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Mr. Emmanuel DECAUX  
Chairperson, Committee on Enforced  
Disappearances (CED)

8-14 Avenue de la Paix  
CH 1211 Geneva 10  
Switzerland

15 February 2013

Dear Mr. Decaux

**RE: INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE: CONSIDERATION OF URUGUAY'S STATE REPORT**

I am writing regarding the forthcoming consideration of Uruguay's state report under Article 29(1) of the International Convention for the Protection of All Persons from Enforced Disappearance (the Convention), which is scheduled for the fourth session of the Committee on Enforced Disappearances (8-19 April 2013).

In this letter, Amnesty International sets out some brief observations regarding the state report<sup>1</sup>, and makes relevant recommendations, which we ask Uruguay to consider implementing.<sup>2</sup>

I have enclosed copies of an Amnesty International report published in September 2011, which might be of interest as background information for the review. The report recalls Uruguay's obligations under the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.<sup>3</sup> Since the publication of this report the Uruguayan Congress adopted, in October 2011, a law that in practice eliminated the effects of the 1986 Amnesty Law (also known as Expiry Law), which prevented prosecutions of those accused of torture, killings, enforced disappearances and other gross human rights violations between 1973 and 1985, before the country's return to democratic rule.<sup>4</sup> While the new law also repealed statutes of limitations to some extent – that would have prevented victims from filing criminal complaints – Uruguayan courts continue to investigate and prosecute cases of enforced disappearances committed in 1970s as kidnapping or abduction and not

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<sup>1</sup> Initial report of Uruguay, UN Doc. CED/C/URY/1, 15 October 2012, [http://www.ohchr.org/Documents/HRBodies/CED/Session4/CED-C-URY-1\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/CED/Session4/CED-C-URY-1_en.pdf).

<sup>2</sup> See Amnesty International, *No impunity for enforced disappearances: Checklist for effective implementation of the International Convention for the Protection of All Persons from Enforced Disappearance*, AI Index: IOR 51/006/2011, 9 November 2011, available in Arabic, English, French, Indonesian and Spanish, <http://www.amnesty.org/en/library/info/IOR51/006/2011/en>.

<sup>3</sup> Amnesty International, *Uruguay: Los crímenes de derecho internacional no están sujetos a prescripción* (only available in Spanish), AI Index: AMR 52/001/2011, 26 September 2011, <http://www.amnesty.org/en/library/info/AMR52/001/2011/es>; see also the Amnesty International Press Release issued together with the report, which is available in English, *Uruguay must investigate and prosecute crimes of the past*, 26 September 2011, <http://www.amnesty.org/en/for-media/press-releases/uruguay-must-investigate-and-prosecute-crimes-past-2011-09-26>.

<sup>4</sup> See Amnesty International Press Release, *Uruguay: Congress adopts landmark law to tackle impunity*, 27 October 2011, <http://www.amnesty.org/en/for-media/press-releases/uruguay-congress-adopts-landmark-law-tackle-impunity-2011-10-27>.

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as crimes under international law, despite the fact that Uruguay made enforced disappearance criminal under national law in October 2006.<sup>5</sup>

### 1) Non state action

Regarding Articles 21.1 and 9 of Act No. 18026 of 2006 (*'Ley de Cooperación con la Corte Penal Internacional en materia de lucha contra el genocidio, los crímenes de guerra y de lesa humanidad'*) the state report maintains at paragraph 54: "Uruguay strictly prohibits enforced disappearance in its domestic legislation". However, Amnesty International considers that the prohibition of enforced disappearances in Uruguay's domestic legislation falls short of the requirements of the Convention.

Article 2 of the Convention defines enforced disappearance as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State". It is notable that article 3 of the Convention requires state parties to investigate acts defined in Article 2 committed by persons or groups of persons acting "*without* the authorization, support or acquiescence of the state [emphasis added]" and to bring those responsible to justice.

It is clear that article 3 contains an express obligation to extend the active subject of the crime not only to state agents, but also to those persons or groups of persons acting without the authorization, support or acquiescence of the state. Uruguay, as any other state party to the Convention, has the obligation to define the conduct prohibited in Article 2 of the Convention when committed by private individuals as a crime under national law.

To Amnesty International's knowledge, none of the provisions contained in Act No. 18.026 of 2006 nor the Penal Code appear to make *enforced disappearance* committed by persons or groups of persons acting without the authorization, support or acquiescence of the state a crime under national law.

#### *Recommendation:*

- Amnesty International calls on Uruguay to promptly amend its national legislation so as to make enforced disappearance committed by persons or groups of persons acting without the authorization, support or acquiescence of the state a crime under national law.

### 2) Jurisdiction

Act No. 18.026 of 2006 provides, in accordance with Article 9(1) (a) and (b) of the Convention, for territorial and active personality jurisdiction. The latter permits Uruguay to prosecute its nationals for the crime of enforced disappearance committed anywhere in the world, if at the time of the offence, they were Uruguayan nationals.

It is notable, however, that Act No. 18.026 of 2006 seems not to provide for the exercise of jurisdiction on the basis of the passive personality principle, that is to say when the victim of the crime of enforced disappearance is a Uruguayan national. This failure is arguably at odds with the stipulation in Article 9(1) (c) of the Convention.

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<sup>5</sup> See, for example: Supreme Court of Uruguay: Gavazzo and Arab Fernández case, ficha 98-247/2006, 6 May 2011 and ruling of 20 July 2011 in Silveira Quesada, Ramas Pereira, Medina Blanco, and Vázquez Bisio case, ficha 2- 43332/2005. Contrary to the ruling of the Uruguayan Supreme Court in this case, the Special Tribunal for Lebanon, Appeals Chamber, Antonio Cassese presiding, found that "Article 15 of the ICCPR allows at the very least that fresh national legislation (or, where admissible, a binding case) defining a crime that was already contemplated in international law may be applied to offences committed before its enactment without breaching the *nullum crimen principle*." See Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, paras.132-133, available at: <http://www.stl-tsl.org/en/the-cases/stl-11-01/rule-176bis/filings/orders-and-decisions/appeals-chamber/f0010>.

*Recommendation:*

- Amnesty International calls on Uruguay to amend its national legislation and clearly stipulate that the country will exercise jurisdiction when the crime of enforced disappearance is committed against one of its nationals, i.e. in other words, on the basis of the passive personality principle.

### **3) No immunities**

States parties are required to investigate and prosecute persons suspected of committing the crime of enforced disappearance regardless of whether they hold an official capacity. This is to say, no person should be granted immunity from investigation or prosecution on account of their official position.

Unlike the legislation in other states, Act 18.026 of 2006 does not contain a provision preventing foreign state officials from claiming immunity from prosecution for crimes under international law, including genocide, crimes against humanity, war crimes, torture, enforced disappearances and extrajudicial executions.

The obligation under the Convention to investigate and bring those responsible for enforced disappearance to justice is absolute. It applies to all persons without any distinction based on official capacity, including heads of state or government, members of government or parliament, elected representatives or government officials. The Convention does not provide for any exception.

Article 11 (1) of the Convention provides that states parties are obliged to “submit the case to its competent authorities for the purpose of prosecution”, if it does not extradite that person or surrender him or her to another state or to an international criminal tribunal.

Furthermore, as pointed out by the UN Human Rights Committee, the official status should not justify the granting of immunity from prosecution of persons suspected of committing such violations.<sup>6</sup>

Likewise, the International Law Commission has explained: “[c]rimes against the peace and security of mankind often require the involvement of persons in positions of governmental authority who are capable of formulating plans or policies involving acts of exceptional gravity and magnitude. These crimes require the power to use or to authorize the use of the essential means of destruction and to mobilize the personnel required for carrying out these crimes. A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required for carrying out the crime, but also abuses the authority and power entrusted to him. He may, therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security”.<sup>7</sup>

Amnesty International urges Uruguay to consider the approach taken by other states with regards to the issue of immunities potentially claimable by state officials.

For example, the 2007 Penal Code of Panama provides that it will apply to any person subject to Panama’s jurisdiction, except to foreign heads of state, foreign diplomatic agents and all those enjoying immunity based on a treaty, which are exempted. However, “such exceptions shall not apply with regard to crimes defined under Chapter XV (genocide, crimes against humanity, war crimes) and

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<sup>6</sup> UN Human Rights Committee, General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, HRI/GEN/1/Rev.8, p. 238.

<sup>7</sup> ILC, 1996 Draft Code, commentary, article 7, para.1.

enforced disappearances”.<sup>8</sup> The Law 059/2009 of Burkina Faso, which implements the Rome Statute of the International Criminal Court into national legislation, provides explicitly that it applies equally to everyone, without any distinction based on official capacity, be it as head of state or government, member of government or parliament, elected representative or other state agent.<sup>9</sup>

*Recommendation:*

- Amnesty International calls on Uruguay to amend its national legislation to provide that its courts will not recognize any claim to immunity from arrest and prosecution for the crime of enforced disappearance, in order to ensure that it complies with the absolute obligation under the Convention to investigate those suspected of criminal responsibility for enforced disappearance.

We hope these observations will be helpful when considering Uruguay’s state report. We would be grateful if you could make this letter and the enclosed materials available to all members of the Committee in advance of the session.

Yours sincerely,



Tania Baldwin-Pask  
International Advocacy Program

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<sup>8</sup> Código penal de Panamá, Artículo 22: La ley penal panameña se aplicará sin distinción de personas, con excepción de:

1. Los jefes de Estado extranjero;
2. Los agentes diplomáticos de otros Estados y demás personas que gocen de inmunidad, según las convenciones internacionales vigentes en la República de Panamá;
3. Los casos previstos en la Constitución Política y las leyes;

Las excepciones establecidas en este artículo no se aplicarán cuando se trate de los delitos contemplados en el Título XV del Libro Segundo de este Código, y del delito de desaparición forzada de personas.

<sup>9</sup> Loi N°059/2009, portant détermination des compétences et de la procédure de mise en œuvre du Statut de Rome relatif à la Cour pénale internationale par les juridictions burkinabè, art. 7: « La présente loi s’applique à tous de manière égale, sans aucune distinction fondée sur la qualité officielle. En particulier, la qualité officielle de chef d’Etat ou de gouvernement, de membre d’un gouvernement ou d’un parlement, de représentant élu ou d’agent d’un Etat, n’exonère en aucun cas de la responsabilité pénale au regard de la présente loi, pas plus qu’elle ne constitue en tant que telle un motif de réduction de la peine. »