Uruguay

Report From Amnesty International Uruguay On The Bill Of Law Establishing The Procedures For National Implementation Of The Rome Statute Of The International Criminal Court

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Amnesty International warmly welcomed Uruguay's ratification of the Rome Statute of the International Criminal Court[1] on 28 June 2002, as it attributes a key role in the defence and protection of human rights and international humanitarian law to this new judicial institution. We would particularly like to note Congress's approval without the six "declarations", which were initially added by the Executive to what was then the bill of law ratifying this treaty, aimed at restricting the International Criminal Court's action in Uruguay in such a way as to be inconsistent with international law.

We would like to take this opportunity to particularly welcome the Executive's proposed law establishing procedures for internal application of the Rome Statute of the International Criminal Court, which the President of the Republic sent to the General Assembly on 18 January 2003 in compliance with article 3 of Law 17.510 of 27 June 2002. This draft law moves towards fulfilling the duty assumed in the treaty to endow the Uruguayan legal organs with the necessary powers to exercise, first and foremost, their own jurisdiction over those allegedly responsible for having committed genocide, crimes against humanity or war crimes. In fact, the whole International Criminal Court system is based on the principle of complementarity, by which it is a duty of the states – and not a power they can implement at their discretion – to exercise first and foremost their own criminal jurisdiction over those responsible for such behaviour and only when a state is unable or unwilling to exercise this power can the International Criminal Court substitute its role. [2]

By means of this report, we would like to bring the General Assembly's attention to a

[1] Approved in Rome on 17 July 1998, PCNICC/1999/INF/3 (revised text) (available at www.un.org/law/icc/index.html). It entered into force on 1 July 2002.
[2] Article 17, Rome Statute of the International Criminal Court.

number of observations and suggestions in relation to this bill of law, our sole aim being to make it fully compatible with the principles of international law recognised by Uruguay.

I. Crimes under international law covered by the bill

Article 2 of the Executive's bill punishes with imprisonment conduct that is defined as criminal by the Rome Statute, via direct incorporation of its text. Our organization does not wish to take a position with regards to the legislative methods by which states decide to implement this treaty, but solely with the conduct that is ultimately classified and repressed in national criminal legislation.

In this respect, we consider that the bill misses an historic opportunity to include in its text other conduct that should be defined as criminal in the national penal code, as provided for in a number of international legal instruments to which Uruguay is a State Party. We shall look at some (by no means exhaustive) examples.

By incorporating the text of the Rome Statute, in the terms of Article 2 of the bill, conduct described in that treaty as "crimes against humanity" will be punished in Uruguay, as in other countries. According to the text agreed at the Rome Diplomatic Conference, this means the widespread or systematic perpetration of certain acts against the civilian population listed in the Rome Statute.[3] The perpetration, in the terms stated, of torture and the forced disappearance of people, among other crimes against humanity, will thus be punished in accordance with Uruguayan law. It should be noted, however, that the carrying out of such acts when not in a "widespread or systematic" manner, for example, isolated or sporadic acts, will consequently remain outside the competence of the national courts.

We would also draw your attention to the fact that paragraph 6 of the Preamble to the Rome Statute states that:

> "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes…"

In this respect, what the Rome Statute is actually recalling is that states have a duty to exercise their competence in relation to all "crimes under international law" and not

[3] Article 7, Rome Statute.

only "crimes against humanity", which form one 'species' within the 'genus' of crimes under international law, qualified by the circumstance of having been committed in a widespread or systematic manner against a civilian population.

It should be noted, for example, that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by Uruguay on 24 October 1986, clearly provides a duty to establish mechanisms that repress such acts in national legislation, even if they have not been committed in the manner described, in the following terms:

> "Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture."[4]

Unfortunately, Uruguay is the only state in the region that has not defined torture in its criminal legislation, in spite of having accepted this duty by ratifying the Convention and now, with the text proposed by the Executive, only those acts that form part of a "widespread and systematic commission" will be repressed with the prison sentences determined in the bill.

It is the same for the Inter-American Convention on the Forced Disappearance of Persons, ratified by Uruguay on 2 April 1996, which imposes a duty to repress such acts – even if they have been committed in an isolated or sporadic way – in the following terms:

> "The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. (…)."[5]

Amnesty International is not calling for innovative work on international law from the national authorities, but the strict fulfilment of commitments that Uruguay freely and

[4] Article 4(1), Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Entry into force 26 June 1987.

[5] Article III, paragraph 1, Inter-American Convention on the Forced Disappearance of Persons, adopted in Belem do Pará, 9 June 1994, entered into force 28 March 1996.

voluntarily undertook by means of the conventional instruments stated.[6] The problem is that whilst the crimes against humanity and war crimes listed in Articles 7 and 8 of the Rome Statute, to which Article 2 of the bill refers, cover the most important acts considered in such categories of crime, they do not provide an exhaustive list of all conduct considered by international law as falling within these categories.

In fact, some acts not specified in the Rome Statute as war crimes are considered as such by international humanitarian law, such as certain offences and other grave violations included in the Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), which was adopted on 8 June 1977, plus certain violations of international humanitarian law applicable to non-international armed conflicts included in the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), also adopted on 8 June 1977. Both instruments were ratified by Uruguay on 13 December 1985. All this prohibited conduct to which we are referring has been recognised as such by our country, which has – by ratifying these conventions – taken on a legal duty to repress it in its national legislation.

In addition, referring exclusively to the Rome Statute means that, in certain cases, the bill demonstrates a number of inconsistencies. For example, by referring directly to the Rome Statute, some conduct repressed by humanitarian law in the strictest way is criminalised in a manner that is inconsistent with international law. In articles 8 (2) (b) (xxvi) and (2) (e) (vii), the Rome Statute specifies that it is prohibited to conscript or enlist children under fifteen years of age into the national armed forces, conduct that is considered a war crime in both international and non-international armed conflicts. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts,[7] signed by Uruguay on 7 September 2000, establishes a higher standard of human protection than this: it determines a minimum age of 18 for participation in hostilities.[8] The Protocol also prohibits all forms of recruitment of children under 18 years of age into the armed forces.[9] If

[6] Amnesty International, "International Criminal Court: Checklist for Effective Implementation of the Rome Statute," AI Index: IOR 40/11/00 (available at http://web.amnesty.org).

[7] G.A. res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49), U.N. Doc. A/54/49 (2000), entered into force: 12 February 2002.

[8] *Ibid.*, Art. 1.

[9] *Ibid.*, Art. 2.

Uruguayan law contents itself with reproducing the Rome Statute to the letter on this point, it will, in our opinion, be failing to implement a treaty, the aim of which it has – by signing it – undertaken not to frustrate.[10] On the other hand, if the definition in the Protocol were reproduced or its text referred to, this would satisfy both the Protocol and the Rome Statute. This has, moreover, been the approach adopted in the texts of the Argentinian,[11] Brazilian,[12] and Congolese[13] bills to implement the Rome Statute, which include this prohibition apply to persons 18 years of age. Amnesty International urges the Uruguayan Congress to adopt the highest standard of protection of the human person.

In addition, by referring exclusively to the letter of the Rome Statute, the bill ignores other prohibitions that Uruguay has undertaken to repress. For example, Protocol I to the Geneva Conventions of 12 August 1949 prohibits

> Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;"[14]

In the terms of Article 85 (1) of this Protocol, such an attack would constitute a "grave breach", that is, the most serious level of war crime. The definition of this war crime is much weaker in Article 8 of the Rome Statute and, once more, referring exclusively to the Rome Statute would fail to criminalise this conduct, which a conventional

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[10] Vienna Convention on the Law of Treaties, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, Art. 18, entered into force 27 January 1980.

[11] Argentinian Bill of Law on International Crimes, Arts. 17 (c) (v) and 19 (c) (ii). See http://www.amnesty.org.

[12] Art. 85 of the bill states that

> "Define o crime de genocídio, crimes contra a humanidade, crimes de guerra e crimes contra a administração da justiça do Tribunal Penal Internacional, dispõe sobre a cooperação judiciária com o Tribunal Penal Internacional e dá outras providências..."

(available at http://www.mj.gov.br/sal/tpi/anteprojeto.htm,.).

[13] Art. 22 (2) (z) available at: www.iccnow.org/resourcestools/ratimptoolkit/nationalregionaltools/legislationdebates/DRCDraftLegFren.pdf.

[14] Art. 57 (2) (a) (iii), Protocol I.

instrument to which Uruguay is a State Party has defined as a "war crime".

Nor has the Rome Statute criminalised as prohibited conduct unjustified delays in repatriating or freeing prisoners of war or interned civilians once active hostilities have ceased. This conduct has been defined as a "grave breach" and, thus, a war crime under the provisions of article 85 (4) (b) of the Protocol and, as previously noted, ratified by Uruguay. The German International Criminal Code contains this provision,[15] as do the implementation laws of Argentina[16] and Brazil.[17] This is also the case with regards to the prohibition of an attack on demilitarised zones, conduct not repressed in the Rome Statute, but which is prohibited in Article 85 (3) (d) of Protocol I.

The bill's omission in relation to crimes committed within the context of non-international armed conflict is also striking. In fact, the ban on causing starvation to civilians as a method of combat, prohibited in article 14 of Protocol II,[18] has no equivalent in the Rome Statute, despite the fact that it is included on the Rome Statute's list of prohibited conduct in armed conflicts of an international nature.[19] Moreover, the "collective punishments"[20] and "acts of terrorism"[21] established in Protocol II and reproduced even in the Statute of the International Criminal Tribunal for Rwanda[22] find no regulatory equivalent in the text of the Rome Statute.

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[15] International Criminal Code, Art. 8 (3) (1). Available at www.bmj.bund.de/images/11461.pdf.

[16] Argentine bill, supra, n.11, Art. 17 (a) (ix).

[17] Brazilian bill, supra, n.12, Art. 86.

[18] Protocol II, Art. 14. Protection of objects indispensable to the survival of the civilian population. "*Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless for that purpose, objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works.*"

[19] Rome Statute, Art. 8 (2) (b) (xxv).

[20] Protocol II, Art. 4 (2) (b).

[21] Protocol II, Art. 4 (2) (d).

[22] Statute of the Tribunal for Rwanda, Art. 4 (b) and (d).

It must also be added that the Rome Statute envisages a number of prohibitions on the use of certain weapons. However, the Rome Statute does not exhaustively list the prohibitions and restrictions on other weapons prohibited or restricted by treaties ratified or adhered to by Uruguay. As has been suggested by the International Committee of the Red Cross (ICRC), the guardian of international humanitarian law, the states enacting laws to implement the Rome Statute should take the opportunity of incorporating the specific prohibitions on weapons included in other treaties which they have ratified.

In the case of Uruguay, it would be necessary to enact regulations in relation to:

> -the 1980 Convention of the United Nations on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and its four Protocols (ratified by Uruguay on 6 October 1994);
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> -the Convention on the Prohibition of the Use, Stockpiling, Production and
> Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Treaty of 1997, ratified by Uruguay on 7 June 2001).

Amnesty International considers that, by referring exclusively to the Rome Statute, a large number of crimes under international law that Uruguay has undertaken to repress will be omitted. All the conduct to which we have referred in this section has been recognised by Uruguay as conduct prohibited by international law and in all cases – as we explained – Uruguay has assumed a duty to repress such conduct in its national law. We therefore request that this duty be implemented in the text of the proposal submitted by the Executive, either through an amendment to the bill, or by whatever legislative procedure may be judged most appropriate.

II. General principles of criminal law

The reference made by the bill of law to the general principles of criminal law established in articles 22 to 33 of the Rome Statute does in many ways signify substantial progress for Uruguay's legislation. Amnesty International is, in general terms, encouraged by these improvements. In fact, the establishment of the imprescriptibility and inadmissibility of official capacity for those responsible for crimes in international law that are listed in the statute, among other principles, updates and brings our country's criminal legislation into line with conventional and customary international law. However, given that a number of the provisions of the

Rome Statute were included only after fierce debate and that, in some cases, they clearly do not represent the highest standard established by international law, we consider that such reference may lead to a lower standard being established in Uruguayan legislation than that recognised by the state through other instruments. By way of example, we can mention:

a) The "responsibility of commanders and other superiors"

Article 28 of the Rome Statute, to which the Bill refers, describes the responsibility of commanders and other superiors. Paragraph (a) refers to the responsibility of military commanders whilst (b) deals with the responsibility of civilian commanders.

From the perspective of international law, all people in positions of authority are obliged to prevent their subordinates from violating the rules of humanitarian law. Article 86 (2) of Protocol I establishes that,

> "the fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach".

In the ICRC's commentary to the Additional Protocol, it states:

> "it should not be concluded from this that this provision only concerns the commander under whose direct orders the subordinate is placed. The role of commanders as such is dealt with in Article 87 (Duty of commanders). The concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control."[23]

Neither Article 7(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia nor Article 6(3) of the Statute of the International Criminal Tribunal for Rwanda distinguish between civilian and military superiors and they establish a standard of responsibility higher than that envisaged in Protocol I.[24] Nor is

[23] International Committee of the Red Cross, Commentary to the Protocol of 8 June 1977 Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), http://www.icrc.org/ihl.nsf/.

[24] Article 7 (3) of the Statute of the Criminal Tribunal for the former Yugoslavia states:

> "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was

such a distinction established in the 1996 Draft Code of Crimes against the Peace and Security of Mankind, drafted by the UN International Law Commission[25].

Article 28 of the Rome Statute, to which the Executive's bill refers, has introduced wording that diverges both from Protocol I and from the Statutes of the two international tribunals mentioned and generally nullifies a development in international law that we consider to be undoubtedly positive.[26] Paragraph (b) (i) of

committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

Article 6 (3) of the Statute of the Criminal Tribunal for Rwanda states:

"The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

[25] Article 6 of the Draft Code of Crimes against the Peace and Security of Mankind (1996):

"The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime."

[26] For example, in the case of *Delalic et al*. IT-96-21 "Celebici Camp" the Criminal Tribunal for the former Yugoslavia reasoned in the following way to interpret the scope of Article 86 (2) of Protocol I in relation to Article 7 (3) of the Criminal Tribunal's own Statute:

"An interpretation of the terms of this provision in accordance with their ordinary meaning thus leads to the conclusion, confirmed by the travaux préparatoires, that a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates. This standard, which must be considered to reflect the position of customary law at the time of the offences alleged in the Indictment, is accordingly controlling for the construction of the mens rea standard established in Article 7(3). The Trial Chamber thus makes no finding as to the present content of customary law on this point. It may be noted, however, that the provision on

this article links the responsibility of the civilian superior to the fact that "the superior either knew, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes." The introduction into this article of a "conscious" element eliminates possible acts of negligence from the conduct of a civilian superior. There is no doubt in our mind that removing the concept of negligence from a civilian superior's responsibility may be counter-productive, with the effect of nullifying the responsibility of people in positions of power, and it is also contrary to international custom.[27]

The Rome Statute is the first international instrument to incorporate varying degrees of responsibility for military and civilian superiors. While it is reasonable to establish a more demanding level of responsibility than that established in Protocol I or in the Statutes of the International Criminal Tribunals, it is not reasonable to distinguish between the standards for military or civilian superiors. In all cases, it is appropriate to maintain the same strict standards for civilian and military commanders.

It should be recalled that the majority of delegations present at the Rome Conference were not in favour of establishing a distinction between the responsibility of civilian or military superiors and that the final wording of Article 28 of the Rome Statute was due to pressure from one delegation in particular, and the need to achieve a general consensus.

> the responsibility of military commanders in the Rome Statute of the International Criminal Court provides that a commander may be held criminally responsible for failure to act in situations where he knew or should have known of offences committed, or about to be committed, by forces under his effective command and control, or effective authority and control." (paragraph 393).

[27] The commentary to the Draft Code of Crimes against the Peace and Security of Mankind (1996) clarifies that not all acts of negligence makes a superior criminally responsible but simply those cases that are so serious they are tantamount to malicious intent:

> "A superior who simply ignores information which clearly indicates the likelihood of criminal conduct on the part of his subordinates is seriously negligent in failing to perform his duty to prevent or suppress such conduct by failing to make a reasonable effort to obtain the necessary information that will enable him to take appropriate action. As indicated in the commentary to article 86 of Additional Protocol I, 'this does not mean that every case of negligence may be criminal...[T]he negligence must be so serious that it is tantamount to malicious intent.' The phrase 'had reason to know' is taken from the statutes of the ad hoc tribunals and should be understood as having the same meaning as the phrase 'had information enabling them to conclude' which is used in Additional Protocol I. The Commission decided to use the former phrase to ensure an objective rather than a subjective interpretation of this element of the first criterion." Available at www.un.org/law/ilc/texts/dcodefra.htm

Amnesty International considers that Uruguayan legislation should omit the reference to Article 28 of the Rome Statute and adopt the highest conventional standard, either by direct reference or via a new definition within its text.

b) Superior orders (or due obedience)

In respect of superior orders, the bill refers to the provisions contained in Article 33 of the Rome Statute, known as "superior orders and prescription of law". In accordance with this provision, carrying out orders from a superior, under the particular conditions listed, constitutes a reason or justification for exemption from responsibility, that is, it excludes or supplants criminal responsibility.

From the perspective of international law, however, the situation is quite the contrary. While so-called "due obedience" may in some cases constitute a mitigation of responsibility, it is never a reason for its complete exclusion. In fact, as the UN International Law Commission clearly explained in its commentary to the 1996 Draft Code of Crimes against the Peace and Security of Mankind, use of the justification or reason of superior's orders – or due obedience – to exempt someone from responsibility has been rejected as a basis for exempting subordinates from criminal responsibility for the perpetration of crimes under international law.

The first precedent in this area was recognised by the Charter of the Nuremberg Tribunal, which in its Article 8 provided that,

> "The fact that a person acted pursuant to orders of his Government or of a superior does not relieve him from responsibility but may be considered in mitigation of punishment imposed by the Tribunal, if justice so requires."

This provision was extremely important, for many of those accused by the Nuremberg International Military Tribunal, established by the previously mentioned Charter, maintained that they had been acting on orders from their superiors. The Military Tribunal, however, rejected such justification reasoning that,

> "The provisions of this Article [article 8] are in conformity with the law of nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of punishment"[28].

[28] See International Law Commission Report, 1996, Chapter II, commentary to article 5, para.1-4. Available at www.un.org/law/ilc/index.html

In line with this, article 5 of the Draft Code of Crimes against the Peace and Security of Mankind (1996) provides that:

> "The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires".

Article 7(4) of the Statute of the International Criminal Tribunal for the former Yugoslavia provides that:

> "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

The Statute of the International Criminal Tribunal for Rwanda contains an identical provision, exclusively recognising the mitigating nature of responsibility (Article 6(4) when acting pursuant to the orders of a superior.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified – as we have stated – by Uruguay, also contains an express provision regarding a superior's orders: Article 2(3) of this treaty provides that:

> "An order from a superior officer or a public authority may not be invoked as a justification of torture."

Article VIII of the Inter-American Convention on the Forced Disappearance of Persons, also ratified, provides for the same by establishing:

> "The defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted. All persons who receive such orders have the right and duty not to obey them."

The Inter-American Convention to Prevent and Punish Torture[29], ratified by Uruguay on 10 November 1992, provides in its article 4 that

> "The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability."

[29] Signed in Cartagena de Indias, Colombia, on 9 December 1985, during the G.A. of the OAS. It entered into force on 28 February 1987.

Similarly, from an historical point of view, the pronouncement of the Human Rights Committee must also be borne in mind when, on examining the scope of legislation on due obedience, which had implicitly conferred an amnesty on those responsible for widespread human rights violations in Argentina, it established that: "the compromises made by the State party with respect to its recent authoritarian past, especially the Law of Due Obedience (...) are inconsistent with the requirements of the Covenant [International, on Civil and Political Rights]*"* (U.N. Doc. CCPR/C/79/Add.46 (1995).

In terms of this region's system for human rights protection, the Inter-American Court has rejected such provisions equally emphatically, by concluding in the *Barrios Altos Case* that:

> "This Court considers inadmissible (…) the provisions for prescription and the establishment of exclusions from responsibility that may attempt to hinder the investigation and punishment of those responsible for serious human rights violations such as torture, summary, extrajudicial or arbitrary executions and forced disappearances, all of which are prohibited as contravening inderogable rights recognised by international human rights law" (*Barrios Altos case, Chumbipuma Aguirre v. Peru*, 14 March 2001, para. 41).

In conclusion, in accordance with the treaties cited, to which Uruguay is a party, and the statutes of the two International Criminal Tribunals,[30] due obedience cannot be validly argued as justification or reason for exemption from criminal responsibility. Carrying out the orders of a superior can only temper the penalties imposed on those responsible for grave violations of human rights or grave breaches of humanitarian law, and can never release them fully from their responsibility. We would therefore like to suggest that this reference be amended.

c) <u>The scope of application of the law</u>

Section 2 of Article 3 of the bill provides that when a person allegedly responsible for one of the crimes defined in the law is within the national territory or in a place under its jurisdiction,

> "the Republic will be able to take the measures necessary to exercise its jurisdiction with regard to this crime (...) when extradition is not requested by the competent State or delivery to the Court."

From our point of view, the exercise of Uruguayan jurisdiction over these crimes does not constitute a mere power or faculty but, on the contrary, is a duty of a legal nature. In fact, the international treaties on this subject include a provision similar to that contained in the bill, but always incorporating a legal duty.

[30] The two Tribunals mentioned were created via resolutions of the UN Security Council, by means of the powers conferred on it in Chapter VII of that organization's Charter; they are therefore binding on all member states of the UN.

The four Geneva Conventions of 12 August 1949,[31] and to which Uruguay has been a party since 5 March 1969, emphasise that:

> "Each High Contracting Party *shall be under the obligation* to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."[32]

The Geneva Conventions are clear in this regard. The state parties "have an obligation" to bring before their courts those allegedly responsible for conduct defined in the Conventions as "grave breaches" (similar to those listed in Article 8(2) of the Rome Statute), unless they decide to extradite them to another state or hand them over to the Court (the ICRC Commentary makes clear that the drafters of the Conventions envisaged this possibility).

Along the same lines, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also makes clear that the exercise of criminal jurisdiction is an obligation, and not a power, in the following terms:

> "Each State Party *shall likewise take* such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him (…).[33]"

In this respect, Articles 12 and 14 of the Inter-American Convention to Prevent and Punish Torture also provide that:

> "Every State Party *shall also take* the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within the area under its jurisdiction and it is not appropriate to extradite him (…)
>
> When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the crime had been committed within its jurisdiction, for the purposes of investigation, and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State that has requested the extradition."

In short, if the sporadic or one-off perpetration of an act of torture or a forced disappearance of persons imposes on Uruguay the duty to exercise its own jurisdiction wherever the crime

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[31] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea. Geneva 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Person in Time of War. Geneva, 12 August 1949.

[32] Arts. 49 of the (I) Convention; 50 (II), 129 (III) and 146 (IV).

[33] Art. 5 (2).

may have taken place, then how can one explain that, in relation to genocide, crimes against humanity and war crimes, this is considered no more than a mere discretionary power?

Nor does the phrase, "*the Republic will be able to adopt"* seem clear to us. In our opinion, the regulation should clearly identify which State organ "can adopt" these measures or, as we propose, "must fulfil" this obligation. Similarly, we consider it important that the victims or their families be able to instigate a procedure of this nature and that it should not remain the exclusive remit of a political organ.

We believe that the bill should be amended on this point such that exercise of jurisdiction forms a legal duty, unless the person allegedly responsible has been extradited to another State or brought to trial before the International Criminal Court.

d) The decision not to cooperate with the Court when it is a question of "national security"

It is well-known that the Rome Statute, due to the insistence of one delegation in particular, includes a provision regarding "national security" which risks being used as a pretext to deny cooperation to the International Criminal Court. The provision contained in Article 72 of the Rome Statute is unfortunate and should not be reproduced in national legislation implementing the Statute. It is hard to imagine the concrete cases in which a state could claim that the disclosure of information or documents in its possession could, in its opinion, affect its national security interests. And in such a case, could its interest in protecting its national security be more worthy of protection than the duty to cooperate with international justice? We think not, unless, of course, the information or documentation whose disclosure is being refused is very closely linked to crimes of international law that could fall within the Court's competence, in which case they would probably form essential elements with which to determine criminal responsibility.

Moreover, when "national security" is not defined in a country's positive legislation, as is the case for the majority of the region's countries, determining its designation and, consequently, the decision not to cooperate cannot be the exclusive and discretional remit of the Government. Even less so if the judiciary is prohibited from declaring on the legality of such a declaration (Article 9(i) of the bill, "Powers of the Executive").

Amnesty International believes that the Uruguay must voluntarily relinquish the reservation relating to national security, for it is only thus that its commitment to international justice will be complete and sincere.

e) Proposal for candidates

Article 9 (n) of the bill confers on the Executive the power to propose candidates for election as ICC Judges and Prosecutor. Amnesty International takes no position with regard to which state organ should hold this power. But we do believe that the proposal for Uruguayan (or foreign) candidates should be in line with a series of premises that guarantee the transparency and publicity of this process. In the public document, "International Criminal Court: Checklist to ensure the nomination of the highest qualified candidates for judges "[34] our organisation formulated a proposal to all states parties to the Statute to ensure that, in the last process for nomination of candidates, a series of recommendations would be taken into account. These included, for example, that the Executive should make a public call for all possible nominations for the selection process; that the nomination of the greatest number of candidates should be encouraged; that civil society and other interested parties should have an opportunity to comment on the knowledge and experience of each of the candidates, etc.

As mentioned above, Amnesty International takes no position with regard to which organ should formulate the decision to propose a candidate, nor whether such a decision should be the prerogative of one of the state branches, but we do believe that this process should be a public one, guaranteeing its transparency. We consider that the process for proposing candidates to posts of judge or prosecutor within the International Criminal Court (like any other international jurisdictional body) should form the object of detailed regulatory legislation in Uruguay, on the basis of the guidelines already mentioned.

f) Issues of Immunity

Article 9 (l) of the bill states that it is a competence of the Executive

> "to resolve issues of immunity within the meaning of article 98 of the Statute in relation to article 27…".

It is public knowledge that halfway through last year, the United States of America (USA) administration submitted to the foreign ministries of all countries, including Uruguay, a draft agreement appearing to fall within the stated Article 98 by which citizens of US origin would be exempt from the jurisdiction of the International Criminal Court when having possibly committed a crime falling within the Court's

[34] AI Document: IOR 40/023/2002/, available at www.amnesty.org/icc/.

competence in the territory of any state party.[35] We have already seen that the states parties have assumed an "obligation" to exercise their own jurisdiction in the first place and, should they not have the capacity to do so, they must hand the person over to be tried before the International Criminal Court.

> The overall object and aim of the Rome Statute is to guarantee that whoever may be responsible for the worst crimes possible will in all cases be brought to justice, principally by the states, in accordance with the underlying principle of complementarity, but if they are unable or unwilling to do so, then by the International Criminal Court as a last resort. Any agreement not expressly provided for in the Rome Statute and which rules out the possibility of the International Criminal Court exercising its complementary role in proceedings when a state cannot or will not exercise this duty, is therefore in contradiction with the aim and object of the Rome Statute.

One key aspect in the aim and object of the Rome Statute has been the inclusion, in Article 27, of the basic principle that no one shall enjoy immunity when committing crimes classified in international law, such as genocide, crimes against humanity and war crimes. Article 27(1) of the Rome Statute clearly recognizes that this,

> "shall apply equally to all persons without any distinction based on official capacity," and 27(2) provides that "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."

This component of the aim and object of the Rome Statute is key, as demonstrated by the fact that only three exceptions (or supposed exceptions) can be applied, which are in themselves extremely reduced: limitations to the exercise of such powers by the

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[35] Cooperation with respect to waiver of immunity and consent to surrender, Art. 98.

> "1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender".

Court:

1) in certain exceptional cases stipulated in Article 90(6), when states parties are permitted to give priority, in application of extradition agreements *already existing*, to requests for extradition from states that are not party to the Rome Statute, and in which the extradition of their own citizens is requested, over concurrent requests for surrender from the Court for those same persons and against whom formal accusations are made, when there are certain criteria that indicate that fulfilment of the first request for extradition will not lead to the impunity of those accused in relation to the events in question;

2) diplomatic and special state immunities that are limited in time, as established in article 98(1); and

3) Status of Forces Agreements (SOFAs) in force and provided for in article 98(2).

Article 98(2) applies to existing Status of Forces Agreements (SOFAs) that are in force, not to any that may be established *after* a state becomes a party to the Rome Statute. In any case, even if a situation were to arise in which the International Criminal Court agreed that this provision was acceptable for such kind of renewed or new agreements, these new SOFAs would undoubtedly have to be consistent with the provisions of the Rome Statute itself and other international law. What is more, every state that signs an impunity agreement with the USA and which had previously signed the Rome Statute will be acting contrary to the aim and object of the Rome Statute and will, consequently, be violating the obligations it has undertaken by virtue of the customary international law governing treaties.

Article 98, the origins of which are to be found in the Diplomatic Conference of Rome, was written to resolve the issue of the relationship between the obligations of the states parties under the *future* Rome Statute and the *existing* obligations of the states parties under international law. Paragraph 1 of article 98 was written, concretely, to deal with the specific issue of the relationship between the obligations of the States Party under the Rome Statute and other prior obligations they may have contracted by virtue of international customary or conventional law relating to diplomatic and state immunities and, in concrete, those included in the Vienna Convention on Diplomatic Relations. Paragraph 2 of article 98 was designed to resolve the issue of the effects of a subsequent multinational treaty, the Rome Statute, on existing agreements, that is, the Status of Forces Agreements (SOFAs). In both cases, the writers adopted a number of carefully formulated provisions, with a number of limited (or apparent) exceptions to the general aim and object of the Rome Statute.

The history of the drafting of the Rome Statute confirms that article 98.2 was never intended to allow for any subsequent inclusion of agreements such as those on impunity, which the United States is now pursuing. In fact, any interpretation of this article with regard to whether it covers this type of agreement will lead to the manifestly absurd and unreasonable result of a Non-State Party being able to subvert the basic principle of the Rome Statute by which *any person* committing genocide, crimes against humanity or war crimes in the territory of a State Party, and regardless of their nationality, must be subjected to the jurisdiction of the International Criminal Court when the States cannot or do not want to investigate and, if there be sufficient admissible proof, brought to trial. In fact, taken to its final and most absurd conclusion, this argument would mean that every State Party could avoid its contracted responsibility, in application of article 86 of the Rome Statute, to arrest and hand over citizens from Non-States Parties accused of crimes in their territory or in the territory of another State Party.

The international campaign currently being undertaken by one single country, the USA, to persuade other states to sign impunity agreements preventing US citizens accused of genocide, crimes against humanity or war crimes from being surrendered to the International Criminal Court is a cause of deep concern to Amnesty International. These impunity agreements do not require that the USA or the state involved investigate or, if there is sufficient admissible proof, prosecute US citizens accused by the International Criminal Court of such horrendous crimes.

The powers conferred on the Executive by the bill to "*resolve issues of immunity within the meaning of article 98*" are excessive and <u>*subject to no judicial control whatsoever*</u>. If it is precisely the judiciary that has the power to undertake trials when determining the alleged criminal responsibility of persons, it must be that same judiciary that determines, free from all political interference, whether a person effectively enjoys some of the exceptions noted to the duty to hand them over. In the final analysis, it will always be the International Criminal Court that decides on its competence in a case.

Amnesty International is opposed to decisions regarding alleged immunity being in the hands of political organs and asks the General Assembly to amend the provision contained in Article 9(1) of the bill.

III) <u>Conclusion</u>

Uruguay has signed and ratified the majority of treaties and conventions on human

rights protection and international humanitarian law. However, its authorities have long ignored their voluntarily assumed duty to criminalise and punish locally such behaviour as prohibited by those conventions. Genocide (the Convention on the Prevention and Punishment of the Crime of Genocide, to which Uruguay has been a state party to since 1967), torture, the forced disappearance of persons and the dozens of war crimes contained in the conventions ratified years ago by Uruguay are not crimes in the legislation of our country.

For this reason, the Executive's initiative to implement the Rome Statute in national legislation is welcomed by our organization. However, as we have stated in this document, this initiative suffers from a number of defects which, although they do not require its rejection, and do justify its amendment.

Amnesty International calls upon the Uruguayan legislature to promptly adopt a law implementing the Rome Statute that is fully in line with principles of international law and containing the highest standards of protection of the human person.

Montevideo, 21 February 2003.