

THE CASE OF GENERAL PINOCHET

Universal jurisdiction and the absence of immunity for crimes against humanity

This paper sets forth Amnesty International's position on two of the legal issues involved in 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 two issues which Amnesty International addresses in this paper are: (1) the scope of universal jurisdiction over certain crimes under international law, including crimes against humanity, and (2) the absence of immunity under international law of heads of state for certain crimes under international law, including crimes against humanity. On 30 October 1998 Amnesty International was provisionally granted leave to intervene as a third party in the appeal of the High Court judgment.

On 16 October 1998, while General Augusto Pinochet Ugarte was on a visit to the United Kingdom, he was arrested based on a Spanish provisional arrest warrant, issued 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 General Pinochet. The Swiss government has sent an extradition request to the United Kingdom in the case of a Swiss citizen who was killed in Chile. Other criminal proceedings have begun or reportedly are planned in national courts in Belgium, France, Italy, Luxembourg and Sweden.

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)

As explained below, under long-settled rules of international law, *any* court may exercise universal jurisdiction over acts amounting to crimes against humanity, such as widespread and systematic murder, torture, forced disappearance, arbitrary detention, forcible transfer and persecution on political grounds, and 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.

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

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 (Directorate of National Intelligence), under the direct command of General 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 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.

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 in Chile. 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 1973 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 Constitution, which General Pinochet was instrumental in drafting, included a system of senators for life who, as parliamentarians, have complete immunity under Chilean law. General Pinochet was assured his position as senator for life on retiring from the armed forces. The 1978 amnesty decree amounts to a self-amnesty.

The Inter-American Commission on Human Rights in 1996 and 1998 concluded that a self-amnesty is incompatible with international human rights law and its legal impact formed part of a general policy of human rights violations (IACHR Reports No. 36/96 and No.25/98).

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 between September 1973 and March 1990 constitute crimes against humanity under international law.

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 the second Spanish provisional warrant (Judgment, pp. 24-25). 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 in Article 6 (c) of the Charter of the International Military Tribunal at Nuremberg (1945) (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).

Crimes against humanity as part of customary law

Moreover, these acts 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). 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). Indeed, even before the adoption of the UN Draft Code of Crimes against the Peace and Security of Mankind and the 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 also is a crime against humanity under international law.

UNIVERSAL JURISDICTION OVER CRIMES AGAINST HUMANITY

These crimes against humanity 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)).

The *jus cogens* nature of crimes against humanity

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”.

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 other 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) the prohibition in international law of acts, such as those alleged in this case, is an obligation *erga omnes* which *all* states have a legal interest in ensuring it is implemented.

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

This legal interest 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; Nigel Rodley, *The Treatment of Prisoners under International Law* (Oxford: Clarendon Press 1987), pp. 101-102).

A number of states have enacted legislation permitting their courts to exercise universal jurisdiction over crimes against humanity (for example: Canada (Criminal Code, Sec. 7 (3.71)) and France) and a number of national courts are reported to have determined that they have jurisdiction over acts which amount to crimes against humanity (See, for example, Marie-Claude Decamps, “*Madrid va demander officiellement à Londres l’extradition du général Pinochet*”, *Le Monde*, 1-2 November 1998, p. 3 (Audiencia Nacional of Spain decides that Spanish courts have jurisdiction over genocide, torture and terrorist crimes committed in another state)). The French *Cour d’Appel* (Court of Appeal) referred to this fundamental rule of international law in the *Barbie* Case when it held 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 Criminelle)*, Judgment, 6 October 1983 (summarizing decision of *Cour d’Appel*), 78 Int’l L. Rep. 128). The French Minister of Justice, Elisabeth Guigou, has stated that she believes that General Pinochet has a case to answer in France and will 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). Jacques Poos, the Foreign Minister of Luxembourg, said on 31 October 1998 that Luxembourg may seek General Pinochet’s extradition. Canadian courts have 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)).

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’interet 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), arrêt du 7 septembre 1927, Serie A, N° 10, p. 70, opinion individuelle du Juge Moore).

The UN Special Rapporteur on torture, 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). 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, “Universal Jurisdiction under International Law”, *Tex. L. Rev.* 66 (1988), pp. 785, 835-837; *Restatement (Third) of Foreign Relations Law*, Sec. 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 (although the District Court of Jerusalem stated that it had jurisdiction based on the protective principle it would appear to be more correct to characterize its jurisdiction as based on the universality principle - see F.A. Mann, “The Doctrine of Jurisdiction in International Law”, *Recueil des Cours*, 1, (1964), p. 95, n. 188).

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 are under an obligation to prosecute and punish crimes against humanity and to cooperate in the detection, arrest 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* (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, Sweden 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”.

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)).

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 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 are unable or unwilling to do so).

The 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)) 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). "International law as such binds every citizen" (*U.S. v. Montgomery*, (11th Cir., 27 September 1985), cited in *Am. J. Int'l L.* (1986), 80, p. 346).

THE ABSENCE OF IMMUNITY UNDER INTERNATIONAL LAW OF HEADS OF STATE FOR CRIMES AGAINST HUMANITY

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 there is no immunity under international law for heads of state and public officials for crimes against humanity has been long established. It 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.

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 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). Article 7 of the Nuremberg Charter was drafted in 1945 by Great Britain, France, the United States and the Soviet Union 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).

Therefore, no state has the power under international law to enact national legislation providing immunity for any individual from criminal or civil responsibility for crimes against humanity.

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).

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

The principles articulated in the Nuremberg Charter and Judgment have long been recognized as part of international law. The UN General Assembly 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.

The fundamental rule of international law that heads of state and public officials do not enjoy immunity for crimes against humanity has also been consistently reaffirmed for more than half a century by the international community (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 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 seven against, with 21 abstentions).

States have repeatedly reaffirmed the validity and necessity of this rule of international law. 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)

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 exclusion of immunity for heads of state and public officials in Article 27 of that treaty, now signed by at least 58 states (the Foreign Secretary of the United Kingdom has stated that it will be among the first 60 states to ratify the Statute), was omitted in the 1994 International Law Commission draft. 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.”

The UN International Law Commission has 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).

Other leading international authorities 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 Sir Robert Jennings, QC & Sir Arthur Watts, KCMG, QC, *Oppenheim's International Law* (London and New York: Longman 9th ed. 1996), 1, pp. 505, para. 148; Claude Lombois, *Droit pénal international*, (Paris: Dalloz 1971), pp. 142, 162 and 506; see also André Huet & Renée Koering-Joulin, *Droit pénal international* (Paris: Thémis 1994), pp.54-55). 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, *The International Criminal Tribunal for Rwanda* (Irvington-on-Hudson, New York: Transnational Publishers, Inc. 1997), 1, 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*, 1, p. 249).

The applicability of the rule of international law to national courts

It necessarily follows that the international law rule that heads of state and government officials are not immune from criminal prosecution applies to national courts as well as to international courts. Indeed, international instruments make this clear. For example, Allied Control Council Law No. 10, promulgated by the Allies, which established the 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)

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 courts. See, for example, District Court of Jerusalem, *Attorney-General of the Government of Israel v. Eichmann*, 36 Int’l L. Rep. (1961) 5, para. 30; *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; *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; *Honecker case*, BverfG (third chamber of second Senate), Order on 21 February 1992, DtZ 1992, 216.). 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.

The reason for the rule of international law

The UN International Law Commission has explained why the rule that heads of state and public officials are not immune 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)

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 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. 30/74(XXVIII) 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 and genocide and other 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 a head of state does not have immunity from criminal prosecution for crimes against humanity, whether in international or national courts.