

Universal jurisdiction

Improving the effectiveness of state cooperation

A shorter version of this Amnesty International statement was delivered by Christopher Keith Hall, Senior Legal Adviser, International Justice Project at the Third International Expert Meeting on War Crimes, Genocide and Crimes against Humanity of Interpol in Ottawa, Canada, 5 to 6 June 2007.

Improving the effectiveness of state cooperation

It is a great pleasure to be invited back again to address you at your third meeting. This invitation recognizes that non-governmental organizations and the police forces of member countries of Interpol can engage in a dynamic and constructive partnership respecting the independence of each in the improvement of the investigation and prosecution of the worst crimes in the world. At the last meeting, I addressed a broad range of challenges for police and prosecuting authorities when using universal jurisdiction to investigate and prosecute crimes under international law and indicated a number of ways that these challenges could be met.¹

Today, I wish to review a few of the many positive developments at the national level in the fight against impunity for genocide, crimes against humanity and war crimes since June 2005, inform you about some activities of Amnesty International and other non-governmental organizations, identify a number of challenges and make a few suggestions for further work, both within the Interpol framework and elsewhere at international and national levels.

Positive developments since June 2005

There have been a number of exciting developments in international criminal courts in the past two years as the surrender of Thomas Lubanga to the International Criminal Court on war crimes charges of using child soldiers in the Democratic Republic of the Congo and the commencement this week of the trial of former Liberian President Charles Taylor in the Special Court for Sierra Leone on war crimes and crimes against humanity charges alleging murder, mutilation, rape, sexual enslavement and other crimes. However, there have been many more important developments at the national level, both with regard to universal and other forms of jurisdiction.

¹ Amnesty International, *Universal jurisdiction: The challenges for police and prosecuting authorities in using it*, AI Index: IOR 53/007/2007, June 2005.

Defining crimes under international law as crimes under national law with universal jurisdiction. First of all, many states parties to the Rome Statute of the International Criminal Court (Rome Statute) since your last meeting have either enacted legislation defining crimes under international law as crimes under national law subject to universal jurisdiction, including Argentina, Costa Rica, Estonia, Panama, Senegal and Uruguay,² or prepared draft legislation doing so, including Burkina Faso, the Central African Republic, Democratic Republic of the Congo, Republic of Korea and Uganda.³ In many countries, this was the first time that these crimes had been considered as crimes under national law.

Increased willingness to implement such legislation. It is equally encouraging that more and more states with legislation defining crimes under international law as crimes under national law have demonstrated the willingness to implement it. In addition to numerous examples of states in the past two years investigating and prosecuting persons for crimes committed in territory subject to their jurisdiction or by their own nationals, I should mention some of the recent positive examples of states in the past two years exercising universal jurisdiction. In an historic shift, investigation and prosecution of such crimes is beginning to be almost routine.

² Argentina: Law Implementing the Rome Statute (*Ley de Implementación del Estatuto de Roma, Ley 26.200*), Official Gazette, 9 January 2007, Arts 3 and 4 (http://web.amnesty.org/pages/int_jus-legislation_argentina2007-esl); Estonia: Penal Code, passed 6 June 2001, as consolidated by April 2006, Arts 8 and 9 (<http://www.legaltext.ee/en/andmebaas/ava.asp?m=022>); Panama: Penal Code (*Código Penal*), Official Gazette: 22 May 2007, Arts 18, 19, 21 and 20 (4) (www.gacetaoficial.gob.pa/pdfTemp/25801/4675.pdf); Senegal: *Loi N° 2007-05 modifiant le Code de la Procédure pénale relative à la mise en œuvre du Traité de Rome instituant la Cour pénale internationale, art.2* (modifying article 669 du Code de Procédure pénale) (<http://www.gacetaoficial.gob.pa/pdfTemp/25801/4675.pdf>); Uruguay: Law Implementing the Rome Statute (*Cooperación con la Corte Penal Internacional en materia de lucha contra el genocidio, los crímenes de guerra y de lesa humanidad*) (*Ley 18.026*), Art. 4 (2) (<http://www.parlamento.gub.uy/Leyes/Ley18026.htm>).

³ Burkina Faso: *Project de loi de mise en oeuvre du Statut de Rome de la Cour pénale internationale* (not yet available on the Internet), art. 15; Central African Republic: *Loi N° ... modifiant et complétant les dispositions du Code de Procédure Pénale Centrafricain, art. 272 and 273* (not yet published on the Internet); Democratic Republic of the Congo: *Loi modifiant et complétant certaines dispositions du code penale, du code d'organisation et de la competence judiciaires, du code penal militaire et du code judiciaire militaire, en application du statut de la cour penale internationale*, Kinshasa, September 2005 (http://web.amnesty.org/pages/int_jus-legislation_drc_draft_2005-fra); Uganda: The International Criminal Court Bill, 2004, Section 18 ([http://web.amnesty.org/web/web.nsf/pages/int_jus-legislation_draft_uganda-eng/\\$FILE/ugandadraftimplementinglegislation.pdf](http://web.amnesty.org/web/web.nsf/pages/int_jus-legislation_draft_uganda-eng/$FILE/ugandadraftimplementinglegislation.pdf)).

On 1 July 2005, just after the Lyon meeting, the French *Cour d'assises* in Nîmes sentenced Mauritanian Captain Ely Ould Dah to ten years in prison for torture in 1990 and 1991.⁴ Three weeks later, on 18 July 2005, after a prosecution by the Attorney General, Faryadi Zardad was convicted in London of torture and hostage taking in Afghanistan and later sentenced to 20 years in prison.⁵ On 14 October 2005, a Dutch court convicted two Afghan former generals, Heshamuddin Hesam and Habibulla Jalalzoy, of war crimes, including torture. In October 2005, Canada indicted Desiré Munyaneza for genocide in Rwanda in 1994 and sent a judge with a team to Rwanda on a *commission rogatoire* to investigate the charges.⁶ In July 2006, Spain requested Guatemala to extradite former President Efraim Ríos Montt and other former high military officers on charges of genocide and torture.⁷ In January this year, the French *Cour de Cassation* reinstated proceedings in the Brazzaville Beach case.⁸ In the last few weeks, Norway has arrested three persons suspected of committing crimes against humanity abroad.⁹ A few weeks ago, Finland arrested a person suspected of genocide in Rwanda and immediately afterwards sent an investigative team from its National Bureau of Investigation to Rwanda.¹⁰ Bernard Ntuyahaga is currently on trial in Belgium on charges of genocide and other crimes.¹¹ As of today, the Danish Special International Crimes Office (SICO) had started investigations in 144 cases concerning crimes in about 30 countries and now has someone in custody suspected of crimes in Rwanda.¹²

⁴ FIDH, *THE ELY OULD DAH CASE: Ely Ould Dah convicted after six years of proceedings. Our perseverance paid off!*, 2 July 2005 (http://www.fidh.org/article.php3?id_article=1809).

⁵ BBC News, *Afghan Warlord Convicted of Torture*, 18 July 2005 (<http://news.bbc.co.uk/1/hi/uk/4693239.stm>); BBC News, *Afghan Zardad sentenced to 20 years*, 19 July 2005 (<http://news.bbc.co.uk/1/hi/uk/4695353.stm>).

⁶ Trial Watch, *Desiré Munyaneza*, (http://www.trial-ch.org/en/trial-watch/profile/db/facts/desire_munyaneza_423.html).

⁷ Inés Benítez, *GUATEMALA: Ex-Dictator on Rocky Road to Congress - and Immunity*, Inter-Press Service, 23 May 2007 (<http://www.ipsnews.net/news.asp?idnews=37871>).

⁸ FIDH, *Case of the "Disappeared of the Beach" - An important victory for victims - The French Supreme Court quashed the decision which annulled proceedings in the « Beach » case before French courts*, 10 January 2007 (http://www.fidh.org/article.php3?id_article=3947).

⁹ Walter Gibbs, *Norway: Police Hold Suspect In Bosnia War Crimes*, *N.Y. Times*, 9 May 2007 (<http://query.nytimes.com/gst/fullpage.html?res=9A01E3DA1731F93AA35756C0A9619C8B63&n=Top%2fReference%2fTimes%20Topics%2fSubjects%2fW%2fWar%20Crimes%2c%20Genocide%20and%20Crimes%20Against%20Humanity>).

¹⁰ National Bureau of Investigation of Finland, *A Rwandan Man Arrested for Genocide*, 5 April 2007 (<http://query.nytimes.com/gst/fullpage.html?res=9A01E3DA1731F93AA35756C0A9619C8B63&n=Top%2fReference%2fTimes%20Topics%2fSubjects%2fW%2fWar%20Crimes%2c%20Genocide%20and%20Crimes%20Against%20Humanity>); *Rwanda: Investigators in Rwanda Over Bazaramba*, *The New Times* (Kigali), 13 May 2007.

¹¹ Trial Watch, *Bernard Ntuyahaga* (http://www.trial-ch.org/en/trial-watch/profile/db/facts/bernard_ntuyahaga_477.html).

¹² For the most recent report, see <http://www.sico.ankl.dk/page22.aspx>.

In addition, at least two states, the Netherlands and Norway, have offered to accept on the basis of universal jurisdiction the transfer of genocide cases from the International Criminal Tribunal for Rwanda.¹³ Although the ICTR correctly did not agree to transfer the *Bagaragaza* case to Norway on the ground that Norway had not defined genocide as a crime under national law, this refusal has encouraged Norway to complete long overdue criminal law reform including genocide as a crime under national law.¹⁴ This case has demonstrated the urgent need to those states that have not yet done so that it is essential to enact legislation defining crimes under international law as crimes under national law.

However, potentially the most significant positive development has been the decision, under intense external pressure, by Senegal to enact the necessary legislation to permit an investigation and prosecution of Hissène Habré, the former President of Chad, for crimes against humanity, including murder, enforced disappearance and torture.¹⁵ This will be the first trial by a country in the South for such crimes based on universal jurisdiction. In the light of the increasing enactment or strengthening of existing universal jurisdiction legislation, it is not likely to be the last. Indeed, if Chile does not extradite Alberto Fujimori to Peru to face charges of torture, under the principle of *aut dedere aut judicare* reflected in Article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it will have to institute criminal proceedings itself based on universal jurisdiction.¹⁶

Activities of Amnesty International and other non-governmental organizations

We very much welcome the opportunity at this meeting to learn about the work of Interpol and all of you in the past two years. In return, I would like to mention here today three important activities of non-governmental organizations in that period that may be of interest to you. We hope that it will be possible for all of us to share such information in the future between meetings.

¹³ Stephanie Nieuwoudt, *Rwandan Tribunal Under Pressure to Wind Up - International court trying Rwandan genocide cases is racing against time to wrap up its trials before a United Nations deadline expires*, IWPR, AR No. 90, 22 January 2007 (http://iwpr.net/?p=acr&s=f&o=328694&apc_state=henpacr).

¹⁴ *Prosecutor v. Bagaragaza*, Decision on 11bis Appeal, No. ICTR-05-86-AR11bis, Appeals Chamber, 30 August 2006 (<http://69.94.11.53/ENGLISH/cases/Bagaragaza/decisions/300806.htm>).

¹⁵ Human Rights Watch, *African Union: Senegal Agrees to Try Hissène Habré Dakar Must Move Quickly to Prosecute Chad's Ex-Dictator*, 2 July 2006 (<http://hrw.org/english/docs/2006/07/02/chile13686.htm>).

¹⁶ Peru's Fujimori faces house arrest in Chile, *Sydney Morning Herald*, 10 June 2007 (<http://www.smh.com.au/news/world/perus-fujimori-faces-house-arrest-in-chile/2007/06/09/1181089396438.html>).

First, Amnesty International helped in the establishment and organization of the first network of African non-governmental organizations to work against impunity. This network played an important role in the successful efforts to convince Nigeria to extradite Charles Taylor to Liberia for surrender to the Special Court and the African Union to persuade Senegal to extradite or try Hisseine Habré.

Second, as you heard Carla Ferstman of Redress mention yesterday, the International Federation of Human Rights (FIDH) and Redress organized the third of a series of conferences concerning Europe and extraterritorial jurisdiction over genocide, crimes against humanity and war crimes in Brussels last November. This conference, which some of you attended, was organized in cooperation with the Civil Liberties, Justice and Home Affairs Committee (LIBE) and the Sub-Committee on Human Rights (DROI) of the European Parliament. Amnesty International made an extensive list of recommendations, in particular concerning the European Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes. I will mention some of them today a little later which are relevant to your work. The report of the conference is well worth your consideration.¹⁷

Third, Amnesty International has begun a comprehensive revision, updating and expansion of its 2001 memorandum, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002 – 018/2001, September 2001, copies of which were provided at the last meeting in Lyon. We plan to issue a shorter version in English, French, Spanish and Arabic, supplemented by more detailed country information in a publicly available database on our website, which will cover civil, as well as criminal, jurisdiction and information about all 192 UN member states. It is to be published in October 2008 on the tenth anniversary of the arrest of the former President of Chile, Augusto Pinochet. Although it is impossible to produce a definitive document in such a rapidly changing field, we hope that it will be as comprehensive as possible and to produce a document that will be useful to police, prosecutors and investigating judges, as well as to victims and their representatives. In undertaking this enormous project, we will be contacting you to seek your assistance in locating legislation and obtaining information about how such legislation is being implemented in practice, including information about special police or prosecutor units dedicated to investigating crimes under international law and recommendations for improving the content and practical implementation of such legislation.

Challenges ahead

¹⁷ Redress and International Federation for Human Rights (FIDH), *Fostering a European Approach to Accountability for Genocide, Crimes against Humanity, War Crimes and Torture: Extraterritorial Jurisdiction and the European Union, Final Report*, April 2007.

At your last meeting, I identified broad range of challenges in the struggle against impunity for crimes under international law and how these challenges could be met. Today, I will mention only three very different examples.

One continuing problem is that much of the academic literature on the subject has yet to catch up with the very extensive state practice of investigation and prosecution in which you have been involved and it still sees universal jurisdiction as a political and diplomatic problem for politicians and diplomats, rather than a part of the criminal justice solution to impunity, and as subject to all sorts of conditions that have no basis in international law.¹⁸ However, we are confident that the increasingly routine use of such jurisdiction, together with the revised, updated and expanded Amnesty International memorandum and a similar study by a Task Force on Extraterritorial Jurisdiction of the International Bar Association, both of which are to be published next year, will effectively address such mistaken views.

A second problem is that in some states, prosecutors remain reluctant in politically sensitive cases to exercise universal jurisdiction, even when the police have done an effective investigation. For example, in one state, a national prosecutor failed to institute criminal proceedings against an interior minister present in the country alleged to have murdered and tortured hundreds of political opponents in a timely fashion and then, after the person fled, refused to do so because the suspect was no longer in the country and the prosecutor claimed that it would be difficult to obtain evidence abroad.¹⁹ The national prosecutor's office in that country also declined twice to open a criminal investigation of a cabinet officer and military officers and soldiers from another state on the ground that that the suspect's state was investigating the crimes, even though none of the investigations concerned the suspect.²⁰ The

¹⁸ See, for example, the Institut de Droit International 2005 resolution, Universal Criminal Jurisdiction with Respect to the Crime of Genocide, Crimes against Humanity and War Crimes (http://www.idi-jil.org/idiE/navig_chon2003.html), which does not expressly list torture and certain other crimes under international law and requires states seeking to exercise universal jurisdiction first to ask states where the crime occurred and the state of the suspect's nationality whether they intended to prosecute.

¹⁹ Human Rights Watch, *Germany: Prosecutor Denies Uzbek Victims Justice Almatov Decision Hurts Berlin's Reputation*, 6 April 2006 (<http://hrw.org/english/docs/2006/04/06/german13124.htm>); Human Rights Watch, *Germany: Victims Appeal Decision on Uzbek Ex-Minister: Failure to Prosecute Undermines Commitment to International Justice*, February 2, 2007 (<http://hrw.org/english/docs/2007/02/02/german15232.htm>).

²⁰ Center for Constitutional Rights, *Complaint to the United Nations Charges German Prosecutor Caved in to U.S. Pressure in Dismissing Torture Case Against Rumsfeld and Other High-Ranking Officials For Torture And War Crimes*, 27 February 2006 (<http://www.ccr-ny.org/v2/reports/report.asp?ObjID=kRrFM3yEeF&Content=716>); Lisl Brunner, *German prosecutor rejects war crimes complaint against Rumsfeld*, *Jurist*, 27 April 2007 (<http://jurist.law.pitt.edu/paperchase/2007/04/german-prosecutor-rejects-war-crimes.php>).

latter decision is now being challenged in court and the victims are seeking justice in other states with universal jurisdiction legislation.

The third problem that I would like to mention today is that, despite the great advances that have been made through Interpol and regionally, for example, through the European Network of Contact Points, state cooperation with other states remains hampered by the absence of an international mutual legal assistance and extradition treaty specifically focused on crimes under international law. This gap means that it will often be difficult, if not impossible, despite good will at the police, prosecutor and investigating judge level to trace, freeze, seize and forfeit assets of suspects; to conduct investigations abroad or to do so in a timely fashion; to obtain foreign documentary evidence, including official copies; and to arrest and extradite suspects when a national prosecution is not possible. National law often limits on inappropriate grounds cooperation in criminal justice matters. Bilateral treaties, where they exist, are inadequate and inconsistent. Regional treaties are limited in geographic scope. International and regional treaties, as well as the two model UN treaties that were never adopted, do not cover all of these crimes, have inappropriate grounds for refusal and inadequate human rights safeguards.²¹

Recommendations for improving the effectiveness of international cooperation in investigations and prosecutions

In the light of the challenges that I outlined in Lyon two years ago and the points that I have just mentioned, you may wish to consider the following six suggestions to improve the effectiveness of state cooperation in the investigation and prosecution of crimes under international law within the Interpol framework, as well as a number of other recommendations for doing so elsewhere. In the light of the limited information published by Interpol on its activities in this area, it is possible that some of the recommendations have already been implemented. For example, the recommendations of the first and second Expert meetings in 2004 and 2005 may have been implemented by the Working Group at its two meetings in 2004 and 2005.

Interpol should take the following six steps:

²¹ For a description of the types of problems with extradition and mutual legal assistance with regard to crimes under international law, see Amnesty International, *The international criminal court: Making the Right Choices - Part III - Ensuring effective cooperation*, AI Index: IOR 40/013/1997, November 1997 (<http://web.amnesty.org/library/index/engior400131997?open&of=eng-385>).

First, publish more information on a regular basis about Interpol's activities concerning crimes under international law, consistent with security concerns (for example, some sensitive information could be circulated in a list serve to selected intergovernmental and non-governmental organizations), as well as relevant reports by other organizations, to foster greater cooperation in the investigation and prosecution of genocide, crimes against humanity and war crimes;

Second, publish a list of contact points designated by each member country responsible for investigation and prosecution of crimes under international law who would be the initial point of contact for anyone with information about such crimes and be responsible for coordinating that country's work on such crimes in international organizations and encourage the approximately 130 member states that have not yet done so to designate such contact points;

Third, encourage such contact points within the framework of Interpol and other international organizations to establish informal or formal mechanisms to develop and implement global strategic cooperation in the investigation and prosecution of crimes under international law for each situation where they are occurring or have occurred;

Fourth, convene meetings of the Experts on Genocide, War Crimes and Crimes against Humanity, and the Working Group, on a more frequent basis, annually or every six months, as the European Network of Contact Points now does; and

Fifth, convene a special meeting of the Experts on Genocide, War Crimes and Crimes against Humanity or the Working Group, to identify, in consultation with civil society, the essential components of an international treaty on extradition and mutual legal assistance for crimes under international law and discuss this proposal at the fourth regular session.

Sixth, adopt at the next Interpol General Assembly a resolution following up Resolution AG-2004-RES-17 (2004) which would

(1) expand the scope of crimes under international law in this area to include extrajudicial executions, enforced disappearances and torture not amounting to crimes against humanity or war crimes and

(2) add the area of crimes under international law to the current list of priority crime areas (drugs and criminal organizations, public safety and terrorism, financial and high-tech crime, fugitives and trafficking in human beings).

Member countries of Interpol should take the following steps to improve the effectiveness of investigations and prosecutions and to end legal, political and practical obstacles to effective universal criminal and civil jurisdiction:

Supporting the work of Interpol:

Designate, if they have not yet done so, contact points, similar to those in the European Network of Contact Points, responsible for investigation and prosecution of crimes under international law who would be the initial point of contact for anyone with information about such crimes and be responsible for coordinating that country's work on such crimes in international organizations;

Increase cooperation with Interpol, particularly in the provision of information to the new Interpol database to assist investigation and prosecution of crimes under international law.

Assist Interpol to a comprehensive study what is needed for a new international extradition and mutual legal assistance treaty on crimes under international law that will ensure prompt and effective investigation and prosecution of such crimes in fair trials without the death penalty or other human rights violations;

Make investigation, prosecution and cooperation regarding crimes under international law a priority:

Establish, where this has not yet been done, national investigation and prosecution units for crimes under international law, staffed by persons with legal and practical experience and highest qualifications;

Devote similar resources to the investigation and prosecution of crimes under international law, such as genocide, crimes against humanity, war crimes, torture and enforced disappearance, as is devoted to other serious crimes, such as "terrorism", organized crime, trafficking in persons, drug trafficking and money laundering;

Strengthen fair procedures for investigation and prosecution and for cooperation with other states:

Ensure that their legislation provides that the first state to exercise jurisdiction, whether universal or territorial, to investigate or prosecute a person has priority over other states with regard to the crimes unless a second state can demonstrate that it is more able and willing to do so in a prompt and fair trial without the death penalty or other serious human rights violations;

Improve procedures in the forum state for conducting investigations abroad, including through the use of joint international investigation teams, with all the necessary areas of expertise;

Ensure that national law provides for the exclusive jurisdiction of civilian courts over all crimes under international law, including crimes committed by members of the armed forces;

Establish rapid, effective and fair arrest procedures to ensure that anyone arrested on suspicion of committing crimes under international law will appear for extradition, surrender or criminal proceedings in the forum state;

Ensure that their law facilitates rapid, fair, thorough and effective extradition proceedings in all situations not covered by the European arrest warrants, as well as mutual legal assistance, and that national law eliminates inappropriate grounds for refusal, but bar extradition and mutual legal assistance where there is a risk of the death penalty, torture or other ill-treatment, unfair trial or other serious human rights violations;

End obstacles to universal jurisdiction and extradition:

Ensure that national law provides that all decisions whether to investigate or prosecute are taken only by an independent prosecutor or investigating judge, not by a political official;

Ensure that their law provides that all decisions whether to extradite are taken by a court, not a political official;

Ensure that national law prohibits the recognition of amnesties and similar measures of impunity for crimes under international law;

Ensure that national law refuses recognition of state or official immunities with regard to crimes under international law;

Eliminate in law and practice any unnecessary procedural obstacles that would delay or prevent the introduction of admissible evidence from abroad;

Eliminate in law and practice any unnecessary procedural obstacles for foreign states seeking to gather information in territory subject to the forum state's jurisdiction concerning crimes under international law;

Ensure the scope of prosecutorial discretion not to investigate or prosecute crimes under international law is reduced and make the criteria for exercising such discretion clear, excluding improper grounds, such as the supposed impact on political negotiations to end armed conflicts;

Strengthen the substantive law concerning crimes under national law:

Define, where they have not already done so, all crimes under international law as crimes under national law, using the broadest definitions under customary and conventional international law, with the legislation applicable to conduct from the moment it was recognized as criminal under international law;

Include the strongest principles of criminal responsibility for crimes under international law, such as a single strict standard of superior responsibility for military commanders and civilian superiors;

Exclude defences in national law which are inappropriate for crimes under international law, such as the defence of superior orders for war crimes;

Provide for all five forms of reparations (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition) to victims and effective and accessible procedures for obtaining such reparations;

Abolish statutes of limitation for crimes under international law, regardless when the crimes were committed; and

Ensure that their law provides effective criminal and civil jurisdiction over all crimes under international law, regardless when or where they were committed, without any requirement that a suspect be present in the forum state until a sufficient time before trial to prepare a defence.