article VI (c) of the International Law Commission's Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (1950)*); Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press 4th ed. 1991), p. 562; Eric David, *Éléments de Droit Pénal International (1997-1998)* (Bruxelles: Presses Universitaires de Bruxelles 1998), p. 540). As the UN Secretary-General made clear in his report to the Security Council on the establishment of the International Criminal Tribunal for the former Yugoslavia, which has jurisdiction over crimes against humanity, "the application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise" (Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 34). He also stated that "[t]he part of conventional international humanitarian law which has beyond doubt become part of international customary law" includes the Nuremberg Charter (*Ibid.*, para. 35). The Security Council expressly stated when it established the International Criminal Tribunal for the former Yugoslavia in Resolution 827 (1993) that it: "Approves the report of the Secretary-General". The Ambassador of the United Kingdom, Sir David Hannay, stated, "We welcome and endorse the Secretary-General's excellent report on the most effective and expeditious means of establishing the tribunal" (UN Doc. S/PV.3217, 25 May 1993).

Indeed, even before the adoption of the 1996 UN Draft Code of Crimes against the Peace and Security of Mankind and the 1998 Rome Statute of the International Criminal Court, the UN General Assembly had recognized that "the systematic practice" of enforced disappearances "is of the nature of a crime against humanity" (UN Declaration on the Protection of All Persons from Enforced Disappearances, adopted by the UN General Assembly in Resolution 47/133 of 18 December 1992, Preamble, para. 4).

Genocide and torture. Genocide, a crime against humanity, is a crime under customary international law as well as under the Convention for the Prevention and Punishment of the Crime of Genocide of 1948 (UN General Assembly Res. 96 (I) (1946); *Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. Rep. 15). Torture is a crime under general international law (J. Herman Burgers & Hans Danelius, *The United Nations Convention against Torture: A Handbook* (Dordrecht: Martinus Nijhoff Publishers 1988), p. 1 ("the Convention is based upon the recognition that the above-mentioned practices [torture and cruel, inhuman and degrading treatment and punishment] are already outlawed under

international law”); (now Sir) Nigel Rodley, *The Treatment of Prisoners under International Law* (1987), p. 156.

II. UNIVERSAL JURISDICTION OVER CRIMES AGAINST HUMANITY AND TORTURE

The crimes against humanity committed in Chile since 1973 are subject to universal jurisdiction. This principle has been recognized under international law since the establishment of the International Military Tribunal of Nuremberg, which had jurisdiction over crimes against humanity regardless where they had been committed. The principles articulated in the Nuremberg Charter and Judgment were recognized as international law principles by the UN General Assembly in 1946 (Resolution 95 (I)). Similarly, genocide and torture are crimes under international law which are subject to universal jurisdiction.

A. The *jus cogens* and *erga omnes* nature of crimes against humanity

Jus cogens. Crimes against humanity and the norms which regulate them form part of *jus cogens* (fundamental norms). As such, they are peremptory norms of general international law which, as recognized in Article 53 of the Vienna Convention of the Law of Treaties (1969), cannot be modified or revoked by treaty or national law. That article provides that “a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Similarly, the prohibition of torture “is itself a norm of *jus cogens* or a ‘peremptory norm of general international law’” (Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Clarendon Press 1997), p. 110; see also Theodor Meron, “International Criminalization of Internal Atrocities”, 89 *Am. J. Int’l L.* (1995), pp. 554, 558; *Restatement (Third) of Foreign Relations Law*, §702, comment n.; Rodley, *supra*, p 70; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-718 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993)). Indeed, Chile itself has declared that “the prohibition on torture has the character of *jus cogens* or obligation *erga omnes*” (Submissions to be made by the Republic of Chile if leave to intervene is given, *R. v. Metropolitan Stipendiary Magistrate, ex parte Pinochet*, House of Lords, 13 January 1999).

Erga omnes. As an eminent authority has explained, “*Jus cogens* refers to the legal status that certain international crimes reach, and obligation *erga omnes* pertains to the legal implications arising out of a certain crime’s characterization as *jus cogens* Sufficient legal basis exists to reach the conclusion that all of these crimes [including torture, genocide and crimes against humanity] are parts of the *jus cogens*”

(M. Cherif Bassiouni, “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*”, *Law & Contemp. Prob.*, 25 (1996), pp. 63, 68). Indeed, as the International Court of Justice recognized in *Barcelona Traction, Light and Power Company Ltd.*, Judgment (ICJ, 1972 Report, p. 32, paras. 33-34) the prohibition in international law of acts, such as those alleged in this case, is an obligation *erga omnes*, which is duty *all* states have a legal interest in ensuring is fulfilled:

“[A]n essential distinction should be drawn between the obligations of a State toward the international community as a whole, and those arising vis-à-vis another State . . . By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have an interest of a legal nature in their protection; they are obligations *erga omnes*.”

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character.”

B. The ability of any state to exercise universal jurisdiction over crimes against humanity and other crimes under international law

Crimes against humanity. The legal interest *erga omnes* permits any state to exercise universal jurisdiction over persons suspected of committing crimes against humanity (M. Cherif Bassiouni, *Crimes against Humanity* (Dordrecht/Boston/ London: Martinus Nijhoff Publishers 1992), pp. 510-527; Brownlie, *supra*, p. 304; Eric David, *Principes de Droit des Conflits Armés* (Bruxelles: Editions Bruylant 1994), para. 4.194 *et seq.*, pp. 643 *et seq.*; Bernard Graefrath, “Universal Criminal Jurisdiction and an International Criminal Court”, 1 *Eur. J. Int’l L.* 1990), 67, 68; Christopher Joyner, “Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability”, 59 *Law & Contemp. Prob.* (1996), pp. 153, 160, 165, 168 (“Every state may prosecute violations of modern fundamental norms of international law, particularly those relating to war crimes and crimes against humanity”), 169; Menno T. Kamminga, “Universal Jurisdiction in Respect of Gross Human Rights Offences: Putting the Principle into Practice”, *Int’l L. Ass’n Y.B.* (1995/1996), pp. 485-491; F.A. Mann, “The Doctrine of Jurisdiction in International Law”, 113-1 *Recueil des Cours* (1964), pp. 9, 95; Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (London and New York: Routledge 7th ed.1997), p. 113 (crimes against humanity “are a violation of international law, directly punishable under international law itself (and thus universal crimes), and they may be dealt with by national courts or by international tribunals”); Theodor Meron, 89 *Am. J. Int’l L.* (1995), pp. 554, 569 (“It is now widely accepted that crimes against

humanity . . . are subject to universal jurisdiction.”); Kenneth C. Randall, “Universal Jurisdiction under International Law”, 66 *Tex. L. Rev.* (1988), pp. 785, 814; Ratner & Abrams, *supra*, p. 143; Restatement (Third) of Foreign Relations (1987), § 404; Rodley, *supra*, pp. 101-102; Malcolm N. Shaw, *International Law* (4th ed. 1997), p. 472; *see also* Convention on the Suppression and Punishment of the Crime of *Apartheid*, Art. V (“Persons charged with the acts enumerated in article II [the crime against humanity of *apartheid*] may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused . . .”).

Crimes against humanity are considered as crimes of the same nature as piracy, which any state may punish. With respect to such a crime, “*le droit ou le devoir d’assurer l’ordre public n’appartient a aucun pays [...] tout pays, dans l’intérêt de tous, peut saisir et punir*” (“the right and duty to ensure public order (*ordre public*) does not belong to any particular country . . . [;] any country, in the interest of all, can exercise jurisdiction and punish” - unofficial translation) (Cour Permanente de Justice Internationale, *Affaire du Lotus* (France/Turquie), arret du 7 septembre 1927, Serie A, N° 10, p. 70, opinion individuelle du Juge Moore).

More than a third of a century ago, the scholar F.A. Mann explained the rationale for universal jurisdiction over crimes under international law:

“The second exception [to the general rule that states do not have criminal jurisdiction over crimes committed by aliens abroad] arises from the character of certain offences. This is such as to affect and, therefore, justify and perhaps even compel every member of the family of nations to punish the criminal over whom jurisdiction can in practice be exercised. These are crimes which are founded in international law, which the nations of the world have agreed, usually by treaty, to suppress and which are thus recognized not merely as acts commonly treated as criminal, but dangerous to and, indeed, as attacks upon the *international* order. Traffic in women and children, trade in narcotics, falsification of currency, piracy and trade in indecent publications are crimes covered by such treaties, and therefore by the principle of universality. By its very nature this principle can apply only in a limited number of cases, but the existence of a treaty is not a prerequisite of its application. It is founded upon the accused’s attack upon the international order as a whole (Mann, *supra*, p. 95 (footnotes omitted, emphasis in original)).

In a footnote, F.A. Mann cited the *Eichmann Case*, which involved crimes against humanity and genocide, as an example of such crimes: “It is, therefore, likely that Israel was entitled to exercise international jurisdiction in the *Case of Eichmann* which arose from a unique case of such an attack.” (*Ibid.*, p. 95, n. 188).

National legislation authorizing the exercise of universal jurisdiction over crimes against humanity. According to information available to Amnesty International, including information supplied by Redress, a number of states, including **Chile**, have enacted legislation permitting their courts to exercise universal jurisdiction over crimes against humanity, war crimes or other crimes under international law, such as torture or enforced disappearances, or they make treaty obligations to try or extradite persons suspected of such crimes directly applicable as part of their national law. These states include:

- **Belgium:** Under the Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions (Moniteur Belge, 5 août 1993), Belgian courts have universal jurisdiction over violations of the four Geneva Conventions of 1949 and their Protocols. In addition, Belgian courts are considered to have jurisdiction over crimes against humanity under customary law. See Luc Reydam, “De Belgische wet ter bestraffing van inbreuken op het internationaal humanitair recht: een papieren tijger?”, 7 Zoeklicht (1998) p. 4. In addition, Loi 13 avril 1995, art. 8, loi relative aux abus sexuels à l’égard des mineurs provides for universal jurisdiction over crimes against minors.

- **Bolivia:** The Bolivian Penal Code (Article 1 (7)) provides that national courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them.

- **Brazil:** The Brazilian Penal Code (Article 7) provides that national courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them.

- **Canada:** Section 7 (3.71) of the Canadian Criminal Code provides for universal jurisdiction over non-Canadians found in Canada for conduct outside Canada that constitutes a crime against humanity or a war crime if the conduct would have constituted an offence in Canada had it been committed in Canada.

- **Chile:** Article 5 of the Chilean Constitution recognizes as limits on sovereignty the respect for law which are inherent in the person and provides that the authorities have the duty to promote and respect rights guaranteed by treaties ratified by Chile which are in force. The Supreme Court of Justice of Chile has recognized under Article 5 the possibility of the direct application of the provisions of international treaties to which Chile is a party and which are in force (Judgment of 9 September 1998, *Pedro Enrique Poblete Cordoba*, paras 9 & 10). Chile is a party to the Inter-American Convention to Prevent and Punish Torture, which it ratified on 30 September of 1988. Article 12 of that

treaty provides for universal jurisdiction over persons suspected of torture. Chile has also signed the Inter-American Convention on Forced Disappearance of Persons on 10 June 1994. Article IV provides for universal jurisdiction over this crime under international law and Chile is obliged under international law to refrain from acts which would defeat the object and purpose of the Convention pending a decision on ratification (Vienna Convention on the Law of Treaties, Art. 18). Chile has also ratified the Convention against Torture on 23 September 1989, which provides for universal jurisdiction in Article 5.

· **Colombia:** The Colombian Penal Code (Article 15 (6)) provides that Colombian courts have jurisdiction over crimes committed abroad by foreigners against other foreigners, when the person presumed responsible is within Colombian territory.

· **Costa Rica:** The Costa Rican Penal Code (Article 7) states that national courts, independently of the place of the event and the nationality of the person presumed responsible, have jurisdiction to judge according to national law the crime of genocide and any crimes against human rights according to treaties accepted by Costa Rica or by its Penal Code.

· **Denmark:** Article 8 (5) of the Danish Penal Code gives the courts jurisdiction to try those responsible for certain crimes when Denmark is bound to do so by treaty (*see* Marianne Holdgaard Bukh, "Prosecution before Danish Courts of Foreigners Suspected of Serious Violations of Human Rights or Humanitarian Law", 6 *Eur. Rev. Pub. L.* (1994), p. 339).

· **Ecuador:** The Ecuadorean Penal Code (Article 5) provides that national courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when international treaties or conventions establish this jurisdiction.

· **El Salvador:** The Penal Code of El Salvador (Article 9) provides the competence of national courts to exercise jurisdiction over crimes committed abroad, when they are considered crimes of international significance according to international treaties or conventions.

· **France:** On 6 January 1998, the *Cour de Cassation* held in the *Wecelas Munyeshyaka* case that France has universal jurisdiction under the French Law 96-432 of 22 May 1996 over genocide and crimes against humanity.

· **Germany:** Article 6 (1) of the German Penal Code provides that German criminal law applies to acts of genocide committed abroad. Article 6 (9) of the German Penal Code provides that German criminal law applies to conduct, including conduct abroad, which Germany is obliged to prosecute under a treaty to which it is a party.

· **Guatemala:** The Guatemala Penal Code (Article 5 (5)) provides that national courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them.

· **Honduras:** The Honduran Penal Code (Article 5 (5)) provides that courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them, or when principles of international permit courts to exercise such jurisdiction.

· **Israel:** The Israeli Nazi and Nazi Collaborators (Punishment) Law, 5710/1950, Sections 1 and 3, which prohibit certain crimes, including crimes against humanity, have been interpreted as applying to acts committed outside Israel by non-Israeli citizens. See discussion below of *Attorney-General of the Government of Israel v. Eichmann*, 36 Int'l L. Rep. 18, 50 (Isr. Dist. Ct. - Jerusalem), *aff'd*, 36 Int'l L. Rep. 277, 299 (Isr. Sup. Ct. 1962).

· **Mexico:** Mexican Penal Code (Código Penal para el Distrito Federal en materia de Fuero Común y para toda la República en materia de Fuero Federal, art. 6) provides that courts have jurisdiction to try those crimes under international treaties imposing this obligation on Mexico.

· **Nicaragua:** The Penal Code of Nicaragua (Article 16 (3) (f)) provides for universal jurisdiction, *inter alia*, over crimes of piracy, slave commerce, racial discrimination and genocide.

· **Norway:** Section 12 (4) of the Norwegian Criminal Code provides that, "Unless it is otherwise specially provided or accepted in an agreement with a foreign State, Norwegian criminal law shall be applicable to acts committed: . . . (4) abroad by a foreigner when the act either" (a) constitutes murder, assault and certain other crimes under Norwegian law or (b) "is a felony also punishable according to the law of the country in which it is committed, and the offender is resident in the realm or is staying therein".

· **Panama:** The Panamanian Penal Code (Article 10) provides that courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the offence was established by international treaties or conventions ratified by Panama.

· **Peru:** The Peruvian Penal Code (Article 2) provides that courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them.

· **Spain:** Article 65 of the 1985 Judicial Power Organic Law (*Ley Orgánica del Poder Judicial, Ley orgánica 6/1985*) gives Spanish courts jurisdiction over acts committed outside Spain where the conduct would violate Spanish law if committed in Spain or violates obligations under international treaties. Article 23 (4) of this law gives Spanish courts jurisdiction over other offences which international treaties require Spain to prosecute, including genocide, terrorism and where treaties require Spain to prosecute such crimes (see “The Criminal Procedures against Chilean and Argentinian Repressors in Spain: A Short Summary (Revision One), 11 November 1998, Derechos Human Rights, <http://www.derechos.org>).

· **Switzerland:** Article 6bis of the Code pénal suisse gives the courts universal jurisdiction over crimes committed outside the territory which Switzerland is obliged to prosecute under a treaty, such as torture. See Switzerland’s Initial Report to the UN Committee against Torture, UN Doc. CAT/C/5/Add.17, para. 52. Article 109 of the Code pénale militaire (Violations of the Laws of War) provides that it is a crime for anyone to act “contrary to the provisions of any international agreement governing the laws or the protection of persons and property, or . . . in violation of any other recognized law or custom of war”. Article 2 (9) extends the application of the Code to civilians and members of foreign armed forces, even if they commit the crimes abroad during an international armed conflict and have no link to Switzerland. Article 108 (1) provides for the application of Articles 109 to 114 to international armed conflict; Article 108 (2) extends their application to non-international armed conflict (See Andreas R. Zeigler, “*In re G.*”, 92 Am. J. Int’l L. (1998), pp. 78, 79).

· **Uruguay:** The Uruguayan *Penal Code* (Article 10 (7)) provides that courts have jurisdiction to try those crimes which were committed abroad, independently of the nationality of the person presumed responsible and that of the victim, when the state, through international treaties or conventions, has pledged to punish them.

· **Venezuela:** The Venezuelan *Penal Code* (Article 4 (9)) provides that courts have jurisdiction to try and punish crimes against humanity committed abroad, by nationals or foreigners, when they are in Venezuelan territory.

National courts which have exercised universal jurisdiction over crimes against humanity. National courts have exercised universal jurisdiction over crimes against humanity during the Second World War in national tribunals established under the authority of Allied Control Council Law No. 10 in Europe or in other national tribunals or commissions elsewhere, and subsequently in ordinary national courts and they have exercised such universal jurisdiction over crimes against humanity which have been committed since the Second World War.

The Allies conducted over 1,000 trials in national tribunals after the Second World War under the authority of the *Allied Control Council Law No. 10* of persons accused of crimes against peace, war crimes or crimes against humanity, based largely on universal jurisdiction (Kenneth J. Randall, *supra*, at pp. 804-810; Ratner & Abrams, *supra*, p. 143; Sponsler, "The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen", 15 Loy. L. Rev. (1968), pp. 43, 53; *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985) ("it is generally agreed that the establishment of these tribunals and their proceedings were based on universal jurisdiction"), *cert. denied*, 475 U.S. 1016 (1986)). Indeed, several of these national tribunals expressly stated that they were asserting universal jurisdiction in cases where the accused were convicted of crimes against humanity or war crimes. For example, in a case in which the accused were convicted of both crimes against humanity and war crimes, the United States court in Nuremberg declared that a state which captures a person responsible for war crimes either may "surrender the alleged criminal to the state where the offence was committed, or . . . retain the alleged criminal for trial under its own legal processes." (*In re List (Hostages Case)*, 11 Trials of War Criminals (1946-1949), p. 1242). The United States argued that the court had jurisdiction because the accused had committed crimes that were "universally recognized" under existing customary and conventional law (*Ibid.*, p. 1235).

In 1961, *Israel* tried and convicted Adolf Eichmann of crimes against humanity committed in Germany during the Second World War based in part on universal jurisdiction. The District Court of Jerusalem stated:

"The State of Israel's "right to punish" the accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source . . ." (*Attorney General of Israel v. Eichmann*, 36 Int'l L. Rep. 18, 50 (Isr. Dist. Ct. - Jerusalem 1961), *aff'd*, 36 Int'l L. Rep. 277 (Isr. Sup. Ct. 1962)).

On appeal, the Israeli Supreme Court reached the same conclusion:

"[T]here is full justification for applying here the principle of universal jurisdiction since the international character of 'crimes against humanity' . . . dealt with in this case is no longer in doubt . . ." (*Attorney General v. Eichmann*, 36 Int'l L. Rep. 277, 299 (Isr. Sup. Ct. 1962)).

F.A. Mann and numerous other scholars have concluded that this case was a proper exercise of universal jurisdiction by a national court over crimes against humanity (Mann, *supra*, p. 95, n. 188; *see, for example*, Joyner, *supra*, p. 168, n. 53).

In 1985, a *United States* court authorized the extradition of a person alleged to have committed acts in Germany and other countries which amounted to genocide and other crimes against humanity to Israel (*In matter of Demjanjuk*, 603 F. Supp. 1468 (N.D. Ohio, *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 457 U.S. 1016 (1986)).

In 1993, the *French Cour d'Appel* (Court of Appeal) recognized the existence of the fundamental rule of international law of universal jurisdiction in the *Barbie* Case when it noted that "by reason of their nature, the crimes against humanity with which Barbie is indicted do not simply fall within the scope of French municipal law, but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign" (*Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie, Cour de Cassation (Chambre Criminel)*, Judgment, 6 October 1983 (summarizing decision of *Cour d'Appel*), 78 Int'l L. Rep. 128).

Canadian courts exercised universal jurisdiction over a non-Canadian accused of crimes against humanity during the Second World War (*see R. v. Finta*, 28 C.R (4th) 265 (1994)).

According to information available to Amnesty International, including information provided by the Redress Trust, after the establishment of the International Criminal Tribunal for the former Yugoslavia in 1993, a number of courts have exercised universal jurisdiction over crimes under international law committed in the former Yugoslavia, including those in:

· *Austria*: In March 1995, Duško Cvjetković, a Serb charged with murder, arson and genocide, was retried for acts committed in Bosnia and Herzegovina in July 1992 after the Austrian Supreme Court ruled that Austria had jurisdiction (*see* Axel Marschik, "The Politics of Prosecution: European National Approaches to War Crimes", in Timothy L.H. McCormack & Gerry J. Simpson, eds, *The Law of War Crimes* (1997), pp. 65, 79-81). He was ultimately acquitted.

· *Denmark*: In November 1994, in *Prosecution v. Refik Šarić*, Danish High Court, Third Chamber, Eastern Division, 25 November 1994, of a Bosnian Muslim was convicted and sentenced to eight years' imprisonment of torture of prisoners of war in violation of the grave breaches provisions of the Third and Fourth Geneva Conventions; the verdict was confirmed on appeal by the Supreme Court on 15 September 1995. The Prime Minister of Denmark, Poul Nyrup Rasmussen, has requested the Minister of

Justice, Frank Jensen, to study the possibility of asking for the extradition of the former head of state of Chile ("Primer Ministro Danés analiza posible demanda extradición", 11 December 1998 (EFE)).

· **Germany:** There have been at least six criminal investigations or prosecutions of persons charged with crimes committed in the territory of the former Yugoslavia. In the case of *Prosecutor v. Duško Tadić*, the Supreme Court of Germany (*Bundesgerichtshof*) on

13 February 1994 held that a Bosnian Serb could be prosecuted in Germany for genocide committed in Bosnia and Herzegovina. He was subsequently surrendered to the International Criminal Tribunal for the former Yugoslavia and convicted (*Prosecutor v. Tadić*, Judgment, Trial Chamber, Case No. IT-94-1, 7 May 1997). He has appealed the conviction. In *Public Prosecutor v. Djajić*, No. 20/96 (Sup. Ct. Bavaria, 3d Strafsenat, 23 May 1997) (reported in 92 Am. J. Int'l L. (1998), pp. 528-532), a Bosnian Serb was acquitted of the crimes of genocide and attempted genocide in Bosnia and Herzegovina, but convicted of grave breaches of the Fourth Geneva Convention and Protocol I. On 26 September 1997, Nikola Jorgić was convicted of 11 counts of genocide and 30 counts of murder and sentenced to life imprisonment by the Düsseldorf High Court (*Public Prosecutor v. Jorgić*, Oberlandesgericht Düsseldorf, 26 September 1997). He has appealed against his conviction. The Federal Prosecutor in Karlsruhe stated on 8 December 1997 that charges were being pressed against Maksim S. for crimes of genocide, murder, rape and torture of Bosnian Muslims in former Yugoslavia. A Federal Prosecutor has opened a criminal investigation of Djuradj Kušić, a Bosnian Serb who was arrested in Munich in September 1997 on suspicion of murder and complicity in crimes against humanity in former Yugoslavia. Another case is reported to be pending in the Düsseldorf High Court against a Bosnian Serb charged with genocide.

· **The Netherlands:** Prosecutors are investigating a number of cases of crimes under international law committed in other countries. On 11 November 1997, the *Hoge Raad* (Netherlands Supreme Court) held that a Military Court had could exercise universal jurisdiction to try Darko Knežević for laws and customs of war, including grave breaches of the Geneva Conventions committed in the former Yugoslavia (*Prosecution v. Darko Knežević*, Sup. Ct. Neth., 11 November 1997).

· **Sweden:** In February 1995, the Public Prosecutor ordered the opening of a criminal investigation against Siniša Jazić, a Bosnian Serb, for the murder of Bosnian Muslims in detention camps in the territory of the former Yugoslavia.

· **Switzerland:** On 28 February 1997, Goran Grabež, a Bosnian Serb was charged with violating the laws and customs of war by torturing prisoners in in the Omarska and Keraterm camps in Bosnia and Herzegovina, but was later acquitted. *In re G.* (Military

Tribunal, Division 1, Lausanne, Switzerland, 18 April 1997) (reported in 92 Am. J. Int'l L. (1998), pp. 78-82).

After the establishment of the International Criminal Tribunal for Rwanda in 1994, a number of prosecutors opened criminal investigations in different states concerning crimes against humanity, genocide or war crimes which occurred in Rwanda, including prosecutors in:

- **Belgium:** Criminal investigations were opened against several Rwandans for violations of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II). Three who had been arrested in 1995 were subsequently transferred to the International Criminal Tribunal for Rwanda pursuant to a request made in January 1996. In August

1996, a Belgian court refused to dismiss a criminal case against Vincent Ntezimana charged with genocide in Rwanda during 1994.

- **France:** An investigating magistrate opened a criminal investigation against a Rwandan priest, Wenceslas Munyeshyaka, for genocide and crimes against humanity committed in Rwanda in 1994. On 6 January 1998, the *Cour de Cassation* rejected a challenge to the investigating magistrate's jurisdiction and held that there was universal jurisdiction under international law based on Security Council Resolution 955, which established the International Tribunal for Rwanda and which was implemented by Law 96-432 of 22 May 1996.

- **Switzerland:** In December 1998, the trial of a Rwandan mayor of a commune in Gitarama province, accused of committing crimes against humanity in 1994 was rescheduled until April 1999 before a military court (*Le Temps* (Switzerland), 17 December 1998). In May 1997, Switzerland agreed to surrender Alfred Musema, arrested in Switzerland in February 1995 and then under investigation by Swiss military judicial authorities, to the International Criminal Tribunal for Rwanda.

More recently, a number of national courts are reported to have determined that they, or other national courts, have universal jurisdiction over acts in other countries which amount to crimes against humanity or torture, including:

- **Belgium:** In November 1998, a Brussels investigating magistrate, Daniel Vandermeersch, declared that he had jurisdiction to open a criminal investigation against former General Pinochet following the submission of a complaint by six Chileans (Belga/Belgian Press Agency, 6 November 1998).

· **Spain:** A Spanish judge has opened criminal investigations against former General Pinochet concerning crimes committed in Chile involving victims of Spanish, Chilean and other nationalities and a criminal investigation against the members of the Argentinian military junta concerning crimes committed during the military government..

· **Switzerland:** A Geneva prosecutor has opened a criminal investigation of former General Pinochet concerning the death of person with Chilean and Swiss nationality. A Swiss court has requested the extradition of former Admiral and deputy military junta member Emilio Massera in December 1998 for kidnapping a person with Chilean and Swiss nationality in Argentina in 1977.

Statements by government officials recognizing universal jurisdiction over crimes against humanity. There have been a number of statements by governmental officials or extradition requests approved by executive officials which demonstrate that their states recognize that national courts have universal or extraterritorial jurisdiction over crimes against humanity, genocide, torture or war crimes, including: **Belgium:** The Minister of Foreign Affairs, Erik Derycke, stated in a television interview that “the British and Spanish authorities have the right to arrest the former Chilean dictator Pinochet (“Interview met Minister van Buitenlandse Zaken Erik Derycke over de arrestatie van Pinochet”, VRT-TV1, 1900, 22 October 1998). **Canada:** On 27 November 1998, the Foreign Minister of Canada, Lloyd Axworthy, welcomed the judgment of the House of Lords in the *Pinochet* case two days before, noting that it “makes clear the global dimension of this challenge and our collective responsibility to address this issue” (Address by the Honourable Lloyd Axworthy to the International Conference on Universal Rights and Human Values - A Blueprint for Peace, Justice and Freedom”, Edmonton, 27 November 1998). **France:** The French Minister of Justice, Elisabeth Guigou, stated that she believed that former General Pinochet had a case to answer in France and would send extradition requests to the United Kingdom if they are approved by French courts (see “Pinochet Gets Bail - But Stays under Police Guard in Hospital”, PA News, 30 October 1998, mfl 301659 OCT 98; AFP, “Londres et Madrid statuent sur le sort du général Pinochet”, *Le Monde*, 29 October 1998, p. 4). Such a request has been sent. **Luxembourg:** Jacques Poos, the Foreign Minister of Luxembourg, said on 31 October 1998 that Luxembourg may seek General Pinochet’s extradition. **Sweden:** On 25 November 1998, the Minister for Foreign Affairs, Anna Lindh, welcomed the House of Lords judgment, saying: “It is good that yet another step has been taken in a process that may lead to Pinochet being brought to justice in Spain” (Ministry of Foreign Affairs Press Release, 25 November 1998). **United Kingdom:** The Secretary of State, Jack Straw, on 9 December 1998, issued an order to a magistrate authorizing the magistrate to proceed with a hearing on a request for extradition to Spain for acts amounting to crimes against humanity and torture committed in a third country. Order to the Chief Metropolitan Stipendiary Magistrate or other

designated Metropolitan Stipendiary Magistrate sitting at Bow Street, 9 December 1998. **United States:** In 1997, after reports that Pol Pot, the head of the Khmer Rouge, had been taken into custody by other members of the Khmer Rouge, the United States Secretary of State, Madeline Albright, and other high-level United States officials pressed states like Denmark and Canada to accept custody with a view to a possible trial either by an international criminal tribunal for Cambodia or, if this proved impossible to establish, by their national courts (*see, for example*, Mark Kennedy & Giles Gherson, “Canada in a spin over U.S. request”, *The Ottawa Citizen*, 14 June 1997, p. A3). Although Pol Pot died before arrangements could be made to transfer him to any national jurisdiction outside Cambodia, these efforts by the Secretary of State and other high-level officials are strong evidence that the United States believes that national courts have universal jurisdiction over crimes against humanity. The former Foreign Minister of **Australia**, Gareth Evans, stated that Australia would have been a suitable venue for a trial of Pol Pot (*The Independent*, 30 July 1997).

Universal jurisdiction over genocide. Although the framers of the Convention for the Prevention and Punishment of the Crime of Genocide in 1948 did not extend the scope of jurisdiction under that treaty beyond territorial jurisdiction and the jurisdiction of an international criminal court, genocide is a crime under customary international law over which any state may exercise universal jurisdiction (Theodor Meron, “International Criminalization of Internal Atrocities”, *Am. J. Int’l L.* 89 (1995), p. 569; Rodley, *supra*, p. 156; Kenneth C. Randall, *supra*, pp. 785, 835-837; *Restatement (Third) of Foreign Relations Law*, § 702, reporter’s note 3 (1986); *see also In matter of Demjanjuk*, 603 F. Supp. 1468 (N.D. Ohio), *aff’d*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 457 U.S. 1016 (1986) (authorizing extradition to Israel of person alleged to have committed acts which amounted to genocide and other crimes against humanity); *Attorney General of Israel v. Eichmann*, 36 Int’l. L. Rep. 277; F.A. Mann, *supra*, p. 95, n. 188); Kenneth C. Randall, *supra*, pp. 785, 836; Ratner & Abrams, *supra*, pp. 142-143; Rüdiger Wolfrum, “The Decentralized Prosecution of International Offences through National Courts”, *Israel Y.B. Int’l Hum. Rts* (199), pp.183; *see also* Octavio Colmenares Vargas, *El Delito de Genocido* (Mexico 1951).

Universal jurisdiction over torture. The UN Special Rapporteur on torture, (now Sir) Nigel Rodley, before he assumed that post concluded more than a decade ago that “permissive universality of jurisdiction [over torture] is probably already achieved under general international law” (Rodley, *supra*, p. 107; *see also* Ratner & Abrams, *supra*, p. 111; *Restatement (Third) of Foreign Relations Law*, § 404).

C. The *duty* to try or extradite persons responsible for crimes against humanity, torture, extrajudicial executions and enforced disappearances

Given that crimes against humanity are *erga omnes*, it follows that all states, including Chile, France, Spain, Switzerland and the United Kingdom, are under an *obligation* to prosecute and punish crimes against humanity and to cooperate in the detection, arrest, extradition and punishment of persons implicated in these crimes. It is now widely recognized that all states are under an obligation to try or extradite persons suspected of committing crimes against humanity under the principle of *aut dedere aut judicare* (see, for example, Bassiouni, *Crimes against Humanity*, *supra*, pp. 499-508; Brownlie, *supra*, p. 315). Moreover, every state which is a party to the UN Convention against Torture (including the United Kingdom, as well as Belgium, Chile, France, Italy, Luxembourg, Spain, Switzerland and the United States) is under a solemn duty under Article 7 (1) of that treaty to extradite anyone found in its jurisdiction alleged to have committed torture or to “submit the case to its competent authorities for the purpose of prosecution”. Failure to fulfil this obligation would be a violation of international law.

Only six months ago on 17 July 1998, the international community reaffirmed the fundamental obligations of every state to bring to justice at the national level those responsible for crimes against humanity, genocide and war crimes and to exercise its jurisdiction over those responsible for these crimes. In the Preamble of the Statute of the International Criminal Court, the states parties affirmed “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”, determined “to put an end to impunity for the perpetrators of these crimes” and recalled “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” (Rome Statute of the International Criminal Court, Preamble, paras. 4-6).

The international community has also recognized that every state should bring to justice those responsible for extrajudicial executions and enforced disappearances. Principle 18 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the UN Economic and Social Council (ECOSOC) in its Resolution 1989/65 of 24 May 1989 and welcomed by the UN General Assembly in its Resolution 44/159 of 15 December 1989, provides:

“Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. *This principle shall apply irrespective of who and*

where the perpetrators or the victims are, their nationalities or *where the offence was committed.*” (emphasis supplied)

Article 14 of the UN Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly in Resolution 47/133 of 18 December 1992, provides:

“Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force. *All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be in their jurisdiction or under their control.*” (emphasis supplied)

Five years before the UN General Assembly adopted this Declaration, it had been recognized that “general international law probably permits, though it may not require, a state to exercise criminal jurisdiction over an alleged perpetrator [of enforced disappearance], regardless of the latter’s nationality or the place where the offence was committed” and that, to the extent that enforced disappearances constitute torture, states parties to the UN Convention against Torture will be required to exercise universal jurisdiction over persons found in their territories who are responsible for enforced disappearances (Rodley, *supra*, p. 206).

The Human Rights Committee, a body of 18 experts established under the International Covenant on Civil and Political Rights to monitor implementation of that treaty (to which the United Kingdom is a party), in an authoritative interpretation of that treaty concluded that enforced disappearances inflict severe mental pain and suffering on the families of the victims in violation of Article 7, which prohibits torture and cruel, inhuman or degrading treatment or punishment (*Elena Quinteros Almeida v. Uruguay*, Communication No. 107/1981, views of the Human Rights Committee adopted on 21 July 1983, para.14, *reprinted in* Selected Decisions of the Human Rights Committee under the Optional Protocol, 2 (1990)). The European Court of Human Rights reached the same conclusion, finding that the extreme pain and suffering an enforced disappearance inflicted on the mother of the “disappeared” person violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits torture and inhuman or degrading treatment (*Kurt v. Turkey*, Judgment, Eur.Ct.Hum.Rts, Case No. 15/1997/799/1002, 25 May 1998, para. 134).

A quarter century ago, the UN General Assembly declared that all states have extensive obligations to cooperate with each other in bringing to justice those responsible for crimes against humanity wherever these crimes occurred and must not take any measures which would be prejudicial to these obligations. These obligations include:

“3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.

4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.

5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.

6. States shall co-operate with each other in the collection of information and evidence which would help to bring to trial the persons indicated in paragraph 5 above and shall exchange such information.

....

8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest extradition and punishment of persons guilty of war crimes and crimes against humanity.” (UN Principles of international co-operation in the detection, arrest extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by the General Assembly in Resolution 3074 (XXVIII) of 3 December 1973).

Although these Principles state that “as a general rule” persons responsible for crimes against humanity should face justice in their own courts, this general rule clearly does not apply when that country has given the person an amnesty or has otherwise demonstrated an unwillingness or inability to bring the person to justice (See, for example, the principle of complementarity in Article 17 of the Rome Statute of the International Criminal Court permitting the Court to exercise its concurrent jurisdiction over genocide, other crimes against humanity and war crimes when states parties themselves are unable or unwilling to do so).

D. Duty to bring to justice those responsible for crimes against humanity regardless whether they are crimes under national law

The failure to incorporate international law on crimes against humanity within the domestic criminal law of a state does not excuse a state from international responsibility for failing to pursue judicial investigations. The International Covenant on Civil and Political Rights (Article 15(2)), to which Chile, France, Spain, the United Kingdom and Switzerland are parties, and the Council of Europe's Convention for the Protection of Human Rights and

Fundamental Freedoms (Article 7(2)) establish that a person accused of committing crimes against humanity can be prosecuted according to the principles established and recognized by international law. The UN Committee against Torture has considered that, as regards torture, this obligation exists regardless whether a State has ratified the UN Convention against Torture, as there exists "a general rule of international law which should oblige all States to take effective measures to prevent torture and to punish acts of torture", recalling the principles of the Nuremberg judgement and the Universal Declaration of Human Rights (UN Committee against Torture, decision of 23 November 1989, Communication Nos. 1/1988, 2/1988 and 3/1988, Argentina, decisions of November 1989, para. 7.2).

The UN International Law Commission reaffirmed the principles established by the Nuremberg Tribunal by which "international law may impose duties on individuals directly without any interposition of internal law" (Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, UN Doc. A/51/10, p. 16); *U.S. v. Montgomery*, (11th Cir., 27 September 1985) ("International law as such binds every citizen"), cited in 80 Am. J. Int'l L. (1986), p. 346).

III. CRIMINAL RESPONSIBILITY UNDER INTERNATIONAL LAW OF HEADS OF STATE FOR CRIMES AGAINST HUMANITY

A. The evolution of the rule excluding head of state immunity

Those responsible for torture, genocide and other crimes against humanity cannot invoke immunity or special privileges as a means of avoiding criminal or civil responsibility. The fundamental rule of international law that heads of state and public officials may be held individually responsible for crimes against humanity has been long established and it was widely accepted before the adoption of the Nuremberg Charter on 8 August 1945 that heads of state could be held criminally responsible for crimes under international

law. As Vattel recognized more than two centuries ago, a head of state who commits murder and other grave crimes in the course of a war

“is chargeable with all the evils, all the horrors, of the war; all the effusions of blood, the desolation of families, the rapine, the violence, the revenge, the burnings, are his works and his crimes. He is guilty towards the enemy, of attacking, oppressing, massacring them without cause, guilty towards his people, of drawing them into acts of injustice, exposing their lives without necessity, without reason, towards that part of his subjects whom the war ruins, or who are great sufferers by it, of losing their lives, their fortune, or their health. Lastly, he is guilty towards all mankind, of disturbing their quiet, and setting a pernicious example” (*Quoted in Quincy Wright, “The Legal Liability of the Kaiser”, 13 Am. Pol. Sci. Rev. (1919), pp. 120, 126)*)

The rule that heads of state can be held responsible for crimes against humanity is simply a specific example of the general rule of international law recognized in the Treaty of Versailles of 28 June of 1919 that immunities of heads of state under international law have limits, particularly when crimes under international law are involved. In Article 227 of that treaty the Allied and Associated Powers publicly arraigned “William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties” and provided for a special tribunal to try the former head of state, with judges appointed by Great Britain and other countries. Article 227 was based on the report presented to the 1919 Preliminary Peace Conference by a commission of 15 leading international law scholars, including Sir Ernest Pollock, Sir Gordon Hewart and W.F. Massey on behalf of the British Empire, André Tardieu of France, Rolin-Jaequemyns of Belgium, N. Politis of Greece, and A. De Lapradelle of France as General Secretary. The Commission, noting the grave charges, including crimes against humanity, against members of the former enemy forces, stated that it desired

“to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different. . . . If the immunity of a sovereign is claimed to extend beyond the limits above stated, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved

against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind.” (Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 29 March 1919, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, *reprinted in* 14 Am. J. Int’l L. (1920) (Supp.), pp.95, 116).

Only the Japanese and American members of the Commission dissented on this point, but the two American members said that their objections did “not apply to a head of state who has abdicated or has been repudiated by his people” (*Ibid.*, p. 136).

The Allies had planned to bring Adolf Hitler, the head of state of Germany, to justice for crimes under international law, and on 3 January 1945, at a time when Hitler was still in power, President Roosevelt wrote to the Secretary of State asking for a report on the charges to be brought against the Fuehrer (Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York: Alfred A. Knopf 1992), p. 38). This request came against a background of proposals for an international criminal court made during the Second World War which expressly provided for trials of heads of state (*see, for example*, Conclusions adopted by the London International Assembly on 21 June 1943, para. 3 (c) (“Crimes committed by Heads of State.”); and Draft Convention for the Creation of an International Criminal Court of the London International Assembly, 1943, Art. 2 (3) (“War crimes can be perpetrated, as a principal or an accessory, by any person whatever, irrespective of rank or position, Heads of State included.”); London International Assembly, *Reports on Punishment of War Crimes* (1943), pp. 324-346; United Nations War Crimes Commission, Draft convention for the establishment of a United Nations war crimes court with an explanatory memorandum, Art. 1 (2) (“The jurisdiction of the Court shall extend to the trial and punishment of any person - irrespective of rank or position - who has committed, or attempted to commit, or has ordered, caused, aided, abetted or incited another person to commit, or by his failure to fulfil a duty incumbent upon him has himself committed, an offence against the laws and customs of war.”).

Great Britain, France, the United States and the Soviet Union began drafting Article 7 of the Nuremberg Charter in the spring and early summer of 1945 at a time when there was still some doubt whether Adolf Hitler was still alive, and the list of proposed defendants agreed at a meeting headed by Geoffrey Dorling Roberts of the British War Crimes Executive on 23 June 1945 included Adolf Hitler (Taylor, *supra*, p. 86). The final list of defendants in the indictment included Karl Doenitz, Adolf Hitler’s successor as head of state of Germany from 1 May 1945 until the end of the Second World War in Europe a week later.

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’” (Justice Robert H. Jackson, “*Report to President Truman on the Legal Basis for Trial of War Criminals*”, *Temp. L.Q.* (1946), 19, p. 148).

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” (Nuremberg Judgment, *supra*, p. 41). 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” (*Ibid.*, pp. 41-42) .

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” (*Ibid.*, p. 42).

The Nuremberg Tribunal found that Karl Doenitz, as head of state of Germany from 1 to 9 May 1945, was “active in waging aggressive war”, 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 (*Ibid.*, pp. 110, 131).

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” (B.V.A. Röling and Rüter, *The Tokyo Judgment* (Amsterdam: University Press 1977), II, pp. 996-1001). 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” (Bassiouni, *Crimes against Humanity*, *supra*, p. 466; see also the view of B.V.A. Röling that the decision not to prosecute the Emperor was the result of a political, rather than a legal, decision by the American President, contrary to the wishes of Australia and the Soviet Union, in his book with Antonio Cassese, *The Tokyo Trial and Beyond* (Cambridge: Polity Press 1994) (paperback edition), p. 40).

B. The principle of individual criminal responsibility of heads of state for crimes against humanity is part of customary international law

The principles articulated in the Nuremberg Charter and Judgment, including the principle that heads of state may be held criminally responsible for crimes against humanity, have long been recognized as part of general international law. The fundamental rule of international law that heads of state and public officials do not enjoy immunity for crimes against humanity has been consistently reaffirmed for more than half a century by the international community. The evidence that this principle is part of customary international law includes resolutions of the UN General Assembly, international treaties and instruments, decisions of national courts, extradition requests sent and honoured by executive officials, state proposals for international criminal courts, reports and codifications of international law by the International Law Commission, writings of international law scholars and statements by intergovernmental organizations.

UN General Assembly. The UN General Assembly unanimously endorsed “the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal” in GA Res. 95 (I) of 11 December 1946.

International treaties and instruments. The principle of criminal responsibility of heads of state has been included in numerous treaties and other international instruments since Nuremberg, including: Article 6 of the Charter of the International Military Tribunal for the Far East (1946); 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 (including the United Kingdom) in favour to only seven against, with 21 abstentions).

State proposals for international criminal courts. Indeed, the UN Secretary-General in his report to the Security Council on the establishment of the *International Criminal Tribunal for the former Yugoslavia* noted:

“Virtually all of the written comments received by the Secretary-General have suggested that the Statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The Statute should, therefore, contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment.” (Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 55)

The **French** proposal submitted to the Secretary-General stated, “in keeping with the Nürnberg precedent - it should be reaffirmed that the fact that a person was performing official duties in no way constitutes a factor relieving him of responsibility. ‘Act of State’ does not exist.” Letter dated 10 February 1993 from the Permanent Representative of France to the United Nations addressed to the the Secretary-General, UN Doc. S/25266, 10 February 1993, para. 96). The **Italian** government proposal provided: “The official status of the author of any of the crimes referred to in article 4 [war crimes, genocide,

crimes against humanity and torture], and particularly the fact of having acted in the capacity of head of State or member of the Government, does not exclude criminal liability.” (Letter dated 16 February 1993 from the Permanent Representative of Italy to the United Nations addressed to the Secretary-General, UN Doc. S/25300, 17 February 1993, Art. 5 (1)) The then **44 member states of the Organization of the Islamic Conference** included a provision in their proposal stating: “The Tribunal shall be competent to try persons accused of responsibility for such crimes at any level, whether as leaders, intermediaries or subordinates, and no form of immunity shall be deemed a bar to prosecution.” (Letter dated

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United States and *United Kingdom* officials have stated on numerous occasions that the current President of Iraq, Saddam Hussein, should be brought to justice for crimes under international law, possibly by an *international criminal tribunal for Iraq*, and a 1997 *United States* proposal for an *international criminal tribunal for Cambodia* included a provision excluding immunity of heads of state for crimes against humanity, genocide and war crimes. The draft statute for an international criminal tribunal for Cambodia which was drafted by the United States and discussed in the Security Council, a copy of which Amnesty International has obtained, provided in Article 8 (2): “The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”

Similarly, states supported the inclusion of this rule in the *Statute of the International Criminal Court* (See Report of the Preparatory Committee on the

Establishment of an International Criminal Court, UN GAOR, 51st Sess., Supp. (No. 22), UN Doc. A/51/22 (1996), para. 193). The principle of no immunity for heads of state and public officials in Article 27 of that treaty had been omitted in the 1994 International Law Commission draft, but included at the insistence of many states and without objection from any state. Article 27 provides:

“1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

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

As of 13 January 1999, the Rome Statute of the International Criminal Court has been signed by at least 73 states from all parts of the globe in the six months since it was adopted on 17 July 1998, including *Chile, France, Switzerland* and the *United Kingdom (Albania, Andorra, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Belgium, Bolivia, Burkina Faso, Burundi, Cameroon, Canada, Chile, Colombia, Congo, Costa Rica, Côte d’Ivoire, Croatia, Cyprus, Denmark, Djibouti, Ecuador, Eritrea, Finland, France, Gabon, Gambia, Germany, Georgia, Ghana, Greece, Honduras, Iceland, Ireland, Italy, Jordan, Kyrgyzstan, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia (the former Yugoslav Republic of), Madagascar, Mali, Malta, Mauritius, Monaco, Namibia, Netherlands, New Zealand, Niger, Norway, Panama, Paraguay, Portugal, Samoa, San Marino, Senegal, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland, Tadjikistan, United Kingdom, Venezuela, Zambia, Zimbabwe)*. The Foreign Secretary of the *United Kingdom*, Robin Cook, has stated that the United Kingdom will be among the first 60 states to ratify the Statute (Hansard, 28 July 1998).

International criminal court decisions since Nuremberg. A Trial Chamber of the *International Criminal Tribunal for the former Yugoslavia* recently emphasized with respect to a charge of torture that the rule of criminal responsibility of heads of state under international law in its Statute and in the Statute of the International Criminal Tribunal was a rule of customary international law:

“Those who engage in torture are personally accountable at the criminal level for such acts. . . . Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7 (2) of the Statute and article 6 (2) of the Statute of the International Criminal Tribunal for Rwanda . . .

are indisputably declaratory of customary international law.” (*Prosecutor v. Furund_ija*, Judgment, Case No. IT-95-17/1-T, para. 140).

International criminal prosecutor. The *Prosecutor of the International Criminal Tribunal for the former Yugoslavia and for Rwanda* recently stated, “Legally, it would be wrong to believe that heads of state who came to power after the break-up of Yugoslavia are exonerated from responsibility for acts committed during the war”. In addition, she noted that “the tribunal’s statutes are very explicit, . . . they do not exonerate a person acting as head of state from responsibility towards the tribunal” (“Top officials in ex-Yugoslavia not immune from prosecution: UN”, Zagreb, AFP, 11 January 1999).

National courts and extradition requests. National courts have authorized the prosecutions of a former head of state of another country for alleged crimes against humanity, genocide or torture and the executive authorities of those states have made formal requests for the extradition of the former head of state (see Part III.D below).

The International Law Commission. The UN International Law Commission recently stated:

“As further recognized by the Nürnberg Tribunal in its judgment, the author of crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence” (Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, UN Doc. A/51/10, p. 41).

Leading scholars. 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 (See Jennings & Watts, *supra*, pp. 505, para. 148; Claude Lombois, *Droit pénal international*, (Paris: Dalloz 1971), pp. 142, 162 and 506; Georg Schwarzenberger, *2 International Law as Applied by International Courts and Tribunals* (1968), p. 508; see also André Huet & Renée Koering-Joulin, *Droit pénal international* (Paris: Thémis 1994), pp.54-55). 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.” (247-1 *Receuil des Cours*, (1994), pp. 9, 82-84).

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.” (Virginia Morris & Michael P. Scharf, 1 *The International Criminal Tribunal for Rwanda* (Irvington-on-Hudson, New York: Transnational Publishers, Inc. 1997), p. 246). 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.” (Morris & Scharf, *supra*, p. 249).

Declarations and recommendations by intergovernmental organizations. On 25 November 1998, the ***UN High Commissioner for Human Rights***, Mary Robinson, the former President of Ireland, said with respect to the judgment of the House of Lords in the Pinochet case earlier that day that it “confirmed the emerging international consensus against impunity” (Tim Weiner, “Europeans, but not U.S., Rejoice at Ruling”, *New York Times*, 26 November 1998, p. 12). On 17 November 1998, the ***Committee against Torture***, the body of experts established under the Convention against Torture to monitor implementation of that treaty, after the decision of the High Court holding that under English law a former head of state enjoyed immunity from prosecution for crimes against humanity, found that Sections 134 (4) and (5) (b) (iii) of the Criminal Justice Act “appear to be in direct conflict with article 2 of the Convention [against Torture]” and Sections 1 and 14 of the State Immunity Act 1978 “seem to be in direct conflict with the obligations undertaken by the State Party pursuant to articles 4, 5, 6 and 7 of the Convention” (Concluding observations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland, 17 November 1998, UN Doc. CAT/C/UK (unedited version). It recommended that these laws be amended to bring them into conformity with the United Kingdom’s obligations under the Convention and recommended that in the case of the former head of state,

“the matter be referred to the office of the public prosecutor, with a view to examining the feasibility of and if appropriate initiating criminal proceedings in England, in the event that the decision is made not to extradite him. This would satisfy the State party’s obligations under articles 4 to 7 of the convention and article 27 of the Vienna Convention on the Law of Treaties of 1969” (*Ibid.*).

The ***European Parliament*** on 22 October 1998, noting that “the 1992 Treaty on European Union lays down certain obligations relating to cooperation between Member

States in combatting international crime, notably inbetween Member States in combating international crime”, congratulated Spanish and United Kingdom authorities “for their effective cooperation in the arrest of General Pinochet”, reaffirmed “its commitment to the principle of universal justice to protect human rights” and called upon the Spanish government “to request the extradition of General Pinochet as soon as possible” (Eur. Parl. Res. B4-0975/98). On 8 December 1998, the *Inter-American Commission on Human Rights* has reiterated the principle of universal jurisdiction, under which any state has jurisdiction to prosecute and try persons responsible for crimes against humanity regardless of the place where the crimes were committed, the nationality of the person responsible and the nationality of the victim (Inter-American Commission on Human Rights, Recommendation concerning Universal Jurisdiction and the International Criminal Court, 101st Session, 8 December 1998, p. 2).

C. The long-settled applicability of the rule of international law to national courts

The international law rule that heads of state and government officials are not immune from criminal prosecution for crimes under international law applies to national courts as well as to international courts. International instruments demonstrate that national courts must apply the same customary law rule of criminal responsibility for heads of state as international courts. National prosecutors have conducted investigations and prosecutions in accordance with rules of international criminal responsibility, national courts have issued indictments and extradition requests or have honoured them, executive authorities of states have transmitted such requests or honoured them and executive authorities have made statements demonstrating that they believe this rule applies to national courts, not just international courts.

International instruments. Indeed, international instruments make this clear. For example, Allied Control Council Law No. 10, promulgated by the Allies, which authorized

the establishment of national military tribunals to try Axis defendants for crimes against humanity, war crimes and crimes against peace, provided in Article 4 (a) that “[t]he 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.” Article IV of the Convention for the Prevention and Punishment of the Crime of Genocide applies to prosecutions which states parties are required to take under Article VI in national courts, as well as to international courts. Principle 18 of the UN Principles for the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions requires that “[g]overnments shall either bring such persons [those identified as having participated in such killings] to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction irrespective of who . . . the perpetrators . . . are”) Article 14 of the UN Declaration on the Protection of All Persons from Enforced Disappearance requires that

“[a]ll States should take any lawful and appropriate action available to them to bring to justice *all persons* presumed responsible for an act of enforced disappearance, who are found to be within their jurisdiction or under their control.” (emphasis supplied) (*see also* Eric David, *Principes de Droit des Conflits Armés Internationaux* (Bruxelles: Editions Bruylant 1994), para. 4.127, p. 605).

The Rome Statute of the International Criminal Court is predicated on the principle of complementarity under which states have the primary duty to bring to justice those responsible for crimes against humanity, genocide and war crimes, but the International Criminal Court may assert its concurrent jurisdiction in any case where a state is unable or unwilling genuinely to investigate or prosecute (Art. 17). Thus, if a state party were to decline to investigate or prosecute a head of state who was suspected of these crimes or to extradite the person to another state willing to do so, it would undermine the very purpose of the Statute, as expressed in the Preamble, “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation” (Preamble, para. 4).

Both the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda envisage concurrent jurisdiction with national courts investigating and prosecuting persons responsible for crimes against humanity, genocide and war crimes, including heads of state, but permit the two tribunals to assert their primary jurisdiction to retry persons tried in national courts in any case where “the national court proceedings . . . were designed to shield the accused from international criminal responsibility” (Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 10 (2) (b); Statute of the International Criminal Tribunal for Rwanda, Art. 9 (2) (b)).

National prosecutors and courts. The rule that immunities under international law of heads of state and public officials are limited, particularly when they have been accused of crimes under international law, has been recognized by national prosecutors and courts, either in opening criminal investigations and prosecutions or in honouring extradition requests, including those of:

· ***Argentina:*** *Trial of the nine military commanders who had ruled Argentina between 1976 and 1982*, Argentinean Federal Court of Appeals, Judgment on 9 December 1985 and Argentinean Supreme Court of Justice, Judgment 30 December 1986. A criminal investigation has been opened by Argentinan Federal Judge Roberto Marquevich regarding the illegal adoption of children abducted by the security forces from their parents who had been “disappeared” between 1976 and 1978. The former head of the junta and President General Jorge Videla and Admiral Emilio Massera have been arrested.

· **Belgium:** In November 1998, a Brussels investigating magistrate, Daniel Vandermeersch, declared that he had jurisdiction to open a criminal investigation against the former head of state of Chile following the submission of a complaint by six Chileans (Belga/Belgian Press Agency, 6 November 1998).

· **Bolivia:** *Trial of former President General Luis García Meza and his collaborators on multiple charges relating to gross human rights violations* Bolivian Supreme Court of Justice, Judgment on 21 April 1993.

· **Denmark:** The Prime Minister of Denmark, Poul Nyrup Rasmussen, has requested the Minister of Justice, Frank Jensen, to study the possibility of asking for the extradition of the former head of state of Chile (“Prime Ministro Danes analiza posible demanda extradición”, 11 December 1998 (EFE)).

· **Equatorial Guinea:** There former President Macias Nguema for genocide and other crimes. Judgment of Special Military Tribunal on 29 September 1979.

· **France:** In November 1998, a French court sought the extradition from the United Kingdom of the former head of state of Chile, former General Pinochet.

· **Germany:** The former President of the German Democratic Republic was tried by a German court, although the case against him was dropped on grounds of his ill-health. *Honecker* case, BverfG (third chamber of second Senate), Order on 21 February 1992, DtZ 1992, 216.). The German Prosecutor General has argued that the former head of state of Chile has no immunity with respect to crimes under international law and Supreme Court transmitted allegations of such crimes to the provincial court of Düsseldorf to determine whether he has immunity (*see* Kai Ambos, “Der Fall Pinochet und das anwendbare Recht”, *Juristen Zeitung*, 8 January 1999, pp. 16-24).

· **Italy:** The Italian Minister of Justice, Oliviero Dilimberto, has asked Milan investigating magistrates to consider opening a criminal investigation of the former head of state of Chile under Article 8 of the Italian Criminal Code (*L’Unita*, 11 November 1998). On 7 January 1983, at the request of the Minister of Justice, a criminal investigation was opened under Article 8 of the Italian Criminal Code concerning Italians who had “disappeared” in Argentina. These proceedings are continuing under the supervision of an investigating judge of Rome court concerning Jorge Rafael Videla, the former head of state, and other Argentine military officials (Case No. 3402/92 r.g. n.r. P.M - No. 1402/93 r.g. GIP).

· **Luxembourg:** On 31 October 1998, the Foreign Minister of Luxembourg, Jacques Poos, said that it may seek the extradition of the former head of state of Chile.

· **Spain:** On 4 November 1998, the *Audiencia Nacional* authorized the prosecution of members of the Argentinian junta and others (Apelacion No. 84/89, sumario 79/97). The following day, the *Audiencia Nacional* approved the prosecution of former General Pinochet and others for genocide, terrorism and other crimes on 5 November 1998 (Apelacion No. 173/98, sumario 1/98).

· **Switzerland:** A Geneva prosecutor has opened a criminal investigation of the former head of state of Chile.

United Kingdom: The Secretary of State, Jack Straw, on 9 December 1998, issued an order authorizing magistrates to proceed with a hearing on a request for extradition to Spain of a former head of state for acts amounting to crimes against humanity and torture committed in a third country. Order to the Chief Metropolitan Stipendiary Magistrate or other designated Metropolitan Stipendiary Magistrate sitting at Bow Street, 9 December 1998.

· **United States:** On 7 January 1999, the Attorney General of the United States said that the Justice Department was fully cooperating with the Spanish government in its criminal prosecution of the former head of state of Chile: “We are continuing to try to do everything we can to make sure that material that Spain has sought under the mutual legal assistance treaty is made available to Spain, and that we do everything else that we can to cooperate.” (United States Department of Justice, Press Conference, The Honorable Janet Reno, Attorney General, 7 January 1999, p. 6). She also said that the Justice Department was considering if former General Pinochet could be brought to trial in the United States in connection with a murder committed in Washington, D.C. in 1976 while he was in office: “[W]e’re reviewing the case that occurred here to see what appropriate steps can be taken there”) (*Ibid.*, p. 7). See also *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994) (holding that the Foreign Sovereign Immunity Act did not prevent United States court from exercising jurisdiction over the estate of the former President of the Philippines for alleged acts of torture and wrongful death since those acts were not official acts committed within the scope of his authority).

Approving statements by executive officials of states. A number of executive officials of states have made statements approving either the provisional arrest in the United Kingdom of a former head of state or the judgment of the House of Lords on 25 November 1998 that a former head of state had no immunity from prosecution in a court of another state for crimes against humanity and torture committed in his own state, including those of:

· **Belgium:** On 21 October 1998, the spokesperson for the Minister of Foreign Affairs, M. Pierre-Emmanuel Debaeu, declared after the provisional arrest of the former head of state of Chile that it was “good that grave crimes not remain unpunished” (“*bon que des crimes graves ne restent pas impunis*”) (“Arrestation Pinochet: satisfaction de la

Belgique”, *Belga*, 21 October 1998). The following day, the Minister of Foreign Affairs, Erik Derycke, stated in a television interview that “the British and Spanish authorities have the right to arrest the former Chilean dictator Pinochet (“Interview met Minister van

Buitenlandse Zaken Erik Derycke over de arrestatie van Pinochet”, VRT-TV1, 1900, 22 October 1998).

· **Canada:** On 25 November 1998, the Foreign Minister, Lloyd Axworthy, said that the House of Lords judgment earlier that day was “a very important precedent-setting decision, where a national court [is] taking on the responsibilities for applying international standards for crimes against humanity”. He added, “The fact that immunity was denied is a very symbolic decision in establishing that there is an international standard that does not prevent any person escaping accountability” (“Canada, UN Human Rights Commissioner welcome House of Lords ruling”, AFP, 25 November 1998, AFP-TC35).

· **France:** The President of France, Jacques Chirac, said in respect of the decision by the House of Lords on 25 November 1998: “May justice be done, and may light be fully shed on Pinochet’s responsibilities”; the French Prime Minister, Lionel Jospin, added: “It’s a surprise, it’s a joy, it’s bad news for dictators.” (Tim Weiner, “Europeans, but not U.S., Rejoice at Ruling”, *New York Times*, 26 November 1998, p. 12.

· **Germany:** According to press reports, the Foreign Minister, Joscha Fischer, and the Minister of Justice, Herta and Paul Amirian, both supported the extradition of former General Pinochet for crimes he was alleged to have committed when he was head of state. (Tim Weiner, “Europeans, but not U.S., Rejoice at Ruling”, *New York Times*, 26 November 1998; “Fischer Recibe Satisfaccion Decision Camara de los Lores”; *Nacional Cronica*, Chile, 5 November 1998 (Internet webpage: <http://tercera.copesa.cl/diario/1998/11/05>); Agence EFE, 25 November 1998).

· **Luxembourg:** On 18 October 1998, the Foreign Minister of Luxembourg, Jacques Poos, issued a press release stating:

“The news that the arrest of General Pinochet by the British authorities following a formal request made by the Spanish judiciary gives me great satisfaction. It would, indeed, be unthinkable that the former dictator of Chile, who had committed numerous violations of human rights in his country, including some which were committed against European citizens, could continue to enjoy impunity on the territory of a European democracy.” (“*La nouvelle de l’arrestation du général Pinochet par les autorités britanniques suite à une demande formulée par la justice espagnole m’a rempli d’une grande satisfaction. Il était en effet impensable que l’ancien dictateur du Chile, qui a commis de nombreuses violations des droits de l’homme dans son pays, y compris contre des citoyens européens, puisse de jouir de*

l'impunité sur le sol d'une démocratie européenne.") (Grand-Duché de Luxembourg, Ministère des Affaires Etrangères, Communiqué de Presse 18 octobre 1998)

D. The reason for the rule of customary international law

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.” (1996 Report of the International Law Commission, *supra*, p. 39)

E. The inapplicability of statute of limitations and the prohibition of asylum

The international law rule which provides that there is no immunity for heads of states or public officials for crimes against humanity is buttressed by the exclusion of statutes of limitation and the prohibition of granting asylum for persons responsible for such crimes.

Crimes against humanity are unaffected by statutes of limitation as recognized in the Convention on Imprescriptibility of Crimes of War and Against Humanity, adopted by the General Assembly of the United Nations, Resolution 2391 (XXII) of 1968, and in the Council of Europe's treaty: Non-applicability of Statutory Limitations to Crimes against Humanity and War Crimes, E.T.S. No. 82, adopted on 25 January 1974. This fundamental rule of international law was reaffirmed in Article 29 of the Statute of the International Criminal Court. Furthermore, those responsible for crimes against humanity cannot benefit from asylum or refuge in another country. (GA Res. 3074(XXVIII), 3 December 1973; Convention relating to the Status of Refugees (Article 1 (f)); and UN Declaration on Territorial Asylum (Article 1 (2)).

CONCLUSION

For the reasons stated above, all states have universal jurisdiction over torture, extrajudicial executions, enforced disappearances, genocide and crimes against humanity and they have a duty to bring such persons to justice in their own courts, to extradite them to a state willing to do so or to surrender them to an international criminal court with jurisdiction over these crimes. It is a fundamental rule of international law that neither a head of state nor a former head of state has immunity from criminal prosecution for crimes against humanity, whether in international or national courts. In the words of the Nuremberg Tribunal more than half a century ago:

“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. . . . 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” (Judgment., pp. 41-42).