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Fédération internationale des ligues des droits de l'Homme  
International federation of human rights  
Federacion internacional de los derechos humanos  
الفدرالية الدولية لحقوق الانسان

# Legal Remedies for Victims of “International Crimes”

Fostering an EU Approach  
To Extraterritorial Jurisdiction

## FINAL REPORT

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*“[G]enocide, crimes against humanity and war crimes must not go unpunished and [...] their effective prosecution must be ensured by taking measures at national level and by enhancing international cooperation.”*

*Council Decision 2003/335/JHA, 8 May 2003*

*“The serious crimes within the jurisdiction of the [International Criminal] Court are of concern to all Member States, which are determined to cooperate for the prevention of those crimes and for putting an end to the impunity of the perpetrators thereof”*

*Council Common Position 2003/444/CFSP, 16 June 2003*

*“The [International Criminal Court’s] strategy of focussing on those who bear the greatest responsibility for crimes within the jurisdiction of the Court will leave an impunity gap unless national authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used.”*

*Paper on some policy issues before the Office of the Prosecutor,  
International Criminal Court – Office of the Prosecutor, 2003*

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# I. EXECUTIVE SUMMARY

The Redress Trust (REDRESS) and the International Federation of Human Rights (FIDH) are organisations that have consistently promoted the rights of victims of some of the worst crimes to access justice and to obtain effective and enforceable remedies. Not only does the process of seeking and obtaining justice contribute to the eradication of safe havens and the end of impunity, it can also play an integral role in victims' journeys to recovery.

In many cases where the victims, or indeed the alleged perpetrators, have left the jurisdiction where the crimes took place, the only way that a remedy can conceivably be effective – or even exist, is through the exercise of extraterritorial jurisdiction. Remedies in the territorial State are often not available due to the nature of the crimes, and the jurisdiction of the International Criminal Court and other international justice mechanisms is limited in a number of significant ways.

Consequently, part of REDRESS' and FIDH's work with victims has been to assist them to exercise extraterritorial remedies in the European Union. The idea to develop a 'European approach' to international crimes such as genocide, crimes against humanity, war crimes and torture was borne through this experience of counselling and support to victims. Notably, victims have faced unequal access to justice in the courts of Member States, even though all have the same international obligations regarding the repression of "international crimes." This has led to gaps in the system resulting in perpetrators being able to escape justice in the territory of one or more Member States; "forum-shopping" by victims, who have converged on a single jurisdiction which provides what are perceived to be wider rights of access to justice; and difficulties in mutual cooperation between Member States. Furthermore, the perception that "international crimes" fall only in the domain of foreign policy, and not also within the sphere of judicial cooperation matters (third pillar) has meant that the competencies of many of the European level of cooperation mechanisms, have to date been narrowly construed.

The problem areas and recommendations outlined in this paper stem from the discussions and conclusions of two conferences organised in 2003. The aim is to make the practices and procedures of Member States more consistent and to foster greater cooperation between Member States in the investigation and prosecution of such crimes. Participants discussed the following options, which include measures that could be taken by the EU, Member States, other European fora, human and victims rights groups and other interested parties. In particular:

- Enhancing European consensus on the fight against impunity;
- Enhancing EU competence over "international crimes" by including them in the upcoming EU Constitution as well as in the 3<sup>rd</sup> pillar while bridging 2<sup>nd</sup> and 3<sup>rd</sup> pillar initiatives;
- Establishing minimum standards for "international crimes" through the adoption of a framework decision on the matter;
- Building on existing EU mechanisms for cooperation in the investigation and prosecution of "international crimes";
- Ensuring equal access to justice and enforceable remedies for victims of "international crimes" committed in third countries through either revision of the Rome II proposal or adoption of another measure;
- Undertaking a comparative study on law and practise of Member States and candidate countries on extraterritorial jurisdiction;
- Supporting current cases; and
- Working with various EU level counterparts, as well as with other European institutions.

## II. THE PROJECT

The main objectives of the Project are to end safe havens for those accused of perpetrating violations of human rights and international humanitarian law, in particular genocide, crimes against humanity, war crimes and torture, and to ensure that the victims of these crimes have access to effective and enforceable remedies. In order to achieve these aims, the Project has employed the following methodologies:

- Determining the feasibility of making consistent the laws and practices relating to the exercise of extraterritorial jurisdiction for serious violations of human rights and international humanitarian law in Member States of the European Union (EU). This includes criminal law and procedure, extending from pre-trial phases to trial and enforcement proceedings, as well as civil claims for reparation, including jurisdictional, procedural and enforcement provisions;
- Developing strategies for enhancing coordination and cooperation between Member States in the detection, investigation and prosecution of such crimes by applying existing EU rules and methodologies, and/or by developing new modalities for cooperation as required.

Two conferences were convened in 2003 to discuss the feasibility and modalities of such approaches.

**Paris Meeting:** The first, an *Expert Meeting* convened in Paris in July 2003, marked the start of discussions on whether a consistent European Union approach to the repression of “international crimes” committed in third countries was warranted and a feasible objective.

Several assumptions were critically reviewed in the course of this Meeting, including, whether: it would be possible to marshal political support at the EU level; the benefit to the approximation or harmonisation of the laws and practices of Member States outweighed any potential detrimental effects; an EU approach to international crime is more effective than an approach aimed solely at encouraging national governments to implement their international obligations. Participants outlined some of the key areas where a common approach would be desirable, and mapped out options for taking matters forward.

The **Brussels Conference**, held in November 2003 and sponsored in part by the European Parliament, provided an opportunity to raise these issues among a wider range of European actors. More than one hundred representatives of Member States, European Union institutions (the Commission, General Secretariat of the Council of the European Union and Parliament), other institutions (International Criminal Court, Council of Europe), NGOs, victims’ groups and practitioners participated in discussions and debates. The Conference presented a unique opportunity for a wide cross-section of actors from different disciplines and perspectives to begin to discuss these very sensitive and complex topics.

## III. THE NEED FOR JUSTICE FROM A VICTIM’S PERSPECTIVE

A key issue in any discussion about how to end impunity for human rights crimes is the victim’s right to, and need for, justice. It is, in fact, unusual, if not exceptionally rare, for victims of human rights crimes to obtain justice. Many victims find it extremely difficult even to obtain any official acknowledgment of what was done to them.

For survivors of torture and organised violence, obtaining some form of acknowledgement of what they have endured is particularly important therapeutically. Acknowledgement generally aids the healing process and can be key to the experience of a sense of closure.

By way of example, the response of Chilean victims to the arrest of General Pinochet in London demonstrates the importance of justice for victims. Even though, in that particular case, justice continues to be denied, many Chilean torture survivors nevertheless derived great comfort and hope that so seemingly invulnerable a criminal was brought within the reach of the law. The extraterritorial proceedings against Pinochet drew important public attention to the crimes he is alleged to have committed and also managed to invigorate debate in Chile on the obligation to punish the perpetrators and to provide reparations to victims.

## IV. AIMS AND OBSTACLES AT THE NATIONAL LEVEL

### A. EU Commitment to Combating Impunity

#### Implementation of International Treaties by EU Member States<sup>1</sup>

States are permitted and at times obliged, to initiate legal proceedings against the alleged authors of certain “international crimes,” regardless of the nationality of the perpetrators, the nationality of the victims or where the crimes were committed, as a matter of treaty or customary international law. This is reflected in the 1984 Convention against Torture<sup>2</sup> and the Geneva Conventions of 1949 and their first Additional Protocol,<sup>3</sup> among other sources. It is also fully consistent with the classical international law approach in which national courts are agents of the international community when enforcing international law. As the Israeli Supreme Court reiterated in the Eichmann case:

*“Not only are all the crimes attributed to the Appellant of an international character, but they are crimes whose evil and murderous effects were so widespread as to shake the stability of the international community to its very foundations. The State of Israel, therefore, was entitled, pursuant to the principle of universal jurisdiction, and acting in the capacity of guardian of international law and agents for its enforcement, to try the Appellant.”<sup>4</sup>*

The relevant offences and jurisdictional rules must be incorporated into domestic legislation in order for most courts of EU Member States to exercise such jurisdiction.<sup>5</sup> However, Member States have taken different approaches and have adopted varying interpretations of their international obligations to extradite or prosecute alleged perpetrators and/or to end impunity for “international crimes.” This has led in practice to differing degrees of access to justice from State to State and even from crime to crime, causing confusion and, in some cases, creating safe havens.

<sup>1</sup> Every EU Member State has ratified the key international conventions that provide for universal jurisdiction over “international crimes,” including the four Geneva Conventions of 1949 and their first Additional Protocol, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>2</sup> Convention against Torture, Article 5(2): Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this article.

<sup>3</sup> Articles 49 of Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, adopted 12 August 1949; Art. 50 of Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, adopted 12 August 1949; Art. 129 of Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949, adopted 12 August 1949; and Article 146 of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, adopted 12 August 1949, entered into force 21 October 1950, Art. 146:

“The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

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

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.”

<sup>4</sup> Supreme Court of Israel, Criminal Appeal No. 336/61, *Adolf Eichmann vs The Attorney General*, Appeal Session 7, para. 11 (f).

<sup>5</sup> While few EU Member States have constitutionally-based dualist legal systems explicitly requiring domestic implementation, many of their courts refuse to recognise their own competence over universal jurisdiction cases without it (France, for example).

The methods by which EU Member States have implemented their international law obligations can be summarised as follows:

*a. Application of the existing ordinary criminal or military law of the country concerned*

This method takes the view that the penal (and/or military) code already in force provides adequate punishment for the acts in question and that it would therefore be superfluous to characterise the acts as distinct offences.

*Advantages of this method:*

- Many modern European penal codes provide for the punishment of these offences, either explicitly or by reference to the underlying offences.

*Disadvantages:*

- Often, offences introduced under domestic criminal law do not fully cover the relevant acts prohibited under international law – for example, national war crimes legislation often does not include all the acts that violate the international laws of armed conflict;
- The elements of the crimes do not always correspond to the requirements of the relevant treaties nor are the penalties always appropriate to the underlying context.

*b. General criminalisation in domestic law*

This method is used in particular in Switzerland, Denmark, Norway and the Netherlands. Grave breaches of the Geneva Conventions and other violations of human rights and international humanitarian law may be criminalised in domestic law by adopting legislation that refers specifically to the relevant provisions of international treaties, international law in general or the particular area of international law (for example, the “laws and customs of war”). Similarly, the range of applicable penalties may be specified.

*Advantages:*

- This option is simple and economical. It provides for the punishment of all applicable violations by simple reference to the relevant instruments and, where applicable, to customary international law;
- No new national legislation is needed when the treaties are amended or new obligations arise for a State that becomes party to a new treaty.

*Disadvantages:*

- General criminalisation may prove insufficient in view of the principle of legality, particularly as this method does not permit any differentiation of the penalty in accordance with the gravity of the act, unless this is left to be decided by the judge in application of strict criteria laid down by law;
- It requires national judges to specify and interpret the applicable internal law in light of international law obligations, leaving them with considerable room for manoeuvre, though this flexibility may be an advantage in certain circumstances.

*c. Specific criminalisation of the offences concerned*

This technique is used in particular by Spain and Finland. In this method, the impugned acts are incorporated into national law, by a “naturalisation” process.

*Advantages:*

- When these offences are independently defined in national criminal codes, it may lead to the repression of a particular breach of a treaty, even if the treaty has not been ratified by the State;
- Specific criminalisation most closely respects the principle of legality, since it provides the most clarity and predictability;
- It simplifies and clarifies the work of law enforcement personnel by relieving them of the burden of research, comparison and interpretation in the field of international law.

*Disadvantages:*

- Specific criminalisation is a major task for national legislators, requiring considerable effort in research and drafting. It may entail an extensive review of existing penal legislation;
- If criminalisation is too full and specific, it may lack the flexibility needed to incorporate new developments in international law at a later stage.

Whatever the extent of the implementation of international obligations relating to extraterritorial jurisdiction, national courts have in some cases filled the gap themselves. Austria, for instance, has not explicitly defined war crimes as a crime under national law. However, by virtue of Article 64 Paragraph 1(6) of the Penal Code, which enables Austria to exercise universal jurisdiction in accordance with its international obligations, conduct constituting a grave breach of the Geneva Conventions would be subject to universal jurisdiction. Further, in the Cjetkovic case, the Supreme Court used an “object and purpose” test to interpret Austria’s international obligations, which enabled it to assert jurisdiction.<sup>6</sup>

### The Relationship with the ICC in Prosecuting “International Crimes”

All fifteen EU Member States have ratified the Rome Statute. The relationship between the International Criminal Court and States Parties is based on the understanding that impunity can only be tackled through a range of coordinated efforts at the national and international level. Numerous provisions of the Court’s statute (the Rome Statute) attest to this:

- **Cooperation:** the Court can request assistance from any State, including States that are not parties to the Rome Statute, and from any international institution;
- **The complementarity principle:** The jurisdiction of the International Criminal Court is complementary to that of national courts. The ICC will only intervene where another state that has jurisdiction is unwilling or unable genuinely to try a case.<sup>7</sup> The Prosecutor of the ICC has made clear that he would only “initiate prosecutions of the leaders who bear most responsibility for the crimes” and recognised that this strategy “may leave an ‘impunity gap’ unless national authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used”,<sup>8</sup>
- **The need for implementation of the ICC statute at the national level,** including through the adaptation of national legislation. Only some EU Member States have adopted internal legislation implementing their obligations under the Statute.<sup>9</sup> In some instances, such legislation has recognised, in relation to the complementarity principle, that crimes under the Statute give rise to extraterritorial jurisdiction, including universal jurisdiction.<sup>10</sup> Given that the limits of the ICC’s jurisdiction will prevent it from hearing all cases involving genocide, crimes against humanity and war crimes, and given that the Court will not even have the capacity to

<sup>6</sup> Judgment of the Oberster Gerichtshof, 13 July 1994, 15 Os 99/94. Republic of Austria v. Cvjetkovic, Landesgericht, Salzburg, 31 May 1995. For the analysis of the case see Axel Marschik, “The Politics of Prosecution: European National Approaches to War Crimes”, in Timothy L.H. McCormack & Gerry J. Simpson, eds, *The Law of War Crimes*, 65, 79-81 (1997).

<sup>7</sup> See Rome Statute, Art. 17.

<sup>8</sup> “Paper on some policy issues before the Office of the Prosecutor,” ICC-OTP, 2003, found at <http://www.icc-cpi.int/otp/030905%20Policy%20Paper.pdf> (last accessed February 2004).

<sup>9</sup> For example, Germany’s Code Of Crimes Against International Law of 26 June 2002 (Code of Crimes), the United Kingdom’s International Criminal Court Act 2001 (ICC Act) and the International Criminal Court (Scotland) Bill, the Netherlands’ International Crimes Act (Act of 19 June 2003 and France’s Law no. 2002-268 of 26 February 2002 Relating to Cooperation with the International Criminal Court (*Loi no 2002-268 du 26 février 2002 relative à la coopération avec la Cour pénale internationale*), among others. Most Member States and candidate countries have not yet fully adjusted their legislation in accordance with both complementarity and cooperation requirements under the Rome Statute and the Agreement on the Privileges and Immunities of the Court (APIC). Only 7 have enacted legislation implementing both: Estonia, Finland, Germany, Lithuania, Malta (not entered into force yet) and the Netherlands. Five have enacted legislation implementing either their complementarity or cooperation obligations but not both: Austria, France Poland, Slovenia and Sweden. Five of the rest are known to have draft legislation addressing either or both: Belgium, Ireland, Italy, Portugal and Spain. The remaining 8 are not known to have prepared any draft at all. Austria is the only EU member of the 4 States that have ratified the APIC.

<sup>10</sup> See, for example, Germany’s Code of Crimes and the Netherlands’ International Crimes Act, *supra*.

hear all cases that do fall within its jurisdiction,<sup>11</sup> the use of extraterritorial jurisdiction is expected to serve as an essential complement. Certain States parties to the ICC Statute have provided, in their internal legislation, for the possibility of deferral of cases to the ICC. Some have determined the extent to which they will exercise extraterritorial jurisdiction before or after referring a case to the ICC. In Belgian law, for example, if the ICC refuses to investigate a case forwarded by Belgian authorities, the case may be re-opened before Belgian domestic courts.<sup>12</sup> In the Spanish draft law, the Ministry of Justice retains an exclusive power to refer a case to the ICC, but the draft law does not specify what measures are to be taken should the ICC refuse the referral.<sup>13</sup>

The way in which the ICC interprets whether a State party is unwilling or unable to genuinely carry out the investigation or prosecution in accordance with Article 17 of the Statute may serve to clarify the role of non-territorial States who would be in a position to exercise extraterritorial jurisdiction. For instance, if governments regularly defer cases to the ICC, the Court may continue to recall the limits of its jurisdiction and to emphasise the multiple responsibilities of States Parties. The policy paper issued by the Office of the Prosecutor<sup>14</sup> recognises that the complementarity principle requires *genuine and competent* national efforts to investigate and prosecute. The office has set for itself the role of using “its best efforts to help State authorities to fulfil their duty to investigate and prosecute at the national level.”

Furthermore, the ICC’s role is not likely to be limited to crimes within its jurisdiction. On 16 July 2003, the Prosecutor, in a press conference relating to its preliminary investigation of crimes committed in the Ituri region of the Democratic Republic of the Congo (DRC), highlighted links between crimes falling into the jurisdiction of the Rome Statute and other crimes, such as weapons smuggling, money laundering and other illegal activities that fuel the conflict. The prosecutor’s intention to collaborate with the investigations and prosecutions of these other crimes signals that it is prepared to engage with experts in other areas of law enforcement and international criminal law. The European Union would have a decisive role to play in the implementation of such a policy given its expertise in tackling organised crime.

The Common Positions of the Council of the European Union on the International Criminal Court<sup>15</sup> illustrate the emergence of a common will to fight impunity for “international crimes” and of a commitment to cooperate to achieve this goal in the most effective way. The Preamble of the 2003 Common Position states that:

- “(4) The principles of the Rome Statute of the International Criminal Court, as well as those governing its functioning, are fully in line with the principles and objectives of the Union.
- (5) The serious crimes within the jurisdiction of the Court are of concern to all Member States, which are determined to cooperate for the prevention of those crimes and for putting an end to the impunity of the perpetrators thereof.”

## **B. Jurisdictional & Procedural Hurdles in Criminal Cases**

Several jurisdictional and procedural hurdles arise at the national level. (These are explained further in the Annexed country studies)

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<sup>11</sup> The ICC’s jurisdiction is limited to crimes committed on or after 1 July 2002 in the territories of States parties or by nationals of States parties – Rome Statute, Art. 13.

<sup>12</sup> *Loi relative aux violations grave du droit international humanitaire*, 1 August 2003, Art. 28.

<sup>13</sup> Draft Organic Law 121/000156 on Cooperation with the International Criminal Court [*Boletín Oficial de las Cortes Generales, Congreso de los Diputados, VII Legislatura, Series A, No. 156-1, 13 June 2003*].

<sup>14</sup> “Paper on some policy issues before the Office of the Prosecutor,” ICC-OTP, 2003, found at <http://www.icc-cpi.int/otp/030905%20Policy%20Paper.pdf>.

<sup>15</sup> Council Common Positions 2001/443/CFSP of 11 June 2001, 2002/474/CFSP of 20 June 2002 and 2003/444/CFSP of 16 June 2003.

## Access to Justice and Executive Discretion

The ability for victims and, in some cases organisations, to directly invoke criminal and/or civil procedures has a direct impact on access to justice. This ability was essential to proceedings in Belgium, France and Spain.

EU Member States have each established one or more of the following means by which prosecutions can be initiated:

1. by the victims ("*constitution de partie civile*"), obliging the authorities to investigate,
2. by any citizen, with the Prosecutor deciding, *proprio motu*, on the opportunity to prosecute; or
3. by judicial or administrative authorities, where victims only have the opportunity to provide information/evidence.<sup>16</sup>

The interrelationship between victims' access to justice and executive discretion (or "*opportunité des poursuites*") is crucial. In some countries the rules for triggering investigations or prosecutions based on extraterritorial jurisdiction differ from those operating for ordinary domestic or "territorial" crimes. The restriction of victims' ability to directly trigger the opening of an investigation, when combined with executive discretion and/or other controls can effectively prevent victims from accessing justice.

## Nexus Requirement, Immunities and Limitation Periods

### "Nexus Requirement"

Many countries require a nexus or link with the territory for jurisdiction to be exercised – e.g., presence of the perpetrator, either during the investigation or only at the time of the complaint or of the opening of the investigation. In some cases, laws require that the author of the crime is present only during the trial, while in other judicial systems *in absentia* trials are permitted.

Certain participants noted that it is essential for the efficiency of investigations and for the potential deterrent effect that the prosecution authority is entitled to act before the perpetrator arrives in the territory of the concerned State. The whole system must be seen as a shared responsibility. As is envisioned by the Geneva Conventions, prosecution authorities could and should cooperate in order to allow one of them to prepare a convincing *prima facie* case, which could serve as a basis for an extradition request. It was also suggested by some that the ability of courts to exercise universal jurisdiction and for the competent authorities to open an investigation should not be predicated on the presence of the alleged perpetrator. International law in no case requires that courts predicate their declaration of competence on such considerations. In particular, the burden of establishing the presence of the suspect in the territory of the concerned State should not rest on the victims, nor should it be a pre-condition to the opening of an investigation.<sup>17</sup>

Furthermore, other practical aspects such as opportunity, resources and cooperation from other States do not concern the ability to exercise jurisdiction itself.

### Immunities

Immunity is an expression of the principle of sovereign equality of States. Sovereign equality, however, can come into conflict with other principles of international law and fundamental norms of human dignity, such as States' obligations to repress "international crimes."

<sup>16</sup> It may be possible for the victim to bring a private prosecution, such as in the United Kingdom. However, the victim bears the cost of the investigation and possibly the prosecution if it fails.

<sup>17</sup> In France, two circulars, namely Circular of 10 February 1995, Art. 2.2.1 (published in the *Journal Officiel*, 21 February) and Circular of 22 July 1996, Art. 1 (*Journal Officiel*, 31 August), edited after the adoption of Law no. 95-1 of 2 January 1995 and Law no. 96-432 of 22 May 1996, respectively, allow during preliminary investigations the interview and the medical examination of victims who have taken refuge in France, even if the suspect has not yet been found in the territory of the Republic.

Immunity has arisen as a potential obstacle in numerous cases based on extraterritorial jurisdiction. The European Court of Human Rights' decision in the *Al-Adsani* case addresses the relationship between these international law principles. The ECHR recognised that the prohibition of torture has attained *jus cogens* status and that *jus cogens* rules prevail over rules of general international law, such as state immunity, though only in respect of "the criminal liability of an individual for alleged acts of torture" and not "the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State".<sup>18</sup> In a strong dissenting opinion,<sup>19</sup> six of the judges argued that "[t]he acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions."

In contrast, certain other courts have ruled that immunity may prevail even in the context of criminal liability. According to the International Court of Justice (ICJ)'s ruling in the *Yerodia* case, immunity is a customary rule applicable before all courts and tribunals – domestic and international – and can be a bar to prosecution of a foreign minister, head of state and perhaps other officials, both while in office and, in certain circumstances, once out of office.<sup>20</sup> In the case against Libyan President and Colonel Mouamar Khadafi, the French *Cour de Cassation* offered a similar interpretation, stating that customary international law bars prosecutions of sitting foreign heads of state before the criminal courts of a foreign country, when no contrary international provisions bind the involved parties.<sup>21</sup>

Others have argued that the commission of an international crime should constitute an implied waiver of immunity on the ground that the prohibition of such crimes has achieved the status of *jus cogens*. Furthermore, it remains difficult to reconcile the rulings of the ICJ and French courts in the context of individual criminal responsibility, with the limitations to immunity contained in the ICC Statute.<sup>22</sup> The *Congo (Brazzaville) v. France* case,<sup>23</sup> now before the ICJ, could provide an occasion for the International Court of Justice to adopt a more compatible interpretation of the relationship between immunities and *jus cogens* rules of customary international law.

There is a margin of interpretation, in particular in the case of the personal immunity and inviolability of acting foreign leaders (Heads of State, of Government, Ministers of Foreign Affairs and diplomats under the regimes of the 1961 and 1963 Vienna Conventions and 1969 New York Convention).<sup>24</sup> It should be recalled that international law does not prevent an investigation of a person still in office, particularly in order to preserve evidence.

### **Limitation Periods**

There is wide recognition of the inapplicability of statutes of limitations to certain crimes under international law.<sup>25</sup> Nonetheless, the practice of States varies widely, in particular, when the offences

<sup>18</sup> *Al Adsani v. the United Kingdom*, European Court of Human Rights, 21 November 2001 (*Application no. 35763/97*), para. 61.

<sup>19</sup> The decision was adopted by a 9 - 8 majority.

<sup>20</sup> ICJ, Judgment in the case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002. This judgment determined that under customary international law foreign ministers, as well as heads of government and heads of state, are immune from arrest by foreign jurisdictions while in office.

<sup>21</sup> Cass. Crim. 13 March 2001, *Bulletin criminel* 2001 No. 64 p. 218: "la coutume internationale s'oppose à ce que les chefs d'Etat en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, faire l'objet de poursuites devant les juridictions pénales d'un Etat étranger".

<sup>22</sup> Rome Statute, Art. 27. It should be noted that the ICJ restricts its ruling on immunity in the *Yerodia* case to domestic prosecutions, and specifically differentiates this from a prosecution before an international court.

<sup>23</sup> ICJ, Order on Request for the Indication of a Provisional Measure in the Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v. France), 17 June 2003.

<sup>24</sup> Vienna Convention on Diplomatic Relations, adopted on 18 April 1961; Vienna Convention on Consular Relations, adopted on 24 April 1963; New York Convention on Special Missions, 8 December 1969.

<sup>25</sup> UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *entry into force* 11 November 1970; 1974 Convention on lack of applicability of statutes of limitation in war crimes and crimes against humanity of the Council of Europe, Strasbourg, 25 January 1974; Section 4 of the draft Basic principles and guidelines on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, 18 January 2000. [E/CN.4/2000/62]; Article 29 of the Rome Statute of the ICC.

are not specifically prescribed. In France, for instance, war crimes are not specifically defined and may only be prosecuted if they fall within a definition of ordinary criminal law. Consequently, the limitation periods that apply to ordinary crimes will be applicable when prosecuting acts amounting to 'war crimes' in France.

Certain participants noted that domestic procedural rules such as limitation periods should not be capable of obstructing the prosecution of "international crimes." The existence of limitation periods in many States may give rise to the unintended result that the ICC, which has outlawed limitation periods for crimes within its jurisdiction, will have exclusive jurisdiction over certain crimes. It was therefore stressed that limitation periods be abolished for the crimes included in the ICC statute as well as for other "international crimes," such as individual acts of torture.

EU Member States should be encouraged to ratify the relevant UN and Council of Europe instruments outlawing statutes of limitation for certain "international crimes,"<sup>26</sup> and to further amend their laws for "international crimes" not covered by these treaties. There is no reason to abolish statutes of limitations for future crimes only as international law does not impose such a restriction, at least in respect of crimes that have not yet been prescribed.

### Conflicts of Jurisdiction between States

Rules established to address the issue of conflicts of jurisdiction, where two or more States seek to exercise jurisdiction, remain very *ad hoc* as regards extraterritorial jurisdiction. At the EU level, certain principles have been developed to forestall duplication of work and double proceedings especially with regard to the *ne bis in idem* and double jeopardy principles.<sup>27</sup> The Commission has also tried to avoid positive conflicts of competence by way of the *lis pendens* principle.<sup>28</sup> It may not be desirable to create exclusive jurisdiction or binding criteria that are very difficult to define: EU Member States are used to more flexible systems and favour a system of consultation/information in cases with a trans-border element. Eurojust may in future play a vital role given that it has the power to recommend who is competent among several States. The Green Paper on the protection of the financial interests of the European Communities and the appointment of a European Public Prosecutor takes a similar approach: The prosecutor would have a limited choice when several national jurisdictions are competent, but also a margin of discretion.

However, strong deference to the territorial jurisdiction, as exemplified in the Spanish *Tribunal Supremo's* rulings in the Guatemala (or Rios Montt) and Fujimori cases, have given rise to such concerns.<sup>29</sup>

In fact, positive competition among States to exercise extraterritorial jurisdiction over "international crimes" is largely theoretical given that the States that are most involved – where the crime occurred or where the alleged perpetrator resides – are often reluctant to initiate a prosecution. From this perspective, it may be appropriate for the State that acts first to have priority. Such a system would respect the victims' right to an effective remedy. The "Disappeared of the Beach" case<sup>30</sup> provides an apt illustration: after the procedure in France was made public, Congolese officials expressed interest

<sup>26</sup> For example, UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted on 26 November 1968, and the European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, adopted on 25 January 1974.

<sup>27</sup> Under Art. 31(1) (d), EU Treaty, positive *and* negative conflicts of jurisdiction are to be avoided.

<sup>28</sup> See, for example, *proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children* (COM(1999)220 – C5-0045/1999 – 1999/0110(CNS)).

<sup>29</sup> Judgments of the *Tribunal Supremo*, 25 February 2003 and 20 May 2003, respectively.

<sup>30</sup> Survivors of the 1999 massacre at the Beach of Brazzaville lodged a complaint in December 2001 in France concerning torture, forced disappearances and crimes against humanity against high Congolese Government officials including President Denis Sassou Nguesso, among others.

in investigating the allegations,<sup>31</sup> though victims remained concerned about the genuineness of the Congolese expression of interest, and wish the case to continue in France. Alternatively, a form of jurisdictional hierarchy could be applied by the jurisdiction where the complaint was first filed. The jurisdiction could, for instance determine whether there is a more appropriate forum; the existence of a superior forum must not be a mere theoretical possibility – there must be a *bona fide* extradition request. Conflicts of jurisdiction can also be avoided through application of extradition treaties, which usually provide that competing extradition requests be resolved by ‘efficient means.’

The International Criminal Court may also play a role in reconciling competing national jurisdictions. In assessing the efficacy of national efforts, the Court may at times be confronted with the question of competing jurisdictions among national non-territorial jurisdictions.

## C. Obstacles in Civil Cases

The use of civil litigation as a remedy for “international crimes” varies among Member States, appearing to be under-used in most of them. Further examination of the causes of this under-use is needed, though some of the potential obstacles are revealed below.

### Limitation Periods

Victims’ claims are often time-barred. Limitation periods in civil claims are common, however the length of time given to make a claim and the start date when such a time period begins to run varies between Member States. The European Court of Human Rights has recognised that limitation periods ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice that might arise if courts were required to decide upon events which took place in a distant past.<sup>32</sup> To date, this Court has not been asked to determine whether limitation periods for civil cases, where torture or other “international crimes” with extraterritorial jurisdiction are at stake, comply with the European Convention. Nor has it been asked to consider a case where the claimant had no opportunity to pursue an alternative means of justice such as criminal proceedings.

An exception with respect to “international crimes” may be merited, as it would ensure more equal access to justice for victims, in view of the fact that in civil law countries the reparations claim may start as a *result* of the criminal prosecution, which may not be subjected to statutes of limitations when it concerns “international crimes.”

### Immunities

Given the nature of “international crimes” which invariably include a state element, civil claims may be barred by immunities. The European Court of Human Rights ruled in the *Al Adsani* case by a slim majority of 9 to 8 that immunity was a legitimate bar to Article 6 and did not violate Mr Al Adsani’s right to a fair hearing.<sup>33</sup> In reaching its decision, the Court accepted that the prohibition of torture, and by implication other crimes that are peremptory norms under international law, is a peremptory norm with *jus cogens* status. However, it found that immunity could still be raised as a legitimate defence to civil claims for damages arising from acts of torture. This was severely criticised by the minority.

This issue will undoubtedly be raised in future, especially as the European Court of Human Rights noted: “the growing recognition of the overriding importance of the prohibition of torture, [though it]

<sup>31</sup> Press release, Congo’s Minister of Communication, *Chargé des Relations avec le Parlement, Porte-parole du Gouvernement*, 10 September 2002: “[L]e Doyen des juges d’instruction du Tribunal de Grande instance de Brazzaville a été saisi des faits, celui-ci a déjà accompli à ce jour plusieurs actes d’instruction.”

<sup>32</sup> *Stubbings and others v. the United Kingdom*, App. Nos. 00022083/93; 00022095/93 European Court of Human Rights, 22/10/1996.

<sup>33</sup> *Al Adsani v. the United Kingdom*. European Court of Human Rights, *supra*.

does not accordingly find it established that there is **yet** acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State” (emphasis added).<sup>34</sup> Furthermore, the Al-Adsani case does not address the issue of the granting of immunity to a state official and this particular issue is likely to be raised in future.

### Forum non conveniens

In the United Kingdom, the principle of *forum non conveniens* provides the courts with the discretion to stay civil proceedings where it is considered that it would be more appropriate for the case to be brought in an alternative country. The types of factors that may be taken into account include the location of the parties and of the witnesses and the place where the wrong was committed or where its effects were felt. The Court in *Spiliada Maritime Corporation v Cansulex Ltd*<sup>35</sup> applied a two-stage test: firstly the defendant must show that there is another natural forum, which is clearly more appropriate for the hearing of the case. Usually this will be the forum in which the damage occurred. However, the availability and access to evidence and the location where the victims and witnesses are based are also taken into account. Secondly the onus is transferred to the claimant to rebut the defendant's arguments by satisfying the Court that justice requires the matter to be heard in the prevailing Court by showing that substantial justice will not be done in the appropriate forum. In *Shalk Willem Burger Lubbe et al v Cape plc*,<sup>36</sup> a class action for personal injury and death, the House of Lords found that justice required the matter to be heard in the UK because of the lack of funding for litigation in South Africa, the complications likely to arise from the legal and factual issues in the matter and the absence of developed mechanisms for handling group actions in South Africa.<sup>37</sup> It is likely that victims who have no access to an effective remedy in the state where the damage occurred would satisfy the second stage of the test.

## V. AN EU APPROACH TO EXTRATERRITORIAL JURISDICTION

The European Union has shown a strong commitment to the International Criminal Court and improved judicial co-operation (on a more horizontal level). Regarding “international crimes” more specifically, the EU, and particularly the Commission, should be ready to examine any gaps and measures to be taken under the reservation of EU competencies.

### A. EU Competence over Substantive Criminal Law

#### Current Framework

The competence of the EU in criminal matters (“third pillar”) is limited, though this might change with the European Convention, which has set a particular emphasis on clarifying EU competencies in the area of criminal law. For this reason the Commission chose to support international mechanisms first (i.e. the International Criminal Court) rather than to delve into matters where the EU competence is still contested by some Member States.

Participants of the Paris *Experts Meeting* concluded that it would be advantageous to characterise “international crimes” as matters that fell both within the domains of foreign policy (second pillar), and justice and home affairs (third pillar), given that an approximation process can only be initiated under the third pillar. The wording of the Treaty on the European Union as amended by the Amsterdam

<sup>34</sup> Para. 66, Al Adsani v. the United Kingdom, European Court of Human Rights, 21 November 2001 (*Application no. 35763/97*).

<sup>35</sup> [1987] 1 AC 460.

<sup>36</sup> (2000) 2 Lloyds Reports 383.

<sup>37</sup> See also *Connelly v RTZ Corporation* (1997) 3 WLR 373.

Treaty<sup>38</sup> (EU Treaty) is ambiguous in this regard. Articles 29 and 31 list crimes as falling within the scope of the “third pillar,” though the crimes of genocide, war crimes and crimes against humanity are not mentioned. As a result, some States have taken the position that “international crimes” do not relate to the “third pillar”. However, the Articles themselves use terms such as “shall include” and “in particular”, implying that their contents are non-exhaustive. Additionally, in practice, the EU has treated the crimes listed in Articles 29 and 31 of the EU Treaty as a non-exhaustive catalogue of EU powers. This is evidenced by the third pillar measures adopted by the Council that relate to other non-listed types of crime, such as environmental crime and victims’ rights in relation to any crime.<sup>39</sup> Furthermore, of all the measures the EU has adopted or seriously considered in the area of substantive criminal law since the Treaty of Amsterdam entered into force, about one half of them concern crimes that are not included in these lists, such as counterfeiting currency, money laundering and credit card fraud. The Commission will also shortly propose a Framework Decision on the protection of suspects and defendants rights in criminal proceedings. Therefore, there should not be an insurmountable competence problem preventing the adoption of *substantive* or procedural rules relating to “international crimes,” including the issue of impunity within the present system.

The characterisation of “international crimes” within the EU will ultimately be for the Convention and the Intergovernmental Conference to decide upon. The Convention has discussed several concepts on how the key limitation between national and EU competences in legal matters should be divided.<sup>40</sup> A majority of Member States argue that only crimes directly related to Community policies should be included (e.g. environmental and economic crimes). However, jurisdictional matters could be seen as a horizontal matter under Article 31 of the EU Treaty. The Convention has not generated a strong impetus for a broader conception.

### **Impact of Draft EU Constitution on “International Crimes”**

At the Brussels summit of 12 and 13 December 2003, the Heads of State and Government failed to reach agreement on the final text of the Constitution. Negotiations will continue in 2004 under the Irish Presidency. The text that will eventually be adopted remains uncertain.

The draft Constitution, as it stands, would create major changes in the area of criminal law. EU powers would include:

- All issues of cross-border cooperation (European arrest warrant, recognition of judgements);
- Domestic criminal procedures in 3 specific areas: rights of individuals as defendants, rights of victims, and admissibility of evidence. Otherwise though, a unanimous vote of the Council will be needed to open discussion (as is the case today, but with ten more Member States); and
- Substantive criminal law for a list of ten crimes only, not including “international crimes,” although the Council could take a unanimous decision to expand this list.<sup>41</sup>

The EU would also be entitled to act where there is a connection to some other policy (e.g., anti-racism, protection of the Euro).

### ***Does the Draft Allow for Increased Involvement of the EU in Extraterritorial Jurisdiction for “International Crimes”?***

<sup>38</sup> Treaty on European Union, adopted on 7 February 1992, as amended by the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, adopted on 2 October 1997.

<sup>39</sup> See, for example, *Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law* and *Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings* [Official Journal L 082, 22/03/2001 P. 0001 – 0004].

<sup>40</sup> Article 5 of the Treaty Establishing the European Community, as amended by the Treaty on European Union, *supra*, and the Treaty of Amsterdam, *supra*. See also the Protocol on the Application of the Principles of Subsidiarity and Proportionality to the Amsterdam Treaty, *supra*.

<sup>41</sup> Article III-172-1 (2): “These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.”

The text does not offer broader prospects to better deal with “international crimes.” The ten crimes that are listed do not specifically include “international crimes.” If there is a desire to address “international crimes” issues within the framework of the EU Constitution, it would be *essential to make sure that they are included in that list, as the list of crimes on which the EU could adopt measures would clearly be exhaustive. Alternatively, the Council could be encouraged to adopt afterwards a (unanimous) decision including these crimes.*<sup>42</sup>

Furthermore, with respect to the ability to approximate and/or harmonise national legislation relating to “international crimes” within the new constitutional framework, the draft sets out that: “European framework laws may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crimes with cross-border dimensions resulting from the nature or impact of such offences or from a special need to combat them on a common basis.”<sup>43</sup>

### **Political Will?**

The Amsterdam Treaty set the creation of an area of freedom, security and justice (AFSJ) as one of the objectives of the Union, but did not define its scope. This concept was *interpreted* as including four areas: 1) asylum and immigration; 2) fight against crime; 3) law and order; and 4) civil justice. Even if most achievements in the criminal field are security-oriented, the AFSJ concept allowed the exploration of new areas such as the harmonisation of judicial guarantees, which are more related to “freedom” or “justice.”

However, in the draft Constitution, Article III-158 is more restrictive as a result of each of the four areas being confined to a particular element of the ASFJ: that is, “freedom” only relates to immigration and asylum, “justice” covers civil justice and “security” is about fighting crime and law and order. Given that freedom and justice are so specified, criminal matters would appear to be limited to security aspects. From an EU perspective, the prosecution of “international crimes” does not appear to correspond to the objective of “security” but more aptly to “justice.” And “justice” does not include criminal matters. One could thus interpret the draft Constitution as *excluding* any EU action on extraterritorial jurisdiction for “international crimes” and even on “international crimes” themselves.

This limitation might not be deliberate, as it seems that the issue was not even raised during the Convention’s debates on Article 172. However, it reflects an ambiguity and a general state of mind.

## **B. Extraterritorial Jurisdiction in Council Framework Decisions**

Most Council framework decisions relating to criminal law matters contain a clause enabling Member States to go beyond the territoriality principle. For example, Article 9 (1) C and D of the Council Framework Decision on combating terrorism<sup>44</sup> and the Council Framework decision on combating trafficking in human beings<sup>45</sup> require Member States to extend their jurisdiction beyond the territoriality principle.

### **Potential EU Framework Decision on “International Crimes”**

One of the clearest ways forward, from the point of view of “international crimes,” would be to adopt a framework decision on the issue, with the definitions of the Rome Statute and of the Convention against Torture, which could seek to approximate certain jurisdictional rules and perhaps also the level of penalties.

Thus far, no EU measure has dealt with statutes of limitations, although some EU officials have discussed the possibility of such a measure in relation to the issue of organised crime. This issue could also be included in a framework decision on “international crimes.”

<sup>42</sup> Article III-172-1.

<sup>43</sup> Article III-172-1.

<sup>44</sup> Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).

<sup>45</sup> Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA – Official Journal L 203, 01.08.2002).

Regarding victims' access, as has been previously noted, the EU has already adopted a general measure in this regard, and certain provisions relating to victims' rights appear in some of the substantive criminal law measures taken by the EU (e.g., terrorism and offences against children). Consequently, on the basis of established practice, it would be possible to include certain victims' provisions in a substantive framework decision on "international crimes."

## **EU Decisions Impacting upon Domestic Procedural Law**

Several existing framework decisions can be used to address the disparities among Member States as regards the procedural aspects of litigation for extraterritorial crimes. They can also serve as a starting point for determining what further framework decisions may be needed.

### **1. Framework Decision on the Standing of Victims in Criminal Proceedings<sup>46</sup>**

Article 9 includes the right to a decision concerning compensation by the offender, but does not harmonise substantive rules on when the offender is required to pay compensation. The decision does not require Member States to allow victims to become a party to proceedings or to bring private prosecutions. Most provisions (including art. 9) were to be applied by March 2002. There is no specific reference to victims of war crimes, crimes against humanity and genocide, though such victims will certainly benefit from the provisions of the decision.

### **2. Framework Decision of 26 June 2001 Relating to Money Laundering, Identification, Tracing, Freezing or Seizing and Confiscation of the Instrumentalities and Proceeds from Crime<sup>47</sup>**

This decision, which had to be applied by the end of 2002, facilitates the use of confiscation orders.

### **3. Draft Framework Decision on Domestic Confiscation Orders<sup>48</sup>**

This decision was proposed in July 2002 and has not yet been formally adopted. It would make confiscation orders easier to secure where a person has been convicted of certain crimes and can be presumed to have obtained income illegally.

### **4. Green Paper on Suspects' Rights**

The Commission will also shortly propose a Framework Decision on the protection of suspects and defendants in criminal proceedings.

## **EU Decisions Impacting upon Cross-border Procedural Measures**

### **1. European Arrest Warrant**

The European arrest warrant (EAW), adopted by the Council in 2002,<sup>49</sup> applies to thirty-two listed crimes and to all other crimes that fall within a specified sentencing threshold.<sup>50</sup> Member States were required to implement the Decision by the end of 2003.

<sup>46</sup> Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA - Official Journal L 082, 22/03/2001 P. 0001 - 0004).

<sup>47</sup> Council Framework Decision of 26 June 2001 relating to money laundering, identification, tracing, freezing or seizing and confiscation of the instrumentalities and proceeds from crime (Official Journal L 182, 05.07.2000).

<sup>48</sup> Draft Framework Decision on the execution in the European Union of Confiscation Orders. Initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders (Official Journal C 184, 02/08/2002 P. 0008 - 0014).

<sup>49</sup> See Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA - Official Journal L 190, 18/07/2002 P. 0001 - 0020).

<sup>50</sup> Article 2 (1) and (2).

### a. Abolition of Double Criminality

Article 2(2) of the Framework Decision abolished the double criminality rule for extradition for a specified list of thirty-two crimes only. One of them is “crimes within the jurisdiction of the ICC”, though war crimes, crimes against humanity, genocide are not explicitly listed, and acts of torture that do not fall within the jurisdiction of the ICC are not mentioned at all. Despite this omission, the list includes, among others, murder or grievous bodily injury, rape, kidnapping or hostage taking and thus may nonetheless cover the acts that amount to such crimes. The EAW may also be issued in other cases where a crime above a certain sentencing threshold has been committed; such crimes would likely include “international crimes.” Member States also have the power to expand the list of crimes not requiring double criminality by way of a bilateral/multilateral treaty.<sup>51</sup>

A number of the grounds on which the EAW can be resisted are relevant to the issue of “international crimes.”

*Mandatory exceptions:* The EAW *must* be resisted where the executing Member State has given the requested person an amnesty, and where there has already been a criminal prosecution in a Member State.<sup>52</sup>

*Optional exceptions:* The EAW *can* be resisted:<sup>53</sup>

- If the concerned person is under prosecution for the same act (*lis pendens*);
- If the executing Member State has adopted a decision not to prosecute or to halt prosecution; or has reached a final judgment;
- If the crime is statute-barred in the executing Member State if that State has jurisdiction over the crime;
- If a third State has already tried and convicted/acquitted someone (double jeopardy);
- If the executing Member State considers the act is within its jurisdiction; or
- If the act occurred outside the issuing Member State and the executing State has only territorial jurisdiction.<sup>54</sup>

Article 20 of the Framework Decision provides that where there is a privilege or immunity in the executing State, time limits regarding execution only start running when this is waived. The Decision does not expressly require states to waive immunity although there is nothing to address situations in which it is not.

Article 16 provides that, “If two or more Member States have issued European arrest warrants for the same person, the decision [...] shall be taken by the executing judicial authority with due consideration of all the circumstances [...]”. A non-exhaustive list of criteria follows.

## 2. Freezing of property or evidence

The Council adopted a Framework Decision<sup>55</sup> for mutual recognition of any measure adopted by a Member State to freeze property or evidence that is held in another Member State. It includes the same list of grounds for abolition of double criminality (art. 3). If a crime is not on the list, the framework decision applies and double criminality will potentially be a ground for resisting the cross-border application of the order.

<sup>51</sup> Article 31 (2).

<sup>52</sup> Article 3.

<sup>53</sup> Article 4.

<sup>54</sup> In the Pinochet case, the executing State (UK) determined that it could not exercise extraterritorial jurisdiction during a specified period, so it could not consider extradition for acts committed during that period.

<sup>55</sup> Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (2003/577/JHA). It must be implemented by 2 August 2005.

Article 7 lists *optional grounds* for refusing recognition or execution, including immunity. There is no provision on waiving immunity, nor is the issue dealt with even indirectly, as is the case with the EAW Framework Decision. Other grounds exist but they are fewer than in the other decisions since freezing is a provisional measure pending continuation of criminal proceedings.

### **3. Other outstanding proposals on the issue of cross border criminal cooperation**

Several framework decisions are expected in the coming months or years. Some of the most developed and relevant projects are listed hereafter.

#### *Execution of confiscation orders*

The Danish Presidency submitted a proposal for a Framework Decision in 2002.<sup>56</sup> It was partly agreed and it is expected that the full text will be agreed soon. The same list of 32 grounds for abolition of double criminality applies. Article 7 lists grounds to refuse recognition or execution. The list is quite similar to the list applying to the EAW but includes immunity or privilege and no rule on waivers. According to Article 18, Member States may conclude “more favourable” agreements among themselves.

#### *Mutual recognition of financial penalties*

The Council agreed on the proposal in principle in May 2003, but it has not yet been adopted.<sup>57</sup> The Framework Decision would apply to criminal penalties and to compensation to victims in connection with criminal proceedings. This would include: cases of compensation where the victim cannot be a civil party, and the decision was taken by a criminal court; and cases where the penalty is payable to a public fund or victim support organisation; but *not* to cases of civil claims, which are covered by Regulation 44/2001 on jurisdiction of and recognition of civil judgments (see below). In sum, civil claims issued in criminal proceedings should be covered by this Framework Decision and civil claims issued in civil proceedings should be covered by the Regulation.

In the final Council decision, there is a list of 39 grounds for abolition of double criminality. One of them includes “threats and acts of violence against persons”, which could include “international crimes” but does not take account of their specificity.

There is a fairly lengthy list of *optional grounds* to refuse the execution including immunity under the law of the executing State if it has jurisdiction and double jeopardy. There is an additional ground as well: if the judgment in the issuing Member State violated human rights. It is quite noteworthy that it is not the case for the other measures.

#### *Double jeopardy*

There is a proposal for a Framework Decision to clarify and expand the existing rules in the Schengen Convention that prevent further prosecution in a Member State where a case has already been ‘finally judged’ in another Member State and to add rules on *lis pendens* situations.<sup>58</sup>

Twelve out of the fifteen Member States allow their national courts to refer questions to the European Court of Justice about the framework decisions or the Schengen rules, including double jeopardy rules. In the first judgments on the latter issue, the Court took a wide view of the current Schengen rule, so that it applies to mediated settlements.<sup>59</sup> This would also logically apply to acquittal.

<sup>56</sup> *Initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders* (2002/C 184/05).

<sup>57</sup> See *Initiative of the United Kingdom, the French Republic and the Kingdom of Sweden with a view to adopting a Council Framework Decision on the application of the principle of mutual recognition to financial penalties* (Official Journal C 278, 02/10/2001 P. 0004 – 0008).

<sup>58</sup> *Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the ‘ne bis in idem’ principle* (2003/C 100/12).

<sup>59</sup> Cases C-187/01 *Gozutok* and C-385/01 *Brugge*, Judgment of the ECJ, 11 February 2003.

The EU Charter of Human Rights also includes the right to be free from double jeopardy and applies to both internal and cross-border situations within the EU.<sup>60</sup>

### C. Cooperation Mechanisms

The use and improvement of EU cooperation mechanisms can be essential to delivering justice for “international crimes” committed outside the forum state. Article 29 of the EU Treaty provides a general mandate to improve cooperation in judicial matters. Existing mechanisms include:

#### Liaison Magistrates

In a Joint Action of 22 April 1996,<sup>61</sup> the Council of the European Union provided a common framework for the appointments of liaison (seconded) magistrates, whose duties mostly consist of general assistance in the host country, and do not include any actual operational competence. The same approach was to be taken in 2003 concerning police cooperation and liaison officers.<sup>62</sup>

#### European Judicial Network (EJN)<sup>63</sup>

The EJN is composed of some 150 liaison magistrates appointed by Member States and meets three times per year. The EJN is assisted by a small permanent secretariat, now located within Eurojust (see below). Currently, the EJN hosts a website,<sup>64</sup> with a database of practical information, and consists of a forum for meeting and discussing difficulties relating to cooperation and facilitates cooperation through direct contacts.

The Network does not have any judicial competences of its own and cannot directly take part in an ongoing case. For instance, it cannot advise judicial authorities to prosecute, or request that they cede jurisdiction to a more appropriate forum. If clear instructions were issued, the EJN could possibly serve as a forum for discussing the implementation of increased cooperation to combat impunity for “international crimes.”

#### Joint Investigation Teams (JIT)

The Council adopted a Framework Decision providing for JITs in 2002<sup>65</sup> and elaborated a model agreement for setting up a JIT in 2003.<sup>66</sup> The Framework Decision provides that “the competent authorities of at least two Member States *may* set up a joint investigation team with a precise purpose and for a limited period of time” (italics added). However, it is not so relevant for “international crimes,” as it deals with teams “set up in one of the Member States in which the investigations are expected to be carried out.”<sup>67</sup> For cases concerning “international crimes,” the most difficult part of the investigation takes place where the breach was committed, i.e. most frequently outside the EU.

### D. Integrated Mechanisms

<sup>60</sup> Charter of Fundamental Rights of the European Union, (2000/C 364/01), adopted on 7 December 2000, art. 50.

<sup>61</sup> *Joint Action (96/277/JHA) of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union* (Official journal L 105, 27/04/1996 P. 0001 – 0002).

<sup>62</sup> *Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes* (Official Journal L.118, 15/05/2003, P.0012 – 0014).

<sup>63</sup> *Joint Action 98/428/JHA of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network* (Official Journal L 191, 07/07/1998, P. 0004 – 0007).

<sup>64</sup> [http://europa.eu.int/comm/justice\\_home/ejn/](http://europa.eu.int/comm/justice_home/ejn/).

<sup>65</sup> *Council Framework Decision of 13 June 2002 on joint investigation teams* (Official Journal L 162, 20/06/2002 P. 0001 – 0003).

<sup>66</sup> Doc. 7061/03 crimorg 17 of 7 April 2003.

<sup>67</sup> Article 1 (b).

## Europol

Europol was established in 1995<sup>68</sup> as a management organ and a police information analysis instrument. It primarily assists national authorities<sup>69</sup> and aims at strengthening their effectiveness and their cooperation. It works in cooperation with national units created by each Member State,<sup>70</sup> which are the links between Europol and national authorities.

Two issues arise concerning Europol's jurisdiction.

### 1. *Material Jurisdiction*

The mandate of Europol has been progressively widened<sup>71</sup> to include all crimes listed in the Annex to the Europol Convention<sup>72</sup> "where there are factual indications that an organised criminal structure is involved".<sup>73</sup> Europol does not have jurisdiction over "international crimes," unless they constitute offences and are committed as part of a criminal organisation. When the Europol Convention was finalised in 1995, extraterritorial jurisdiction over these crimes was not as relevant as it is now. As a consequence, the mandates of Europol and Eurojust (created in 2002, see below) differ on this matter.

Amending the Europol Convention to include these crimes may be politically sensitive, though there is no specific legal obstacle.

### 2. *"Territorial" Jurisdiction*

Europol's territorial jurisdiction requires that "two or more Member States [be] affected by the forms of crime in question in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences concerned".<sup>74</sup>

### 3. *Potential Added Value of Europol Regarding Investigation of "International Crimes"*

Europol has two objectives. The first one is data processing. Europol uses the data it is sent to proactively "profile" offenders and organised crime. The second is enhanced coordination in investigations, and information exchange.

In theory, Europol could:

- Facilitate coordination through its liaison officers' network and the national units;
- Reduce legal obstacles by requesting Member States to initiate, conduct or coordinate investigations in specific cases,<sup>75</sup> though Europol requests are not binding and Eurojust may have a more relevant jurisdiction;

<sup>68</sup> *Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention)* (Official Journal C 316, 27/ 11/1995 p. 0002 – 0032). Europol is also mentioned in Article 29 of the EU Treaty.

<sup>69</sup> Europol is under the absolute obligation to inform national authorities of any element concerning them (art. 13). The transmission of personal data by Europol to a third State or third body is subject to the agreement of the Member State that provided the data (art. 18). The powerful management board illustrates the intergovernmental nature of Europol.

<sup>70</sup> Article 4, *ibid.*

<sup>71</sup> M. Van Ravensten, "Investigation departments: the extension of Europol's mandate," to be published in a special report of the *Review of Criminal Law and Criminology* dedicated to current events in the field of European Criminal Law. Europol's mandate was initially limited to drug trafficking, trafficking of nuclear and radioactive substances, illegal immigration, and stealing of vehicles (Article 9 of the Europol Convention). It was extended to terrorism (*Council decision of 3-4 December 1998 instructing Europol to deal with crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property* (Official Journal C 26, 30 January 1999, P.0022)) and money laundering (*Protocol Drawn Up on the Basis of Article 43 (1) of the Convention on the Establishment of a European Police Office (Europol Convention) Amending Article 2 and the Annex to That Convention* (Official Journal, C 358, 13 December 2000, PP.0002 - 0007)).

<sup>72</sup> *Council decision of 6 December 2001 extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention* (Official Journal C 362, 18 December 2001, P.0001).

<sup>73</sup> Article 2.

<sup>74</sup> Article 2-1.

<sup>75</sup> After the entry into force of the 28 November 2002 *Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol* (Official Journal C 312, 16/12/2002 P. 0002 – 0007) (art. 3 (b)).

- Contribute to cost-sharing arrangements;
- Have specialised agents who could participate in joint investigation teams. However this could only be possible if the JIT operates on the territory of a Member State.

## Eurojust

The Council established Eurojust in 2002<sup>76</sup> “to reinforce the fight against serious crime” and to stimulate and improve the coordination, between the competent authorities of the Member States, of investigations and prosecutions in the Member States and to improve cooperation by facilitating the execution of international mutual legal assistance and the implementation of extradition requests and to render the investigations and prosecutions of Member States more effective.

Eurojust is a permanent judicial unit composed of one national member seconded by each Member State. Together they constitute the “College” and elect a President.<sup>77</sup> They are assisted by a secretariat headed by an Administrative Director.

### 1. Material Jurisdiction

Eurojust is still in the developing phase. At the moment, it concentrates mainly on the crimes referred to in Articles 29 and 31 of the EU Treaty.<sup>78</sup> However, the mandate of Eurojust is not limited to these crimes. While it may become active on its own initiative only for a limited list of crimes (Article 4(1)), Article 4(2) of the Eurojust Decision allows it to also deal with any other crime when requested by Member States.<sup>79</sup> Consequently, the crimes of genocide, crimes against humanity, war crimes and torture are within the scope of Eurojust, on the condition that an *authority of a Member State refers a case to Eurojust*. Other Member States cannot oppose such a move. National sovereignty preoccupations make some Member States reluctant to submit cases to Eurojust or even to the European Judicial Network.

### 2. "Territorial" Jurisdiction

The Eurojust Decision is more flexible than the Europol Convention regarding territorial jurisdiction: “at the request of a Member State's competent authority, Eurojust may also assist investigations and prosecutions concerning only that Member State and a non-Member State [...] where in a specific case there is an essential interest in providing such assistance.”<sup>80</sup> It cannot be asserted with full certainty that this provision embraces extraterritorial investigation on “international crimes.” In addition, if two Member States are involved in a case, Eurojust can act on its own initiative.

### 3. Activities and Powers

The principal power of Eurojust consists in requesting national authorities to consider:

- Undertaking an investigation or prosecution or accepting that one of them may be in a better position to undertake an investigation or to prosecute specific acts;
- The creation of or participation in a joint investigation team.

Eurojust cannot issue legally binding orders to investigate and cannot itself initiate or conduct investigations. An amendment is under discussion but would require a change to the treaty. Nevertheless, Eurojust's non-binding requests are difficult to ignore: prosecutors usually have to justify their refusal and to report to their ministry. The simple announcement of the possibility that a formal request could be transmitted is often enough to make them act.

<sup>76</sup> Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA). Eurojust is also mentioned in Article 29 of the EU Treaty.

<sup>77</sup> Articles 2 and 28.

<sup>78</sup> Article 4 lists the crimes over which Eurojust has jurisdiction, including computer crimes, fraud, corruption, money laundering, environmental crime, etc.

<sup>79</sup> Article 4 (2): “For types of offences other than those referred to in paragraph 1, Eurojust may in addition, in accordance with its objectives, assist in investigations and prosecutions at the request of a competent authority of a Member State.”

<sup>80</sup> Article 3-2.

Additionally, its members remain national judicial authorities themselves: each State is free to define the powers of its member in relation to national authorities.

Although Eurojust has a limited mandate and cannot be considered as a prosecution authority, it is a genuinely *independent* judicial body.

#### **4. Potential Added Value of Eurojust Regarding Investigation of “International Crimes”**

If the members of Eurojust gain the trust of national authorities, Eurojust may assist in overcoming some obstacles linked to the transnational aspects of cases by:

- Facilitating contacts between competent authorities, notably through dialogue within the College;
- Issuing requests to consider prosecution or non-prosecution: even if they are non-binding, Eurojust’s requests have a weighty importance.

Eurojust has a proper budget and may provide material support to Member States. However, Eurojust’s mandate most probably prevents it from requesting the creation of or from financing a joint investigation team acting outside of the Union. Eurojust was not created to assist in extraterritorial cases.

### **A European Prosecutor?**

The publication of the Commission’s “Green Paper” on the European Prosecutor was followed by public hearings and raised some controversies.<sup>81</sup> However, the draft European Constitution includes the possibility of creating a European prosecution authority.<sup>82</sup> As in the Commission project, this European authority would act before national courts; there is no plan to create a European criminal court. While the Commission had proposed to limit the material jurisdiction of the European Prosecutor to the prosecution of criminal activities targeted specifically at the Community’s financial interests, the draft Constitution refers to “serious crimes affecting more than one Member State and [...] offences against the Union’s financial interests”. The will of Member States on this very symbolic matter remains to be seen at the Intergovernmental Conference.<sup>83</sup>

### **E. Decisions Specifically Dealing with “International Crimes”**

Two specific decisions were recently adopted in the framework of the third pillar concerning the investigation and prosecution of war crimes, crimes against humanity and genocide.

#### **The “War Crimes Network”**

On 13 June 2002, the Council created a “European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes”.<sup>84</sup> The network is now functioning – the list of contacts is available and in use.

The creation of a network on a specific theme draws attention to a concerned area but does not carry legally binding effects. The network aims at facilitating contacts between professionals specialised in the prosecution of “international crimes.” It could be considered as a “thematic European Judicial Network” and has the same strengths and weakness (see above). Indeed, there were proposals that the mandate of the EJM be extended rather than creating a new network, and many States are

<sup>81</sup> “Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor” (Brussels, 11.12.2001 COM (2001) 715 final). For comprehensive information about the “Green Paper,” see [http://europa.eu.int/comm/anti\\_fraud/green\\_paper/index\\_en.html](http://europa.eu.int/comm/anti_fraud/green_paper/index_en.html).

<sup>82</sup> Draft Treaty Establishing a Constitution for Europe, doc. conv. 850/03, adopted on 13 June and 10 July 2003, Art. III-175.

<sup>83</sup> See S. DeBoilley, “Un pouvoir juridictionnel européen en matière pénale ?”, to be published in a special issue of the *Revue de droit pénal et de criminologie* devoted to “Actualités de droit pénal européen”.

<sup>84</sup> Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (2002/494/JHA, Official Journal L 167, 26/06/2002 P. 0001 – 0002).

expected to appoint authorities that are EJM members as contact points (as is already the case for Belgium).

The Council decision makes no provision for the organisation of periodic meetings of the network or for a budget to that end. The 8 May 2003 decision<sup>85</sup> organises periodic meetings, but without a European budget.

### **Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes**

On 8 May 2003, the Council adopted a decision “on the investigation and prosecution of genocide, crimes against humanity and war crimes”.<sup>86</sup> It aims to increase cooperation among national units in the investigation and prosecution of such crimes.

The decision aims at reinforcing the possibilities offered to Member States regarding the investigation and prosecution of alleged perpetrators. It should help reinforce cooperation between national units in order to maximise the ability of law enforcement authorities in different Member States to cooperate effectively in that field.

This instrument is binding by nature but is almost free of obligation in its content. The adopted decision differs in this regard from the original draft decision proposed by the Danish government.<sup>87</sup> In particular, two important obligations that had been included in the draft were removed:

- The obligation to investigate and prosecute,<sup>88</sup>
- The obligation to provide resources.<sup>89</sup>

### **F. EU Competence over Civil Law**

The EU’s competence over civil law matters is limited by Article 65 of the EU Treaty, which requires there to be “cross border implications” for measures to be adopted, and that those measures should be “necessary for the proper functioning of the internal market”. The draft EU Constitution<sup>90</sup> as it stands maintains most existing rules on civil law and provides only slight clarifications. It may therefore be a challenge to use EU competence to legislate in respect of matters solely or largely concerning defendants in non-EU countries. However, the issue could certainly be addressed as part of broader legislation setting out general conflicts or jurisdictional rules, i.e. the Brussels and Rome II Regulation.

### **Brussels Regulation (on Jurisdiction, Recognition and Enforcement of Judgments)<sup>91</sup>**

<sup>85</sup> Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes (2003/335/JHA, Official Journal L 118 , 14/05/2003 P. 0012 – 0014).

<sup>86</sup> Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes (2003/335/JHA, Official Journal L 118 , 14/05/2003 P. 0012 – 0014).

<sup>87</sup> Initiative of the Kingdom of Denmark with a view to adopting a Council Decision on the investigation and prosecution of *inter alia* war crimes and crimes against humanity (2002/C 223/09, Official Journal C 223, 19.9.2002, p. 19).

<sup>88</sup> Article 3-1 of the Danish initiative: “In so far as a person who has applied for a residence permit is suspected of planning, committing or participating in the commission of war crimes or similar serious crimes, the Member States must ensure, in accordance with national law, that the relevant acts are investigated, and, where justified, prosecuted.”

<sup>89</sup> Article 4 of the Danish initiative: “Member States shall take the necessary measures to ensure that the law enforcement and immigration authorities have the appropriate resources and structures to guarantee the proper and effective investigation and prosecution of the offences referred to in Article 1”. Para. 9 of the preamble of the decision now provides that States “ should ensure that law enforcement authorities and immigration authorities have the appropriate resources [...]”.

<sup>90</sup> Draft Treaty Establishing a Constitution for Europe, *supra*.

<sup>91</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

This regulation covers jurisdiction relating to civil actions. It replaces the prior Brussels Convention,<sup>92</sup> with very similar rules, and is applicable since 1 March 2002.

It covers civil actions which are purely without connection with criminal law or which are brought subsequently, following criminal proceedings and that would apply to any kind of crime. The general rule is that jurisdiction over a case:

- belongs to the courts of a State where the defendant is domiciled, if a defendant is domiciled within the EU (Art. 2);
- is determined by the national law of each State (Art. 4), if the defendant is domiciled outside the EU.

The Regulation contains an obligation to recognise judgments of other Member States, subject to a public policy exception. This exception must be narrowly interpreted and the 2000 European Court of Justice judgment in *Krombach* (Case C-7/98) held that a court cannot refuse to enforce a judgment on grounds of jurisdiction only, except for cases expressly listed, and none of the listed cases relate to the issue of responsibility for war crimes or other “international crimes.”<sup>93</sup> Therefore, differing jurisdictional rules in civil cases between Member States does not appear to justify a refusal to enforce a foreign judgment.

### **Rome II Regulation (Proposed Regulation on Conflict of Law in Non-contractual Cases)<sup>94</sup>**

A proposal relating to conflict of laws in non-contractual States was made in July 2003. With conflict/choice of laws rules, it is possible for a State to apply foreign civil law – e.g., the rules might give jurisdiction to the UK courts but require American law to apply. The proposed Regulation would apply to conflict rules even where the application of the Regulation would result in a decision in favour of the law of a non-EU Member State (art. 2). As a general rule, the law of the country where the damage arose or is likely to arise would apply (art. 3(1)). If the plaintiff and defendant had habitual residence in the same country at the time when the damage arose, then that country’s law applies (art. 3(2)). Article 22 provides for a public policy exception.

In most or all cases brought regarding tort liability for “international crimes,” the law of a non-EU Member State would apply; but the EU rules on jurisdiction in Regulation 44/2001 could result in a Member State’s court having jurisdiction, if that Member State permits its courts to entertain cases against defendants not domiciled in the EU. Those judgments would then have to be recognised and enforced by other Member States.

The European Commission has also proposed a Directive on compensation for victims of crimes<sup>95</sup> that would only apply where the crime took place in a Member State and would only concern compensation from the State rather than from the perpetrators, which is covered by the Framework Decision on the standing of victims in criminal proceedings.<sup>96</sup>

## **VI. EXTERNAL FACTORS**

<sup>92</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention), adopted on 27 September 1968.

<sup>93</sup> This decision applied the Brussels Convention, but the rules under discussion are replicated in Article 35(3) of the Regulation.

<sup>94</sup> COM (2001) 427.

<sup>95</sup> *Proposal for a Council Directive on compensation to crime victims* (\* COM/2002/0562 final – CNS 2002/0247 \*/, Official Journal C 045 E, 25.02.2003 p. 0069 - 0089).

<sup>96</sup> *Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceeding*. (Official Journal L 82 , 22/03/2001).

Only a few years ago, with the creation of the *ad hoc* international criminal tribunals, the adoption of the Rome Statute and the developments in the Pinochet case, the protection of human rights and dignity seemed to be recognised as clear priority vis-à-vis the sovereignty of nations. In recent years, however, there appears to be a return to earlier conceptions of sovereignty. This is particularly illustrated by the attacks of the US government against universal jurisdiction and the ICC. The EU has resisted quite firmly on matters relating to the ICC, but remains silent on the issue of universal jurisdiction.

## A. Influence of the United States

It is hard to discern a coherent long term US strategy regarding universal jurisdiction, as opposed to the very organised campaign it has mounted against the International Criminal Court. The United States has encouraged States parties to the Rome Statute to sign bilateral agreements that would prevent such States from surrendering US nationals present on their territory to the ICC, without stipulating that the alleged perpetrators would necessarily be handed over to another jurisdiction. The US has used Article 98(2) of the Rome Statute to justify these agreements, though deep concern has been expressed from civil society groups and governments about the validity of the agreements. No EU country has signed such an agreement, and the only European countries to have done so are: Romania, Albania, Bosnia-Herzegovina and Macedonia.

Meanwhile, the US has only rarely shown an interest in the practice of universal jurisdiction. In the Pinochet case, where the US was requested to open its archives, and in the more recent complaints filed in Belgium, which were perceived by the US to be a direct threat to its interests. In the latter instance, its threats are said to be a major contributing factor to the repeal of Belgium's universal jurisdiction legislation.

Within the US, the Government did adopt measures to exercise universal criminal jurisdiction on the basis of the Torture Convention and terrorism instruments although there has never been a successful criminal prosecution on this basis. There is a unique civil jurisdiction under the Alien Tort Claims Act (ATCA) for victims of human rights violations<sup>97</sup> and in 1992 the Torture Victims Protection Act<sup>98</sup> expanded this jurisdiction. The ATCA recently came under fire because of cases against corporations. Remarkably, the Attorney General submitted an *amicus* brief against the whole Act rather than simply against the particular issue of corporate accountability.<sup>99</sup>

The current US stance may not necessarily denote a long-term policy against universal jurisdiction *per se*. The US administration might see some interest in using universal jurisdiction in terrorism cases, for example.

## B. Impact of the ICJ

In theory, the International Court of Justice (ICJ) should not be of particular relevance to a *European* approach, however, the two cases concerning universal jurisdiction brought before the ICJ have an impact on European procedures.

The first decision, in the *Yerodia* case<sup>100</sup> relates more to the question of immunity than to universal jurisdiction itself. The next decision to be taken in the case of the *Disappeared of the Beach*<sup>101</sup> may have a more direct impact. As set out in Article 59 of the ICJ's statute,<sup>102</sup> the decisions of the Court have no binding force except between the parties and in respect of a particular case. However, the

<sup>97</sup> Alien Tort Claims Act (28 U.S.C. § 1350).

<sup>98</sup> Torture Victim Protection Act of 1991 (28 USC Sec. 1350).

<sup>99</sup> Brief for the United States of America, as Amicus Curaie (Nos. 0056603, 0056628), *John Doe I, et al., v. Unocal Corporation, et al.*, United States Court of Appeals for the Ninth Circuit.

<sup>100</sup> ICJ, Judgment in the case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), *supra*.

<sup>101</sup> Case concerning *Certain Criminal Proceedings in France* (Republic of the Congo v. France).

<sup>102</sup> Statute of the International Court of Justice.

decisions interpret and apply international law, which all States are obligated to respect. After the “Yerodia” decision, the Belgian *Cour de cassation* granted immunity to sitting Heads of States.<sup>103</sup> Likewise, a prosecutor referred to the ICJ reasoning before a court of appeal in France, in a case about Guantanamo detention issues.<sup>104</sup>

In the Beach case, a French investigating judge had decided to open a case following a complaint filed by FIDH, the French *Ligue de droits de l’homme* and the *Observatoire congolais des droits de l’homme* against Congolese President Denis Sassou Nguesso and others.<sup>105</sup> Congo filed an application at the ICJ against France, which consented on an *ad hoc* basis to the jurisdiction of the court.<sup>106</sup> A decision in the case is not expected at least until the end of 2004.

## VII. OPTIONS FOR THE WAY FORWARD

During the Project’s two conferences, participants discussed the following options for developing an EU approach to extraterritorial jurisdiction for “international crimes.” The options include measures that could be taken by the EU, Member States, other European fora, human and victims rights groups and other interested parties. In particular:

- Enhancing European consensus on the fight against impunity;
- Enhancing EU competence over “international crimes” by including them in the upcoming EU Constitution as well as in the 3<sup>rd</sup> pillar while bridging 2<sup>nd</sup> and 3<sup>rd</sup> pillar initiatives;
- Establishing minimum standards for “international crimes” through the adoption of a framework decision on the matter;
- Building on existing EU mechanisms for cooperation in the investigation and prosecution of “international crimes”;
- Ensuring equal access to justice and enforceable remedies for victims of “international crimes” committed in third countries through either revision of the Rome II proposal or adoption of another measure;
- Undertaking a comparative study on law and practice of Member States and Candidate countries on extraterritorial jurisdiction;
- Supporting current cases; and
- Working with various EU level counterparts, as well as with other European institutions.

### A. Enhancing European Consensus on Combating Impunity

The Common Position of the Council of the European Union on the International Criminal Court<sup>107</sup> illustrates the emergence of a common will to combat impunity for “international crimes” and of a

<sup>103</sup> See, for example, Belgian Court of Cassation, Ruling in the case against Ariel Sharon and Amos Yaron, 12 February 2003, as found at <http://indictsharon.net/12feb2003detrans.pdf>.

<sup>104</sup> Cour d’Appel de Lyon, Sassi et Benchellali, 20 May 2003.

<sup>105</sup> Criminal complaint (with constitution of *partie civile*) filed with the Public Prosecutor of the Paris Superior Court (*tribunal de grande instance*) on 5 December 2001 by FIDH, LDH and the Congolese Observatory of Human Rights (OCDH) against Denis SASSOU NGUESSO, President of the Republic of Congo; General Pierre OBA, Minister of the Interior, Public Security and Administration; Norbert DABIRA, Inspector General of the Army, residing in France; General Blaise ADOUA, Commander of the Republican Guard (the Presidential Guard) and unnamed others.

<sup>106</sup> Pursuant to Article 38, paragraph 5, of the Rules of Court concerning proceedings wherein “the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made”.

<sup>107</sup> Council Common Position 2003/444/CFSP of 16 June 2003 (2002/474/CFSP; 2001/443/CFSP).

commitment to cooperate to achieve this goal in the most effective way. EU support to the ICC should encompass a broader commitment to justice for “international crimes,” comprised of a series of interconnected activities, including support to national level (both trials in the territorial State and trials proceeding on the basis of extraterritorial jurisdiction) and international jurisdictions, including, but not limited to, the International Criminal Court. In this regard, the ICC and other jurisdictions would be inextricably linked. This is wholly consistent with the ICC Office of the Prosecutor’s stated objectives and defined priorities,<sup>108</sup> and with the complementarity principle more generally.

Consensus should be built across disciplines and sectors. Continued dialogue and more formalised processes should specifically target accession countries and pave the way for the greater involvement of experts from accession States.

## **B. Enhancing EU Competence over “International Crimes”**

### **Incorporate “International Crimes” into EU Draft Constitution**

EU competence over “international crimes” is key to the EU’s ability to promote cooperation and complementarity with the International Criminal Court. Yet, under the wording of the current draft Constitution, the EU would not have the power to adopt measures on judicial cooperation in criminal matters and minimum rules for the definition of criminal offences in relation to these crimes, as they are not included in the Constitution’s list of crimes.<sup>109</sup> This should ideally be clarified prior to the finalisation of the Constitution. Alternatively, the Council could be encouraged to adopt afterwards a (unanimous) decision including these crimes, as the draft Constitution permits.<sup>110</sup>

### **Include “International Crimes” in the 3rd Pillar and Bridge 2<sup>nd</sup> and 3<sup>rd</sup> Pillar Initiatives**

The question of extraterritorial jurisdiction over “international crimes” touches on both the Common Foreign and Security Policy and Justice and Home Affairs. However, as of today, these two are not linked within European institutions and there is no network between them. A more holistic approach to international justice can be achieved in part by formally including genocide, crimes against humanity, war crimes and torture, as such, in the 3<sup>rd</sup> pillar and by bridging 2<sup>nd</sup> and 3<sup>rd</sup> pillar initiatives relating to “international crimes.” This horizontal (trans-pillar) effort will remain necessary even after the adoption of the new EU Constitution since, and even if the pillars are formally abolished.

## **C. Establishing Minimum Standards for “International Crimes”**

The specificity of “international crimes” is recognised by international treaty and customary law because of the *nature* of the crimes, the collective interest of the international community in ensuring that these crimes are punished, and the particular difficulties associated with ending impunity for these crimes in particular.

Given the extent of the variances in States’ interpretations of their obligations under international treaties in respect of the exercise of extraterritorial jurisdiction, a Framework Decision<sup>111</sup> concerning “international crimes” could usefully be adopted. Ideally, a Member State would be willing to press for such a Decision during its Presidency term or otherwise, and interested groups and experts should continue to canvass the willingness of Member States to support such an agenda.

<sup>108</sup> For example, Statement by Mr. Luis Moreno-Ocampo, Chief Prosecutor, Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court, the Hague, 16 June 2003.

<sup>109</sup> Currently at Article III-172-1 (2) of the Draft Treaty establishing a Constitution for Europe, adopted by consensus by the European Convention on 13 June and 10 July 2003, submitted to the President of the European Council in Rome on 18 July 2003; see *infra*. The provision reads: “These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.”

<sup>110</sup> Article III-172-1.

<sup>111</sup> Under the current draft EU Constitution, framework decisions would be replaced by “framework laws.”

Such a Decision could determine minimum European standards on jurisdictional rules relating to “international crimes,” seeking to approximate such rules in order to put into practice the stated commitment of the EU to end impunity for these crimes, and to strengthen cooperation. The Decision could detail minimum standards on the scope and jurisdiction of the crimes, taken from the relevant international treaties, as well as on potential restrictions on the exercise of jurisdiction, such as immunities, limitation periods and nexus requirements.<sup>112</sup> Not only would this ensure that international treaties are consistently applied throughout the EU and overcome the present hurdles hindering inter-State cooperation in the investigation and prosecution, it would also facilitate the application of the principle of complementarity, crucial to the success of the International Criminal Court.

*Minimum standards* (as opposed to fully harmonised procedures), are an appropriate starting point. Existing framework decisions, such as the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings,<sup>113</sup> may also serve as a basis for further action. (Annex A provides guidelines for the drafting of a Framework decision on “international crimes.”)

Minimum standards would reflect Member States international obligations, while allowing for States to go further if they so choose. Also, it would not prevent the evolution of customary or conventional international law. The regime for “international crimes” should not be less favourable than the one applicable to “ordinary crimes.”

## Contents of a Framework Decision

Framework Decisions dealing with criminal matters usually include:

- A definition of the offence;
- A rule on the level of penalty; and
- Rules on jurisdiction.

Most of the existing Framework Decisions are designed to implement existing international criminal law agreements, and occasionally, they have gone beyond the original decisions (e.g. in the definition) or have clarified certain points.

A few of the issues that may be addressed by a Framework Decision for “international crimes” include:

### ***Victims’ Access to Justice & Executive Discretion***

As has been previously noted, the EU has already adopted a decision on victims’ access, and certain provisions relating to victims’ rights appear in substantive criminal law measures (e.g., terrorism and offences against children). Consequently, on the basis of established practice, it would be possible to include certain victims’ provisions in a substantive framework decision on “international crimes.”

The elaboration of minimum standards<sup>114</sup> could be useful in addressing the following problem areas:

- In States where the possibility to directly trigger prosecutions exists for ordinary domestic criminal offences, there is a tendency to restrict this power by giving the ultimate decision to open an investigation to prosecuting authorities (e.g. Germany, Belgium, France).<sup>115</sup>

<sup>112</sup> Those framework decisions that relate to criminal matters usually define the offence, set out the rules on penalties and on jurisdiction.

<sup>113</sup> OJEU L 82 of 22.03.2001 p.1.

<sup>114</sup> It may not make sense to harmonise the law on these points because of the significant differences in legal systems – particularly between common law and civil law approaches.

<sup>115</sup> In civil law countries, this appears clearly in the distinction between “*plainte simple*” and “*plainte avec constitution de partie civile*”: in France and Belgium, victims (and NGOs in France) have to choose between these two: a “*plainte simple*” leaves the Prosecutor free to decide on the opportunity to prosecute, while a “*constitution de partie civile*” automatically triggers the opening of an investigation. The latter was used in all universal jurisdiction cases in Belgium and France. The new Belgian law

- There is a tendency in universal jurisdiction cases to require discretion or additional criteria when deciding to either open an investigation or prosecute (e.g. Germany, Belgium, the draft law in France, the need for Attorney General consent in the UK).
- Not all countries have clear, formal criteria governing the decisions of prosecuting authorities as to whether to investigate or prosecute (making it more difficult to challenge such decisions).
- Not all countries have a right to appeal (or review) the decision not to investigate or prosecute (either generally or specifically in relation to universal jurisdiction cases; e.g. Denmark, Belgium) and some that do permit such challenges allow political considerations to justify refusal.
- Insufficient political will and resources to pursue universal jurisdiction investigations and prosecutions may lead to lengthy delays.
- Not all countries afford victims the ability to seek civil remedies in relation to damages caused by extraterritorial crimes.

In the search for clear minimum standards and criteria guaranteeing victims' access to justice, the Council framework decision on the standing of victims in criminal proceedings is a useful starting point.<sup>116</sup>

### **Nexus Requirements**

Minimum standards could also be useful in addressing the following challenges:

- Some States condition the ability to open an investigation relating to "international crimes" on the presence of the perpetrator or on other nexus requirements.
- Member States also have a positive obligation to pursue the perpetrator of a war crime as soon as s/he is known to be present in a Member State. This interpretation is consistent with the principle of *aut dedere aut judicare* as set out in the Geneva Conventions and taking into account the European Convention on Extradition. This matter must be opened, even if there is no actual extradition request. Nonetheless, this obligation is not reflected in the implementing legislation of many Member States.

### **Statutes of Limitation**

Thus far, no EU measure has dealt with statutes of limitations, although some EU officials have discussed the possibility of such a measure in relation to the issue of organised crime.

### **Definition of Crimes**

A framework decision could also cover the definition of "international crimes" in Member States' domestic legislation. Such definitions would replicate those contained in the Rome Statute and other relevant international instruments (e.g. the Torture Convention).

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and the French draft ICC law abrogate "*constitution de partie civile*" so that only the prosecution authorities will decide on the opportunity to prosecute. (See Belgium's *Loi relative aux violations grave du droit international humanitaire*, 1 August 2003, and France's *Avant-projet de loi portant adaptation de la législation française au Statut de la Cour pénale internationale et modifiant certaines dispositions du code pénal, du code de justice militaire, de la loi du 29 juillet 1881 sur la liberté de la presse et du code de procédure pénale*, June 2003. Regarding the latter, see also *Commission Nationale Consultative des Droits de l'Homme*, "Avis sur l'avant-projet de loi portant adaptation de la législation française au Statut de la Cour pénale internationale," 15 May 2003.)

<sup>116</sup> See *Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings* (2001/220/JHA - Official Journal L 082 , 22/03/2001 P. 0001 - 0004), Article 2-1 and 4.

## D. Building on Existing EU Cooperation Mechanisms

It is important to consider the potential of existing mechanisms to determine whether new, specialised mechanisms are required to enhance cooperation in relation to “international crimes.” Can existing EU initiatives, such as the creation of a European network of contact points for these crimes in each Member State,<sup>117</sup> and the Council decision on reinforcing cooperation between national units of Member States for the investigation and prosecution of these crimes,<sup>118</sup> be built upon?

The practices of existing EU initiatives such as the EU arrest warrant, Europol, Eurojust and other mechanisms, such as Liaison Magistrates,<sup>119</sup> European Judicial Network<sup>120</sup> and Joint Investigation Teams,<sup>121</sup> have all enhanced mutual cooperation generally between Member States. These initiatives may be well placed to play a more significant role in relation to “international crimes,” despite the existing limitations to their competencies,<sup>122</sup> e.g., by:

- Expanding their competencies;
- Strengthening working relations with such bodies;
- Increasing the resources available to the network of contact points;<sup>123</sup>
- Using existing police (investigations) and judicial training programmes to raise awareness on issues concerning the investigation and prosecution of “international crimes”;
- Developing closer linkages among European institutions, as well as between them and States experts;
- Encouraging experts in law enforcement and organised crime to be in contact with the Office of the Prosecutor of the ICC, in facilitate information sharing and transmission of expertise.

The mechanisms of the Council of Europe could also be utilised to this end, as could other forums such as the OSCE, particularly in respect of candidate countries.

## E. Ensuring Equal Access to Justice and Enforceable Remedies

The right of victims of crimes to an enforceable and effective remedy falls within the stated objectives of the Amsterdam Treaty.<sup>124</sup> There are a number of initiatives that assist victims of crimes in general

<sup>117</sup> Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (2002/494/JHA, Official Journal L 167, 26/06/2002 P. 0001 – 0002).

<sup>118</sup> Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes (2003/335/JHA, Official Journal L 118, 14/05/2003 P. 0012 – 0014).

<sup>119</sup> Joint Action (96/277/JHA) of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union (Official journal L 105, 27/04/1996 P. 0001 – 0002).

<sup>120</sup> Joint Action 98/428/JHA of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network (Official Journal L 191, 07/07/1998, P. 0004 – 0007).

<sup>121</sup> Council Framework Decision of 13 June 2002 on joint investigation teams (Official Journal L 162, 20/06/2002 P. 0001 – 0003). The network is designed to facilitate contact between professionals specialised in prosecution of international crimes, and could in theory work in tandem with the European Judicial Network.

<sup>122</sup> Europol's competence is currently confined “to prevent and combat unlawful drug trafficking, illegal money-laundering activities, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings and motor vehicle crime” and related offences [Protocol amending Article 2 of the Europol's convention], whereas, Eurojust has wider powers allowing it to intervene without a request from a Member State in respect of certain enumerated crimes including money laundering, and organised crime and related offences.

<sup>123</sup> 2002/494/JAI.

<sup>124</sup> Tampere Conclusions, adopted 15 & 16 October 1999.

without impinging on the competence of Member States.<sup>125</sup> These include the Council Regulation on jurisdiction and enforcement of judgments (Brussels Regulation)<sup>126</sup> and the proposed regulation on the conflict of laws in non-contractual cases (Rome II regulation) that will address jurisdictional issues.<sup>127</sup> There is, however, no specific initiative in relation to either access to justice or ensuring an enforceable remedy to victims of “international crimes.” The European Commission’s proposed Directive on compensation of victims of crimes, only applies to crimes that took place within a Member State and where the State, and not the perpetrator, provides the compensation.<sup>128</sup> Although this proposed Directive recognises victims’ right to compensation, it does not tackle extraterritorial claims.

The text of the “*Rome II proposal*” should be further examined with a view to seeking changes related to “international crimes.” Also, the rights of victims of “international crimes” to effective and enforceable remedies should be further discussed at the EU level.

## F. Comparative Study on Law and Practice of EU Member States and Candidate Countries

A comprehensive assessment of the laws and practices of Member States and candidate countries could be conducted, which would include an analysis of both criminal and civil approaches to extraterritorial jurisdiction, and tackle the issue of corporate accountability. It could also usefully include an examination of how to make the rights of victims a reality in Europe, with a particular focus on the most significant barriers to civil claims – state immunity and limitation periods, as well as how to implement the Decisions of the EU Council on investigating and prosecuting genocide, crimes against humanity and war crimes, including the setting up of contact points,<sup>129</sup> among other issues. Such a study would facilitate joint action and assist in the process of determining minimum standards.

## G. Supporting Current Cases

Even before the above measures are taken, progress toward the objective of preventing the European Union from being used as a safe haven for perpetrators of “international crimes” can be achieved by supporting ongoing extraterritorial jurisdiction cases.

Careful monitoring of ongoing cases, such as the *Congo (Brazzaville) v. France* case, further trials of Rwandans in Belgium, the Netherlands’ prosecution of a Congolese (DRC) army officer for acts of torture and rape, the trial of Argentine naval officers in Spain, is merited. European and international law experts and practitioners should undertake to collaborate more in their work and to submit legal briefs as appropriate to judges in order to ensure that they are aware and take into account of developments in other States and at the regional and international level. An informal network of such practitioners should be fostered, either by using existing forums,<sup>130</sup> or creating new ones.

## H. EU Level Counterparts

<sup>125</sup> Article 65 of the EU Treaty allows the EU to adopt measures in relation to civil matters where there are “cross border implications” and that those measures are “necessary for the proper functioning of the internal market”

<sup>126</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>127</sup> COM (2001) 427 for ‘Rome II Regulation’.

<sup>128</sup> Proposal for a Council Directive on compensation to crime victims (\* COM/2002/0562 final – CNS 2002/0247 \*/, Official Journal C 045 E, 25.02.2003 p. 0069 - 0089).

<sup>129</sup> Council Decisions 2003/335/JHA and 2002/494/JHA.

<sup>130</sup> Such as the Universal Jurisdiction Information Network.

Further dialogue at the EU level could be fostered by involving the European Parliament, Commission, Council, Council Working Group on Public International Law (COJUR), Council on Justice and Home Affairs and contact points.

Other important European fora, such as the Council of Europe, who are already involved in the promotion of international justice and improving domestic legislation in this context, should be brought further into discussions on strategies and approaches.

An action or working group comprised of interested NGOs, MEPs, State officials and other stakeholders should be developed to build on the momentum of the two meetings and the Brussels Conference in particular.

## VIII. ANNEXES

### A. Elements of a possible Framework Decision on breaches of international human rights and international humanitarian law<sup>131</sup>

#### Core provisions

##### *Preamble*

- must set out reasons for use of 'legal base'<sup>132</sup>
- must explain broadly why EU measure is added value in relation to existing international rules, i.e. limits on jurisdiction of ICC, ICC will not be prosecuting every case within its jurisdiction in any event; also why the two existing EU decisions on this issue are not sufficient; note that the EU/EC frequently adopts measures that supplement/run in parallel to international criminal law treaties or international human rights law (sex and race discrimination, asylum, data protection, labour law) or other areas (shipping)
- set out references to human rights (see further below)

##### *Purpose clause*

- to approximate criminal legislation of the Member States in order to end safe havens for alleged perpetrators of violations of human rights and international humanitarian law, in particular genocide, crimes against humanity, war crimes and torture ("international crimes")
- although note that framework decisions do not always have 'purpose' clauses

##### *Scope*

- a) set out crimes covered: genocide, crimes against humanity, war crimes and torture
- b) limited to crimes not within jurisdiction ICC, because of its temporal or geographical/personal limitations, plus also applies where ICC has jurisdiction but in accordance with Rome Statute, Member States can/will prosecute

##### *Definitions*

- is a definitions clause necessary?
- at least the Framework Decision would need the usual definition of 'legal person' as not including States [or international organisations], if legal persons are to be subject to liability

##### *Offences*

- provision ensuring that Member States national law covers definition of "international crimes" as set out in relevant international treaties
- question: should this entail a requirement to set out the offences specifically, or should it be left to Member States to decide whether ordinary criminal law could cover the offences (the latter approach was taken in the Framework Decision on terrorism)?
- note that Framework Decisions usually set out specific rules on criminal liability rather than make reference to the definitions in international treaties, but there is an exception (see Framework Decision on counterfeiting the euro)
- this would be an opportunity to clarify any ambiguous issues about definitions in international treaties, if desired
- need for provision here (or elsewhere in text?) clarifying that the offences will be assumed to be included on the 'white list' of crimes not subject to dual criminality under various framework decisions on criminal cooperation on the grounds that murder, serious bodily harm are on these lists? Or should these offences be added to the 'white list' by means of a separate clause setting out amendments to the other framework decisions?

<sup>131</sup> Presented at the Brussels Conference by Professor Steve Peers, Human Rights Centre, University of Essex.

<sup>132</sup> See *supra*: EU Competence over Substantive Criminal Law.

### *Inchoate offences*

- obligation also to criminalize attempts, instigation participation, aiding and abetting
- usual for Framework Decisions to cover some or all of these cases (terrorism FD also covers leading a terrorist group)

### *Immunity and privilege*

- need to specify extent of abolition of immunity/privilege?
- if so, must decide on wording; problems re Congo case, conflicting international obligations?
- would impact upon framework decisions on cross-border cooperation that refer to immunity/privilege
- note: no prior case of Framework Decision expressly restricting privilege/immunity, although wording of FD on European arrest warrant on this issue is ambiguous

### *Limitations clause*

- need for approximation of national law on limitations on bringing proceedings?
- Note: no prior case of Framework Decision addressing this issue

### *Penalties*

- could read ‘the offences set out in Article X shall be punished by a maximum term of at least ten years’
- such a clause is standard in a large majority of adopted/proposed EU framework decisions harmonising substantive criminal law; standard rules on use of such clauses were agreed by the JHA Council April 2002; ‘over ten years’ is the highest level of sanction but the template is just a guideline so can be departed from
- there are cases in Framework Decisions of variation of sanctions for different offences covered by the FD, or some offences not covered by standard rules at all (terrorism Framework Decision) also higher/lower sanctions depending on circumstances of crime

### *Penalties for legal persons*

- standard clauses concerning principle of liability for legal persons (need not be criminal liability) and form of penalties to be applied to them
- note that usually legal persons do not include states or international organizations—see definitions clause above

### *Jurisdiction*

- all Framework Decisions have jurisdictional provision; standard approach in Framework Decisions is to require territorial and active personality jurisdiction, but then specify that the latter is optional; but some go further, especially Framework Decision on terrorism
- start with universal jurisdiction over all crimes defined in Framework Decision? Or more limited approach?
- need for rules/guidelines on priority jurisdiction: for example, see framework decision on terrorism for fullest set of guidelines. Should these be binding rules?
- also probable need for rule about relationship with ICC: content of rule?
- *lis pendens*: can refer to Framework Decision on ‘ne bis in idem’ principle, which contains rules (or rather guidelines); or is there a need for different guidelines or binding rules in this area?
- International *ne bis in idem*: is there a need to derogate from Schengen rules/Framework Decision?
- Provision regarding extension of these rules to third states? (nb general *ne bis in idem* rules in Schengen apply to Norway/Iceland and possibly soon Switzerland); possible limits upon or total lack of EU competence on this (cf *Opinion 1/2003*, pending before ECJ, on parallel civil law issue)

*Final provisions*

- Implementation: usually two years, can be earlier (terrorism/arrest warrant) or later, particularly in relation to particular provisions (cf arrest warrant and own nationals, parts of framework decision on victims)
- Monitoring: standard rules described above; some examples of more detailed monitoring; could there be a case for a more public procedure involving reports by NGOs?
- Territorial application: Gibraltar
- Entry into force

**Further issues***Role of ministries:*

- should it be permitted/required/precluded that ministry's consent needed for prosecutions?
- possible rules on ability to appeal against ministry's decision?
- possible importance of provision on ministerial consent in gaining political support for proposal?

*Victims:*

- some cases of reference to victims in FD, but not much; usually just reference to framework decision on standing of victims in criminal proceedings; would this be enough?
- Note: the framework decision on victims does not entail an obligation to permit victims to launch the criminal proceedings against the accused

*Mutual assistance, et al:*

- is there a need for a specific clause dealing with cooperation within the EU, in light of separate framework decisions on arrest warrant, etc.?
- is there a need for a provision on cooperation with the ICC, in light of the two existing third-pillar Decisions on ICC crimes?

*Safeguard clause*

- is such a clause necessary?
- safeguard re asylum, ECHR, in particular Arts. 3, 5 and 6
- reference also to national constitutions, Art. 6(2) TEU? (frequent provision inserted into FDs: This Framework Decision shall not have the effect of derogating from fundamental rights as set out in Article 6(2) TEU)
- reference to EU Charter of Fundamental Rights in preamble; the Framework Decision would respect not just the provisions of the Charter on fair trial, etc., but also respect the provisions on human dignity, freedom from torture and illegal detention, right to life, non-discrimination

*External relations*

- need for provision on treaties between EU as a whole and third states on these issues?
- need for provision on EU Member States' agreements pursuant to ICC statute?

*Rome Statute exception*

- possible restriction on MS using the exception in Art. 124, re war crimes by own nationals on own territory?

**Civil law**

- not possible for third pillar act to address civil law issues (jurisdiction, conflict of law, state compensation for victims, arguably restitution issues)
- this could be subject of separate legislation, possibly referred to in preamble of Framework Decision

*Rules on judicial jurisdiction and recognition of judgments*

- current jurisdiction rule in Reg. 44/2001:
- jurisdiction belongs to the courts of a state where the defendant is domiciled, if a defendant is domiciled within the EU (Art. 2);
- jurisdiction is determined by the national law of each state (Art. 4), if the defendant is domiciled outside the EU
- is there a need to suggest changes to these criteria, in particular harmonization of the national laws relating to non-EU defendants, at least re: "international crimes"?
- Potential issue that EC lacks capacity to harmonize MS law re defendants domiciled externally: see *Opinion 1/2003*, pending before ECJ, on existence and extent of EC exclusive external competence as result of Reg. 44/2001; but see proposed scope of 'Rome II' Regulation (below)
- note that the 'public policy' exception to recognition of judgments in Reg. 44/2001 cannot be used to refuse to recognise a judgment due to differences in national rules on jurisdiction (see report of July 2003 conference)

#### *Rules on choice of law*

- proposal for 'Rome II' Regulation July 2003 on choice of law re non-contractual civil liability
- would harmonise rules not just between MS but also MS rules concerning possible application of non-MS law; arguable that EC lacks competence to harmonise this
- general rule: the law of the country where the damage arose or is likely to arise would apply (art. 3(1))
- if the plaintiff and defendant had habitual residence in the same country at the time when the damage arose, then that country's law applies (art 3(2))
- Article 22 provides for a public policy exception
- means that there would be mandatory jurisdiction of non-EU country where international crime arguably giving rise to civil liability took place outside the EU, unless public policy clause can be interpreted to mean that a different jurisdiction rule can apply in these cases
- discussion just beginning in Council/EP
- options for addressing issue: either
  - o a) argue for specific rule on harmonization of law on civil liability for "international crimes," requiring MS to take a form of universal jurisdiction, possibly subject to certain conditions to be set out in Regulation or left to MS; would still be need to decide which MS has jurisdiction
  - o b) argue for exclusion of issue of civil liability for "international crimes" from scope of Regulation, or express permission for MS to derogate from the normal rules in the Regulation in the case of civil liability for "international crimes"
  - o c) argue for exclusion of issue of liability for any damage taking place outside EU from the scope of the Regulation

#### *Rules on compensation of crime victims by States*

- proposed Directive 2002; would only apply to damage suffered within MS
- could argue for expansion of scope re damage suffered outside MS, but obvious difficulty either seeking to establish a principle that a MS responsible to pay damages for crime suffered outside EU territory, or alternatively seeking to adopt EC legislation that purports to impose obligations on non-Member States [the legislation concerns substantive obligations of States, not merely the question of extraterritorial jurisdiction]; also possible argument re limited EC competence

#### *Separate legislation re civil law compensation claims for "international crimes"*

- some prior examples of harmonization of tort liability (1985 directive on product liability; proposal for Directive on environmental liability at advanced stage of EC legislative procedure; possible forthcoming proposal on liability of service providers generally; specific provisions in e-commerce Directive)
- however, it is possible that issue of civil liability for "international crimes" is outside the competence of the EC under Article 65 EC or 95 EC (internal market power) because of a) insufficient link with internal market/cross-border effects, and b) the EC power to adopt legislation on 'compatibility' of MS' civil law is insufficient?

- could be stronger argument for EC competence for measure essentially concerned with civil liability for acts committed within EU, but limited use of such a measure re: "international crimes"
- note that opt-out by Denmark required, opt-out by UK and Ireland possible; also use of 'flexibility' provisions is possible; though the flexibility powers cannot be used if the EC lacks any competence
- issues which could be addressed (based on July 2003 conference report):
  - o a) substantive law re conditions for civil liability
  - o b) limitation periods
  - o c) immunities

## B. Agendas

### Paris Expert Meeting, 16/17 July 2003

#### DAY I: 16 July 2003

9.00-9.15 Registration

9.15-9.30 Welcoming address - Paul-Albert IWEINS, Bâtonnier of the Paris Bar

#### MORNING SESSION: FROM A NATIONAL PERSPECTIVE

9.30-10.30 Why the need for a European Union (EU) approach to “Extraterritorial jurisdiction”?

1. **Clarifying concepts and strategic focus** - Carla FERSTMAN, Legal Director, REDRESS
2. **Current European Political Commitment** - Martin WASMEIER, European Commission, Directorate General, Justice and Home Affairs, Judicial cooperation in criminal matters

10.30- 10.45 Coffee Break

10.45 – 12.30 **Key national developments on extra territorial jurisdiction within specific EU countries**  
*Chair: Ariana PEARLROTH, Project Director, Universal Jurisdiction Information Network, REDRESS/CJA*

1. **Status of ratification and implementation of the main international instruments in the fight against impunity in European States** – Olivia Venet, Belgian Red Cross
2. **Belgium** – Luc WALLEYN, Lawyers without Borders
3. **France** – Patrick BAUDOIN, lawyer, Former President of the FIDH
4. **Spain** – Juan GARCES, lawyer
5. **Germany**– Wolfgang KALECK, lawyer

12.30 – 1.30 Lunch

#### AFTERNOON SESSION I: A VICTIMS-ORIENTED APPROACH

1.30 – 2.30 **Victims’ orientated approach: Access & rights to a remedy, a comparative European law approach**

- **Common vs. Civil Law Approaches regarding Reparation and Victim’s Access to Justice** - Fiona MCKAY, Director, International Justice Program, Lawyers Committee for Human Rights, and Jeanne SULZER, International Justice Program Director, FIDH

2.30-2.45 Coffee Break

#### AFTERNOON SESSION II: FROM A EUROPEAN PERSPECTIVE

2.45-5.00 **European initiatives and the fight against impunity of “international crimes”**  
*Chair: Dan Van Raemdonck, President of the Belgium League for Human Rights and President of the FIDH European Association*

- **Mutual cooperation between states and the EU arrest warrant: the EU approach to transnational crime & the question of serious international human rights and humanitarian law violations** - Steve PEERS, Professor of Law at University of Essex
- **Europol/Eurojust/European Judicial Network/ Contact Group on International Crimes/other European justice initiatives** – Serge DE BIOLLEY, Scientific Collaborator, Institute of European Studies at the Free University of Brussels

5.00 **PRESS CONFERENCE (INTERNATIONAL JUSTICE DAY)**

**DAY II: 17 July 2003**

**MORNING SESSION: DISCUSSION GROUPS OR WORKSHOPS ON PARTICULAR KEY AREAS**

**9.00-10.45 Working Groups: Jurisdictional & Procedural Hurdles in Criminal Cases**

**Working Group 1: Competing jurisdictions**

*Rapporteur: Juan GARCES, lawyer*

- State to State competing jurisdiction and its impact on civil and criminal cases
- State to International Criminal Court (ICC) & its impact on civil and criminal cases

**Working Group 2: Access to justice and Executive discretion**

*Rapporteur: Jeanne SULZER, FIDH*

**Working Group 3: Nexus requirement, immunities and limitation periods**

*Rapporteur: Philip GRANT, TRIAL*

**10.45-11.00 Coffee break**

**11.00-11.45 Plenary session: Report back from small groups**

*Chair: Ariana PEARLROTH, REDRESS*

**11.45-1.00 Civil claims**

*Chair: Rosanna MESQUITA, UK Legal Adviser, REDRESS*

- **Civil claims: jurisdictional & procedural hurdles**
  - Forum issues & nexus requirements - Sapna Malik, Solicitor, Leigh Day
  - Immunities and Limitation periods - Geoffrey Bindman

**1.00-2.00 Lunch**

**AFTERNOON SESSION: Creating political will for an EU approach**

**2.00-3.15 External factors**

*Chair: Irune Aguirrezabal, European Coordinator, CICC*

- **US Approach towards Universal Jurisdiction** – Fiona MCKAY, Director, International Justice Program, Lawyers Committee for Human Rights
- **ICC – Complementarity principle with national jurisdiction** – Jennifer Schense, CICC
- **ICJ and Universal Jurisdiction: impact on an EU approach** – Hervé Ascensio, Professor Law at University Paris XIII

**3.15-3.30 Coffee Break**

**3.30-5.15 Roundtable: Action plan for moving forward**

*Chair: Antoine BERNARD, Executive Director, FIDH*

**5.15-5.30 Concluding remarks – Carla FERSTMAN and Jeanne SULZER**

**5.30 Close of Meeting**

## Brussels Conference, 24/25 November 2003

### DAY I

#### European Parliament – Committee on Citizen's Freedom and Rights, Justice and Home Affairs Legal Remedies for Victims of "International Crimes" Fostering an EU Approach to Extraterritorial Jurisdiction Seminar

*Chair – Jorge Salvador Hernández Mollar, President, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs*

#### **15:00-15:30**      **Opening Statements**

- *Welcome – Alima Boumédiène-Thiery, MEP, Rapporteur, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs*
- *Presentation of the project and background paper – Antoine Bernard, Executive Director, FIDH and Carla Ferstman, Legal Director, REDRESS*

#### **15:30-16:15**      **The need for justice from a victim's perspective**

- *Justice for victims: how does it contribute to victim's healing process? – Malcolm Smart, Director, Medical Foundation*
- *Testimony: why bringing a case before a European court? – Ousmane Dia, Partie civile in the Ely Ould Dah case*

#### **16:15-17:30**      **Creating a coherent approach in the fight against impunity: the relationship between the ICC and the EU in prosecuting "international crimes"**

- *Implementing the complementarity principle in the EU – Hans Bevers, Ministry of Justice, The Netherlands*
- *Building upon the EU Common position on the ICC – Nadia Plastina, Ministry of Justice, Italy*
- *Closing the "impunity gap" – Silvia Fernandez de Gurmendi, International Criminal Court, Prosecutor's Chef de cabinet*

#### **17:30-18:30**      **Identifying an EU approach to justice for "international crimes"**

- *Towards a European approach to the implementation of extraterritorial jurisdiction – Géraud de la Pradelle, Université Paris X*
- *European stance on the mechanisms to combat impunity – Dan Van Raemdonck, President of FIDH-European Association and of the Ligue des droits de l'Homme (Belgique francophone)*

#### **18:30-19:30**      **Reception**

DAY II

**Meeting room Galileo – Hotel Bedford, 135 rue du Midi, Brussels**  
**Legal Remedies for Victims of “International Crimes”**  
**Fostering an EU Approach to Extraterritorial Jurisdiction**

**8:45-9:45**      **Developing a comprehensive and integrated approach to ending impunity for “international crimes”**      *Chair – Menno Kamminga, Professor of International Law, Maastricht University*

- *Status of implementation of international law obligations by Member States – Christopher Hall, Amnesty International*
- *From a civil law perspective – Patrick Baudoin, FIDH*
- *From a common law perspective – Steven Powles, Doughty Street Chambers*

**9:45-10:30**      **Immunity: a significant obstacle to ending impunity**

- *Exceptions to immunity for “international crimes” – Maria Gavouneli, University of Athens*

**10:30-10:45**      **Coffee Break**

**10:45-11:45**      **Key issues for an EU approach**

*Chair – Hans-Werner Bussmann, Federal Foreign Office, Task Force for the Establishment of the ICC*

- *EU Cooperation Mechanisms: Enhancing their Ability to Fight Impunity for “International Crimes” Serge de Biolley, Institute of European Studies, Free University of Brussels*
- *Law and practice in Member States: Ways to bridge the gaps – Steve Peers, University of Essex*

**11:45-13:15**      **Working Groups**

**Working Group 1** :– *Towards common standards on extraterritorial jurisdiction in EU Member States*

**Working Group 2** : – *Building on existing EU mechanisms to strengthen the fight against impunity for “international crimes”?*

**13:15-14.30**      **Lunch**

*[Parallel lunch for the Rapporteurs of the working groups]*

**14:30-16:00**      **Reports from working groups and discussion**

*Chair – Irune Aguirrezabal, European Coordinator, CICC*

**16:30-17:00**      **Coffee Break**

**17:00**              **Concluding Speeches**

*Chair – Carla Ferstman, REDRESS*

- *Perspectives in the Intergovernmental Conference – Hans G. Nilsson, Council of the European Union*
- *Core questions to be dealt with in the European framework – Concluding remarks – Antoine Bernard, Executive Director, FIDH*



## C. Law Chart

Country	Domestic law explicitly provides for exercise of UJ for:*				Presence Required? ***	Residence Required? ***	Executive Consent**** Required?	Double Criminality Required?†	Recognizes Immunities?		Recognizes Foreign Amnesties?	UJ in ICC leg. or draft law?
	CAH**	Genocide	Torture	War Crimes					State	Official‡		
<b>EUROPE &amp; CENTRAL ASIA</b>												
Austria	C (EN, SC)	Yes	No	No	NC	No	No	Yes		Yes	NC	
Belgium	Yes	Yes	No	Yes		Yes		No		Yes		Yes
Denmark	C (M)	No	No	Yes	NC	NC	Yes	Yes		Yes	NC	
Finland	C	Yes	Yes	Yes	No	No	NC	Yes				Yes
France	No	No	Yes	No	Yes	No	No	No		Yes	No	Yes
Germany	Yes	Yes	No	Yes	NC	NC		NC			No	Yes
Greece	C (EN)	No	No	No	No	No		No	Yes	Yes		
Ireland	No	No	Yes	Yes (GB)			Yes					
Italy	No	Yes	Yes	No	NC	No	Yes					
Luxembourg	C(T, SC)	Yes	Yes	Yes			No					
Netherlands	Yes	Yes	Yes	Yes	Yes	No				Yes		Yes
Portugal	C(EN, SC)	Yes	No	Yes	NC	No	No					
Spain	NC	Yes	No	No	No	No	No	No	NC	No (former)	No	
Sweden	C	Yes	No	Yes	NC	NC	Yes	Yes	NC	Yes		
United Kingdom	C(EN)	Yes	Yes	Yes (GB)	No	Yes	Yes	Yes	Yes	Yes(current)		Yes

\*Civil and/or criminal. Responses to this section refer to domestic law that names the particular crime only and not to provisions that address crimes generally or to international law. A blank box indicates that there is no information available or that there is no known provision authorising UJ over the crime.

\*\*CAH = Crimes against humanity.

\*\*\*To open an investigation. A No indicates that there is nothing on the face of the law that would prevent the opening of an investigation without the presence/residence of the accused in the country.

\*\*\*\*"Executive consent" refers to consent by an official of the executive branch of government.

†A requirement that enables the forum state to exercise universal jurisdiction over a case only when the territorial state likewise recognizes the crime in its domestic law. In some instances the requirement further specifies that the forum state can exercise UJ only if the territorial state similarly recognizes the ability to exercise UJ over the crime.

‡Concerning immunities for heads of state or other public officials.

**Yes:** For simplicity, Yes is used when there is either absolute or near certainty.

**NC** = Not clear

**NF** = None found

**ADAJ** = Aut dedere aut judicare (either extradite or prosecute). Sometimes this phrase is used in legislation or statements but its effect on the ability to initiate investigations without presence of the accused is not clear.

**Rome** = All aspects of the crime that are in the Rome Statute

**C** = Conduct that can amount to crimes against humanity if committed in the circumstances specified in the Rome Statute, but is not called crimes against humanity (ex: there is universal jurisdiction for torture, but not for crimes against humanity per se)

**M** = Murder

**EX** = Extermination

**EN** = Enslavement

**D** = Deportation or forcible transfer of population

**I** = Imprisonment or other severe deprivation of physical liberty

**T** = Torture

**SC** = Crimes of sexual violence

**P** = Persecution against an identifiable group or collectivity

**ED** = Enforced disappearances

**A** = Apartheid

**OIA** = Other inhumane acts

**GB** = Grave breaches of the 1949 Geneva Conventions and/or Protocol 1

**WC** = War crimes, other than Grave Breaches (GB) (in internal and/or international conflict)

**^** = Scope of universal jurisdiction limited to certain conflicts or geographical regions

**^^** = Scope of universal jurisdiction limited to certain types of victims and/or perpetrators.

*(Italics)* = *Unclear if law is applicable*

In addition to UJ provisions, domestic law criminalizes this international law crime.

Either it is not known if domestic law criminalizes this international law crime or it does not do so.

## D. Country Studies<sup>133</sup>

### AUSTRIA

Austrian law establishes universal jurisdiction over “punishable acts which Austria is under an obligation to punish.”<sup>134</sup> This provision could be deemed applicable to several crimes under international law, such as grave breaches of the 1949 Geneva Conventions and torture under the Torture Convention. The Government has in fact asserted that this provision “is the legal basis for the fulfilment of the obligations established by article 5 of the [Torture] Convention.”<sup>135</sup> Article 5 imposes an obligation to either try or extradite alleged torturers present in the territory of a State party. The Government also views the Convention against Torture as being directly enforceable under Austrian law.<sup>136</sup>

Austrian law also provides for universal jurisdiction over the following acts, as long as the suspect cannot be extradited: kidnapping, slavery, human trafficking, counterfeiting of currency or of particularly protected securities, acts involving organised crime, certain drug-related offences<sup>137</sup> and offences involving hijacking. The provision establishing universal jurisdiction for hijacking specifies that prosecutions can only take place if the suspect is in Austria.<sup>138</sup>

Additionally, Austrian courts are able to exercise universal jurisdiction over crimes under Austrian law, as long as the act is also punishable in the place where it was committed. If the suspect is a foreign national upon the commencement of the criminal procedure, Austrian courts would only have jurisdiction if certain criteria can be satisfied: 1) the suspect must be found on Austrian territory; and 2) s/he cannot be extradited “for reasons other than the type or nature of the act.”<sup>139</sup> This provision could, and has been, applied to offences such as genocide, which is a crime under Austrian law.<sup>140</sup>

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<sup>133</sup> This report was written by Ariana Pearlroth and edited by Carla Ferstman of REDRESS. We have relied heavily on the following sources in the preparation of the information in the report: the Universal Jurisdiction Website (<http://www.universaljurisdiction.info>); Amnesty International’s report “Universal Jurisdiction – the duty of states to enact and enforce legislation,” **AI Index: IOR 53/002/2001, 1 September 2001** ([http://web.amnesty.org/web/web.nsf/pages/legal\\_memorandum](http://web.amnesty.org/web/web.nsf/pages/legal_memorandum)); M.E.I. Brienen and E.H. Hoegen, Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure, Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)) (<http://www.victimology.nl/onlpub/Brienenhoegen/BH.html>); and REDRESS’ report, “Universal Jurisdiction in Europe: Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide,” 30 June 1999 (<http://www.redress.org/publications/UJEurope.pdf>). The report has also benefited from country-specific information provided by a range of national human rights institutes and organisations, which was collected by REDRESS as part of a feasibility study for the Project on the approximation and/or harmonisation of standards at the EU level. We also wish to thank those who contributed to individual chapters: Austria: Louise Sperl, Ludwig Boltzmann Institute of Human Rights; Ngwengeh Jacline Chungong, REDRESS; Belgium: Soline Nève and Guillaume de Walque, La Ligue des Droits de l’Homme; Orlando Fernandez, REDRESS; Luc Walley; Denmark: Dorit Borggaard, Rasmussen Holdgaard, Gregor Noll and Marianne Nørregaard, Danish Centre for Human Rights; Finland: Minna Kimpimäki; France: Haidee-Laure Giles, REDRESS; Jeanne Sulzer and Sébastien Bourgoin, FIDH; Germany: Caroline Harvey and Claudia Ludwig, REDRESS; Wolfgang Kaleck, lawyer, President of the Republican Lawyers association, Vice president of the European democratic lawyers (Germany); Greece: Martha Papadopoulou, Ministry of Foreign Affairs, Greece; Anna Damaskou and Antonis Xenakis; John-Sotirios Spyropoulos, REDRESS; Ireland: Ray Murphy, National University of Ireland, Galway; Italy: David Donat Cattin, International Law & Human Rights Legal Advisor, Parliamentarians for Global Action; Sylvia Mercogliano; Pietro Sardaro; Stefan Scheer, REDRESS; Luxembourg: Soline Nève and Guillaume de Walque, La Ligue des Droits de l’Homme; Nicolas Thieltgen, Decherts; Netherlands: Hans Bevers, Ministry of Justice, the Netherlands; Portugal: Maria Fernanda Pinheiro; Ngwengeh Jacline Chungong; Sarah Gomes; Maria Joao Vasquez; Spain: Luis Benavides, REDRESS; Dr. Juan E. Garcés, lawyer (Spain); Sweden: Rolf Ring, Raoul Wallenberg Institute; Per Lennerbrant, Legal Adviser, Division for Criminal Law, Ministry of Justice, Stockholm, Sweden; Office of the Prosecutor-General, Sweden; United Kingdom: Rosanna Mesquita, Clare Hamill, and Sarah Richards, REDRESS; Florence Campbell, Pro Bono Officer, Freshfields **Bruckhaus Deringer**.

<sup>134</sup> Penal Code (*Strafgesetzbuch*), Art. 64(1)(6). (Translation found in Austria’s initial State party report to the Committee against Torture (CAT/C/5/Add.10), para. 23.)

<sup>135</sup> Austria’s initial State party report to the Committee against Torture (CAT/C/5/Add.10), para. 24.

<sup>136</sup> Austria’s initial State party report to the Committee against Torture (CAT/C/5/Add.10), para. 7ff.

<sup>137</sup> Penal Code, Art. 64(1)(4).

<sup>138</sup> Penal Code, Art. 64(1)(5)(d).

<sup>139</sup> Penal Code, Art. 65(1)(2). (Translation found on the website of the International Committee of the Red Cross at <http://www.icrc.org/ihl-nat.nsf/0/e1cb1944e1871a23c1256ab20031fc2c?OpenDocument>.)

<sup>140</sup> Penal Code, Art. 321. The Supreme Court (*Oberster Gerichtshof*) has recognised Austrian jurisdiction under Art. 65(1)(2) over a genocide case that was based on universal jurisdiction. (Judgment of the Supreme Court, 15Os99/94, 13 July 1994, as

Furthermore, the Constitution provides that, “the generally recognized rules of international law are regarded as integral parts of Federal law.”<sup>141</sup>

With respect to civil action, victims can bring civil claims for compensation either as part of criminal proceedings<sup>142</sup> or in separate civil litigation, irrespective of the claimant’s nationality.<sup>143</sup> If Austrian courts are unable to establish jurisdiction over a case under the usual rules of Austrian law, the Supreme Court has the authority to order them to assume jurisdiction if Austria is obligated to do so under conventional international law.<sup>144</sup>

In addition, victims of violent crime punishable by more than a six-month prison term, who have permanent residence in Austria and are citizens of a State in the European Economic Area, may seek state compensation for personal injury, though not pain and suffering, under the Victim Compensation Act.<sup>145</sup> Decisions by the administering agency on this matter can be challenged in a civil court.<sup>146</sup>

## CASES

One case has been brought before Austrian courts based on universal jurisdiction against Bosnian Serb Dusko Cvjetkovic for genocide, murder and arson allegedly committed in Bosnia and Herzegovina. The Supreme Court declared the case admissible under the Genocide Convention and Art. 65(1)(2) of the Penal Code.<sup>147</sup>

In August 1999, actions were taken against high Iraqi official Issat Ibrahim Khalil (a.k.a. Al Doori), who was in Austria for medical attention. The U.S. government reportedly requested Austrian authorities to undertake his arrest. He was rumoured to have been the military commander in charge of a 1988 poison gas attack on Kurds, among other crimes. A local Austrian official then filed a complaint with the Public Prosecutor alleging his responsibility in the torture of two Iraqi citizens.<sup>148</sup> The prosecutor reportedly initiated an investigation, but Al Doori left the country a few days later.<sup>149</sup>

In another case, an investigation was instituted but not concluded against a Croatian citizen living in Austria. In 1993, a Croatian court convicted him in absentia for war crimes under the Croatian Penal Code and handed down a ten-year prison sentence. The suspect moved from Austria to Hungary, and in September 2001 was extradited to Croatia, where he is currently serving out his prison sentence. The Austrian case has been suspended.<sup>150</sup>

## ISSUES INVOLVED

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found in REDRESS, “Universal Jurisdiction in Europe: Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide.” 30 June 1999, pp. 16-17.)

<sup>141</sup> Constitution, Art. 9(1).

<sup>142</sup> Criminal Procedure Code, Art. 47(f).

<sup>143</sup> Civil Procedure Code (*Zivilprozeßordnung*), Art. 3.

<sup>144</sup> Jurisdiction Act (*Jurisdiktionsnorm*), Art. 28.

<sup>145</sup> Victim Compensation Act (Verbrechensopfergesetz über die Gewährung von Hilfeleistungen an Opfer von Verbrechen, VOG), Sections 1-2-1 and 9-1.

<sup>146</sup> M.E.I.Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)), Chapter 3, Section 3.6.

<sup>147</sup> Judgment of the Supreme Court, 15Os99/94, 13 July 1994, *supra*. The case eventually failed on the merits, as none of the five prosecution witnesses could identify the defendant. (Republic of Austria v. Cvjetkovic, Landesgericht Salzburg, 31 May 1995, as found in REDRESS, “Universal Jurisdiction in Europe: Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide.” 30 June 1999, p. 17.)

<sup>148</sup> Case report to the Public Prosecutor Vienna concerning Izzat Ibrahim Khalil Al Door, submitted by Peter Pilz, 13 August 1999 (as found in Amnesty International, “Universal Jurisdiction - the duty of states to enact and enforce legislation.” AI Index: IOR 53/002/2001, 1 September 2001.).

<sup>149</sup> As reported in Amnesty International, “Universal Jurisdiction - the duty of states to enact and enforce legislation.” *supra*.

<sup>150</sup> Higher Regional Court Vienna, 22dVR4575/01.

**PRESENCE REQUIREMENT:** As noted above, specific provisions condition the exercise of universal jurisdiction on the presence of the accused in Austrian territory. These concern offences related to hijacking, and offences under Austrian law committed by a foreign national under Penal Code Article 65(1)(2). In contrast, offences that Austria is under an obligation to punish, as provided for in Article 64(1)(6), do not explicitly require presence. However, a particular international obligation to prosecute may be conditioned on the presence of the accused. These provisions do not specify the stage of proceedings at which presence would be required.

Presence during the criminal trial is required except if the alleged offence carries a prison sentence of no more than three years and the defendant was summoned to appear by a court and already underwent a court interrogation. In such circumstances, the trial could proceed even if the defendant fails to appear.<sup>151</sup>

Presence during civil proceedings do not require the defendant's presence as long as s/he has been properly summoned by a court. If the defendant's address is not known and a writ cannot be delivered, a *curator absentis* can be nominated in order to represent the defendant and the case will proceed as though the defendant was present.

**IMMUNITY:** Given that the Constitution provides that, "the generally recognized rules of international law are regarded as integral parts of Federal law",<sup>152</sup> immunities, insofar as they are recognised by the general rules of international law, may apply.

**RELATIONSHIP WITH OTHER JURISDICTIONS:** Austrian courts have interpreted the Genocide Convention and Article 65(1)(2) of the Penal Code as setting out the relationship between territorial jurisdiction and Austrian courts with universal jurisdiction in the context of the prosecution of acts of genocide. In the Cvjetkovic case, the Supreme Court held that although the Genocide Convention establishes that alleged perpetrators of genocide should be tried by courts of the territorial state or by an international tribunal,<sup>153</sup> this rule assumes that the territorial state has a functioning legal system. Since this was not so, and there was not at that time an international tribunal able to handle the facts of the case, the Court held that the purpose of the Convention would be undermined if Austrian courts did not exercise jurisdiction. This appears to establish a hierarchical relationship with respect to the crime of genocide in which the territorial state has priority, while Austrian courts would be able to exercise universal jurisdiction should it be necessary. This was reinforced by the Supreme Court's application of Penal Code Article 65(1)(2). This provision conditions the exercise of Austrian jurisdiction in cases based on the universality principle on an inability to extradite the suspect. The Court accepted that the dysfunctional nature of the territorial state's legal and communication systems satisfied this condition.<sup>154</sup>

**STATUTES OF LIMITATION:** Article 57 of the Penal Code establishes statutes of limitation of between one and twenty years for the prosecution of all offences under Austrian law except those punishable by life imprisonment. Regarding civil claims for damages and torts, the limitation period is three years, starting from the moment of the damage and/or when the perpetrator is known to the victim. If the claim is based on an intentionally committed crime sanctioned with more than one year of imprisonment, the limitation period extends to thirty years.<sup>155</sup>

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<sup>151</sup> Criminal Procedure Code (*Strafprozeßordnung (StPO)*), Art. 427, in conjunction with Penal Code, Art. 17.

<sup>152</sup> Constitution, Art. 9(1).

<sup>153</sup> Genocide Convention, Art. 6.

<sup>154</sup> Supreme Court, Cvjetkovic case, 13 July 1994, *supra*.

<sup>155</sup> Civil Code, Art. 1489.

## BELGIUM

Belgium's well-known universal jurisdiction law was repealed in August 2003 and replaced, in far more restrictive form, with amendments to the Belgian Criminal Code. These amendments, adopted on 1 August 2003, provide Belgian courts with jurisdiction over genocide, crimes against humanity and war crimes,<sup>156</sup> as well as ancillary offences, only if the accused is Belgian or has primary residence in Belgian territory,<sup>157</sup> if the victim is Belgian or had lived in Belgium for at least three years at the time the crimes were committed,<sup>158</sup> or if Belgium is required by treaty to exercise jurisdiction over the case.<sup>159</sup> The previous law (*Loi du 16 juin 1993 relative à la repression des infractions graves aux Conventions Internationales des Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977*), as amended in 1999 and now repealed, had provided for universal jurisdiction over war crimes, crimes against humanity and genocide without any nexus requirements. Certain nexus requirements were added when it was amended in April 2003, though not to the extent that exists under the August 2003 legislation.

Belgian law also provides for jurisdiction over summary and indictable offences under Belgian law that are also offences under the law of the place of commission, as long as the alleged perpetrator has primary residence in Belgian territory, the public prosecutor orders the prosecution, and either the victim or his/her family has filed a complaint or the State where the offence took place has advised Belgian authorities to prosecute.<sup>160</sup>

Belgian courts are also able to exercise universal jurisdiction over certain crimes against minors, where the person is found in Belgium.<sup>161</sup>

To claim compensation for damages, victims can bring a civil action as part of criminal proceedings.<sup>162</sup>

## CASES

Complaints based on universal jurisdiction have been filed against: four Rwandans for genocide; Israeli Prime Minister Ariel Sharon and others for their role in a massacre, carried out by Israeli-allied Christian militia, in the Sabra and Shatila refugee camps; former head of the Palestinian Preventive Security Service Muhammad Dahlan for terrorism and incitement to murder Israelis; former Chadian President Hissène Habré for torture and crimes against humanity during his rule from 1982 to 1990; the oil company TotalFinaElf for its logistical and financial support of the Burmese military, which was responsible for crimes such as forced labour, murder, torture and extrajudicial executions amounting to crimes against humanity in Burma (Myanmar); former Chinese President Jiang Zemin for torture, genocide and crimes against humanity allegedly committed against Falun Gong practitioners; former U.S. President George Bush, Sr., Vice President Dick Cheney, Secretary of State Colin Powell and

<sup>156</sup> Specifically, violations under the Geneva Conventions and both additional protocols, the Rome Statute of the International Criminal Court, and grave breaches as defined in Protocol II to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. (See the Penal Code, as amended by the 5 August 2003 – Law Relating to Grave Breaches of International Humanitarian Law (*5 Août 2003 - Loi relative aux violations graves du droit international humanitaire*), Art. 136quater.

<sup>157</sup> 17 April 1878 – Law Containing the First Title of the Criminal Procedure Code (17 Avril 1878 – Loi contenant le titre préliminaire due Code de procédure pénale), as amended by the 5 August 2003 – Law Relating to Grave Breaches of International Humanitarian Law, *supra*, Art. 6(1<sup>bis</sup>), in conjunction with the amended Penal Code, *supra*, Book II, Title Ibis (Grave Breaches of International Humanitarian Law (*Des violations graves du droit internationale humanitaire*)), which establishes and defines these crimes under Belgian law.

<sup>158</sup> Amended Criminal Procedure Code, *supra*, Art. 10(1bis), in conjunction with the amended Penal Code, *supra*, Book II, Title Ibis.

<sup>159</sup> Amended Criminal Procedure Code, *supra*, Art. 12bis.

<sup>160</sup> Amended Criminal Procedure Code, *supra*, Art. 7. Note that when the offence is committed during war, this rule differs slightly (See Art. 7(2) of the same Code).

<sup>161</sup> Law Containing Provisions Regarding the Repression of Trafficking in Human Beings and of Child Pornography of 13 April 1995 (*Loi du 13 avril 1995 contenant des dispositions en vue de la repression de la traite des êtres humains et de la pornographie enfantine*), Art. 8.

<sup>162</sup> For the specific rights and conditions, see the amended Criminal Procedure Code, *supra*, Arts. 4, 66 and 67, among others.

Gen. Norman Schwarzkopf for war crimes during the first Gulf War; U.S. General Tommy Franks for war crimes under his command during the recent Gulf War; three former Khmer Rouge leaders for genocide and crimes against humanity in Cambodia; as well as against, Congolese Foreign Minister (at the time the case was brought) Yerodia Abdoulaye Ndongbasi, former Iranian President Ali Akbar Hachémi-Rafсанджани, former Chilean President Augusto Pinochet, former Moroccan Interior Minister Driss Basri, President of Rwanda Paul Kagame, President of Congo (Brazzaville) Denis Sassou Nguesso, Iraqi leader (at the time the case was brought) Saddam Hussein, Cuban President Fidel Castro, President of the Ivory Coast Laurent Gbagbo, his predecessor Robert Gueï and two ministers, President of the Central African Republic Ange-Felix Patassé, and Mauritanian President Maaouya Ould Sid'Amhed Taya, among others. Of these, only the four Rwandans have been convicted. Many others never even reached admissibility hearings. A variety of cases are still under investigation.

Most of the above cases, however, can no longer proceed as a result of the August 2003 legislative changes. Nonetheless, the new legislation does include a transitory provision allowing a limited category of advanced cases to continue, including those concerning the Rwandan genocide and the killing of two Belgian priests in Guatemala, as well as the complaints filed against ex-Chadian dictator Hissène Habré, for which a Belgian investigating judge had already gone to Chad in 2002.<sup>163</sup> Two Rwandan accused are currently under arrest in Belgium.

At least one complaint has been filed since the enactment of the August legislation, though it includes links to Belgium. At the end of August 2003 six individuals reportedly lodged a complaint against China's former President Jiang Zemin and other senior Chinese officials. The complainants included a Belgian citizen, a Belgian resident, as well as several foreign nationals and residents.

## **ISSUES INVOLVED**

**PRESENCE REQUIREMENT:** Although Belgian law does not specify any presence requirement for the exercise of universal jurisdiction over genocide, war crimes or crimes against humanity, residence is a prerequisite. In particular, residence of either the alleged perpetrator or the victim in Belgian territory has been established as a condition except where Belgium is required by treaty to exercise jurisdiction over a case.<sup>164</sup> Under the previous 1993 law (as amended in 1999), no link to Belgium was required.<sup>165</sup>

**EXECUTIVE DISCRETION:** Unless the accused is Belgian or has his primary residence in Belgium, the decision as to whether to proceed with any complaint, including whether to initiate an investigation concerning genocide, crimes against humanity or war crimes rests entirely with the state prosecutor.<sup>166</sup> This considerably reduces victims' ability to obtain direct access to the courts, as compared to procedure in place prior to the 5 August 2003 amendments in which victims could be involved as civil parties (i.e. through "*constitution de partie civile*"). For ordinary crimes under Belgian law, an order from the office of the public prosecutor (*ministère public*) is required for prosecutions based on universal jurisdiction to take place, even where the accused has primary residence in Belgium.<sup>167</sup>

**IMMUNITY:** The 1993 law expressly excluded immunity for state officials whereas the current legislation provides that, "[i]n accordance with international law, prosecutions are excluded with respect to:

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<sup>163</sup> 5 August 2003 – Law Relating to Grave Breaches of International Humanitarian Law, Art. 29, §3.

<sup>164</sup> See first paragraph of this chapter for further details.

<sup>165</sup> As confirmed by the Supreme Court (*Cour de Cassation*) in the case against Ariel Sharon and others, 12 February 2003.

<sup>166</sup> The amended Criminal Procedure Code, *supra*, Art. 6(1°bis), 10(1°bis) and 12bis. The prosecutor is obligated to proceed with a case unless it is manifestly unfounded, the alleged offences do not fall within the framework of Book II, Title Ibis of the Penal Code, the case could not be found admissible, or, in the interests of justice and in keeping with Belgium's international obligations, the case should instead be brought in another jurisdiction, where the administration of justice is independent and impartial. According to the same article, it is not possible to challenge the prosecutor's decision.

<sup>167</sup> See paragraph 2 of Article 7.

- foreign heads of State, heads of government and ministers of foreign affairs, during the period in which they are in office, as well as other persons for whom immunity is recognised by international law;
- persons who enjoy immunity, total or partial, based on a treaty to which Belgium is a party.<sup>168</sup>

This shift appears to have resulted from the decision of the International Court of Justice in the case of the Democratic Republic of the Congo v. Belgium which determined, *inter alia*, that foreign ministers, and by inference heads of state and government, enjoy immunity while still in office, except if the State they represent waives their immunity.

**RELATIONSHIP WITH OTHER JURISDICTIONS:** Belgium's minister of justice is required to inform the International Criminal Court (ICC) of cases that the State prosecutor has decided not to pursue in certain specified circumstances.<sup>169</sup> Additionally, the Minister of justice, by a decision of the counsel of ministers, can inform the ICC of acts of genocide, crimes against humanity and war crimes<sup>170</sup> that are before the Belgian judiciary. If the ICC decides to address the acts, Belgian competence over the offences must cease. However, if the court subsequently decides not to proceed, Belgium will again have competence.<sup>171</sup>

**STATUTES OF LIMITATION:** Prosecution of acts of genocide, crimes against humanity and war crimes<sup>172</sup> are not subject to any statute of limitations.<sup>173</sup>

## DENMARK

Danish law provides for universal jurisdiction over crimes that Denmark is obligated to prosecute under conventional international law.<sup>174</sup> This would clearly cover torture under the Convention against Torture<sup>175</sup> and grave breaches of the Geneva Conventions,<sup>176</sup> among other crimes. It is questionable, however, as to whether it would apply to crimes against humanity or genocide. These crimes, or conduct amounting to them, could however be tried under the following, more restrictive provisions:

Section 8(6) of the Penal Code enables Danish courts to exercise universal jurisdiction over any crime under Danish law that carries a prison sentence of more than one year, as long as the act would also be punishable in the territorial state and extradition of the accused for trial in another country has been "rejected". Section 8(6) does not explain the meaning of "rejected," leaving it unclear as to who can reject transfer to another state and whether extradition needs to have been requested and refused as a pre-condition for the exercise of jurisdiction by Danish courts.

Additionally, Section 7 of the Penal Code requires that domestic courts exercise jurisdiction over crimes under Danish law committed abroad by Danish residents, or nationals or residents of Nordic

<sup>168</sup> The amended Criminal Procedure Code, *supra*, Art. 1°bis. (Unofficial translation by the Universal Jurisdiction Information Network.)

<sup>169</sup> For further details, see Articles 10(1°bis) and 12bis of the amended Criminal Procedure Code, *supra*.

<sup>170</sup> As defined in the amended Penal Code, *supra*.

<sup>171</sup> 5 August 2003 – Law Relating to Grave Breaches of International Humanitarian Law, Art. 28.

<sup>172</sup> As defined in Articles 136bis, 136ter and 136quater of the amended Penal Code, *supra*.

<sup>173</sup> The amended Criminal Procedure Code, *supra*, Art. 21.

<sup>174</sup> Penal Code (*Straffeloven*), Section 8(5).

<sup>175</sup> As confirmed by Denmark's first report to the Committee against Torture (CAT/C/5/Add.4): "19. [...] Denmark has, in fulfilment of the requirements as to jurisdiction flowing from article 5 [of the Torture Convention], established jurisdiction on the principle of *aut dedere aut judicare*. Accordingly, Danish criminal jurisdiction can, under section 8 (1) (5), be exercised in respect of criminal offences committed outside Danish territory, regardless of the offender's nationality, where the act is recognized by an international convention in pursuance of which Denmark is under obligation to institute legal proceedings. This provision establishes, *inter alia*, Danish jurisdiction in torture cases regardless of where the act was committed and irrespective of the offender's nationality."

<sup>176</sup> As demonstrated by the Supreme Court's confirmation of Danish jurisdiction in the Sarić case, 15 August 1995.

countries who are present in Denmark, where: 1) the crimes were committed in a territory not belonging to any state and are punishable by more than 4 months of detention; or 2) the crimes were committed in a foreign state and are also punishable under the law of that state. For crimes under Danish law that are committed in territories not belonging to any state and are punishable by a sentence more severe than 4 months of detention, Danish courts would also have jurisdiction if the victims were residents of Denmark.<sup>177</sup> Torture, war crimes and crimes against humanity are not specifically defined as crimes under Danish law, but there are a number of other provisions that may apply to actions constituting these crimes and could therefore be used to prosecute them.<sup>178</sup>

The Military Criminal Code also provides for universal jurisdiction over certain crimes committed during armed conflict by members of foreign military services who are interned in Denmark and other specified persons who may not have Danish nationality.<sup>179</sup>

Civil claims for compensation can be brought either within criminal proceedings or in separate civil actions.<sup>180</sup> In criminal proceedings, the Public Prosecutor is obligated to pursue civil claims lodged by the victim, if this can be done without considerable inconvenience. Where separate civil proceedings are lodged, the victim bears a financial burden, as each party is obligated to pay the expenses of the proceedings. Once a ruling has been made, the losing party is required to reimburse the other side.<sup>181</sup>

Victims can also seek compensation for personal injury from public funds if the victim is a Danish resident or, at the time of the injury, was a civil servant in the Danish foreign service.<sup>182</sup> If there is a criminal prosecution in Denmark for the alleged crime, the victim must make a compensation claim during trial. It is, however, also possible to seek such compensation from public funds even if the perpetrator is unknown or cannot be found.<sup>183</sup>

## CASES

In 1994, Refik Sarić was convicted and sentenced, under Penal Code Art. 8(5), to eight years imprisonment for crimes amounting to grave breaches of the Geneva Conventions committed against Bosnian Muslims.

Former chief of staff of the Iraqi army Nizar al-Khazraji, who had been living in Denmark as an asylum seeker, was charged on 19 November 2002 with grave breaches of the fourth Geneva Convention in relation to crimes allegedly committed against Kurdish civilians during the 1980-1988 Iran-Iraq war. Although he had been placed under house arrest, he managed to escape in March 2003. In response, the Danish authorities issued both a national and international arrest warrant and expressed a willingness to request an extradition in the event that the accused is found abroad.

As of early 2002, an investigation was underway into crimes committed by a Burundian who was seeking asylum in Denmark. The Burundian had told immigration authorities of his crimes, though later denied making such statements. The Director of Public Prosecutions reportedly determined that Denmark could exercise jurisdiction over the matter.

Danish immigration authorities also submitted information to the Director of Public Prosecutions about crimes committed by another asylum seeker – from Sierra Leone – who had admitted his actions during immigration proceedings. However he disappeared before the Director of Public Prosecutions received the information and no investigation had been initiated as of the start of 2002.

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<sup>177</sup> Penal Code, Section 8(3).

<sup>178</sup> For example, murder under Penal Code Section 237, acts of violence under Sections 244 to 248 and rape under Section 216.

<sup>179</sup> Military Criminal Code, Act No. 216 of April 1973, Sections 2, 5(2) and 6.

<sup>180</sup> Administration of Justice Act (*Retsplejeloven*), Section 991.

<sup>181</sup> Administration of Justice Act, Sections 311 and 312.

<sup>182</sup> Consolidated Act on Compensation from the State to Victims of Crimes (*Voldsofferloven*), Section 1(3).

<sup>183</sup> Consolidated Act on Compensation from the State to Victims of Crimes, Section 6.

The only known case concerning a perpetrator not present in Denmark was against former Chilean President Augusto Pinochet. In 1998, 15 Danish residents of Chilean origin lodged a complaint with the Director of Public Prosecutions (*Rigsadvokaten*) against Pinochet for torture and other ill-treatment committed in Chile between 1973 and 1988. They requested that Denmark open an investigation concerning the alleged acts and seek Pinochet's extradition from the United Kingdom with a view to prosecuting him. After consideration, the Director of Public Prosecutions replied in the negative, determining that Denmark did not have jurisdiction over the alleged offences. The Ministry of Justice later confirmed this decision.<sup>184</sup>

As of early 2002, the Danish immigration authorities were reportedly looking into several asylum cases in which the asylum seekers may have committed crimes subject to universal jurisdiction.

Under the legislation for state compensation, very few extraterritorial cases have been brought and all have involved persons with close connections to Denmark.

### ISSUES INVOLVED

**PRESENCE REQUIREMENT:** The defendant must be present for the trial phase of proceedings, as trial in absentia is prohibited in Denmark.<sup>185</sup> Until the trial phase however, prosecutions could theoretically proceed for certain crimes under international treaty law, regardless of the location of the accused, as Section 8(5) of the Penal Code does not establish any further presence requirement. This would arguably apply to grave breaches of the Geneva Conventions of 1949, as the Conventions have been interpreted as creating an obligation to find and bring to trial or extradite persons responsible for grave breaches, irrespective of the accused's location. Furthermore, jurisprudence confirms that once charges have been laid against a suspect present in Denmark, criminal proceedings for grave breaches can continue, at least until the trial phase, even if the accused flees the country (see al-Khazraji case above).

Some obligations to prosecute under international law, however, arise only if the accused is present in the territory of the forum state. This is the case with the Convention against Torture.<sup>186</sup> Indeed, Danish authorities determined that they did not have jurisdiction over torture allegedly committed by former Chilean President Augusto Pinochet, who was in the United Kingdom when jurisdiction was being considered.

**EXECUTIVE DISCRETION:** Prosecutions under Section 8 (4-6) of the Penal Code cannot take place except with the approval of the Minister of Justice, a political appointee.<sup>187</sup> Such discretion may be limited by Section 12 of the same Code, which restricts the application of Section 8 in accordance with "the applicable rules of international law."<sup>188</sup> A decision not to prosecute may not be permitted, for example, where Denmark has a duty to prosecute under international law. This could render discretion in the context of Section 8(5) of the Penal Code meaningless, given that it 8(5) concerns these scenarios in particular.

**IMMUNITY:** As the Penal Code restricts the application of Section 8 in accordance with international law,<sup>189</sup> it appears that immunities would apply in cases based on universal jurisdiction insofar as they are recognised by international law. This was confirmed in one case against the Israeli ambassador to Denmark Carmi Gillon. He had been accused of bearing responsibility for the torture of prisoners allegedly committed by the Israeli Security Service during his term as head of the Service. However, the Minister of Foreign Affairs stated that his diplomatic immunity precluded any prosecution from

<sup>184</sup> Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Fourth periodic reports of States parties due in 2000 (CAT/C/55/Add.2), *Addendum, Denmark*, [4 August 2000], paras. 32-34.

<sup>185</sup> Administration of Justice Act, Section 847.

<sup>186</sup> See Article 5(2).

<sup>187</sup> Circular letter of the Director of Public Prosecution 3/2002 (*Rigsadvokatens Meddelelse 3/2002*), *Kompetenceregler side 3*, Section 1.4.3.1.

<sup>188</sup> Translation found in Amnesty International, "Universal Jurisdiction - the duty of states to enact and enforce legislation," AI Index: IOR 53/002/2001, 1 September 2001, Chapter 4 (Part A).

<sup>189</sup> Section 12.

proceeding against him under the Vienna Convention on Diplomatic Relations. The Justice Ministry confirmed this interpretation on 25 July 2001 and the police closed the case.

Denmark does not have general legislation on state immunities.

**FORUM NON CONVENIENS:** Danish courts do not appear to have the discretion to reject competence over a case based on the doctrine of *forum non conveniens*.

**STATUTES OF LIMITATION:** The Penal Code establishes statutes of limitation of 5 to 15 years for most crimes under Danish law. Crimes such as hijacking and murder however are exempt from prescription periods.<sup>190</sup> With respect to civil litigation, most claims for compensation must be made within five years of the damage taking place.<sup>191</sup> Additionally, applications for compensation from public funds cannot be submitted any later than two years from the date of the offence.

## FINLAND

Under Finnish law, Finnish courts can exercise universal jurisdiction over a broad range of crimes, often without any nexus requirement. Such crimes include war crimes, genocide, torture, counterfeiting, drug-related offences, hijacking and sabotaging aircraft, attacks against internationally protected persons, hostage taking, unlawful handling of nuclear material, unlawful involvement in chemical weapons, and piracy and other unlawful acts against the safety of maritime navigation, as well as perhaps other crimes under international treaties ratified by Finland that carry an obligation to either extradite or prosecute,<sup>192</sup> and terrorism.<sup>193</sup>

Jurisdiction over crimes committed abroad can also be triggered by any offence under Finnish law, as long as the act is also criminalised under the law of the place of commission, if within a state,<sup>194</sup> and the alleged perpetrator either: (1) was at the time of the offence, or is upon the start of trial, permanently resident in Finland, or (2) was apprehended in Finland and at the beginning of trial a citizen or resident of a Nordic country.<sup>195</sup> Finnish courts must also exercise universal jurisdiction over offences under Finnish law, which are also offences in the place of commission, in the context of vicarious administration of justice, where the territorial State has either requested that they do so or requested extradition but extradition was refused.<sup>196</sup>

A civil claim for damages can be brought through separate civil proceedings, regardless of any link between the case and Finland. Victims who are resident in Finland can also seek compensation from the Finnish State for personal injury committed abroad.<sup>197</sup>

## CASES

On 11 September 2003, a group of Falun Gong practitioners resident in Finland filed a criminal complaint against Luo Gan, a Standing Committee member of the Chinese Communist Party's Politburo. During his visit to Finland in early September, Luo Gan was formally notified of the complaint

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<sup>190</sup> Penal Code, Sections 93 - 97.

<sup>191</sup> Act on Limitations (*Forældelsesloven*), Section 1(5).

<sup>192</sup> Finnish Penal Code, as amended by 650/2003, Chapter 1, Section 7(1) and (2), in conjunction with the Decree on the application of Chapter 1, Section 7 of the Penal Code (627/1996, as amended by Decrees 353/1997, 118/1999, 537/2000 and 370/2001), entered into force on 1 September 1996 (see Appendix 7 of the Council of Europe Progress Report by Finland, 11 September 2001).

<sup>193</sup> *Ibid* and Penal Code, Chapter 1, Section 7(3), in conjunction with Chapter 34a.

<sup>194</sup> Penal Code, Chapter 1, Section 11(1). Some exceptions to this rule apply to certain specified crimes, such as sexual offences against children and corruption by public officials, under Paragraph 2 of the same Section.

<sup>195</sup> Penal Code, Chapter 1, Section 6.

<sup>196</sup> Penal Code, Chapter 1, Sections 8 and 11, with the exceptions cited above.

<sup>197</sup> Victim Compensation Act (1973/935).

alleging his responsibility for torture and genocide carried out against Falun Gong practitioners in China. However, he returned to China before any further action was taken by Finnish authorities.

Additionally, one case based on Chapter 1, Section 7 of the Penal Code is now reportedly underway concerning drug offences committed in the Netherlands. However, the case involved defendants who were Finnish nationals or residents.

### **ISSUES INVOLVED**

**PRESENCE REQUIREMENT:** Neither presence nor any other nexus to Finland is required to exercise universal jurisdiction under Chapter 1, Section 7 of the Penal Code. However, as noted above, the application of universal jurisdiction under certain other provisions can be conditioned, *inter alia*, on the alleged perpetrator being apprehended in Finland.<sup>198</sup>

**EXECUTIVE DISCRETION:** According to Chapter 1, Section 12 of the Penal Code, criminal investigations in universal jurisdiction cases can be carried out only under order of the Prosecutor-General, except in certain limited circumstances, such as where the alleged perpetrator was a permanent resident of Finland at the time of the commission of the offence or upon the start of trial and the victim is a Finnish resident. The Penal Code does not specify criteria for the exercise of this discretion.

**IMMUNITY:** The Penal Code does not address immunity for foreign officials. However, as Section 15, Chapter 1 of the Penal Code states that international law binding on Finland can restrict the application of Finnish law, it appears that immunities would apply insofar as they are recognised by the general rules of international law.

**STATUTES OF LIMITATION:** Statutes of limitations apply to many crimes that can trigger the exercise of universal jurisdiction, as specified in Section 1, Chapter 8 of the Penal Code. However, crimes that carry a maximum penalty of life imprisonment, such as genocide, are not subject to prescription.

## **FRANCE**

French law provides for universal jurisdiction over war crimes, genocide and crimes against humanity under limited conditions. In particular, the ability to exercise universal jurisdiction over such crimes appears to remain limited to those specific instances when international conventions/treaties are said to have specific application in France by way of implementing legislation. For example, French courts can exercise their jurisdiction over such crimes when committed either in the former Yugoslavia since 1991 or in Rwanda, or by Rwandan citizens in neighbouring countries, during 1994.<sup>199</sup> They can assert jurisdiction over specified crimes, that France has a duty to prosecute under international treaties, including torture, terrorism, piracy, hijacking, corruption of European public officials and offences committed by means of nuclear materials.<sup>200</sup> Military courts can also hear cases based on a limited form of universal jurisdiction in which the alleged offences were committed in breach of the laws and customs of war during an armed conflict to which France was a party in limited circumstances.<sup>201</sup> Specifically, the offences must have been committed since the start of the armed conflict, by either enemy nationals or those working for the enemy or in the enemy's interests, and in a zone of the war. Such offences also need to have been committed against a French protégé, a soldier serving or having served France, a stateless person or a refugee resident, or against the possessions of such persons.

French courts also have the authority to exercise jurisdiction over any offence punishable under French criminal law committed on or after 1 March 1994 by persons who subsequently became French nationals.<sup>202</sup>

<sup>198</sup> Penal Code, Chapter 1, Section 6(3)(b).

<sup>199</sup> Law no. 95-1 of 2 January 1995 and Law no. 96-432 of 22 May 1996.

<sup>200</sup> Criminal Procedure Code, Article 689 to 689-10.

<sup>201</sup> Code of Military Justice (Code de Justice Militaire), Art. 70.

<sup>202</sup> Penal Code, Art. 113-6 § 3.

Civil compensation for damages can be obtained in the context of criminal proceedings, as the criminal judge addresses both the criminal sanction and the civil damage.<sup>203</sup>

## CASES

Prominent cases brought in France on the basis of universal jurisdiction include those concerning the Rwandan priest, Munyeshyaka, Javor, and the recent case of Ely Ould Dah, a Mauritanian lieutenant. Several other cases involve crimes committed in Rwanda in 1994, including *Dirigeants de la Radio Télévision Libre des Mille-Collines* and *Bucyibaruta* and others.

Other cases, all of which are pending, include: the vice-consul to the Tunisian Consulate in France, Khaled Ben Said, subject of an international warrant since February 2002; the case against the Algerian General, Khaled Nezzar, accused of committing crimes of torture and cruel, inhuman and degrading treatment; the case brought by six Tunisian victims against Tunisian alleged torturers Mohamed Ali Ganzoui, Ali Mansour and Mohamed Ennaceur; and finally the case of "the Disappeared of the Beach," which refers to the massacres allegedly conducted in Brazzaville in 1999 by Denis Sassou Nguesso, President of the Republic of Congo, Pierre Oba, General of the Ministry of the Interior, Public Security and Territorial Administration, Norbert Dabira, Inspector General of the army residing in France, and Blaise Adoua, General, Captain of the Republican guard (a.k.a. the presidential guard). This latter case became the subject of a claim by the Republic of Congo against France at the International Court of Justice.

## ISSUES INVOLVED

### PRESENCE REQUIREMENT:

#### *Investigation*

With respect to crimes that may be prosecuted under Article 689-1 of the Criminal Procedure Code, such as torture, terrorism, piracy and others, presence must be established before a criminal investigation can be opened.<sup>204</sup> The same requirement applies to cases launched on the basis of Law no. 95-1 of 2 January 1995 and Law no. 96-432 of 22 May 1996 concerning, respectively, crimes committed in the former Yugoslavia since 1991 and Rwanda or, by Rwandan citizens, in neighbouring countries, in 1994.

Given that Article 689-1 of the Criminal Procedure Code requires that the suspect "be found" in French territory before the launch of any criminal proceeding, the question arises as to whether this requirement prevents the opening of an investigation when the whereabouts of the suspect are unknown – i.e. when an investigation would be required to determine whether the accused is present. The investigating judge in the Javor case adopted a liberal approach but this was not followed by the Cour de cassation. In the Javor case, the victims did not bring any evidence that the suspects were on French territory when they filed their complaint. The investigating judge held that Article 1 of the Criminal Procedure Code gives victims, along with prosecutors, the right to initiate prosecutions, and that the presence requirement enshrined in Article 689-1 does not prevent victims from exercising that right even when the suspect's whereabouts are not known. Therefore, he concluded, victims can not only refer the matter to a judge, but may also initiate any investigative measures in order to identify and search for the authors of the offence.

However, the Indicting Chamber of the Court of Appeal and the Cour de Cassation both reaffirmed the condition of presence. The Cour de Cassation seemed to assert that the burden of establishing the presence of the suspect in French territory rested on the victims and had to be carried out prior to any complaint.

In theory, the victim could launch a complaint *in rem*, i.e. against an unnamed person (in French: '*plainte contre X*'). This is usually used when the victim does not know who committed the offence. It would allow him/her to automatically shift the burden of finding the offender onto the Public Prosecution.

Even when the suspect has not been found on French territory, it is still possible, with respect to

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<sup>203</sup> Criminal Procedure Code, Art. 3.

<sup>204</sup> Criminal Procedure Code, Art. 689-1; *Cour de cassation, Javor case*.

crimes committed in the former Yugoslavia or Rwanda, to ensure that evidence, such as a medical examination in case of rape, is collected in France and would be available if the suspect is later found there.<sup>205</sup> Similarly, pursuant to Article 77-1 of the Criminal Procedure Code, “if the case calls for findings or technical or scientific examinations which may not be postponed”, the district prosecutor can decide to carry them out.

### **Prosecution**

Once the accused has been found on French territory and a prosecution has been launched, the prosecution may continue even if the accused is no longer there. The case of the Mauritanian lieutenant Ely Ould Dah illustrates this. In June 1999, while he was staying in France, two French organisations, on behalf of two victims, filed a complaint against him on charges of torture. The lieutenant was first imprisoned, and later placed under judicial supervision. In April 2000 he managed to escape to Mauritania. Despite his absence, in May 2001 the investigating judge indicted him and ordered a trial before the *Cour d’Assises*. His lawyers then started a long legal battle to dismiss the case on jurisdictional grounds. Finally, both the Court of Appeal and the *Cour de Cassation* confirmed the decision of the investigating judge to proceed with the case even though the accused remained in Mauritania.

### **Trial**

Trials in absentia (*jugements par contumace*) in universal jurisdiction cases are also possible, subject to the presence of the accused in French territory prior to the beginning of the prosecution.<sup>206</sup> Again, the Ely Ould Dah case provides a good example of its application. In its decision of 23 October 2002, the *Cour de Cassation* declared French courts competent to exercise universal jurisdiction in the case against Ely Ould Dah in respect of alleged acts of torture and complicity of torture committed in Mauritania in the 1990s, according to Articles 689-1 and 689-2 of the Criminal Procedure Code, and decided to send the case to the *Cour d’Assises du Gard* to be judged. This marked the first time that French courts would try someone who is not present at a trial based on universal jurisdiction.

**EXECUTIVE DISCRETION:** In criminal matters, the opportunity to bring a prosecution remains the discretion of the Public Prosecutor.<sup>207</sup> In France, prosecutors are under the authority of the Ministry of Justice.<sup>208</sup> Furthermore, Article 36 of the Criminal Procedure Code allows the Ministry of Justice to issue written instructions to prosecute a particular case or refer the matter to the relevant court, although orders not to prosecute are theoretically not permitted.<sup>209</sup>

However, according to Article 1 of the Criminal Procedure Code (French version), victims can institute a civil action. Such a mechanism obliges the Public Prosecutor to open an investigation and designate an investigating judge, thereby allowing victims to have a direct access to justice. A majority of the pending universal jurisdiction cases have been filed using this mechanism. The French draft law incorporating into national law crimes under the jurisdiction of the International Criminal Court would abrogate “*constitution de partie civile*” so that only the prosecution authorities would decide on the opportunity to prosecute. Victims would only be able to become civil parties after this decision is taken.<sup>210</sup>

<sup>205</sup> Two circulars, namely Circular of 10 February 1995, Art. 2.2.1. (published in the *Journal Officiel*, 21 February) and Circular of 22 July 1996, Art. 1 (*Journal Officiel*, 31 August), edited after the adoption of Law no. 95-1 of 2 January 1995 and Law no. 96-432 of 22 May 1996, respectively, allow during preliminary investigations the interview and the medical examination of victims who have taken refuge in France, even if the suspect has not yet been found in the territory of the Republic. Such measures are considered as “conservatory measures” (“*mesures conservatoires*”) – i.e. measures taken to preserve a right or a property, in the event of later prosecutions.

<sup>206</sup> General rules governing trials in absentia are set down in Article 627-21 (definition) and Articles 628 to 641 of the Criminal Procedure Code.

<sup>207</sup> Criminal Procedure Code, Art. 40.

<sup>208</sup> Ordonnance n° 58-1270 of 22 December 1958, Art. 5.

<sup>209</sup> See Rep. Min 4 Sept 1995, JOAN (*Journal Officiel de l’Assemblée Nationale*) Q 1995, p. 3802. For further information on the links between the Public Prosecutor’s Office and the Executive see, for example, ELLIOTT Catherine, *French Criminal Law*, Willan Publishing, 2001, Chap. 2, pp. 23-32.

<sup>210</sup> Avant-projet de loi portant adaptation de la législation française au Statut de la Cour pénale internationale et modifiant certaines dispositions du code pénal, du code de justice militaire, de la loi du 29 juillet 1881 sur la liberté de la presse et du code de procédure pénale, June 2003. See, also Commission Nationale Consultative des Droits de l’Homme, “Avis sur l’avant-projet de loi portant adaptation de la législation française au Statut de la Cour pénale internationale,” 15 May 2003.

**IMMUNITY:** France recognises immunity for foreign heads of state while in office. In a recent ruling in the case against Libyan President and Colonel Muammar Khadafi, the *Cour de Cassation* stated that customary international law bars prosecutions of sitting foreign heads of state before the criminal courts of a foreign country, when no contrary international provisions bind the involved parties. In addition, in response to an application for the arrest of Zimbabwean President Robert Mugabe, when he was visiting Paris, a French court reportedly ruled that Mugabe holds immunity from prosecution as a sitting head of state.

**RELATIONSHIP WITH OTHER JURISDICTIONS (INCLUDING ICC):** Chapter II of Law no. 95-1 of 2 January 1995 concerning crimes committed in the former Yugoslavia addresses the relationship between French jurisdiction and that of the International Criminal Tribunal for the former Yugoslavia (ICTY) when each seeks to exercise jurisdiction over the same case. A request by the ICTY for the cessation of French jurisdiction essentially requires automatic implementation by the French judiciary, assuming the proper procedures have been followed and the case falls within the ICTY's jurisdictional mandate. One particular provision in Chapter II – i.e. Article 6 – establishes the relationship between a civil action under this law before French courts and a criminal proceeding before the ICTY.

Law no. 96-432 of 22 May 1996, concerning offences committed in Rwanda, or by Rwandans in neighbouring countries, in 1994, incorporates the same provisions.

## GERMANY

German law expressly provides for the exercise of universal jurisdiction over genocide, crimes against humanity and war crimes.<sup>211</sup> Additional crimes that can trigger universal jurisdiction in Germany include serious offences involving nuclear energy, explosives or radiation, assaults against air or sea traffic, trafficking in human beings, unauthorised distribution of narcotics, dissemination of pornographic writings, counterfeiting, subsidy fraud, and acts committed abroad if they are prosecutable on the basis of a binding international agreement.<sup>212</sup> German courts may also exercise universal jurisdiction over other crimes, including ordinary crimes under national law (e.g. murder, assault), which were carried out by someone who concomitantly committed one of the above acts.<sup>213</sup> Furthermore, when an act is prosecutable under a binding international agreement but is not defined as a crime in German law, it may be possible to exercise universal jurisdiction over any crime under German law that constitutes the said act (e.g. murder constituting a war crime or genocide).<sup>214</sup>

German law also expressly provides for jurisdiction over all crimes defined under German criminal law either where the perpetrator subsequently acquired German citizenship or, on the basis of the principle of vicarious administration of justice, where the perpetrator was a foreigner apprehended in Germany and could not be extradited for trial.<sup>215</sup>

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<sup>211</sup> Section 1, Code of Crimes Against International Law (Völkerstrafgesetzbuch), passed on 30 June 2002. No prosecutions have yet been initiated under this new legislation, although several universal jurisdiction cases had been lodged and declared admissible under Germany's previous universal jurisdiction legislation – Article 6, Criminal Code (Strafgesetzbuch). This provided for universal jurisdiction over genocide and “acts which, on the basis of international agreement binding on the Federal Republic of Germany, shall also be prosecuted if they are committed abroad”, among other crimes. German courts exercised such jurisdiction in the Djajic and Jorgic cases, among others.

<sup>212</sup> Section 6, Criminal Code.

<sup>213</sup> In the Jorgic case, the Federal High Court held that because it had jurisdiction over the crime of genocide it could “annex” jurisdiction over the concomitantly committed crime of murder. (Section 1, Judgment, Jorgic case, Federal High Court, 30 April 1999.) Subsequent to the introduction of the Code of Crimes, it would seem that such annexation remains possible as long as the *actus reus* of the crime being annexed is covered by the principal crime.

<sup>214</sup> For example, due to the fact that grave breaches did not exist per se as crimes under German domestic law, they were instead prosecuted as crimes under national law such as murder. (See Judgment, Djajic case, High Court of Bavaria, 23 May 1997.)

<sup>215</sup> Article 7(2), Criminal Code. The High Court of Bavaria used this provision to further support its exercise of jurisdiction, *inter alia*, over murder in the Djajic case (Judgment, Djajic case, High Court of Bavaria, 23 May 1997).

Civil compensation can be sought in several ways: within criminal proceedings, separate civil litigation or victim-offender mediation. Before criminal courts, civil claims can be brought for any of the above crimes at any time during criminal proceedings,<sup>216</sup> although the court may reject the application for a joint procedure without providing reasons and appeals are not permitted.<sup>217</sup> Compensation may only be awarded if the defendant is found guilty or sentenced to a special measure,<sup>218</sup> such as a provisional stay of proceedings by the court on condition that the alleged perpetrator compensates the victim.<sup>219</sup> In practice, very few civil claims are brought in this manner, as criminal courts tend to prefer not to rule on civil matters.

Victims can seek compensation through separate civil proceedings, as long as the defendant has either residence<sup>220</sup> or perhaps assets<sup>221</sup> in Germany. The ability to base the declaration of competence on the presence of assets alone is unclear; while the German Code of Civil Procedure recognises the presence of assets as a sufficient nexus to Germany, a court ruled in 1991 that it is not.<sup>222</sup> Aside from residence, what would suffice as a link to Germany remains unclear.

Compensation through victim-offender mediation was introduced in Germany in 1994.<sup>223</sup>

## CASES

Cases brought before German courts on the basis of universal jurisdiction include those against Novislav Djajic, Maksim Sokolovic, Djuradj Kusljic and Nikola Jorgic – all of whom were found guilty – among others. Civil claims did not form part of the criminal proceedings.

## ISSUES INVOLVED

**STATE SOVEREIGNTY:** Before the Code of Crimes Against International Law was passed (which expressly states that it shall apply to acts which bear no relation to Germany), German courts adhered to the principle of non-intervention (“*Nichteinmischung*”) requiring an “inland link” (“*inländische Anknüpfungspunkt*”) between the accused and Germany before jurisdiction could be exercised in order to respect the principle of territorial sovereignty.<sup>224</sup>

The minimum requirements for establishing an “inland link” were unclear, as courts have tended to consider the sum of all existing links in the particular case when rendering their decisions rather than specifying any minimum.<sup>225</sup>

With the introduction of the Code of Crimes against International Law, this rule has changed with respect to genocide, war crimes and crimes against humanity. Section 1 of the Code expressly states that the Code shall apply even to acts that bear “no relation to Germany”, thus clarifying that the inland

<sup>216</sup> Criminal Procedure Code (*Strafprozeßordnung*, or *StPO*), Sections 403-406c.

<sup>217</sup> Criminal Procedure Code, Sections 404-5.

<sup>218</sup> See Section 7.2 under guideline D.10 and D.11.

<sup>219</sup> Criminal Procedure Code, Section 153 a. The prosecutor’s office has responsibility for enforcing the compensation order.

<sup>220</sup> Civil Procedure Code (*Zivilprozeßordnung*), Section 12.

<sup>221</sup> Civil Procedure Code, Section 23.

<sup>222</sup> Bundesgerichtshof, Judgment, 2 July 1991, (XI ZR 206/90) = NJW 1991, 3092 (3093 ff.).

<sup>223</sup> M.E.I.Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)), Chapter 9, Section 9.

<sup>224</sup> See, *inter alia*, Judgment, Jorgic case, Duesseldorf Court, and Judgments, Federal High Court, 20 October 1976, 8 April 1987, 13 February 1994, 11 December 1998 and 11 February 1999.

<sup>225</sup> See, for example, Judgment, Jorgic case, Federal High Court, 30 April 1999; Judgment, Tadic case, Federal High Court, 13 February 1994; Judgment, Djajic case, Federal High Court; Judgments, Federal High Court, 20 October 1976, 8 April 1987, 11 December 1998 and 11 February 1999.

link requirement no longer applies. However, the requirement may or may not still be applicable to the exercise of universal jurisdiction over crimes that remain outside the scope of the Code.

#### **PRESENCE REQUIREMENT:**

##### **Genocide, War Crimes and Crimes against Humanity**

Prior to the enactment of the Code of Crimes Against International Law, the ability of German courts to exercise jurisdiction over an extraterritorial crime of genocide, war crimes or crimes against humanity could have hinged on the presence or residence of the accused in Germany when no other link to Germany could satisfy the “inland link” requirement.

With the introduction of the Code of Crimes, there is no requirement that someone suspected of genocide, war crimes or crimes against humanity be present on German territory for an investigation to commence. However, prosecution might not proceed if the suspect is neither in Germany nor likely to be present in Germany, depending on the decision of the prosecutor.<sup>226</sup>

##### **Serious Offences involving Human Trafficking, Other Acts Prosecutable on the Basis of Binding International Agreement, etc.**

Cases involving offences that fall within the application of Section 6 of the Criminal Code may still need to demonstrate the existence of an “inland link” for German courts to accept jurisdiction. Such a link could be satisfied by the presence or residence of the accused in Germany. However, the absence of any so-called “inland link” requirement in the new Code of Crimes against International Law may signal a shift away from this approach.

**EXECUTIVE DISCRETION:** The Public Prosecution Service (*Staatsanwaltschaft*) is required to “take action in the case of all criminal offences which may be prosecuted, provided there are sufficient factual indications”.<sup>227</sup> However, Section 153 of the Code of Criminal Procedure identifies the conditions under which the public prosecution office can (though it is not obliged to) dispense with a case. These conditions appear to allow for the possibility of dispensing with a prosecution on political grounds.

**IMMUNITY:** Germany’s Judiciary Act (*Gerichtsverfassungsgesetz*) recognises the general rules of public international law on sovereign immunity.<sup>228</sup>

**FORUM NON CONVENIENS:** German law of civil procedure does not recognise the doctrine of *forum non conveniens*.

**RELATIONSHIP WITH OTHER JURISDICTIONS:** The principle of residual jurisdiction may be applicable in civil suits in cases of negative conflict of jurisdiction – that is, cases where no other State exercises jurisdiction and German statutes do not establish a basis for civil jurisdiction. However, there does not appear to be any case law on the subject.

**VICTIMS’ ACCESS TO JUSTICE:** On paper, victims hold a strong position in German criminal law and procedure. In principle, victims can participate in a number of ways, such as by joining the proceedings as an auxiliary prosecutor or by bringing a civil claim for damages in adhesion to criminal proceedings.<sup>229</sup> However, in practice victims face numerous obstacles. Access to information depends on the victim’s role in the proceedings. The procedure of adhering civil claims to criminal proceedings often proves unsuccessful for victims, perhaps due to lack of information and support in preparing the claim, resistance among judges and prosecutors to dealing with civil claims during criminal proceedings, the fact that lawyers can earn more by bringing a claim in a civil court than a criminal

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<sup>226</sup> Code of Crimes against International Law, Section 153f, *supra*.

<sup>227</sup> Section 152(2), Code of Criminal Procedure. (Unofficial translation found on the German Ministry of Justice website, [http://www.bmj.bund.de/eng/service/federal\\_law/10000013/?sid=03664838178c2f6671bc18df34d04914](http://www.bmj.bund.de/eng/service/federal_law/10000013/?sid=03664838178c2f6671bc18df34d04914).)

<sup>228</sup> Section 20(2).

<sup>229</sup> Criminal Procedure Code, Section 403 ff.

one. Enforcement is also usually left to the victim. Victims also rarely obtain compensation through the victim-offender mediation procedure.<sup>230</sup>

## GREECE

Greek law provides for universal jurisdiction over piracy, counterfeiting, slave-trading, human trafficking aimed at “debauchery”, drug trafficking, prostitution, pornography and “any other crime for which specific provisions or international conventions signed and ratified by the Greek state provide for the application of Greek criminal legislation.”<sup>231</sup> This latter rule, in conjunction with the Constitution provision establishing that “[t]he generally recognised rules of international law, as well as international conventions [...] shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law [...]”, appears to require the exercise of universal jurisdiction by Greek courts over crimes such as grave breaches of the Geneva Conventions and torture under the Convention against Torture, among others.<sup>232</sup> Torture has been defined as a crime under domestic law.

Although Greek law does not provide for universal jurisdiction over crimes against humanity per se, certain conduct amounting to crimes against humanity that is both defined under Greek law and over which universal jurisdiction can be exercised, such as torture<sup>233</sup> and slave-trading,<sup>234</sup> can be prosecuted in Greece. Yet, it does not appear that one could be charged with crimes against humanity itself. The same is true of genocide.

Criminal jurisdiction can also be exercised over any act committed abroad that is defined as a felony or misdemeanor under Greek law as long as the alleged perpetrator was a Greek citizen either upon the commission of the offence or subsequently and the offence is also punishable under the law of the state where the offence was committed or the offence was committed in a country where all State structures have collapsed. In the latter circumstance, the double criminality rule does not apply.<sup>235</sup>

Greek criminal law establishes the right of every torture victim to seek compensation.<sup>236</sup> Victims can bring civil claims for damages for torture and other crimes noted above either through separate civil litigation<sup>237</sup> or within criminal proceedings.<sup>238</sup> Victims can choose to bring all or only part of their claims in criminal proceedings.<sup>239</sup> Additionally, claims that are brought before civil courts can be discontinued

<sup>230</sup> For further information on victim’s access to justice, see M.E.I.Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)), Chapter 9.

<sup>231</sup> Penal Code, Article 8. (Translation by Amnesty International in its report, “Universal Jurisdiction - the duty of states to enact and enforce legislation,” AI Index: IOR 53/002/2001, 1 September 2001.)

<sup>232</sup> Constitution, Art. 28(1). (Translation found on the Ministry of Justice website <http://www.ministryofjustice.gr/>.) Also see, initial report of Greece to the Committee against Torture (CAT/C/7/Add.8), para. 32: “As of the date of publication in the Official Journal of Act No. 1782/88 on the ratification of the Convention against Torture, all persons subject to Greek law as well as law-enforcement agencies are under an obligation to comply with its provisions.” And para. 33: “The Convention cannot be repealed, amended, restricted or changed by any law because, once an international convention has been ratified, it takes precedence over any conflicting legal provision, in accordance with article 28 of the 1975 Greek Constitution”, as quoted by Amnesty International in its report, *supra*. Courts have abided by this provision (see Judgment 1574/1999, Court of Appeal of Athens, and Judgment 286/1999, Court of Appeal of Piraeus, which held that Article 14 (7) of the International Covenant on Civil and Political Rights prevails over contrary provisions in Article 8 of the Penal Code). It should also be noted that the same Article 28 sets reciprocity as a condition for the enforcement of international treaties on foreign nationals. However, it is understood that the condition of reciprocity does not apply with regard to human rights treaties.

<sup>233</sup> Defined in Arts. 137A to D of the Penal Code.

<sup>234</sup> Defined in Art. 323 of the Penal Code.

<sup>235</sup> Penal Code, Art. 6.

<sup>236</sup> Penal Code, Art. 137D.

<sup>237</sup> Civil Code, Arts. 914-938.

<sup>238</sup> Criminal Procedure Code, Arts. 63-70, 82-88, 108, 468, 480 and 488.

and then brought within criminal proceedings against the same defendant.<sup>240</sup> Where a civil claim is brought before a criminal court and a final decision is handed down, civil claims for that crime may no longer be initiated through civil proceedings unless the claimant, during the criminal proceedings, had explicitly retained the right to seek further damages through separate civil litigation.<sup>241</sup> The person requesting civil or criminal proceedings is required to pay certain costs of the proceedings. They may be reimbursed depending on the outcome of the trial.

### **ISSUES INVOLVED**

**PRESENCE REQUIREMENT:** Presence prior to trial does not appear to be required in universal jurisdiction cases.

**EXECUTIVE DISCRETION:** The Public Prosecutor has discretion, though based on very strict criteria, in deciding whether or not to initiate proceedings. S/he can decide not to prosecute only if the alleged facts do not constitute a crime, do not satisfy the elements of a crime or are virtually impossible to verify. Any decision not to prosecute is subject to appeal.<sup>242</sup> The Minister of Justice has the authority, upon prior decision of the Council of Ministers, to defer the initiation of criminal proceedings or to suspend such proceedings in the case of political crimes or crimes which may seriously affect the international relations of the country. Suspension of criminal proceedings may take place no later than the initiation of discussion of the case in court.<sup>243</sup> In the context of civil proceedings, the authorisation of the Minister of Justice is required for the execution of a judgment against a foreign state.<sup>244</sup>

**IMMUNITY:** As Article 28(1) of the Constitution provides that international law prevails over domestic law, it appears that immunities would apply insofar as they are recognised by international law. With respect to state immunity in civil claims, a decision by Greece's Special High Court (*Anotato Eidiko*) in a case against the Federal Republic of Germany demonstrated that states enjoy immunity before Greek courts, even where the damages occurred in Greece.<sup>245</sup>

**STATUTES OF LIMITATION:** Foreign statutes of limitation cannot bar prosecutions under Article 8 of the same Code, according to Article 9(2) of the Penal Code. However, it appears that foreign prescription periods would apply to crimes perpetrated by persons who were at the time or subsequently became Greek citizens – i.e. crimes prosecuted under Article 6 of the Penal Code.<sup>246</sup>

## **IRELAND**

Under Irish law, Irish courts can exercise universal jurisdiction over, *inter alia*, grave breaches of the Geneva Conventions of 1949 and their first additional protocol<sup>247</sup> and torture.<sup>248</sup>

Victims can also seek civil remedies through criminal proceedings for damages suffered as a result of these crimes, even when the prosecution is based on universal jurisdiction.<sup>249</sup> There are two possible

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<sup>239</sup> For further information, see M.E.I.Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)), Chapter 10, Section 7.2.

<sup>240</sup> Criminal Procedure Code, Art. 66.

<sup>241</sup> Criminal Procedure Code, Art. 67.

<sup>242</sup> See for example Criminal Procedure Code, Arts. 43(1), 47 and 48.

<sup>243</sup> Criminal Procedure Code, Art. 30(2).

<sup>244</sup> Civil Procedure Code, Art. 923.

<sup>245</sup> Special High Court, Germany case, June 2002. The ruling was specific to damage caused by foreign (i.e. German) armed forces operating in Greece, whether during armed conflict or peacetime.

<sup>246</sup> Penal Code, Art. 9.

<sup>247</sup> Geneva Conventions Act, 1962, as amended by the Geneva Conventions (Amendment) Act 1998, Section 3.

<sup>248</sup> Criminal Justice (United Nations Convention Against Torture) Act, 2000, Sections 2 and 3.

procedures for obtaining a compensation order from the court, though both are conditioned on the defendant being convicted: 1) the victim can take the initiative by applying to the court for compensation; or 2) the court can of its own initiative order the defendant to pay compensation. However, if a court chooses not to award compensation, it is under no obligation to explain its reasons.<sup>250</sup> A civil claim for damages can also be brought through the civil courts.

Compensation may also be awarded through the Scheme of Compensation for Personal Injuries Criminally Inflicted. This state compensation is provided as a measure of charity; victims do not have a legal right to it.<sup>251</sup> There have, however, been reports that the Scheme has become virtually inactive during the past few years.<sup>252</sup>

### **ISSUES INVOLVED**

**EXECUTIVE DISCRETION:** Prosecutions for grave breaches of the Geneva Conventions and Protocol I cannot be instituted without the consent of the Attorney General.<sup>253</sup> Additionally, the Geneva Conventions Act specifies that the Minister of Foreign Affairs has sole authority to determine whether the Act is applicable to a particular case.<sup>254</sup> With respect to torture and ancillary offences, the consent of the Director of Public Prosecutions is required in order to proceed with a prosecution beyond the initial charge and arrest.<sup>255</sup> The DPP, theoretically independent from the Executive, has the discretion to decide whether to prosecute an indictable offence, and must make this decision on the basis of the sufficiency of the available evidence and the public interest.

**IMMUNITY:** The Irish Constitution provides that the “State may exercise extra-territorial jurisdiction in accordance with the generally recognised principles of international law.”<sup>256</sup> It would therefore appear that Irish courts could apply immunities insofar as they are recognised under these generally recognised principles.

**STATUTES OF LIMITATION:** Claims for compensation to the Criminal Injuries Compensation Tribunal should generally be made within three months from when the injury was inflicted. However, there is flexibility for exceptional circumstances.

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<sup>249</sup> Criminal Justice Act, 1993, Section 6(1).

<sup>250</sup> M.E.I. Brien and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)), Chapter 12: Ireland, Section 5.2.

<sup>251</sup> See Brien and Hoegen, *Victims of Crime in 22 European Criminal Justice Systems, supra*, Chapter 12: Ireland, Section 3.7.

<sup>252</sup> For further information on the various means of obtaining compensation for victims, see Brien and Hoegen, *Victims of Crime in 22 European Criminal Justice Systems, supra*, Chapter 12: Ireland.

<sup>253</sup> Under the amended Geneva Conventions Act, *supra*, Section 3(3).

<sup>254</sup> Amended Geneva Conventions Act, *supra*, Section 5.

<sup>255</sup> Criminal Justice (United Nations Convention Against Torture) Act, 2000, Sections 5(2).

<sup>256</sup> Art. 29(8).

## ITALY

Italian courts can exercise universal jurisdiction over torture,<sup>257</sup> any crime under Italian law that carries a prison term of at least three years,<sup>258</sup> and “any other crime for which special legal provisions or international agreements specify that Italian criminal law applies”.<sup>259</sup> There is debate, however, as to whether the latter can be applied without the incorporation into Italian law of the relevant jurisdictional provisions.<sup>260</sup>

Somewhat more limited jurisdictional provisions can also be found in military statutes. For example, the 1941 Wartime Military Criminal Code (*Codice Penale Militare de Guerra*), as amended in 2002, establishes that, “[t]he provisions of Title IV [on offences against war laws and usage], Book Three [on military offences in particular] of this code concerning offences committed against wartime laws and customs, also apply to military personnel and any other member of the enemy armed forces when any of these offences have been committed to the detriment of [...] an allied state or a subject thereof.”<sup>261</sup> The Code defines certain war crimes, including grave breaches of the Geneva Conventions among others.

Civil claims for compensation and restitution can be brought either in the context of criminal proceedings<sup>262</sup> or separately before civil courts. The relationship between these two types of proceedings is set out in Article 75 of the Criminal Procedure Code.

### ISSUES INVOLVED

**PRESENCE REQUIREMENT:** In order to exercise universal jurisdiction over torture under Law No. 498 of 3 November 1988, the perpetrator would need to be present in Italian territory and not to be extradited.<sup>263</sup> Similarly, the ability to exercise universal jurisdiction over any crime under Italian law that carries a prison sentence of at least three years is restricted by a requirement that the alleged perpetrator be present in Italian territory and that no extradition to the territorial or home state has been ordered.<sup>264</sup> In contrast, no presence requirement is stipulated for the prosecution of crimes that Italy is obligated to prosecute under international agreements in accordance with Art. 7(5) of the Penal Code.

**EXECUTIVE DISCRETION:** Generally, the Public Prosecutor (*Pubblico Ministero*) is obligated to exercise criminal action once a criminal complaint has been lodged and then to submit the case to an investigating judge for prosecution, unless Italian courts would not have jurisdiction over the facts or the allegations are manifestly unfounded.<sup>265</sup> Decisions not to prosecute can be challenged.<sup>266</sup> To prosecute someone for torture under Art. 3(1)(c) of Law No. 498 of 3 November 1988, or for ordinary

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<sup>257</sup> Law No. 498 of 3 November 1988 (*Legge 3 novembre 1988, n.498*), Art. 3(1)(c); and Penal Code, Art. 10. In its initial report to the Committee against Torture, Italy noted that both of these provisions cover, at least in part, the obligation established in Art. 5(2) of the Torture Convention. Torture is not defined as a crime, however, under Italian law and therefore would need to be prosecuted as ordinary crimes under Italian law that amount to torture, as the Italian Government has explained in its reports to the Committee against Torture. (Italy’s initial state party report (CAT/C/9/Add.9), para. 36; as reiterated in *Third periodic reports of States parties due in 1998: Italy, 15/12/98* (CAT/C/44/Add.2), 15 December 1998, para. 9.) As of today, however, there has been no jurisprudence or pre-trial proceedings in this regard.

<sup>258</sup> Penal Code, Art. 10. Genocide, for example, has been criminalized in Italian law and carries a prison sentence of more than three years (Law No. 962 of 9 October 1967 (*Legge 9 ottobre 1967, n.962*)).

<sup>259</sup> Penal Code, Art. 7(5).

<sup>260</sup> See, for example, Amnesty International, “Universal Jurisdiction - the duty of states to enact and enforce legislation,” AI Index: IOR 53/002/2001, 1 September 2001, Chapter 4, Part B, p. 10.

<sup>261</sup> Art. 13. (Translation found at [http://www.giustiziamilitare.difesa.it/legislazione/cpmg/en/libroprimo\\_en.shtml](http://www.giustiziamilitare.difesa.it/legislazione/cpmg/en/libroprimo_en.shtml)).

<sup>262</sup> Penal Code, Art. 185; and Criminal Procedure Code, Arts. 74, 90, 101, 394, 396.

<sup>263</sup> Art. 3(1)(c).

<sup>264</sup> Penal Code, Art. 10(1) and (3).

<sup>265</sup> Constitution, Art. 112 (“The public prosecutor has the duty to initiate criminal proceedings.”).

<sup>266</sup> Criminal Procedure Code, Arts. 408 to 410.

crimes under Penal Code Art. 10, the Minister of Justice must first issue a request for the prosecution to take place.

**STATUTES OF LIMITATION:** Statutes of limitation are laid out in Articles 157 to 161 of the Penal Code.

## LUXEMBOURG

Luxembourg law provides for universal jurisdiction over genocide,<sup>267</sup> grave breaches of the 1949 Geneva Conventions,<sup>268</sup> certain offenses committed in wartime that are not justified by the laws and customs of war,<sup>269</sup> torture (either if the victim resides in Luxembourg<sup>270</sup> or when “an application for extradition has been submitted, but the person concerned has not been extradited”<sup>271</sup>), war crimes, genocide and crimes against humanity committed during certain periods in the former Yugoslavia and in Rwanda and neighbouring countries,<sup>272</sup> and offences involving perjury (faux serment and faux témoignage) and bribery of trial participants.<sup>273</sup> Furthermore, Luxembourg law provides for universal jurisdiction over certain other war crimes, rape, crimes against public decency (pudeur), certain offences against minors, and certain offences involving prostitution, counterfeiting of currency or falsification of official documents.<sup>274</sup>

Civil claims for compensation for the above crimes can be sought either within criminal proceedings or separately.<sup>275</sup>

## CASES

In 1998, Chilean refugees in Luxembourg filed a complaint against former Chilean President Augusto Pinochet following his arrest in London. The investigating judge ruled that Luxembourg law at the time did not provide for jurisdiction over the alleged facts.<sup>276</sup>

<sup>267</sup> Law of 8 August 1985 Concerning the Repression of Genocide (8 août 1985 – Loi portant répression du génocide), Art. 6.

<sup>268</sup> Law of 9 January 1985 Concerning the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949 (Loi du 9 janvier 1985 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949) (Mém. A N° 2 du 25 janvier 1985, p. 24), Art. 10.

<sup>269</sup> Law of 2 August 1947 Concerning the Repression of War Crimes (Loi du 2 août 1947 sur la répression des crimes de guerre) (Mém. 1947. 755 - Pas. 1947. 500), Art. 1. This provides jurisdiction to War Crimes Courts (*Cour[s] de crimes de guerre*).

<sup>270</sup> Code of Criminal Investigation (Code d’Instruction Criminelle), Art. 7-3, in conjunction with Penal Code, Arts. 260-1 to 260-4.

<sup>271</sup> Code of Criminal Investigation, Art. 7-4, in conjunction with Penal Code, Arts. 260-1 to 260-4. (Translation found in *Third periodic reports of States parties due in 1996: Luxembourg* (CAT/C/34/Add.14), 19 February 2001, para. 21.)

<sup>272</sup> Law of 18 May 1999 Introducing Certain Measures for Facilitating Cooperation with: 1) the International Tribunal created by the United Nations Security Council in its Resolution 827 of 25 May 1993 for the judgment of persons presumed responsible for serious violations of international humanitarian law committed on the territory of the former Socialist Federal Republic of Yugoslavia since 1991 2) the International Tribunal created by the United Nations Security Council in its Resolution 955 of 8 November 1994 for the judgment of persons presumed responsible for acts of genocide or other serious violations of international humanitarian law committed on the territory of Rwanda and Rwandan citizens presumed responsible for such acts or violations committed on the territory of neighbouring States, between 1 January and 31 December 1994 (Loi du 18 mai 1999 introduisant certaines mesures visant à faciliter la coopération avec: 1) le Tribunal international créé par le Conseil de Sécurité des Nations Unies dans sa Résolution 827 du 25 mai 1993 pour le jugement des personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l’ancienne République fédérative socialiste de Yougoslavie depuis 1991 2) le Tribunal international créé par le Conseil de Sécurité des Nations Unies dans sa Résolution 955 du 8 novembre 1994 pour le jugement des personnes présumées responsables d’actes de génocide ou d’autres violations graves du droit international humanitaire commises sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d’Etats voisins, entre le 1er janvier et le 31 décembre 1994), Art. 2.

<sup>273</sup> Code of Criminal Investigation, Art. 7-1, in conjunction with Penal Code, Arts. 221bis and 223.

<sup>274</sup> Code of Criminal Investigation, Art. 7(3) and (4) and Art. 5-1, in conjunction with Penal Code, Arts. 163, 169, 170, 177, 178, 187-1, 192-1, 192-2, 198, 199, 199bis, and 368 to 382.

<sup>275</sup> Code of Criminal Investigation, Art. 3.

<sup>276</sup> Réquisitoire du 19 novembre 1998 du parquet du tribunal d’arrondissement de Luxembourg dans l’affaire de la plainte contre Augusto Pinochet, n° 18077/98/CD, reprinted in *Annales du Droit Luxembourgeois* 393 (1999).

## ISSUES INVOLVED

**PRESENCE REQUIREMENT:** The 9 January 1985 law that provides for universal jurisdiction over grave breaches of the Geneva Conventions specifies that presence is not required: “Every individual, who has committed, outside the territory of the Grand Duchy, a violation covered by the present law, can be prosecuted in the Grand Duchy even if he is not found here.”<sup>277</sup> To prosecute someone in Luxembourg for war crimes, crimes against humanity or genocide that fall within the jurisdictions of the International Criminal Tribunals for Rwanda or the former Yugoslavia, however, the alleged perpetrator would need to be found in Luxembourg.<sup>278</sup> Prosecutions for other acts of genocide or for certain offences committed in wartime that are not justified by the laws and customs of war, require that the suspect be either found in Luxembourg territory, found in an “enemy country” (*pays ennemi*), or extradited to Luxembourg.<sup>279</sup> Prosecution for a limited number of war crimes and certain crimes involving the falsification of documents or currency requires simply that the suspect’s whereabouts be known, whether s/he is in Luxembourg or abroad.<sup>280</sup> Jurisdiction over crimes such as falsifying documents and counterfeiting currency can also be conditioned on the presence of the alleged perpetrator in Luxembourg territory.<sup>281</sup> Prosecutions for torture can proceed as long as one of two possible criteria are satisfied, both of which imply the perpetrator’s presence at some stage: either 1) the victim is resident in Luxembourg;<sup>282</sup> or 2) extradition of the alleged perpetrator must have been requested but not granted.<sup>283</sup> Aside from presence, certain residence requirements apply to civil claims when brought as part of criminal proceedings.<sup>284</sup> With respect to civil claims brought separately, generally the tribunal where the defendant is resident has competence to hear the case.

**RELATIONSHIP WITH OTHER JURISDICTIONS:** Article 12 of the 1985 law concerning grave breaches of the Geneva Conventions provides that Luxembourg courts can cede jurisdiction to foreign courts. However, if the foreign court fails to take action on the case within six months or it renounces its intention to exercise jurisdiction, the Luxembourg courts can re-establish their own jurisdiction over the facts of the case.<sup>285</sup> With respect to offences covered by the statutes of the International Criminal Tribunals for Rwanda or the former Yugoslavia, Luxembourg law stipulates the ability of these tribunals to request the cessation of the exercise of jurisdiction by Luxembourg.<sup>286</sup>

**STATUTES OF LIMITATION:** Statutes of limitation for criminal prosecutions are set out in Chapter V of Title VII of Book II of the Code of Criminal Investigation.

## THE NETHERLANDS

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<sup>277</sup> Law of 9 January 1985 Concerning the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949, Art. 10. (Translation found in Amnesty International, “Universal Jurisdiction - the duty of states to enact and enforce legislation.” Al Index: IOR 53/002/2001, 1 September 2001.)

<sup>278</sup> Law of 18 May 1999 Introducing Certain Measures for Facilitating Cooperation with the international tribunals for Rwanda and the former Yugoslavia, *supra*, Art. 2.

<sup>279</sup> Law of 8 August 1985 Concerning the Repression of Genocide, Art. 6; and Law of 2 August 1947 Concerning the Repression of War Crimes, Art. 1.

<sup>280</sup> Code of Criminal Investigation, Art. 7(3) and (4).

<sup>281</sup> Code of Criminal Investigation, Art. 5-1.

<sup>282</sup> Code of Criminal Investigation, Art. 7-3. The wording of this provision appears to imply residence of the victim at the time of the commission of the offence.

<sup>283</sup> Code of Criminal Investigation, Art. 7-4.

<sup>284</sup> Code of Criminal Investigation, Art. 60.

<sup>285</sup> <sup>285</sup> Law of 9 January 1985 Concerning the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949.

<sup>286</sup> Law of 18 May 1999 Introducing Certain Measures for Facilitating Cooperation with the international tribunals for Rwanda and the former Yugoslavia, *supra*, Art. 3.

Under recently enacted implementing legislation for the International Criminal Court (the International Crimes Act), Dutch courts have the authority to exercise universal jurisdiction over genocide, war crimes, crimes against humanity and torture, as long as the alleged perpetrator either is present in the territory of the Netherlands or has become a Dutch national subsequent to the commission of the crime.<sup>287</sup> It is possible that the new International Crimes Act cannot be applied retrospectively to crimes committed before its entry into force on 1 October 2003. Section 21(2) of the Act refers to offences committed before the Act's entry into force as punishable under the Torture Convention Implementation Act.<sup>288</sup> Additionally, the Constitution provides that, "No offence shall be punishable unless it was an offence under the law at the time it was committed."<sup>289</sup> Furthermore, the Explanatory Memorandum, an integral part of the Act, provides guidance to this effect.<sup>290</sup>

Prior to the introduction of the International Crimes Act, Dutch courts were able to exercise universal jurisdiction over, *inter alia*, violations of the laws and customs of war,<sup>291</sup> genocide (if the perpetrator subsequently became a Dutch national)<sup>292</sup> and torture.<sup>293</sup> Crimes against humanity as a distinct crime could not trigger universal jurisdiction, however. Nonetheless, certain offences amounting to crimes against humanity, such as torture for instance, could be tried based on universal jurisdiction under legislation in force at the time.

Dutch law also establishes universal jurisdiction over piracy and counterfeiting,<sup>294</sup> hijacking and other attacks against aircraft and maritime navigation where the perpetrator is present in the Netherlands.<sup>295</sup> Some additional provisions establishing universal jurisdiction can be found in Criminal Code Article 4.

Furthermore, Dutch courts can exercise jurisdiction under the representational principle with respect to any crime under Dutch law, as long as the "prosecution has been taken over by the Netherlands from a foreign state on the basis of a treaty from which the competence of the Netherlands follows."<sup>296</sup>

Civil claims for compensation can be brought either within criminal proceedings for any of the above crimes<sup>297</sup> or through separate civil proceedings under tort law. Each carries significant limitations, however.

In the course of a criminal trial, victims can obtain compensation in two ways. First, they can join proceedings as a civil party and make a claim. Alternatively, where the defendant is convicted, the court may order him/her to compensate the victims. In the former scenario, only a simple process is

<sup>287</sup> International Crimes Act, adopted 19 June 2003, entered into force 1 October 2003, Section 2(1)(a) and (c) and 2(3), in conjunction with Sections 3 to 8 and 10 which define these acts as crimes under Dutch law.

<sup>288</sup> The Torture Convention Implementation Act was repealed by Section 20 of the International Crimes Act, *supra*.

<sup>289</sup> Art. 16 [Nulla Poena Sine Lege].

<sup>290</sup> Page 25.

<sup>291</sup> Wartime Offences Act (*Wet Oorlogsstrafrecht*) (1952), Art. 3(1) and (3). See application of this article in the Knežević case. Also, see *In re Rohrig*, Special Criminal Court, Amsterdam, 24 December 1949, 17 Int'l L. Rep. 393. (as cited in Amnesty International, "Universal Jurisdiction - the duty of states to enact and enforce legislation," AI Index: IOR 53/002/2001, 1 September 2001, Chapter Four, Part B). The ruling provided that "[i]here is a rule of customary international law by which those who violate the rules of war can be punished by those into whose hands they have fallen (the so-called theory of detention). This rule has the same universality as that applied internationally in the rule which treats pirates as enemies of mankind."

<sup>292</sup> Netherlands Act of 2 July 1964 Implementing the Convention on Genocide (*Uitvoeringswet genocideverdrag*) (hereinafter, Genocide Convention Implementation Act), Section 5(2).

<sup>293</sup> Act of 29 September 1988 implementing the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Implementation) Act (*Uitvoeringswet Folteringverdrag*) (hereinafter, Torture Convention Implementation Act), No. 478, Section 5.

<sup>294</sup> Penal Code, Arts. 4 (3) and (5), in conjunction with 381-385 and 208-215.

<sup>295</sup> Penal Code, Arts. 4 (7) and (8), in conjunction with 166, 168, 350, 352, 354, and 385a to 385c.

<sup>296</sup> Penal Code, Art. 4a. Under the representational principle (or the "vicarious administration of justice"), states can exercise jurisdiction on behalf of or when requested to do so by the state in which the crime occurred, or possibly also by another state with jurisdiction.

<sup>297</sup> Penal Code, Art. 36(f); and Civil Procedure Code, Art. 51a(1). The victim can also opt to bring only a part of his/her claim through criminal proceedings (see Civil Procedure Code, Art. 51a(3)).

permitted; the victim cannot bring witnesses or experts to support the claim and if the damage cannot easily be determined, the criminal court will not be able to consider the claim.<sup>298</sup> In the latter, the victim has no control over whether or not compensation is considered.

With respect to civil litigation, nexus requirements limit the circumstances in which proceedings can take place. In particular, they can be brought only where either: 1) the claimant resides in the Netherlands,<sup>299</sup> or 2) the claimant has requested the freezing or seizure of assets and the defendant has assets in the country.<sup>300</sup>

Victims who have not managed to obtain compensation through these procedures or from an insurance company or elsewhere can apply to the Criminal Injuries Compensation Fund.<sup>301</sup>

## CASES

Cases based on universal jurisdiction have been brought against, *inter alia*, former Surinamese military leader Desiré Delano Bouterse for torture and murder committed in Surinam; Darko Knežević for grave breaches and violations of Common Article 3 of the Geneva Conventions of 1949 committed in the former Yugoslavia; former Chilean President Augusto Pinochet for torture in Chile and former Argentine Minister of Agriculture Jorge Zorreguieta and other government ministers for torture and crimes against humanity. Dutch military courts were declared competent to try Darko Knežević. Additionally, in April 2002 the Dutch Ministry of Justice announced the creation of a task force, *Nederlands opsporingsteam voor oorlogsmisdadigers* (NOVO), mandated in part to investigate the potential involvement of asylum seekers in war crimes in their home countries. This may have led to the arrest and charging of a Congolese (Kinshasa) colonel in September 2003, reportedly for torture, and rape.<sup>302</sup>

## ISSUES INVOLVED

**PRESENCE REQUIREMENT:** The presence of the accused is a pre-condition for prosecution in most circumstances. As noted above, to prosecute someone under the new International Crimes Act for genocide, war crimes, crimes against humanity or torture committed outside Dutch territory, where neither the suspect nor the victims of the said crimes are Dutch nationals, the suspect must be present in the territory of the Netherlands.<sup>303</sup> Although, the relevant provision of this Act does not offer any clarity as to the stage at which this rule would apply<sup>304</sup> – at trial, at admissibility hearings, to open an investigation, or otherwise – the Explanatory Memorandum points to opening of the investigation being conditioned on the existence of reason to believe that the suspect is present on Dutch territory.<sup>305</sup> Additionally, the notes of the Ministry of Foreign Affairs on this provision may shed some light; they indicate that the provision concerns the trial and perhaps admissibility phases only: “The reasons for making this [presence requirement] were the difficulties associated with conducting a trial in *absentia* of an individual with no ties to the Netherlands, as well as the desire to limit jurisdictional conflicts.”<sup>306</sup>

With respect to attacks against civil aviation and maritime navigation, prosecution is conditioned on the suspect's presence in Dutch territory.<sup>307</sup>

<sup>298</sup> Civil Procedure Code, Arts. 334(1), 361(3).

<sup>299</sup> Civil Procedure Code, Art. 126(3). In such circumstances, it may also be required that the defendant and claimant are of the same nationality.

<sup>300</sup> Civil Procedure Code, Art. 767.

<sup>301</sup> “Information Supplementary to the Second Dutch Report and a Review of the Report by the Committee against Torture.”

<sup>302</sup> Anthony Deutch, “Dutch Court Charges Congolese Colonel,” *Associated Press*, 30 September 2003.

<sup>303</sup> Reasons as to why this restriction was established can be found on pages 18-19 of the International Crimes Act's Explanatory Memorandum.

<sup>304</sup> International Crimes Act, *supra*, Section 2(1).

<sup>305</sup> Page 38.

<sup>306</sup> Netherlands Ministry of Foreign Affairs website, [http://www.minbuza.nl/default.asp?CMS\\_ITEM=MBZ459385](http://www.minbuza.nl/default.asp?CMS_ITEM=MBZ459385).

<sup>307</sup> Penal Code, Arts. 4 (7) and (8), in conjunction with 166, 168, 350, 352, 354, and 385a to 385c.

Regarding other crimes, while presence during trial is the norm in the Dutch legal system, trial in absentia is permitted in certain circumstances.<sup>308</sup>

**EXECUTIVE DISCRETION:** The Public Prosecutor, who has the sole authority to initiate criminal proceedings, is empowered with a significant degree of discretion. Under the expediency principle (*opportuïteitsbeginsel*), the Prosecutor can determine whether or not to bring a prosecution based on public interest. Criteria for this decision may include technical issues, such as sufficiency of evidence, or policy, concerning, for example, the severity of the alleged offence, the offender's personal circumstances or otherwise.<sup>309</sup> The Explanatory Memorandum for the International Crimes Act has noted that the Prosecutor's decision may be based on factors such as whether the suspect would be entitled to immunity under international law,<sup>310</sup> whether prima facie evidence is sufficient, and whether a conviction is reasonably possible, considering for example the prospect for obtaining cooperation from other states essential for the gathering of evidence.<sup>311</sup> A decision of the Public Prosecutor not to institute proceedings can be challenged by an "interested party" in an appeals court.<sup>312</sup>

**IMMUNITY:** The Penal Code states that the jurisdiction provided therein shall be subject to limitations recognised by international law.<sup>313</sup> More specific rules have also emerged. In particular, sitting "foreign heads of state, heads of government and ministers of foreign affairs [...], and other persons in so far as their immunity is recognised under customary international law" or under a Convention applicable in the Netherlands, are immune from prosecution for genocide, war crimes, crimes against humanity and torture as defined under the new ICC implementing legislation.<sup>314</sup>

**RELATIONSHIP WITH OTHER JURISDICTIONS:** The Netherlands recognises a hierarchy of jurisdictions in which the territorial jurisdiction has priority over the exercise of universal jurisdiction by Dutch courts.

**STATUTES OF LIMITATION:** Although Sections 70 to 76a of the Criminal Code establish statutes of limitation for crimes under Dutch law, they do not apply to genocide, torture, crimes against humanity and most war crimes committed under the enactment of the International Crimes Act.<sup>315</sup> The Netherlands has ratified the European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes.

## PORTUGAL

Portuguese law expressly provides for universal jurisdiction over genocide, slavery, abduction, human trafficking, sexual abuse of children and certain types of war crimes, where the accused is "found" in Portugal and cannot be extradited.<sup>316</sup> A few of these crimes are classified in the Penal Code under the heading "crimes against humanity," but this is not defined as a distinct offence.<sup>317</sup> Portuguese law also

<sup>308</sup> Criminal Procedure Code (*Wetboek van Strafvordering*), Arts. 278 to 280.

<sup>309</sup> Criminal Procedure Code, Arts. 67 and 242; and M.E.I. Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)), Chapter 17, Section 7.1.

<sup>310</sup> Pages 34-36.

<sup>311</sup> As outlined in H. Bevers, J. Roording and O. Swaak-Goldman, "The Dutch International Crimes Act (Bill)," in Mathias Neuner, ed., *National Legislation Incorporating International Crimes* (BWV, Berlin, 2003).

<sup>312</sup> Criminal Procedure Code, *supra*, Arts. 12 to 13a.

<sup>313</sup> Penal Code, Art. 8.

<sup>314</sup> International Crimes Act, *supra*, Section 16.

<sup>315</sup> The International Crimes Act, *supra*, Section 13 exempts these offences from the application of any statutes of limitation. Section 21(2) of the same Act extends the application of Section 13 to acts of torture punishable under the Torture Convention Implementation Act and specifies that it applies retrospectively.

<sup>316</sup> Portuguese Penal Code (Código Penal Português), Art. 5(1)(b).

<sup>317</sup> See Capítulo II -Dos crimes contra a humanidade of Título III – Dos crimes contra a paz e a humanidade of the Penal Code.

provides for universal jurisdiction, regardless of the location of the alleged perpetrator, over terrorism, communication or information fraud, counterfeiting, certain premeditated acts (not concerning serious crimes against the person) and certain crimes against foreign States and international organisations.<sup>318</sup> Additionally, the Penal Code provides for jurisdiction over any act committed abroad: 1) which the state is obligated to prosecute under an international treaty,<sup>319</sup> or 2) for which Portugal is generally able to extradite the perpetrator and the accused is in Portugal but his/her extradition cannot be granted.<sup>320</sup> The former may well obligate Portugal to try or extradite suspected torturers found in its territory, in accordance with the 1984 Convention against Torture, which Portugal has ratified.<sup>321</sup>

Under Portuguese law, victims have a right to compensation,<sup>322</sup> even in cases based on universal jurisdiction. Generally, compensation must be addressed in the context of criminal proceedings,<sup>323</sup> and victims need to take the initiative by filing civil claims for damages. In very limited circumstances, the criminal court has the authority to award compensation even if the victims have made no such claim, but only where they require special protection.<sup>324</sup> A conviction is not an absolute pre-condition to the awarding of compensation.<sup>325</sup>

Civil claims can also be brought before civil courts, but only in limited circumstances – in particular, when, for instance: 1) the victim was not informed of the opportunity to claim in a criminal court; 2) a prosecution has not taken place up to eight months after the reporting of the crimes; 3) a decision has been taken not to prosecute, to suspend prosecution, to stop proceedings before the sentence is enforced, or to bring the proceedings before a military court or in a summary form; among other criteria.<sup>326</sup>

## **ISSUES INVOLVED**

**PRESENCE REQUIREMENT:** Most provisions that allow for universal jurisdiction in Portugal require that the alleged perpetrator be present in Portugal in order for the courts to try a case. However, Article 5(1)(a) of the Penal Code does not contain this requirement, enabling the courts to hear cases concerning terrorism, crimes against foreign States and international organisations and other offences.<sup>327</sup> Additionally, under Article 5(2) of the Penal Code, Portuguese courts may try crimes that Portugal is obligated to prosecute under conventional international law regardless of the location of the accused. This would arguably include grave breaches of the Geneva Conventions.

**EXECUTIVE DISCRETION:**<sup>328</sup> Portugal does not appear to have made executive discretion part of the judicial process. The public prosecutor is legally obligated to investigate all crimes brought to his/her attention,<sup>329</sup> and, generally, to prosecute when there is sufficient evidence, the perpetrator can be

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<sup>318</sup> Penal Code, Art. 5(1)(a).

<sup>319</sup> Penal Code, Art. 5(2).

<sup>320</sup> Article 5(1)(e) Penal Code.

<sup>321</sup> Torture is defined as a crime in Arts. 243 and 244 of the Portuguese Penal Code.

<sup>322</sup> Penal Code, Arts. 129 and 130; Civil Code, Art. 483. Much of the information provided on civil claims in this chapter is from M.E.I. Brienens and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)).

<sup>323</sup> Criminal Procedure Code, Section 71. Section 72 provides for certain exceptions.

<sup>324</sup> Criminal Procedure Code, Section 82A.

<sup>325</sup> Criminal Procedure Code, Section 377.

<sup>326</sup> Criminal Procedure Code, Section 72-1, as explained in Brienens and Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, *supra*, footnote 136.

<sup>327</sup> See first paragraph of this chapter for a more comprehensive list of offences.

<sup>328</sup> The information on executive discretion in this chapter was found in Brienens and Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, *supra*.

<sup>329</sup> Criminal Procedure Code, Section 262.

identified and charged and public action is permitted.<sup>330</sup> The public prosecutor could, however, suspend proceedings conditionally for offences that are subject to less than five years of imprisonment, as long as s/he has the consent of the examining magistrate, the auxiliary prosecutor and the accused.<sup>331</sup> The victim has the right to challenge decisions not to prosecute,<sup>332</sup> but not decisions to suspend proceedings.<sup>333</sup>

**STATUTES OF LIMITATION:** Persons who wish to claim compensation through criminal proceedings must file a claim within twenty days of being notified that the case will be prosecuted or an indictment issued.<sup>334</sup> Additional rules on prescription periods can be found in Articles 118 to 122 of the Penal Code.

## SPAIN

A single article of Spanish law provides for universal jurisdiction over the crimes of genocide, terrorism, piracy, hijacking, counterfeiting of foreign currency, offences related to prostitution and corruption of minors and handicapped, drug trafficking and any other crime that Spain has a duty to prosecute under international treaties,<sup>335</sup> which includes torture and certain violations of international humanitarian law, among others. (For crimes against humanity that do not constitute genocide or torture, the ability of the article to provide a basis for universal jurisdiction remains questionable and has yet to be determined by Spanish courts.) Furthermore, Spanish law provides that any criminal complaint filed by a victim is also a civil claim except if the claimant expressly renounces it.<sup>336</sup>

Despite the existence of legislation establishing and supporting the competence of Spanish courts to try cases that have no direct link to Spain, the most recent jurisprudence in 2003 has raised doubt about the ability to exercise universal jurisdiction when there is no such direct connection. In its decision in the Rios Montt (Guatemala) case,<sup>337</sup> the Supreme Court (*Tribunal Supremo*), Spain's highest court, determined – by eight votes to seven – that the aforementioned article is too general to "allow criminal proceedings to be instituted"<sup>338</sup> on the basis of universal jurisdiction, and that, due to limitations imposed by the principles of state sovereignty and non-intervention, Spanish courts can only exercise jurisdiction over genocide where there exists a "point of connection"<sup>339</sup> with Spain.

The impact that this decision will have on other cases before Spanish courts is not yet clear. Future rulings are likely to clarify whether the effect of the Rios Montt decision on other cases is to limit jurisdiction over crimes other than genocide. There has been only one subsequent judgment – that of the Supreme Court in the Fujimori case – where the Court had the opportunity to do so. Here, the Court did not mention any pre-requisite of a link with Spain. Instead, it determined that Spain would have jurisdiction, but ruled not to admit the criminal complaint "for the moment" since the crimes allegedly committed by former President Fujimori are under judicial investigation in Peru and several persons linked to him are in jail there or are fugitives.

<sup>330</sup> Criminal Procedure Code, Section 277 and 283.

<sup>331</sup> Criminal Procedure Code, Section 281.

<sup>332</sup> Criminal Procedure Code, Sections 277, 278 and 287-2b.

<sup>333</sup> Criminal Procedure Code, Section 281-5.

<sup>334</sup> Criminal Procedure Code, Section 77-2.

<sup>335</sup> Organic Law 6/1985, of 1 July, of the Judicial Power (Ley Organica 6/1985, de 1 de julio, del Poder Judicial), Art. 23.4. Additionally, the "Purpose of the Act" of Organic Law 6/2000 of 4 October Authorising Ratification by Spain of the Statute of the International Criminal Court does not expressly enable the exercise of universal jurisdiction yet does lend further support to Spain's right to apply the universality principle to genocide and recognises the possibility, if not a duty, to exercise universal jurisdiction for crimes against humanity.

<sup>336</sup> Spanish Criminal Proceedings Law, Art. 112.

<sup>337</sup> Judgment, Rios Montt case, *Tribunal Supremo*, 25 February 2003.

<sup>338</sup> Unofficial translation provided by Amnesty International, on file with the authors.

<sup>339</sup> *Ibid.*

## CASES

Several complaints have already been filed on the basis of universal jurisdiction, including the cases against former Chilean president Augusto Pinochet, former Chilean general Herman Brady, former Argentinean military official Ricardo Miguel Cavallo, former Guatemalan head of state Efraín Ríos Montt, and several other officials, among others. Argentinean navy officers are currently in Spanish jails awaiting trial for crimes of genocide, terrorism and torture; the trial is expected to take place during 2004. All these criminal proceedings have included civil actions.

## ISSUES INVOLVED

**STATE SOVEREIGNTY:** Until the Supreme Court's Rios Montt ruling in February 2003, Spanish courts had held that the exercise universal jurisdiction by Spain was not contrary to the principle of sovereign equality embodied in Article 2 of the United Nations Charter.<sup>340</sup>

In the Rios Montt decision, however, the Supreme Court took the view that the principles of state sovereignty and non-intervention can in fact restrict jurisdiction. As such, the Court reasoned that the exercise of extraterritorial jurisdiction by Spanish courts can only be justified where either: a) there exists a direct connection with Spanish national interests, or b) such jurisdiction is "accepted"<sup>341</sup> by agreements between States or by a decision of the United Nations. The Court's examples of national interests that could trigger Spanish competence over a case included the nationality of the alleged perpetrator or the victim (i.e. the active and passive personality principles) or anything that would be covered by the "protection of interests" (or protective) principle. The Court's examples of instances in which jurisdiction would be accepted by agreements between States included ones in which the State is under an international treaty obligation to either extradite or prosecute perpetrators of the crime who are present in its territory. This controversial decision was taken by a slim majority (eight to seven).

In the subsequent Fujimori decision, the Supreme Court did not address the direct connection requirement but did assume that there was a limit to the exercise of jurisdiction: where the territorial state is prosecuting a case in an effective manner, there is no need for a State with universal jurisdiction to intervene. It further explained that a determination that there has been no effective prosecution in the territorial state does not imply any pejorative judgment of that State.

**PRESENCE REQUIREMENT:** As noted above, the Supreme Court's Rios Montt ruling appears to have introduced a presence requirement with respect to the exercise of universal jurisdiction over certain crimes. The Court does not specify at what stage of a case the perpetrator would need to be present in Spanish territory, but it implies that this would be a precursor to any establishment of competence by a Spanish court. The launch of investigations may still be possible even in the absence of the accused.

Prior to the Rios Montt ruling, it had been possible not only to investigate criminal conduct but also to declare judicial competence regardless of the location of the accused. This was evident in the Pinochet case in which the *Audiencia Nacional* declared Spanish courts competent, even though Pinochet was in the United Kingdom at the time. The ruling of the Supreme Court in the Fujimori case seems to follow the pre-Rios Montt line of reasoning.

Presence during the merits phase of a trial has always been obligatory however.<sup>342</sup>

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<sup>340</sup> See, for example, Judgment, Pinochet case, Audiencia Nacional, 5 November 1998. The Court stated that, "Article 2(1) of the Charter of the United Nations ("The Organisation is based on the principle of the sovereign equality of all its Members") is not a legal provision which invalidates the proclamation of jurisdiction made in article 23(4) [...]. When the Spanish courts apply the said legal provision, they are not interfering in the sovereignty of the State where the crime was committed, but rather they are exercising Spanish sovereignty with regard to international crimes. Spain has jurisdiction to judge the events by virtue of the principle of universal prosecution for certain crimes - a category of international law - recognized by our internal legislation." (Unofficial translation by Micah Myers, as indicated by Juan Garcés.)

<sup>341</sup> Unofficial translation provided by Amnesty International, on file with the authors.

<sup>342</sup> Articles 789(4), 791(4), 793, 834, 835 and 836, Criminal Procedure Code.

**EXECUTIVE DISCRETION:** Executive discretion does not exist in Spanish criminal procedure.

**IMMUNITY:** Spanish law recognises immunities that exist in public international law.<sup>343</sup> In practice, it appears that Spain does not recognise immunity for former heads of state or “senators for life” in criminal proceedings, including where civil claims are attached. In addition, sovereign immunity might not be applicable when the crime alleged is the crime of genocide. According to the Central Magistrate’s Court Number Five, in a decision concerning the request for extradition of Pinochet from the United Kingdom, “sovereign immunity cannot protect someone who has been charged with the crime of genocide, because this would contradict the Genocide Convention of 1948, which is binding on the United Kingdom.”<sup>344</sup> The Genocide Convention is also binding on Spain.

**RELATIONSHIP WITH OTHER JURISDICTIONS:** The Spanish law on cooperation with the International Criminal Court, adopted in December 2003, requires that Spanish authorities refrain from taking any action on crimes that have been committed abroad by foreign nationals and are within the competence of the ICC, except for encouraging them to be redirected to the ICC. If, however, the ICC either does not open an investigation or does not find the case admissible, the crimes could once again be brought before Spanish authorities.<sup>345</sup>

Furthermore, Spanish jurisprudence recognises a hierarchy of national jurisdictions in the context of the crime of genocide, if not other crimes as well. The Supreme Court, in both the Rios Montt and Fujimori rulings, determined that territorial jurisdiction has priority over all other forms of jurisdiction “where there is a real and effective concurrence of active jurisdictions”.<sup>346</sup> In the Fujimori decision, the Supreme Court clarified that to commence proceedings based on universal jurisdiction in Spain, “serious and reasonable proof” that the offences “have not been prosecuted effectively to date by the territorial jurisdiction”<sup>347</sup> must be provided. The Court explained that there exists a “principle of necessity of jurisdictional intervention”,<sup>348</sup> derived from the nature and purpose of universal jurisdiction. This establishes the priority of the territorial jurisdiction over a State exercising universal jurisdiction.

There is a significant difference between the two judgments. In the Rios Montt decision, the Court's ruling of inadmissibility was of a permanent character. In the Fujimori ruling, the Court determined that “for the moment”<sup>349</sup> there is no need for Spanish courts to exercise jurisdiction. Perhaps this difference can be attributed to the fact that the Fujimori decision did not address a nexus requirement, as had the Rios Montt decision.

**STATUTES OF LIMITATION:** Limitation periods exist for most crimes, though the crimes of genocide, crimes against humanity, crimes against protected persons and property during armed conflict are exempt.<sup>350</sup>

## SWEDEN

Most of the crimes in the Swedish Penal Code are universally applicable. The competence of the Swedish court must however be determined according to the rules in Chapter 2 of the Penal Code.

<sup>343</sup> Article 21(2), Organic Law 6/1985, of 1 July, of the Judicial Power, *supra*.

<sup>344</sup> Unofficial translation by the Universal Jurisdiction Information Network (UJ Info).

<sup>345</sup> Organic Law 18/2003, on Cooperation with the International Criminal Court (*Ley Orgánica 18/2003, de Cooperación con la Corte Penal Internacional*), *Boletín Oficial del Estado*, 11 December 2003, Art. 7(2) and (3).

<sup>346</sup> Decision of the Supreme Court in the Rios Montt case. (Unofficial translation provided by Amnesty International, on file with the authors.)

<sup>347</sup> Unofficial translation by Amnesty International.

<sup>348</sup> Unofficial translation by UJ Info.

<sup>349</sup> “[E]n el momento actual”. (Unofficial translation by UJ Info.)

<sup>350</sup> Penal Code, Art. 131.

Swedish courts can exercise universal jurisdiction over “crime[s] against international law”, hijacking and sabotaging aircraft/airports, maritime sabotage, unlawful involvement in chemical weapons and mines, false or careless statements before international courts,<sup>351</sup> and any crime that would result in a prison sentence of a minimum four years.<sup>352</sup> In addition, any crime under Swedish law that carries a prison sentence of more than six months can also trigger universal jurisdiction, as long as the accused is present in Sweden.<sup>353</sup> Furthermore, such jurisdiction can be exercised over all crimes under Swedish law where the alleged perpetrator: 1) was resident in Sweden at the time of the offence or subsequently became resident, 2) became a Swedish citizen subsequent to the commission of the crime, 3) is a citizen of a Nordic country and present in Sweden,<sup>354</sup> or 4) was employed in a foreign contingent of the Swedish military and committed the crime in the course of duty.<sup>355</sup> Swedish courts can also exercise jurisdiction over crimes under Swedish law committed: 1) by anyone in an area where a detachment of the Swedish military is present for a purpose other than an exercise,<sup>356</sup> or 2) against a Swedish resident.<sup>357</sup> Sweden has criminalized war crimes<sup>358</sup> and genocide,<sup>359</sup> among other offences. Crimes against humanity is not defined as such, though certain conduct amounting to crimes against humanity can be prosecuted before Swedish courts.

Civil claims for compensation can be brought in the context of criminal prosecutions based on universal jurisdiction. In criminal proceedings, the prosecutor is obligated to pursue any civil claims requested by the victim, if this can be done without considerable inconvenience and if the claim is not manifestly unfounded. However, where this is not possible, the Court can order that the claim be brought instead through civil action. An award for damages in criminal proceedings is not conditioned on the defendant being convicted.<sup>360</sup>

## CASES

One criminal investigation was initiated by a Public Prosecutor against Sinisa Jazic, suspected of having murdered Bosnian Muslims during the war in the former Yugoslavia. Swedish authorities arrested Jazic, who was seeking asylum in Sweden at that time (1995), but subsequently released him and closed the case due to insufficient evidence.<sup>361</sup>

In October 2002, Swedish prosecutors refused to pursue a case against Israeli Prime Minister Ariel Sharon for war crimes committed by the Israeli army in the occupied Palestinian territories since September 2000. According to the prosecutor, it was impossible in practice to obtain the evidence necessary to be able to take the case to trial, given the distant location of the crime scenes and witnesses.

In response to a question about whether there are examples of alleged perpetrators being present in Sweden but not investigated or prosecuted, the Swedish Prosecutor-General's Office responded, “No such case is known to the Prosecutor-General's Office. Every prosecutor has a duty to start a prosecution when he or she has reason to believe that there will be a conviction.”<sup>362</sup>

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<sup>351</sup> Swedish Penal Code, Chapter 2, Section 3(6).

<sup>352</sup> Penal Code, Chapter 2, Section 3(7).

<sup>353</sup> Penal Code, Chapter 2, Section 2(3).

<sup>354</sup> Penal Code, Chapter 2, Section 2(1) and (2).

<sup>355</sup> Penal Code, Chapter 2, Section 3(3).

<sup>356</sup> Penal Code, Chapter 2, Section 3(2).

<sup>357</sup> Penal Code, Chapter 2, Section 3(5).

<sup>358</sup> Penal Code, Chapter 22, Section 6.

<sup>359</sup> Act (1964:169) on punishment for genocide.

<sup>360</sup> Code of Judicial Procedure, Chapter 22, Sections 1, 2, 5 and 7.

<sup>361</sup> Amnesty International, “Universal Jurisdiction - the duty of states to enact and enforce legislation,” AI Index: IOR 53/002/2001, 1 September 2001, Chapter Six.

<sup>362</sup> Comments on this report made by the Office of the Prosecutor-General, submitted to authors by Per Lennerbrant, Legal Adviser, Division for Criminal Law, Swedish Ministry of Justice, on 26 January 2004, (on file with authors).

**ISSUES INVOLVED**

**PRESENCE REQUIREMENT:** In some instances, to exercise jurisdiction over a crime committed abroad where there is no connection between Sweden and the accused, such as citizenship or residence, the accused must be present in Sweden.<sup>363</sup> There are, however, certain crimes over which Swedish courts can exercise jurisdiction even in the absence of this link with the Swedish state.<sup>364</sup>

Where presence is a stated requirement, the Swedish Supreme Court has, according to the Ministry of Justice, "ruled that the expression 'present in the state' should be interpreted as follows: The person in question should be present in Sweden by his own free will, the regulation should not be applied when a person has been transferred to Sweden by Swedish legal authorities. This has, in Swedish legal literature, been interpreted so as the relevant point of time for the required presence is *when the prosecution is announced*."<sup>365</sup>

**IMMUNITY:** Foreign officials and representatives of international organisations cannot be prosecuted in Sweden except by Government order.<sup>366</sup> As the Penal Code states that limitations resulting from generally recognised fundamental principles of public international law or international agreements binding on Sweden can restrict the application of Swedish law, it appears that immunities would apply insofar as they are recognised by international law.<sup>367</sup> Certain specified persons are also entitled to immunity from civil claims that are brought within criminal proceedings.<sup>368</sup> In the context of civil proceedings, individuals can claim immunity based on the law on immunity and privileges in certain cases.<sup>369</sup> Swedish courts may also apply customary international law rules on immunity.

**EXECUTIVE DISCRETION:** In accordance with Penal Code Chapter 2, Section 5, "the authority of the Government or a person designated by the Government" is required in order to institute a prosecution for an extraterritorial crime except if the crime is a false or careless statement before an international court or if it meets other conditions, such as having been committed in a Nordic country or during the course of duty by an individual employed by a foreign contingent of the Swedish military.

Nonetheless, in its initial report to the Committee against Torture, the Swedish Government asserted that the initiation of a prosecution for torture is obligatory as long as "there are reasonable grounds to believe that an offence has been committed."<sup>370</sup>

**DOUBLE CRIMINALITY:** In order for Swedish courts to exercise universal jurisdiction under certain provisions of the Penal Code, the act must be criminal under the law of the territorial state.<sup>371</sup>

**FORUM NON CONVENIENS:** Swedish courts recognise the doctrine of *forum non conveniens*. However, the claim can be made only during the claimant's first appearance in the case.

**STATUTES OF LIMITATION:** All crimes under Swedish law are subject to statutes of limitation, depending on length of prison sentence that they carry.<sup>372</sup>

<sup>363</sup> Penal Code, Chapter 2, Section 2(2) and (3).

<sup>364</sup> Penal Code, Chapter 2, Section 3(6) and (7).

<sup>365</sup> Comments on this report by Per Lennerbrant, Legal Adviser, Division for Criminal Law, Swedish Ministry of Justice, 26 January 2004, (on file with authors). The case at issue is Swedish Supreme Court case (NJA 1987 s 771).

<sup>366</sup> Penal Code, Chapter 2, Section 7a.

<sup>367</sup> Penal Code, Chapter 2, Section 7.

<sup>368</sup> Code of Judicial Procedure, Chapter 20, Section 10.

<sup>369</sup> *Lagen (1976:661) om immunitet och privilegier i vissa fall*.

<sup>370</sup> Initial report of Sweden to the Committee against Torture (CAT/C/5/Add.1), para.13.

<sup>371</sup> See Penal Code, Chapter 2, Section 2.

<sup>372</sup> Penal Code, Chapter 35.

## UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

United Kingdom law explicitly provides for universal jurisdiction over the crimes of torture,<sup>373</sup> hostage taking,<sup>374</sup> participating in the slave trade,<sup>375</sup> offences against United Nations personnel,<sup>376</sup> piracy<sup>377</sup> and certain war crimes, including grave breaches of the 1949 Geneva Conventions and their first additional Protocol.<sup>378</sup> It also provides for a more limited form of extraterritorial jurisdiction over three of the crimes under the statute of the International Criminal Court – war crimes, crimes against humanity and genocide. To exercise universal jurisdiction over these crimes, they must have been committed by a United Kingdom resident at the time of either the commission of the act or the institution of proceedings<sup>379</sup> or, in England and Wales only, a person subject to United Kingdom service jurisdiction.<sup>380</sup> Likewise, the UK War Crimes Act 1991 provides for only limited extraterritorial jurisdiction over certain crimes committed during the Second World War.<sup>381</sup>

Compensation can be sought for the loss or damage suffered by the victim for these crimes through civil proceedings. There is no requirement under English law for a person launching a claim for a civil wrong committed abroad to be resident in the UK or to be a British national. However, in claims where the injury occurred outside the UK, the claimant has to overcome a number of procedural hurdles that may be raised by the defendant such as *forum non conveniens* (see below).

Alternatively, a victim may be awarded compensation for personal injury, loss or damage in a criminal prosecution if the defendant is found guilty.<sup>382</sup> Courts are required to consider whether the offender should be ordered to pay compensation in every case where the offence has resulted in personal injury, loss or damage.

### CASES

In addition to the well-known hearings concerning the extradition of former Chilean President Augusto Pinochet to Spain, cases have been brought in England and Wales against, *inter alia*, Mr. Zardad Sarwar, a mujahadeen military commander in Afghanistan accused of torture. Sarwar was charged by the London Bow Street Magistrate Court on 18 July 2003 with crimes of torture under Section 134 of the Criminal Justice Act 1988 and hostage-taking under the 1982 Taking of Hostages Act. During the last couple of years, various attempts have been made to arrest individuals accused of these crimes. The first was an attempt to have an arrest warrant issued for former U.S. Secretary of State Henry Kissinger for war crimes in Southeast Asia. In 2003, an application was filed for an arrest warrant for Mr. Narendra Modi, the current Chief Minister of State of Gujarat, India, while he was visiting the

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<sup>373</sup> Criminal Justice Act 1988, Section 134(1).

<sup>374</sup> Taking of Hostages Act 1982, Section 1.

<sup>375</sup> An Act for consolidating with Amendments the Acts for carrying into effect Treaties for the more effectual Suppression of the Slave Trade, and for other purposes connected with the Slave Trade (Slave Trade Act, 1873), Section 26, as amended by the Statute Law (Repeals) Act 1998. Exercise of universal jurisdiction is conditioned on the presence of the alleged perpetrator within the jurisdiction.

<sup>376</sup> United Nations Personnel Act 1997, Sections 1,2, 3 and 5(3).

<sup>377</sup> R v. Keyn (1876) 2 Ex D 63, 2 bilc 701, CCR; R v. Anderson (1868). See also Halsbury's Laws of England.

<sup>378</sup> Geneva Conventions Act 1957, Section 1(1); and the Geneva Conventions (Amendment) Act 1995, Section 1.

<sup>379</sup> However, in the latter circumstances, the act would need to have constituted an offence in the particular part of the United Kingdom that is exercising jurisdiction. International Criminal Court Act 2001, Section 68; International Criminal Court (Scotland) Act 2001, Section 6.

<sup>380</sup> International Criminal Court Act 2001, Sections 51, 52, 58 and 59; International Criminal Court (Scotland) Act 2001, Sections 1 and 2.

<sup>381</sup> War Crimes Act 1991, Section 1 – with respect to war crimes committed in Germany or German-occupied territory between 1939 and 1945. Jurisdiction under the Act is limited to offences of homicide constituting a violation of the laws and customs of war, committed by a person who is now a British citizen or resident in the United Kingdom, or who had such status on or after 8 March 1990.

<sup>382</sup> Section 35, Powers of the Criminal Courts Act 1973.

United Kingdom on personal business. The application, filed on behalf of three victims, accused Modi of responsibility for acts of torture under section 134 of the Criminal Justice Act 1988.

Mohammed Ahmed Mahgoub Ahmed Al Feel, a Sudanese doctor working as a general practitioner in Dundee, Scotland, was charged with torture under Section 134 of the Criminal Justice Act in September 1997. In May 1999, the charges were dropped, apparently for lack of evidence. Additionally, it has been reported that Antoine Gecas, a Lithuanian living in Edinburgh, has been accused of responsibility for the deaths of some 32,000 people during the Second World War, but the authorities have never charged him.<sup>383</sup>

There have been a few civil cases brought before the United Kingdom courts, including, for example, the Al-Adsani case in which the claimant brought an action for damages against the State of Kuwait and a named perpetrator as a result of torture he suffered in Kuwait and threats he claimed to have received in the United Kingdom following his revelations about the torture. The case against the Kuwaiti State was dismissed by UK courts on the grounds of state immunity. The European Court of Human Rights found that this dismissal did not breach the claimant's Article 6 rights, despite the Court's clear finding that torture was a peremptory norm with *jus cogens* status under international law. The case brought by Ron Jones against the Interior Ministry of Saudi Arabia and a named individual for torture allegedly committed by Saudi authorities will come before the Court of Appeal in May 2004. This follows Saudi Arabia's successful application before a Master to claim immunity under the State Immunity Act 1978.

### ISSUES INVOLVED

**PRESENCE REQUIREMENT:** In a universal jurisdiction case, the police are able to carry out an investigation regardless of the location of the accused. However, the case can only proceed to trial if the accused is present in the United Kingdom.

**EXECUTIVE DISCRETION:** Numerous laws containing universal jurisdiction provisions require the consent of an appointee of the executive branch of government, usually the Attorney General. Under the ICC Act, no proceedings may be brought in England and Wales and Northern Ireland except with the approval of the Attorney General.<sup>384</sup> The same is true under the War Crimes Act 1991,<sup>385</sup> the Geneva Conventions Act 1957 as amended by Section 70 of the ICC Act,<sup>386</sup> the Taking of Hostages Act 1982,<sup>387</sup> the Criminal Justice Act 1988<sup>388</sup> and the United Nations Personnel Act 1997 for certain offences.<sup>389</sup> Variations on these rules may apply for Scotland.

Just recently, in considering the application for an arrest warrant under Section 134 of the Criminal Justice Act, a UK court accepted that the Attorney-General's consent was not needed to issue an arrest warrant but found that consent was required for the issue of a summons.<sup>390</sup>

**IMMUNITY:** *Heads of state* – As confirmed by the House of Lords in the Pinochet case,<sup>391</sup> acting heads of state have a right to immunity from individual criminal prosecution for any crime regardless of whether those acts are official functions carried out in the exercise of duties or acts performed in

<sup>383</sup> Further information on cases against alleged perpetrators of World War II-era atrocities can be found in a 2001 report by the Simon Wiesenthal Centre (See Gerard Seenan, "Nazi hunters condemn UK record on prosecutions," *The Guardian*, 20 April 2001).

<sup>384</sup> Section 53(3).

<sup>385</sup> Section 1(3).

<sup>386</sup> Section 1A.

<sup>387</sup> Section 2(1). It reads: "Proceedings for an offence under this Act shall not be instituted – (a) in England and Wales, except by or with the consent of the Attorney –General [...]"

<sup>388</sup> Section 135.

<sup>389</sup> Section 5(1).

<sup>390</sup> In the case against Gujarati Chief Minister Narendra Modi.

<sup>391</sup> *R v. Bow Street Metropolitan Stipendiary Magistrate & Others, ex parte Pinochet Ugarte* [1999] 2 WLR 827 at 91.

private capacity – that is, heads of state are afforded immunity *ratione personae*. Former heads of state are not granted the absolute immunity afforded to an acting head of state but rather immunity *ratione materiae* that is only for acts carried out in an official capacity or in the exercise of the duty of a head of state. In the Pinochet case, the majority of the Law Lords found that Pinochet was not entitled to immunity for acts of torture.

**States** – States are generally immune from the jurisdiction of the courts of the United Kingdom, with qualified exceptions. For example, in disputes relating to commercial transactions, a State may not be entitled to immunity if the dispute is considered to be a commercial act (*acta jure gestionis*).<sup>392</sup> Additionally, although Section 1(1) of the State Immunity Act 1978 affords a state general immunity from the jurisdiction of the UK courts, this is subject to a number of exceptions provided for in the Act. In light of the European Court of Human Rights' decision in the Al-Adsani case, it will be difficult for torture victims and other victims of crimes with universal jurisdiction to overcome the procedural hurdle of immunity granted to a foreign state until the decision is overturned or international law develops a firm exception to the grant of immunity for these types of crimes.<sup>393</sup>

**FORUM NON CONVENIENS:** The general principle concerning the application of the doctrine of *forum non conveniens* in the United Kingdom, as stated by Lord Goff in the leading case of *Spiliada Maritime Corporation v Cansulex Ltd* (1987), is that a stay will only be granted on the ground of *forum non conveniens* when the court is satisfied that there is another available forum, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and the aims of justice. The Court applied a two-stage test: firstly the defendant must show that there is another natural forum, which is clearly more appropriate for the hearing of the case. Usually this will be the forum in which the damage occurred. However, the availability and access to evidence and the location where the victims and witnesses are based are also taken into account. Secondly the onus is transferred to the claimant to rebut the defense by satisfying the Court that justice requires the matter to be heard in the prevailing Court by showing that substantial justice will not be done in the appropriate forum. In *Shalk Willem Burger Lubbe et al v Cape plc* (2000), a class action for personal injury and death, the House of Lords found that justice required the matter to be heard in the UK because of the lack of funding for litigation in South Africa, the complications likely to arise from the legal and factual issues in the matter and the absence of developed mechanisms for handling group actions in South Africa.

**STATUTES OF LIMITATION: Criminal** – There are no stated limitation periods for crimes subject to universal jurisdiction under United Kingdom law. In *R v Anthony Sawoniuk*, the Court of Appeal refused the claimant's application that his conviction for war crimes under the War Crimes Act 1991 should have been stayed on account of the time delay between the offence (1942) and the date on which the prosecution was brought (1999) and the admissibility of evidence. The claimant held that the Prosecutor had discharged the burden of proof (on the balance of probabilities) that the delay between the crime and the criminal proceedings had caused him "serious prejudice .... to the extent that no fair trial could be held".

**Civil** – The limitation period for personal injury claims is three years. This may in certain circumstances, with leave of the court, be extended for a further six years.<sup>394</sup> This, however, is subject to the court's discretion, which will take into account the length and reason for the delay in bringing the case, the defendant's conduct, any period of disability of the claimant and the claimant's conduct.<sup>395</sup>

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<sup>392</sup> See *Trendtex Trading Corporation v Central Bank of Nigeria*, 1997 2 WLR 356.

<sup>393</sup> The Court recognised that the law was still developing this exception.

<sup>394</sup> See, for example, the Limitation Act 1980, Section 11, and *Stubbings v Webb* 1 [1993] AC 498.

<sup>395</sup> Limitation Act 1980, Section 33.