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Fédération internationale des ligues des droits de l'Homme
International federation of human rights
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الفدرالية الدولية لحقوق الانسان

UNIVERSAL JURISDICTION TRIAL STRATEGIES

Focus on victims and witnesses

A report on the Conference held in Brussels, 9-11 November 2009

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Contents

INTRODUCTION AND KEY THEMES.....	4
A. OVERVIEW OF UNIVERSAL JURISDICTION TRIALS IN EUROPE	4
(1) Wolfgang Kaleck: General overview of trials and dismissals.....	4
(2) Christopher Hall: Universal Jurisdiction and foreign relations.....	8
Discussion	10
B. VICTIMS' EXPERIENCES OF THE TRIAL PROCESS	11
(1) Clément Abaifouta, Chad: Hissène Habré case in Senegal.....	11
(2) Marcel Touanga: The Republic of Congo, 'the Disappeared of the Beach of Brazzaville' case in France	13
(3) Carla Artes Company, Argentina: Scilingo case, Spain.....	16
(4) Wolfgang Blam, Rwanda / Germany: Joseph Mpambara case, the Netherlands.....	17
Discussion	20
C. PROTECTION OF VICTIMS AND WITNESSES	20
(1) Géraldine Mattioli Zeltner: Protection Challenges in the territorial state	20
(2) Jaqueline Mukandanga Blam, Rwanda/Germany: Joseph Mpambara case, the Netherlands	22
(3) Hester van Bruggen: Challenges in relation to witness protection from the perspective of national prosecutors.....	24
Discussion	27
D. EVIDENTIARY COLLECTION PRIOR TO TRIAL	28
(1) Hester van Bruggen: Access to victim's firsthand accounts.....	28
(2) Reed Brody: Role of NGOs	30
(3) Susanna Mehtonen: Inter-state cooperation and rogatory missions	33
Discussion	36
E. TESTIMONY DURING TRIAL	38
(1) Manuel Ollé Sesé, Spain: Logistics and other challenges.....	38
(2) Mari Reid: Video-link witness evidence	40
Discussion	42
(3) Helena Vranov: Psychological support.....	43
(4) Yaiza Alvarez Reyes: Witness familiarization.....	46
(5) Jesus Tecu: Rios Montt case, Guatemala, Spain.....	47
Discussion	48
F. JUDGMENT, SENTENCE, OUTREACH AND IMPACT	49
(1) Åsa Rydberg van der Sluis: General overview.....	49
(2) Rodolfo Yanzon	53
(3) Clémence Bectarte: Ely Ould Dah case judgment, Mauritania, France	53
(4) Mamadou Diagana: Ely Ould Dah case, Mauritania, France.....	55
(5) Viviana Uribe: Outreach, Pinochet case, Chile.....	56
Discussion	59

G. REPARATIONS (CLAIMS, AWARDS, ABILITY TO ENFORCE ASSETS).....	59
(1) Luc Walley: Belgium	59
(2) Philip Grant: Switzerland.....	61
(3) Héloïse Bajer-Pellet: France.....	64
(4) Juan Garces: Spain.....	65
H. COUNTRY UPDATES IN EUROPE.....	67
(1) Siri Frigaard: Norway	67
(2) Lars Hedvall: Sweden.....	70
(3) Philip Grant: Switzerland.....	72
(4) Andreas Schüller: Germany and Austria	74
Discussion	75
(5) Manuel Ollé Sésé: Spain.....	75
(6) Luc Walley: Belgium	77
(7) Kate Maynard: United Kingdom	79
(8) Chantal Joubert: Netherlands.....	81
(9) Patrick Baudouin: France.....	83
Discussion	85
CLOSING REMARKS.....	87

INTRODUCTION AND KEY THEMES

The International Federation for Human Rights (FIDH) and the Redress Trust (REDRESS) have been working together on extraterritorial jurisdiction for about six years, with the main goal being to facilitate exchanges and foster a common approach between the different Member States of the European Union (EU). We have sought to bring together different national and international actors involved in this work, including lawyers, human rights organizations, investigators, prosecutors and EU officials, to encourage discussion of the central challenges relating to the exercise by Member States of extraterritorial jurisdiction, mutual cooperation and the challenges associated with the investigation and prosecution of such crimes. This conference is part of this overall programme of work.

The focus of this particular conference is on trial strategies and in many ways the topic attests to the progress that has been made over the past decade with extraterritorial jurisdiction cases. We could never have had a conference ten years ago on trial strategies because the number of cases that had proceeded to the trial stage was just too small to analyse. We are very pleased that the situation has now evolved; now there is a rich practice to consider. Another emphasis of the conference is on the particular experience of victims and witnesses within these trials. We often hear that a particular individual has been arrested, or that a conviction has resulted, however we rarely consider the many individuals that are indelibly affected by extraterritorial proceedings. These individuals have suffered terrible crimes and have faced numerous hurdles in agreeing to testify, particularly when it is a foreign court and they may not speak the same language and where the culture is different. One of the goals of this conference is to shed light on the experiences of these victims and witnesses. What is perhaps most interesting is the range of people speaking and participating at this conference. We have prosecutors, lawyers, human rights activists, but most importantly we have quite a number of individuals, victims and witnesses who have direct experience of going through the trial process.

A. OVERVIEW OF UNIVERSAL JURISDICTION TRIALS IN EUROPE

The first panel provides an overview of some of the key developments with respect to trials in Europe and also considers Europe's part in the global use of universal jurisdiction and some of the political and other issues that have arisen in the course of such cases.

(1) Wolfgang Kaleck¹: General overview of trials and dismissals

It is difficult to give a general overview of the cases which have not reached the trial phase, of the dismissals and the main reasons for these dismissals. We know there are several hundred files all over Europe but even in countries like Germany, a country that likes to put order into things, there is no record of the number of complaints filed nor of the countries the complaints relate to and so we can only estimate the number as "several hundred". Most of these files only contain a complaint, and some of these complaints are without any merit. However, several

¹ Wolfgang Kaleck is General Secretary of the European Centre for Constitutional and Human Rights (ECCHR) based in Berlin, Germany. His recent article From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998 – 2008, gives a good overview over universal jurisdiction developments. <http://students.law.umich.edu/mjil/article-pdfs/v30n3-Kaleck.pdf>.

dozens of serious investigations have been carried out all over Europe and several handfuls of procedures resulted in trials, some of them in the presence of the accused and some of them *in absentia*. In order to analyse the cases, I would like to talk about waves of cases which have been the object of investigations during the last 12-15 years all over Europe; summer, winter and spring.

The first is the Yugoslavian wave. This is the wave of cases which are partly ongoing investigations concerning the wars in the former Yugoslavia. The first country to mention is Germany. Interestingly, Germany has a much stronger law now than it had at the beginning of the 1990's. However, German prosecutors in the early 1990's were eager to prosecute war crimes suspects from the former Yugoslavia. We had a special unit with about 100 cases against various citizens. The leading case is the Jorgić case², which made it all the way to the European Court of Human Rights where the sentence was finally confirmed. The judgment from 2007 is interesting, and also confirms the principle of universal jurisdiction.³ Other cases to mention include the 1994 Danish case,⁴ one in Sweden in 2006⁵, and one in Norway in 2008⁶, not often mentioned in the general debate on universal jurisdiction.

The second wave, which is still ongoing, is the investigations concerning Rwanda. The most important case - the 'Butare Four'⁷ case in Belgium, resulted in a conviction in 2001. A number of other cases in Belgium are ongoing. In 2001 in Switzerland, Fulgence Niyonteze was convicted of war crimes.⁸ Also, there were the Latin American cases beginning with Argentina in 1995, followed by the Pinochet⁹ complaint in 1998 in London and one important conviction in Spain, the Scilingo¹⁰ judgment in 2005. Similarly there were several procedures in France and Italy, somewhat controversial because they were convictions *in absentia*. These convictions concerned Astiz¹¹ in France and Suárez Mason¹² in Italy. In Germany a series of investigations

² Nikola Jorgić, Oberlandesgericht Düsseldorf, 26 September 1997, IV - 26/96, Nikola Jorgić, Bundesgerichtshof, 30 April 1999, 3 StR 215/98F, Jorgić v Germany (App no 74613/01) - [2007] ECHR 74613/01.

³ Jorgić v Germany, App. No. 74613/01 (ECtHR, 12 July 2007).

⁴ Refik Sarić. Danish Supreme Court, Denmark, 25 November 1994, acquitted of 11 charges and found guilty of the remaining 14 charges. Sentenced to 8 years imprisonment with an additional life time ban from entering Denmark.

⁵ Jackie Arklöv. Stockholm District Court, Sweden, judgment of 18 December 2006, case number B4084-04. Arklöv was found guilty of wrongful imprisonment, torture, war crimes and assault of Bosnian Muslim prisoners of war and civilians. The court did not impose a jail sentence because Arklöv was already serving a life term sentence that was imposed in 1999.

⁶ Mirsad Repak. Oslo District Court, Norway, first instance verdict delivered in December 2008 sentenced him to five years' imprisonment for 13 out of 14 counts of indictment for crimes committed against Serbs detained in the Dretelj camp near Mostar. Court of Appeal, 11 March 2010, Repak was found guilty of unlawful deprivation of liberty of civilians in Bosnia and Herzegovina (but acquitted of torture). Court of Appeal, 13 April 2010, the sentence was reduced to four and half years' imprisonment.

⁷ Public Prosecutor v 'Butare Four', Cour d'Assises, 8 June 2001. Belgian courts subsequently convicted Etienne Nzabonimana and Samuel Ndashykirwa in 2005 for their involvement in the genocide, Cour d'Assises, 29 June 2005 and Bernard Ntuyahaga on 4 July 2007 to twenty years.

⁸ Fulgence Niyonteze judgements: http://www.trial-ch.org/fileadmin/user_upload/documents/APPEL_FN.pdf ; www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/Cassation_Niyonteze.pdf ; www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/ATF_Niyonteze_2006.doc .

⁹ Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte (No. 3) - [2000] 1 A.C. 147.

¹⁰ Alfred Scilingo, Criminal Division of the Spanish Supreme Court in Appeal n° 10049/2006-P, 3 July 2007.

¹¹ Alfredo Ignacio Astiz, French Cour d'Assises, 16 March 1990.

¹² Carlos Guillermo Suárez Mason, Rome Second Criminal Court, 6 December 2000 sentenced to life imprisonment *in absentia*.

resulted in arrest warrants in 2003 issued against Videla¹³ and Massera,¹⁴ and in an extradition warrant for Videla, which is still pending.

The third wave to be observed is what I would call the Afghanistan and African wave. In the UK, Zardad,¹⁵ an Afghan warlord was convicted in 2005. There is also the Hissène Habré¹⁶ case, which Reed Brody and Clément Abaifouta will talk about. Having mentioned the 4 waves, you will have noticed that none of these cases involve Northern or Western actors. So none of the convictions, we can observe, concern any actor of a powerful state. Human rights lawyers and organizations wanted to change that, which led to a wave of cases which I would call 'delicate' cases or 'hardcore' cases. Some people would call them political cases, which is obtuse because all these cases have political elements. The most important cases are the series of Chinese cases relating to the Falun Gong and Tibet, which ended up in Spain. We had a case regarding Russia / Chechnya in Austria regarding President Kadyrov¹⁷ and there is a whole series of cases regarding the accountability of US officials. On the one hand there were the rendition cases, which are not purely universal jurisdiction cases but based on the principle of territoriality and active or passive personality. On the other hand there was a whole series of cases regarding Donald Rumsfeld,¹⁸ the torture lawyers and Guantanamo. This is the 2004 complaint/2006 case¹⁹ in Germany,²⁰ the 2007 case in France²¹ and an ongoing procedure in Spain.²²

I will talk about the short summer of universal jurisdiction in the 1990s. There was enthusiasm even amongst the states as this was shortly after the establishment of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). The Yugoslavian and Rwandan waves were supported by states; strong special units were established and countries like Germany felt encouraged to really push for the International Criminal Court (ICC) and to establish new legislation that would allow for the prosecution of such crimes. The other summer, of course, was the effect the arrest of Pinochet had on lawyers' and human rights organizations, not only in Europe but around the world. The symbol of the new power of the human rights movement was the arrest of Augusto Pinochet. This led to numerous grassroots actions but also highly skilled efforts on many levels to prosecute violators of human rights and hold them accountable.

¹³ Jorge Rafael Videla Redondo, German Nuremberg Court, 2003.

¹⁴ Emilio Eduardo Massera had an arrest warrant against him from the Nuremberg District Court in 2003. In 2004 the German Public Prosecution closed any further investigations and all legal remedies have been to no avail.

¹⁵ Faryadi Sarwar Zardad, UK Old Bailey Criminal Court, 10 October 2004 and 19 July 2005.

¹⁶ Belgian International Arrest Warrant issued September 19 2005 by Judge Franssen who also requested Habré's extradition from Senegal [see below *Reed Brody: Role of NGOs*]. Belgium v. Senegal, International Court of Justice, instituted 19 February 2009. See <http://www.icj-cij.org/docket/files/144/15052.pdf?PHPSESSID=1dcbbaa0df33438f58396c505e336d90> .

¹⁷ Ramzan Akhmadovich Kadyrov, President of Chechnya.

¹⁸ Other complaints were brought against him in Argentina (2005), Sweden (2007) and France (filed 25 October 2007, rejected 16 November 2007). For further information see

<http://jicj.oxfordjournals.org/cgi/content/full/mqp077?ijkey=ATpEUsad4WQbfcB&keytype=ref> .

¹⁹ Criminal complaint filed against him, but no further proceedings based on the principle of subsidiarity; new complaint filed on 14 November 2006. On 27 April 2007 the federal prosecutor refused to seek to investigate.

²⁰ See <http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld%2C-et-al>.

²¹ See <http://ccrjustice.org/ourcases/current-cases/french-war-crimes-complaint-against-donald-rumsfeld%2C-et-al>.

²² See <http://jicj.oxfordjournals.org/cgi/content/full/mqp077?ijkey=ATpEUsad4WQbfcB&keytype=ref#SEC6>.

We had several periods of harsh winter such as in Belgium in 2003 where some high profile cases were filed. Amongst them were the Sharon²³ case, and the case against the military commander of the second US invasion in Iraq, Tommy Franks.²⁴ Due to the Israeli and American pressure, the Belgian government amended its laws and this led to the current practice, in which the rights of civil parties have been curtailed. Belgian universal jurisdiction laws are now limited to Belgian residents. Similar limitations are now being introduced in Spain though the Spanish situation is somewhat different as victims' and lawyers' organizations maintained their right to trigger prosecutions and many investigations are pending. There was also the series of events from last year, where the Rwandan case led to the heavy reaction of the African Union which Christopher Hall will speak about. There was the China case²⁵ that was admitted and lastly the Israel case²⁶ which was admitted and led to diplomatic pressure by Israel.

The reasons for these winter periods are both practical and political. The practical problems are inherent in extraterritorial cases. Gathering evidence is a challenge as is the fact that most of the suspects and witnesses are not present in the state where jurisdiction is to be exercised. Also, it is difficult for such prosecutions to handle mass crimes involving numerous suspects. The *Realpolitik* is evident whereby powerful states use power to avoid investigations and prosecutions and jurisdictional states use all kinds of legal tricks to avoid investigations and prosecutions. The first trick is the misuse of the principle of immunity. In the International Court of Justice's Yerodia²⁷ decision, immunity in universal jurisdiction cases was restricted to serving heads of states and ministers of foreign affairs. In some countries there is a tendency to extend immunity to former state officials. This can be seen in the 2007 Rumsfeld case in France where Rumsfeld came in a private capacity to hold a speech and was no longer the Minister of Defence. Still, the French Prosecutor held they had to 'follow' the Yerodia decision.²⁸ Another ploy that has been used is when a suspect, whose actions would trigger treaty obligations at least with regard to torture, is present in Europe; the state simply ignores this fact to avoid initiating a procedure. The Uzbek Minister of Interior, who was already on an EU travel ban was allowed to come to Germany for medical treatment and was not bothered by any criminal procedures. The Israeli minister, Doron Almog,²⁹ went to the UK and the Netherlands and was able to leave those countries although procedures had been filed. In the ECCHR's Kadyrov case in Austria last year, we advised the Austrian authorities that the Chechnyan President and the head of the torture unit were coming for a football match. The Austrian authorities said that it was the weekend and that they had not received our complaint. We know now from the files that they had contacted the Russian Embassy to inquire if he was really coming and yet they did

²³ Dismissed by the Belgian Court of Cassation on 24 September 2003 for lack of jurisdiction after Belgian criminal law reform on 23 June 2003.

²⁴ On 21 May 2003 the Belgian government, however, decided to transfer proceedings to the American judiciary, and to put a stop to proceedings in Belgium. The complainants appealed against the decision to transfer the proceedings to the American judiciary. On 23 September 2003 the Brussels Court of Appeal dismissed the appeal against the decision of the government.

²⁵ Falun Gong case against China's former President Jiang Zemin and top official Luo Gan, Spanish High Court, Spain, criminal complaint filed October 15, 2003.

²⁶ Audiencia Nacional, Spain, 29 January 2009 against Israeli Defence Minister Binyamin Ben-Eliezer, the Chief of Staff of the IDF Moshe Ya'alon, the former Commander of the Israeli Air Forces Dan Halutz and four others for crimes against humanity, namely targeting Hamas Commander Salah Shehadeh. Investigation halted 30 June 2009, Audiencia Nacional, Spain.

²⁷ Abdoulaye Yerodia Ndombasi, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) International Court of Justice (ICJ), 14 February 2002.

²⁸ See <http://www.icj-cij.org/docket/files/121/8126.pdf>.

²⁹ Major General Doron Almog, arrest warrant issued against him on 11 September 2005 for violating the Geneva Conventions in Gaza. Dismissed when information of the pending warrant was leaked to Almog on board his plane, resulting in him returning to Israel, see <http://www.guardian.co.uk/uk/2005/sep/12/israelandthepalestinians.warcrimes> (last accessed 19 April, 2010).

nothing. We had a victim/witness residing in Austria who had already filed a complaint to the European Court of Human Rights (ECtHR) against Kadyrov and was threatened by members of the Russian or Chechynan secret service. He was eventually killed in Austria in January 2009. We can see very dirty and corrupt interactions between European authorities and authorities of countries where human rights are violated.

Finally, I will talk about early spring. There are pending procedures all over Europe and some important investigations in Spain and other countries. We have strong efforts of organizations like the ones who organized this conference to strengthen the legal system and educate the public about universal jurisdiction procedures. On the other hand, universal jurisdiction is not yet universal at all, which is highly problematic not only for the cases, but also for the criminal justice system and for human rights in general. There is an obvious danger of double standards and this endangers the whole concept of human rights; this unbearable situation must be changed.

(2) Christopher Hall³⁰: Universal Jurisdiction and foreign relations

This is a conference on trial strategies in universal jurisdiction cases in European courts which focuses on victims and witnesses. However, it may be useful to see universal jurisdiction in Europe as part of a broader legal framework - as simply one tool to achieve international justice for victims of genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances. Along with international criminal courts and national courts exercising territorial active or passive personality jurisdiction or protective jurisdiction, universal jurisdiction must not be seen as operating in a vacuum. It has a dynamic relationship with the other forms of jurisdiction and it is almost always used only when national and international courts have failed to exercise these other forms of jurisdiction. A review of where we are with regard to universal jurisdiction in Europe can benefit from situating it in a global context. There are at least five reasons for doing so that will be sketched out today. First, crimes under international law are crimes against the entire international community and are therefore the responsibility of the entire international community to prevent, investigate and with sufficient admissible evidence, to prosecute. Second, investigations and prosecutions based on universal jurisdiction can almost never succeed without long and difficult work done abroad by victims and their families to document the crimes. Third, such investigations and prosecutions will usually require and certainly benefit from cooperation with other states often outside Europe, including the state where the crimes occurred, the suspect's own state, or a state where the victims and witnesses or evidence are located. Fourth, investigation and prosecution based on universal jurisdiction outside of Europe and particularly in the South, is essential to preserve both the legitimacy of this tool of international justice and its perceived legitimacy. Indeed, the absence of a single trial for crimes under international law in a country in the South is a significant factor in the recent and so far successful attack by certain states and academics on so called abusive universal jurisdiction. Most recently, there has been a debate on this subject which has been taking place in the 6th Committee of the United Nations General Assembly (UNGA) and the increasing hostility in European countries to universal jurisdiction.³¹ Finally the attacks on the exercise of universal jurisdiction by European courts probably can only be defeated by generating support outside Europe for this tool of international justice. Amnesty International

³⁰ Christopher Hall is Senior Legal Adviser, Internal Justice Project at the International Secretariat of Amnesty International.

³¹ The UNGA will resume the considerations of this agenda item during the 65th Session in the autumn of 2010.

has repeatedly pressed states to adopt a shared responsibility model with regard to the investigation and prosecution of crimes under international law. Such an approach will increase the effectiveness and uniformity of national responses, ensure that immigration, police and prosecutors develop with other states, global strategies to end impunity in specific situations such as Brazil, Chechnya, Timor Leste, Sri Lanka, USA and Zimbabwe to pick some at random and to reduce costs. Investigations and prosecutions by European police and prosecuting authorities involving crimes committed outside Europe will require working closely with civil society in the states where the crimes were committed and elsewhere. For more than a decade, Amnesty International has been urging those acting on behalf of victims in countries outside Europe, to do so as part of a long term strategy, devising secure methods to protect witnesses and evidence, documenting the crimes, identifying suspects, tracking their movements, assessing the possibilities in the legal systems of the countries that the suspects visit, preparing dossiers in a form that makes them useful to European immigration, police and prosecuting authorities, vetting translators and interpreters and developing effective public or private lobbying.

In some instances as with Chile, Argentina and Palestine, such steps have been taken, and effectively. In some situations sadly, they have yet to be taken. Investigations and prosecutions based on universal jurisdiction of crimes under international law committed outside Europe will usually face the obstacle that the state cooperation framework is not effective. Indeed, it is often not effective within Europe itself. Although some international multilateral treaties involving crimes under international law providing for extradition and mutual legal assistance exist, these are fundamentally flawed and usually permit the requested state to deny cooperation on a number of inappropriate grounds such as the dual criminality requirement or fail to contain sufficient human rights safeguards. In addition, there are few bilateral extradition and mutual legal assistance treaties. Amnesty International has repeatedly called for states under the shared responsibility approach to draft, adopt, ratify and implement an effective extradition and mutual legal assistance treaty regarding crimes under international law that would fill the gaps in the existing legal framework. These steps should be taken as a matter of priority. There has not been a single trial based on universal jurisdiction for a crime under international law since the Second World War in a country in the South. There have been several failed attempts in Brazil, South Africa, Uruguay and in Senegal, which promises that a trial of Hissène Habré will take place in this century. There have been trials of persons accused of hijacking aircrafts, for example the Mike Hoare trial in South Africa. Kenya, Somalia, the Seychelles and possibly Yemen may conduct trials of persons accused of piracy based on universal jurisdiction. However, apart from trials in Canada³² and Israel,³³ all trials based on universal jurisdiction of crimes under international law have been in European courts. Although Europe can be proud of this record, it permits those hostile to international justice to claim to credulous audiences that universal jurisdiction is being abused by European states as part of a neo-imperialist plot. It has been one factor in the successful initiative by Rwanda, supported by the African Union Assembly to obtain a debate on this subject in October 2009 at the 6th Committee of the UNGA and in the increasing hostility within European countries to universal jurisdiction. Until police and prosecuting authorities in the South can be convinced to open investigations and prosecutions, or victims and their families seek to constitute themselves as *parties civiles* or to commence private prosecutions in the South, universal jurisdiction will become increasingly difficult to defend in Europe. Finally, Europe needs to build support in the South for the exercise of

³² De'sire' Munyaneza.

³³ Adolf Eichmann.

universal jurisdiction by its courts and to form a strategic partnership of friends of international justice, including universal jurisdiction. The failure to do so effectively led to the disturbing debate in the 6th Committee and the current very problematic draft resolution on the subject.³⁴

Discussion

One commentator agreed that universal jurisdiction cases should not be Eurocentric. In the case of Spain, one of the issues being confronted is the attack of universal jurisdiction links with an effort to avoid investigating war crimes and human rights crimes in Spain like the ones of 1936-1974. Perhaps, a country from the South will open a universal jurisdiction case for crimes committed in Spain. This could be an important development. Mr. Hall agreed that this would be a very important step forward if it succeeds. Also, we have to ask why we have failed to inspire civil society around the world to use this tool. There have been a few serious efforts, but so far they failed. Two in South Africa, one with regard to Ethiopia³⁵ and another with regard to Zimbabwe³⁶, and of course Senegal³⁷ which is to this day, a failure. Further there was an attempt in Uruguay to exercise universal jurisdiction under the Apartheid Convention against P.W. Botha when he visited Uruguay. Wolfgang Kaleck noted that there is one quote that comes out of the German-Chinese dialogue on the Rule of Law project, whereby China said, “*Are you really going to put the issue of torture in China on the agenda? Let’s talk about Guantanamo.*” Increasingly important actors of the South agree that the double standards of western states are unbearable. Similarly, when a leading Indian journalist visited Germany and was asked to comment on the situation in Germany, he asked “*What about the rendition cases? What are you going to do about the case of Khaled El-Masri*”³⁸?

Marcel Touanga from Congo Brazzaville, President of the group for the ‘missing persons of the beach’ stated that when we listen to what you say about Africa we notice that human rights could very well become a phenomenon that is going to disappear. In Congo, we are still facing resistance and reluctance from European countries that consider that the perpetrators of the crimes should be protected. And so they make sure that these people cannot be prosecuted when we lodge a complaint in Belgium or France. The victims do not have the legal or political power to make sure that things move along as they should. We lodged complaints in Belgium that were considered to be admissible but then one fine morning we were told that Belgium had changed its legislation. We need to think and think hard to find a formula that can be applied so that we continue talking about human rights so that perpetrators can be prosecuted no matter in which country the crimes have been committed. ***If you focus on crimes committed in European countries and if you leave aside crimes committed in Africa, it is as if international justice only made decisions on the basis of geography, on the basis of race and on the basis of these social values of the victims.***

³⁴ Information on the 65th session of the 6th Committee on the topic of the Scope and Application of the Principle of Universal Jurisdiction is available here: <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri.shtml>.

³⁵ Mengistu Hailé Mariam.

³⁶ Basson Wouter.

³⁷ Hissène Habré

³⁸ CIA’s abduction of the German citizen dismissed in *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) by the US courts on May 12 2006 leading to the ECCHR filing a complaint in June 2008 against the Federal Republic of Germany at the Administrative Court in Berlin.

Clément Abaifouta, the president of the organisation in Chad for Habré's victims, who himself is a victim, stated that since universal jurisdiction came into effect, '*we believed this was a deterrent weapon*'. However disappointingly, it turned out to be not much of a deterrent in the end. In Africa, we cannot understand how people can be above the law, that people can do whatever they want, and I am also disappointed because the same people who have carried out crimes like killing and raping, are welcomed in European countries. I think that we all have to agree that the time has come for us to comply with the law and to respect human beings.

Christopher Hall noted that there has been significant progress in the implementation of the Rome statute and in every single case he was aware of, implementing legislation or draft implementing legislation for the Rome Statute has provided for universal jurisdiction over genocide, war crimes and crimes against humanity and occasionally some other crimes. Now it can be as restrictive as in the United Kingdom, but even in the UK things are changing or are becoming very expansive, as in a handful of countries, and this is happening in the South. However, in Africa, only two of the states that are a party to the Rome statute have implemented it: Senegal and South Africa. In both countries there is universal jurisdiction and to this day we only have the failed case of Hissène Habré and the failed attempt with regard to some people in a country neighbouring South Africa. This is despite the fact that both countries are magnets for people from those sub-regions. Wolfgang Kaleck reminded that we are in the middle of a process which will take some time. Nobody foresaw that the International Criminal Tribunal for the former Yugoslavia was really going to work. Nobody had foreseen the Pinochet arrest when the first proceedings started. A lot has happened since the middle of the 1990s. We need to make it better and learn to work with the patience of the Argentinean Mothers of Plaza de Mayo. Their sustained work is evident in the results you see now in Argentina and all these reopened trials against the Argentine military dictatorship. 33 years after the military coup, Argentinean courts are full of procedures against former torturers and military officers and we need to take this as a vital example.

B. VICTIMS' EXPERIENCES OF THE TRIAL PROCESS

(1) Clément Abaifouta³⁹, Chad: Hissène Habré case in Senegal

The struggle led by the victims of political crimes and repression in Chad is essentially a massive mobilization of people of goodwill to make sure that our fight against impunity through the trial of the former president Hissène Habré takes place along with trials against former agents of the political police, the DDS⁴⁰. For our association, the Hissène Habré case is also educational because we want to make sure the crimes are not repeated. For the last ten years, we have been asking why no actionable, tangible evidence has been found in Chad or Senegal in order to initiate proceedings. As everybody knows, Hissène Habré, who we have nicknamed the Chadian 'Pinochet', has been accused of the gravest crimes. He was arrested in 2000 and again in 2005 by the same authorities who are claiming today that they need \$18 million before initiating the trial. Chad and Senegal, according to us, are cooperating. We must ask if they are simply cooperating for the purposes of delaying a trial? But, this conspiracy is just not going to work. Justice must be rendered for these poor victims. President Wade's silence is simply a trick

³⁹ Mr. Abaifouta is the Chairman of the Chadian Association of Victims of Political Repression and Crime (AVCRP).

⁴⁰ Direction de la Documentation et de la Sécurité.

to distract us from our objective to try the torturers of a regime accused of widespread crimes. The trial has not started yet so I cannot tell you about my experience during trial. However, I will explain the constant efforts made by victims to make sure this trial take place.

I was arrested on 12 July 1985 in N'Djamena, the capital of Chad. Two men came into the house where I was staying as a student. I was taken 300 meters and to my great surprise there was a dark pick-up parked with military men on board carrying weapons. I understood then that I was being arrested. These people led me to believe that they simply had some routine questions to ask me and then I could go home. But what confirmed my suspicion was that a few other young people were arrested that same night, other young students who had the same scholarship as me. I had received a scholarship which meant I was going to study in Germany, and then because of this scholarship I was arrested. It was 10 pm when the car that took us stopped in what I would call 'the house of oblivion', the house of the DDS, the political police of Hissène Habré. This 'house of oblivion' scared everybody in Chad. Whoever you were, you would be scared by just the mention of the name. If you were arrested, your parents would immediately go into mourning because they knew this was a departure to a place without return. They believed that I wanted to join the rebellion and they asked me why I had joined them. Quite naturally I was surprised by the question. Then, they took my clothes off and I was taken into a small room, 2 x 3 meters. In that room, there were other people who were lying down in a deplorable situation. We had to wait for 17 hours for our first meal to come. It was rice, barely cooked, in a rusted barrel. I remember what an old man, who had been arrested, told me "Eat, my son, because tomorrow you will eat at the same time of day". The room could only accommodate seven people, but they added more people without any consideration. We slept in turns, because there was not enough space for everyone to sleep. In that same room, there was also a bucket where we were supposed to relieve ourselves, so imagine the stench. Our jailers did not care. After two weeks they managed to put 40 people in this room. Finally, they moved us to another jail called a Detention Unit and the condition in which I saw all these men, women, children completely naked, completely crazy, sickened me. No consideration was given to women and the soldiers raped them every night.

I spent four years in detention and those years affected me. We could be sick, thirsty, hungry, but nobody could care less. They said we had to die because this is the treatment given to enemies of the state. I was pinned down to the ground for six months because of malnutrition. I needed food and medical care. I was never taken before a judge or lawyer and I was cut off from my family. The place of detention is actually a place to die. How many people did we have to bury in Hamral-Goz? Everyday there was an average of eight people or more, who died. Their deaths have been the incentive for me to continue my struggle. Every day, I was submitted to humiliating work. I had to do laundry, iron soldiers' clothes, cook for the soldiers, split logs, make the soldiers beds and so on. Eventually I was forced to become a gravedigger. This inhuman experience traumatized me. While digging graves, I had to bury my fellow prisoners everyday and I buried about a 1000 of them. It was not because of negligence, but sheer wickedness that they had to die. Ten years after my release, I was still traumatized, dreaming about this every night. I was living in constant fear, fatigue and losing my memory, all of it due to this animal-like behaviour of my jailors. This is the reason why my life has been broken and I wonder whether I will be able to prepare the future of my children. Ten years have elapsed since then, and I realize now that I have regained some part of my memory, I can now remember things. I have now become a tireless fighter for humanity. I realize now that what I witnessed was the disintegration of the human being and this deserves the attention from all of us and all these people who have contributed to the fight led by Chadian victims. Another cruel example I would like to share with you is, if you can manage to stuff 300 people into one single room and using a car to push the door closed, is that not the cruellest act?

I have many challenges. Ten years later, justice has not been rendered. Is it because I am black? Is it because I should not be judged or tried by white people or the other way around? No my friends, law has no colour or else we would be dealing with sheer impunity. If law has no colour, why should we not extradite Hissène Habré to Belgium? This is only blackmail. I suffer from one thing: it is this genuine thirst for justice, for truth. This is really what I want and I believe maybe in this room you will find a solution to my problem, since I need justice. I need justice in order to write our history for our children. They have the right to know what happened under Hissène Habré. In my country, in Chad, interestingly there are 'untouchable people' who still harass the victims like me on a daily basis. Somebody said, "That those who know how to die, they die in Soweto (South Africa)." I replied that I died in Chad in the DDS jails. The challenge for us is that our country Chad is keen to open a new era and to develop. It is a very big challenge for us, since we have to mobilize the Senegalese society to assist those victims so that the Hissène Habré trial takes place. This is the difficulty with the universal jurisdiction trials for the victims. For victims of incredible suffering, fighting impunity is enough, but now in addition to this, a third country has to be mobilized and that is not easy. We, the victims of the Hissène Habré regime, are trying to make the press, the political groups and civil society aware of our struggle so that they join us and can fight alongside with us so that justice is rendered to these victims. I have just been to Dakar, Senegal, where I spent two weeks. I believe that for the first time, we have finally been heeded by the Senegalese society and by politicians, trade unions, and religious representatives. However, I am very sceptical. Ten years later, I am not going to be easily convinced that Senegal is finally going to try Hissène Habré. I was walking in the streets of Dakar and a taxi cab stops. There was a woman in this taxi cab who stopped me and calls my name. I walk to the taxicab and she tells me, "My son may God assist you in getting this trial because since Hissène Habré arrived here, we know that he is a bad man". There had been a documentary shown about the blood-thirsty regime of Hissène Habré, and thanks to this, the door is finally cracked open in Senegal. We have to rise to the occasion and exert some pressure on Senegal, so that President Abdoulaye Wade, who has protected Habré finally takes action. Is Wade above the law? I do not think so. However, if we exert pressure and if nothing happens by the end of January 2010, I would like to challenge this panel. We will have to press on the pedal and do more, so that Senegal finally gives in and does something about Hissène Habré, so that justice is finally made for the victims. It is another form of torture we are put under by Senegal because we have been waiting ten years. Hissène Habré was arrested in 2000 and again in 2005; do we really need \$18 million?

(2) Marcel Touanga⁴¹: The Republic of Congo, 'the Disappeared of the Beach of Brazzaville' case in France

In 1991, we organized a national conference in the Republic of Congo. Since then, the single party stopped leading the country. Thanks to that, we now have several political parties, we have democratic institutions that have been put in place and in 1992 a President was democratically elected.⁴² Mr. Denis Sassou-Nguesso, who was in power from 1979-1992, came third in the election and was eliminated from the process. However he did not willingly withdraw. He went to France where he prepared for his return. On 5 June 1997, going through Gabon, troops of mercenaries and militia men started a war in Brazzaville. After 2-3 months of fighting, Sassou-Nguesso chased away the President elect. As Sassou-Nguesso realized that despite

⁴¹ Colonel Marcel Touanga is the Chairman and founder member of the Collective of Brazzaville Beach Missing Persons' Families.

⁴² Mr. Pascal Lissouba.

proclaiming himself President, he only had limited public support, he started a second war on 8 December 1998 and bombed densely populated areas in the south of Brazzaville. Those that managed to escape the bombs took refuge in the forest; they left with nothing at all. International agencies that came to assist were prohibited from helping those that had fled to the bush. There were so many casualties that they were picking them up with bulldozers.

Those that managed to return to the city were put in make-shift camps in churches and schools. In these camps, the royal guard and militia arrested whoever they wanted and also carried out assassinations. In one camp they forced the inhabitants to collect the thousands of corpses in various districts of the city. After their work was finished, they were executed so that they could not testify about what they had seen.

Those who stayed in the bush, remained there for eight months, with no assistance from the international community or from the state. Former UN Secretary-General Kofi Annan stated that he could not mobilize the assistance of the UN if France did not give the green light for this intervention. The people in the bush got sick and were decimated. There were families that went with 12 members and who came back with only two.

In April 1999, the international community finally reacted and the Congolese leaders had to take a more flexible position because in the meantime people had crossed the Congo river and taken refuge in the Democratic Republic of Congo. These people were then assisted by the UNHCR and from 14 April 1999 onwards they were repatriated to Brazzaville. When the convoys arrived to the Beach of Brazzaville, the people were separated: women on one side, men on the other. They had to remove their clothes and were searched by the guards. People were arrested; for example if you were wounded or had a scar, you were considered a suspect. They arrested 800 people and sent them to various camps. In the convoy you had relatives who were trying to find their loved ones. They were told that the President was a good man because he brought all these people back, but actually this was a cover up for a deadly operation. They arrested these people, handcuffed them in front of their relatives and sent them to the camps. The camps were part of an official program. Everybody was registered and executions were performed by firing squad. Under the authority of military officers, they were executing people in the presidential compound, on the river banks of the Congo, but also inside some suburbs of Brazzaville. It is in this context that my son, his mother and some brothers were affected. I came over to meet them and my wife said that my son was arrested. Because of my position and my rank, I told the officers that these people were my relatives and asked why they had arrested my son. They said "Colonel, we were given instructions to arrest your son". I said "Instructions from whom?" and he said, "Instructions from the General". I said I would like to speak to him, but was told that it was impossible. I saw the Prime Minister and told him that my son had been arrested and asked him to give instructions for him to be released. He picked up his phone and agreed that my son was to be released along with other people. I realized that there were other people as well, so I started to take steps. The first day, my son did not show up. On the second day, he did not show up. I contacted these people again, and a week later I found out that my child has been executed. I asked "Why?" I said, "Please give me the body so I can bury my child". They said they could not give me the body because it had been destroyed. This young, bright, university student who had just joined the Gendarmerie and who had a very bright future ahead of him, this is what happened to him.

There were other people who went through the same thing. There were 350 parents who had the courage to speak up. I managed to gather all the parents. We agreed to begin searches because if they killed our children, they should at least give us their bodies. I went all the way to the home of the President of the Republic. He was not at home but his wife was there. I left a

note, because she refused to open the door. She answered my note and said “No, we did not do anything to anybody, all these people are still there”.

Some people were arrested, registered and executed. Other people had been locked up in containers. There was one case in Brazzaville where lots of people had been locked up in containers and the officers who had the keys left Brazzaville. When they returned, everybody in the container was dead. What did they do? They could not remove these decomposing bodies, so they took the whole container and dumped it into the river. This is how they wanted the evidence to disappear.

Other people had been assassinated on the banks of the river, others in the bush. Those on the banks of the river were pushed into the water. Those killed in the bush were left to rot. This is how the Brazzaville authorities behaved in this case, which today is called the case of the people who disappeared on the Beach of Brazzaville.⁴³ We mobilized the Congolese Observatory for Human Rights (OCDH) and the French League for Human Rights (LDH). At first nobody could believe us. Finally, they were convinced that this had happened. We took them to the place where the skeletons were gathered and finally we mobilized the head of the UN in Brazzaville. Later on, through the OCDH we managed to mobilize the FIDH, who sent a delegation. We worked for three days and nights to produce evidence to corroborate what we were saying. We were able to tell them where people had been executed, where skeletons were still present. Thanks to FIDH, we brought this case to justice.

In my country, I lodged a complaint and thanks to all the pressure we exerted, the judge signed up to the case. The judge called me into his office and I showed him all the evidence we had. The third time I met him he said, “Colonel, I am not as brave as you, I am not a hero. I cannot take this case, it is a time bomb. I will not dismiss the case either. I will leave this file aside, because I am not in a position to take this case.”⁴⁴ We had to take the matter to foreign justice and thanks to the FIDH, a complaint was lodged before the Tribunal de Grand Instance in Meaux in France. The French justice system received the complaint. The Congolese authorities claimed that we had made this whole thing up, or that an opponent of the regime had made this up. They also said that France did not have the right to take on a case regarding Congo and if the case had to be dealt with, it had to be in Congo. However, it was too late by then, so what did they do instead? They complained against France before the International Court of Justice, saying that France did not have the right to take up this case.⁴⁵

Finally, proceedings began in France when the Head of the Congolese Police, Mr. Jean François Ndengue was arrested on 1 April. His arrest was like an earthquake in Congo-Brazzaville. The population was so happy to hear that finally the Head of the Police had been arrested. Mr. Ndengue immediately appealed this decision. President Sassou-Nguesso realized that the case could either cost him his own life or his position. Congolese embassy staff claimed

⁴³ “Disappeared of the Beach” Republic of Congo (Brazzaville), Cour de Cassation (Criminal Chamber of the French Supreme Court) 9 April 2008 which rejected defence council motion on behalf of the accused

⁴⁴ It should be noted that since then, the Congolese case has been concluded. As summarized by TRIAL, on 17 August 2005, the Brazzaville Criminal Court found all the 15 indicted not guilty of the charges against them. Nevertheless, the judge assigned the civil costs for the disappearances to the Congolese state. See further: http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/jean-francois_ndengue_536.html .

⁴⁵ Republic of the Congo v. France, ICJ, The Hague, Netherlands, initiated 9 December, 2002. Dispute between the DRC and France with regard to proceedings for crimes against humanity and torture commenced inter alia against the Congolese Minister of the Interior, Mr. Pierre Oba, in connection with which a warrant was issued for the witness hearing of the President of the Republic of the Congo, Mr. Denis Sassou Nguesso. ICJ fixed time limits on 16 November 2009 for the filing of additional pleadings on 16 February and 17 May 2010.

that Ndengue was actually on a diplomatic mission, because from a legal point of view based on some agreements, you cannot arrest somebody who is on a diplomatic mission. However, we have evidence that he was not on a diplomatic mission. At 2:00am in the morning on 3 April, the Investigating Magistrate of the Paris Appeals Court annulled the decision to arrest Mr. Ndengue. So in the middle of the night they met and they cancelled that decision and they ordered him to be released. During that same night Mr. Ndengue managed to board a Gabonese airplane in an airport somewhere near Paris and he left France. He just disappeared. This is what those two states did in order to block the whole case.

This is not the end of the story. The judge had requested the dismissal of the proceedings against Mr. Ndengue, but the entire proceedings were cancelled on 24 November 2004. We filed an appeal and on 10 January 2007 the French Court of Cassation took up the case again and the proceedings are still continuing.⁴⁶ We have not yet been asked to come to court.

Justice is impeded by political interests, by relationships between the perpetrators of the crimes (African dictators) and their sponsors who are in Europe. That is why today's meeting is particularly important, because it gives us the opportunity to think about the methods we have to use to preserve human rights. This is what happened in Congo-Brazzaville. It is an abomination, and Mr. Sassou-Nguesso, like former President Charles Taylor of Liberia, and the other dictators, should end up at the International Criminal Court. There has never been an enquiry commission because the decision was never made. We never had a court hearing; we never had a trial.

(3) *Carla Artes Company, Argentina: Scilingo case, Spain*

I was able to give evidence in the trial of Scilingo,⁴⁷ which was tried thanks to universal jurisdiction. My case is a bit complicated and difficult to explain since it involves the 'Plan Condor'.⁴⁸

My case does not start in Argentina, but in Bolivia. In 1976, my mother and I were abducted. I was only 9 months old and my mother was 24 years old. She was brutally tortured by Bolivian civilians from the Home Office, and by Argentinean military officials who went to Bolivia to torture my mother and other Argentines. This torture took place over 4 months. My mother was tortured in all the possible ways and I was also tortured at only 9 months old. The dictatorships of Argentina, Chile, Bolivia and Paraguay ordered my mother's transfer to Argentina as she was Argentinean. She and I were transferred illegally to Argentina on 29 August 1976. We ended up in an illegal detention camp. There were 365 camps that existed in Argentina. Torture, killings and all sorts of things went on there. My mother was sent to the camp of Orletti, where all prisoners who had been captured in foreign countries ended up.

As for myself, I was taken by one of the intelligence officials working in this camp, Mr. Rufa. His wife wanted a little girl of less than a year old with green eyes. This couple registered me as their daughter. Mr. Rufa led a double life. During the day he was a perpetrator at the camp and during the evening he was a loving father. Or this is what he wanted people to believe. In fact, I

⁴⁶ See further, <http://www.fidh.org/Affaire-des-disparus-du-Beach-Recapitulatif-des,1584>.

⁴⁷ Alfredo Scilingo, Spanish National Court, Spain 19 April 2005; sentence increased 4 July 2007.

⁴⁸ Plan (or Operation) *Condor* was a campaign of political repression involving assassination and intelligence operations officially implemented in 1975 by the right-wing governments of the of South America. Condor's key members were the governments in Argentina, Chile, Uruguay, Paraguay, Bolivia and Brazil.

was the victim of ill-treatment, psychological and physical ill-treatment and sexual abuse from the age of 6 to 10, from my 'supposed father'. All this went on until I was 10 years old. My grandmother had spent 9 years and gone all over the world fighting and speaking about what was going on in Argentina -not only that her own daughter had disappeared, but also more than 30,000 other people had disappeared as well.

I met my grandmother in August 1985, as a consequence of a joint police operation of national and local police. At first, the national and local police could not agree who should detain him. They could not agree who would get the medal from the Ministry office. They prolonged this until a year later, when the arrest became effective and he was transferred to the head offices of the Buenos Aires police. This person had been wanted for many years and there were files of the disappeared people which appeared on TV. So when my grandmother learned that I was in Argentina in 1983, she came from Spain (she is Spanish) to Argentina with the promise, not only from President Raul Alfonsin, but also from the King of Spain, that they would do everything they could for the 'baby' to reappear. This took one and a half years and our meeting took place on 24 August 1985. This is when everything crumbled for me, because suddenly my name was not Gina Rufa any longer, but Carla Rutina Artes. It is difficult to talk about, because of how it affects someone who has their life crumbling before them. I know that as a little girl, I could adapt to the situation, but now it is difficult being 30 or 35 years old and learning that your family does not exist, that your parents have disappeared. This case is not unusual, there are many youngsters in Argentina and elsewhere who are aware of all this and who cannot forget that the perpetrators chose Europe as a continent to escape to. There are also many sons and daughters of the disappeared in Europe. I hope that one way or another, through my declaration or others' declarations, others may realise that they may, in fact, be the sons and daughters of the disappeared people.

The trial of Mr. Scilingo, gave us a lot of hope. In Argentina, we believed we would never be able to have justice. I must say that after the opening in Spain of the Scilingo case, we knew there would be an impact in Argentina. Why had somebody been tried outside of Argentina, when everything had happened in Argentina? In my specific case, Mr. Rufa, was condemned to 9 months for forging public documents. Not even for the disappearance of people, or abduction, or being a perpetrator in an illegal camp. Three years ago, when the trial ended, he was detained and arrested once again in Argentina, where he is on trial for his involvement in two camps. There will also be another trial for Operation Condor. Something has been reactivated in Argentina. Trials took place, justice has gone forward, or at least we believe it is going forward. Human rights survivors in Argentina not only demand justice - we only want justice, we do not want anything else. There is a slogan that a lot of human rights organizations have used: 'Justice, not vengeance'. Not vengeance for what they have done or have not done, because revenge is useless. Only justice can repair. I hope with all this that human rights organizations are very well aware that human rights do not have a colour or a flag. Human rights have been signed up to since 1948, have been signed and ratified to support the principle that politics are not the consequence of human rights. Human rights have to exist as such.

(4) Wolfgang Blam, Rwanda / Germany: Joseph Mpambara case, the Netherlands

My presentation is slightly different from what my predecessors have said, probably because the case of Rwanda is better known. I was born in Germany. I am a doctor and I raised my family in Rwanda and I worked in Rwanda. Rwanda is unfortunately known for the genocide in 1994. During the genocide I spent six weeks in Kibuye in the western part of Rwanda that was never liberated by the rebels. For the last ten years I have been living with my family - my wife

and child - in Germany. In 2007/2008, we were part of a trial in the Netherlands, against a Rwandan citizen who did not allowed us to escape in April 1994.

The first thing that must be said is that people are extremely happy that there are charges and that there is a trial. There is a personal interest in the trial; you want to participate, to take part in the proceedings but there are also difficulties. It is difficult to find information about the legislation and proceedings in each country, because even if you are a European citizen, if you go to another European country other than your own, things are different. This lack of information leads to a lack of understanding, you do not really understand how committed you could or must be. At a minimum, you think you have to be available and you can participate as a simple witness and that is what is asked of you. However, there is another condition, and in the case of Rwanda, we are asked to make more progress than other countries where they are just talking about justice. At a minimum, you would need to have a civil claim. According to our experience, given the current condition, this civil claim should be part of the criminal proceedings even though the amount of compensation in our cases is extremely limited, it is almost ridiculous because it is so small. Ideally, to have proper redress and compensation you would need to have a civil claim that will give you compensation, but financial resources are scarce. This is the same for all victims.

First of all there is a psychological barrier. The first question you ask yourself is your security; is the EU safe enough for us to take a risk in the proceedings? If you are somewhere else than the country where the crimes have taken place, it is not easy to take part in the proceedings. If you are not a legal expert and not used to these proceedings you are reluctant to take part. Lawyers are supposed to listen to every word you say. Am I going to be able to express myself properly? That is a big problem. My wife and I and other people, we have talked about this. We think sometimes that we are not fit to take part. We are victims, survivors of genocide, but we have actually only seen a small part of the crime. You have seen other victims, you have seen their bodies, but almost never have you seen the crime itself and so it is difficult to testify as to what has happened and you think that is what the lawyers want. If you have been only slightly tortured, slightly wounded, you cannot compare what happened to you, to those who were killed.

My main topic is organization and funding. Legal framework, presence and observation during the trial, all this is based on our experience with the Mpambara case⁴⁹ in the Netherlands. I would like to present to you some of the issues that have been partially resolved and others through which a solution must be found. At the beginning of the proceedings when you are a witness it is important to list requirements that are not taken into account when talking about justice. This is something that has to take place on a daily basis, but this is something people have to live through, they are not lawyers and they are trying to pick up the pieces of their lives. When mentioning participation at the trial, the easiest part is to ask to participate as a witness. First of all, there is contact through intermediaries, this is accessibility, this is easy in Europe since you can use e-mail, or the telephone. Elsewhere in the world it may not be so easy. Thereafter, there is an initial interview in your place of residence with (in our case) German police officers. You have to be available because this takes place during the working day so you need authorization by your employer. So, there is an official investigation in Germany and in German. We were offered a reimbursement of the loss of working time. I filled in the form but it never worked out. This is just a small detail, but I wanted to tell you since I did not want to just talk about the larger aspects - I also want to explain how the small difficulties have an impact.

⁴⁹ Joseph Mpambara, The Netherlands, The Hague District Court, 23 March 2009.

Then, if you are important enough in the trial, you have to testify under oath. This takes place in the forum state, where the trial is taking place. Therefore you need more time and resources, transportation, housing, translation, and then psychological support because for the first time, you as a witness are going to be facing at least the defence counsel. This is more or less running smoothly in Europe. Our experience was positive, although of course everything can be improved.

In the course of the trial, the roles can be switched. The witness is also a victim. They are survivors so they have a right to file a civil complaint. This role switch may alter the order of priorities even before you find yourself in front of a criminal court, because you realize quite reasonably that you are entitled to compensation. If you want to lodge a civil complaint on the basis of a criminal trial which has already started, it is important to list the various steps and requirements linked to this phase and process. First, when you decide to lodge a civil complaint and when becoming a civil plaintiff, you must first find yourself a lawyer to represent you or at least provide legal counsel. This is a negative issue. In Germany, there are a number of organizations to help and support victims but I was not able to find proper information in German. Fortunately I speak more languages than German so I found information elsewhere. Telephone and e-mails are easy in Germany but not elsewhere in the world. Secondly, it is difficult or almost impossible to do anything if you have not got the funds. In my case, I was not poor enough to be automatically supported, but not wealthy enough to start legal proceedings that were going to cost me a lot of money. Thank you to REDRESS because they supported us. If they had not done so, we would not have been able to participate. Once you have the funds, you have to hire a lawyer. This step cannot be skipped even though according to the law an individual is entitled to file a complaint without one.

Then there is the beginning of the trial itself. You have the right to be present, which costs money, as it takes place somewhere else. Then you have to testify. The criminal court handled everything, we had to go once and testify with the translation into German and so on. Then, there are delays in the proceedings which make the trials longer and increase costs. Finally, you wait for a decision, it is best if you are present but once again this costs money, so we were not there. Not only for financial reasons, but once we were no longer witnesses, we no longer had the right to interpretation. Even the legal decisions are in Dutch. I cannot use them because I do not speak Dutch. If there is an appeal, you have to go through the whole thing all over again.

After I have listed all this, I would like to make a proposal. In the framework of civil law, in universal jurisdiction, these structures to support and assist the victims and witnesses need to be developed further, to provide more information on the proceedings, preferably in the mother tongue of the victims concerned. Assistance and support as to the proceedings, as well as translations of at least the main documents (at least the charges and decision) and also access and participation through a lawyer. To make sure that national trials in the framework of universal jurisdiction are successful, we must be aware that this must not be exceptional. We are aware that our case was exceptional, but you need to make sure that victims and witnesses can participate on a regular basis. You need to make sure that you have the proper documents that European justice systems require. I would like to put to you what I think is absolutely necessary not only for our case, but for future cases as well. Why not form a fund for the legal support of international victims so that the perpetrators are convicted not only to a prison sentence but will also have to pay compensation for their crimes.

Discussion

Mr. Blam commented in response to a question about witness security and disclosure that as they live in Europe, they didn't need any specific protection measures, but there are psychological obstacles. He grew up in Europe, but his wife came from a country where there is no rule of law. His experience as a European was completely disturbed by what he lived through in the genocide. I thought about it and I asked myself 'Am I going to take a risk?' I am safe here in Europe, I am far from Rwanda. However I am not far from a number of genocidaires. It is not only the victims that fled to Europe, it is the killers that flee. We do not always know who they are, but they are there and hiding. What made me think twice is the presence of the perpetrators in Europe. Another commentator noted that the survivors should all be able to join together, work together, maybe that would give them more weight on the international scene rather than have scattered efforts. Clément Abaifouta from Chad noted that it would be good to have some kind of synergy. The law has no colour, and if the law has no colour we must be able to work together, financially, practically and intellectually to make sure such things do not happen again. The pain that the victims have to live through when they see their oppressor or the killers not being charged is something that should mobilize the legal organizations and experts so that we can weave some kind of a net into which will fall all the dictators. We have been asleep for too long. On the issue of protection, he noted that some people refuse to testify because they live in the same neighbourhood as their oppressors. Marcel Touanga from Congo noted that there was no judicial independence; the people who are responsible for the crimes, are also the foundation of political power. That is where the protection of witnesses comes into play. In Africa, what kind of protection are you going to get? You could be shot anytime; at home, on the street. The protection issue is very serious. Mr. Blam added that the laws of international justice, up until now, are not really ready to deal with mass crimes. We were frustrated from our point of view because you are dealing with one case, one day in your life, but we are not representatives of a group of victims and the law does not provide for mass crimes.

C. PROTECTION OF VICTIMS AND WITNESSES

(1) Géraldine Mattioli Zeltner⁵⁰: Protection Challenges in the territorial state

I will start by making a few remarks on protection based on Human Rights Watch's experience of observing trials of grave international crimes at the national and international level.

The experience of international tribunals such as the ICTR and ICTY have shown that victims and witnesses in cases involving genocide, war crimes and crimes against humanity are likely to face serious security, psychological and physical challenges as a result of their involvement in prosecutions. Threats can extend to their families as well. Typically such crimes are committed in fraught political contexts, such as civil wars, *coups d'Etat* and ethnic conflicts. Often, suspects and victims continue to live side by side in the places where the crimes took place. Tensions persist. In many countries there will be no protection programme, no resources to institute such programmes, and thus leaving victims and witnesses vulnerable to threats or attacks. Worse still is when those meant to administer protection – e.g., national police forces –,

⁵⁰ Géraldine Mattioli Zeltner, Advocacy Director of the International Justice Program, Human Rights Watch, Brussels.

were involved in the crimes themselves, or lack the credibility with victims and witnesses to organise their protection. Protection is not only a duty owed to victims and witnesses who participate in trials; there is also a responsibility not to expose them to more suffering or threats.

Protection is also crucial for the effective functioning, fairness and ultimate success of these prosecutions. This is mainly for two reasons. First, most of the evidence tendered at these trials is based on victim and witness testimony. If victims or witnesses are threatened or are too scared to come forward with what they know, or if they change their testimonies at the last minute or fail to attend court as a result of threats, it can compromise the success of the prosecution's case. There are examples of such situations, for instance during the *Haradinaj et al* case at the ICTY. The threats were so intense that witnesses did not come forward.⁵¹

Defence witnesses are also central to the fairness of any trial. Often when we think of security and protection we think of victims, but defence witnesses can also be at risk. Not having defence witnesses at a trial significantly compromises fairness. Human Rights Watch, for example, filed an amicus curiae brief before the ICTR in which we argued against the transfer of cases from the ICTR to Rwanda. One of the key reasons we cited was threats to witnesses who had come forward to offer their testimony on behalf of the defence. The law on 'genocidal ideology' in Rwanda is vague and suggests that even offering testimony on behalf of a defendant could become part of this genocidal ideology, thus exposing the witness to prosecution or arrest.⁵²

There is not a lot of information on security and protection problems in universal jurisdiction cases that I am aware of and I hope the panel and participants might help to shed further light on this. From Human Rights Watch's research conducted in 2006, for the publication 'Universal Jurisdiction in Europe'⁵³, all investigators and prosecutors we spoke with in Europe were acutely aware of the risks that their presence in the field or their investigations might create for victims and witnesses in the countries where the crimes took place. Belgian investigators mentioned that in at least one instance they had talked to a villager in Rwanda, who was subsequently threatened and had to be relocated to another village. They also mentioned that there were security and protection concerns relating to witnesses once they came to Brussels to testify; they were all lodged together in a *kazerne*; victims, prosecution witnesses and defence witnesses were kept together in one place, which became problematic.

Regarding defence witnesses, we learnt that for example in the Zardad case in the United Kingdom, no defence witnesses came forward. In some of the Rwandan cases in Belgium and elsewhere, defence witnesses were slated to participate, but did not ultimately participate. Differently, in Denmark and the Netherlands, for example, we were told that investigators sought to be discreet in approaching victims and witnesses in the countries where the crimes took place. UK investigators used the UK embassy in Afghanistan as a neutral place providing excuses for potential victims and witnesses to come to the embassy in order to keep confidential their role in the case. In Belgium we were told that psychological support was offered during trial. All those with whom we spoke emphasised the biggest obstacle in undertaking this work - that they had no control over what was happening in the territorial state, as they had no authority in those states to organise witness protection.

⁵¹ See Prosecutor v. Haradinaj et al, Case No. IT-04-84-T, Trial Judgement, 3 April 2008. Section 2.2 of the judgment discusses the difficulties with obtaining witness testimonies.

⁵² See further, Human Rights Watch's Amicus Brief: <http://www.hrw.org/en/news/2008/01/03/human-rights-watch-amicus-brief-ictr>.

⁵³ <http://www.hrw.org/en/reports/2006/06/27/universal-jurisdiction-europe-0>.

Whilst international and national prosecutions are different, it may nevertheless be useful to consider whether certain practices from international jurisdictions might be useful recommendations for national investigators, prosecutors and defence lawyers in universal jurisdiction cases to consider when assessing issues relating to the security and protection of victims and witnesses. First, the prosecution team has an important role in carrying out a detailed evaluation of the security situation in the territorial country before commencing investigations and having a full understanding of the potential risks to victims and witnesses. Second, there is a need to build in safety structures when contacting victims and witnesses by, for example, using intermediaries or safe locations. Third, relates to the need to consider how to transport witnesses to the trial location. International tribunals have sometimes given sample excuses to witnesses to help ensure that their absence is not noticed in their village. It would equally be helpful to consider whether in-court protection measures used by international tribunals could be made available in universal jurisdiction trials, and what measures might be available in universal jurisdiction trials to relocate victims or witnesses who come under grave threats, to maintain regular contact with victims and witnesses to assess evolving risks throughout the investigation, the trial and afterwards. The final lesson learnt is the importance of informing victims and witnesses of what is possible regarding protection and what is not possible. We all know that protection is never perfect and it is very important that victims and witnesses are able to make their own assessment as to whether they wish to be involved.

(2) Jaqueline Mukandanga Blam, Rwanda/Germany: Joseph Mpambara case, the Netherlands

I am a survivor of the 1994 genocide. I was in Rwanda with my husband, I managed to leave with him and my son but the rest of my family was decimated, as were my friends and neighbours. I was lucky to survive and to be able to go to Europe. When you arrive in Europe it is easy to think you are leaving all your problems behind, that you can finally breathe normally and that you are far from the problems. In fact, you are never far away because you still live in fear. You have post-traumatic stress problems and you need medical care. When you arrive in Europe you have to deal with daily life, but you are also confronted with the presence of genocide suspects. In most cases, these people threaten you even though it is no longer a physical threat. You can never be immune from that. In addition, you are in countries where human rights are respected but you realise that the laws are not easily implemented in your particular case. The presence of genocide suspects is a major difficulty. I learnt that somebody I saw during the genocide and somebody who killed a lot of people in my town, was in Europe. By accident - or by chance - I found out that he had been arrested in the Netherlands and all sorts of questions came into my mind. I thought it was a good thing, but then you get afraid. You wonder, 'What should I do? Should I be a witness? Should I stay behind? What should I do?' I for one knew I had to come forward. It is my duty to contribute to finding the truth about this genocide, because I survived it. You want justice to be rendered and consequently there is also the question of reparation and compensation, because all these people who committed genocide were intellectuals, or are people who are well off because they were traders. They still have their families who stayed behind in Rwanda, and they still have all their wealth while these poor survivors have nothing at all. These were the motivations that encouraged me to come forward and participate in the trial against Mpambara in the Netherlands.

It is extremely difficult psychologically, because you thought you were finally far away from it all but you have to re-live the whole experience of genocide and everything flashes back. Even though I went to see a psychologist for post trauma therapy it was still extremely difficult for me

to take part in the investigation. Luckily the Prosecutor's team and the police conducting the investigation were very professional, supportive and they really listened to me. The prosecution team in the Netherlands was working together with Germany. People came to talk to us and we provided them with our testimony. We also went to the Netherlands, where we made another statement and were greatly assisted with interpreters. Psychological support was available at all times, all day long. One difficulty of this experience is to be confronted by the defence lawyer. He is doing his job to defend his client, he has to do everything in his power to destabilise you and that is really unbearable. I think that crimes are crimes but genocide is not an ordinary crime, it is 'the crime of crimes'. Luckily I had a lot of support and assistance. It was difficult but at the same time I felt relaxed because there was a positive side to the experience. You cry a lot but it feels good, it is relieving and you can state things in front of your torturers. In 1994, these torturers kept insulting me and would say, 'You cannot even cry', but during the investigation I cried my eyes out and it really felt good.

After the investigation is the trial. There you have the accused who is your torturer. This is extremely difficult from a psychological point of view, because when you see this person he is sort of pleading, while you know perfectly well what this person has done and that is very difficult. Also during trial you are there as a victim and you are there as a witness and it is very difficult to find your place in this type of environment because you can be a witness in one case without being directly involved, but at the same time you are also a victim. In a genocide case you are thinking 'Ok, I am a victim. Am I speaking on my own behalf or on behalf of a group? The genocide was not directed towards me personally; it was directed towards my ethnic group. Am I speaking on behalf of my own person, Mrs. Mukandanga, or am I there as a representative of the Tutsi group?'

You feel guilty because you think 'I am selfish, I am here only for myself, but I should not be here for myself.' All these things come to mind with all the psychological problems you are going through. Then there was the verdict and Mpambara was sentenced to 20 years imprisonment. I was elated. 'Finally justice is done'. At the same time you take a step back and you think that the courts are considering only one part of what we went through; as Dutch law didn't allow for universal jurisdiction over genocide, the case proceeded on a lower crime basis. Is this right, is this fair? The genocide itself was not acknowledged. He was punished, but not for genocide. And, it was not him alone; there was a whole group of them. The court focused in on a single day out of 3 months of genocide, and for the vast numbers that died, where is the justice for them? I should not be ungrateful towards justice because they have done a lot, but on the other hand you have to understand us, the survivors, it is very difficult. It is like we are never happy. At any rate I am very grateful to the team in the Netherlands, I want to thank all those people who have tried so hard.

After the verdict comes the question of your safety and resuming your daily life. One of my friends also agreed to testify. He now has problems with other Rwandans; he is receiving threats and called an accomplice. All of this scares me because I also came forward. Another friend of mine who lives in a village in Germany went shopping with two others. She overheard someone speaking in Kinyarwanda: 'Here you are', 'I thought they were all dead but here they are walking freely in Europe'. It can be scary because you can run into such people at any moment. When you have participated in a trial and you know that the whole family of the victim is living in Europe you are always afraid when you walk around, when you go out. I have not been physically injured, but I suffered morally and psychologically. I am still always afraid that something will happen to me or my family and I hope that it is only going to remain fear and nothing more.

(3) Hester van Bruggen⁵⁴: Challenges in relation to witness protection from the perspective of national prosecutors

I will talk about the same case that has just been mentioned – the Mpambara case. However, in the Dutch National Prosecution Office, Department for International Crime, we have also been involved in many others cases related for example to crimes committed in Liberia, Afghanistan, Democratic Republic of Congo and Iraq. I will speak on the efforts to protect witnesses from physical threats. I will also try to focus on efforts that assist with mental protection; what we can do to alleviate trauma resulting from testifying.

In practically every case we have worked on, witnesses have been threatened and intimidated and we have to acknowledge that we have very few tools and possibilities to intervene. Yet, there are steps we can take, and we have to maximise even the smallest possibilities that we have to protect witnesses.

In the Netherlands we have a unit of the national police which deals with witness protection. The responsibility for witness protection, be it for defence or prosecution witnesses, is with the prosecutor's office and we will instruct this police unit on how to deal with protection concerns. The police unit has extensive practical experience of protection - how to place people in witness protection programmes, offer them new identities and that kind of thing. There is another instrument under Dutch law which is not used very often but sometimes it is employed to protect witnesses and that is the possibility of anonymous witness. Most countries do not allow for anonymous witnesses, but under Dutch law it is allowed, under very strict rules. In such cases the investigative judge plays a crucial role in assessing the credibility of an anonymous witness and thereafter advising the court on his or her credibility.

Dutch law is hardly written for international criminal cases. Situations encountered in the course of our investigations illustrate how we reacted or tried to react and what we tried to do and some lessons we learnt. I will start with a case we had regarding Liberia against a Dutch businessman, Guus Kouwenhoven, who was suspected of delivering arms to Charles Taylor and his militias. The court found him guilty but he was acquitted on appeal. The case is now at the Supreme Court.⁵⁵ At a certain point late in the investigation we found a witness who was willing to give very incriminating evidence. The investigators spoke to the witness. The testimony was a long statement, and was added to the case file and then the court decided that the investigative judge had to go back to Liberia to talk with the witness, while taking the defence and the prosecutor with him. In the Netherlands we usually do not bring witnesses to court, but we take the investigative judge, the lawyer and the prosecutor to the witness. In this case the testimony was put into the file. At that moment we did not have any possibility to keep the identity secret or anonymous and it was clear who the witness was. Sometime later we received a statement which was made by the same witness in Liberia in front of a notary, in which the witness said that he had lied, that he had been pressured. We got in touch with the witness, discussed the case and the indications that the witness had been threatened were very clear. We tried to get this witness into a Dutch witness protection programme. This was much more difficult than when it concerns a witness from Amsterdam, for instance. The witness

⁵⁴ Hester van Bruggen is a Prosecutor in *National Prosecution Office, Department for International Crimes, the Netherlands*.

⁵⁵ Guus Kouwenhoven, The Hague District Court, sentenced 7 June, 2006 to 8 years' imprisonment not for war crimes but for breaking the UN arms embargo against Liberia. Overturned by a Dutch appeals court on 10 March 2008. The Supreme Court has recently ordered a retrial.

protection programme asks a lot from the witness, you have to leave the place where you live, you have to leave your family and you cannot contact your family for a certain amount of time, so it is a very extreme measure. Even in the Netherlands some witnesses say that these are too extreme consequences and they refuse. This is also what happened in the Liberia case. It was very difficult for the witness to leave behind their family, their village, everything. This witness refused to do this, but the situation was so extremely threatening towards this witness that we were hardly able to explain to the court what was going on. I do not want to say that this was the main issue of why Kouwenhoven was acquitted, because this would not be true, but it was one of the factors. So, there are times when you have to let one of your best witnesses go, when threats are as serious as they were in this case.

In the Rwandan case,⁵⁶ which has already been mentioned today, we questioned witnesses, put their witness statements in the case file and the investigative judge decided which witness they wanted to question in the presence of the lawyer and the prosecutor. The investigative judge sent a letter explaining how we were going to question these ten witnesses and the police officers went to Rwanda to prepare the whole mission. They found out that the first two witnesses on the list had disappeared and the third witness got in touch stating that he had been approached by family members of the suspect and asked to change his testimony or leave the country. He also informed us that the other witnesses who had disappeared had been given the same offer, namely to get them to Europe or to get away as long as they were willing to go, in order to change their testimony or even better not testify at all. When the leader of an investigation, which in the Netherlands is the prosecutor, gets this kind of information the responsibility can be very heavy. How was the situation going to be handled? We discussed with the Rwandese authorities how we could get the witness who had been approached by the family away to safety, as soon as possible. They did a very good job, all we had to ask was 'Please bring him to safety' and a safe house was found for him. We gave the threats priority and dropped everything else and found out that he has been called by someone from Finland, that he had been called by the cousin of the suspect and that he has been called by the brother of our suspect from Mali. In fact, the brother of our suspect was detained in a UN facility in Mali and he still was able to call with a mobile phone to threaten our witnesses. For us it was important to know if the suspect had been directly involved in the attempt at influencing the witnesses, because it is a crime. We sent a couple of police officers to Mali, to Finland, to Rwanda and we obtained a list of incoming telephone calls on our witness' telephone to determine who had been calling him. Within hours the Rwandese authorities produced a list of telephone numbers. I am not able to produce such a list in the Netherlands when I want to, but they produced it in Rwanda in conformity with their law and it was very easy. One number on the list was from the detention facility in Mali and another number was from Finland. We tried to coordinate as much as possible. Within 1.5 weeks after the witness had been called, his cousin was incarcerated in Finland, his brother had been talked to in Mali, the suspect had been talked to in the Netherlands and the guy in Rwanda had been talked to. It is difficult to do more than this; they cannot be detained for a long time and it is even harder to prove a direct link. We talked to the suspect and said that we were aware of what was going on. We reminded him that his family/friends are not helping him, since the Court would be advised and it would harm his case. We also drew up a report of what actions we had taken.

In Afghanistan, the intimidation was more subtle so that you could hardly even say to the court 'Look at what they have been doing'. In some countries when a high ranking police officer visits you to say hello and then leaves again, this is enough. Even suggesting that 'it would be better

⁵⁶ Joseph Mpambara, The Hague District Court, 23 March 2009.

for your future if you stayed at the office tomorrow instead of going to the Dutch investigative judge' is enough to intimidate a witness.

The first and perhaps most important lesson we learnt is the importance of being completely honest and open with witnesses about our limitations right from the start. We try to give practical solutions like assuring witnesses that if anything happens or they feel threatened they can call either a Dutch police officer, a local police officer or somebody who knows something about witness protection. There is now an initiative in place where a police officer is on duty all day seven days a week for all kinds of issues. Witnesses can use the Dutch police officer's hotline if something is wrong. This has been very useful in some of our latest cases. In some situations we have provided a special SIM or telephone card. It is a small thing, but it can make a big difference. The third thing that worked well in the Rwandese situation is to investigate as deeply as possible what happened in order to be in a position to convey to the court and show the suspect and family that you are aware of precisely what they were doing. The last thing, is commitment, money, and know-how: share this as much as possible with the country you are working in. You should also try to find out in advance the risks. This may be very difficult without offending people but try to find ways to cooperate with the local authorities. These are the main lessons we learnt.

On the issue of psychological assistance, we are very aware of the great sacrifice we ask of our witnesses. It is not just once that they have to testify, but several times. They have to be confronted by the lawyer and the suspect and this is an extreme sacrifice. Accordingly, we try to afford psychological assistance. In the Rwandese case we took a Dutch psychiatrist along to talk to witnesses and also to advise the investigative judge and investigators about what to do and what not to do. We also worked with a Rwandese social worker who could inform us when witnesses needed support. You have to understand that the witnesses talked to the investigative judge and the lawyer all day. Even during breaks it is difficult to get away or talk to somebody, particularly when you are questioning people at the Embassy. There, the witnesses are still caught between 'these white people in their suits, who do not speak their language and who serve them sandwiches when they want beans'. These are small things, but they are very important and cannot be underestimated. The social worker was excellent; she took the witnesses during the breaks and instructed them to not talk about the case which most witnesses do not want to talk about anyway. This is a very small measure, but it might make it a bit easier for the witnesses. We also try to call the witnesses every so often to see how they are doing. It can be difficult because you do not want to give the impression you are trying to influence them. Within certain boundaries, police officers can also call every now and then to check up on them.

No matter how much money and effort you expend, it all comes down to the humbling realisation that you are completely dependent on the courage of witnesses to testify, no matter how difficult it is. As Mrs. Mukandanga Blam correctly mentioned, under Dutch law and in some other countries, we are not able to prosecute for genocide. It is only when you hear the statements of victims and you hear how difficult it is or what an extra burden it is when people do not get convicted for genocide, but for torture, in our Dutch case, you realise this is something we really need to act upon. Even if the perpetrator has got a conviction for torture and so the sentence is somewhat appropriate, for victims it is incredibly important to be prosecuted under the right label. After the testimony of Mrs. Mukandanga Blam at our hearing, everybody realised how important it was to change the law and that is what is happening right now. There is a bill before Parliament, which will allow for prosecutions of genocide with retroactive effect, which is very uncommon under Dutch law.

Discussion

Several participants raised questions about the remit of the Dutch witness protection programme. Ms. Van Bruggen emphasised that information about what measures are taken need to remain confidential. It was also queried whether any thought had been given by police and prosecutors in Europe to establish a multi-state solution of relocating witnesses, to share the burden, to which Ms. Van Bruggen agreed that greater cooperation would be very beneficial. Birgitte Vestberg, a Danish prosecutor noted that from her experience of such cases, it was important to work with nongovernmental organisations to help contact victims and witnesses in remote areas. She also drew attention to the Interpol conference that had recently taken place in Lisbon, Portugal, where police officers from around the world came together to discuss witness protection.

Ms. van Bruggen also noted the challenges of protecting insider witnesses, where getting the witness out of prison to testify can raise serious safety concerns vis-a-vis fellow inmates when the witness is thereafter returned to prison. At least the first time you meet them you have to make sure that there is a very good alternative tale they can tell. Sometimes there are possibilities to transfer prisoners to another prison. Insider witnesses are already difficult witnesses and you have to be very critical always about their motives. It is difficult enough without granting them privileges so you will have a very hard time if you transfer them to another wing, it is hard to make the court still decide they are credible and they do not have ulterior motives to talk to you.

In response to another question, Ms. van Bruggen noted that it is only possible to work in foreign countries when you are welcome there. Sometimes we go to countries without the direct intention to carry out witness interviews, but more to assess whether there will be a possibility to do so in future while ensuring that we do not interfere in the sovereignty of the country, for example. A good example is the Democratic Republic of Congo where some witnesses were living. I assessed our chances of being welcomed as very small to investigate in a case relating to a Rwandan suspect. However, we went over there and talked to the people who had something to say. We took our investigative judge to talk to the local investigate judge to explain how we work. In the end it worked well and we were welcome enough to do what we had to do. Another aspect is security and safety. That remains difficult when you investigate in Kabul in Afghanistan. When investigating in Congo we hired companies experienced in protecting embassies to give advice and if necessary, to escort us. In a lot of countries you are not welcome because you might be threatening to the authorities and in such cases you have to work from outside, mainly from Europe and that is a huge limitation.

Ms. van Bruggen noted, in relation to protection measures post-trial, that protection measures can continue for as long as necessary. After the verdict has been rendered we try to contact witnesses to inform them of the outcome.

In the course of our proceedings you see for example how unacceptable certain flaws are within your own legislation. What we try to do in every case is to get the court to say something about it. For example, it is very clear the courts said we do not have jurisdiction over genocide in the Mpambara case. We suspected it, but we were not sure, and now the Supreme Court has confirmed that there is no jurisdiction. We have heard the victims and we have a very good case

to go to our legislators. In that respect we have very close cooperation with our Ministry of Justice, they are also attending today.

D. EVIDENTIARY COLLECTION PRIOR TO TRIAL

The panel was chaired by Anne-Marie Kundert, a lawyer with the Crown Prosecution Service (CPS) in England and Wales who specialises in extradition and who has been advising the Government of Rwanda in relation to four genocide suspects living in the UK.

By way of introduction, she noted the difficulty of obtaining first-hand accounts of crimes in the Rwandan cases. After 3 years' worth of work you feel responsibilities for these witnesses once they have given statements and in her case, each of the four requests were based on at least 14 prosecution statements. We can all visit these countries and we can all see witnesses but when we step back on that plane and go back to our own countries those witnesses still have to deal with the fact that they have come forward and given evidence. I am acutely aware, even as an extradition lawyer, of the duty to make sure those witnesses are well and being checked upon. As with Hester van Bruggen, I have had experiences where witnesses have been approached and all we can do is ask the Rwandans to investigate it.

Regarding Susanna Mehtonen's presentation on the Bazaramba case in Finland,⁵⁷ we followed the proceedings closely in Kigali because one of the interesting things I picked up on was their ability to cross-examine directly some of the witnesses in court. There are lots of things happening in Rwanda which they hope will address some of the concerns that have been raised and have thus far prevented extraditions and transfers to Rwanda, for example the use of video-link, which means that Susanna Mehtonen's presentation will be very relevant. We heard Hester van Bruggen talk about judges travelling to witnesses and that is something that the Rwandans have now passed legislation for, so that judges will be able to travel out of Rwanda and take testimony of individuals who do not feel comfortable to give evidence in Rwanda. With regard to the law on genocide ideology, there are already laws in place to say that it will not apply to those that come and give evidence. We relied heavily on victims coming forward and we have a duty of care to support them as best we can to ensure they are not harmed and that they come forward to give evidence in court. It is vital to work together and if there are problems that need to be looked at on a more regional level in terms of the conference that Ms. Vestberg mentioned earlier then we all need to be signed up, all connect with the prosecutors and for NGOs to connect as well.

(1) Hester van Bruggen: Access to victim's firsthand accounts

Access to witnesses will depend on the circumstances. Whether you operate in Congo, Chile, France, or Finland, each time it is different. The only general thing to say is that it requires a lot of creativity and pragmatism to find a way to connect with witnesses. When the police team and prosecutors obtain permission to start a new case we sit down and say ok what now; where do we start in this new country? We often do not even know the language. We always use intermediates; we do so because it is usually very hard, or not even allowed, to operate

⁵⁷ François Bazaramba on trial in the District Court of Porvoo, Finland, which opened on 1 September 2009.

independently in other countries. These intermediaries might be local authorities in countries where we are welcome. When we are sure we can cooperate with NGOs, we try to find witnesses through the network our investigators have built up in the country. Sometimes one witness will lead us to others. The question is which method to use in a given case and how will the court react to our methodology. In a typical Dutch case which took place on Dutch soil, the basic attitude of the court towards my methods to locate witnesses is neutral. When operating in countries in Africa or South America, the attitude of the court is usually critical, and this is understandable. We have used different approaches with varying success. For instance, the use of intelligence officers in these types of cases is not very successful, because it casts even more doubt over our working methods. We tried it once and we learnt that it was not a good method. What we do now - and I think it is the only way to make the court feel comfortable to convict someone on foreign witness statements - is absolute and complete openness.

In cases like these, it is crucial to be completely open about the way you met your witnesses and what you discussed with intermediaries. It also means, and I have touched upon the subject of cooperation with NGOs, that these intermediaries have to be willing to testify before a Dutch investigating judge or a Dutch court to explain how they worked. When we cooperate with an NGO who gives us witnesses, the NGO has to be willing to tell us their methods. That is not always compatible with the role of an NGO, or with the goal of an NGO. Sometimes it might even be dangerous for an NGO if it works in the area where your witnesses are or where the family of the suspect is located. Although the interests are not always the same, it is still useful to explore the possibilities and the boundaries of cooperation. It is a big responsibility. NGOs do usually have large networks, which is fundamentally important to prosecutors. We also learnt the hard way that we should base our case on witness statements from as many sources as possible. This makes your case less vulnerable if one of your sources is discredited or when the court does not trust witnesses who came through the authorities or through an NGO. For example in one Rwanda case we used witnesses from the Parket-Generaal, from the ICTR, 'snowball witnesses', and witnesses we got through the Canadians. That was a good decision because some witnesses were struck from the witness list by the court. The court noted that the witnesses had testified many times before and never mentioned the name of the suspect, which casted doubt on their credibility. Luckily, we had other witnesses. This is something we had to learn.

When we start a new case the first thing we do is find out which colleagues from abroad have been working in the area. This ensures that we do not make the same mistakes our colleagues made and also the other way around.

A lesson we learnt and what we are really investing in now is trying to find witnesses in Europe, America and the Netherlands for several reasons. The first thing is that it is difficult to remove suspicions which can be raised about witnesses who are still living in the country where the crimes were committed. The reasons for such suspicion can be the political climate, possible intimidation or various other reasons. Also, with regard to witness protection, it is much easier using a witness living in the Netherlands or Finland when you try to raise such issues. Until now it has been difficult for us to get in touch with victims' networks or with victims' in Europe. Even if we have an understanding of the Dutch victim community, we have less insight into communities in Belgium or France, so it is something we need to further develop. We have developed leaflets and we also tell people that they can approach us if they think they have something to tell us. This is important because up until now we have experienced just how invisible we are in the victims communities in Europe. The leaflets have been left at asylum seeker centres and they have been translated into many languages. We have not had any results yet, but it is very new so we will have to see. We have a lot of dealings with our

immigration service, who speak to a lot of people from abroad, who can tell them whether they are victims of torture. What we discussed with the immigration service is that they try to be as precise as possible about the crimes people have seen and about the place they have been living. We do so because when we start a case, for example in Rwanda or a certain part of Afghanistan, it is interesting for us to see which people live in the Netherlands but were born in Kabul, or the place where we start our investigation. We are also trying to work with the immigration service so that when people start telling them that they are a victim, the service should ask them if they could provide their name to us, to become a witness. I do not expect that a lot of people will agree, but again we just have to wait again for the first results. This is a very small step to get a grip on the potential witnesses who live in the Netherlands. We travel a lot, but there have to be witnesses living in Europe who are prepared to talk to us. It is also an invitation to the NGOs to think about their networks and to get in touch or discuss the possibilities of cooperation.

Ms. Kundert also stressed that the distinction between defence and prosecution witnesses can be blurred. A witness can be giving evidence for the prosecution one day, and give evidence for a defendant the next. Just as one genocidaire may have killed on one day he may also have saved another family on a different day.

(2) Reed Brody⁵⁸: Role of NGOs

The advantage of talking about the Hissène Habré case is that over the ten years it has been going on, half the people in the audience have worked on the case, FIDH, Philip Grant and Alain Werner. As Clément Abaifouta spoke about yesterday, it is about the struggle of victims. It has not only been four years, they have been fighting for justice for 19 years; this is the procedural history of the case. This case has provided a lot of employment for a lot of lawyers in a lot of places. This case has been fought out in Chad, Belgium, Senegal, The Hague, at the United Nations Committee against Torture, the International Court of Justice and at the Economic Community of West African States (ECOWAS). The first case was filed in Senegal in 2000 and in February 2000 Hissène Habré was arrested in Senegal. Unfortunately, as is too often the case, he left Chad with the contents of his country's treasury and built a web of protection around himself in Senegal. The case was thrown out of the Senegalese courts in 2001. By that time the victims had filed a case in Belgium under the then universal jurisdiction law. The case survived the repeal of the Belgium law for a very important reason as we organised together with Amnesty, FIDH, la League Belge, the defence of the Belgium law of universal jurisdiction. The victims were brought to Belgium and in meeting after meeting, Clément Abaifouta's colleague Souleymane Guengueng, looked at the Belgium authorities eye to eye. By that time a Belgian judge had already gone to Chad on a letters rogatory mission. The Belgian police team was working on this case, Chadian victims and witnesses had exposed themselves to go and see the Belgian judge. The victims made a very powerful case to the Belgian authorities that when they had come to the assistance of the Chadian victims, it was now their responsibility not to let go of the case. When the Belgian law of universal jurisdiction was finally repealed, a clause was put in allowing certain cases to continue and the criteria was written on purpose in such a way so that the Hissène Habré case could continue.

After four years, Belgium issued an arrest warrant, which is still valid, and a request for extradition of Hissène Habré. Senegal asked the African Union what should be done with the

⁵⁸ Reed Brody is European Press Director, Human Rights Watch.

case. By that time the United Nations Committee against Torture in a case called *Guengueng v Senegal*⁵⁹ had ruled that Senegal had violated the Torture Convention by failing to prosecute or extradite. The African Union's expert committee took that on board and said that Senegal should be the place where Habré is prosecuted. So, three years ago Senegal agreed to prosecute Habré, but the sticking point has been that Senegal would like to see 27 million Euro from the international community up front before they do anything for the victims. As a side remark I should mention that Senegal now has, following the repeal of the law in Spain, the best universal jurisdiction law in the world. However, the problem is not just to have these laws, but to use them. As Senegal continued to stall earlier this year, Belgium brought a case before the International Court of Justice (ICJ) asking the court to order Senegal to prosecute or extradite Habré. So even though this case is obviously going to take years to decide, it is a *Damocles'* sword that is over Senegal's head. It is really to Belgium's credit to take such a non-*Realpolitik* step as to go to the ICJ on behalf of victims most of whom are not Belgium.

The particularity of the Habré case compared to most of the other cases we have been talking about, is that by and large Habré did not torture people himself. This is the only surviving universal jurisdiction case against a head of state or a top ranking official. There are two layers of evidence. There is the layer of showing the crime base, to be able to show that people were tortured or that people were killed. Equally important is the linking evidence. How do you bring Hissène Habré into that? How do you bring the Head of State or the head of the enterprise into those crimes, as he was not the one carrying out torture? For NGOs there are particular difficulties in collecting this type of evidence. First of all, it is a question of resources. Governmental bodies have the taxpayers' money, but the FIDH and Human Rights Watch have limited budgets for doing these things so the collecting of evidence is in the first place very expensive and we have to raise money for that. Secondly, we have no compulsory powers. Government authorities have official ways of compelling people to testify or of provoking evidence. That is not the case for NGOs. We are unofficial actors in all of this, so we can only get people to talk to us who agree to talk to us and we have even less power when it comes to witness protection. This has been a serious problem with the Hissène Habré case, where we have Belgium, or now Senegal as the forum State, but Chad is of course the territorial state. Without going too deeply into the motivations of the Chadian government, I should say that one of the big problems we have is that many of Hissène Habré accomplices and torturers are still in Chad and still in positions of power in Chad. Our lawyer Ms. Jacqueline Moudeïna⁶⁰ was almost killed when a grenade was thrown at her by one of Habré's accomplices, whom she is suing in Chad. Mr. Souleymane Guengueng, the founder of the Victims Association,⁶¹ was forced into exile because of threats. This is a constant thing. There is very little other than advocacy that we can do about it. It is to the victims' credit that many of them have persevered and understood the difficulties.

We are in a situation in the Habré case, both in Belgium and Senegal, where we have the ability to constitute as *partie civile*. Victims can actually present evidence; victims have lawyers as *partie civile* who present evidence. We have some very good lawyers here in Belgium such as Eric Gillet, and we have a good legal team in Senegal. In these legal systems the rules of evidence are not nearly as strict as they are in British or American courts. Anything can be

⁵⁹ *Suleymane Guengueng et al. v. Senegal* CAT Communication No. 181/2001, 19 May 2006 CAT/C/36/D/181/2001, calling on Senegal to prosecute or extradite Habré. See, [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/aafdd8e81a424894c125718c004490f6?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/aafdd8e81a424894c125718c004490f6?Opendocument).

⁶⁰ In charge of legal affairs at the Chad Association for the Promotion of the Defence of Human Rights (Association tchadienne pour la promotion et la défense des droits de l'Homme- ATPDH).

⁶¹ Chadian Association of Victims of Political Repression and Crime.

emitted into evidence including the weight attributed to that evidence. We have endeavoured to build the case ourselves and that goes down better with some judges than others. One of the big advantages of NGOs as opposed to prosecutors is our constant contact with the victims, which enables us to be in a better position to obtain evidence and put it together as we have been working with these people for years and years. There are three kinds of evidence that can be broken down into: victims' testimony, documentary evidence and insider testimony. For victims' testimony, the FIDH and Human Rights Watch many years ago, collected more than 150 victims' statements and this is the protocol we used. None of the witnesses, with a couple of exceptions, had actually been confronted with Hissène Habré. We had a major stroke of luck in that while we were producing a film for this case we tried to film the former headquarters of the political police. Whilst there, and by chance, we discovered the files of the political police in Chad. My colleague from Human Rights Watch and I stumbled by chance on stacks and stacks of documents that had just been gathering dust for ten years.

We found the documents by chance but gathering them was another thing and Clément and his association spent seven months going in every morning cleaning the place and all of those documents are now on CD ROMs. Death certificates, lists of people who were killed, evidence of an uprising, all the people who died of sickness recorded *de loco* where Clément was held for a while, names of the villages burned down, evidence of American support for the DDS that mentions the American councillor for the Hissène Habré political police, and all were placed into a database. Patrick Ball working on many truth commissions helped to create a database that enabled us to spin out a lot of statistics that included information such as 1,208 different people were killed within the prisons of N'Djamena and that Hissène Habré received 1,265 direct communications about detainees. As well as these very powerful statistics there was the opportunity to look at the mortality rate in prison over time and determine where it spiked. I think in 1986 the average mortality rate was 1 prisoner out of every 100 died each day. Patrick Ball's association also produced a report where they analysed the document flow, showing the tight control Hissène Habré had over the political police. It came to light that he only put people from his small ethnic group in charge. The director of the political police met with him and produced reports all the time. These documents are certainly the heart of the case, highlighting just how tightly controlled it was and how fully Habré was kept informed.

There is no written order from Hissène Habré directing people to torture and kill, but we did find reams of documents sent to him about people being tortured, detained, spying, which when you put together with tight control makes for a very strong factual case. But we still need insiders, people involved in the machinery. However, these people have committed illegal acts since they were involved themselves, so it is a difficult game to play. It is vital to obtain information from people who were around Hissène Habré. Thanks to one of the leading charities and activists, the president of the League for Human Rights and Vice President of FIDH, we were able to locate in Paris a man who had been a sub-director of Habré's political police. For many years Alain Werner spent days interviewing him and we presented to the court a 50-page declaration by this man, about how the system worked and about how orders came from Hissène Habré and others. The prosecutor has noted all the detention units of the DDS, dates, names, places in order to build this case. They were arrested in N'Djamena and then all over the Chadian territory. This guy is an incredible witness and we have no way of protecting him and we have no way of preventing him from being prosecuted. Alain and I will both agree that there are many witnesses who say that they were tortured by him. It is a very interesting factor, because there are many people we work with in Chad who cannot believe we have been talking to this man because he is a torturer.

Another question posed in this case is how to prosecute Habré. Senegal states that there are 40,000 victims, which means that a trial would last 3 years. If you give Senegal the 27€ million, that would become the "Milosevic strategy", the "kitchen sink strategy". Then there is the "Saddam strategy", where you make representations of the crime committed by Saddam, against the Kurds, the Shiites and political prisoners. In other words, something can be done that is more manageable. Chadian groups have said they will accept for Senegal to prosecute on less than all the crimes Habré committed. It is important that the crimes to be prosecuted are representative, but at the same time one has to understand the difficulty of prosecuting the perfect trial. We have tried to choose evidence for the Senegalese prosecutors who know nothing about this case, which is regarded as the easiest case with the worst crimes. We have been trying to offer to the prosecution where we have documents that contain insider testimony and witnesses that make Hissène Habré's participation in those crimes very clear. The complaint we filed is based on all those documents and testimonies. A prosecution strategy has been suggested to Senegal to focus on the most serious but easiest crimes.

Each case is going to be different but we have tried to do the work ourselves and to present the most manageable collection of evidence possible. So far at least we have presented a very strong case for Hissène Habré's personal involvement.

(3) *Susanna Mehtonen*⁶²: *Inter-state cooperation and rogatory missions*

Amnesty International is following the Bazaramba trial currently ongoing in Finland. It started in September 2009 and is the first time a Finnish court is faced with one of the core international crimes and is Finland's first universal jurisdiction case.

Bazaramba came to Finland in 2003 as an asylum seeker. His asylum application was denied as he was found named in the Human Rights Watch "None to Tell" report of 1999. Investigations started only two or three years later largely because REDRESS and FIDH published a list of countries where genocide suspects were living in Europe, and Finland was on that list. I suspect that the list was one of the reasons why the police started their investigation.

Pre-trial investigations in Finland are conducted by the police without involvement from prosecutors. The investigation lasted 18 months; their starting point was the indictment and arrest warrant that had been issued by the Rwandan Parquet General. The Parquet General handed over their dossier to Finnish police, which also received the Gacaca dossiers because there were three cases in Gacaca proceedings against Bazaramba and over 300 perpetrators named him as a suspect. The police also used various human rights reports. Many witnesses in the Human Rights Watch "None to Tell" report on Butare préfecture named him. Also, there were reports by African Rights and the Danish Baptist Church where Bazaramba was mentioned. The police delved into that material to start building their own case. They also travelled to Africa extensively and interviewed over 120 witnesses all over Africa - in Rwanda, Zambia, Burundi and Malawi and in the United States. They filed requests for mutual legal assistance in all the countries. In most cases these applications were responded to, but there were also situations where there was no mutual legal assistance agreement between Finland and the other countries and they just had to improvise. Even though there was cooperation, the police who worked on the case were able to work independently without interference. The dossier the Finnish police gathered was kept in their custody and was not handed over to

⁶² Susanna Mehtonen, Amnesty International, Finland.

anybody else. Defence counsel also travelled separately to collect evidence of their own. They also travelled with the police to hear those witnesses when the dossier was handed over to the prosecutor. Based on the dossier, the prosecutor indicted Bazaramba for genocide, conspiracy to commit genocide and public incitement to commit genocide.

Around 20,000 - 50,000 victims lost their lives in Butare préfecture. The prosecution claims that Bazaramba was a leader in that community and was responsible for ordering others to kill Tutsis there. He spread propaganda before and during the genocide, acquired and distributed machetes, ordered others to burn the houses of Tutsis and was involved in redistributing Tutsi property after the genocide. Since the prosecution decided to consider him a leader in the genocide and inciter of the genocide, most or all of the witnesses were co-perpetrators who took orders from Bazaramba, participated in the actions, or were aware of what was going on in the préfecture. One of the reasons why there are no victims as witnesses is because the prosecution and the police have stated that it was nearly impossible to find any victims from the region who had survived the genocide, or any victims who would have been able to find information or be aware of who was leading the attacks, or who had ordered the attacks.

Bazaramba denied all the allegations. He claims that the case is based on a political conspiracy and fabricated evidence and that during the genocide he fled with and tried to protect Tutsis.

The trial took place in Bazaramba's home town, in Porvoo, a tiny city 50 km east of Helsinki. This is a district court that is fairly small and which normally deals with ordinary crimes like robbery, car thefts and civil claims like divorces. So it was a challenge for such a small court to take on the first genocide case in Finland. Many issues surfaced during this trial that point to the fact that the court was not prepared to handle a case of this calibre. As indicated, there are no victims as witnesses, or as parties to the proceedings. This is unfortunate but the police claim that it was impossible to find victims and was impossible to find the kind of victims who would have had a right to be present at the trial i.e. related by blood to some of the deceased. They also said that even if such victims existed, the police would never have had enough resources and time to them. We have been considering within Amnesty to request the court to do that after the criminal proceedings end. Victims normally have quite a strong position in Finland in criminal proceedings; they are allowed to be present, to demand reparations during the trial and to submit their own evidence. So it is unfortunate that in this case the victims are absent. During the trial everything is translated into Kinyarwanda. As there are no interpreters who know Finnish and Kinyarwanda, everything is translated from Finnish to English or French, and then from English or French to Kinyarwanda, and again in the other direction. The proceedings are very arduous and it takes forever for one part of a witness statement to be translated to most of the parties. Luckily some of the judges know French and English so they obtain information at the first stage of the interpretation.

It became clear at an early stage that the court was unwilling to bring to Finland the 70 witnesses called by the prosecution and defence. Most of the prosecution witnesses are incarcerated in Rwanda, which means they cannot leave and come to Finland. Even for the others who are not incarcerated, it would be too logistically challenging to issue travel documents and passports to a very large number of people. The presiding judge especially has said that it is inhumane to bring in persons who have to be in Rwanda for the harvesting season and if they are brought to Finland they might lose their harvest. It was also mentioned that Finland is too cold so it would be inhumane to bring African witnesses to Finland! Immigration policies are also behind it, during the preparations it was asked what would happen if all 70 witnesses applied for asylum, what if they stay in Finland. It was a last option to bring witnesses to Finland, so alternatives were considered. The first alternative was to hear witnesses through

video link, which is normal in Finnish criminal cases, but the court felt they needed to be present to assess witnesses' reliability. They decided to travel to Africa, since the majority of the prosecution witnesses resided in Rwanda they decided to hear them there. The trial first started off in Finland and after hearing the opening statement and expert witnesses the whole court moved to Rwanda. All the judges, the secretary, the prosecutors and two defence counsels moved to Rwanda. The accused stayed in Finland and followed the proceedings through a direct video-link. The police who had previously investigated the case organised with the Rwandan authorities a court room from a supreme court in Kigali for the trial. The courtroom was transformed into a Finnish courtroom with Finnish courtroom technology. They removed the seal of the Government, the pictures of President Kagame and the witness booth. The court also travelled to see the crime scenes in Butare préfecture. They went into the church where the massacre took place, to the home of Bazaramba and many other places. All the hearings were conducted just as they would be in Finland; they were taped and were heard under the Finnish oath. Rwandan authorities guarded the facilities and would bring in witnesses who were incarcerated but other than that, there were not involved. One defence counsel stayed in Finland with the accused. They would communicate through Skype during breaks. 38 witnesses were heard in Rwanda. There were a few minor problems with the technology, but it went well and all the parties were mostly happy with how it turned out. As regards the defence witnesses, it is quite a challenge because most of them are scattered around Africa, e.g. in refugee camps in Zambia, Burundi, Malawi and some of them had also disappeared. The first option was to hear the defence witnesses in Burundi but Burundi never responded to Finland's request. There was an option to hear the witnesses at the ICTR in Arusha but this idea was later dropped. The current plan is that the court will travel to Tanzania and hear the witnesses in facilities in Dar es Salaam. Most likely the Embassy of Finland in Tanzania will rent a conference room where they can conduct that part of the trial. Their plan is to hear 23 defence witnesses but it is still unclear whether and when they are going there. The trial was supposed to finish by end 2009 but I am sceptical.

Two issues of particular interest concern witness protection and torture allegations. Defence witnesses have claimed that they feel threatened by the Rwandan Government and felt unsafe to testify at the trial. Finland does not have measures to protect witnesses. We live in quite a safe, small country where we have ordinary crimes and not much organised crime. Finland has no witness protection program, so it is a huge challenge to be faced with something like this and the court did not take this issue very seriously. When the Defence filed their first motion, the court said it wasn't possible to protect witnesses under law and that they didn't believe they were under threat, so this was quite a problem. Amnesty International issued a statement urging the justice system of Finland to protect the witnesses for the sake of a fair trial. The court's decision was appealed and the Court of Appeal stated that it is possible to interpret the law to allow for witness protection. The court decided to take the only protection measure available, which was to conduct the trial in a closed hearing. The judgment, once it comes out, will for that part also be redacted.

Another issue concerns the reliability of witnesses and state cooperation. There are torture allegations in this case. The defence claim that the majority of prosecution witnesses have been tortured at some stage of their incarceration in Rwanda. Not in connection to the Finnish investigation of Bazaramba, but in connection with the investigation relating to their own cases. The Defence filed a motion requesting the court to delete the testimonies of three witnesses and to deny the testimony of 13 others. The court denied the application and this was interesting, because in Finland you submit whatever you want to the judge and then the judge decides what is reliable, what is relevant and how you weigh that evidence. However, the court went on to interpret the UN Convention against Torture and it stated among other things that lawful

sanctions are not torture. Even if Article 15 of the CAT would provide that evidence as a result of torture should not be allowed in proceedings, it should be established first that torture has happened so you would have to specify who the perpetrator is and you would have to first go to court and determine that there was torture. They considered that torture requires the intent to obtain information and ignored all the other possible purposes recognised under the Convention. This is a problematic decision that will likely be appealed. It has highlighted problems with collecting evidence abroad, particularly when dealing with incarcerated witnesses with regard to how reliable the evidence is and how to obtain information on whether they have been tortured or not. Another lesson learnt regarding the torture decision concerns the difficulties a small court like this one is faced with when hearing an international case.

Ms Kundert commented that in the Finnish case, a prosecution witness had indicated that he had been offered money by one of the defence lawyers to be relocated to Zambia if that witness did not testify. With regard to the video link, she noted that there was a defence lawyer in Finland sitting with Bazaramba who did not realise that her microphone was on, and two particular incidents were picked up by Finnish media and ended up in the court 24 hours later. The judge had asked all the witnesses who were not Hutu or Tutsi at the time of the genocide and the lawyer made this comment "Are they gay or straight?" and this was picked up. It was a public court, everyone heard and nothing was said by the prosecution or the judge in relation to that comment. Secondly when the judge was thanking the witnesses for their testimony the defence lawyer then said "Go and kiss their arse at the same time." It was all recorded in public and the press reported it. Back in court there were apologies and an investigation into the conduct of the Defence. I was getting questions from the prosecutors of Rwanda asking whether they can say these things. This brings it home that there is no such thing as flippant comments in cases like this.

Discussion

A question was posed to Dutch and UK officials whether they received much cooperation and information from the ICTR, and with the impending closure of the ICTR, whether steps were being taken to gain access to both open and confidential information. Ms. Kundert noted that there were challenges in this regard and that there must be an easier way for people to not only access information, but if you see something relevant there must be a means of being able to produce that in a reasonable manner. There is a memorandum of understanding that has been agreed by the UK and the ICTR regarding the use of information, but it is not mainly for the context of immigration. For prosecutors, the situation remains ad hoc. Ms. van Bruggen noted in agreement that the ICTR are sitting on a goldmine of information for prosecutors and the only way to get information is to send police officers over there who are able to read Kinyarwanda, French, English, all three of them and allow them to sift through the archives themselves. That is what they have been doing for the last three years. Our investigators have been there twice a year, sometimes three times a year for a whole week. A new ICTR unit has very recently been established that deals with requests from foreign investigators. This is a good step forward because there is now a new procedure on how to ask for information, when you can come over there and how to obtain access to intelligence which indicates how things are becoming easier. Ms. Kundert noted that where the ICTR archives will go to is a live issue. Particularly at a time when Rwanda is trying to do its own archives of the Gacaca records, which means that it is obviously not going down too well with regard to the records being held somewhere else in Africa.

On the work of NGOs, another commentator queried whether Human Rights Watch had regulations about collecting evidence that might result in criminal cases in terms of concerns

about being called to testify later in the process. Géraldine Mattioli Zeltner noted that the Hissène Habré case is a unique case for HRW. HRW has a methodology about how to ensure that collected information is credible. Nothing will be published unless it has been cross-checked with at least two sources corroborating the information as much as possible. Information is sought from not only victims but also from the other side so there are a number of steps our researchers are trained to take to make the information credible for our reports. What is important to underscore is that our reports are not reports of prosecutors or investigations, we are not criminal agents. The threshold of information to make it into our reports is very different from what you will need to prosecute a case in court. In the past few years it has been noticed that this information collected can be useful for investigators and prosecutors in criminal cases. Our general counsel offices try to develop a number of guidelines for our researchers to make this information useful, particularly regarding the chain of custody. In terms of our cooperation directly with prosecution services at the national and international level, we do not have memoranda of understanding because this cooperation is very ad hoc and depends on a number of factors. A very recent example regards the Israel Defence Forces (IDF) in Israel who started some investigations and asked HRW whether some of our witnesses in our Gaza report would be willing to talk to them. We have gone back to some of the witnesses and asked them whether they would be willing to participate. Where one of our researchers is appearing in court or a witness in court, this is a different dimension and aspects related to the security of the researcher is taken into consideration. For example, would that researcher get into a risky situation if they testify? HRW also take into consideration the ability to continue working in those countries. If participating in a prosecution means that the HRW will never be able to work in a certain country again, we have to weigh our interests and a number of factors are taken into consideration. It is preferable for HRW to be called as expert witnesses by the court, as opposed to being called by either prosecution or defence. We would determine our approach on a case by case basis.

A commentator queried whether prosecution services have any sort of agreements when working with NGOs who supply factual evidence that might be used in the case. Ms. Kundert noted that in the UK, there is a new panel that has been established to link the prosecution service and NGOs in London which will deal with precisely these types of questions.⁶³

Another commentator raised concerns about insider witnesses and whether they are granted immunity from prosecution. Another commentator expressed surprise that there are no Rwandan victims participating in the Finnish trial and wondered whether there was an outreach programme used to reach victims organisations in Rwanda or other countries.

⁶³ The 'War Crimes Community Involvement Panel' is chaired by the Crown Prosecution Service.

E. TESTIMONY DURING TRIAL

(1) Manuel Ollé Sesé, Spain: Logistics and other challenges

There is no model, general guidelines or a defined strategy applicable to all universal jurisdiction cases. Our experience in Spain is that each proceeding is different with different features and characteristics.

In the Spanish criminal justice system, the witness is crucial. Without evidence, we cannot proceed. In universal jurisdiction cases, there are different types of witnesses. Firstly, a 'victim witness' is a special kind of witness who unfortunately have lived and suffered the violation of human rights. But in a human rights case, the victim witness probably did not see who the perpetrator was. We also have the 'impartial witnesses' who are not victims, but who can shed some light regarding what has happened. And, insider witnesses are also sometimes very important for the testimony in the case. There are also 'qualified witnesses', who probably did not have direct knowledge of the facts, but these can be experts that help to put the facts in context.

For victim witnesses, lawyers and NGOs need to help ensure that they can fulfil the different functions of being a witness, a victim, and a participant in the formal proceedings through civil party or public action. Here there are dual demands. On the one hand, the judge should see that the testimony is credible, but also, there needs to be further elements that will confirm that what the victim is saying is true. The majority of these crimes take place in a clandestine way; the executioner is not before the victims. Insider witnesses can pose a problem because they typically agree to testify only if they get immunity and it is difficult to know how to approach such cases. In Spain, insider witnesses can get a significant reduction in their sentence in exchange for cooperation.

What are the strategies we follow? I will start with the victim witness and this is the case of 30% of the proceedings. The first thing we try to do with the victim witness once we have identified the person is to try to have a detailed interview with him or her. The witnesses may have talked to their family and friends, but they may have forgotten important or relevant details. The witness will explain what happened and slowly what is important for the proceedings begins to become clear. The job of the lawyer is to read between the lines. This means that the victims start changing their role and that they start to recognize themselves as a witness. They start realising what is and what is not important for the judge and the case. Also for the lawyer this is very important because we learn the story of that witness. We interview the witness who talks freely and spontaneously about his life. Then we start to see that the witness starts to remember things that he did not remember before. He realises that he knew a lot more than he thought, that is, because he is directed. If that witness comes to Spain to give a declaration, he can have the protection of the 1994 law. Through this law, he will have the status of a protected witness.

How do we make this evidence effective? In Spain, universal jurisdiction cases have progressed not only because of the legislation and the prosecutors; we also have the direct support from human rights associations in the countries where the crimes took place, for instance in Argentina, Guatemala and El Salvador. The first thing we look for are adequate witnesses for what we want to prove. This is based on the principle of efficiency in Spanish Law.

The principles we try to apply is to give a dignified treatment to the witness, avoid secondary victimisation, and to give full support to the victim including by informing the victim about what we are doing in Spain and what his rights in Spain are, and then to determine what problems might arise. Secondly, and this may seem obvious, we fix the day, time and place so that he

feels respected. The place must be spacious with sufficient light and we try to create a trusting relationship, so that the victim is able to tell us all the facts in the best possible way. Also, especially in cases of torture or sexual violence, we try to have a male lawyer for men and female lawyers for women. We introduce ourselves, we tell them what we do, where we come from, and we guarantee professional confidentiality. After this, we ask for a full description of the facts. We have established a standard set of questions that we use as a guide and include all the details in an Excel sheet. If the witnesses do not mind, we film their declaration. We also try to document any injuries. Where possible, we have a team of experts and psychologists that accompany us to try to assess the witnesses. When the trial is in Spain, we involve the witnesses through video-conference, as was done in the Scilingo case. If this is not possible, then we bring the witnesses to Spain. We do so with our own resources, and it is a combined effort of different human rights organisations. In a number of cases that have been taken on board by the public prosecution office, the Government has agreed to pay for those trips. For that to happen, the public prosecution need to accept the witnesses. In other instances, we could also go to countries where the crimes took place. In the case of Guatemala⁶⁴, the investigating judge had to return because the Guatemalan judges did not authorise the trip. However, a rogatory letter was ultimately approved, which allowed Spanish Judge Garzon to go there and take all the testimonies that had been prepared following all the protocols mentioned. All the rogatory letters sent to the United States of America in the Couso⁶⁵ case, regarding the journalist murdered in Iraq, have been ignored.

I will conclude with testimony from the 2001 Cavallo case,⁶⁶ which related to accusations of genocide and state terrorism in Argentina. In 2001, someone spotted Cavallo in Mexico. Immediately an international arrest warrant was issued, we had 24-48 hours to arrest him and he was arrested in Cancun before leaving for Argentina. The direct victims of Cavallo who recognized him sent hand-written testimonies to the court by fax to support the accusation. Other times, if it is impossible to go to court, we try to take the witnesses to their consulates which are closer to their residences. The testimony written at their homes is taken to their consulate and certified by a public notary. It becomes a public document which needs to be ratified afterwards, but it is an added element to the evidence. We are continuously learning of what victims need and demand from us.

Often, when preparing very difficulty testimonies, you will need to review it several times with the witnesses. When you come out of court you have heard witnesses saying things they never said before and that they have never told anybody. They tell you afterwards, after so many years and after such a vacuum, in front of a judge and even if he is a foreign judge that they felt confident to reveal more. The judge treats them exceptionally well and what many of the witnesses say after concluding their testimony is 'Now I can die. I have done what I needed to do and I am helping the families and victims that have not been able to tell their story'. 'I am thankful that a judge, although he is hundreds of kilometres away, will proceed against these criminals.'

⁶⁴ Mayan genocide (Case against former Guatemalan president Efraim Rios Montt.

⁶⁵ José Couso, Telecinco cameraman killed by US shellfire at Hotel Palestine, Baghdad 8 April 2003, Spanish Supreme Court.

⁶⁶ Ricardo Miguel Cavallo, *Juzgado Central de Instruccion* N° 5 of the *Audiencia Nacional*, criminal court Madrid, Spain.

(2) Mari Reid:⁶⁷ Video-link witness evidence

In the UK we use video-link evidence, called 'live link', on a daily basis in a variety of cases. For many years we have used it to allow vulnerable witnesses, such as child witnesses or adults with mental disorders, learning impairment or who are physically disabled, to give their evidence from a place other than the court room where the trial is taking place.

The use of the 'live link' was extended to allow intimidated witnesses to give their evidence in this way as well. Bearing in mind that the commission of certain crimes increasingly results in witnesses being drawn from all over the world, our laws have developed to allow any party to apply to the Court for leave for evidence to be given through a live television link by a witness outside the United Kingdom.

An example of a case where live link was used is the Zardad case, which I will come back to. First it is important to explain about our legal system. In England and Wales criminal trials take place before juries. Individual jurors may find it difficult to understand why they are hearing evidence about what happened in another country, especially ones with which they are not familiar, such as Afghanistan and Rwanda. They may not understand the history, culture and customs of such countries and indeed they may not care. In war crimes or crimes against humanity cases it is essential that the prosecution ensure that the jury understands these issues and tries to bring the case to life for them so that they can understand the context of what the witnesses describe and appreciate the circumstances that prevailed.

There are a number of practical matters that must be considered when deciding whether to call witnesses in person or by live link. Trial counsel may well want all key witnesses to give their evidence in person before a judge and jury. However, if this is not the best option for the witnesses, or at least for some of them, live link may provide an acceptable solution. The prosecutor has to weigh up the significance of the evidence of each individual witness and balance this against his personal circumstances to determine whether he should be asked to give evidence in person or by live link. If evidence from abroad is to be facilitated through a live link, then a venue must be identified which can be used by the witness when he is giving his evidence. The venue must be a place where the witness can give evidence uninterrupted in a separate room away from others. Sometimes, embassies have been used as venues. However, depending on changing circumstances the embassies may not be prepared to assist unless the territorial state is agreeable to this proposal. Embassies were not established with this sort of procedure in mind, but rather to facilitate and provide resources for Ambassadors and diplomats representing their respective governments/citizens.

There are certain procedural rules we have to follow when applying to call witness evidence by live link from abroad. In practice this means that we often have to make our applications early in the proceedings, though there is a provision to make applications out of time if there is good cause, such as if a new witness is traced abroad. One or more interpreter may be needed to translate what is being said by witnesses giving evidence via live link. The court may impose a condition that the witness should give evidence in the presence of a specified person. This person can answer any questions put by the trial judge as to the circumstances in which evidence is given. The Defence may wish to send a representative to be present whilst the witness gives evidence, to safeguard against any suggestion that the witness was being

⁶⁷ UK Prosecutor with the Crown Prosecution Services in the counter-terrorism division, which is responsible for casework relating to terrorism, breach of the Official Secrets Acts, inciting religious or racial hatred, war crimes and crimes against humanity.

prompted or coerced into giving evidence. The satellite link itself may have to be encrypted if there are security concerns. The right equipment and technicians are also necessary to establish the satellite link and to deal with any technical problems that may arise. In the Zardad case, police officers had to travel to Afghanistan several weeks before the trial was due to start to set up a satellite link with the Central Criminal Court from the British Embassy in order to enable the witnesses to give evidence via this link. They also confirmed the location of the witnesses to ensure that people had not disappeared or moved away and that they were still available to give evidence. They also carried out various tests with the court link to ensure that the sound and picture quality were satisfactory. Officers remained throughout the trial to support the witnesses, as well as technical support officers who also remained throughout the trial. It may be best practice to let witnesses try out the equipment during the test sessions to enable them to familiarise themselves with how the process works. This is important, as the last thing anyone would want is for the witness to be stilted and ill at ease. The witnesses must be treated properly, especially when arrangements are being made as to how, where and when they should give evidence. If it is not possible to accommodate their wishes, they must be told why. They must be asked for patience and some flexibility, especially as the time draws near to giving evidence. Flexibility and co-operation from those assisting in the territorial state is paramount. For example, in an espionage case last year we called a witness to give evidence by live link from a remote location in Afghanistan. The equipment and police technicians had to be transported to the facility being used for the link. The Ministry of Defence and NATO were very helpful in cooperating to ensure they reached their destination safely. The judge and jury, lawyers and court staff may have to sit during unusual hours because of time differences. In practice this can be arranged, provided that the court is given plenty of notice. The jury are normally warned about this at the beginning of the trial and are then given notice as to which day or days are proposed to hear evidence from abroad. Contingency plans are important. In the case I mentioned, concerning the live link from Afghanistan last year, we were warned when we arranged the link that bad conditions, such as sandstorms, might adversely affect the satellite link and that we might lose the picture and sound. We therefore made contingency plans to call other evidence if the link broke down and to rearrange the live link for a different time and date if it became necessary. In the event, the link worked perfectly and apart from a slight time lag, the quality of sound and picture were excellent. The cost of the links can be expensive, booking the satellite time, providing the technical equipment and technicians, can all prove costly. In the Zardad case, the costs of the equipment were in the region of £150,000 and the satellite time was £60,000 or thereabouts for each trial. However, if use of the link is the best way of securing the co-operation of the witness and his evidence, the financial cost is justifiable.

Between 2003 and 2006, we prosecuted a warlord named General Zardad, who had exercised military control and authority over an area within Afghanistan. The allegations arose out of his actions during the civil war, which took place in Afghanistan between 1992 and 1996. Zardad was a military commander with approximately 1,000 men under his control; he had a military base in Sarobi which he controlled. Almost all traffic between Peshawar, Pakistan, and Kabul, Afghanistan, took the road through Sarobi and had to pass the military base. There was a checkpoint positioned at a strategically important point in the road. Control of the checkpoint enabled Zardad and his soldiers to steal goods and money from persons passing through and to prevent supplies reaching his enemies in Kabul. Zardad and his soldiers used indiscriminate and unwarranted violence on innocent civilian travellers. They would beat, wound, torture, shoot and kill them. They would detain and imprison them. They would hold for ransom or exchange civilians taken at the checkpoints or elsewhere.

When the Taliban took over control of Afghanistan, Zardad fled to Pakistan, from where he subsequently made his way to the UK. He applied for asylum in the UK in September 1998.

Zardad was arrested in London in July 2003. There was no application by Afghanistan for Mr. Zardad's extradition to Afghanistan. One of my colleagues in the Counter Terrorism Division reviewed the evidence against Zardad and decided that he should be prosecuted for offences of torture and hostage-taking. At trial, Zardad faced an indictment containing a count of conspiracy to torture and a count of conspiracy to take hostages between 1992 and 1996. We called expert evidence to explain the context of the conflict in Afghanistan and the power that Zardad was able to exert.

The majority of witnesses were in Afghanistan. The Immigration and Nationality Directorate (IND) were reluctant to grant them UK visas, as they feared that they would claim political asylum if they were allowed to enter the UK. There is a law in England and Wales (section 32 of the Criminal Justice Act) which allows for evidence to be given via video link from abroad. However at the time of trial preparation a commencement order had not been made preventing the provision from coming into force. This was brought to the attention of the Home Office and a Minister subsequently signed the commencement order prior to the first trial in October 2004. Therefore, we were able to apply for and use the live link procedure. The equipment to enable witnesses to give evidence via video link had to be taken by sea and land to Afghanistan. During the first trial, 40 witnesses gave evidence from the British Embassy in Kabul, via a live link to the court in London. That trial resulted in what we call a 'hung jury', whereby the jury were not able to reach a unanimous or a majority verdict. During the re-trial, a small number of key witnesses who had left Afghanistan since the first trial were flown to the UK to give evidence in person. The remainder of the witnesses gave their evidence from Kabul as before. Whether the presence in person in court was a decisive factor in the subsequent guilty verdicts reached by the second jury is unclear; we do not know the reasoning of the second jury in reaching their decision. On 19 July 2005 the trial judge sentenced him to 20 years imprisonment on each count to run concurrently. Zardad appealed against conviction and sentence but he was unsuccessful.

Regarding the first jury in the Zardad case, we do not know whether the use of live link lessened or reduced in some way the impact of the evidence that the witnesses from Afghanistan gave to the court. Feedback from counsel sometimes results in negative assessments as to what impressions witnesses have made on live link and they often express the wish that the witnesses had given evidence in the court room. However, these instances have not necessarily resulted in acquittals. Over the years, research has been carried out regarding the use of live link and video evidence in respect of child abuse trials. That research has not found that the use of video recorded and live link evidence has affected the outcome of trials. In terms of the court procedure, live link has to be fitted into the trial time table, you *do* need to plan which week or days you will be calling evidence by the link, as the court staff and jury need to be given time to make any necessary arrangements, depending on the difference in time zones. However, like all best laid plans, technical problems may mean there are delays, therefore a contingency plan is advisable to fill in any gaps until the link can be established.

Discussion

A question was asked about whether video-conferencing technology has improved since the initial trial in 2003. It was also queried whether EU states could make arrangements to share such specialised equipment. Ms. Reid responded that in another Afghanistan case she prosecuted last year, they still needed to rely on a satellite link and could not simply use Skype

as there was a need for an encrypted link because there were security concerns with regard to witnesses. She agreed that it would be a good idea for states to share the equipment and move it about as needed. In response to another question about the possible use of live link in the investigation stage, Ms. Reid noted that in the UK, prosecutors are separate to the police. While in certain cases such as war crimes or crimes against humanity, it is more likely than not, that the prosecution team will be working together with the police, the prosecutors do not play a role akin to the investigating judge in civil law countries. For instance, the CPS and the police would be looking at avenues that should be explored with witnesses, or talking about witness protection issues, which countries we can apply to, to obtain evidence from abroad. As far as the UK is concerned, video-link is not used in the investigation stage. However, there are other options available. Very often the police will record the evidence of a significant witness not with the view to those witnesses using that recording as a means of giving their evidence in chief in the court proceedings, but rather simply to have a full version of what questions were asked of the witness and what the responses were. In other words, the police take a recording of significant witnesses, but not for use in court. The other way of dealing with such evidence by way of video-recording is video-recorded evidence. If a witness is vulnerable, then it is possible to record their evidence. There are difficulties, if the officers are travelling from the UK to certain countries where they are not getting that much cooperation because they have got to take the equipment with them, but it is possible.

Manuel Ollé Sesé noted that in Spain, they do use video-conferencing during the investigation and at trial. In the Scilingo case, about 80 or 90 witnesses, including victim-witnesses, non-victims and experts testified through video-conference. Due to the time difference, we had a connection every afternoon at 4pm, and we were connected to another court in Buenos Aires.

In response to another question about whether the public prosecution cooperates in the investigations, Manuel Ollé Sesé responded that lawyers that represent victims typically take most of the initiative to prepare the indictment; we would provide the names, put forward lists. If there is a concrete political problem, we remember the Pinochet case - Juan Garces was involved with it - the public prosecution was saying no to everything that was requested. Usually though, the public prosecution office will say yes. We would wish for the public prosecution office to expand its mandate to be able to act on its own initiative and to go to Guatemala and El Salvador to carry out investigations. This does not currently take place and so the investigative burden is on the shoulders of the private parties. The victims and private prosecutors do not have the power of a public prosecutor or an investigative judge and they do not have the resources of the public prosecution or the Ministry of Justice. I think that despite all resource limitations, we are able to progress and go forward. If the public prosecution got engaged a little bit more, we would be able to do so more efficiently.

(3) Helena Vranov⁶⁸: Psychological support

Thank you to the victims for sharing your stories, because if you were not willing to do so, there would be no tribunals. I work with the Victims and Witnesses Section (VWS) of the ICTY. We contribute to the effective functioning of the ICTY by facilitating all appearances of witnesses who are called by the prosecution, defence or chamber. While doing this, we work to ensure that the services we provide do not result in further harm or traumatising of witnesses. We try to provide psychological, emotional and practical assistance to witnesses in the best possible

⁶⁸ Helena Vranov, Senior Support Officer, Victims and Witnesses Section, ICTY.

way, so that at least they can experience their testimony in a positive way and if possible, for it to become a healing process. When the VWS was set up, it was considered how best to provide counselling or support to witnesses. Should those tasks be separated from one another or would it be helpful to have a psychologist or psychiatrist for one or two hours during the day witnesses are testifying? I know that as soon as some people from the former Yugoslavia hear the word 'psychologist' or 'psychiatrist', they ask us if we think that they are crazy and they say that they do not want to speak to anybody.

We have discovered there are three types of issues that witnesses can face: i) issues related to psycho-social support; ii) logistical issues, and iii) protection issues. When we refer to VWS support, we are actually referring to the package of all of these services that can be helpful and useful to witnesses. The victims should not only be seen as victims but also as survivors. They have coping skills, they have managed to escape the situation they were in and they have gained strength and have decided to testify before the Tribunal. We are trying to see how we can actually empower them, to use their existing coping skills, to help them go through the experience, as positively as possible. Since 1996, we have had more than 6,000 witnesses testify before the Tribunal. In the beginning, we only had an office in The Hague so whenever there was the need for somebody to go visit the witnesses in the region, somebody would have to travel from The Hague. In 2002 a Sarajevo field office was established, with a representative from the VWS who can respond immediately to issues faced by witnesses in the region.

There are three distinct stages of support services. In the pre-testimony phase, we will deal with logistical matters such as finding out if the witness has a passport, if he needs a visa, does he need transport from his home to the airport, and has he ever flown before. In cases where witnesses need more assistance, we can have one of our staff from the Sarajevo field office to meet them at home, to assess the situation and to see what problems can be removed even before they travel. Once they arrive in Amsterdam, there is a driver waiting to drive them to the hotel where someone who speaks their mother-tongue is available to provide them with all the information they require. For people who have been through the war and experience severe trauma, unpredictability and lack of information can exacerbate their stress-levels. Once they are in The Hague, we have a witness assistance program, which is comprised of eight assistants who speak several languages including the mother tongue of the witnesses. They can assist the witnesses while in the Netherlands with all practical matters. For example, simple things like going out and buying meals. Or, if they just had a proofing session with the prosecution and are upset because they had to go through the statements and that triggered a lot of memories. Then they might need someone to be with them, take a walk and try to relax them a bit to prepare them for the next day. We are the first point of contact, so if the witnesses have any issues it is important to let them know they can turn to us and can actually request some assistance.

Once they start testifying, we follow their court appearance. For us, it is very important to be aware of what is going on in court. It is also important for us to liaise with the court officers inside the court room if we see that a witness might need additional attention or if there are any medical issues that would be beneficial for the court to be informed about. The court also knows how to contact us if the witness breaks down during testimony, which can happen at any moment. We are part of a neutral body and do not meddle with evidence; we do not provide assistance on how witnesses should answer certain questions. Sometimes we do not even know about their statements or their ordeal but we are there in case they want to vent. Once they begin testifying, so many emotions are triggered, so many issues might come up. Once they are under oath, for example, they cannot speak to the investigator or the prosecution with whom they have worked for several years. In order to not let them feel abandoned and help

them feel supported we are again trying to create a supportive network so they know who they can turn to in order to seek some assistance or if they need someone to listen to them. This is one of the most important tasks we undertake - listening to the witness and to see what the witness wants because we can have a great model, but it might not be applicable to all witnesses. It is very important to tailor our services to individuals.

Once the witnesses have finished testifying, we organise their travel back and identify their needs. Sometimes the witnesses are overwhelmed by their experiences. Sometimes we have to employ specialised medical assistance or a psychiatrist. While the witnesses are with us, they are medically insured, because the testimony can also trigger physical reactions and end up as a deterioration of their health. This is especially the case with many of the witnesses from the former Yugoslavia, who are 55 years of age or older and most of them do have some form of health problem. It is very assuring for them to know they can be taken care of in case they would fall ill. We have witnesses who have had to be hospitalised, or who have had to go to the doctor on several occasions. Once they know that they can be taken care of medically if need be, it can ease their stress.

We try to ensure that the witnesses keep in regular contact with the families. If they have small children, it is determined whether the children need to accompany the witness to The Hague or whether a carer can be employed while they are absent. Sometimes there will be a need for a support person or family member to accompany the witness to The Hague. We have also received a donation from Norway, which has enabled us, for example, to buy clothing for some witnesses who are in a poor economic situation and who want to appear 'dressed as a normal person' before an international court. This can sometimes help put them at ease and prepare in the best possible way for court. Everything can go smoothly when testifying but we do not know what the result of their testimony may be once they return home. They are provided with phone numbers both in The Hague and in Sarajevo in case there are any emergencies or issues that arise.

It was mentioned previously that sometimes witnesses experience difficulties when they return. It can be very subtle comments without concrete threats. We have had female rape victims who have testified and even though they had protective measures, the public knew the event they had testified about, and if there is only one survivor, it is not very difficult to match who that person was. Once that witness goes back to her village, she might be shunned from the community and there are no protective measures for such a situation. It is the social environment and the context they are returning to, which is also very difficult for witnesses to deal with.

The VWS has organised several conferences to bridge the gap between the tribunal in The Hague and the region. Many NGOs were invited who are dealing with victims and witnesses in order to exchange information about the problems witnesses encounter because of their testimony, and to find ways to assist them. Our mandate means we are not in any position to provide any long term therapy so we have to rely on NGOs and we can actually refer the witnesses to several of them.

There has been extensive use of video-link testimony. Most of the witnesses testifying through video link have done so due to psychological or medical reasons. In cases where video link has been granted by the triaogul chamber, our section is always present.

It is important for the witnesses to be compensated for financial losses whilst away from home. For example, they are provided with meal allowances, a "witness allowance" for incidental costs such as buying telephone cards and an "attendance allowance", to reimburse other costs

though it doesn't reimburse lost wages; there are standard rates so regardless if you are unemployed or are a doctor, you would obtain the same payment. People can also claim extraordinary losses but will need to provide additional documentation.

(4) Yaiza Alvarez Reyes⁶⁹: Witness familiarization

Together with the psycho-social and logistical support, the VWS also has what we call judicial and extra-judicial protection. Judicial protection is, in principle, when the party calling the witness applies to the chamber and requests specified protective measures. The Chamber can allow the witness to testify with a pseudonym, voice or image distortion or have a closed session that protects their identity. However, in some cases, the witness might be afraid, but the party calling the witness is unwilling to seek protective measures. In those cases, the role of the VWS is essential, because we are occupied with the concerns of the witnesses and have no other considerations. We are entitled to apply directly to the Chamber on behalf of the witnesses and ask for protective measures. Alternatively, we can liaise with the Chamber to allow the witness to address the court and explain the reasons for requiring protected measures. Ultimately, it is the Chamber's decision to grant protective measures.

The other type of protection is extrajudicial protection. During or after testimony, information might be received from the witness or from the party calling the witness that they are in danger. Measures have to be taken in order to remove that person from the situation they are in. For this, the protection unit receives the request and assists on a case by case basis recommending to the Registry the actions that should be taken. This ranges from advising the local police, to relocating the witness. At the ICTY, we have the possibility of relocating not only the witness but also the whole family, which can be up to nine members together with the witness. We have to secure agreements with member states to relocate those witnesses. We have agreements with 13 states and this is something that is continually being negotiated. Right now almost all the witnesses we have waiting to relocate are about to be relocated, but we expect that we may have another wave of witnesses who need relocation. Another issue mentioned this morning was insider witnesses. In the earlier days of the ICTY, there were a lot of guilty pleas, so a lot of accused served a sentence and were assisting the prosecution in other cases. In the majority of such cases, there were relocation needs. These are very difficult cases because there are not many countries we have an agreement with who will accept insider witnesses. This is one of the challenges we have to face.

When information is received that someone has to be relocated, the person's family is taken from the place where they live and moved somewhere else. It takes time to locate a country willing to accept that person or the family, so for some time they will need to be with us in the Netherlands. There is a huge amount of work that the protection unit has to do. Assist them, find a house for them, find a school and include them in the health system, amongst other things. Usually the witnesses do not speak Dutch. It is a completely different culture. The protection officers are with them 24/7 during the time with us in the Netherlands. When they are finally accepted in the permanent state of relocation our protection officers will help them travel to the country, to get to know the new place and, will assist them to integrate into their new life. Once they are relocated, we are the only link to their past. When they have to get a new passport, we will need to be involved. When the witness has to testify in another case before the tribunal or in another case from the former Yugoslavia, this all happens through us. The tribunal is going to

⁶⁹ Yaiza Alvarez Reyes, Legal Officer, VWS, ICTY.

close soon and the Registry is trying to co-ordinate how it can maintain a small unit within the residual mechanism of the Tribunal, in order to follow up with these witnesses, but it has still not been determined.

(5) Jesus Tecu: Rios Montt case, Guatemala, Spain

I was a witness in the case that is taking place in the High Court in Spain. I also testified in the genocide case in Guatemala and other proceedings against some members of the military. I am a survivor of five massacres in my village called Rio Negro. I witnessed these massacres. They killed five members of my family. They killed seven children and seventy women.

In Guatemala, when we started to speak out against the illegal cemetery and burials where our loved ones were, we were wondering if the perpetrators knew what we were doing and what the consequences would be. Justice in our country is racist. The survivors and witnesses were threatened and the perpetrators walked freely in the different cities and villages. I have testified, and this experience helped me to engage with other witnesses, especially when we testified in Guatemala. On many occasions the judges were not happy. They felt offended and did not give any time to the witnesses to testify or to explain what they needed to say. A lot of witnesses forgot their names; they are more afraid about what would happen after their testimonies.

There were a lot of questions. Why go to another country? Why travel for so many hours when there is a justice system in our own country? It is not that the system does not work; the problem is that justice officials are not working. We were determined that if there was no justice for our families, for the silent victims, we were going to look for justice so their deaths would not lead to impunity. We went to a small village in a region where there had been many killings. Almost 7,000 people lost their lives, women, children, men. We convinced certain people to travel and testify before the Spanish judge. Concern was expressed regarding the trip and the consequences of going to a foreign country to testify.

The intention was to testify in Guatemala before a Guatemalan judge with a Spanish judge present. This was not allowed, and on many occasions in our countries, appeals have been used to delay proceedings. Therefore, we were obliged to travel to Madrid to testify. Three days before, we were in a hotel in the capital. The media was present and on many occasions the media had been complicit with those responsible for giving the orders for the killings. Once we got to the airport, they were looking for us outside of the airport to take some pictures, to have some declarations, but we were able to get inside the airport. The coordinators of the trip bought a group ticket. They did not ask for individual travel tickets but a group ticket. The Spanish ambassador helped us, came with us, to enable us to get through immigration easily. We were at the airport and were wondering what would happen. After Guatemala, we went to Panama. We asked whether we were in Madrid when we got to Panama. We were not even half-way and we were already asking if we were there yet! Once we got to Madrid, what was positive was that we went through immigration without many questions or many examinations.

The people who organised the trip took proper care of the witnesses, they stayed in their houses and a week later, we had to testify in groups. I think that four people testified per day because the testimony of each of the witnesses took 1-2 hours. In my opinion, what was important when testifying was the behaviour of the judge, who was extremely humane. He treated the witnesses correctly. If we compare the behaviour of the Spanish judge to the Guatemalan judges, who were threatening the witnesses, the situation was very different. We went back to Guatemala and received many threats from the Police and the Army. On many

occasions, files were 'lost' and all the testimonies ended up in the hands of the Army. Hence, there was grave concern when we went to Guatemala, but it has been a year since we testified and the witnesses have not actually been harmed in any way.

Another important issue is to be able to create alternatives to take care of the witnesses. In countries where massacres and genocide took place, sometimes life can seem worthless. A witness needs a lot of care. He needs to be followed up and if he is accompanied by a psychologist it is important. It does not mean the psychologist will interrogate the witness, but it means they will be with him.

He noted that the victims found strength through the Mayan culture in Guatemala; sometimes the dead are not dead but we are the dead ones because sometimes we do not look towards the future, but the spirits can predict what the future will be. What we say daily is that in cases where we seek justice, we seek justice not revenge. We believe we are supported by the spirits of those killed during the massacres and we have that faith. The fight is not a fight by the living ones but also by the dead ones.

Discussion

One commentator asked about how victims come in contact with lawyers, and how do lawyers deal with the situation of the victims have taken painstaking steps to advance the cause of justice; how difficult is it when they finally find a lawyer who will help, to sit back and let the lawyer lead the case? Mr. Tecu explained that he met Manuel Ollé in 1996 through another Spaniard who had undertaken research in Guatemala and went to the site of the massacres of Rio Negro and other massacres in other communities. Manuel Ollé added that the San Francisco based Centre for Justice and Accountability took care of the logistics, organising with other organisations in Guatemala, and arranging the first interviews with young lawyers and drafting the testimonies before the case was filed.

A question was asked to the WVS staff from the ICTY whether they share their work and practice with other international tribunals. There was a further question posed whether it would be possible to adopt a similar approach to protection in universal jurisdiction cases to the approach taken by the ICTY. Manuel Ollé noted that in the Guatemala case, they were concerned about what would happen when the victims returned to Guatemala. There is a duty to follow-up, but we had to seek the assistance not of the NGOs, the professionals, but the judges and the public prosecutors. The judges and the public prosecutors should be co-responsible because once they have been transferred to Spain, it is their co-witness. They should be concerned, not only by the security measures, but they should periodically see how the witnesses are, if they need anything, what has happened and what the specific circumstances are. All this should be done from an institutional point of view.

Siri Frigaard, the Chief Public Prosecutor and Director of the Norwegian National Authority for Prosecution of Organised and Other Serious Crime, commented about the question about what countries with universal jurisdiction were doing for witnesses. She noted that it is unrealistic that countries like Norway, are able to follow witnesses in their own countries after having been witnesses in court. What we are doing is when we had witnesses, we spoke to them and brought with us a lawyer (we have a system in Norway that witnesses can get a lawyer to protect them) who spoke to the witnesses. She got in contact with the local Red Cross, to be

aware of these witnesses, knowing they were going to give testimony in the court in Norway in the hope they could follow up their situation when they returned. We do not have the resources to do it ourselves.

F. JUDGMENT, SENTENCE, OUTREACH AND IMPACT

(1) Åsa Rydberg van der Sluis: General overview

I will give a brief overview of the universal jurisdiction cases in Europe that have actually resulted in a judgment and where applicable, the sentences that have been given.

In Belgium seven people have been convicted in three cases on the basis of universal jurisdiction, all of them relating to crimes in Rwanda. The first case is from 8 June 2001, the so-called “Butare Four” case, in which four Rwandans were convicted for war crimes against Tutsis in Rwanda. Mr. Alphonse Higaniro,⁷⁰ a former politician and businessman was convicted of war crimes and received 20 years imprisonment. Mr. Vincent Ntezimana,⁷¹ from Butare University, was convicted of war crimes and received 12 years imprisonment. I believe that he was released in 2006. Ms. Consolata Mukangano, aka Sister Gertrude,⁷² a Benedictine nun and the Mother Superior, was convicted of war crimes and received 15 years imprisonment. Ms. Julienne Mukabutera, aka Sister Maria Kisito,⁷³ a Benedictine nun was convicted of war crimes and received 12 years of imprisonment. She was released in June 2007, after having served half her sentence.

The next judgment in Belgium was on 29 June 2005, against two half-brothers both convicted of aiding Hutu militias in killing Tutsis and moderate Hutus in south-east Rwanda. Mr. Etienne Nzabonimana,⁷⁴ a former wholesaler, was convicted of genocide and received 12 years imprisonment. Mr. Samuel Ndashyikirwa,⁷⁵ a former small business owner, was convicted of genocide and received 10 years.

Finally, the latest judgment in Belgium was in 2007 against Mr. Bernard Ntuyahaga, a former member of the Rwandan Armed Forces. He was found guilty of having killed an unknown number of Rwandan civilians and also for having murdered UN peacekeepers. This sentence has been confirmed by the Cour de Cassation, on appeal, 12 December 2007.⁷⁶

In Denmark, there has been one judgment. Mr. Refik Saric,⁷⁷ a Bosnian Muslim was himself a prisoner in a Croat-run prison camp Dretelj in Bosnia and Herzegovina. He was promoted to a job in the camp and mistreated other prisoners. In 1994, a Danish court acquitted him of some charges but found him guilty of others and sentenced him to 8 years in prison and a life-time

⁷⁰ Cour d’assises, Belgium, 8 June 2001.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ Cour d’assises, Belgium, 29 June 2005.

⁷⁵ Cour d’assises, Belgium, 28 June 2005.

⁷⁶ Since the conference, there has been another judgment in Belgium. Ephrem Nkezabera was arrested in June 2004. His trial commenced in November 2009 and he was found guilty on 1 December 2009 and given a 30 year sentence. He died of cancer on 24 May 2010.

⁷⁷ Danish Supreme Court, Denmark, 15 August 1995.

ban from entering Denmark after the sentence was completed. The sentence was confirmed in 1995.

In France, there have been two cases, which both have reached a judgment and which all took place *in absentia*. As will soon be discussed in detail, on 1 July 2005, the case against former Captain Ely Ould Dah from Mauritania resulted in a trial *in absentia* (due to his escape from prison) and he received a 10 year prison sentence for having committed torture in the Jreida death camp. The jurisdiction issue was upheld by the Cour de Cassation. On 30 June 2009, the European Court of Human Rights held that France had not violated the Convention's ban on retroactivity.⁷⁸

The other case in France relates to a former agent of the internal security department of Tunisia, Mr. Khaled Ben Said⁷⁹. He fled France after having been informed of the charges. He was convicted *in absentia* in December 2008 to 10 years imprisonment for complicity in torture.

Germany has tried four persons based on universal jurisdiction, all of them relating to crimes committed in the former Yugoslavia. In May 1997, Mr. Novislav Djajic⁸⁰ was charged in relation to the shooting of 15 Bosnian Muslims on a bridge and thereafter throwing them in the river Drina. While he was found guilty of murder, he was acquitted of genocide, since he was found to have lacked genocidal intent. He was sentenced to 5 years imprisonment, obtained early release and was expelled from Germany.

Mr. Nikola Jorgic,⁸¹ a Bosnian Serb, who had resided for most of his life in Germany, was found guilty of genocide against Bosnian Muslims for executions, torture and expulsions. He received a life sentence in 1997. This judgment and sentence have been appealed but it has become final and the European Court of Human Rights has found that the sentence was in compliance with the European Convention.⁸²

In 1999, a German court found Mr. Maksim Sokolovic,⁸³ another Serbian long-term resident in Germany, guilty of aiding and abetting the crime of genocide against the Muslim population in Osmaci in Bosnia and Herzegovina. Sokolovic received a sentence of 9 years in prison for this crime. The appeal was rejected.

Finally, in 1999, a German court found Mr. Djuradj Kusljic,⁸⁴ a Bosnian Serb and former chief of the police station in Vrbanjci in northern Bosnia, guilty of genocide in conjunction with six counts of murder. He received a life sentence. On appeal, in 2001, this sentence was upheld. There are reports that he was released in 2006.

In the Netherlands, there have been judgments against five people in four different universal jurisdiction cases. In the first case relating to the Democratic Republic of Congo (ex-Zaire), Mr. Sebastien Nzapali,⁸⁵ a former member of President Mobutu's guard in the early 1990s, was

⁷⁸ ECtHR Decision on the admissibility in the in the case of OULD DAH v. FRANCE (No. 13113/03), March 2009.

⁷⁹ Criminal Court of Strasbourg, France, 15 December 2008.

⁸⁰ Court of Appeal of Bavaria, Germany 23 May 1997.

⁸¹ Federal Court of Justice, Germany, 30 April 1999.

⁸² ECtHR judgement issued on 12 July 2007 in the *Jorgic v. Germany* case (Application no. 74613/01).

⁸³ Higher Regional Court (Oberlandesgericht) of Dusseldorf, Germany, 29 November 1999; appeal rejected by the Federal Supreme Court (Bundesgerichtshof), Germany, 21 February 2001.

⁸⁴ Bavarian Higher Regional Court, Germany, 15 December 1999; appeal rejected by the Federal Court of Justice (Bundesgerichtshof (BGH), 21 February 2001.

⁸⁵ Rotterdam District Court, Netherlands, 7 April 2004.

found guilty of torture. The other allegations were not proven. In 2004, he was sentenced to a term of imprisonment of 2 years and 6 months.

The next Dutch case concerned two Afghan men, accused of torture and war crimes. In 2005, both Mr. Heshamuddin Hesam,⁸⁶ a former head of the Afghan military intelligence of the KhAD, the secret police and Mr. Habibullah Jalalzoy,⁸⁷ former head of unit charged with interrogations of the KhAD, were found guilty of torture and war crimes in Afghanistan in the 1980s. They were sentenced to 12 years in prison. In July 2008, the Dutch Supreme Court upheld the convictions.

There has been another Dutch case relating to Afghanistan and the KhAD. Mr. Abdullah Faqirzada was an officer in the KhAD who was prosecuted for torture and war crimes. In June 2007, he was acquitted, since his implication with the proven crimes by the KhAD was uncertain. On 16 July 2009, this acquittal was upheld.

Finally, the latest judgment in the Netherlands is from the case that we have already talked much about, the case against Mr. Joseph Mpambara,⁸⁸ who was sentenced to 20 years imprisonment for torture in Rwanda. It is currently on appeal.

I should also add that in the Netherlands, there have been two judgments in relation to criminal arms trade (the Van Kouwenhoven⁸⁹ and Van Anraat⁹⁰ cases respectively).

The first and only person to be tried in Norway was Mr. Mirsad Repak,⁹¹ a former member of the Croatian Armed forces, near the Dretejl prison camp in Bosnia and Herzegovina. He was indicted for war crimes and crimes against humanity. In December 2008, Repak was found guilty of war crimes and sentenced to five years imprisonment.

Although there are many ongoing cases in Spain, there is only one that has reached a judgment. It is the case against former Argentinean naval officer Alfredo Scilingo,⁹² a case which we have also heard about earlier at the conference. In 2005, he was found guilty of crimes against humanity and torture and was sentenced to 640 years in jail. In 2007, the Supreme Court of Spain increased this sentence to 1084 years for crimes against humanity. He is likely to serve 25 years.

Although this is not a clear-cut universal jurisdiction case, I still want to mention the case against Arklöv, since it was the first time in Sweden that liability for a crime against international criminal law was tried. Jackie Arklöv⁹³, a Swedish citizen, took part in the war in the Former Yugoslavia as a mercenary on the Croatian side, and he was accused of having tortured Bosnian Muslim prisoners in the Gabela and Grabovina camps. In December 2006, a Swedish court found

⁸⁶ Sentenced in a criminal tribunal in The Hague, 14 October 2005; upheld The Hague Court of Appeal, 29 January 2007; upheld Dutch Supreme Court, 9 July 2008.

⁸⁷ District Court of The Hague, 14 October 2005; upheld The Hague Court of Appeal, 29 January 2007; upheld Dutch Supreme Court 9 July 2008.

⁸⁸ The appeal began at The Hague District Court, Netherlands 13 October 2008 and is ongoing.

⁸⁹ Guus Van Kouwenhoven, conviction overturned 10 March 2008 by a Dutch appeals court and acquitted Van Kouwenhoven, prosecution intend to appeal to the Supreme Court.

⁹⁰ Frans Van Anraat, sentenced 23 December 2005, increased 9 May 2007, upheld 30 June 2009 Supreme Court but shortened the sentence.

⁹¹ Oslo District Court, Norway, 2 December 2008. Since then the appeals court in Oslo sentenced Repak to four and a half years imprisonment on 14 July, 2010 for war crimes in Bosnia and Herzegovina in 1992, see <http://www.balkaninsight.com/en/main/news/27324/>.

⁹² Sentenced Spanish National Court, 19 April 2005; sentence increased Spanish Supreme Court 4 July 2007.

⁹³ Stockholm District Court (Stockholms Tingsrätt), Judgement of 18 December 2006, case number B4084-04.

Arklöv guilty of wrongful imprisonment, torture, assault, ethnic cleansing, looting and arbitrary detention. At that time Arklöv was already serving a life sentence for unrelated crimes committed in Sweden. No appeal against this judgment was lodged.

In Switzerland two people have been convicted on the basis of universal jurisdiction. The first case concerned the former Yugoslavia in the 1990s. A Swiss military tribunal tried Mr. Goran Grabez,⁹⁴ a driver and manual worker, for war crimes (accused of beating prisoners) said to have been committed against prisoners in the Omarska and Keraterm camps in Prijedor in northern Bosnia-Herzegovina. Due to contradictory evidence, the court acquitted Grabez in April 1997.

In 1999, a Swiss military court found Mr. Fulgence Niyonteze,⁹⁵ a former mayor of Mushubati in Rwanda guilty of war crimes. He was sentenced to 15 years of imprisonment and expulsion from Switzerland. On appeal, in May 2000, Niyonteze was sentenced to 14 years of imprisonment and expulsion upon release. This sentence became final in April 2001. At the end of December 2005, Niyonteze was released on parole and finally deported from Switzerland.

In the United Kingdom, the only case that has led to a conviction is the case against Mr. Faryadi Sarwar Zardad,⁹⁶ a commander in the warlord group Hezb-i- Isami in Afghanistan. As such he controlled more than 1000 men who terrorised, tortured and killed people who tried to pass through this important route in the early 1990s. In 2005, the first jury hung, but the second jury found that Zardad was guilty of torture and hostage taking and was sentenced to 20 years imprisonment. The judgment was appealed and dismissed 7 February 2007.⁹⁷

There have been many recent judgements outside Europe. For example, in Canada, Desire Munyaneza,⁹⁸ was convicted of genocide, crimes against humanity and war crimes in Rwanda. He received a life sentence with no opportunity for parole for 25 years. In the USA, a case emerged concerning Chuckie Taylor⁹⁹, son of former President of Liberia, Charles Taylor (who is standing trial before the Special Court for Sierra Leone). He was sentenced in the USA to 97 years of imprisonment for torture committed in Liberia.

What conclusions can be drawn from this overview, if any? Most of the cases that have reached a judgment in Europe originate in the former Yugoslavia, Rwanda or Afghanistan. The majority of cases that have reached a verdict are cases where the accused were on the territory of the forum state due to having been granted asylum (or they were already living in the country for many years) or they came to the forum state to seek asylum but were recognised by someone. In other words, not many cases have become final where the accused was visiting the country, or was handed over to the forum state thanks to an arrest warrant. Finally, what also struck me as a former UN staff member and employee of the ICTY, is that in Germany the accused from the former Yugoslavia were prosecuted for genocide, and I dare say that not all of these cases would have been prosecuted as such before the ICTY. On the other hand, the Rwanda cases in several states in Europe, due to the applicable laws at the time as already discussed, were not

⁹⁴ Division 1 Military Tribunal, Lausanne, Switzerland, acquitted 18 April 1997.

⁹⁵ Sentenced Military Appeals Tribunal, Switzerland, 26 May 2000; confirmed High Military Appeals Court, Yverdon-les-Bains, 27 April 2001; released 29 December 2005.

⁹⁶ Sentenced Old Bailey Criminal Court, United Kingdom, 19 July 2005.

⁹⁷ *R. v. Zardad (Faryadi Sarwar)* [2007] EWCA Crim 279.

⁹⁸ Quebec Superior Court, Canada, 29 October 2009.

⁹⁹ Chuckie Taylor was convicted in October 2008 by the US District Court for the Southern District of Florida and sentenced to 97 years imprisonment. On 15 July 2010, the US Court of Appeals for the Eleventh Circuit confirmed the conviction.

prosecuted for genocide, when they probably would have, had the accused been indicted and tried at the ICTR.

(2) Rodolfo Yanzon¹⁰⁰

I will speak about what is going on in Argentina today. In the next few weeks there will be one of the most important trials in Argentinean history against perpetrators of crimes against humanity - Alfredo Astiz, a naval officer of the Argentinean navy who was accused and judged *in absentia* in France and in Sweden. We asked for extradition, he was also accused in Spain and there were other accused that were subject to extradition by the Spanish Judge Garzon. The trials instigated in Europe against Argentinean military officers allowed us to generate debate about the need for accountability, not only at an international level, but also inside our country, and the need to set aside the laws that granted impunity to these perpetrators. Argentineans realised there were other countries interested in these crimes because these crimes were not committed exclusively against Argentineans; there were trials in Germany, France and Spain. The big public debate that even took place amongst academics, lawyers and political parties, is that something must happen. Fortunately people are *still* debating it, but we also know that some sectors of the population will try to put a break to all this. Therefore the universal jurisdiction trials that take place in Europe, have been, will be, and are of paramount importance to indict all these perpetrators. In a few days we will have the first trial for crimes against humanity. The first big step we are all waiting for is to add to the list Åsa gave us, the people that took decisions over war crimes and crimes against humanity from the USA and Europe.

(3) Clémence Bectarte:¹⁰¹ Ely Ould Dah case judgment, Mauritania, France

I will take a few minutes to describe the Ely Ould Dah case, and then I will give the floor to Mr. Diagana who will explain the impact this judgment has had in Mauritania. At the end of the 1980s - early 1990s, Mauritania underwent a massive period of repression orchestrated by the Mauritanian government. In 1991 a thousand people were arrested and tortured and 500 were executed in this wave of repression. Already in 1991 some members of civil society and widows groups tried to claim justice by all sorts of means. They tried to establish an investigative committee, they tried to lodge complaints, but all in vain. Thereafter an amnesty law was passed by the Mauritanian Government, making it impossible to obtain justice in Mauritania.

Civil society, the survivors and the families of victims found themselves in a situation of total impunity and it is in this context that they turned to universal jurisdiction. Why in France? Why in 1999? This is when the complaints were lodged in France. Why FIDH? Many Mauritians had been victims of acts of repression and had taken refuge and found asylum in France. Some set up an association which Mr. Diagana chairs, and it is through an FIDH member league - the Mauritanian Association of Human Rights, that these victims finally got in contact with FIDH and were made aware of the possibility to use universal jurisdiction.

In 1999, the victims who had taken refuge in France found out that a former captain of the Mauritanian military was in France. He was being trained in France and this is where the complaint was prepared, through FIDH and the French League of Human Rights. The complaint

¹⁰⁰ Rodolfo Yanzon, Lawyer, Argentina.

¹⁰¹ Lawyer and coordinator of the FIDH Legal Action Group.

was lodged in 1999 in Montpellier. This Captain Ely Ould Dah was arrested and confronted by some of his victims because some testimonies had been included in the complaint that was filed. He was investigated for acts of torture and barbarism, which are the only acts over which you can file a case based on universal jurisdiction in France. He spent three months on remand then he was released on bail. He then fled and escaped to Mauritania. Since he did not return, the judgment that was handed down on 1 July 2005 was read out in his absence.

This was a long uphill battle both politically and legally and it took about five years of battles to end up with a judgment. In this particular case there was no cooperation from the Mauritanian authorities. The French judges had to simply base themselves on the testimonies they received from the victims, FIDH and the other association that lodged complaints. There was no possibility for the judges to go to Mauritania, to examine other witnesses, nor to send any rogatory missions to Mauritania. Ely Ould Dah was sentenced to 10 years imprisonment, the maximum sentence for the crime of torture in France, *in absentia*. He was represented by defence counsel during the hearing. He was not physically present and the consequence of that means that an arrest warrant was issued against him. If he were to be arrested again, he would be re-tried at a Cour d'Assize in France, by the same type of court because the judgment was made *in absentia*.

In France, the judgment has had considerable impact as the first judgment based on universal jurisdiction. For the judges and others involved in other cases, it is a strong signal that there is a chance for such cases to end with a conviction despite all the difficulties, be they political, legal or logistical.

The Tunisian case of Khaled Ben Said led to a second judgment and sentencing based on universal jurisdiction, on 15 December 2008. Again the judges could not travel to Tunisia to hear some of the witnesses. In spite of this, the case succeeded thanks to the strong willpower of the victims and their courage to come forward. It is not only the victims who are refugees in France who are exposed to risk, but also the people who stayed behind in Mauritania or Tunisia. In France, the only protection measure is to testify anonymously but otherwise there is no program to protect witnesses, so it is dangerous for them to come forward, both for the victims in France and the ones who remain in the countries where the crimes took place. Another impact is that there were a lot of legal, technical issues to be addressed. The Amnesty Law passed by the Mauritanian Government was declared inoperative, and that was very important. In many other situations the authorities of the countries where the crimes were committed have tried to dodge justice by passing such amnesty laws and the message was loud and clear. In France, in respect of universal jurisdiction cases, the local amnesty law is not a bar. This was confirmed by the ECtHR last year because Ely Ould Dah's defence appealed the judgment handed down in France referring to the Mauritanian Amnesty Law, claiming that there was no right to sentence him in France. The ECtHR held that such an amnesty law was inoperative when issued in Mauritania for a judgment rendered in France.¹⁰² Finally, it was very important for us, for FIDH, for other human rights organisations and also victim's organisations for this judgment, to have the widest possible impact in Mauritania. In July 2005, we had a great number of victims coming from Mauritania, representatives of civil society and of the Diaspora, who attended the two-day hearing. For us, it is an essential part of the proceedings. It is not only to give support to the victims, but also the fact that civil society in the country where the crimes were committed are kept abreast, to ensure that these judgments have an impact locally, even though the judgments

¹⁰² ECtHR Decision on admissibility in the case of OULD DAH v. FRANCE (No. 13113/03), 17 March 2009.

are handed down in a far away legal system. For the judgment to have an impact in the country where the crimes were committed, you need to make that connection.

(4) Mamadou Diagana: Ely Ould Dah case, Mauritania, France

The killings took place in 1990 and today it is 2009. 19 years have passed and there has only been one judgment, but the impact was huge. Clémence told you that no rogatory mission could travel to Mauritania and that there was no cooperation from the Government of Mauritania. It is an uphill battle and impunity persists, has been persisting for 19 years and still Captain Ely Ould Dah is the only one to have been tried. He ran away back to Mauritania and again enjoys impunity. He has even been promoted, he is a Colonel today and all the trimmings that go with such promotions. If it were not for the NGOs who supported the victims, who were listening to us, who were with us all along the way, it would have been a lot harder on us. I really wanted to start with those words of thanks.

It goes without saying that states are putting up hurdles. There is a lack of political will and there are economic interests between the West and these African countries, but the NGOs remain NGOs and they are doing their work. It is through them that I found a new impetus, a new courage. My friends, before they died - I have their pictures here - they were all asking me 'If we die, please, *please* continue our struggle. Tell them the truth, tell the truth to the whole world. Tell them that we died of torture.' We were not expecting to capitalise on this at all, but we really have to realise that we are working with people who gave us their trust.

What are the consequences of the Nîmes trial? If you have no access to justice at home and you can get access elsewhere, it is extraordinary; it is quite moving because everything you tried in your own country led to nothing. I was listening to the testimony of Clément Abaifouta and it is like we were brothers, we went through the same thing because the cases are very much alike. Impunity is rampant, and having access to a judgment based on universal jurisdiction has a huge positive impact on the victims.

I would like to recall the background of this case. Ely Ould Dah was arrested on 1 June 1999, on the basis of a complaint lodged by FIDH and LDH based on testimonies of former officers of the Mauritanian army, victims of torture and arbitrary imprisonment. He was training in Montpellier, and was arrested and confronted with his victims on 3 July 1999. The judgment was a big blow against the Mauritanian Government, still under the authority of Colonel Ma'aouiya Ould Sid'Ahmed Taya, who had hung many Mauritanian blacks and mass deported the black population to neighbouring countries in an act of ethnic cleansing. Even outside Mauritania, the impact of the judgment was felt, since our friends from Chad, Congo, Tunisia and Algeria have hugely commended the FIDH and LDH. They were all surprised by the way this complaint turned out. Hope was now possible for all victims. Torturers, those walking around in the major European palaces could no longer show off in the West. Universal jurisdiction became the policeman of the world. We are able to say that our complaints were successful and that the psychological impact for us is huge, because for two decades we had been denied any justice in Mauritania. Impunity is still total and rampant and even encouraged by the various authorities despite many appeals by national and international NGOs. But, the Ely Ould Dah judgment in France was humiliating for the criminal regime. Now, our torturers have finally understood that times have changed and that international justice is operational and will catch up with them. Victims who were unable to speak freely have lodged a complaint and have found the courage to show their joy and satisfaction. Some even left Nouakchott in Mauritania to attend the trial in Nîmes. Boosted by this success, they started speaking up. Even in the ranks of the army, the

torturers were accusing each other. They all wanted to exonerate themselves. This was unthinkable for the last 20 years. The trial in Nimes ended on 1 July 2005. On 3 August 2005, there was a military coup stirred up by the closest co-operator of Mr. Taya, Colonel Ould Mohammed Vall, the Director of Safety, and General Abdel Aziz. But, luckily, thanks to the persistence of the international community, the African Union, and the fact that the European Union stopped sending aid, the military committee gave up and organised democratic elections in March 2007. During 15 months, the democratically elected President Sidi Ould Cheikh Abdallahi started to work on humanitarian problems such as the return of the deported. The fear is felt by the torturers, who do not come to France anymore because they know they could be arrested. Through this fight against impunity, everybody feels boosted to continue the struggle because they know it can work. Many human rights associations have been created; many people realise that this is the time we must set up these associations in order to continue the fight. Lastly, this state denied all these crimes and said, 'No we did not kill anybody', then left and deserted them. The state has now recognised that crimes took place, that there were abuses but still they will not carry out any independent or international investigation on these crimes. However, at least what is fundamental is they recognise now that there were abuses and crimes, whilst they never admitted that before.

It is still far from perfect in our country and there is no democracy to speak of. However, we can see that things are moving forward. Who would have thought that refugees would be able to make it back to Mauritania after 20 years of exile? Problems relative to their reintegration, the restitution of their land, their herds, remain unsettled. The point is that universal jurisdiction made it possible for refugees to come back. At least we are talking about the problems, about what happened, the reasons why these people were deported. This was only made possible after Ely Ould Dah was sentenced. It is an educational process, but for some countries you need international pressure for them to give in. I simply want to tell you that it was useful. Some criminals are still at large and are not far away, there is still impunity, a lot of people have not been tried, but at least the lines have been switched. Fear has switched sides and that is very important. This is what I wanted to tell you today in respect of what Clémence so brilliantly did regarding the Ely Ould Dah case.

Rodolfo Yanzon noted that we should concern ourselves with how we can find solutions. Mr. Diagana said very clearly that when a victim can testify in public, this is a means of liberation for the victim. It is inconceivable, as Clémence said, that in order to be able to testify, victims do not get any help or protection. This happens in Argentina too. I want to talk about a very tragic case, the disappearance of a witness after he testified against a person involved in genocide. For more than three years now, he has disappeared. We do not know anything about him, and this is a clear signal as to how these 'gentlemen' try to impede testimony from becoming public.

(5) Viviana Uribe: Outreach, Pinochet case, Chile

I have found it very difficult to feel like a victim these days because I rebel against the term 'victim'. Over these last few years, I have used the concept of torture survivor or witness. I represent an institution created in 1980 when the Chilean dictatorship was still in power. The Pinochet regime started in my country in 1973. This was a regional problem, with thousands of disappearances. I was a political prisoner during the Pinochet dictatorship. I underwent physical, psychological and sexual torture. I had my three sisters, my father and other members of my family undergo torture too. There were also disappearances in my family. My former companion was a victim of political assassination. I suffered the same destiny as other people in jail. I had to be exiled for 12 years.

In spite of all these experiences which are still with me, from the first moment together with all those who underwent the same conditions - I am talking about hundreds of Chileans - I took the role of a witness in order to denounce and make statements against the crimes of the military dictatorship. We were helped initially by the Catholic and other Protestant Lutheran churches. From the start, we collected facts and identified places of detention and torture in organised and methodical ways. Then, we began to identify those responsible, the perpetrators. Later on we set up solidarity networks together with other human rights organisations, family networks, denouncing and informing other countries of what was going on in Chile and Latin America. These complaints were well documented and detailed. This enabled lawyers to present complaints months after the Coup about disappearances and summary executions, though not for torture.

In 1978, the military government passed an amnesty law, ensuring that those identified as responsible were never taken to court. In 1984, still within the military dictatorship, Chile ratified the UN Convention against Torture; Pinochet signed it and it came into effect in 1988, a few months before he was defeated. In 1990, in the transition to democracy, Pinochet was named Head Commandant of the Army and then Senator for life. In Chile, until Pinochet's detention in October 1998, he had immunity for all these crimes and the fact that there was no justice had an enormous impact on the families of the victims. When the transition took place in Chile, we set up truth and reconciliation commissions. This gave us the chance to open up and some truth followed. Not much was obtained in terms of justice but it was a first step. We made visible what had been going on in our country. The dictatorship disappeared and executed more than 2,800 people. The last report on torture determined that 28,000 people had been tortured.

Up until 1990, before and after, only some high profile cases had gone to court. We had more than 3,200 disappeared and torture cases but only five or seven cases reached court. The most well known one, Orlando Letellier, a famous trade unionist, involved a case of people whose throats had been cut. We then had a case of a young French man, Alphonse Chanfreau, who had been detained with us in 1974, and a female judge took his case to court. This judge was right wing but saw the case and sympathised with it. We had to have people from all over the world come to Chile to bear witness. It was not just this young Frenchman's case that was being judged. It was the repressive machinery of the Pinochet regime. For the first time, we faced our torturers and this meant that each person who bears witness, who has lived through the experience, has to face the perpetrator. In that manner, you see that they are lying. No doubt, this is one of the most difficult situations to live through. Somebody who has tortured you, who has murdered your family, is saying you are a liar; this creates very strong feelings. How can you prove that what he is saying is a lie when the only evidence you have is your testimony? There are no longer marks on your body and you are unable to produce any evidence. In the Chanfreau case, we could identify all the leading agents who were part of this oppressive machinery. At each moment of the proceedings, which lasted two years, we were convinced that each single case was going to be successful. But, our Supreme Court rejected the case. We have never in other cases been able to make the dictator responsible for his acts and this made us impotent and frustrated, but we continued to work towards identifying those responsible and we had direct communication at the international level.

The world shows great solidarity with our country, especially Spain. In Spain we had very strong relationships with solicitors and with Judge Garces. We felt that he was committed and that his commitment was the same as ours. With Spanish judges too, we were organised and with Chilean human rights organisations. So we had committed torture survivors, the coordinated work of Chileans outside and then we got the news that Pinochet was in London to undergo surgery. In a very coordinated manner, he was detained in London. This is the high profile case

of Pinochet in London and world opinion saw this case as a question of law and ethics. In terms of law, jurisdiction was extended and this showed the effectiveness of the hundreds of international agreements and conventions that recognise human rights. In this case, Pinochet was finally accused of not just all murders and disappearances, but he was also accused of torture. The Convention says that all parties must allow extradition of the perpetrator and if he is not extradited he must be tried. International criminal law was something new, for us at least, until Pinochet's detention.

My organisation was delighted with the detention of Pinochet. However, Chilean society was divided. We activists were going after Pinochet, but at least one sector of the Chilean Government who worked for Pinochet protested against his detention in London. There was a division in Government and within the Armed Forces. A communication requested the Government to do everything they could in order to overcome the detention of the dictator. The legal impact in Chile was immediate in that the Chilean courts up until then had maintained the amnesty law. One of the most important points of these proceedings was the presentation of complaints against Pinochet. We had seventeen complaints involving hundreds of people lodged. This changed not just Chilean justice, but many other countries who started to present complaints. We had a complaint in France by French citizens who had disappeared, were murdered or assassinated by the Chilean military dictatorship and extradition was requested of Pinochet to France. There is another French case that is going to be reviewed and revised in French courts together with the complaints made by other French Chileans. The investigation in France and the hearings will enable us to hear historic witnesses and the case is still open. We have the support of French lawyers, victims and civil parties' families and witnesses who will be present during these proceedings, which we hope takes place at last in May 2010. Today in Chile we have more than 350 proceedings. More than 50 of them are already sentenced and more than 10 of those have received sentences of more than 100 years. This is very impressive. The crimes cannot be denied for the Chilean people and also on the international level, we know Pinochet is not just a murderer but also a thief; we can see how he enriched himself. For many people, the theft is more important than murder, disappearance, exile. Little by little those that were for him started to become quiet. We had thousands of crimes of detention and disappearance but in the end, he is accused of fraudulent bank accounts independent of 'the Pinochet case'. All this consolidates democracy and the struggle for human rights in terms of the families and victims.

The Pinochet case made clear several important points. Firstly, that implementation of justice at the national or international level does not create chaos and it is very important for raising people's consciences. The more you increase justice for victims and sanction those who violated human rights, the more you defeat impunity. Never again will a criminal be able to travel like a tourist, without any concerns, without the fear of being detained. Finally, the Pinochet case gives a very clear message on how important it is to have a state of law that applies to all equally.

Rodolfo Yanzon added that in Argentina, we too sentenced a member of the DINA¹⁰³, and he is in jail in Buenos Aires for having killed General Prats and his wife. It is also important to add that Argentinean judges, in terms of the Condor Operation, requested the extradition of Pinochet and were denied this by the Chilean justice system. This was also the case with regard to other

¹⁰³ Dirección de Inteligencia Nacional, or Directorate of National Intelligence was the Chilean secret police in the government of Pinochet.

members of the army in other countries. The oral judgment for the Condor case will take place in Argentina next year.

Discussion

One commentator raised the issue of in absentia cases; how can we have a viable procedure if the accused is not present? Clémence Bectarte noted that in France, the procedure has recently been changed to give more guarantees, given the requirements for an equitable trial. Indeed, the defendants can be represented as was the case in the Khaled Ben Said trial; the attorney was specifically designated by the accused to represent him. Once a person convicted in absentia is arrested, that person has the right to a retrial in their presence so it is as though the first trial had not taken place. The main impact is the strong message that is sent out which prevents them from travelling which could be said to be a minor thing but it has important practical consequences.

G. REPARATIONS (CLAIMS, AWARDS, ABILITY TO ENFORCE ASSETS)

(1) Luc Walley: Belgium

Reparation is not a simple issue. For the victims in general it is not the first thought that crosses their mind; their first thought is to have truth, to establish that the culprits can be pursued, sentenced, punished and sanctioned. In my experience many victims are ill at ease when discussing reparation, especially when discussing monetary reparation. They fear that their fight against impunity will be interpreted as being purely motivated by monetary gain. The second issue is that very often financial issues are a bone of contention among victims. They cannot agree, as the system for obtaining reparation is poorly organised. Reparation in principle does not need to be of a monetary nature. It can be symbolic, such as a monument to the memory of those who were killed, commemorative events, or reparation could be that the persons are re-established in their exact situation with their assets, their home and so on.

Regarding universal jurisdiction and particularly in Belgium we only think about monetary reparation and also individual reparation. The International Criminal Court approach is that reparation can be collective reparation for a group of people and if assets are available, whether they belong to a person who has been sentenced or to an authority, one can engage in a collective form of reparation *vis a vis* those who are victims. It is not necessarily the best solution either, it is a solution that is a practical only when we are talking about clearly identifiable places such as a village where we have a group of victims killed in the village and the school can be reconstructed, that would be a form of reparation. It is not at all as obvious if some part of the inhabitants of a locality were victimised by another part of the population of that same locality, such as in Rwanda where measures for collective reparation should be *vis a vis* the Tutsi community. But, free schooling education for the children of the Tutsi community are very quickly viewed as discriminatory by the members of the other community, of which some of them are not at all responsible for crimes that were committed. Here, reparation can in and of itself become a factor which instead of contributing to a new form of balance or peace can create resentment, hatred and more conflict. It is a complex issue which needs to be very carefully taken on board.

As regards Belgium, the only form of reparation we know is monetary reparation. We have very little experience in this field; we have had three Assize Court trials in Belgium regarding the Rwandese genocide. There have been various demands and proceedings underway based on universal jurisdiction and various civil actions. Most of these proceedings were to establish responsibility and in each trial there was a civil claim for compensation where the victims were able to ask for reparation from the criminal courts in accordance with the Belgian system. The victim can file as a civil claimant and can not only participate in the criminal proceedings but can in some cases initiate the criminal proceedings, and can request damages. This is what has been done in many of these proceedings where the Brussels Assize court awarded damages to Rwandese victims. The awards were determined by applying Rwandese law, taking on board under international private law the civil code in Belgium, the criteria of the Rwandese law was applied to assess moral damages and then translated into Euros. There were awards but the issue here is that these victims need to prove the wrong that had been caused. There is no help from the public authority to establish the wrong. When one has to prove that one's husband or father has been murdered you need to prove the murder, you need to show that it was within the context of the genocide, that that person was killed and in a context that makes a connection with the accused. You need to establish your family relationships, you need to produce official documents, and these need to be validated by the Belgian authorities. Some were able to do that and then they received some form of theoretical award because the accused who had been arrested in Belgium had no assets in Belgium.

After the sentencing of two businessmen in Belgium, the few victims who obtained financial awards needed to get executive enforcement judgment for Rwanda and had to get a decision from a Kigali judge to seize the assets in Rwanda. At the end of the day when the sale of a major building was announced, that sale could not take place because another judgment was issued to stop the sale. This was done at the initiative of other victims, who believed they were disadvantaged, since some other victims had obtained awards in Belgium whereas they had not. Therefore the judgment to sell the building was blocked, interrupted and in spite of the fact that many of the accused have assets in Rwanda or even in Belgium, there has been no real success in obtaining monetary reparation that is linked to the assets coming out of the genocide either on an individual or collective basis. This is the practical difficulty. The political difficulty is that Belgian legislation translates group claims into individual claims; when there is a collective wrong and the whole community has been victimised, it is impossible for the courts to award damages to the collective and it must be translated into an individual claim.

What are the solutions? We believe it is in class action lawsuits, like in the USA, where one has a mechanism that allows a whole class of people to come together to make a collective claim. When a group acts, then the victim can act and not only in his own interest, but also in the name of the broader collectivity. In some countries in Europe, legislation has been enacted. There are discussions in Belgium to go in the direction of class action lawsuits. In addition to the civil claim made in connection with a criminal case, there is a possibility to introduce purely civil claims and that is even more complex.

We have proceedings under way in Belgium whereby victims of the Rwandese genocide have sued the state of Belgium in a claim for damages for a situation that happened at a school in Kigali. It was claimed that in a military base where the Belgium troops had their headquarters, 3,000 refugees were protected by these Belgium military troops and were massacred when the troops withdrew from those quarters. The withdrawal was not under the order of the UN, but under a purely Belgium initiative; after the assassination of Belgian peacekeepers, Belgium decided to withdraw its troops from Rwanda. The responsibility for this incident has been highlighted by the Parliamentary Commission created by the Belgium Senate and the victims

have taken the opportunity to initiate proceedings against the Belgium state. This is a difficult claim because we are dealing with a whole series of hurdles. The first hurdle is the statute of limitations. In criminal courts, at least in Belgium under international conventions, it is considered that crimes against humanity do not prescribe. The issue is raised if this also applies to a state, since this is a civil complaint which is not against a perpetrator, but against a state. So, the court will have to rule on this matter. Our position is that the state is civilly responsible for what its military officers and soldiers have done and if there is complicity in crimes that have been committed it should also be the responsibility of the Belgian state. The second hurdle, and I believe that this has also been raised *vis a vis* Dutch soldiers regarding their role in Srebrenica, is that the Belgian soldiers who had acted in this way were officially under the orders of the UN and not the Belgium state. Belgium claims that they had seconded its soldiers to the UN and if this did not go the right way, if orders were not properly carried out, it is the UN's responsibility and not the responsibility of Belgium, as they had no command over those soldiers. The UN either was or was not in charge. It is very difficult to establish these issues because the UN is not very cooperative in this type of investigation. In one of the cases in Belgium, General Dallaire of Canada¹⁰⁴ was summoned as a witness at the Assize Court. To date he has always refused to appear on the grounds of immunity, and it might also apply to the current trial; we will know more in a few weeks time.

In conclusion, reparation is a complex field in Belgium, but it is a very important topic. It is the greatest injustice one can imagine seeing people enrich themselves from crimes against humanity and that they continue to benefit from this enrichment. They are known and subject to legal proceedings and we have situations where people are in jail and at the same time their family continues to benefit from the enrichment, the assets, the rents, the investments in Switzerland, etc and who can act against that? It is up to the victims to fight, but they do not really have the means to fight in this type of investigation other than by paying for private detectives and so on. There is a responsibility on the part of the states to investigate regarding issues of confiscation of assets and to take measures that have been taken for people suspected of terrorist acts, for instance to freeze assets in banks and provide for mechanisms whereby the assets can be accessed for suits brought by the victims.

(2) Philip Grant¹⁰⁵: Switzerland

I have been asked to talk about the penal and civil aspects and to explain how things work in Switzerland. First, the idea of collective compensation / reparation at least for crimes committed abroad does not exist. We have asked ourselves in Switzerland how restitution can be granted, how to guarantee non-repetition for crimes abroad. On the criminal level, no trial has led to a conviction and the granting of reparations. The only trial that took place in Switzerland was the case mentioned earlier against a former Rwandan mayor,¹⁰⁶ but the victims were either not informed or did not file a claim as civil parties. There was another case in which the defendant who had spent 712 days in detention was acquitted and was awarded compensation.

In Switzerland, victims can file a civil claim as part of the criminal trial. The judge can require the victim to file the claim in a civil court if the claim is very complicated and would overwhelm the

¹⁰⁴ General Dallaire was the Force Commander of UNAMR, the UN peacekeeping force in Rwanda 1993-1994.

¹⁰⁵ Philip Grant, President, TRIAL.

¹⁰⁶ Fulgence Niyonteze. On 26 May 2000, Niyonteze was sentenced by the Military Appeals Tribunal to 14 years' imprisonment and 15 years' expulsion from the territory of Switzerland.

criminal trial. Similar to Belgium, the law requires the harm to be linked with the criminal acts committed. Rwandan law will be applied for something that has happened in Rwanda, Bosnian law for something that has happened in Bosnia, and the amount of compensation is going to be very different on the basis of the nationality of the accused and the victims. Until the end of 2008, if the victim could not obtain reparation from the perpetrator, the victim could ask the Swiss Government to contribute to compensation. If a crime was committed abroad, the victim could obtain assistance from the Swiss authorities who were supposed to pay part of the compensation. However, you had to have your domicile in Switzerland at the time the acts were committed and you had to be a Swiss citizen. New legislation has now been enacted according to which you cannot seek reparation from the Swiss state for a crime committed. It is from the perpetrator that the victim must obtain compensation.

If the accused has assets in Switzerland – and a number of perpetrators have villas on Lac Léman and other assets - Swiss legislation allows the seizure of these at the beginning of the trial and at the end of the trial these assets can be confiscated in favour of the victim. If the assets resulting from pilfering are deposited in a Swiss account they can be used to compensate the victim. The problem arises in that you have to prove the link between the acts committed abroad and the money in Switzerland and this is extremely difficult. Swiss legislation also has a relief clause when it comes to proving a link between the act and the funds. If you can demonstrate that the perpetrator is a member of a criminal organisation, the totality of the assets of the criminal organisation can be seized/confiscated and awarded to the victim.

We have precedents that did not concern criminal trials in Switzerland but requests for mutual legal assistance; entire political regimes abroad can be considered to be criminal organisations. That was the case for the Abacha regime in Nigeria; there were hundreds of millions of Swiss francs in Swiss banks. It was also the case for the Duvalier regime in Haiti. The judge of the Federal Tribunal ruled that the criminal acts committed in Haiti under the Presidency of Duvalier were obvious. It was also obvious that these dictatorial regimes led to the systematic pilfering of the Haitian treasury for the benefit of the Head of State and his associates and accomplices. In this way, in principle, assets located in Switzerland belong to criminals recognised as part of criminal organisations that are convicted on the basis of universal jurisdiction trials, could be seized, confiscated and awarded to the victims. However, there are many obstacles. For instance, victims have to prove that they suffered harm but they may be unfamiliar with Swiss courts and procedure and the legal assistance system in Switzerland is limited. Victims, if they reside abroad, can get assistance but not for the entire proceedings.

Another obstacle concerns immunities. Immunities rules are usually invoked and the victims, once immunity comes into play, cannot claim anything before a penal court. In civil proceedings, what happens in the civil court in Switzerland is extremely important. The problem is to establish the jurisdiction of the tribunal. First you need to check that the court has jurisdiction. The first criterion is to identify the defendant. He has to be in Switzerland, be domiciled in Switzerland or have his usual residence in Switzerland. This does not have to be long-term. You could have an asylum seeker, for example. About 15 years ago Felicien Kabuga who was a financial sponsor of the Rwandan genocide resided in Switzerland before being expelled. He had assets in Switzerland and a civil claim was lodged against him.

Even if the defendant is not resident, if you can prove there is a link with Switzerland, there is still the possibility to file a case. There was a claim filed not so long ago. There was an

association of Roma who filed a complaint against IBM.¹⁰⁷ IBM does not have its headquarters or offices in Switzerland, but in the 1930s and 1940s it had an office in Geneva and IBM is said to have provided assistance to the Nazis through the production of punch card machines that allowed the Nazis to locate the Jews and Roma and then send them to the death camps. The federal authorities under the Supreme Court confirmed that in this particular case, part of the illegal act had taken place in Geneva and so there was a link to Switzerland and a claim could be filed before Swiss courts. Unfortunately this did not take place due to the statute of limitations.

The last possibility for the victim, if the defendant is not in Switzerland or if part of the illegal act has not been committed in Switzerland, is the law on international private law in Switzerland. It allows the victim to seize the Swiss court if proceedings have not been instigated elsewhere and if there is a sufficient link (even if the link is not very solid) with Switzerland. We tested this with a case of torture against a former Tunisian Minister of Interior, Mr. Habib Ammar¹⁰⁸ who in 2001 was in Geneva. He was in hospital for a back problem and a complaint was filed against him. There was a leak and he found about it and the Tunisian mission took him out of Switzerland. A claim for reparation was filed in Switzerland by one victim. The victim was domiciled in Switzerland, has been recognised as a victim of torture and we considered that a sufficient link had been established with Switzerland to allow the complaint to be filed. However, we lost the case in the first instance. It has been said that the Minister who torture within the framework of his official duties was actually only doing his job. We went to the Supreme Court, they claimed they were not going to take immunities into consideration and we are trying to find out if there is a sufficient link with Switzerland. Unfortunately, our arguments were not accepted by the judge: that a victim is domiciled in Switzerland and that there is an impact on Switzerland because the person is handicapped and can get benefits from the Swiss state. This is not enough for a case to be tried and the case is now before the ECtHR. Things have reached a standstill in Strasbourg.

There is one last possibility to seize assets in Switzerland. If you discover that there are funds or villas in Switzerland and if a decision has been made by a foreign court you can seize the funds in Switzerland through an *execuatur*. You need to find out if there are assets in Switzerland and whether this allows a victim to proceed to a Swiss court to request for the assets to be awarded to him or her. In conclusion, there are a lot of impediments and a lot of obstacles. We have to be creative, to try and go around those obstacles. As an NGO, we have stopped claims against people who are transiting through Switzerland. We try to see if the ECtHR is going to help us, but there must be more creative ways to proceed and obtain reparations.

¹⁰⁷ In January 2002 the Gypsy International Recognition and Compensation Action association (GIRCA) filed a lawsuit against IBM in Geneva's Court of First Instance on behalf of five Roma (Gypsy) plaintiffs who were orphaned in the Holocaust. The lawsuit alleged that IBM assisted the Nazis in Holocaust killings during World War II by providing the Nazis with punch card machines and computer technology that resulted in the coding, tracking and killing of Gypsies. The plaintiffs sued IBM for "moral reparation" and US\$20,000 each in damages. In April 2005, the Court of First Instance dismissed the case, finding that the statute of limitations applied and the court was barred from hearing the case because too much time had elapsed since the alleged harm occurred. The Supreme Court of Switzerland affirmed this ruling in 2006.

¹⁰⁸ See further, http://www.trial-ch.org/en/activities/details/year/22/article/tunisia.html?tx_ttnews%5BbackPid%5D=50&cHash=fa3aa2d161

(3) Héloïse Bajer-Pellet¹⁰⁹: France

In France, there is no assistance from the state so victims have to fend for themselves to obtain reparation. My lawfirm represents the victims in the Ely Ould Dah case and I will speak about the civil aspects of this case. With regard to reparation for the harm suffered by victims, France along with Belgium and Switzerland make it possible for criminal courts, through the civil partie system, to compensate victims. In the case of Ely Ould Dah, there is also a parallel proceeding, where you can apply for compensation through the commission for victims.

The Cour d'Assises assesses the admissibility of civil claims. Once this is established, the court can determine and award compensation to victims and will hand out a binding judgment which normally should make it possible to obtain compensation. As with other cases, there were difficulties to enforce the judgment, because Ely Ould Dah remains at large. Then there is the problem to locate and seize the assets, especially when they are in another country.

In order to deal with such difficulties, in France a commission was set up called the Commission for Compensation of Victims for Acts of Terrorism and other offences, (CV). The CV sits at every trial of the regional court but they are not bound by the decisions taken by the Cour d'Assises regarding compensation either on the principle or the amounts. The CV can decide not to compensate the victim because it believes the victim took part in the offence or maybe they will change the amount awarded. If the Cour d'Assises is granting 15,000€, the CV is not bound by that and they may compensate at an amount they believe is more in line with the material loss.

The CV is a body that assesses the amount and then the amount is paid out by a guarantee fund, a sort of trust fund funded by insurance contracts; Insurance Companies contribute 3% to this guarantee fund. The guarantee fund then ensures that the money is paid back by the accused. The CV was not established with the view to universal jurisdiction cases, so there are difficulties in terms of its actual jurisdiction. The conditions of admissibility of an application are extremely strict in terms of the nationality of victims and the place where the acts were commissioned. If it is not a French victim, this victim will have to demonstrate that the acts were committed in France, else it is not clear that the CV will agree to compensate.

Whether you are before the CV or Cour d'Assises the idea is to fully reimburse direct and personal loss. There is no possibility for class actions as it is the victim individually who is compensated. There are delays and other challenges.

Ely Ould Dah was convicted and sentenced to 10 years imprisonment. The civil judgment awarded 1,000€ for the victims'associations and 15,000€ plus 1,000€ in contribution to legal fees to the victims. Ould Dah fled France so we had to find another way to obtain compensation for the victims. We approached the CV on behalf of the victims. Three of the victims, including Mr. Diagana, had become French nationals before the CV was seized. The other two had not yet obtained French nationality and we knew the latter applications would not be admissible; the CV said they had no jurisdiction over the last two because the acts were committed in Mauritania, by Mauritanian perpetrators, on Mauritanian victims. The decision of the CV was confirmed on appeal. Concerning the three victims, who had become French, whilst the CV made some difficulties to accept the proof of the harm suffered by victims, it carried out a medical inquiry and eventually, the decision of the CV in relation to the three victims was positive, surpassing the amounts allocated by the Cour d'assises.

¹⁰⁹ Héloïse Bajer – Pellet, lawyer, France.

The lawyers have brought a claim to the ECtHR to challenge the decision not to afford the remaining victims (who had been deemed non-nationals) with access to the CV.

(4) Juan Garces¹¹⁰: Spain

It is true that financial compensation is secondary to the victims. They want justice above all and in the Pinochet case, this was the same.

In Spain, civil claims can be joined to criminal claims. In relation to the civil component of the claim, there was no cooperation from the Chilean authorities who, at the time, and this is still the case today, gave sanctuary to Pinochet and assisted him in keeping his assets. Two years later, in 1996, I requested that Pinochet's assets be frozen. I received a decision on 18 October 1998 and we started to look for the assets. We had a few indications relating to Switzerland, the Virgin Islands, the Bahamas, Canada and Luxembourg. We sent rogatory letters to try to find the assets but we had no success. We asked for assistance from Chile, which quite clearly rejected our request. The fact that Pinochet was never in fact extradited, and had been returned to Chile made it even harder to obtain compensation. There was no criminal conviction upon which to base the compensation.

In July 2004, the American Senate Investigative Commission carried out an investigation and by chance it found a link to approximately 100 accounts belonging to Pinochet under different names. The Bank was a highly respected American bank about 100 meters away from the White House, named The Riggs Bank. When we found out about this about 24-48 hrs later, we lodged a complaint with a Spanish court against Pinochet, his wife, his lawyers and all the people who contributed to the hiding of the assets in the Riggs bank, including against the bank itself, because it had cooperated in the hiding of the assets. We also initiated action in the United States because we wanted to be able to fight complaints with American courts using the US RICO legislation (Racketeer Influenced and Corrupt Organizations Act, with special measures to tackle organised crime).

We thought we were in a strong position so we held a meeting in Washington with about 30 lawyers representing Riggs bank against two of us from Spain. We stated that according to our information \$9 million belonging to General Pinochet had been hidden. Willingness to make an agreement was conveyed; however it was stated that the bank owners had to pay every single cent of the money channelled through the bank, which they accepted. We said to the Spanish Court that it should accept this agreement with the bank and the money should be awarded to all Pinochet's victims who had gained recognition with the Spanish court. The court and the Public Prosecutor accepted this and then time came to assess Pinochet's personal liability, and we applied Spanish criteria to compensate victims of terrorism, torture and genocide set out in Spanish jurisprudence. The court accepted our proposal and it helped set up a fund in the hands of a Spanish foundation responsible for managing the funds in the interest of the victims.

After negotiating for about 5 months, we obtained from the Riggs Bank and its owners \$8 million and the rest was used to pay for the lawyers' fees. CODEPU and other human rights organisations inside and outside of Chile were instrumental to alert eligible victims about the fund; not only those who had filed a complaint in Spain, but also those who the Chilean state had recognised as victims, such as the 3,400 disappeared and the 20,000 survivors of torture. The fact that the Chilean state recognised them as victims was sufficient for the Spanish court to entitle them to awards from that fund.

¹¹⁰ Lawyer, Spain.

Some victims were not interested in compensation and were more focused on issues such as truth and criminal prosecutions. But, over 20,000 victims applied for financial compensation. All the other victims of torture whose parents had been murdered or missing, those who had not been recognised as victims by the Chilean state were also allowed to file a claim. There were also about 5,000 applications from people who considered themselves to be victims, but who had not been recognised as such by Chile.

We created a Commission chaired by Dr. Helmut Frenz, a highly respected former Lutheran church bishop because during the dictatorship he was part of the Ecumenical Commission that protected Chileans. Together with five other experienced experts, the Foundation taught him to review and freely decide on each application. In conformity with the rulings of the Spanish Court, the Foundation made those proposals as to who should be awarded what. The Commission conducted the study and out of around 8,000 applications, 4,000 were considered as legitimate. All together there were about 22,000 people who were awarded compensation.

The distribution of the funds took place on a *pro rata* basis, but it was not very much money in the end. Even so, this compensation was highly appreciated by the victims, because it was the first time they were receiving something tangible in relation to Pinochet. One victim wrote to us from America explaining that her husband was a University Professor and that he had no way of proving what he went through in Chile. She asked if the bank payment showing the transfer of money to their account could be sent. Even though it was only \$200 he wanted to frame it and it and put it up in the room to show it as proof of what Pinochet had done. The psychological dimension of this is very important. The payment was very difficult because we had to go through bank transfers and we had to check that the all the money was reaching the beneficiary. However, there were 50 states involved and in some countries the exchange provisions made it very difficult for bank transfers to reach an account. In Argentina and Venezuela we had to use Western Union to make sure the money could reach the recipients. Everything was displayed on the internet to make sure proper coordination existed between the 50 states. This required 5 months of negotiating to get the money from the Riggs Bank and 4 years to qualify the beneficiaries and make sure that each one got its part of this money.

This is a continuous process. This has not been made public yet, but there is another important bank which may have participated in the same crimes. There are assets which have been frozen in Spain and there have also been claims of money laundering, but Pinochet is now dead. There is a problem with that because his criminal liability for the crimes of genocide, terrorism and torture can no longer be prosecuted. Since Pinochet is no longer accountable for these crimes he is not civilly liable either for them. So what can we do? Nevertheless money laundering and hiding assets are also illegal acts that took place after October 18, 2008 and those who aided and abetted in these crimes are alive. After four years of work, it has shown us that the amount of time is no different from other cases. You need to be patient, to work hard and not expect quick results. After four years of work we have managed to find enough evidence for the court and for the first time the Prosecutor's office helped us. The last phase of this case was very complicated, but we had a solid case and in 2008 we asked the court once again to broaden the criminal complaint to the crimes of money laundering and concealment of Pinochet's assets and to take into account the amount of money transferred to these accounts, about \$9-12 million. This money was hidden and transferred through a variety of financial transactions the addition of which led to a total amount of approximately \$64 million. For the assets properly hidden it was \$9-12 million but for the money laundering transfers it reached an amount of \$64 million. The public prosecution agreed to to accept our claim to extend it to all the banks involved, and from a civil point of view we can consider the banks as liable. The court together with the Public Prosecutor and the Legal Representative of the victims made a decision

that the claim could be extended to all the banks involved. The main bank involved has 10 days to make available to the court the \$64 million. If within 10 days of notification, the money has not been deposited on an account determined by the court; there will be an embargo up to a level of \$105 million. This means that money from the bank could be seized in the country of establishment of the bank but also in other countries, making it quite complicated.

H. COUNTRY UPDATES IN EUROPE

(1) *Siri Frigaard: Norway*

I am the Chief Public Prosecutor of a Unit in Norway that deals with core international crimes. As a prosecutor it is interesting to listen to victims or witnesses because you are often sitting in your room and become narrow-sighted. All the victims and witnesses in this meeting have spoken about the need for justice.

Justice can be many things. I have been working as the Deputy General Prosecutor of Serious Crimes in East Timor. The people in East Timor were saying that they wanted justice for what happened before and during 1999. However, in East Timor you are faced with a Government that maintains that it is more important to forget the past and that one should look to the future. This touches on the previous discussion about political will. All the indicted people are staying in Indonesia because it is a safe haven for them. I think all of us are attending this meeting because we want to fight impunity. We want those responsible for these terrible crimes to be held accountable. To be able to fight impunity it is important that we not only have international tribunals but also that the tribunals, the country of origin and all the other third countries are working together. That is the only way we can fight impunity. And if the political will is not present in a country, it is more difficult to be able to do something about these crimes.

In Norway there is and has been political will to fight these crimes. We have established a special prosecution unit that I head. An investigation unit was also established; it began in 2005 with four investigators, and today there are twelve. In my office there were five prosecutors, and today we are only four, as one of the prosecutors was appointed Deputy Minister for Justice and the Police, which shows how the Government are also looking at what we are doing.

In a country you need political will, not only to establish special units but also for resources, to be able to work. In addition you need the proper regulation. In Norway we also have had the political will to amend our regulations, and in this connection I will mention the Bagaragaza case,¹¹¹ that the Netherlands and Norway know very well. We were asked by the Prosecutor of the ICTR to take over the case against Bagaragaza. The case was accepted internally, however there were some problems. One problem was that we did not have proper laws for genocide; therefore the Tribunal did not want to transfer the case to Norway. Another problem for us was the question of jurisdiction. According to our regulation at that time, we could prosecute a foreigner for such offence committed abroad if the suspect was in Norway. The interpretation of “being in Norway” had been that if you had arrived in Norway willingly, you could be tried. The question of being “brought to Norway for trial”, that would be the situation for Bagaragaza, had not been dealt with before by a Norwegian court. We stated that when Bagaragaza accepted to

¹¹¹ The Prosecutor v. Michel Bagaragaza, Case No. ICTR-2005-86, sentenced 5 November 2009 to 8 years in jail for complicity to commit genocide

be transferred to Norway to be prosecuted, he was coming to Norway “willingly” and therefore we were of the opinion that we had jurisdiction. But as already mentioned, this had never been tried in the Court before, so we were a little uncertain, but still quite convinced this would be accepted by the court.

But due to the decision of the Tribunal not to transfer the case to Norway on the basis of lack of regulations of genocide, my Government quickly changed the law, and as mentioned in the background paper, we received a new law on genocide, crimes against humanity and war crimes on 7 March 2008 with retroactive effect. There were further amendments with respect to universal jurisdiction. The main rule is that the Norwegian criminal legislation applies to acts committed in Norway, or to acts committed abroad by a Norwegian national or by a person residing in Norway. But when changing the law in 2008, a new paragraph was introduced saying that criminal legislation also applies to acts that Norway has a right or an obligation to prosecute under agreements with foreign States or under international law generally.

As an illustration of the work we have been doing, I will mention two different cases:

The first is the case against Repak. The indictment was issued in April 2008 and we used the new law with retroactive effect for war crimes and crimes against humanity. The trial in the first instance court took place in 2008 and we received the verdict on 2 December 2008. It was a big surprise to everybody that the judge ruled that the retroactive application of the legislation for crimes against humanity was NOT in accordance with the Constitution, while it was in accordance with the Constitution when it comes to war crimes. The reasoning is in my opinion hard to understand and I am not trying to justify it. We have appealed it and the Repak defence also appealed the judgment.

In this case we used both video link testimony and had witnesses from the Balkans present in Norway. The regulation in Norway is that the main witnesses have to be present in court and the result of that is that you cannot take all witnesses via video link. In this case we used both methods and it worked perfectly. The impression the Balkan victims gave on the video link was almost stronger than that of the victims present in court, because you were able to get close up to their faces in order to read the expressions and their body language.

On the issue of video link during investigations, we learned that in Croatia, we were not allowed to take statements ourselves; the statements had to be taken by the authorities in Croatia. However, one witness did not want to give his statement to the Croatians, he wanted only to talk to us. We solved this problem by establishing a video link from Croatia to Norway and took his statement as a police interrogation.

Security of witnesses in other countries might be a burden for prosecutors because there is little you can do. In this case, we appointed a Norwegian lawyer to take care of the witnesses. She accompanied us to the Balkans when we spoke to the witnesses. We also made contact with the International Committee of the Red Cross in the Balkans, so together they were able to be in contact with the witnesses. It has so far worked well and as far as I know nobody has been harassed.

But I am still concerned about this issue because in another case, in another country, I have lost a witness. The witness I had was also a suspect, but this was an organized crime case and this witness was killed. The witness was in custody but we had to release him because of injuries. In the country he was residing, there were no possibilities to operate on him and no other country was willing to receive him for operation. He left the country after having been released from custody, was operated, returned back and before we were able to arrest him again he was

killed. Whose responsibility is this? Is it mine or somebody else's? It is a terrible burden to have the responsibility of witnesses in cases like this. So, if you think that something might happen to a witness, it might be in my opinion, better to close the case.

The other case I want to talk about is the Gaza complaint given to my office on 22 April 2009. Six Norwegian lawyers filed a complaint with us for incidents claimed to be acts of war crimes and crimes against humanity, conducted by Israeli armed forces in the last Gaza campaign, 27 December 2008 to 25 January 2009. They were representing Norwegian citizens of Palestine origin and the complaint was against 10 named Israelis. They comprised allegations against, among others, Olmert, Livni, Barak, the Chief of Defence in Israel Gabi Ashkenazi together with some other high officials. The complaint was about wilful killings of civilians, extensive destruction of property, the use of prohibited weapons, white phosphorous and grenades in heavily populated areas and artillery or air strikes on hospitals. The complaint consisted of many files and every month we received more documents. The complainants have been very active to gather information in Palestine and we also had a television team that made a program about the evidence given to us. Therefore, it was a big task for us to handle the complaint especially because as I said, my office comprises of five people and we are also dealing with international organized crime, computer crimes, sexual abuse of children on the internet and counter-terrorism.

When the complaint was made it was broadcasted over the whole of Norway and also internationally. We had to decide whether or not we were going to open an investigation. That decision is down to prosecutorial discretion in Norway. The decision taken by us can according to the regulations be appealed to the General Prosecutor of Norway. Two Prosecutors from my office worked on this case until our decision was taken. All the different reports from the United Nations have been read, the Israelis have been contacted and reports have been obtained from them. We have also been obtaining reports from and had discussions with other countries about the question of universal jurisdiction. We have been working very closely with the decision of whether or not to open an investigation. The reasoning behind the decision not to open an investigation was complex. The first question we had to ask ourselves was if we had universal jurisdiction or not to do so. The answer to that question was in our opinion, yes, we can do it, we have universal jurisdiction to open an investigation in a case like this. Then the next question was whether or not we had the obligation to do so. In our opinion we did not have the obligation to open an investigation. We were also looking into the situation of immunity for any of the persons mentioned. However, the main thing for us was to deal with this case in the same manner as all the other complaints we had received involving offenses like war crimes, crimes against humanity and genocide. We have about 80 cases to choose from. So where to start? Certain criteria for selection of cases have been determined, and also criteria for the prioritization of cases. One of the reasons behind having these criteria is the lack of resources. We are few to deal with these cases. We have few human resources, and the finances do not allow us to travel much which is necessary when it comes to offences committed in another country. Therefore, when it comes to cases concerning core international crimes, cases where people are not staying in Norway are put aside. That is one of the criteria for selecting a case - that the person suspected is present in Norway. When we looked into this case we also realized that the possibilities to investigate the case were uncertain. Will we have access to witnesses? Will we have access to documentary evidence in Israel and Palestine? And also, if we managed to conduct an investigation and were able to issue an indictment, will we be able to prosecute the case? The persons suspected will never arrive in Norway to stand trial and in Norway if the sentencing is more than one year, you cannot have a trial *in absentia*. Looking at the resources we have, it would in my opinion be a misuse to start investigating a case which you will not be able to present in court in order to get a conviction.

What is the precedent of this decision? There is none, because this is one specific case that we have been looking into and have decided on. It does not fall within the criteria to be selected and prioritized and therefore is handled as such.. That does not mean that we will make the same decision in other similar cases. It depends on the case and the possibilities amongst many other things.

When it comes to the question of political implication, I have to emphasize that we did not have any political involvement or pressure. I have noticed that the Ministry of Justice and the Ministry of Foreign Affairs have been eager to learn about the decision we took, but there has been no pressure whatsoever. The last call I received before I left Norway in order to participate in this meeting, was some journalist asking me if I was afraid to be criticized for having taken a political decision. My answer to that question was and still is, no, because this is not a political decision, but a decision taken by a Prosecutor in charge of running an office where we have to do our best with the resources we have, and therefore have to prioritize on the basis of impartial criteria.

(2) Lars Hedvall: Sweden

I am a Prosecutor in Sweden, one of four designated prosecutors handling genocide, war crimes and other such cases. Our work includes cooperation with the Specialized Unit within the national criminal police force. I am in charge of the investigation and I inform the police what they should do in these cases as soon as they have a suspect. I also take care of extradition cases. I will give a brief overview of the extradition case of Ahorugeze. He was first apprehended in Denmark after a year-long investigation there in relation to murder and attempted murder in Rwanda. In the end, he was released and the crimes that had been investigated by the Danish police form part of the crimes we have in the extradition requests. However, there are additional crimes in the extradition request made to Sweden.

In 2008, I received a call from a colleague who explained to me that the Rwandan Embassy in Sweden had called him and that a man had been apprehended. He was in Sweden to get a new passport for his new wife and the Rwandan Embassy explained to the police that this man had an Interpol 'red notice'. He was wanted by Rwandan authorities and my colleague asked me if I could deal with this as a prosecutor in charge of war crimes. On 16 July 2008, I arrested him. On 18 July 2008, the first instance court confirmed the arrest and on 4 August 2008, we received a formal extradition request from the National Public Prosecution authority in Rwanda, who wanted to prosecute Ahorugeze on genocide charges. Mr. Ahorugeze was arrested on charges for genocide, complicity in genocide, conspiracy to commit genocide, murder and extermination as a part of crimes against humanity. He opposed extradition on the following reasons: i) The witness statements in the extradition request were false and part of a conspiracy against him; ii) The crimes in question he considered to be political crimes and he was at risk of being persecuted by Rwandan authorities; iii) His rights risked being seriously violated if he was extradited to Rwanda; and iv) The early closure of the Danish investigation on the ground that a prosecution was unlikely to result in a conviction, shows that he is innocent. The District Court of Solna (Sweden), the first instance court in this case, decided on 29 September 2008 to remand Mr. Ahorugeze in custody. The case went to the Government and it referred the case to the office of the Prosecutor General for an investigation in furtherance of the extradition request, not an investigation in the pre-trial sense. On 9 March 2009 the Prosecutor General transferred the case to the Supreme Court for examination. The Prosecutor General found probable cause for almost all counts and foremost genocide. He also assessed the investigation on the case with some cause for doubts, supported the view that the situation in Rwanda was not so serious as

to bar the extradition pursuant to Article 3 and 6 of the ECHR. On a personal note and that was also felt by the Prosecutor General's office, a crime should be prosecuted where it was committed and this is also the spirit of the 1948 Convention on Genocide.

During the time when the case was in the Supreme Court, there were decisions from Finland and the UK not to extradite suspects to Rwanda and this was something that had to be borne in mind when dealing with these questions. However, in its Decision of 26 May 2009, the Supreme Court found no obstacles under the Swedish Extradition Act, which would prevent an extradition. It also made an examination under the European Convention of Human Rights, but the Supreme Court found no legal obstacles to prevent the extradition. However, the Supreme Court stated that with regard to Article 6, the investigation of the case gave rise to some doubts, so they were following the prosecution here and that should be taken into consideration in the third examination of the case and it was handed over to the Swedish Government.

The Government decided in early July 2009 that Mr. Ahorugeze would be extradited to Rwanda for crimes that under Swedish law are equivalent to genocide, complicity and conspiracy to commit genocide. This was the end of the national process in Sweden and I can say that in Sweden we can prosecute genocide so we have no problem there. We have universal jurisdiction when it comes to that type of criminality, though we have to have the Government's permission to do so. We can investigate and can have a pre-trial investigation but we cannot indict without the Government's agreement when a person comes from abroad. Mr. Ahorugeze was not happy with the Government's decision so he went to the ECtHR and submitted his case to the court and following a request from the ECtHR, the Swedish Government delayed enforcement under the extradition order.

The court put three questions to the Swedish Government in order to decide whether Mr. Ahorugeze's case would be admissible: First, had the Swedish Government obtained guarantees from Rwanda? Will the applicant receive a fair trial and not be subjected to treatment contrary to Article 3 if extradited to Rwanda? The Government's Decision is based on an assessment of the investigation done and not on any guarantees. Sweden has not requested any guarantees from Rwanda, the Swedish assessment is that an extradition to Rwanda - regardless of any guarantees - would be consistent with Article 6 of the ECHR. The Government's Decision was considered compatible with Article 3 as no manifest grounds have been found to indicate that Mr. Ahorugeze would be at a serious risk of torture or other inhumane treatment or punishment in Rwanda. Secondly, the ECtHR asked whether the Swedish Government obtained a guarantee that Mr. Ahorugeze will be placed in a particular detention facility or whether the Swedish Government could determine where Mr. Ahorugeze will be placed upon return to Rwanda and during the proceedings. The answer to this question was based on the information in the request and additional information. The Swedish Government has understood that Mr. Ahorugeze will spend most of his detention and all of his possible sentence in a specified detention facility, and it would be possible to find out where he is when detained and/or imprisoned. Lastly, the ECtHR asked whether the Swedish Government has adopted measures to monitor and follow a future detention and trial in Rwanda. The Government's extradition decision as formally stated is not based on guarantees and any assurances concerning monitoring guarantees and commitments are not relevant. Rwanda has, however, unilaterally pledged that Swedish representatives are welcome to observe and monitor the proceedings. The circumstances in the case are such that Sweden is prepared, if necessary, to take measures to monitor the legal proceedings, both concerning the situation of Mr. Ahorugeze as a detainee, and the legal proceedings in the court. This is more or less where we stand today. Mr. Ahorugeze was to submit a response to this by 30 October, but he has been granted additional time until 15 November 2009. So, thus far we are discussing the

admissibility to the ECtHR. If the Court decides that this case is not admissible, Mr. Ahorugeze will be extradited to Rwanda as soon as possible. If the court will try this case *in extensio*, it will take some time and I have to consider as a Prosecutor whether I should start the pre-trial investigation in parallel with the proceedings before the ECtHR.

(3) Philip Grant¹¹²: Switzerland

I would like to pass on information about the changes of the law in Switzerland¹¹³ and then talk about a few recent cases and future cases. Switzerland is a bit of a complicated country with its federal structure.

For a case to proceed the suspect must be in Switzerland and must not leave Switzerland. If the suspect leaves Switzerland once the case has been opened, the case will be dismissed because there is no longer jurisdiction. In addition to this, there is the additional condition that there must be a close link between the accused and Switzerland. Either the suspect must have his legal domicile in Switzerland, he must come very often to Switzerland to visit a doctor, but Parliament has stated that if he visits his banker that is not close enough a link to be detained. The situation is complicated but this is going to be modified because the Parliament is examining a Bill to implement the Rome Statute. Everything is going to be harmonized and placed under the aegis of the national jurisdiction. The Bill is being reviewed by the Senate. We were auditioned in August and we tried to have a few modifications taken into account, which bear on genocide. For example, the Bill is taking into account protective groups and is going to include political and social groups. The Government said that people who are ill or mentally handicapped would be included in social groups. Crimes against humanity, which currently are not part of Swiss law, are going to be part of the criminal code. What is really important for us, is to redefine the rules of jurisdiction and to dispose of this close link that usually prevents prosecutions. It is not yet clear whether the law will be retrospective. We would like the law to be applied as of 2002, which is the time when Switzerland ratified the Rome Statute.

Another modification of the law that came into force on 1 January 2008 was the law on asylum. The authorities responsible for asylum must communicate to the judiciary any rejection of asylum application due to the suspicion that they have committed international crimes. So far, we have not been informed of any cases being prosecuted. From 2011, we will have a Federal Criminal Code for all of Switzerland, so the Cantons will no longer be in charge of penal law. So this harmonization will be implemented starting 2011.

I will try to present five cases, four of which TRIAL has been involved with. The first one is the case of a former Algerian minister who was supposed to come to Switzerland to attend a conference in the canton of Fribourg. The UN Committee against Torture is considering a case brought by an Algerian victim who said he was tortured under the orders of this former Minister.

¹¹² President TRIAL, Switzerland.

¹¹³ After the conference, on 18 March 2010, the Swiss Council of States passed a federal law incorporating into the Swiss penal code crimes provided for by the Statute of the International Criminal Court. Crimes against humanity will become part of Swiss legislation and war crimes will be defined much more precisely than is currently the case. Henceforward, according to the new code, genocide will also be considered as being committed against members of a "political or social" group, and not solely against members of a national, racial, religious or ethnic group. Except in cases where they are committed by Swiss or foreign military personnel, or against the Swiss military, such crimes shall be prosecuted and judged by the ordinary authorities of the Confederation and not by military courts. The law will not have retroactive effect. See further: http://www.trial-ch.org/no_cache/en/activities/details/article/genocide-crimes-against-humanity-and-war-crimes-switzerland-to-have-a-new-law-but-with-limited-a.html.

We found out the Minister would come to Switzerland about 10 days before his arrival, so we had time to lodge a complaint. We lodged one with the authorities of the canton. The testimony of the victim was deemed to be credible and the investigating judge decided that if he could find the ex-Minister he would need to face the victim and then a decision would be made as to what would come next. The investigating judge wanted to avoid a diplomatic incident so he asked the Ministry of Foreign Affairs if the ex-Minister had some kind of immunity. He did not, so there were no special impediments, nothing that would prevent us from questioning this person. There was however a leak, we do not know where the leak took place, we think we know but we are not certain. So a few hours before going to the Canton in Fribourg, the ex-Minister suddenly went to France and then went back to Algeria.

Another case relates to a torturer who lives in Geneva with his family and the cantonal prosecutor does not want to have anything to do with this case. He says that 'we are not an international court, it is not up to us to handle this'. We tried to explain to him that there is a Convention against Torture, but obviously this is nothing he wants to hear, so he does not want to investigate. We had to hire a private detective who took photographs of the person leaving his house. We went back to the prosecutor, showed him the photographs evidencing that the person actually lived there. The Prosecutor was slightly embarrassed and said, 'Let's start again, as the person seems to live in Geneva.' Six months have passed and nothing has happened. We hesitated to make this public since there is a risk that the person could leave Switzerland. However, recently we have received information that the country of origin of the person might do something, so we are remaining very discreet and keeping a low profile. We are waiting to see what is going to happen in the next coming weeks otherwise we will have to go public with this.

Another case is an Article 1F cases of the Refugee Convention, so a rejection of a request for asylum from a person from Somalia. There was an application for asylum and the person admitted that he had chaired courts that convicted dozens of people without a fair trial. A Prosecutor of the same Canton took a ridiculous decision. He said that 'the evidence is so slim that even Amnesty International has said nothing about this and if Amnesty International does not say anything to me, what do you want me to do, what can I do with this case?'

Another case is underway but I cannot give too many details. It is one of these one-off cases that we exposed to the relevant authorities after finding information by chance. We exposed the case to the court and the pre-trial investigation is underway. On Monday, I was told that a decision was going to be made in the coming weeks to find out whether the pre-trial investigation was going to stop short or going to continue and potentially detain the suspect who lives in Switzerland. He cannot be expelled to his country of origin.

The final case relates to a former Rwandan minister who was a member of the provisional Government during the genocide. He has been living in Switzerland for several years and police proceedings had been initiated by the military court who carried out a preliminary investigation and dismissed the case in 2004-05. Last year however, Rwanda asked for extradition, but the request was eventually rejected.

(4) Andreas Schüller¹¹⁴: Germany and Austria

I will talk about three issues in Germany and Austria.

First, FDLR¹¹⁵ President Ignace Murwanashyaka has been living in Germany for many years. He obtained asylum in 2000, in 2001 he became president of the FDLR, and in 2005 he was put on a UN sanctions list. In 2006, the Federal General Prosecutor in Germany initiated some pre-investigations of alleged war crimes and crimes against humanity. These pre-investigations were halted in 2007 for lack of evidence relating to his involvement. In 2008, there was an international arrest warrant issued by Rwanda together with an extradition request from Rwanda. The Federal German Prosecutor asked for an extradition warrant, on the same day that the ICTR decided that they will not refer cases back to Rwanda. The EU and Germany took the positions that they will also stop immediately any extraditions to Rwanda and this was the end of the extradition request. Murwanashyaka was still in Germany and the German Federal Prosecutor opened a new pre-investigation. In 2009 he was sanctioned by a local court because he was still acting politically in contravention of a previous ban. He obtained a minor sentence and this is where we are now. The Prosecution is investigating the case, in 2007 they did not have enough evidence and I do not know if they will find more now.¹¹⁶

The second issue relates to German Colonel Klein who was involved with the German mission in Afghanistan. He had ordered air strikes some 6 – 8 weeks ago, against hijacked fuel tankers in Kunduz and there were allegedly many civilians killed. So far, the German local prosecutor, Andreas Dresden, had investigated this case as an ordinary crime. Only last week he referred the files to the federal prosecutor in Karlsruhe who has the special competence on international crimes. I think that the German Government and the former Minister of Defence stated in his farewell speech and in Germany that German soldiers in Afghanistan should not face criminal investigations for following orders. The former minister said the strikes were proportionate and sees no reason for further investigation. This puts some pressure on the Prosecutor because it should be the Federal Prosecutor who decides if it is proportionate or not and if there should be an investigation or not. This indicates how Germany is dealing with international crimes, especially as all people involved directly do not touch the issue – by not investigating and trying to keep it out of judicial proceedings.¹¹⁷

Finally is the Kadyrov complaint in Austria. In 2008 we learnt that President Kadyrov of Chechnya was expected to attend a European football championship game in Salzburg. We had evidence from one witness who had been tortured in Chechnya, not only by some Chechnyans, but by Kadyrov himself. This man had filed complaints already to the court in Salzburg and in Russia against Kadyrov. There was strong evidence and when this witness came to Austria, his family in Chechnya were detained and his father was also tortured for 10 months in a detention facility. With this evidence we filed the complaint to the prosecutor in Salzburg. Three days before the scheduled match, the Prosecutor in Salzburg said that they were not competent. They usually transfer the file to the competent prosecutor, but this time, they did nothing. Three

¹¹⁴ Andreas Schüller, Legal Analyst, ECCHR.

¹¹⁵ The FDLR is a rebel group in eastern Congo, formed of the former Rwandan army and includes approximately 300 genocidaires from 1994, but it is estimated to have a number of 6-7,000 rebel fighters in eastern Congo. They control parts of the Kivu region, especially since May 2009. A large number of crimes were committed.

¹¹⁶ Shortly after the conference, Ignace Murwanashyaka and Straton Musoni were arrested in Germany on suspicion of crimes against humanity, war crimes and heading an illegal criminal organization. See further: <http://www.dw-world.de/dw/article/0,,4810524,00.html>

¹¹⁷ In April 2010 the German State Prosecutor closed the case against Colonel Klein. See further: <http://www.dw-world.de/dw/article/0,,5483181,00.html>

days later, on the Saturday, our Austrian associate attorney tried to file the complaint to the competent authorities in Vienna. She was told that she could fax the complaint, but that they will only check the fax machine during office hours on Monday morning at 7.30, and the game was on Sunday. She was told that she could not come in person because it was the weekend and nobody would be there to open the door. That was actually not the case, because later we were told that it was also due to lack of evidence that they did not proceed. However, they never told the key witness and they never asked him about it. It is still pending because there was never a formal decision. We filed a complaint to the UN Special Rapporteur on Torture, Austrian professor Manfred Nowak, who made a request to the Austrian government to explain the whole situation. We will see if they had an obligation under the Convention against Torture to at least open an investigation and arrest Kadyrov, because the UN Convention against Torture was implemented into Austrian law years ago.

Discussion

A number of questions were posed to Ms Frigaard, the Norwegian Prosecutor about the decision not to proceed with the investigation in the Israeli case, and the criteria used to decide the matter. Ms. Frigaard noted that there are no strict criteria that they use; these are in a constant state of evaluation.

Another commentator queried whether, it would be good to open an investigation to collect evidence even if it is not going to go to trial but just to preserve evidence, and how that might apply to the Norwegian context. Ms. Frigaard indicated that their decision is to concentrate on those in Norway; 'I am talking as a prosecutor who has to be realistic with what I am able to do.'

(5) Manuel Ollé Sésé: Spain

On 4 September 2009 there was a modification of the law in Spain. The reforms were developed very quickly. A proposal was made on 14 May 2009 and already by 5 November, the reform was published and in force in Spain. We did not have a public debate, there were no calls for expert evidence. The law was reformed through the reform of another law; the modifications were included in a law that considers judicial salaries and holidays. There was concern amongst certain sectors of Spanish society that Spain risked becoming 'the international police,' and there were certain political interests. There were three types of cases that were particularly challenging: i) China:¹¹⁸ Three days before the hearing in Congress they told us that if Spain was going to proceed with the Tibet¹¹⁹ and Falun Gong cases, China would deny permits for Spanish companies operating in China; United States and Guantanamo Bay: There was very similar political pressure exerted, as in iii) Israel/Gaza. Many officials came to Spain, with demands for the law to be modified.

The first restriction in the law on universal jurisdiction relates to its absolute character. Previously, there was no other condition, just the gravity of the crime. Now there are three

¹¹⁸ Against former Chinese President Jiang Zemin, Spanish High Court (2003) / Spain's National Court (Audiencia Nacional) accepted charges of genocide and torture on 11 November 2009 against 5 high ranking CCP (Chinese Communist Party) officials for their contribution in the persecution of Falun Gong.

¹¹⁹ Against Chinese authorities, Spanish Supreme Court, 6 September 2005.

connections or link requirements. Either one or the other has to be in place. First, the suspect must be on Spanish territory, introducing some sort of passive personality principle that was never previously in Spanish law. Second, the need for the existence of Spanish victims and the third alternative requirement regards any other relevant substantial link with Spain. The link with Spain is not defined.

There is also another subsidiary criterion that did not exist before. Criminal proceedings are now in all cases subject to the condition that no other country has jurisdiction or that no international tribunal has started proceedings. So, if no proceedings have commenced and nobody else is prosecuting these same punishable acts, how are we going to know if this is truly being investigated in another country? As in the case of Gaza and Israel, how do we ascertain the situations through subsidiary means? Two proceedings might be in place, and one proceeding might give the appearance of justice when in reality it is not, thus preventing us from starting proceedings in Spain as they are being initiated elsewhere. It might take 20 years to get to testify. With the criteria of subsidiarity, there could be fraudulent things going to court and we would not have due process.

Politicians are saying, do not worry, although we are restricting this, you will continue to be judged by courts of your country and international tribunals. I would like to ask the politicians 'How efficient is the International Criminal Court? Does it judge everything that we think should go to court?' Unfortunately, we have to say no. Our legislation is so schizophrenic following this amendment. It is so badly drafted, so inefficient, because it says that the procedure will be suspended provisionally when another proceeding starts on the basis of the same facts in another country or by an international tribunal. What suffices in Argentina and El Salvador is that the son, boyfriend or girlfriend or any of the accused goes to the tribunal of that country and places a complaint relating to the same facts, for our proceedings to be suspended? Quite separately from it being against all the provisions of international law and also the provisions of our internal law, what is seen here is a response to those states who demanded this kind of change.

What will happen in the future? We still have to continue to be optimistic. With respect to the new subsidiarity and connection criteria, if we interpret them in accordance with the obligations of Spain under international law, I am convinced that we will be able to win. Therefore, we would be going back to applying international law.

In conclusion, the Tibet case is an open case. It is ongoing and we have a Spanish Prosecutor with us today. In Spain it is not the Prosecutor who investigates the case, it is a judge and some of them claim to be independent from the Prosecutor, who may receive an order saying do not investigate. The Tibet case, which is under investigation, has many difficulties. As you can imagine China is very much against it. There is another case involving a person who was assassinated in Iraq. Unfortunately the United States authorities have not allowed any rogatory missions but the Guatemala case is in very robust health, as explained earlier. The Guantanamo case concerning the CIA flights is in our highest court and unfortunately it has been suspended for the moment though it may be reopened. Perhaps this will finally be taken up by the Constitutional Tribunal so that it could consider the constitutionality of the legislative reforms.

The greatest contribution Spain has had in the last 25 years in the international community in terms of human rights has been the application of the principle of universal jurisdiction. This principle of universal jurisdiction does not mean that we accept any demand and any claim, but that it is done according to law. Therefore, a *hommage* must be rendered to victims because

they are the ones who deserve proper justice and to be fully informed about the situation. If they are denied justice in their country because the States do not want to deal with it or they cannot do it, if amnesty laws are in place, we should not see the laws as valid. The only possibility we have today is to fight for human rights, to bring back dignity to all the victims who have seen their human rights violated, for the mothers of the Plaza de Maya, it is for civil society to fight to give us justice.

(6) Luc Walley: Belgium

Tommorrow, at the Palais de Justice in Brussels, a trial will start against Mr. Nkezabera, probably the most prominent genocide suspect to be tried in Belgium.¹²⁰ He was someone who belonged to the planners of the genocide, and in addition he does not even deny it. For the first time we will have someone who has confessed the facts and for several years has cooperated with Belgian justice in the last two trials. He was a witness, but also cooperated with international justice because he has a strange status. It was upon the request of the ICTR that Belgium opened this file as part of the ICTR's completion strategy. He was residing in Belgium when the application from the international Prosecutor reached Belgium. At the time, Belgium had not even opened a file about this man. This file was among the files transferred to other countries, because Nkezabera had not yet been indicted by the ICTR. This is a fairly different case, he is a very important perpetrator, but he is repenting and so he is an insider witness and he is also a protected witness. This trial was supposed to be extremely interesting for various reasons. On the one hand Mr. Nkezabera is speaking up and providing a lot of information. Also for the very first time the Federal Prosecutor was prosecuting not only for war crimes, which has been the case until now in Belgium, but also for genocide.

The crime of genocide has been provided for in our legal system since 1999. However, he was not prosecuted on that ground because we did not want to take the risk of having a long legal debate about the retroactivity of the law. Since we were dealing with somebody who had confessed to planning the genocide, we hoped that the issue would not come up. The issue did come up because the Defence raised it and Nkezabera was before the tribunal based on the charge of genocide. However, on appeal, the counts were changed and now he is only being prosecuted for charges of war crimes. Interestingly, several months later the same Appeals Chamber, but differently constituted, decided differently in the Guatemala case where the investigation is still underway. That case concerns war crimes committed at the beginning of the 1980s, prior to the universal jurisdiction law in Belgium. In that particular case, the Appeals Court decided that nothing precluded it from considering the facts as applying retroactively. The reasoning was exactly opposite to what happened in the Nkezabera case. It is not excluded that the Cour d'Assises may revisit its position, but we will see.

The Nkezabera file was opened in 2004 and the accused remained in detention for several years while the investigation was not making much progress. Last year he was released because the competent authorities decided that his detention was no longer justified, because we were beyond reasonable delay and so he was released. Meanwhile his health condition deteriorated, he suffers from very serious cancer and is in a terminal phase. Therefore, the experts agreed that he is unfit to appear in court and he has refused to be represented by his

¹²⁰ Ephrem Nkezabera, found guilty and sentenced to 30 years imprisonment December 1 2009, Cour D'Assises, Belgium, for playing a key role in the Interahamwe (extremist Hutu militia in the Rwandan Genocide), financing and supplying arms to the militia. In March 2010, the court ordered a retrial, due to the fact that Nkezabera had not been present during the first trial (due to illness). He has since died of cancer.

counsel. Last week we had a very difficult debate in court because the court, the prosecutor, the civil parties were faced with a dilemma. Either they have this trial *in absentia* so that there is no defence or no accused present. Alternatively we delay the trial in the hope that someday his health condition may improve. If so, the trial may never take place, so the victims were invited to put forward their views on this point. Some of them thought that under such circumstances the trial was meaningless. The Prosecutor rejected the arguments of the defence, which were based on the European Convention of Human Rights and the rights of the Defence. Finally the Cour d'Assises decided to open this trial *in absentia*. It is a specific trial when you only have the representatives of the civil claimants and the Prosecutor, when the accused's box is open and there is no one representing the defence. This also means that the testimonies will take place in a different kind of setting, because the questions will come from one side, but we hope that it may contribute to some reparation for the victims.

It is also important to note that Belgium has limited the scope of its jurisdiction and the conditions attached to universal jurisdiction. This particular case is the exception to the rule, because in the great majority of the files that had been opened they have now been either closed, partially closed or dismissed. The whole momentum that existed in the 1990s has been slowed down. A few cases linked to the Rwandan genocide and Guatemala are still open. We also applied the same principles with one notable exception for the Hissène Habré case, where Belgium continued with the case that had been initiated. For the other cases, we applied the criteria that there needs to be a connection with the country, you prosecute if Belgians were victims, you prosecute in cases where the perpetrator is present in Belgium or if the perpetrator is Belgian. However, you are then not dealing with universal jurisdiction anymore. In practice, these are proceedings that are applied to asylum seekers who might be excluded or might have been guilty of crimes against humanity or war crimes. This was the situation in the first Rwandan case where we were also dealing with asylum seekers, who were prosecuted before the Cour d'Assises.

One final point. Even when victims are present in Belgium, it does not necessarily mean that investigations are going to be initiated. Mr. Schyvens lodged a complaint against those who tortured him for four years in Saudi Arabia. He was tortured alongside a number of others, including a British/Canadian citizen, Mr. Sampson who published a book about this whole affair and I think a film has been made in Canada regarding the situation. We filed a complaint based on the crime of torture but also for torture as a crime against humanity. The Public Prosecutor's position was that you cannot prosecute for torture, as long as the torturer is not on Belgium territory. We could have prosecuted without the need for the torturer to be present, if that torture could be qualified as crimes against humanity. However, we were not able to provide enough evidence to demonstrate that the torture carried out in Saudi Arabian prisons was sufficiently widespread or sufficiently organised to constitute a crime against humanity. This is also a case in which Belgium argued that the decision is not left to the discretion of the Public Prosecutor. That decision has still to be confirmed by another jurisdiction and it is a unilateral decision. Only the Prosecutor will present his case, and the Chamber decides, without being in a position at all to listen to the victims who filed the complaints, and there is no appeal.

(7) Kate Maynard¹²¹ : United Kingdom

I have been asked to cover two issues Firstly, an update on the scope of universal jurisdiction in the UK and secondly, the obstacles of bringing proceedings in the UK. I can speak from my experience in a couple of cases. Firstly, with regard to the law in the UK, there is a patchwork of universal jurisdiction laws so when a victim asks if they have a remedy in the UK, it can be quite difficult or quite arbitrary to respond to that question. There is the Geneva Conventions Act from 1957, which gives courts criminal jurisdiction over grave breaches of the Fourth Geneva Convention committed in international armed conflict and under occupation. Grave breaches include wilful killing, torture, the extensive destruction and appropriation of property not justified by a military necessity and carried out unlawfully and wantonly but there is a whole list in section 147 of grave breaches. The second major piece of legislation is the Criminal Justice Act 1988, which creates the criminal offence of torture and gives jurisdiction over suspected perpetrators found on the territory, no matter where the torture occurred or whether the victim is a resident or British national. The third major piece of legislation is the International Criminal Court Act 2001, which provides jurisdiction to prosecute UK nationals or residents for alleged offences of genocide, war crimes and crimes against humanity committed anywhere in the world after 2001. That Act did not define residents and was not retrospective which led to the embarrassing situation for example, where genocide suspects from Rwanda, Sudan and Croatia were found to be living in the UK but could not be prosecuted there. Following successful lobbying, the Government announced in July 2009 that they were going to provide retrospective jurisdiction for most crimes under the ICC Act, with few exceptions going back to 1 January 1991, which is where the crimes were first incorporated into the statute of the modern international tribunal. The amendment will also define who will be treated as residents in the UK, which includes those with indefinite leave to remain or those who have made such an application, including those coming to study in the UK. However in the Parliamentary debate the minister stated it did not include those coming to study on a military course, which is interesting. Those who have made an asylum claim or who have had a claim determined, those who have made an application for indefinite leave to remain, those who are subject to a deportation order are just examples, the full list is in the legislation which is in the process of being passed.¹²² If somebody does not come squarely within one of the definitions, time will tell what some of those criteria actually means when tested in the courts.

There are four factors set out in the new legislation, which may provide an indication whether somebody is counted as a resident. Those factors are the period in which the individual has been, or intends to be, in the UK, the purposes for which they are here, or intend to be here, whether the individual has family or other connections to the UK and the nature of those connections and whether the individual has a residential property located in the UK. These are factors that will be taken into account if the suspect does not come squarely within one of the examples.

The message then in terms of the scope of universal jurisdiction is positive, but the next major issue concerns the obstacles to actually using universal jurisdiction and victims obtaining justice in the UK and that is the tension between the rule of law and politics. I can give you some examples of obstacles in my experience working for victims in the UK. We have been told already there had been two prosecutions so far using universal jurisdiction. One is the Zardad case,¹²³ the Afghan torturer and the other was the Second World War case. In 2005, I attempted

¹²¹ Kate Maynard, lawyer, United Kingdom.

¹²² The legislation has now come into force.

¹²³ Faryadi Zardad, Old Bailey Criminal Court, 19 July 2005 and 7 February 2007.

in conjunction with lawyers from the Palestinian Centre for Human Rights, to obtain an arrest warrant for Doron Almog. He was the Commander for the Gaza strip and in 2002 a suspect for grave breaches of the 4th Geneva Convention. Before we knew the suspect was travelling, we produced an evidence file and then discovered with about two weeks' notice that the suspect was travelling to the UK. We approached the War Crimes Unit of the Police, the Counter-Terrorism Unit at Scotland Yard and unfortunately in the time available they were unable to make a decision whether to use their powers of arrest to arrest the suspect when he was in the UK. We had instructions from our client to try and obtain a warrant for his arrest in the Magistrate's Court. As in the UK, a victim can ask the court to issue an arrest warrant, the Director of Public Prosecutions or Attorney General is not required for that step, although a prosecution would require the consent of the Attorney General. We went to court and persuaded the top London Magistrate that the evidence presented was capable of proving a *prima facie* case against the suspect. That was the end of our involvement and it all went downhill from there.

The warrant was passed from the court to the police and we now know through following police complaint procedures that the police consulted widely on what to do with the warrant. They consulted the Foreign and Commonwealth Office and various police forces, because the suspect was going to speak in another area of the country outside London, the special branch, the community unit. They also appointed Doron Almog a lawyer while he was in the process of flying into the UK. The existence of the warrant was leaked to the Israeli Embassy who contacted the plane and the pilot and warned Almog not to get off the plane. The officers were with the immigration officers and Almog was on the plane refusing to get off. One of the reasons why it ended in the police deciding not to board the plane was because they were partly concerned about having an armed shoot out with the armed air marshals from the plane at Heathrow. They were concerned about the safety aspect for that and they did not know their arrest powers, whether they had the power to board the plane and the carrier would not let them on. Although we understand Doron Almog is still on a watch list, we hope that if he returns to the UK, he will be arrested and prosecuted. Our clients were obviously devastated that by design or incompetence, the rule of law was frustrated. As a footnote, it was a powerful lobby from Israel and the UK to change our laws, to take away the power of victims, to try and get an arrest warrant so the perpetrator, the suspect was secured in the UK, while the courts and the Attorney General decided whether to prosecute. Happily the Government have announced they would not bow to that pressure, so that facility is still there.¹²⁴

In another case, a non - Israeli case and an urgent case, I have had dealings with the police after the Almog case. A protocol between the police and Crown Prosecution Service (CPS) is developing and there is a greater liaison between the police, CPS and other agencies now. An assessment panel or a gateway group has been established between the CPS, the police, the Border Agency, Ministry of Justice or Foreign Office to discuss issues about universal jurisdiction and flagging up issues to consider. I understand that when there is a live case now presented to the police and CPS, they will consult widely, so on issues like impact with UK relations, identifications, evidentiary issues but also the practical and political issues, prospects of country cooperation, issues about witnesses coming to the UK or giving evidence by video link. There is also a Community Interest Panel which we have heard has been set up in the UK by NGOs with interest in universal jurisdiction cases, to discuss issues such as witness protection and collection of evidence.

¹²⁴ Following further arrest warrants being issued, additional pressure has been mounted to change the law, so the issue is still live.

Finally, our practical concerns when approaching the police with a case, and on top of the list is the politicisation of decisions, whether to pursue cases or not. The second issue concerns resources; the police dealing with these cases are still in the counter-terrorist unit at the police and although they profess that they do have a flexible demand-led system where they can scale up investigations as the need arises rather than having a dedicated investigation unit, obviously our concerns of competing powerful pressures in resources are obvious. Clearly from my experience the police are more interested if the suspect has a long term visit here and the deeper the UK connection, the more likely it is that resources will be deployed. It is difficult handing over to the police because then it is out of your hands. For the Almog case, we are concerned about wide consultation, the risk of leaks, and the risk to victims of leaks once they have their heads above the parapet and give their evidence to the police there are concerns about their safety. The slowness of the process means it can take a long time if there is no need for urgency and again the length of time together with the amount of consultation gives one concern. Following the Almog case, some of the other initiatives that have developed since then concern having a UK universal jurisdiction group. Amnesty International, Human Rights Watch, REDRESS, some parliamentarians and some lawyers meet and discuss universal jurisdiction matters and share experience. We lobby for changes in the law or against them.

(8) Chantal Joubert¹²⁵: Netherlands

I will provide an overview of the latest developments in The Netherlands concerning the investigation and prosecution of international crimes. The War Crimes Unit in the Netherlands has been around since 1994. It was established to concentrate solely on crimes committed in the former Yugoslavia but very quickly it increased to include all international crimes. We have the luxury in the Netherlands of having very strong political will. However, it also sometimes creates the impression that what the prosecutors and investigators are doing is never enough. This is because the Parliament is always pushing for more and the result is that cases are brought before the court, whereas much of the work of the Public Prosecutors Department and the Police in this field is preliminary work, investigative work and the selection work of all the files we have.

The Dutch authorities receive cases and the bulk of the cases are from the 1F files,¹²⁶ the migration department. When there is an Article 1F decision to exclude a refugee from protection, the files are sent to the Public Prosecution Department, and that is the bulk of all the cases we have. After that, complaints and open sources are also part of the workload; one example would be the case of van Anraat, a Dutch national who sold chemicals to Iraq. The Public Prosecution Department prosecuted his case, which started by a television documentary on Dutch television where van Anraat indicated that he had knowledge of what Saddam Hussein was going to do with the chemicals he had sold to him.¹²⁷

Very recently we published the selection of cases in the Netherlands. The Ministry of Justice sent a letter to the Parliament where insight was given on the selection of cases for prosecution. There are not necessarily criteria, but we do look at the feasibility of cases before we send them to be processed in the judicial system. When a case is not selected in the first round, it is not thrown away but kept on the workload and periodically reviewed. A case not being prosecuted

¹²⁵ Chantal Joubert, Ministry of Justice, the Netherlands.

¹²⁶ Refers to Article 1(f) of the Refugee Convention of 1951.

¹²⁷ See further: http://www.trial-ch.org/en/trial-watch/profile/db/facts/frans_van-anraat_286.html

today may be prosecuted a year or two years later, since these crimes do not prescribe in law. We have a lot of experience in prosecuting these crimes and we had in the year before last, an internal analysis of how we are doing this and how it can be improved. Parliament is keen on having more cases, so the Ministry of Justice introduced an intensification program for the prosecution of international crimes. This intensification program was put in place on the basis of four pillars, with most of the pillars concentrating on fine-tuning the work we have already been doing. The first pillar was the further professionalization of the approach and working method of the whole enforcement chain. The second pillar is securing quality and expertise. The third pillar is increasing the capacity and resources, two of the key issues in these types of investigations. The fourth pillar was improving legal instruments.

The Ministry of Justice has repeated on many occasions that they see the commitment of the Netherlands to stay in the top group of countries bringing perpetrators of international crimes to justice and we see this as part of the promise made to the world community, when we signed and ratified the Rome Statute of the ICC. With the Rome Statute's principle of complementarity, we all created a close system of law enforcement of international crimes. All countries are responsible for enforcing their own international crimes on their territory. This is the only way to one day end the culture of impunity.

During this conference and at many other conferences organized by REDRESS and FIDH we have heard of many of the practical problems the investigation teams encounter: security of the investigators and witnesses, ability of interpreters working in post-conflict situations in non-western countries and cultural problems at trial. The fact that investigators are dependent on third parties, NGOs, local competent authorities and the UN, are all practical challenges. Evidence can be precarious as these cases rely on testimonial evidence where the facts of the case have taken place a long time ago and available witnesses are often traumatized. It is very difficult to have witnesses brought before European courts, it has an impact on the witness, on the court and the way the court sees the witnesses. The acknowledgement of these difficulties and experiences has prompted the Netherlands to review a number of strategies. I will give you an example from a year ago when we started this program. We tried to reinforce internal and inter-departmental cooperation. We tried in our program to not only involve the Immigrations and Naturalization Department, the Police, but also the Ministry of Foreign Affairs and other agencies, so that we can all work together in solving these cases. The Immigration and Naturalization Department amended their working methods, and are trying to increase the availability of witnesses residing in the Netherlands. This is done by asking or telling the witnesses if they have seen or witnessed something. If so, they can go to the police who will explain their work with the Public Prosecution Department. We have created a number of flyers in different relevant languages, such as Rwandan, French, Farsi and Arabic. We are trying to distribute these flyers to relevant places in order to provide information, to show that we are there and that we are willing to listen to all the stories.

Our Prosecutor has already mentioned the importance of having witnesses in the Netherlands, but also witnesses could be very helpful in the EU, Canada or the US. Therefore, we are very open to start discussions with anyone wanting to discuss with us how we could achieve this. I am very curious about all the ideas you might have. This is something that will also be discussed in the EU Network of Contact Points. We remain committed to cooperation with our EU partners and all partners to reduce cooperation problems in the field. We have also increased the capacity of the Police and Public Prosecution Department. We have scrutinized our legal instruments and this has prompted us to change our new law that was established in 2003, which codified our patchwork of implementing legislation. However, we thought within a few years, small changes had to be made. The bill is now pending and the first and most

important thing we wanted to change is the jurisdiction. The Netherlands has a very strict legality principle where we cannot render laws that are retroactive, but what we will try to do is to make the exercise of jurisdiction retroactive from the time we ratified the Genocide Convention. The reason we decided to implement this change was because of the Joseph Mpambara case. It is important to state this here, as we are hoping in the future to be able to prove genocide in a more effective manner. We are also changing our Extradition law as we needed a treaty to extradite. We are increasing the amount of treaties, for example, the Additional Protocol II for war crimes committed in a non-international conflict and the Genocide Convention. We have also changed our provision on the transfer of criminal proceedings. In the Bagaragaza case, shared with Norway, regarding transfer criminal proceedings legislation, it was stated that only states could transfer a case. This has now been changed so that tribunals can transfer a case. What are the results of these changes? We cannot say anything yet, because we do not have any results yet. In 2008, we had seven cases before a judge, seven ongoing investigations and 25 files that were being analysed. As mentioned earlier, over the last few years, the Netherlands have brought seven suspects before a judge in five different situations. The last point is that results in these cases are not only to be expected in the number of cases brought before the judge, because every case you bring before a judge has an impact on the culture of impunity, which we are trying to end. We have to be realistic about the expectations and resources that all these countries have. The Netherlands is a rich country and we have resources, but even these resources are limited. We have to be realistic about the fear that these cases may instill in suspects that they may one day be prosecuted. This is important and it has an impact.

(9) Patrick Baudouin¹²⁸: France

The last topic to be discussed is France. It is important to note that there is a difference between what the French authorities say at the highest levels, which is always that France is the land of human rights and is a major crusader for international justice. That has rarely been true. If it is true, it is in the past. In reality, France is very reticent regarding international law and is always very protective of its sovereignty for various historical reasons. It is obvious to France that it is not at all among the best, in terms of universal jurisdiction and international law. Even though France ratified the Rome Statute of the ICC, France is the only country (together with Colombia) that has excluded itself from the jurisdiction of the ICC for war crimes for seven years. France has not yet adopted implementing legislation for the ICC Statute. Also, France is one of the only countries that does not include in its criminal legislation a definition of war crimes. War crimes can give rise to proceedings, but to simplify things they are considered as mere offences, ordinary offences. The second issue is that France does not today allow proceedings under universal jurisdiction, except for torture and a slightly different crime, which is terrorism. Therefore, in France, if you want to initiate proceedings you can only do so by lodging a complaint on the basis of torture, as that is defined in French criminal law.

Two decisions have already been referred to: the Khaled Ben Saïd case (Tunisia) and the Ely Ould Dah case (Mauritania). Today the French authorities are very slowly and timidly translating the Rome Statute into internal law. It is under Committee Review in Parliament and it was submitted to the Senate in June 2008. Here we are in November 2009, a year and a half later, and we are still told that there are more important statutes that should take priority. The Senate

¹²⁸ Patrick Baudouin, Lawyer, France, Honorary President, FIDH

has voted for texts, which, if confirmed, would reduce the possibility of using universal jurisdiction. Why? There are four criteria.

According to the text before the Senate, when you have proceedings in France for torture, the alleged perpetrator must be on the French territory. With the texts the Senate has adopted, the perpetrator must have habitual residence on French territory, which means that the alleged torturers can come to France on shopping sprees and that would not amount to 'habitual residence in France'. They can stay a few months as they usually do, because generally these torturers are corrupt, they have a lot of money, they stay in the best hotels in Paris and they will continue to come to France with all impunity. The second criterion is different to usual French criminal law as the initiative to launch proceedings will exclusively belong to the Prosecutor's office. With ordinary offences or crimes, the victim or the family of the victim can initiate proceedings as a civil party. With regard to more serious violations such as war crimes and genocide, only the Prosecutor can initiate proceedings, so obviously political agendas will be involved. I know that nothing would have come to light if the initiative had been in the hands of the Prosecutor with regard to the two just-mentioned cases. It is a political world and some would like to control these cases, which have political and diplomatic implications. The third criterion is the principle of double incrimination *i.e.* you can proceed with proceedings for war crimes, genocide or crimes against humanity only if the alleged perpetrator belongs to a country which itself has incriminated these crimes. In most situations we are dealing with countries that do not necessarily have such legislation. The last criterion, and it is very limiting under the Senate text, is that we would first have to see that the ICC is not proceeding in relation to the crimes, whereas the Rome Statute makes it mandatory for those states that have ratified the Rome Statute to do everything possible to initiate criminal proceedings. It can be seen how restrictive France is and we are fighting along with FIDH, other NGOs, lawyers and judges, to try and change this legislation. It seems as if we will be heard at the lower house of Parliament rather than at the Senate, but in some ministries recently, we were at the Prime Minister's office in Paris and we could see there was a great deal of reticence to move forward, to be in line with what is done as per the major principles, and France will probably lag behind.¹²⁹

The second issue I want to talk about is that there is not only a blockage in France, but in addition French authorities use other methods to create obstacles in these actions. There is a whole gamut of ways where the political authorities can avoid applications of the principle of universal jurisdiction. In France the new excuse is that immunity is imagined and I will illustrate three examples of imagined immunity. The first example we had to deal with is a case where we are fighting. I have never seen such a case with as many implications and interferences from politicians, and it is known as the Beach of Brazzaville case. In this case, the Director of the National Police of the Republic of Congo (Brazzaville) came to France for medical care in the spring of 2004. The investigative judge who knew about this was very courageous. He detained this National Police Director from Congo. He was detained and was released. At 2 am, the President of the Investigative Chamber rendered an order to free this man, which says something about the independence of the judge in France, which is supposedly a democratic country. It was alleged by the Embassy of the Republic of Congo in France that this man had immunity because of an official mission in France. This was however completely fabricated. We

¹²⁹ On 12 and 13 July 2010, the French National Assembly examined the French draft implementing legislation of the Statute of the ICC and adopted the text without requiring a number of amendments that had been put forward by civil society groups. In particular, the text retained the four cumulative criteria, which severely weaken the implementation of the principle of universal jurisdiction for the crimes which fall under the ICC jurisdiction. However, it was decided to establish a specialised unit that will permit a better legal treatment of international crimes proceedings; including the specialisation of judges, though this legislation relating to the specialised unit is still to be debated and adopted by the French Parliament.

knew he was in France for medical care, that he was going to go back to Brazzaville and that he had met no official that was on an official list, making the immunity completely fabricated.

Second example, Donald Rumsfeld came to Paris for a conference at a club for the military in Paris. Immediately we lodged a complaint with the Public Prosecutor. It was a very solid complaint that we filed, with many major arguments that implicated Rumsfeld in torture. He had signed memos that recommended the use of torture and other ill-treatment methods, so it was a solid file. The political impact would have been huge if Rumsfeld had been arrested at the military club, but what were we told? That the Prosecutor's office needed to contact the Ministry of Foreign Affairs to see if Mr. Rumsfeld, who was no longer the Secretary of State, still had any immunity. The Ministry of Foreign Affairs confirmed that he had immunity because he was a former Minister of Defence and a judgment of the ICJ said that a Minister of Foreign Affairs could benefit from immunity. I believe that in the ICJ case it was a Minister from the DRC, who was at the time in office, whereas Mr. Rumsfeld was no longer in office. Therefore, how can one use this judgment when there was no text that talked about a former minister benefitting from immunity?

A more recent example regarded a case concerning Mauritania, where in France a complaint was lodged by Professor Clément, who has double nationality Mauritanian and French. He went to Mauritania to visit his family. Perhaps he said something that was not acceptable for the local authorities in Mauritania, because he was detained for 11 days and was tortured in Mauritania. When he returned to France he lodged a complaint and a few days ago in Paris there was a visit from the President of Mauritania, accompanied by various officials. This included a Former Home Secretary who was one of the torturers in the file and we asked the investigating judge to summon the Home Secretary. What did the investigating judge do? She said she will first see if he is on a Foreign Affairs mission, if he is on the list of accredited personalities, which he was not, and therefore she found out he had false passports and identity. She asked the Ministry of Foreign Affairs whether he nonetheless had some form of immunity as a former Home Secretary, and so he went back to Mauritania without any concern. We do not have any international documents that talk about immunity for former Government Ministers that can be used in order to stop proceedings, which completes the gamut about how political authorities create many obstacles. What is of interest for our meeting today is to try and coordinate our action, to try and see what other difficulties we are faced with and try to move forward. We need to be optimistic that universal jurisdiction is moving forward. It is not a surprise to see that there are obstacles due to *Realpolitik*, but we should not give up. We should continue to fight with all the necessary courage.

Discussion

In the discussion, Mr Baudouin noted, in response to a question about whether victims could seize the International Court of Justice for a mis-use of immunities, that it was not possible to seize the ICJ in this way (by victims), though it would be interesting to see a case brought on the mis-use of immunities. He also noted, regarding the need to adopt standards at a European level. I believe this is an opportunity, something desirable and it is probably one of the purposes of all meetings and future actions, but with a caveat, because these standards should not be minimum standards. It is always a risk when you deal with the European Union, surely it is desirable, but provided we raise the standard rather than lowering it. Another commentator noted that it would be necessary for the European Union to take initiatives to coordinate or fight

against immunity at the European level. If there was a European framework then this would avoid competition towards a lower standard. It will also solve the problems of feasibility because you could have a system where each country is not simply waiting for the suspect to arrive on its territory. You could be more proactive, you could investigate without prosecuting and each country could collect information provided by claimants who build up the cases, exchange information at the international level with other prosecutors. Therefore, if someone showed up either in Paris or Brussels you would not have to open the case because it would have been already ready in the different countries. Another point made was that it is important not to leave all the initiatives up to the public prosecutor's office. Experience has shown that without the involvement of the victims, it simply does not work. One possible solution to reconcile both is to integrate both and have criteria applied by tribunals, even though these criteria limit jurisdiction, at least you would have the possibility for victims to challenge decisions made by a Prosecutor and they would not have absolute discretionary power.

Ms Joubert noted, on the issue of feasibility is that they consider whether they have immediate jurisdiction or not, is the country engaged in war, is there evidence available to the Netherlands? These are very practical issues. I do want to suggest communication is closed because these crimes do not prescribe, there is nothing to stop us looking at these in one or two years time and in reprocessing these files. She also noted that the specialised units in the Netherlands are comprised of a number of investigators and prosecutors that only deal with crimes against humanity, war crimes and torture. The discussion between terrorism and these crimes has no interaction in principle. Some of the prosecutors have worked on terrorism cases but they are of a different nature than these types of cases. That is why we chose specialization for these cases. She also agreed with a comment made that it was important to prosecute arms dealers and stressed that they trying to do that. We have brought two Dutch nationals¹³⁰ before the Dutch court for sending weapons to Charles Taylor, for sending chemicals to Saddam Hussein. It is a very important part of the work but it is also very complicated in terms of constructing the evidence.

Manuel Ollé noted that Spain was indeed under pressure as a result of the cases that were brought. If you go to the newspapers dated 16 October 1998 when Pinochet was arrested, you can see for yourself.

¹³⁰ In 2005, the trial of Frans van Anraat began, the first Dutch person to be accused of complicity in genocide and war crimes. He was accused of selling the chemical raw materials for mustard gas to Saddam Hussein and thus accused of being an accomplice to the attacks of Saddam Hussein's armed forces against the Kurdish civilian population during the former Iraqi regime in the mid 1980s. Van Anraat's sentence amounted to no less than 15 years imprisonment. A few months after a second Dutch national, Guus Kouwenhoven, was arrested, on charges of complicity to war crimes by supplying weapons to Charles Taylor, the former president of Liberia. Kouwenhoven, however, has not been found guilty of war crimes, but of illegal arms dealing, for which he has received the maximum sentence of eight years. Recently, a retrial has been ordered.

CLOSING REMARKS

Regarding the comment about whether we should work towards a European harmonization, it takes me back to discussions with FIDH in 2001/2002 leading up to why we decided we should join forces to work on universal jurisdiction in Europe. I remember the first meetings that we held together. We were in a small room with a few NGOs and a few lawyers, almost nervous to meet together because universal jurisdiction was so sensitive. It was at the time when Belgium was becoming under threat and the whole idea of a process of universal jurisdiction was almost incredible. Then today I look around the room and we are having a much broader discussion with prosecutors, investigators, people from a much wider array of countries, as well as involving victims of the crimes themselves, so I think we have moved significantly forward.

In the early days we did go as far as to draft a European Directive on the implementation of universal jurisdiction and that process of drafting was done by the NGOs, not by any state and this was quite interesting. However, we never presented it and never pursued it because we realized the treaties and statutes were much stronger than we were ever going to get in terms of a European Union directive or agreement, about how to proceed. Instead we tried to accumulate ways to ensure different investigators, prosecutors and lawyers in different countries increasingly spoke to each other and shared their experiences. This also meant that the work on some of the cases, which had cross jurisdictional implications, could be dealt with together. One of the things we supported quite a lot, continue to support and hope will take further shape is the EU Network of Contact Points of Genocide, Crimes against Humanity and War Crimes. An official body made up of state representatives at the working level, coming together to work on these cases. This is a different discussion than we were having five or six years ago when it was more about how *not* to do work or how to fight fires.

The discussion is how to do the work and how to deal with the cases. There is certainly a lot more that needs to be done and it is evident by the discussions in the room today and over the past few days, we are not where we need to be. We have a fair way to go, both in how the authorities are dealing with the victims and witnesses in a technical sense but also have a lot to learn about how we are going to responsibly deal with the cases. The cases, which are not going to pass by in an imperceptible way, but the ones that are going to cause political challenges and we need a lot more work on that. With respect to the way forward, this conference that has been so enriching for me and hopefully for all of you will be followed up; a report will be written to in principle ensure discussions can at least be recorded and distributed and reach a wider audience.

With respect to the way forward we really hope we will be able to discuss with all of you over the coming period, to enrich the work and to bring even more people on board.



87 Vauxhall Walk
London, SE11 5HJ
United Kingdom
www.redress.org

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17, passage de la main d'or
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