

## Hard cases: bringing human rights violators to justice abroad

A guide to universal jurisdiction

## About this publication

Article 7 (1) of the Convention against Torture

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

The arrest of Augusto Pinochet in the United Kingdom has focused attention on a little used provision of international law – the universal jurisdiction rule. This rule allows the prosecution of those responsible for war crimes or crimes against humanity in the courts of any country, regardless of where or when the crimes were committed and the nationality of the victims or the accused. If applied effectively and fairly, the universal jurisdiction rule could be an extremely important tool for combating the most serious human rights abuses.

This short publication aims to provide a straightforward explanation of the rule, setting out the arguments that support its use and examining some of the ethical, practical, and legal problems that arise in trying to apply it.

The publication draws on discussions held at a meeting in Geneva in May 1999, which was attended by participants from some 25 countries, including representatives from national and international NGOs, lawyers and legal scholars, and prosecutors.

*"Universal jurisdiction is the essential tool of the international community in its endeavour to bring war criminals to justice. This booklet provides a useful and highly accessible introduction to the subject."*

Justice Richard Goldstone

(Constitutional Court of South Africa,  
former Chief Prosecutor, International Criminal Tribunal  
for the former Yugoslavia and Rwanda)

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Additional information about the Council may be found at the end of this document.

**jurisdiction** (jooor-) *n.* administration of  
or of); legal or other authority; extent of  
it extends over; hence  
*jurisdiction* f. OF *jure-*; *jurisdiction* ~ *jurisdiction*  
prec.; see DICTIONARY

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## Preface

by Bacre Waly Ndiaye

Every day, it seems, we hear new accounts of atrocities being committed in countries around the world. Armed militias linked to the military massacre defenceless civilians in East Timor; more mass graves are discovered in Kosovo; and civilians are being bombed or deliberately starved in Angola. Any casual observer of the media would easily get the impression that we live in a brutal world, and that human rights are being denied on a massive scale.

Survivors tell horrible stories of torture, of being forcibly rounded up and deported, of whole populations being persecuted, and women raped. We hear of young children having their arms chopped off, or being forcibly conscripted to fight pointless wars. Villagers in war zones tell of being terrorised by warring factions, forced to take sides or risk being seen as traitors and enemies. These stories come from dozens of countries on all continents.

I spent several years as the United Nations (UN) Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, a mandate that brought me into direct contact with the survivors and victims of human rights abuses. I travelled to many countries, and received information from many others. I heard first hand the accounts of how innocent people were killed, and read thousands of pages of testimony. People met with or provided information to me in the hope that the UN could stop these abuses, and that it would do something to ensure that those responsible were brought to justice.

In the past, many accounts of atrocities were told as if nothing could be done. Today, however, more and more there is a sense that those who carry out these brutal acts should be punished. More importantly, coupled with this demand for justice, international mechanisms are being put into place to ensure that this demand can, at least in some cases, be met. We have seen

in the past decade how quickly globalisation advances in some areas – the media, investment and trade. Now too, one can see, in an embryonic form, a much-needed global approach to the rule of law as set out in international human rights and humanitarian standards.

International tribunals have been established to put on trial people accused of committing crimes against humanity and war crimes in Rwanda and the former Yugoslavia. Last year, an overwhelming majority of states voted to establish a permanent International Criminal Court, and this institution could be up and running in a few years time.

In addition to these international mechanisms, national governments are now under pressure not just to deal with abuses at home, but also to ensure that where possible the courts in their country deal with abuses happening elsewhere. The universal jurisdiction rule allows national courts to try those who have committed war crimes and crimes against humanity in other countries. This rule was invoked by a Spanish judge to indict Senator Augusto Pinochet in Spain – and this led to Pinochet's arrest in the United Kingdom.

If more national courts were to invoke the universal jurisdiction rule, it would be a very effective means of demonstrating to those who commit the most horrific crimes that there is no safe haven. Or, as this booklet puts it, *"Impunity at home will no longer be a guarantee of impunity abroad"*. The failure to prosecute at home might arise either from an unwillingness to prosecute, or from an inability to do so – for example, in weak and failed states where the legal structures for such prosecutions are not in place. In either case, the possibility of prosecutions abroad, including the prosecution of members of armed groups, can help to combat impunity. Universal jurisdiction prosecutions could also be a good means of enhancing human solidarity, by showing that when these terrible crimes happen elsewhere, all of us feel a responsibility to try to do something about it.

However the rule is complex, and putting it into practice raises a number of practical, legal and ethical problems. The International Council on Human Rights Policy organised a meeting in May 1999 to discuss these problems. This booklet is an effort to present this discussion to a wider audience, to show both the importance of the universal jurisdiction rule, and the difficulties that need to be overcome if it is to be applied more widely. I think those reading it will find it a useful and user-friendly guide to universal jurisdiction. It is written in a straightforward way that is not too legalistic.

The arrest of Senator Pinochet in the United Kingdom was another signal that the international community as a whole is beginning to take seriously its obligation to ensure the most serious human rights violations do not go unpunished. Such efforts must be encouraged.

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<sup>1</sup> The opinions expressed are made in the author's personal capacity.

## Acknowledgements

This booklet has been written by David Petrasek, a Research Director at the International Council, and Peggy Hicks, former Deputy High Representative for Human Rights in Bosnia.

It draws on discussions that took place in May 1999 at a meeting hosted by the International Council.

The participants at the meeting are listed in Annexe A at the end of the booklet.

## INTRODUCTION

On 17 October 1998, Senator Augusto Pinochet lay in bed in a London clinic, recovering from a back operation. The former Chilean President and Commander-in-Chief of the Chilean Armed Forces had arrived some weeks earlier for a private visit. Two London policemen arrived at the clinic with an arrest warrant. The Spanish Government had requested Pinochet's extradition to Spain to stand trial for human rights violations committed in Chile. Pinochet was formally notified by the London police that he was under arrest until the extradition request could be considered.

The arrest quickly became front-page news all over the world. It aroused intense legal as well as public interest. After a complicated legal procedure, on 24 March 1999 the House of Lords, Britain's highest appeal court, ruled that Pinochet could, in principle, be extradited to stand trial in Spain for at least some of the crimes he was alleged to have been responsible for. The actual extradition proceedings got underway in September 1999.

For many human rights advocates, and not just in Latin America, Pinochet personifies the problem of impunity – the way in which the powerful avoid facing justice for their misdeeds. The killings, disappearances and torture committed against thousands of political opponents by Pinochet's military government after it seized power in a coup d'état in 1973 were well known and documented. So too was Pinochet's defiance of those who criticised such abuses and his continued lack of public remorse. The fact that he was arrested in a foreign country came as a shock, both to his supporters and opponents. Suddenly and dramatically, world attention focused on an obscure and little-used provision of international law – the principle of universal jurisdiction.

Universal jurisdiction is a rule that allows courts in any country to bring to trial those responsible for crimes against humanity and war crimes. Under the rule, the nationality of the accused, or his

or her victims, or the place where the crimes were committed, do not determine where and when a trial can take place. For crimes against humanity, any court in any country can consider the allegations. In many countries, human rights crimes remain unpunished, even in the face of tens of thousands of victims. The universal jurisdiction rule holds the promise that courts elsewhere might redress these wrongs when courts at home fail to do so. Though little used in the past, the rule clearly has very profound implications for efforts to prevent and punish serious human rights violations.

However, recourse to the courts of one country to sit in judgement on crimes committed in other countries raises many difficult problems. It is also, inevitably, controversial. While human rights lawyers and activists welcomed the arrest of Pinochet, because it offered new hope that the worst human rights crimes will not remain unpunished, commentators in several countries, including Chile, protested vigorously. They argued that the prosecution was an abuse of Chile's sovereignty, that Spain (and Britain) had no right to pass judgement on events that occurred many years ago, that prosecution of government leaders would lead to international chaos, that Chile's amnesty law (exempting Pinochet from punishment there) could not be ignored abroad, and that the prosecution itself was biased and selective.

This short booklet introduces the principle of universal jurisdiction and explains some of the difficult legal, ethical and practical problems that arise when it is applied. Its aim is to affirm the validity and value of the rule, but chiefly to discuss the many obstacles that must be managed if, as is likely, other cases proceed. The text is based on a discussion of universal jurisdiction hosted by the International Council on Human Rights Policy from 6 – 8 May 1999, which was attended by representatives from some 25 countries, including international and national non-governmental organisations (NGOs), lawyers and legal scholars, and government prosecutors. A list of the

participants is included in Annexe A.

The booklet has five chapters. Chapter One explains the universal jurisdiction rule, and the crimes to which it applies. Chapter Two describes the various arguments that support use of the rule. Chapter Three discusses the factors that should be taken into account in deciding when universal jurisdiction prosecutions are appropriate. A discussion of the Pinochet case and the House of Lords decision is set out in chapter Four. Finally, chapter Five looks at various legal obstacles that universal jurisdiction prosecutions will face and identifies some ways of overcoming them.

## One: WHAT IS UNIVERSAL JURISDICTION?

The universal jurisdiction rule is not readily understood by most lawyers, much less by the public at large. The idea, however, is straightforward. All national legal systems must include some rules for determining which individuals and which crimes are covered by that system. Usually, the territory of the country provides both a geographical and legal boundary, so that national laws apply to people living inside the territory concerned and to crimes committed within the same territory. For example, a United States court may not under US law try an Argentinian accused of committing a bank robbery in Argentina though, if the suspect is present in the US, he or she might be sent back (extradited) to Argentina to stand trial. National legal systems differ, of course. Even when a crime has been committed abroad, a national court may sometimes be able to try the accused person. This might be, for example, when he or she is a citizen of that country or when the crime was committed against a citizen of that country. Usually, nevertheless, some such link to the country is required. When countries try to pass laws that give their courts jurisdiction over events that take place outside their territory, other countries often protest.

In contrast, universal jurisdiction is a system of international justice that gives the courts of any country jurisdiction over crimes against humanity, genocide and war crimes, regardless of where or when the crime was committed, and the nationality of the victims or perpetrators. It allows the prosecution of certain crimes before the courts of any country even if the accused, the victim, or the crime, has no link to that country.

### **Why are crimes against humanity and war crimes subject to universal jurisdiction? Why should these types of crimes be treated differently?**

Crimes against humanity and war crimes are among the most serious crimes and are subject to universal jurisdiction because punishing them is the concern of all states, not just the



responsibility of the state in which they are committed. These crimes violate international law, and it is a duty and in the interest of every state to uphold that law.

A rough analogy may be found in domestic law. A civil wrong occurs when one person causes harm to another, for example by negligence in a car accident, or by breaching a contract. To rectify that harm, the aggrieved person must personally sue the wrongdoer. The state does not act on the aggrieved person's behalf. By contrast, if an act is criminal in nature – an assault, a robbery or a killing, for example – the state prosecutes. All citizens have an interest in seeing such crimes prosecuted. In a similar way, crimes against humanity are crimes that harm all states not just those in which they took place and all states have an interest in prosecuting them and punishing the offenders.

If we look at the list of crimes covered by the rule, we can see the force of this argument.

### **Which crimes are covered by the rule?**

The rule covers crimes against humanity and war crimes. Crimes against humanity include systematic or widespread acts of murder, extermination, enslavement, torture, deportation or forcible transfers of population, arbitrary imprisonment, enforced disappearance of persons, persecution on political, religious, racial, or gender grounds, and rape, sexual slavery and other serious forms of sexual violence. Also included are practices like apartheid.

Genocide is also a crime against humanity and is also covered by the universal jurisdiction rule. Genocide involves acts such as killing or persecuting members of a racial, religious or ethnic group with the purpose of destroying that group.

War crimes are similar acts committed during war. They are for the most part defined in the Four Geneva Conventions and their Protocols. Some of the most serious war crimes include killing of prisoners or civilians, torture, conducting unfair trials, unlawful

deportation or transfer, the taking of hostages, and attacks on the civilian population.

### **Who might be subject to the rule?**

There is, regrettably, no shortage of potential suspects who could be prosecuted abroad for crimes against humanity. Since the Second World War, such crimes count millions of victims in dozens of countries. Among others, calls have been made to prosecute Jean Claude “Baby Doc” Duvalier, ruler of Haiti from 1971 – 1986 and presumed to reside in France; Alfredo Stroessner, Paraguayan dictator from 1954 – 1989 and living now in Brazil; Milton Obote and Idi Amin Dada, Ugandan rulers from independence through 1985 and living now in Zambia and Saudi Arabia respectively; Mengistu Haile Mariam, in control of Ethiopia from 1977 – 1991 and now in Zimbabwe and Hissène Habré, the ex-Chadian ruler now living in Senegal. But this is a very selective list, and only includes ex-rulers now living abroad. One might easily add to it countless other current and former leaders or others in authority at all levels, who are still in their own country but might travel abroad. One could also include leaders of non-state armed groups. Before Abdullah Ocalan, the leader of the PKK (Kurdish Workers Party) was apprehended in Kenya and brought to trial in Turkey, there were calls for him to be prosecuted in Italy where he had temporarily sought refuge.

### **Different types of universal jurisdiction**

The term universal jurisdiction relates to different types of prosecutions. In its purest sense, the term refers to prosecutions initiated against a suspect regardless of where the crime was committed or against whom, and regardless of where the suspect is now located. But it is also sometimes applied to cases where the prosecuting state has some links with the crimes alleged (for example, where the crime, though committed elsewhere, involves victims who are nationals of, or live in, the prosecuting state). While these cases are less “pure” examples of universal jurisdiction, they can be viewed as intermediate

steps between a jurisdiction based on strict territoriality and a jurisdiction that is universal.

In some situations, the rule of universal jurisdiction *requires* states to initiate prosecutions; in others, it simply *allows* them to do so. In some cases, one has to look to the language of the relevant treaty. For example, Article 7 of the Convention against Torture *requires* states to try suspected torturers who are not extradited elsewhere for trial. In other circumstances, the degree of obligation is less evident, for example where contradictions exist between the standards of international law and the actual practice or national law of states. (These issues are discussed in more detail in chapter Five.)

### **What relationship exists between international criminal tribunals and national courts applying universal jurisdiction?**

The court at Nuremberg was the first modern example of an international court established to try crimes against humanity and war crimes. The Nuremberg process was completed in 1946. Almost half a century passed before another international criminal court was created – the International Criminal Tribunal for the former Yugoslavia, (ICTFY) set up in 1993. A related court was put in place following the genocide in Rwanda in 1994. However, these international tribunals deal only with crimes against humanity and war crimes in the territories of the former Yugoslavia and Rwanda. In Rome in 1998, a majority of states voted to establish a permanent international criminal court and agreed a statute for it. But the court will not be set up and start operating until a sufficient number of states have formally ratified the treaty agreed to in Rome, and this might take some years.

In this booklet we look at cases where national courts in one country prosecute crimes against humanity and war crimes committed in other countries, and not at international courts. While the two existing international tribunals and the permanent court (when it becomes operational) look at similar crimes,

national courts can still play an important role in bringing violators of human rights to justice.

## Two: WHY PROSECUTE USING UNIVERSAL JURISDICTION?

Precisely because the principle of universal jurisdiction is at odds with the normal application of criminal law, it is difficult to convince governments to use it. There are many political and practical obstacles to its successful use. Moreover, the public does not always understand why courts in one country should try cases from another – even for very serious crimes. It is therefore essential to set out clearly the different arguments that can be made in support of universal jurisdiction, and to assess their quality.

At the outset, one has to recognise that perhaps no other human rights topic generates as much passion and debate as the question of prosecuting past crimes against humanity. In so many situations, even where the abuses took place ten, twenty or thirty years ago, victims, and their families continue to demand justice, unwilling to draw a line through the past. This should not be surprising. It is manifestly unjust that those who murdered and persecuted them or their loved ones should face no punishment. Yet, at the same time, there are some who argue that in cases of mass violations some form of closure without prosecutions (or only some prosecutions) is necessary. Sometimes, it is the victims themselves who make this point. We do not aim to resolve this debate here. The point simply is to note that the debate is emotionally charged. Thus, there is added value in stepping back from it and thinking through, in an objective way, the arguments about using universal jurisdiction.

### **To obtain justice**

This is the first and (superficially) the most self-evident justification for universal jurisdiction prosecutions. It seems clear that it is right to bring to justice people who commit the terrible offences to which universal jurisdiction is applicable. Where justice cannot be obtained at home, it seems appropriate that such criminals should be prosecuted abroad.

What, however, do we mean by justice? Does justice include some element of retribution?

If it includes some form of punishment, and punishment is defined as “a penalty for wrongdoing” and retribution is “something given or demanded in repayment, especially punishment”, the distinction between seeking punishment and seeking retribution may appear slight. Are advocates of universal jurisdiction prosecutions comfortable with retribution as an objective?

There is clearly a delicate balance between seeking vengeance and desiring suitable punishment; few would dispute that punishment of some sort is a component of justice. Questions arise, however, about the motives for seeking punishment and what priority punishment should be given in the aims of the justice system. With regard to motivation, the key principle would seem to be that punishment should be driven by a sense of fairness and a duty to defend the law and to hold violators accountable before that law – rather than a more personal desire to inflict injury. With respect to the justice system, punishment should be one of several possible aims, including rehabilitation.

The rights of victims also need to be considered. The right of victims to see that their pain and suffering has consequences for those who have committed crimes against them is an element in the idea of justice. Most victims consider that prosecution of those who have perpetrated crimes against them is necessary for justice to be done. But criminal prosecutions are not the only means of achieving such satisfaction. Victims, or their families, may seek compensation or may prefer official acknowledgement of crimes, full disclosure of their scope, and an apology, rather than prosecution (although such preferences usually arise only when victims have been deprived of their right to seek prosecutions). Of course, most alternative forms of satisfaction are complementary to prosecutions, not contradictory. It remains sound, therefore, to conclude that obtaining victim satisfaction is a significant aim of universal jurisdiction prosecutions.

One further point concerning justice should be mentioned. Not surprisingly, human rights advocates worry about the consequences if universal jurisdiction prosecutions fail. It is important to recognise that acquittals should not be viewed simply as failures of the legal system to convict a person legally responsible for crimes. In some cases, there is simply insufficient evidence to prove a person guilty beyond a reasonable doubt. In other cases, acquittals may occur because there is substantial evidence supporting innocence (for example, in cases of mistaken identity). In such circumstances, obtaining justice will also mean upholding the innocence of a person who has not been proven guilty.

### **To deter violations of rights**

It is commonly argued that universal jurisdiction prosecutions can stop specific human rights abuses by leading to the arrest of those responsible, and over time can deter future abuses by creating fear of prosecution in those who might commit them.

In practice, however, it is very difficult for political, legal, and practical reasons to initiate successful prosecutions abroad against individuals responsible for current abuses. Politically, governments will rarely want to take action against persons currently in power. Legally, persons still in office will in most cases benefit from broad immunities under domestic law (discussed below). And practically, those responsible for ongoing abuses may be less likely to travel to a potentially unfriendly jurisdiction. Still, it seems clear that where prosecutions abroad can take place against those currently engaged in human rights abuses, this would act as a deterrent, at least in the case of those accused.

Usually the deterrence argument is raised to make the point that punishing abuses, even if they happened several years ago, will deter future crimes. This view is based on the assumption that perpetrators commit their crimes in the expectation that, because they hold power in their country or because the

country's legal system is unwilling or unable to prosecute such crimes, they will not face justice. If perpetrators of human rights crimes are charged and tried in at least some cases, a message is sent that impunity at home is no longer a guarantee of impunity abroad.

How strong is the deterrence argument? Views differ. On the one hand, there is little evidence to show that international prosecutions deter further crimes – and some evidence even leans in the opposite direction. Some of the worst crimes of the Bosnian conflict in former Yugoslavia, including the disappearance and likely execution of over 7,000 men at Srebrenica, took place after the International Tribunal had begun issuing indictments. Similarly, it is now clear that hundreds of people were massacred in Kosovo after the International Tribunal began actively investigating abuses there. Indeed, it was forcefully argued by those who opposed Pinochet's prosecution that tyrants would not conclude from it that they should cease their crimes, but rather that they should hang on to power at all costs because this had become the only effective defence against prosecution.

Since few universal jurisdiction prosecutions have taken place, there is not much basis either way for determining their effect. Any deterrent effect may only emerge in the long term, following a larger number of prosecutions. Also, one could argue that the International Tribunal's failure to deter war crimes in the former Yugoslavia may be due to its lack of teeth, as evidenced by the fact that key indicted suspects were not arrested.

One other point should be mentioned. It may be difficult, if not ultimately impossible, to prove that prosecutions have a deterrent effect. For this reason, deterrence should not be viewed as if it was the only justification for universal jurisdiction prosecutions. Deterrence should be seen instead as one important objective among others.

Where deterrence is an objective, it follows that universal



jurisdiction prosecutions should be given wide publicity, particularly in countries where systematic or grave abuses are occurring or likely to occur. Since prosecutions of senior officials are likely to attract more publicity, they might prove a better deterrent than prosecutions of minor officials.

### **To support the rule of law**

For the purpose of this discussion, a society based on the rule of law can be seen as one in which laws are passed through a democratic process and are enforced by police and prosecutors who act in a manner that respects human rights. Further, it requires that laws are interpreted by a judiciary that acts independently, even when pressured by the executive branch or political parties to act differently. Finally, the rule of law requires that all persons and institutions are equal before and under the law. No-one is above the law.

When grave crimes are not prosecuted, these principles will be disregarded and the rule of law will be threatened. For example, if those in power prevent judges from investigating their misdeeds, or force legislatures under their control to pass sweeping amnesty laws. On this basis, it is claimed that universal jurisdiction prosecutions strengthen the rule of law.

Furthermore, where officials or the powerful break the law or abuse the rights of others with impunity, they undermine respect for the law more generally. Victims and their families and friends lose confidence in the legal system and government and also in the judicial authorities who are often perceived to participate in the abuses, because their judgements support the malpractices concerned or fail to condemn them. Prosecution of the worst crimes is therefore considered essential to ensure that domestic legal systems function effectively, and prosecutions abroad may help strengthen the domestic legal system in two ways. First, they remove a stumbling block to restoring legitimacy. If the most notorious cases are prosecuted abroad, impunity is challenged and the domestic courts are able to show their

credibility in less controversial circumstances. Second, universal jurisdiction prosecutions may help kick-start prosecutions at home. International prosecutions may create political space for domestic prosecutors to take more aggressive domestic action against suspects.

Nevertheless, there is room for doubt about the extent to which prosecution abroad contributes to the development of the rule of law at home. Some would argue that this form of surrogate justice abroad might provide an excuse to avoid real national legal reform; or that the act of punishment occurs at too great a distance to have the deterrent impact desired.

### **To promote social reconciliation**

Do universal jurisdiction prosecutions help a society to achieve reconciliation and healing after a period of conflict and social trauma? Some maintain that well-publicised prosecutions abroad can promote social healing because they expose the facts and provide victims with at least some satisfaction. On the other hand, it is argued that prosecutions can stir up bitterness and conflict and delay social recovery. There is little empirical evidence for such a view. In Chile, for example, there is no indication, so far, that Pinochet's arrest has endangered Chilean democracy, as some commentators argued it would. Indeed, many believe that, by removing Pinochet from the scene, democracy in Chile has been strengthened.

On this issue too, there is much debate. It seems clear that a complete failure to prosecute any past human rights crimes will not provide a firm basis for building the rule of law in the future. If most of these crimes were committed against ethnic or religious groups in a country, how can they be expected to genuinely feel part of an emerging new order?

The argument about the extent to which prosecutions abroad may or may not aid in advancing social reconciliation at home will always be a bit speculative either way. Still, it is interesting to note that since Pinochet's arrest in the United Kingdom, families

of the disappeared and senior military figures in Chile have been meeting for the first time to try to resolve these cases.

### **To reveal the truth**

One of the merits of universal jurisdiction prosecutions is that they help to reveal the truth and establish an official record of what occurred. If past abuses remain shrouded in secrecy and denial then there is little basis for societies to move forward. Victims and communities that suffered will always bear a legitimate grievance. For countries in transition to democracy, unacknowledged graves will prove a shaky foundation on which to build the rule of law.

While recognising the usefulness of prosecutions to establish the facts, however, one should not rely too heavily on court proceedings to create a historical record. Judicial proceedings obtain only the facts necessary to establishing the case against a defendant and are limited by rules of evidence that restrict development of a complete record. Other mechanisms such as truth commissions are probably more effective in establishing an official record of events, though prosecutions can certainly play a complementary and helpful role in deriving an accurate history.

By encouraging public debate, universal jurisdiction prosecutions also help to increase public awareness. Indeed, the verdict of another country's courts might in some cases be viewed as more impartial and thus create a more credible and lasting impression than a domestic recording of events. By eliciting a genuine examination of events and their causes, prosecutions may assist the development of greater public agreement on a shared history. Universal jurisdiction prosecutions can educate people about events that have been shrouded in mystery or purposefully covered up. A single prosecution can throw light on the responsibility of those implicated in abuses, both those who were actively involved and those who helped create the climate in which abuses became possible.

### **To register international concern**

Universal jurisdiction prosecutions illustrate effectively the basic principle that serious human rights violations are the concern of everyone, not just the people in the country where they were committed. When a foreign country decides to prosecute crimes that occurred in another land, regardless of whether its own nationals were victims, it demonstrates the international dimension to basic human rights. The very fact that these prosecutions challenge traditional attributes of sovereignty and the immunity of leaders to commit grave abuses within their own national borders is a basis upon which prosecution should be advocated.

Of course, for universal jurisdiction prosecutions to send this message effectively, the prosecuting state must be perceived to intervene for the general good, not to advance its own political or historical interests.

### **To protect society**

As long as perpetrators of crimes remain at large, they continue to be a threat to the society in which they reside. Given the gravity of the crimes that are subject to universal jurisdiction, the threat posed by those suspected of such crimes is substantial. This problem concerns not only the country in which the abuses originally occurred, but also other states given that many suspects have emigrated, often as refugees. In such circumstances, suspects pose a threat both to society at large, and to other refugees who may be exposed to further abuses. This argument may be especially helpful in demonstrating to foreign states why they have an interest in universal jurisdiction prosecutions.

### Three: WHEN SHOULD UNIVERSAL JURISDICTION PROSECUTIONS BE ENCOURAGED?

Having considered the various arguments that can be cited in support of universal jurisdiction prosecutions, we can now turn to looking at the question of when such prosecutions are appropriate.

The first point to note is that, in law, the decision to prosecute rests with government prosecutors. Victims and human rights groups are not usually in a position, or entitled, to select cases for prosecution. In some states, individuals can bring private prosecutions, sometimes subject to the permission of the prosecutor or the court. However, the applicability of procedural rules in cases involving universal jurisdiction prosecutions will not always be clear. Nevertheless, victims and human rights groups do play a substantial role in determining which cases are prosecuted. In addition to circumstances in which victims can directly file claims, human rights organisations often contribute to ensuring that a case is prosecuted both by helping to make the case ready for prosecution and by pressing publicly for prosecution.

The key problem here is selectivity – in choosing cases for prosecution it is essential to avoid bias. Any real or apparent bias in choosing cases will damage the credibility of all work in this field. By their nature, of course, all criminal prosecutions are selective. Prosecutors routinely make decisions as to which cases are strong and important enough to justify expending the resources necessary to take them to trial. But for universal jurisdiction prosecutions, selectivity and allegations of bias are especially problematic. Because these cases will always have political implications, it will be hard to show that the decision to proceed in any one case (or not to proceed in another) is based on legal considerations alone, and not on political factors. Also, because so many human rights violations have gone unpunished, a sudden decision to act in one case will seem irregular and attract suspicion.

For these reasons, decisions to press for prosecution should be made on objective grounds that can be articulated clearly. Having said that, it should also be noted that accusations of bias are probably unavoidable, particularly from those who stand to lose if prosecutions proceed. Such accusations should not hamper a progressive application of the law, but they do give added grounds for considering carefully the types of cases to take up.

This chapter describes some of the considerations that arise when making such decisions.

As a starting point, two points deserve to be highlighted: the quality of evidence, and the priority to be given to prosecutions at home.

### **Quality of evidence**

There is no point in encouraging prosecution, whether abroad or at home, where there is a lack of reliable evidence to support the charge. Prosecutors, assisted by the police, have the job of gathering this evidence and deciding whether it is sufficient to bring a case to trial. They need to be encouraged to not shy away from rigorous efforts to put together a solid case for prosecutions abroad. But it would seem obvious that in the absence of reliable and sufficient evidence, it would be foolish to push for prosecutions.

### **Priority of prosecutions**

It should be a priority to prosecute in the country where the crimes were committed, if it is possible to do so. The aims of prosecution set out in chapter Two are probably best served by prosecutions at home. National prosecutions are better able to deter ongoing abuses and combat impunity. They are more able to support the rule of law and restore faith in the legal system. Finally, they are likely to be more effective in encouraging public discussion of past crimes and facilitating social reconciliation. Just as important, from a practical standpoint it is usually far easier to assemble evidence and gather witnesses to support a prosecution in the country concerned rather than abroad.

Even where national systems are theoretically able to bring prosecutions, there are circumstances in which prosecution abroad may be justified. National legal systems may not be prepared or equipped to prosecute fairly these complex and highly-charged cases. Where prosecutions are unreasonably delayed or slow, or there are indications that the national system will not prosecute, other options should be pursued. The short rule is, nevertheless, that universal jurisdiction prosecutions are most useful where the state that should normally prosecute has proved itself unable or unwilling to do so.

### **ETHICAL QUESTIONS**

There are a number of ethical issues that arise in thinking about cases which should be prosecuted abroad.

#### **Should suspects be excluded (by reason of age, infirmity, etc.)?**

Are there any suspects who because of their personal circumstance should not be the subject of a push for universal jurisdiction prosecution? In particular, the age and health of the suspect may be relevant, and there may be legal problems in prosecuting minors. It would seem wrong to push for trials of persons who are unfit to stand trial. This is a very real problem, as the types of crimes at issue are generally exempt from any limitation clauses on how long after they were committed they can be prosecuted. Senator Pinochet himself is 83 years old.

But it is difficult to say in advance, especially from outside the judicial process, whether someone is unfit to stand trial. This is really a question for the courts to decide. Obviously, once a prosecution is underway, an elderly or infirm defendant can, and should, be treated differently in order to ensure fairness of the proceedings. One should note that there have been several trials of elderly persons for war crimes and crimes against humanity committed in the Second World War which have generally been seen as fair.

### **Should prosecutions be avoided in certain states?**

It is relevant to consider whether a defendant will receive a fair trial in the jurisdiction where he or she is found. It is evident that defendants do not receive fair trial rights in all countries. In addition, some countries may impose extreme sentences, such as the death penalty, or prison conditions may fall well below human rights standards.

It is probably not possible to develop a list of acceptable and unacceptable states based on each jurisdiction's adherence to fair trial standards generally. Instead, a case-by-case approach is better. Legal systems are not static, they can be more or less fair depending on the type of the case and, in some circumstances, the publicity it receives. Even a system that routinely denies certain basic rights (e.g., access to counsel) might be substantially more compliant with fair trial standards in a case which is under international public scrutiny. If advocates are concerned about whether a suspect can get a fair trial in the country in which he/she is found, they should press for other states to undertake prosecution of the case.

The potential application of certain punishments, including the death penalty, should constrain calls for prosecution in those states. Prosecution should not be encouraged in states that would apply other cruel, inhuman or degrading treatment, or where torture of the suspect might be likely.

### **Will universal jurisdiction prosecutions lead to jurisdictional imperialism?**

The term "jurisdictional imperialism" might be used to describe the concern that most universal jurisdiction prosecutions are likely to take place in North American and European courts, whereas the majority of those prosecuted are likely to come from developing countries. This is a real concern given that in recent years – though not before – many of the gravest human rights crimes have occurred in developing countries. It is also clear that western states are more likely to have the resources and



legal structures in place to support universal jurisdiction prosecutions.

This imbalance could discredit a legal process that claims to be truly international. Were former colonial powers to take a sudden interest in crimes committed in their former colonies, though their own colonial record has been exempt from scrutiny, it might appear to be unfair or an abuse of power.

There is no easy answer to this problem. One solution might be to request other states to prosecute in such cases. In addition, prosecutions that break the north-south mould might be promoted with particular vigour.

### **LEGAL AND PRACTICAL CONCERNS:**

In addition to ethical concerns, a number of questions and issues arise in thinking about which cases to prosecute abroad.

#### **Should current or former leaders be prosecuted first?**

Prosecutions of current leaders should ideally be given a high priority because they may actually stop abuses; former leaders by definition are no longer in a position to commit new violations. However, the prosecution of serving heads of state is both legally and politically very difficult. As noted in chapter Four below, some of the opinions in House of Lords decision in the Pinochet case include very troubling language concerning the absolute immunity of a current head of state. Piercing the veil of immunity will undoubtedly be all the more difficult in a case involving a sitting head of state. Indeed, the Pinochet case illustrates how great a challenge immunity can pose even in the case of a leader who has long been out of power. States are likely to be all the more reluctant to prosecute (or extradite) a current leader based on the possible foreign policy consequences of such action. Strategically, therefore, it might be more advisable to proceed with prosecutions of former leaders, in order to build a track record that would ultimately support prosecutions of current leaders.

## **Big fish, small fish**

At first glance, the advantages of prosecuting high-level officials appear to be clear. Such prosecutions are likely to generate greater publicity, which would better serve several of the aims of prosecution, including deterrence. They are also more likely to deter lower-level officials, while it is doubtful that the reverse is equally true. Finally, from the perspective of justice, to prosecute lower-level officials without going after those who were responsible for their actions would send the wrong signal.

Having said this, prosecutions of high-level officials present more substantial legal impediments than prosecutions of lower-level officials. In particular, immunity problems are more likely when high level officials are prosecuted. Such prosecutions are also more likely to be controversial politically. Also, it is necessary to prosecute lower-level officials to show that superior orders is not a defence against charges issued under universal jurisdiction. Furthermore, if prosecutions are at least partly designed to meet the needs of victims, it should be recognised that victims may be more satisfied by the prosecution of the person who actually perpetrated violations against them, than by prosecution of their political or military leaders.

The key point here will be the question of balance. If it seems that prosecutions are only proceeding against the small fish, then over time the sense of unfairness, that big fish are let off the hook, will call into question the credibility of the process. In other words, in the long run both types of prosecution are necessary.

## **Universal jurisdiction prosecutions of non-state actors**

Should prosecutions relying on universal jurisdiction be attempted against non-state actors for example, members of armed groups not linked to (and usually in conflict with) the state? There are good reasons to do so. International law does not generally distinguish between state and non-state actors when it comes to prosecuting crimes against humanity. From

the victims' perspective, and the interests of justice, crimes should clearly be punished regardless of whether the perpetrator was acting in the name of the state. Moreover, if universal jurisdiction prosecutions are limited to state criminals, they may appear to be biased, given that many members of armed groups have committed crimes against humanity.

However, some caution is called for. Such armed groups are usually considered to be criminal by the state against which they fight. At least in theory, therefore, their members can be prosecuted under the normal criminal law. One of the rationales for prosecution abroad – the unwillingness to prosecute at home – is thus less clear-cut. On the other hand, it may be particularly true in the case of such groups that the home state will be unable to prosecute, or will not do so in a fair manner.

### **Problems with naming names**

To make use of the principle of universal jurisdiction, organisations must identify the individuals they believe should be prosecuted. Once this is done, information can be given without publicity to the authorities. But on occasion, the need might arise to publicly call for a named person to be prosecuted, for example, where the authorities fail to investigate a complaint already given in confidence. This public naming presents certain hazards. The organisation may expose the person named to retaliation; there is a risk that the person named will not receive a fair trial; victims may be exposed to the risk of retaliation or suffer pressure to testify. Above all, there is the danger of accusing someone who is innocent, an act that, in societies that have suffered from extreme human rights violations, can endanger the life or security of the person wrongly identified.

An organisation that identifies alleged perpetrators may also have to defend itself against libel suits or may itself become the target of intimidation and threats.

Despite these hazards, it is possible to name names responsibly. Organisations calling for prosecutions should be careful about

how they identify individuals. They should call for investigation and emphasise they are not presuming guilt. Suspects should be named only where strong evidence exists and where there is a good chance of successful prosecution. Organisations should also consider the possibility (though it might be remote) that giving publicity to accusations against a person might prejudice the fairness of his or her eventual trial.

### **The relevance of national efforts to resolve**

Is it opportune to prosecute on the basis of universal jurisdiction when local efforts are being made to control human rights abuses or resolve their effects? This question has been hotly debated in various places. In particular, it has often been argued that prosecutions abroad relying on universal jurisdiction should not proceed when a domestic amnesty has been declared (as in Chile, or South Africa).

It should be stressed first of all that a national amnesty cannot legally bar prosecutions relying on universal jurisdiction. Any individual victim who has not agreed to an amnesty has an unassailable right to seek justice. Recognising this principle, however, does not entirely resolve the debate, since the question is not whether prosecutions can *legally* occur but rather whether it is *appropriate* to press for prosecution in all circumstances.

This issue exposes tensions between some of the purposes underlying universal jurisdiction prosecutions. On the one hand, it is argued that such prosecutions are designed to address local victims' needs and it is inconsistent to insist on prosecution even when they have obtained other forms of redress. On the other hand, the core premise of universal jurisdiction prosecutions is that it is in the interest of prosecuting states and the international community to bring the perpetrators of grave crimes to justice. Justice in these cases is not for the victims only, but also for the public at large.

In practice, this dilemma is largely theoretical, since most

national efforts to resolve human rights crimes cannot claim the legitimacy they would require to justify suspension of universal jurisdiction prosecutions. For example, few lawyers would agree that, because General Pinochet was given an amnesty in Chile, he should not be subject to legal procedures in Spain. Other cases are more difficult. It is harder, for example, to say whether the amnesties granted by the South African Truth and Reconciliation Commission should weigh against calls for universal jurisdiction prosecutions. At a minimum, national processes should be evaluated to determine their legitimacy. A key factor in that analysis should be the extent to which victims participate in and gain satisfaction through the process.

National efforts to address human rights crimes are intended to help social healing and reconciliation. Universal jurisdiction prosecutions have the potential to upset such efforts. This is also an issue. Were powerful states to prosecute abroad without consideration for initiatives taken by local authorities, it might discredit the universal jurisdiction rule (as described above in the section on jurisdictional imperialism).

Most would agree that the views of victims and their communities should be considered very carefully when decisions are made to prosecute abroad. As with all forms of extraterritorial jurisdiction, in every case it should be asked whether it could not be prosecuted domestically. National amnesties or truth commissions cannot definitively remove the option to prosecute abroad. But given limited resources it seems pointless to argue that prosecution should be urged abroad in circumstances where the victims do not seek prosecution because they consider that effective local action has been taken on their behalf. Of course, this assumes that it is possible to gain a valid sense of what the victims do want, and that their choice to forego prosecutions is freely made. Still, focusing on the many cases in which victims' groups are aggressively pushing prosecutions will normally be a priority.

This said, further attention should be paid to the issue of how

to evaluate and weigh domestic efforts, including amnesties. Standards should be derived for analysing the legitimacy of domestic decisions to forego prosecutions so that organisations considering universal jurisdiction prosecutions can more effectively factor this issue into their decisions.

### **RELEVANT FACTORS IN ADVOCATING PROSECUTIONS**

In thinking about which cases deserve to be prosecuted abroad, all the above considerations will come into play. Additional practical factors are also relevant.

#### **Availability and strength of evidence**

As indicated above, the strength of the case that exists or can be prepared against the suspect is a critical factor when evaluating whether prosecution abroad is desirable. The quality of evidence will frequently be the determining factor for prosecutors. In all cases the presence of good evidence is required before prosecutions can proceed. Only well-documented cases have any chance of succeeding.

#### **Seriousness of the offences**

Of course, the type and extent of offences will always be an important consideration in determining whether prosecution should be urged. While all crimes against humanity should be prosecuted, it is sensible to proceed first with the worst violations. At the same time, there is a risk in going for the most dramatic sounding cases first. Evidentiary requirements for the gravest violations may be particularly difficult to meet (e.g., genocide, that requires a showing of intent).

#### **Extent of NGO, victim, and society support for prosecution in the country where abuses occurred**

As discussed above, as in any prosecution, the views of the victims should be considered in deciding whether to push for prosecutions using universal jurisdiction. Cases in which victims groups have engaged in extensive efforts to develop evidence and push for their prosecution should justifiably be given some

precedence (bearing in mind, of course, whether it is possible to engage in such activity in the country concerned). Cases should be encouraged where they are publicly defensible, a factor which argues in favour of taking victim's views into account.

### **Likelihood of preventing ongoing abuses or deterring future crimes**

Given that deterrence is an important rationale for universal jurisdiction prosecutions, it is sensible to evaluate cases by the degree to which they meet this objective. This factor may argue in favour of prosecutions of high level officials because of the publicity such cases receive. Prosecutions of cases where ongoing abuses may be addressed could also be a priority.

### **Likelihood of success**

Cases should also be evaluated according to their likelihood of success. For example, an appropriate litigation strategy might take the easiest cases first. However, success should not be viewed simply in terms of the ultimate outcome of the case. For example, in the Pinochet case, the fact that Pinochet has been detained against his will in the UK could itself be viewed as a limited form of success. This factor should be especially important in the early selection of cases that should be pushed in order to avoid starting out with a string of failures. As the process becomes more established, a less pragmatic perspective could emerge.

### **Security risks involved**

Any responsible process for deciding whether to prosecute under universal jurisdiction should take into account the safety of organisations that advocate prosecution, and the safety of victims, witnesses and the accused, should prosecution go ahead.

### **Cost**

One final point is the question of financial cost. For a number of reasons (gathering of evidence abroad, translation, legal

complexities, etc.) universal jurisdiction prosecutions are likely to be more costly and drawn out than normal criminal proceedings. While the cost of prosecutions should not be an excuse for failing to take action, it does illustrate that, in the real world, there will be choices made as to which cases go forward. In such circumstances, the process of deciding which cases should be pressed is all the more important.



## Four: A LOOK AT THE PINOCHET CASE

A closer look at the Pinochet case illustrates exactly how difficult it is to prosecute a case based on the principle of universal jurisdiction. As mentioned, as of this writing, the proceedings so far against Pinochet have not even reached the substance of the charges against him. Instead, the case to date has focused only on the limited legal question of whether the UK would agree to extradite Pinochet to Spain. Extradition is the process by which one country asks another to transfer a suspect from one state to the other. In this case, Spain charged that Pinochet had been responsible for the murder of Spanish citizens in Chile at the time when he was the Chilean President, and that he was responsible for systematic acts in Chile and other countries including murder, torture, disappearance, illegal detention and hostage-taking. On that basis, Spain asked the UK to arrest Pinochet, and to extradite him to Spain.

### **What did the UK House of Lords decide?**

Augusto Pinochet challenged his threatened extradition to Spain on the basis that he was immune from prosecution because he was a former head of state. State (or sovereign) immunity is a long-recognised legal rule that since all states are sovereign and equal, they are prevented from sitting in judgement on the acts of each other. The seven judges who heard the case in the House of Lords (the highest court in the UK) found that under the laws of the UK, a former head of state is immune from prosecution for official acts undertaken while serving as head of state, regardless of where the official acts occurred. Commenting on an issue not present in the case they were considering, the judges also generally agreed that under UK law personal immunity would provide absolute protection from criminal or civil proceedings in a national court for a *current* head of state.

The judges then considered whether Pinochet was immune from prosecution for the acts of torture, conspiracy to commit torture,

murder, and conspiracy to murder. With very limited discussion, the judges concluded that state immunity did apply to the charges of murder and conspiracy to commit murder.

Apparently, the judges did not believe that murder was a crime of sufficient gravity to fall outside the usual rules by which immunity applies. At the same time, six of the seven judges held that state immunity did not apply to the allegations of torture and conspiracy to commit torture. They relied heavily on the UN Convention against Torture in deciding that Pinochet was not immune. In reaching that decision, the judges concluded that while the Convention against Torture does not explicitly refer to heads of state, heads of state were included within the definition of torture in Article 1 of the Convention which refers to a public official or other person acting in an official capacity.

In addition to determining whether Pinochet was immune from prosecution, the House of Lords also had to decide whether the crimes alleged by Spain were subject to extradition under the laws of the UK. Under UK law, if extradition is sought for crimes committed outside the territory of the requesting state (extra-territorial crimes), then those crimes must also be punishable under the UK's law when they occur outside its territory. In the House of Lords decision, the application of this rule took a surprising turn. The judges accepted Pinochet's argument that for this standard to be satisfied, the crimes at issue must have been crimes punishable in the UK at the time they occurred, not just at the time the extradition request was made. Under this standard, it was not enough that torture, murder, and hostage-taking were punishable under UK law even if they occurred outside the country at the time the arrest warrant was issued against Pinochet. Instead, the question became whether each of these offences (as well as conspiracy to commit both torture and murder) were recognised as extra-territorial crimes in the UK at the time the alleged offences occurred. Under UK law, torture became an extra-territorial offence on 29 September 1988, through an amendment to the

Criminal Justice Act (passed to bring UK law into line with the Convention against Torture). UK law recognises murder as an extra-territorial offence, but only if committed after 1 August 1978 in one of the states to which the provisions of the European Convention on the Suppression of Terrorism apply (which do not include Chile).

Most of the charges contained in the Spanish arrest warrants were thus eliminated, including all torture charges pre-dating 29 September 1988, and all murder (and conspiracy to murder) charges pre-dating 1 August 1978. Both torture and murder charges relating to acts alleged in Spain survived, given that those crimes were not extra-territorial (they were alleged to have occurred in the country requesting extradition). The judges also threw out the charge of hostage-taking, based on Lord Hope's analysis that the acts alleged did not meet the definition of hostage-taking contained in the relevant UK law.

The majority of the judges also found that torture is a crime under customary international law. In particular, they concluded that prohibition of torture amounts to a norm with special status (*jus cogens*) that takes precedence over treaties and customary international law generally. Yet, despite this finding, all the judges except one still found it necessary to rely on the Convention against Torture to conclude both that torture met the extradition standards of UK law and that Pinochet could not claim state immunity from the torture charges.

In the end, the House of Lords found that Pinochet was subject to extradition and was not entitled to state immunity *only* with regard to the charges of torture and conspiracy to commit torture that occurred after 8 December 1988 (the date when the UK finally ratified the Convention against Torture).

The actual extradition proceedings against Pinochet could then proceed and got underway in September 1999.

### **What lessons can be learned from this case so far?**

The Pinochet case is important because it provides a real life example of how a case involving universal jurisdiction will be handled by the highest court in a country with a well-developed and generally well-respected legal system, and where legislation actually exists permitting courts to exercise universal jurisdiction. It illustrates how far international human rights law has come in the last fifty years, but also how far it still has to go. The case is an important milestone for the international human rights system and represents an important step away from the concept of non-interference in the internal affairs of sovereign states. The Pinochet case sends a clear message that there is no state immunity for former heads of state for torture. At the same time, the case shows that universal jurisdiction prosecutions face a number of substantial hurdles.

One fact that stands in the way of drawing lessons from the Pinochet case is that the decision itself is a muddle, barely understandable to seasoned UK practitioners, and largely incomprehensible to other readers. The seven judges each wrote a separate opinion and they agreed on little except their conclusion in the case. The resulting confusion will minimise the importance of the legal reasoning in the Pinochet case.

Nevertheless, the Pinochet case exposes two key obstacles that some cases involving universal jurisdiction might face: extradition procedures and claims of immunity. The case shows that the question of where a case arises is crucial. The Pinochet case was immensely more complicated because it involved extradition of a suspect to another country. Obviously, if Pinochet had travelled to Spain, or if the UK itself had been willing to prosecute him, the proceedings would have avoided all the difficult legal questions relating to extradition. The Pinochet case also demonstrates that state (or sovereign) immunity can pose a substantial impediment to universal jurisdiction prosecutions. It illustrated as well that the limits of state immunity are unclear, and that this doctrine has not kept pace with the emerging force of international human rights law.

Lying below the surface in the Pinochet case is a very restricted legal decision that does not recognise much of the development of international law in the last fifty years. If all three of the states involved (United Kingdom, Chile and Spain) had not been parties to the Convention against Torture, the outcome of the Pinochet case could have been different. The judges in the case seemed uncomfortable with the field of customary international law. Instead, they chose to rely on something they could put their hands on – a treaty.

The decision could also undermine efforts to prosecute current heads of state. Without much discussion, several judges noted that heads of state would have absolute immunity from prosecution in a national court abroad while they are in office. Obviously, such statements contribute to a climate of impunity for powerful leaders, many of whom have no intention of leaving office soon (or ever).

Despite these limitations, the Pinochet case is significant in a number of respects. First, and foremost, the decision has had a major impact on public perceptions regarding the possibility of prosecuting former heads of state, regardless of the restricted legal bases for the judgement. What the public sees is that the case against Pinochet is going forward, and that he has not been able to return to Chile. The case has substantial symbolic value in the fight against impunity.

At the same time, Pinochet's current circumstances cannot have gone unnoticed by other current or former leaders who have presided over substantial human rights abuses during their time in office. These leaders must now at least view their plans for travel abroad very differently (even if they do not decide to change their behaviour at home).

The Pinochet proceedings have also provoked substantial new interest among interested parties (including victims groups and human rights organisations) about the use of universal jurisdiction to prosecute substantial abuses.

The case has also had a substantial impact in Chile. For many victims of the Pinochet era, the extradition proceedings, and the publicity, have amounted to a real chance at having their suffering acknowledged. The proceedings have provided an opportunity for public education on what happened during the Pinochet years, and who is responsible. While some argue that the opening of a public debate within Chile on these issues is itself a significant step forward, others have contended that reopening the Pinochet case disturbs a situation that had, for better or worse, achieved closure. There does, however, seem to be some hope that the debate over the case will aid in a process of genuine healing within Chile. It is worth noting that since Pinochet's arrest in the UK, there has been unexpected progress in domestic attempts to prosecute officials responsible for abuses during his rule.

## Five: OBSTACLES TO THE EXERCISE OF UNIVERSAL JURISDICTION

Use of universal jurisdiction by national courts is still a rare phenomenon. The legal base for universal jurisdiction prosecutions has developed largely since World War II, and its foundations in international law remain somewhat shaky. Though the rule is well-established in some respects, there remain grey areas where the application of universal jurisdiction is unclear. Moreover, states have taken few steps to ensure that universal jurisdiction prosecutions are possible in their courts. As a result, national law on the subject of universal jurisdiction lags far behind international law in most countries.

In addition to a poorly-developed legal framework, universal jurisdiction prosecutions face a number of practical obstacles. By their nature, such prosecutions occur far from the evidence and witnesses necessary to the case. They also throw up complex and difficult legal questions in specialist areas, which those involved will often not understand well. Judges at the national level, for example, are not generally well-versed in international law.

This chapter sets out some of these problems. Of course, listing all the obstacles could be read as a reason not to act, but that is not the intention here. Rather, identifying the obstacles is a necessary first step before finding ways of overcoming them, and some suggestions in this regard are made at the end.

### **Problems in international law**

The universal jurisdiction rule applies to crimes against humanity and war crimes. In the past, it was not clear what specific crimes were included under these general headings, and there is still some confusion.

It is now generally accepted that crimes against humanity include systematic or widespread acts of murder, extermination, enslavement, torture, deportation or forcible transfers of

population, arbitrary imprisonment, enforced disappearance of persons, persecution on political, religious, racial or gender grounds, rape, sexual slavery and other serious forms of sexual violence, and the practice of apartheid. This list comes from the Statute of the International Criminal Court agreed in Rome in 1998.

War crimes are defined in the Four Geneva Conventions of 1949 and their Protocols, as well as other international humanitarian law treaties. These include grave breaches of the Geneva Conventions: wilful killing, torture or inhumane treatment, wilfully causing great suffering, or serious injury to body or health, extensive destruction and appropriation of property (not justified by military necessity and carried out unlawfully and wantonly), compelling a prisoner of war or other protected person to serve in a hostile army, wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement, or the taking of hostages. Under the Statute for the permanent International Criminal Court agreed in Rome, war crimes also include other serious violations of the laws and customs applicable in international armed conflict. The Statute defines what offences constitute war crimes in a non-international armed conflict.

With grave breaches of the Four Geneva Conventions, the list is fairly clear and established and almost all states have ratified the Geneva Conventions. There is less agreement on war crimes covered by Protocol I to these Conventions, as a number of states have not ratified it. Among other things, this Protocol prohibits certain types of warfare, for example, indiscriminate attacks on civilians. The Geneva Conventions and Protocols cover mostly international armed conflicts. For internal conflicts, there is still some uncertainty about what amounts to an international crime. Some acts are clearly prohibited – murder, torture, hostage-taking, cruel or degrading treatment, and unfair trials – but the prohibition of other acts in internal conflicts is less clear.



To this problem of identifying what are international crimes, is added the problem of knowing when and on what terms these crimes should be prosecuted on the basis of universal jurisdiction. The legal basis for exercising universal jurisdiction differs depending on whether the crime is set out in an international treaty or is part of customary international law.

For crimes such as torture and grave breaches of the Geneva Conventions, the relevant treaties say clearly that offenders who are found within the territory of a state must be prosecuted or extradited to face prosecution elsewhere. The wording of the treaties is quite clear and little discretion is left to the state. With respect to other crimes, however, there is no specific treaty or the relevant treaty does not state clearly whether a state can or should prosecute an offender found in its territory when the crime was committed elsewhere. The Genocide Convention, for example, makes no provision for universal jurisdiction; and, unlike torture, no specific treaty deals with enforced disappearances or extrajudicial executions. In these cases, the basis for universal jurisdiction prosecutions is found in customary international law. While most experts agree that customary international law allows for universal jurisdiction prosecutions of all crimes against humanity, it is not clear whether, in relation to each particular crime, states are *obliged* to prosecute.

These uncertainties have real-life consequences, as the Pinochet case demonstrated. There, the British judges showed extreme reluctance to apply customary international law and seemed comfortable only when they were dealing with specific treaty provisions that had been incorporated into national law.

### **Problems in domestic law**

Under international law (whether treaties or customary international law) all states have the ability to undertake universal jurisdiction prosecutions (and most states, including parties to the Geneva Conventions and the Convention against Torture, are

required to prosecute certain crimes). However, the domestic law of most states places many obstacles in the path of such prosecutions.

### **Incorporation of crimes under international law**

In some countries, treaties are automatically the law of the land and can be relied upon directly in domestic courts. In many others, however, treaties must be incorporated into domestic law in order for someone to rely on them in court. In those cases, a domestic legislature must adopt implementing legislation. Since states are bound under international law by the treaty regardless of whether implementing legislation is adopted, it should follow that implementing legislation is put forward in all but the most exceptional cases. Unfortunately, even in the case of such well-accepted treaties as the Geneva Conventions, many states have failed to take the necessary steps to incorporate their obligations under the treaty into domestic law.

The process of incorporation includes both recognising the international crime (e.g., genocide, torture) in domestic law, and also recognising that it can be prosecuted regardless of where the crime occurred. While the number of states that have expressly recognised torture, genocide, crimes against humanity and war crimes in their domestic criminal law has increased exponentially in recent years, it is still the case that these provisions do not exist in all countries. Even in the many states where such domestic criminal laws do exist, not all have explicitly provided for universal jurisdiction prosecutions. This gap between international obligations, and what domestic law actually allows for, is a significant problem.

### **Ability to rely on customary international law**

While the situation regarding reliance on treaties in national courts is not as encouraging as it might be, the circumstances relating to reliance on customary international law are much worse. As we saw, the British House of Lords, a generally well-respected legal authority, failed to uphold basic principles

of customary international law relating to universal jurisdiction in the Pinochet case.

Like treaties, customary international law can also be applied directly in domestic courts in some states, while in others it must be incorporated into domestic law before it can be recognised in national courts. Again, most states have not undertaken such a process.

### **Immunities and defences to prosecution**

Even where domestic law clearly permits prosecution based on universal jurisdiction, it can present a number of additional barriers to a successful result. Two relevant areas of domestic law in this respect are criminal responsibility and immunities.

#### **Criminal responsibility**

Prosecution of crimes against humanity and war crimes can sometimes be blocked because domestic law fails to implement international law principles of criminal responsibility. For example, under international law, an accused superior can, in some circumstances, be held criminally responsible for acts such as murder or torture committed by those under his or her command. But many domestic criminal or military justice codes do not include similar provisions. National law may also, for example, allow a lower-level accused the defence that he or she was, in committing horrible crimes, only following orders – a defence that is generally not allowed under international law. Also, domestic law might provide that after the passage of a certain amount of time, a crime that has so far gone unpunished cannot be prosecuted (i.e., a statute of limitation applies to the crime). Again, under international law, crimes against humanity and war crimes are not subject to such statutes of limitation.

#### **Immunity**

In most states, universal jurisdiction prosecutions will also face immunity problems in cases involving current or former heads of state. In accordance with bilateral and multilateral treaties, as well as customary international law, heads of state are immune

from prosecution in some circumstances (as discussed in the Pinochet case). Many other government officials, particularly diplomats, are also able to claim immunity. These immunities can run directly counter to efforts to prosecute universal jurisdiction crimes, which by their nature usually involve government authorities. To some extent, this is a battle that has been developing over the course of the last fifty years, as human rights law has gradually given individual rights greater precedence over states' rights. As the Pinochet case illustrates, immunity laws are in a confusing state in many countries. It seems that most states have not modified their existing laws on immunities to take account of the evolution of law towards a more restricted view of official immunity.

Even when ratifying international treaties such as the Convention against Torture, which are predicated upon the responsibility of government officials for their criminal acts, states have not modified their laws to strip immunity for such acts. Thus, in cases involving current or former heads of state, immunity laws present a substantial obstacle to prosecutions based on universal jurisdiction.

### **Extradition law**

The issue of extradition also arises when universal jurisdiction prosecutions are considered. Again, the Pinochet case is an instructive model. It is easy to focus too much on the proceedings in the UK, and to forget that the real case is in Spain. (Proceedings in the UK address only the question of whether Pinochet will be extradited to Spain, where the actual criminal trial will be held.) Like Pinochet (who was well aware of the case against him in Spain), many suspects will not travel to a country that seems likely to initiate proceedings against them. Universal jurisdiction prosecutions, therefore, will sometimes involve one state requesting the extradition of a suspect from another state.

In this respect, the statutes of the international criminal tribunals contain an important advantage. Under the statutes of the

tribunals established by the UN to address war crimes in Rwanda and the former Yugoslavia, states are required to surrender suspects to the tribunals, and not to extradite them. For example, the ICTFY Statute requires states to comply without undue delay with an order issued by the Tribunal, including orders calling for the arrest or detention of persons, or the surrender or the transfer of an accused person to the Tribunal. Under these provisions, surrender can occur virtually simultaneously with arrest or detention, should the Tribunal make such a request.

In contrast, extradition laws generally provide for a complex legal process which can take months, if not years, to reach its conclusion. In addition, extradition laws impose substantive restrictions on the circumstances in which a suspect will be transferred to another country for trial. As was the case with Pinochet, many extradition laws require that the offences for which the accused is sought are also subject to punishment in the extraditing state. They frequently exempt political offences in some way (though crimes such as torture should not fall within this category), and allow officials of the extraditing government to decline extradition for extra-legal reasons (such as the effect on foreign policy).

A host of additional issues may be relevant in extradition proceedings, including the nationality of the suspect, statutes of limitation, the possible unfairness of legal proceedings in the requesting state, and humanitarian grounds (e.g., age, illness).

### **Competing jurisdictions**

It is evident that several countries could bring universal jurisdiction prosecutions simultaneously against the same individuals, since the rule gives all countries the ability to prosecute certain crimes. This point is once more illustrated by the Pinochet case, where to date five countries other than Chile (Belgium, France, Italy, Spain and Switzerland) are seeking to prosecute.

This said, the possibility of conflict may be more theoretical than practical. The main aim of states that seek to prosecute universal jurisdiction crimes should be to see that justice is done, rather than necessarily doing justice themselves. To that end, a successful prosecution in Spain could render efforts to bring Pinochet to justice in Belgium, Switzerland, Italy or France moot. From a practical standpoint, a state that holds the suspect will have a substantial advantage in pressing the case, not least because of the difficulties of extradition noted above. Similarly, a state that has an advantage with regard to available evidence, either documentary or potential witnesses, will be more likely to initiate successful proceedings. In many cases, issues of competing exercises of jurisdiction may be resolved by the well-known, not-so-legal principle of first come, first served. States that work to initiate cases based on extensive investigation, as was the case with Spain's efforts to prosecute Pinochet, will have an intrinsic advantage in any competition to prosecute universal jurisdiction cases.

While the practical difficulties presented by competing exercises of jurisdiction may be manageable, circumstances exist in which real conflicts can be imagined. For example, prosecution in a jurisdiction which is considered to be overly friendly to the suspect could raise suspicions that the proceedings will somehow favour the defendant, and that the court will be less than impartial. Where a state's legal system has frequently failed to meet fair trial standards, other states may be called to prosecute. Such circumstances could raise the north-south issue discussed above.

### **The problem of evidence**

A key problem for universal jurisdiction prosecutions is that by definition the evidence – the facts needed to prove a case – will be located at a distance, in the country where the crimes were committed rather than in the prosecuting country. Problems of evidence arise in three areas, each of which is crucial to a successful prosecution: (1) investigation; (2) documents; and (3) witnesses.

## **Investigation**

With regard to investigations, it is easy to see that prosecutions in a foreign court will face substantial disadvantages. In many cases, prosecutors will not have access to the places where the crimes occurred, which can pose substantial problems in developing the case. This problem might be partially overcome if the authorities in that country were willing to co-operate, but in many such prosecutions this will not be the case. Even if they grant prosecutors access to the territory, local authorities may undermine in other ways their ability to investigate effectively, for example by refusing to provide the security necessary to ensure their safety.

## **Documents**

Criminal prosecutions can succeed or fail based upon the documentary evidence presented. However, prosecutors in universal jurisdiction cases will often have problems getting access to the relevant documents. Under ordinary circumstances, prosecutors can require anyone with relevant information, including government officials, to surrender those documents for use in the case. In universal jurisdiction prosecutions, foreign prosecutors or courts will not in most cases be able to force authorities or individuals in the country where the abuses occurred to submit documents. Where documents are available, courts will face special challenges in verifying whether they are authentic.

## **Witnesses**

Obtaining witness testimony will raise obvious problems for universal jurisdiction prosecutions. Foreign prosecutors and courts will find it difficult to compel witnesses to testify because of the distances involved, and audio or video, rather than direct testimony, might be necessary. This in turn raises problems about the fairness of trials and the defendant's right to challenge witness testimony. Nor is the prosecuting state in a good position to protect witnesses and their families.

Witnesses may sometimes need to be relocated to the state that prosecutes, and ultimately given asylum there. If such witnesses return home, the prosecuting state would not be able to guarantee their safety.

The practical evidentiary problems are thus very real and likely to deter prosecutors from bringing cases that they would otherwise support.

Nevertheless, such problems have been overcome. In the Pinochet case, victims and human rights groups were able to provide much documentary evidence, apparently of high quality.

It should also be noted that the difficulties in trying to obtain documents and witness testimony from foreign jurisdictions are not unique to universal jurisdiction prosecutions. Many civil and criminal cases require that evidence be gathered outside the jurisdiction where the case is being tried. States have developed a complicated network of agreements to deal with these efforts, often called mutual legal assistance agreements. Typically, these allow one state to rely on the co-operation and assistance of another state, for example to conduct searches and seizures, interview witnesses, excavate graves, and produce documents.

However, these agreements also typically allow the requested state a good deal of discretion in deciding whether or not to co-operate. For example, assistance may be refused because the offence is not recognised in domestic law or the proceedings are considered unfair or because a state's national interest is at risk. Furthermore, the process is often very slow. Many experts believe that, if universal jurisdiction prosecutions are really to work, the mutual legal assistance system must be comprehensively overhauled. It may be necessary to enforce co-operation when grave crimes under international law are involved, and the process should become more transparent, with an independent scrutiny procedure to assess whether refusals to co-operate are justified.



### **Strengthening the legal basis for universal jurisdiction**

The problems of evidence and other problems in domestic law that make universal jurisdiction prosecutions difficult are not insurmountable. The fact that some prosecutions are proceeding shows that this is so. Nevertheless, steps need to be taken to strengthen the basis for such prosecutions.

### **Surveys of domestic law**

As a starting point, it would clearly be helpful to survey national laws that are relevant to universal jurisdiction prosecutions, in particular national criminal laws and procedures. Such surveys would address a broad range of issues, including the extent to which international treaties have been incorporated into domestic law (where that step is necessary) and whether the specific crimes that are subject to universal jurisdiction are recognised in national laws. Surveys should address not only the law as written, but how it is applied in courts. In addition, as noted above, surveys of related areas of law will be necessary, including extradition, immunities, and mutual legal assistance.

Preparation of such legal surveys would be the basis for development of a list of legal reforms. Given the likely length of that list, reforms will need to be prioritised. One goal of such efforts should be to ensure that states that undertake universal jurisdiction prosecutions adopt a consistent approach.

### **Clarifying international law**

Further examination of relevant customary international law may be useful. As noted, it is not always clear which crimes are subject to universal jurisdiction proceedings and when universal jurisdiction prosecutions are mandatory under international law. The goal should be to expand mandatory universal jurisdiction in a variety of ways, including national legislation, decisions of courts, and statements from authoritative international bodies.

## Co-ordination

Effective efforts in the field of universal jurisdiction prosecutions will also depend greatly upon the ability of involved individuals and organisations to share their experiences and knowledge. Building networks among all the participants in this field is important, including human rights organisations, victims groups, lawyers associations, prosecutors, judges, and academic institutions.

## Training

A knowledge gap exists within organisations advocating prosecutions, and also within the relevant legal authorities (primarily prosecutors and judges). Human rights organisations and victims groups do not have sufficient knowledge in the broad range of legal subjects that arise in universal jurisdiction cases, in particular criminal law and procedure. For their part, neither prosecutors nor judges are adequately trained to address the complex questions of international law that are an unavoidable part of universal jurisdiction prosecutions. These shortcomings present a challenge to universal jurisdiction prosecutions that cannot be ignored.

Effective training of human rights lawyers in the field of criminal law and procedure is therefore essential. Advocates must also become more familiar with other relevant areas of law, including extradition and mutual legal assistance.

Training for prosecutors and judges should no doubt focus on the intersect between criminal law and procedure and human rights and humanitarian law. Training should thus be additional to more general human rights law training and should include the development of teaching materials. These should cover international standards but also specific national laws and cases to ensure that they are relevant to their audiences.

### **Winning public support**

The need for public education concerning the purposes underlying universal jurisdiction prosecutions is also important. Only through effective articulation of the broad range of important objectives served through universal jurisdiction prosecutions would these efforts gain public understanding and support. Without a broad public consensus supporting prosecutions, it would be difficult to obtain the legislative changes necessary for successful exercise of universal jurisdiction. In some cases, only a major public relations campaign could convince the public at large of the need to expend resources to prosecute cases from abroad.

## CONCLUSION

At the time of writing, Senator Pinochet remains confined in a temporary home near London. There are good reasons for thinking that in the not too distant future he may stand trial in Spain for at least some of the crimes against humanity committed under his regime. Meanwhile, since Pinochet's arrest in October 1998, a Rwandan mayor has been convicted and imprisoned in Switzerland for war crimes relating to his role in killings during the genocide in Rwanda in 1994, and a Mauritanian military officer has been arrested and charged in France with torture, relating to acts alleged to have been committed in Mauritania in 1991. A senior Iraqi politician fled Austria in August 1999, where he had gone for medical treatment, two days after attempts were made to have him arrested for crimes including genocide against Iraqi Kurds. There were also reports in August 1999 that ex-President Suharto, of Indonesia, was afraid to travel to Germany for medical treatment believing he might be arrested there and charged with crimes against humanity. Prosecutors in several countries are reported to be examining many other cases.

The universal jurisdiction rule holds enormous promise for efforts to tackle impunity, and to strengthen the protection of human rights. If universal jurisdiction prosecutions continue, those who commit the most horrific crimes can no longer be sure that impunity at home will guarantee their impunity abroad. For when independent courts elsewhere step in, the factors that hinder justice at home will no longer be as relevant.

But fulfilling this promise will require a sober assessment of the risks and difficulties involved. Prosecutions abroad of human rights violators can be justified on many grounds, as we have seen. But, if universal jurisdiction prosecutions are to be an effective means of punishing crimes against humanity, the political and ethical issues raised here should not be ignored. Those advocating such prosecutions must be clear that, where

possible, prosecutions at home are preferable. Much work remains to be done to strengthen the legal basis for universal jurisdiction. Above all, cases must be well documented.

The case in Spain and the UK against Senator Pinochet has rightly been seen as a milestone for international human rights law. While by no means the first such case, Pinochet's notoriety brought the attention that has made the proceedings against him a turning-point. There is, apparently, strong public support in Chile, Spain and the United Kingdom for the case against him to continue. But in less well-known cases, will the public, at home and abroad, understand the rationale? If all such prosecutions occur in western countries, and deal mainly with offenders from the developing world, will this be a credible means of enforcing international law? If prosecutors shy away from the big fish and only investigate those who followed orders, will this enhance or undermine support for the rule of law?

In the end, the answers to these and many other questions will not be found in international law. It is not what the law provides, but rather *the perception of how it is being applied*, that will determine the success of universal jurisdiction prosecutions. A crucial factor in shaping that perception will be the ability to demonstrate that justice and fairness are not only the aims of exercising universal jurisdiction, but are also guiding the actions of those advocating and bringing such prosecutions.

## Annexe A: LIST OF PARTICIPANTS

### THINKING AHEAD ON UNIVERSAL JURISDICTION

Meeting 6 – 8 May 1999

International Council on Human Rights Policy

<b>Ambassador Thomas Hammarberg</b>	Chair UN Secretary General's Special Representative on Human Rights in Cambodia; Chair of the Executive Board of the International Council on Human Rights Policy
<b>Peggy Hicks</b>	Rapporteur Former Deputy High Representative for Human Rights in Bosnia

#### Invited Guests

<b>William Bourdon</b>	Secretary General, <i>Fédération internationale des ligues des droits de l'homme</i> , France
<b>Reed Brody</b>	Advocacy Director, Human Rights Watch, USA
<b>Youk Chhang</b>	Director, Cambodian Documentation Centre, Cambodia
<b>Helena Cook</b>	International Lawyer, UK
<b>Claudio Cordone</b>	Director, Research and Mandate Programme, Amnesty International, UK
<b>Michael Cowling</b>	Professor of Law, University of Natal, South Africa
<b>Francisco Cox</b>	Inter-American Institute for Human Rights, Costa Rica
<b>Fr. Michael Czerny, SJ</b>	Director, Social Justice Programme, Society of Jesus, Rome
<b>Louise Doswald-Beck</b>	Head, Legal Office, International Committee of the Red Cross, Geneva
<b>Semih Gemalmaz</b>	Professor, University of Istanbul, Turkey
<b>Gerald Gray</b>	Centre for Justice and Accountability, San Francisco, USA
<b>Wesley Gryk</b>	Lawyer and Board Member of Redress Trust, UK
<b>Christopher Keith Hall</b>	Legal Adviser, Amnesty International, UK
<b>Cecilia Jiminez</b>	Association for the Prevention of Torture, Geneva
<b>Frederik W. Jjuuko</b>	Professor of Law, Makerere University, Uganda
<b>Nursyahbani Katjasungkana</b>	Executive Director, Women's Association for Justice, Indonesia
<b>Menno Kamminga</b>	Professor of Law, University of Rotterdam, Netherlands
<b>Yasantha Kodagoda</b>	Attorney General's Department, Sri Lanka
<b>Frank La Rue</b>	Director, <i>Centro para Acción Legal en Derechos Humanos</i> , Guatemala
<b>Aminu Mahmoud</b>	Head, Legal Resources, Civil Liberties Organisation, Nigeria
<b>Rodolfo Mattarollo</b>	Deputy Executive Director, MICIVIH, Haiti
<b>Fiona McKay</b>	Legal Officer, Redress Trust, UK
<b>Amin Mekki Medani</b>	Lawyer, Board Member of Arab Organisation for Human Rights, Egypt
<b>Manouri Muttetdtuwagama</b>	Lawyer, Sri Lanka
<b>Jelena Pejic</b>	Lawyers Committee for Human Rights, USA
<b>Luis Perez Aguirre, SJ</b>	<i>Servicio Paz y Justicia</i> , Uruguay
<b>Mona Rishmawl</b>	International Commission of Jurists, Geneva

**Christopher Staker** Prosecutor's Office, International Criminal Tribunal for the former Yugoslavia, the Hague  
**Jeanne Sulzer** *Fédération internationale des ligues des droits de l'homme*, France  
**Wilder Tayler** General Counsel, Human Rights Watch, UK  
**Paul Vickery** Director, War Crimes Section, Department of Justice, Canada

**From the International Council on Human Rights Policy**

**Robert Archer** Executive Director  
**William Burklé** Treasurer, member of Executive Board  
**Mohammed-Mohamedou** Research Director  
**Craig Mokhiber** Research Consultant  
**David Petrsek** Research Director, and Co-ordinator of the meeting

## Annexe B: FURTHER READING

Readers wishing for further information on universal jurisdiction, particularly on its legal aspects, may like to consult the published material listed below:

**Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction**, AI Index: IOR 53/01/99, May 1999, 14 pages.

(Available also in Arabic, French and Spanish.)

**United Kingdom: The Pinochet case – Universal jurisdiction and the absence of immunity for crimes against humanity**,

AI Index: EUR 45/01/99, January 1999, 37 pages.

(Available also in French and Spanish.)

**Available from:**

Amnesty International  
1 Easton St.  
London WC1X 8DJ  
United Kingdom

[www.amnesty.org](http://www.amnesty.org)

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**Crimes Against Humanity: Pinochet Faces Justice**,

International Commission of Jurists, July 1999, 128 pages.

(Available also in Spanish.)

**Available from:**

International Commission  
of Jurists  
PO Box 216  
81A Avenue de Châteline  
CH-1219 Châteline  
Switzerland

[www.icj.org](http://www.icj.org)

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**Report of the Sixty-Eighth Conference**

(Held at Taipei, Taiwan, Republic of China, 24-30 May 1998), International Law Association, London, 1998, pages 563-576 "The Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences", First report to the Committee on Human Rights Law and Practice, Rapporteur Prof. Menno T. Kamminga.

**Available from:**

International Law Association  
Charles Clore House  
17 Russell Square  
London WC1B 5DR  
United Kingdom

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**National Enforcement of International Humanitarian Law: Information Kit**,

Advisory Service on International Humanitarian Law, ICRC Publications.

(Available also in French.)

**National Implementation of International Humanitarian Law,**

**Annual Report 1998**, Advisory Service on International Humanitarian Law, ICRC Publications. (Available also in French.)

**Available from:**

International Committee of the  
Red Cross  
19 avenue de la Paix  
1202-Geneva  
Switzerland

[www.icrc.org](http://www.icrc.org)

**Répression Nationale des Violations du Droit International Humanitaire, (Systèmes Romano-Germaniques) Rapport de la**

**réunion d'experts**, Genève 23-25 septembre 1997, Advisory Service on International Humanitarian Law, ICRC Publications.

(Available also in Spanish.)



## About the International Council on Human Rights Policy

The International Council on Human Rights Policy was established in 1998 following a long process of consultation that started after the 1993 World Conference on Human Rights in Vienna.

The Council's Mission Statement reads:

*“The International Council on Human Rights Policy will provide a forum for applied research, reflection and forward thinking on matters of international human rights policy. In a complex world in which interests and priorities compete across the globe, the Council will identify issues that impede efforts to protect and promote human rights and propose approaches and strategies that will advance that purpose.*

*The Council will stimulate co-operation and exchange across the non-governmental, governmental and intergovernmental sectors, and strive to mediate between competing perspectives. It will bring together human rights practitioners, scholars and policy-makers, along with those from related disciplines and fields whose knowledge and analysis can inform discussion of human rights policy.*

*It will produce research reports and briefing papers with policy recommendations. These will be brought to the attention of policy-makers, within international and regional organisations, in governments and intergovernmental agencies and in voluntary organisations of all kinds.*

*In all its efforts, the Council will be global in perspective, inclusive and participatory in agenda-setting and collaborative in method.”*

The Council starts from the principle that successful policy approaches are likely to take account of the diversity of human experience. The Council will co-operate with all that share its human rights objectives, including voluntary and private bodies, national governments and international agencies. Neglect of social and economic rights depress the quality of human life as much as violations of political and civil rights. The Council will undertake work across the whole range of human rights issues.

To be relevant, the Council must identify and concentrate on issues that matter. This is the core task of the International Council, a group of 22 individuals from all regions and a variety of backgrounds.

The International Council meets annually to set the direction of the Council's Programme. It ensures that the Council's agenda and research draw widely on experience from around the world. Members help to make sure that the Council's programme reflects the diversity of disciplines, regional perspectives, country expertise and specialisations that are essential to maintain the quality of its research.

To implement the programme, the Council employs a small secretariat of six staff. Based in Geneva, its task is to ensure that projects are well designed and well managed and that research findings are brought to the attention of relevant authorities and those who have a direct interest in the policy areas concerned.

## THE INTERNATIONAL COUNCIL

<b>Abdullahi An-Na'im</b>	Professor of Law, Emory University School of Law, Atlanta, Georgia. Sudan.
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<b>Ligia Bolivar</b>	Founder, Legal Defence Program, Venezuelan Program for Human Rights Education and Action (PROVEA).
<b>Theo van Boven</b>	Professor of International Law, University of Maastricht; Member of the UN Committee on the Elimination of Racial Discrimination. Netherlands.
<b>William Burklé*</b>	Former banker; Board Member of Migros. Switzerland
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<b>Yash Ghai*</b>	Sir Y K Pao Professor of Public Law, Hong Kong.
<b>Thomas Hammarberg*</b>	Ambassador; UN Secretary General's Special Rapporteur on Human Rights in Cambodia. Sweden.
<b>Bahey El Din Hassan</b>	Director, Cairo Institute for Human Rights Studies. Egypt.
<b>Ayesha Imam*</b>	Co-ordinator, International Solidarity Network of Women Living under Muslim Laws, Region West Africa. Nigeria.
<b>Hina Jilani*</b>	Director, AGHS Legal Aid Cell, Lahore. Pakistan.
<b>Virginia Leary</b>	Distinguished Service Professor of Law, State University of New York at Buffalo. United States of America.
<b>Goenawan Mohamed</b>	Poet; Founder and former Editor of <i>Tempo</i> magazine, Indonesia
<b>Bacre Waly Ndiaye</b>	Lawyer; Director of the Office of the UN High Commissioner for Human Rights in New York. Senegal.
<b>Margo Picken</b>	Associate Fellow at the Centre for International Studies, London School of Economics. United Kingdom.
<b>N. Barney Pityana</b>	Chair, South African Human Rights Commission. South Africa.
<b>Daniel Ravindran</b>	Founder, Asian Forum for Human Rights and Development (Forum-Asia). India.
<b>Dorothy Thomas</b>	Consultant, Shaler Adams Foundation. United States of America.
<b>Renate Weber</b>	Co-President, Romanian Helsinki Committee. Romania.

**\* Member of the Executive Board**

## The Research Programme

**National Human Rights Institutions** Ref 102: Publication: March 2000. Assesses the extent to which these bodies are acquiring social legitimacy and meeting the needs of vulnerable groups. It also examines the role of government, judicial and non-government institutions in making these bodies more or less effective. Field research has been undertaken in Indonesia, Mexico and Ghana, and secondary research on several other countries. Researcher: Richard Carver.

**Human Rights Assistance Programmes** Ref 104: In research. Examines the effectiveness of human rights assistance programmes from the perspective of beneficiaries. Research is focussing on the administration of justice in Bulgaria, Cambodia, Guatemala and South Africa. Secondary research will consider programmes in several other countries. Researcher: Craig Mokhiber.

Start: March 1999. Consultation on draft: November 1999 to January 2000. Publication: May 2000.

**Armed Groups** Ref 105: In research. Examines the degree to which human rights organisations have succeeded or not in reducing or preventing abuses by armed groups. Ten case studies on eleven countries were written for a roundtable consultation on 6–8 September 1999. A synthesis report will be circulated for consultation, from December 1999 to April 2000, leading to a summary of conclusions in mid-2000.

Start: April 1999. Publication: December 1999. Consultation: December 1999 to April 2000. Final paper: June 2000.

**Governments and Media** Ref 106: In design. Will examine the way the media cover human rights issues by researching how governments and the media interact on issues of public policy in which human rights is an important element. A feasibility report was prepared in March 1999. A consultation with journalists was held in July 1999, focussing on coverage of the Kosovo crisis.

Design: 4th quarter 1999. Start: 1st quarter 2000.

**Accountability of Private Business** Ref 107: In design.

This project will identify specific obligations that can be directly placed on corporations to respect and promote human rights.

Design: 4th quarter 1999. Start: 1st quarter 2000.

**Economic and Social Rights** Ref 108

Economic and social rights was a principal theme of the third meeting of the International Council in June 1999. Work is now under way to narrow the research focus.

Design: 1st quarter 2000. Start: 2nd quarter 2000.

**Traditional Authorities** Ref 109: Pre-feasibility.

Exploratory research will identify a specific project the Council might research on the role that traditional authorities play in protecting or obstructing protection of human rights in various domains and in different societies. It will also examine methodological issues that arise.

Feasibility: 1st quarter 2000. Design: 2nd quarter 2000 (subject to Board approval).

**Religion and Rights** Ref 110: Pre-feasibility.

Further exploratory research will be done to identify a specific project that might be undertaken on an aspect of this subject.

Pre-feasibility: 1st quarter 2000. Design: 2nd quarter 2000 (subject to Board approval).

**Universality** Ref 111: No status.

The Council maintains a watching brief on this subject. In the course of 2000 a research project may be approved. It is likely to focus on issues relating to gender.

**Racism** Ref. 112: In research.

The Council will hold a meeting in December 1999 to consider some of the key policy issues associated with racism, in the context of the international conference on racism that will be convened by the UN in mid-2001.

## How to order publications and documents from the Council

If you would like to order copies of this publication or information about other Council publications or subscribe to the quarterly Council newsletter, please complete the form overleaf and return it to the Secretariat at the address given.

### This publication

**Ref. 102** *Hard cases: bringing human rights violators to justice abroad – A guide to universal jurisdiction*  
International Council on Human Rights Policy, 1999  
ISBN 2-940259-01-1, 72pp., 165mm x 220mm.  
Available in English. Frs.15.00(+ Frs.3. p&p) Qty. \_\_\_ Total:(Frs.) \_\_\_

### Previous Publications

**Ref. 103** *Taking Duties Seriously: Individual Duties in International Human Rights Law – A Commentary*,  
International Council on Human Rights Policy, 1999,  
ISBN 2-940259-00-3, 80pp., 165mm x 220mm,  
Currently available in English.  
Frs.13.50 (+ Frs.3. p.&p.) Qty. \_\_\_ Total:(Frs.) \_\_\_

### Forthcoming Publications

**Ref. 105** *Armed groups*,  
International Council on Human Rights Policy, 1999  
ISBN 2-940259-02-X. Publication: December 1999.  
Price: Frs. 15.00 + p&p. Qty. \_\_\_\_\_

**Ref. 102** *Performance & legitimacy: national human rights institutions*,  
International Council on Human Rights Policy, 2000  
ISBN: 2-940259-03-8. Publication: March 2000.  
Price: Frs. 36.00 + p&p. Qty. \_\_\_\_\_

**Ref. 104** *Human rights assistance*,  
International Council on Human Rights Policy, 2000  
ISBN 2-940259-04-6. Publication: May 2000.  
Price: Frs. 36.00 + p&p. Qty. \_\_\_\_\_

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Frs.13.50 (+ Frs.3. p.&p.)

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**Ref. 105** *Armed Groups*, International Council on Human Rights Policy, 1999 ISBN 2-940259-02-X.  
Publication: December 1999.

Price: Frs.15.00.(+postage & packing\*)

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Publication: March 2000.

Price: Frs.36.00 (+postage & packing\*)

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