



**FOSTERING A EUROPEAN APPROACH TO  
ACCOUNTABILITY FOR  
GENOCIDE, CRIMES AGAINST HUMANITY,  
WAR CRIMES AND TORTURE**

**Extraterritorial Jurisdiction and the European Union**

**Final Report**

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

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

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

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

“The European Parliament welcomes the progress made in the application of the principle of universal jurisdiction in respect of crimes against humanity, genocide and torture.”

Resolution on the proceedings against Rios Montt, 26 October 2003



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## I. Introduction

There is international consensus that perpetrators of the most serious crimes under international law- genocide, crimes against humanity, war crimes, torture and enforced disappearances- must be held accountable. The obligation to investigate and prosecute such crimes has been recognised as an obligation *erga omnes*, meaning a legal interest owed by all States, and is reflected in international treaties and as a matter of customary international law.

At the same time, it has been recognised that the victims of such crimes have an enforceable right to a remedy and adequate and effective reparations.<sup>1</sup> Without redress, feelings of powerlessness and disenfranchisement can hold survivors in a state of perpetual ‘victimhood’.<sup>2</sup> The ability to access effective remedies is therefore a key factor in overcoming the effects of the crime and in the fight to combat impunity.

The courts of the State in which the crime took place (the territorial State) would appear to be the most obvious judicial arena to afford justice to victims. In reality, however, these courts may be inaccessible for a variety of legal and/or practical reasons, including the availability of domestic immunities or amnesties, *de facto* impunity and security risks, particularly where crimes were State sponsored. Again, after protracted periods of inter-State, internal armed conflict or strife, it can be virtually impossible to bring persons accused of such crimes to trial in the State where the atrocities were carried out, because the entire State structure may have been so disrupted or even destroyed in the course of the conflict, or there may be such deep ethnic or political divisions that to hold a fair trial is simply not feasible.

The movement to ensure that impunity does not prevail for the crimes in question is not new or novel. At Nuremberg, the principle that certain crimes should not escape punishment was clearly expressed and the obligation on Contracting States to seek out and prosecute those said to be responsible for grave breaches of international humanitarian law is a key aspect of the Geneva Conventions, 1949, and Additional Protocol 1 of 1977. Treaties such as the United Nations Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment and the new Convention on the Protection of all Persons from Enforced Disappearances include the obligation to prosecute or extradite accused persons found on the territory of parties to the Convention, irrespective of where the crimes were committed.

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<sup>1</sup> United Nations General Assembly- Basic Principles and Guidelines on the right to a Remedy and Reparations for victims of gross violations of human rights and serious violations of international humanitarian law, 16 December 2005, also known as the ‘Van Boven/ Bassiouni Principles.’

<sup>2</sup> See, Yael Danieli, *Preliminary Reflections from a Psychological Perspective*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES: GENERAL CONSIDERATIONS (Neil Kritz, ed., United States Institute for Peace Press, Washington DC, 1995) (discussing the “conspiracy of silence”) and Roger Gurr and José Quiroga, *Approaches to Torture Rehabilitation: A Desk Study covering Effects, Cost-effectiveness, participation and sustainability*, in 11(1) *Torture, Quarterly journal on rehabilitation of torture victims and prevention of torture*, 3-35 (2000).

International prosecutions for serious crimes under international law have gained ground with the establishment of the ad hoc tribunals for the former Yugoslavia (ICTY) in 1994 and for Rwanda (ICTR) in 1995, and later with the establishment of 'internationalised' courts such as the Special Court for Sierra Leone, and specialised courts or chambers in countries as diverse as East Timor, Kosovo and Cambodia. Efforts to ensure global accountability for serious human rights violations culminated in the establishment of the International Criminal Court (ICC) whose statute came into force on 1<sup>st</sup> July 2002. The European Union has contributed substantially to the negotiation and coming into force of the ICC Statute and continues to promote its universal ratification and implementation into domestic law in the context of its Common Foreign and Security Policy (CFSP).

The movement to end impunity for the most serious crimes under international law is also evidenced by the growing recourse to foreign courts through universal and other forms of extraterritorial proceedings. The exercise of universal or other forms of extraterritorial jurisdiction is a necessary complement to territorial proceedings and cases before international or internationalised courts, both of which leave significant gaps in their coverage of which alleged perpetrators have had advantage. As a general rule, jurisdiction over crime is primarily territorial: it is the State within whose borders a crime has been committed which has the legal authority and duty to deal with it in accordance with that State's domestic law. However, foreign States may exercise jurisdiction in a number of instances, for example if their nationals were impacted by the crimes or the crime was directed at the foreign State, or where the accused is a national of the foreign State. States may also exercise jurisdiction on the basis of universal jurisdiction, a principle which permits, and at times requires, States to prosecute certain crimes under international law, regardless of where they were committed, regardless of the nationality or location of the author or the victims and irrespective of any specific connection to the prosecuting State, on the basis that the crimes offend the international community as a whole and all have an inherent interest and responsibility to ensure that perpetrators of such crimes do not evade justice.

The growth of universal and other forms of extraterritorial jurisdiction proceedings is due in part to the increased presence of alleged perpetrators in the territories of States seeking to exercise jurisdiction. It also results in part from the work of the ad hoc and specialised international criminal tribunals which has to a certain extent motivated States to end safe havens for alleged perpetrators from the situations covered by those tribunals, particularly Rwanda and the former Yugoslavia. It is also a practical outcome of the limited mandates and jurisdiction of international tribunals, which could not possibly investigate or prosecute all alleged perpetrators. Further, the arrest of former Chilean Dictator Augusto Pinochet in October 1998 in London inspired victims to initiate criminal proceedings in a number of countries, particularly in European countries.<sup>3</sup>

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<sup>3</sup> Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity, by Professor Diane Orentlicher, E/Cn.4/2004/88 Of 27 February 2004,

The United Nations *Basic Principles and Guidelines on the right to a Remedy and Reparations for victims of gross violations of human rights and serious violations of international humanitarian law* call on States to take the necessary steps to ensure that they are capable of exercising universal jurisdiction or extraditing or surrendering suspects of international crimes to other States or international tribunals:

*"5... States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction...."*

With an increase in victims as well as perpetrators seeking refuge in European countries, especially following the conflict in the former Yugoslavia and the genocide in Rwanda in 1994, several Member States of the European Union and other European countries such as Norway and Switzerland,<sup>4</sup> took steps to exercise extraterritorial and in particular, universal jurisdiction. However, the actions taken by such States differed significantly owing to the different procedural rules and legal cultures. As only a small number of countries have exercised universal or other forms of extraterritorial jurisdiction, safe havens for perpetrators of the worst crimes continue to exist in the territories of Member States of the European Union.

Within the European Union, the fight against impunity was primarily considered to be a matter falling within its Common Foreign and Security Policy (CFSP), in other words, as outward-focused, emphasising demarches and cooperation with States, primarily in relation to the ICC. There was much less emphasis on the internal practices or policies of EU Member States and the extent to which they implemented their obligations to end safe havens within their borders.

This was the situation in 2003, at the outset of the joint project of the International Federation of Human Rights (FIDH) and REDRESS on 'Fostering an EU approach to Extraterritorial Jurisdiction'.<sup>5</sup> The objectives at the time are still valid today: to end safe havens for those accused of perpetrating the most serious crimes under international law and to ensure that the victims of these crimes have access to effective and enforceable remedies within the European Union.

However, the circumstances and the environment in which the debate on the exercise of universal and other forms of extraterritorial jurisdiction and the role of the EU in advancing the fight against impunity takes place today, has improved considerably

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Paras. 49-53. The proceedings against Pinochet in Europe also triggered proceedings in Chile, initiated by victims who had previously kept silent and were not considered by the Chilean Justice and Truth Commission until the filing of the complaint in Europe.

<sup>4</sup> For the purposes of this Report, Member States of the EU and affiliated countries such as Norway and Switzerland will be referred to as 'European countries'.

<sup>5</sup> See REDRESS and FIDH: *Legal Remedies for Victims of International Crimes: Fostering an EU Approach to Extraterritorial Jurisdiction* (March 2004), available online at: <http://www.redress.org/publications/LegalRemediesFinal.pdf> (English) and <http://www.fidh.org/IMG/pdf/LegalRemedies-Final-french.pdf> (French) (last accessed March 2007).

when compared to the initial phase of the Project. Notwithstanding the pessimistic predictions of universal jurisdiction's early demise following the repeal of Belgium's universal jurisdiction law, numerous investigations and trials based on universal jurisdiction have taken place in the territories of Member States since 2003 with several further ongoing investigations and prosecutions. Within the European Union, the support for the ICC has increased and been complemented by support for international humanitarian law. A key development is that the EU's stalwart external support under the CFSP is now complemented by initiatives within the EU's Justice and Home Affairs policy. Legislative instruments specifically aimed at increasing cooperation amongst European Member States in the investigation and prosecution of serious crimes under international law, have been progressively implemented in the past three years.

The challenges for the competent authorities within EU Member States to progress complex extraterritorial investigations in respect of genocide, crimes against humanity, war crimes and torture are elaborated upon in this Report. Equally, best practice solutions on how best to overcome such challenges are explained. The experience of the EU in its establishment of a common approach to the fight against transnational crime, as illustrated for instance in the fight against terrorism, are explored with a view to applying such approaches to serious crimes under international law.

The practical developments in recent years have managed to shift the debate on universal jurisdiction from *whether* it should be exercised and *whether* the EU has competencies in the context of its Justice and Home Affairs Policy to ensure a common approach to *how best to implement* obligations in practice, *how to overcome* remaining obstacles and *how to achieve* a unified European Framework.

The purpose of this Report is to illustrate the advances made in recent years in the implementation of international criminal law in practice, to highlight the remaining challenges and the further beneficial roles EU institutions may play, together with national governments, to overcome these. Combined with its commitment to international criminal justice on an external level, the EU and its Member States can play a leading role in advancing the fight against impunity for genocide, crimes against humanity, war crimes and torture.

This Report follows a Conference that was organised by REDRESS and FIDH in collaboration with the Civil Liberties, Justice and Home Affairs Committee (LIBE) and the Sub-Committee on Human Rights (DROI) of the European Parliament. The Conference took place on 20-21 November 2006 in the European Parliament in Brussels and brought together government representatives from more than 20 European countries, policy makers and civil servants from European institutions, police investigators, prosecutors and judges, academics and civil society experts. The Report is based in large part on the presentations and discussions which arose during the Conference.

## II. Summary of Conference Proceedings

### II.1 National implementation of international law obligations

With the exception of customary international law, the enforcement of international criminal law is usually dependent on States signing and ratifying relevant treaties. Upon ratification, a State is obliged to comply with the obligations of the treaty. For the purposes of this Report, States' compliance with, and implementation of, the obligations arising out of the following treaties will be considered: the Geneva Conventions and its two additional Protocols<sup>6</sup>, the Genocide Convention<sup>7</sup>, the Convention against Torture and other cruel, inhuman or degrading treatment or punishment<sup>8</sup> and the Rome Statute of the International Criminal Court.<sup>9</sup> Ratification without implementation of the obligations is meaningless and States need to overcome various challenges for the implementation of the treaty obligations into domestic legislation and in practice.

All Member States of the EU and many other affiliated European countries have ratified the relevant human rights treaties and are bound by the principles of international customary law and consequently have the same obligations to comply effectively with these obligations.<sup>10</sup>

States use different approaches to implement these obligations into their domestic legislation. In 'monist' legal systems, such as Estonia, Hungary or Germany, international law enjoys priority over domestic law and in theory, international law is directly applicable in the courts of those countries. In 'dualist' legal systems, such as the United Kingdom, Malta and Ireland, specific implementation into domestic law of the offences and relevant jurisdictional rules is an essential requirement for their application in practice.

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<sup>6</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force 21 October 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force October 21 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force October 21 1950; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force 21 October 1950; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force 7 December 1978; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Adopted on 8 June 1977, entered into force 7 December 1978.

<sup>7</sup> Convention on the Prevention and Punishment of the Crime of Genocide, G.A. res. 260 A (III), adopted on 9 December 1948, entered into force 12 January 1951.

<sup>8</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [Annex, 39 U.N. GAOR Supp., No. 51, p. 197, U.N. Doc. A/39/51 (1984)], entered into force 26 June 1987.

<sup>9</sup> Rome Statute of the International Criminal Court, adopted on 17 July 1998, entered into force 1 July 2002.

<sup>10</sup> Every Member State has ratified the Geneva Conventions and the first Protocol, the UN Convention against Torture, the Genocide Convention and, except for the Czech Republic, the Rome Statute of the ICC.

Even in monist legal systems there is a strong impetus for States to expressly include the relevant offences into domestic legislation, to ensure that treaty obligations are complied with. Most European countries include for instance the offence of genocide in their domestic legislation, irrespective of their legal system, yet definitions of the crime differ substantially. The definition of war crimes similarly differs in most Member States or, as in France, is not included at all in the Penal Code.<sup>11</sup>

Germany and The Netherlands, both monist systems, introduced special international crimes codes, criminalising the offences of genocide, crimes against humanity and war crimes.<sup>12</sup> Where crimes are not specifically implemented in national legislation, courts invariably will have regard to the way in which the crimes are characterised in international law or treaties when determining whether the alleged acts constitute the offences in question. However, several problems can still arise:

- Courts are often reluctant to recognise their own competence to implement international law without the existence of domestic legislation, even in monist countries. For instance, in the past French courts have refused to recognise their own competence over war crimes without domestic legislation expressly enabling them to exercise universal jurisdiction over war crimes.<sup>13</sup>
- Statutes of limitation that apply in respect of ordinary crimes may inadvertently be extended to international crimes. In Denmark, for example, no implementing legislation exists for the UN Convention against Torture and torture as an 'offence against the person' is subject to a limitation period of 10 years.<sup>14</sup> Danish investigators will not be able to investigate a complaint of torture that was submitted to the authorities once the 10 year limitation period expired,<sup>15</sup> despite the increasing recognition that the crime of torture does not prescribe.

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<sup>11</sup> See FIDH Report "CPI: loi française d'adaptation: enjeux et tabous", no 312, September 2001, available online in French [http://www.fidh.org/article.php3?id\\_article=1447](http://www.fidh.org/article.php3?id_article=1447) (last accessed March 2007); for a copy of the Penal Code see [http://www.legifrance.gouv.fr/html/codes\\_traduits/liste.htm](http://www.legifrance.gouv.fr/html/codes_traduits/liste.htm) (last accessed March 2007) ; current law reform proposals seek to include 'war crimes' in the French Penal Code, see Le Monde, 'Les crimes de guerre pourraient figurer dans le code pénal', 26 July 2006, available online at <http://www.lemonde.fr/web/article/0,1-0@2-3224,36-798575,0.html?xtor=RSS-3208> (last accessed March 2007).

<sup>12</sup> The 'German Code of Crimes Against International Law' of 26 June 2002 is available at <http://www.iuscomp.org/gla/statutes/VoeStGB.pdf> , the Dutch 'International Crimes Act 2003' is available online at <http://www.minbuza.nl/en/themes,international-legal-order/international-criminal-court/background-information/International-Crimes-Act.html> Other countries that have adopted International Crimes Codes include Malta and the United Kingdom. Malta's International Criminal Court Act of December 2003 is available online at [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_14/chapt453.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_14/chapt453.pdf), the International Criminal Court Act of the United Kingdom of 2001 at <http://www.opsi.gov.uk/ACTS/acts2001/20010017.htm> (last accessed March 2007).

<sup>13</sup> Javor Case, Chambre criminelle de la Cour de Cassation (Cass. Crim, 26 March 1996, Bull.crim. No 132).

<sup>14</sup> Danish Penal Code, Sections 93-97.

<sup>15</sup> See Website of Danish Serious International Crimes Office at <http://www.sico.ankl.dk/page34.aspx> (last accessed March 2007).

- Offences as defined in domestic legislation do not always take into account the gravity of the crimes and as such might not cover a particular conduct.

The case of Michel Bagaragaza illustrates that the implementation of offences into domestic legislation with the exact definition as is contained in international treaties and conventions is crucial. In the context of the completion strategy of the International Criminal Tribunal for Rwanda (ICTR), the Office of the Prosecutor in 2006 requested the Tribunal to transfer the case of Michel Bagaragaza to Norway. Although Norway does not have any implementing legislation for the crime of genocide, it does have a broad basis for universal jurisdiction, enabling Norwegian authorities to prosecute non-nationals for crimes committed outside of Norway against non-nationals irrespective of any specific link to Norway. The Norwegian Government, after extensive consultations with the Norwegian Special Prosecution Office, agreed to receive Bagaragaza for trial, who was accused of conspiracy to commit genocide, genocide and complicity in genocide. Since Norwegian law does not provide for the offence of genocide nor complicity to commit genocide, an indictment for 'complicity to commit multiple murders' was considered by the prosecution authorities. The indictment would have described the relevant acts allegedly committed by the indicted person with reference to the concept of genocide and related norms as established in international law. Even the objective and subjective elements would have been assessed to enable Norwegian courts to decide whether or not the concept of 'aggravating circumstances' could be applied. In the case of a conviction, Bagaragaza would have faced the maximum term of imprisonment under Norwegian law of 21 years.

However, the Rwanda Tribunal rejected the request of the Office of the Prosecutor to transfer the case to Norway due to the absence of the crime of genocide in Norwegian legislation.<sup>16</sup> Although it was clear that Norway was prepared to assist the ICTR and to accept referrals, the Rwanda Tribunal indicated that Norway was unsuitable to receive referrals from it due to the lack of implementing legislation.

**Following on from the above, European countries should include the broadest possible definitions of crimes under customary and conventional international law. The EU could consider adopting a Framework Decision on serious international crimes, to bring Member States' national legislation closer together and to foster a more coherent system of international criminal justice. Such a Framework Decision could outline standards on the scope and jurisdiction of the crimes, taken from the relevant treaties, as well as on potential restrictions on the exercise of jurisdiction, such as immunities, limitation periods and nexus requirements.**

**National implementing legislation should include the concept of command responsibility and joint criminal enterprise, enabling courts to convict those who bear the greatest responsibility. This is particularly relevant in the context of the**

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<sup>16</sup> The Prosecutor v Michel Bagaragaza, *Case No. ICTR-05-86-AR11bis*, decision of 30 August 2006, available at <http://69.94.11.53/ENGLISH/cases/Bagaragaza/decisions/300806.htm> (last accessed March 2007).

early completion strategies of the ICTY and the ICTR, which will require the tribunals to close down before some of those most responsible are apprehended and surrendered to the tribunals. It would be difficult for States to investigate and prosecute these perpetrators where the concept of command responsibility or joint criminal enterprise has not been implemented into substantive criminal law.

## II.2 Obstacles to the ratification and implementation of international law treaties into domestic law

States may encounter obstacles in the process of ratification and implementation of international treaties. These may include amendments or changes to the Constitution to make it compatible with the treaty. In Poland, for example, the ratification of the Rome Statute of the ICC was contingent on the compatibility of the Constitution, which stipulated that the extradition of Polish citizens is prohibited, which countered the obligations of States Parties to the Rome Statute to arrest and surrender suspects to the ICC. The question to be answered was whether the notions of ‘surrender’ and ‘extradition’ were identical, which would have required amendments to the Constitution, or whether surrender could be distinguished from extradition. Based on the practice of the ad-hoc tribunals (ICTY and ICTR) as well as the lack of a definition of the term ‘extradition’ in the Constitution, the Government took the position that the two concepts were different.<sup>17</sup>

Consultation with legal experts and discussions with all competent bodies involved in such a process, including the Ministries of Justice and Foreign Affairs, Parliament and the Supreme and/or Constitutional Court will be required to ensure correct implementation. Experiences of other countries that have implemented the same treaty should be shared to guarantee an efficient implementation procedure. Amending the Constitution can be a long procedure, considerably slowing down the ratification process. In particular in countries with a relatively recent Constitution, it could reopen debates on topics unrelated to the proposed amendments, thereby prolonging or even rendering the ratification process impossible or impractical.

Once the ratification procedure is completed, further consideration should be given to further amendments to laws or codes to give effect to the ratified treaty. Existing procedural rules may equally need to be amended, for example by excluding statutes of limitation for serious international crimes or inappropriate defences such as superior orders, and by enabling victims to access justice and recognising the right to reparation. The incorporation of the ICC in national law can also lead to a broader revision of existing legislation and to the inclusion of other offences under international law. The Dutch Code of Crimes, for example

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<sup>17</sup> Since the ratification of the Rome Statute by Poland on 12 September 2001, the Constitution was changed to comply with the European Arrest Warrant and since 18 November 2006 permits the extradition of Polish nationals.

goes beyond the crimes listed in the Rome Statute to include the crime of torture.<sup>18</sup>

### II.3 The complementarity principle of the ICC

The establishment of the International Criminal Court in July 1998 constituted a major contribution to the (global) enforcement of international criminal law. The ICC came into force on 1 July 2002 and to date, 105 countries have ratified the Rome Statute.<sup>19</sup> With the exception of the Czech Republic all European States have ratified the Rome Statute.<sup>20</sup> The ICC's jurisdiction is limited to crimes committed by nationals of States Parties or to crimes committed on the territory of a State Party. However, the Security Council may also refer a situation of a non State Party to the ICC as has happened in the case of Darfur (Sudan) and a non State party may make an ad hoc declaration under Article 12(3) of the Statute, recognizing the jurisdiction of the ICC on its territory. The ICC will only be able to investigate and prosecute crimes committed after its coming into force on 1 July 2002.

The jurisdiction of the ICC is not only limited, it is also complementary to the jurisdiction of national courts. As a corner stone of the ICC statute, the principle of complementarity entails a shared responsibility for combating impunity for genocide, war crimes and crimes against humanity between States Parties and the International Criminal Court. The primary jurisdiction rests with the State Party and the ICC may only initiate proceedings where a State is unwilling or unable genuinely to investigate or prosecute.<sup>21</sup>

While the wording of the principle provides for different possible interpretations, the requirements for 'unwillingness' and 'inability' as referred to in Article 17 of the ICC Statute are strict. Accordingly, for the principle to be applicable, a domestic investigation and/or prosecution must be genuine and must have been initiated or be under way. The domestic proceedings must further encompass the same situation and person who is a subject of the case before the ICC. Despite these apparently clear criteria, concern has been voiced in the past about the lack of transparent decision-making of the Prosecutor and a failure to establish clear criteria and guidelines on the circumstances in which a case might be admissible and an investigation be opened by the Office of the Prosecutor.

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<sup>18</sup> Dutch International Crimes Act 2003, Section 8, available online at <http://www.minbuza.nl/en/themes,international-legal-order/international-criminal-court/background-information/International-Crimes-Act.html> (last accessed March 2007).

<sup>19</sup> For a list of countries that have ratified the Rome Statute, see <http://www.icc-cpi.int/statesparties.html> (last accessed March 2007).

<sup>20</sup> The Czech Republic has signed the Rome Statute on 13 April 1999 but has yet to ratify, see <http://www.iccnw.org/?mod=country&iduct=45> (last accessed March 2007).

<sup>21</sup> Rome Statute of the International Criminal Court, Article 17.

The principle of complementarity reflects the responsibilities of States under international law to investigate and, where applicable, prosecute international crimes. The principle is designed to act as a catalyst for State compliance.

Transitional justice mechanisms, such as truth commissions, do not appear to fall within the scheme of complementarity as envisaged by Article 17 of the Rome Statute, which is arguably directed at criminal investigations and prosecutions. However, some may argue, that such measures should be taken into account by the Court when deciding whether or not to open an investigation, or, after its conclusion, whether or not to prosecute.

It is the ICC- the Prosecutor as well as the judges- that determine the complementarity principle. The Prosecutor has expressed a positive approach to complementarity, which encourages States to fulfil their obligations and to implement legislation and take other domestic actions to ensure their compliance with the principle.<sup>22</sup> The ICC Statute serves as a very strong incentive for States Parties to introduce the ICC offences into national law.

## II.4 Universal jurisdiction

As outlined above, under the ICC's system of complementarity, all States have an obligation to bring to justice those responsible for genocide, crimes against humanity and war crimes. This is further emphasised in the Preamble of the Rome Statute which provides that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".<sup>23</sup> The limited resources available to the ICC and the strategy of the Prosecutor to "initiate prosecutions of the leaders who bear most responsibility for the crimes"<sup>24</sup> will enable the ICC to handle only a handful of crimes that are committed every year throughout the world.

The European Union and its Member States have done much to establish the ICC and ensure the universal ratification of the Rome Statute. At the same time, European countries have been faced with an increase in victims and suspects of international crimes seeking refuge within their territories. Determined not to provide a safe haven for perpetrators, European countries have transferred several perpetrators to the ICTY or ICTR or, where the tribunals did not accept such transfers, investigated and prosecuted accused persons on the basis of universal jurisdiction. Belgian and Swiss

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<sup>22</sup> The Office of the Prosecutor, Report on Prosecutorial Strategy, 14 September 2006, available online at [http://www.icc-cpi.int/library/organs/otp/OTP\\_Prosecutorial-Strategy-20060914\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf) (last accessed March 2007).

<sup>23</sup> Preamble of the Rome Statute, available online at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf) (last accessed March 2007).

<sup>24</sup> "Paper on some policy issues before the Office of the Prosecutor", ICC-OTP, September 2003, available online at [http://www.icc-cpi.int/library/organs/otp/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf) (last accessed March 2007).

courts so far have prosecuted a total of 7 persons involved in the Rwandan genocide. Another trial of an alleged Rwandan perpetrator, partly based on universal jurisdiction is due to commence in April 2007 in Belgium.<sup>25</sup> Since the first ‘modern’ universal jurisdiction case in 1994,<sup>26</sup> European courts have convicted perpetrators based on universal or other forms of extraterritorial jurisdiction in approximately 20 cases, involving serious international crimes committed in Mauritania, Rwanda, the former Yugoslavia, Argentina, Afghanistan, Democratic Republic of Congo and Uganda. The number of trials is increasing with 7 convictions in 2005 alone.<sup>27</sup>

Yet much more needs to be done. Under the terms of the completion strategy, the ad hoc tribunals stopped issuing new indictments. Accordingly, accused persons found in European countries can no longer be transferred to the ad-hoc tribunals as previously. Indeed, as was illustrated with the Bagaragaza case and Norway, the tribunals are actively seeking to transfer cases to third countries to ensure that all those indicted are tried before the end of 2010. The ICC will not be able to take cases from the tribunals, since it does not have jurisdiction over the crimes, which were committed before its coming into force.

**Given the large number of suspects within Europe, States are encouraged to step up their efforts to investigate and prosecute such cases.<sup>28</sup> To date only 7 out of 27 Member States have exercised universal jurisdiction.<sup>29</sup>**

Although all European countries have some legislative provisions for universal jurisdiction, a number of hurdles prevent a coherent application of universal or other forms of extraterritorial jurisdiction. These obstacles range from a failure to define

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<sup>25</sup> The trial of Bernard Ntuyahaga is scheduled to begin on 19 April 2007, see <http://www.hirondelle.org/arusha.nsf/LookupUrlEnglish/442766D9BA5E745AC12572980025EBFD?OpenDocument> (last accessed March 2007).

<sup>26</sup> Prosecution v. Refik Saric, Danish High Court, Third Chamber, Eastern Division, 25 November 1994; see REDRESS, Universal Jurisdiction in Europe, June 1999, <http://www.redress.org/documents/inpract.html> for further details (last accessed March 2007).

<sup>27</sup> For an overview of prosecutions based on universal jurisdiction see, inter alia, REDRESS, “Universal Jurisdiction in Europe, Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide”, 30 June 1999, available online at [www.redress.org/publications/UJEurope.pdf](http://www.redress.org/publications/UJEurope.pdf) (last accessed March 2007); FIDH and REDRESS, “Legal Remedies for Victims of “International Crimes”- Fostering an EU approach to Extraterritorial Jurisdiction”, March 2004, available online at <http://www.redress.org/publications/LegalRemediesFinal.pdf> (English) and <http://www.fidh.org/IMG/pdf/LegalRemedies-Final-french.pdf> (French); FIDH & REDRESS, EU Update on Serious International Crimes, June 2006, available online at <http://www.redress.org/publications/EU%20Report%20vol%201%20June%202006%201%20.pdf> (last accessed March 2007); Human Rights Watch, Universal Jurisdiction in Europe: The State of the Art, available online at <http://hrw.org/reports/2006/ij0606> (last accessed March 2007).

<sup>28</sup> See for instance the “List of people suspected of having participated in the Genocide of 1994 in Rwanda and who are abroad”, issued by the Rwandan Federal Prosecution Services in May 2006, available online at <http://www.parquetgeneral.gov.rw/gb/Publication/presgene.pdf>; the Guardian refers to ‘20 more genocide suspects still living in the UK, 30 December 2006, available online at <http://www.guardian.co.uk/rwanda/story/0,,1980223,00.html> (last accessed March 2007).

<sup>29</sup> These countries are Denmark, France, Spain, Germany, the United Kingdom, Belgium and the Netherlands. Switzerland also exercised universal jurisdiction in one case involving a Rwandan perpetrator.

the crimes under international law as outlined above, the lack of clear criteria for an investigation of serious crimes under international law, the existence of State and other official immunities as well as the lack of political will and at times poor technical skills to undertake the practical steps required for investigations and prosecutions.

**The European Union can play an important role in assisting Member States in their exercise of universal and other forms of extraterritorial jurisdiction. The adoption of the Framework Decision establishing the Network of Contact points in respect of persons responsible for genocide, crimes against humanity and war crimes has already proved to be crucial to increase cooperation in the detection and investigation of international crimes by Member States.<sup>30</sup> Beyond the adoption of a Framework Decision on serious international crimes, the EU could also adopt an Action Plan in the context of its Justice and Home Affairs Policy that could seek to increase and/or regularise cooperation amongst European countries, link the activities of the various EU Cooperation mechanisms such as Europol and Eurojust, stimulate discussion on the challenges in the fight against impunity within the relevant Council working groups, all of which would eventually lead to a more coherent practice by Member States. Similar Action Plans were adopted in the context of the EU's fight against terrorism and drug trafficking.<sup>31</sup>**

On the external level, the European Parliament in October 2006 adopted a resolution on the proceedings against Rios Montt, in which it welcomed the “progress made in the application of universal jurisdiction over crimes against humanity, genocide and torture”.<sup>32</sup>

## II.5 Key procedural hurdles in the exercise of universal jurisdiction

Although it is an established principle of international law, the exercise of universal and other forms of extraterritorial jurisdiction still poses a number of hurdles for victims who seek to initiate investigations and for prosecutors seeking to progress cases. While these vary, past instances in which national authorities have failed to open or progress investigations illustrate some of the key hurdles. These include the requirement that the alleged perpetrator be present on the territory in order for an investigation to be opened, often combined with a large degree of discretion of authorities in charge of deciding whether or not to open an investigation.

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<sup>30</sup> see further below, page 38.

<sup>31</sup> EU Drugs Action Plan(2005-2008), Horizontal Working Party on Drugs, 19 May 2005, available online at <http://register.consilium.eu.int/pdf/en/05/st08/st08652-re01.en05.pdf>; Plan of Action to combat terrorism, 2004, available online at <http://consilium.europa.eu/uedocs/cmsUpload/EUplan16090.pdf> (last accessed March 2007). An Action Plan has successfully contributed to the formation of an EU approach to the International Criminal Court, see further below, n133.

<sup>32</sup> European Parliament Resolution on the Proceedings against Rios Montt, P6\_TA(2006)0466, 26 October 2006, available online at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0466+0+DOC+XML+V0//EN&language=EN> (last accessed March 2007).

Prosecutorial authorities in certain past cases have decided not to open an investigation on the basis of the ‘principle of subsidiarity,’ giving priority jurisdiction to the territorial State and/or an international tribunal. Especially where the authorities enjoy a large degree of discretion as to whether to initiate a criminal investigation, civil suits play an important role for victims to obtain remedies and reparation for crimes under international law. Yet extensive immunity provisions can prevent victims from succeeding with such civil claims. Other hurdles experienced by victims include a lack of resources available for legal representation, lack of information on the progress of proceedings received from investigating authorities and a failure of authorities to provide victims with reasons for rejecting their complaint, and/or the possibility to review the decision not to investigate or prosecute.

### ***II.5.1 The presence requirement***

The essence of the principle of universal jurisdiction defies territorial borders. The presence of the accused person on the territory of the investigating State (the forum State) is therefore not *per se* a precondition for the exercise of such jurisdiction under international law. Indeed, the Geneva Conventions, 1949 require States to “seek out and prosecute” those said to be responsible for grave breaches.<sup>33</sup> The ‘extradite or prosecute’ clauses in other treaties are more nuanced, neither obliging States to initiate investigations outside of the territory of the forum State, nor denying such possibilities.<sup>34</sup>

Despite this, many European countries require some sort of nexus or link with their country for jurisdiction to be exercised. Often the nexus is the presence of the alleged perpetrator on the territory of the forum State. For instance, in The Netherlands, suspects will need to be present at the outset and during the investigation whilst only at the time of the filing of the complaint in France. In other countries, such as the United Kingdom or Germany, the anticipated presence of the suspect on the territory is sufficient to initiate an investigation while the presence during trial is required. In other countries, the presence of the suspect is only required during the trial as for instance is the case in Spain or Norway, while in others, such as France or Italy, trials are permitted in absentia.

The requirement of presence at the early stages of an investigation may diminish victims’ ability to address national authorities. This is particularly so when the opening of the investigation is dependent on the suspects’ presence and where the

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<sup>33</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, *entered into force* 21 October 1950, Art. 49; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, *entered into force* 21 October 1950, Art. 50; Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* 21 October 1950, Art. 129; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* 21 October 1950, Art. 146; all four Conventions are available online at <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions> (last accessed March 2007).

<sup>34</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [Annex, 39 U.N. GAOR Supp., No. 51, p. 197, U.N. Doc. A/39/51 (1984)], *entered into force* 26 June 1987, Art. 4-5.

burden to prove such presence is on the victim. The Convention against Torture for instance does not impose an obligation on victims or their legal representatives to put in place methods of surveillance and detection to inform authorities of the movements of their torturers; indeed it is the authorities themselves who are best placed to undertake such investigations. The complainants, immigration authorities, diaspora communities, Interpol and/or authorities of other countries can be useful contacts in establishing such presence. The Prosecutor of the *Tribunal de Grande Instance* in Paris ordered such preliminary investigations to ‘confirm the presence in France of those accused of genocide in Rwanda and whose presence had been reported by the complainants.’<sup>35</sup> Further, if suspects are only present for a short period of time, national authorities that have not already opened investigations, may not have sufficient time to investigate and produce evidence to apply for an arrest warrant within the duration of the suspect’s presence, which has in a number of cases enabled suspects to flee the territory.<sup>36</sup>

Certain mechanisms could contribute to a more coherent practice within Europe and enable authorities to efficiently follow up on complaints filed by victims. For instance, governments could ensure that immigration services screen asylum and visa applicants for potential involvement in serious international crimes. Specialised units or departments to do just this have been established in Denmark, The Netherlands, the United Kingdom and Norway, leading to several investigations in Denmark and Norway and to 3 convictions to date in The Netherlands and a Ugandan national in Denmark.<sup>37</sup> Ideally immigration units should be linked with specialised prosecution units, in order to ensure that persons identified through immigration checks will be investigated and prosecuted, instead of simply deported, the latter having contributed in some cases to further evasions of justice. Governments should also consider introducing the requirement of anticipatory presence into domestic legislation where this does already form part of the law or established practice.

### ***II.5.2 Prosecutorial and executive discretion***

In most European countries with a civil law tradition, investigative judges or prosecutors are obliged to investigate and prosecute ordinary crimes where evidence suggests that a crime has been committed. With respect to serious international crimes, this obligatory principle must be considered alongside the principle of ‘opportunity,’ in which authorities enjoy a certain degree of discretion of whether or not to investigate a complaint. In Germany for instance, the Federal Prosecutor may refrain from investigating a complaint where the alleged perpetrator is not present in

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<sup>35</sup> This decision was taken in January 2000 following the complaint filed by FIDH and the French Ligue des droits de l’Homme (LDH)

<sup>36</sup> Human Rights Watch, ‘Universal Jurisdiction in Europe: The State of the Art’, June 2006, page 47.

<sup>37</sup> See further below, page 22

Germany and where no other national or international court is investigating the complaint, irrespective of the amount of evidence available.<sup>38</sup>

In common law jurisdictions such as the United Kingdom and Ireland, it is usually the police that decides whether to investigate a case and the prosecution authorities, whether to prosecute. In the context of the prosecution of serious crimes under international law, this discretion is subject to the consent of the Attorney-General, who enjoys absolute discretion over the prosecution of such offences.<sup>39</sup> Following an application by private parties, a magistrates court in London clarified in the cases against Doron Almog and Narendra Modi respectively that the Attorney-General's consent was not needed to issue an arrest warrant, but that consent was required for the issuance of a summons.<sup>40</sup>

**Prosecutorial discretion can operate to prevent the filing of frivolous complaints. Yet, clear and transparent criteria must exist to ensure the legitimate and transparent exercise of such discretion. Furthermore, complainants and victims should have a possibility to judicially review the decision of the competent authorities not to investigate (or prosecute) their complaint. A purely administrative procedure which requires victims to direct their appeal to the Ministry of Justice or another higher official within the decision-making authority is not sufficient. The publication of reasoned prosecutorial decisions will improve transparency and may lead to the development of guidelines for prosecutors and consistent practice for other, similar cases.**

### *II.5.3 The principle of subsidiarity in the context of international criminal law*

The 'subsidiarity' principle is a principle developed by certain courts and which appears in several national laws, though it does not have any basis in international law. It gives priority jurisdiction ahead of foreign extraterritorial investigations or prosecutions to courts of the territorial State or the nationality of the offender and/or international tribunals. The principle is particularly prominent in Belgian<sup>41</sup> and

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<sup>38</sup> Paragraph 153f of the German Code of Criminal Procedure. In the case of former Uzbek Interior Minister Zokirjon Almatov, the German Prosecutor refused to investigate a complaint against Almatov, ignoring the possibility of investigating outside Uzbekistan by interviewing witnesses and victims present in Germany and neighbouring countries; see Human Rights Watch, "Germany: Victims appeal decision on Uzbek Ex-Minister", 2 February 2007, available online at [http://hrw.org/english/docs/2007/02/02/german15232\\_txt.htm](http://hrw.org/english/docs/2007/02/02/german15232_txt.htm) (last accessed March 2007).

<sup>39</sup> Criminal Justice Act, Section 135; Geneva Conventions Act, Section 1 A; International Criminal Court Act, Section 53 (3); War Crimes Act, Section 1 (3).

<sup>40</sup> For further information on the case of Doron Almog see, The Palestinian Centre for Human Rights, 'Israeli war crimes suspect evades British justice after UK court issues warrant', 11 September 2005, available online at <http://www.pchrgaza.ps/files/PressR/English/2005/101-2005.htm> (last accessed March 2007); further information on the case against Narendra Modi is available at AWAAZ, 'London judge turns down arrest warrant against Modi', 20 August 2003, available at <http://www.awaazsaw.org/pressres/presscont5.htm#20082003Rediff> (last accessed March 2007).

<sup>41</sup> Article 7 of the Law amending the law of June 16, 1993, concerning the prohibition of grave breaches of international humanitarian law and article 144ter of the Judicial Code.

German<sup>42</sup> legislation and has been applied in the past by the Spanish Supreme Court in the case against Rios Montt.<sup>43</sup>

The principle of complementarity of the Rome Statute illustrates the principle of subsidiarity in a vertical context between States and the ICC. The ICC will observe and assess the ability and willingness of a State genuinely to conduct an investigation or prosecution. In a horizontal context, the ‘subsidiarity’ principle is said to regulate the relationship between States and the main objective appears to be to protect State sovereignty, referring to non-interference in national affairs, exhaustion of domestic remedies and the protection of local remedies. Yet the principle of subsidiarity is based on the presumption, that the territorial States or other States with ‘priority’ of jurisdiction will do what is required to prevent and punish serious crimes under international law within their own territory, which is often not the case.

**‘Subsidiarity’ should usefully be seen as a system that establishes certain safeguards and monitoring mechanisms. In contrast, the principle should not imply that States should refrain from exercising universal jurisdiction if there is only a slight possibility that territorial proceedings will be triggered at some point in the future. Details of the principle need to be clarified, in particular, at what stage it is to apply if at all: at the outset of an investigation or after its conclusion. Unless the specific case has been officially opened in the territorial State and there is evidence that the State has the willingness and capacity genuinely to try the case, there should be no reason for authorities to invoke a principle of ‘subsidiarity.’**

It will be difficult for foreign courts to determine whether authorities of another State are in fact carrying out good faith investigations or prosecutions, and courts are generally reluctant to rule on the systems in place in other countries. In the case against Rios Montt, the Spanish Constitutional Court ruled that Spanish courts could exercise universal jurisdiction provided that the complainants could present reasonable evidence demonstrating a lack of judicial activity in the territorial state.<sup>44</sup> In 2005, the German Federal Prosecutor rejected a complaint against Donald Rumsfeld, arguing that United States’ authorities, though not investigating specifically against Donald Rumsfeld nor the specific crimes referred to in the complaint, were investigating the ‘complex’ as a whole and therefore German authorities, under the principle of subsidiarity, could not exercise jurisdiction in that specific case.<sup>45</sup>

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<sup>42</sup> Article 153f of the Code of Criminal Procedure; Commentary to the Introduction of the Code of Crimes Against International Law, Bundestag Drucksache 14/ 8542, 13 March 2002, pp37-38.

<sup>43</sup> Judgment, Rios Montt case, Tribunal Supremo, 25 February 2003.

<sup>44</sup> Constitutional Tribunal, judgement of 26 September 2005; for an Analysis of the Judgment see : Hervé Ascensio, ‘The Spanish Constitutional Tribunal’s Decision in Guatemalan Generals- Universality is back’ , Journal of International Criminal Justice 4 (2006), pp586-594.

<sup>45</sup> The Decision of the Federal Prosecutor in the first case against Donald Rumsfeld of 24 June 2005 is available online at <http://www.diefirma.net/download.php?8651010ea2af5be8f76722e7f35c79de&hashID=44b8c6eba6a3530e554210fa10d99b3a> (German) and [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/german\\_appeal\\_english\\_tran.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/german_appeal_english_tran.pdf) (English). The case against Donald Rumsfeld and others has been refiled with the German Federal Prosecutor on 14 November 2006 and is currently

In the absence of a monitoring system and clear criteria, any principle of subsidiarity is best placed with judicial, rather than prosecutorial, authorities.<sup>46</sup> Further, where it exists, it should be interpreted narrowly, taking into account the duty of States to prevent and punish serious crimes under international law and to cooperate in the detection, investigation and prosecution of such crimes. This is especially relevant in scenarios involving universal or other forms of extraterritorial jurisdiction, which exist as a tool precisely to fight judicial inaction in the territorial State. The principle of subsidiarity could equally be interpreted to provide priority to the first State to assert jurisdiction (on whatever basis of jurisdiction); should the territorial State subsequently seek to investigate and/or prosecute the suspect, it would first need to demonstrate that it is willing and able to do so.

#### *II.5.4 Immunities in civil cases*

Civil suits can play an extremely important role for victims in attempting to address impunity for crimes under international law. This is particularly so in common law systems where there is limited ability for victims to participate in criminal proceedings and claim reparation. The central barrier to the adjudication of civil cases involving serious international crimes is the recognition of immunities by certain courts. The differences and particularities between the legal systems in Europe has meant that within a two year period, the Italian and English highest courts have rendered diametrically opposing decisions in very similar cases.

In 2004, in the case of *Ferrini v Federal Republic of Germany*,<sup>47</sup> the Italian Supreme Court was faced with the question of whether “immunity from jurisdiction can exist even in relation to actions which [...] take on the gravest connotations and which figure in customary international law as international crimes, since they undermine universal values which transcend the highest interest of single States”. The action in question- forced labour- was considered to be a peremptory norm under international law which ranked higher than state immunity as a customary law rule. The court held, that the grant of immunity “would hinder the protection of values whose safeguards is to be considered essential to the whole international community”.

In the cases of *Al Adsani v Kuwait*<sup>48</sup> and *Jones v Saudi Arabia*,<sup>49</sup> victims of torture lodged civil claims against the Governments of Kuwait and Saudi Arabia respectively

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pending. For further information, see <http://www.rav.de/rumsfeld2.html> and <http://www.ccr-ny.org/v2/GermanCase2006/germancase.asp> (last accessed March 2007).

<sup>46</sup>As is the case under the Rome Statute where it is the Court that determines the inability/ willingness of a State to investigate and prosecute an individual for the crimes listed in the Rome Statute, Article 17 (1).

<sup>47</sup> *Ferrini v Federal Republic of Germany* (Cass.Sez.Un. 5044/04).

<sup>48</sup> *Al-Adsani v Government of Kuwait and Others*, CA 12 March 1996; 107 ILR 536. This case went to the European Court of Human Rights, *Al Adsani v the United Kingdom* ECHR (2001) 752.

<sup>49</sup> *Jones v Ministry of Interior Al Mamlaka Al Arabiya as Saudiya and others* (2006) UKHL 26.

and, in the case of Jones, also against individual officials. The British Court of Appeal and the House of Lords respectively recognised the immunity of foreign States and, in the case of Jones, the immunity of individual officials, despite the allegations of torture. Both courts focused on the national statute on immunity - the State Immunity Act 1978- rather than international law, as the United Kingdom has a dualist legal system. Although the State Immunity Act does provide for several specific exceptions, human rights are not included in the enumerated list of exceptions. The reference to State immunity bears a great risk to foster impunity and to leave victims without access to justice. Indeed, as noted in a dissenting opinion of the Arrest Warrant case, “in practice, immunity leads to de facto impunity”.<sup>50</sup> In all of the immunity cases to date, the courts of the State in which the crimes took place have not been available or accessible forums to victims.

Thus far, neither the Council of Europe nor the International Law Commission has considered the question whether immunity should be available in cases concerning serious human rights violations. International law does not prevent States from reforming domestic legislation unilaterally and to enact an exception to State immunity for serious human rights violations. However, States are reluctant to take unilateral action. The most appropriate site for action may be at the regional level, providing for a role of both, the Council of Europe and the European Union. The Secretary General of the Council of Europe only recently emphasised the need ‘to ensure that the rules on ‘State immunity do not lead to impunity for perpetrators of serious human rights violations’ as well as for ‘clear exceptions to States immunity in cases of serious human rights abuses’.<sup>51</sup>

## II.6 The investigation of serious international crimes

International law requires that perpetrators of international crimes be brought to justice. The Inter-American Court of Human Rights, as well as the Supervisory bodies established under the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment have reaffirmed the obligation of States to investigate thoroughly serious violations of human rights and to prosecute those responsible. The European Court has repeatedly recognised that, in cases involving serious violations of human rights, article 13 of the European Convention requires States to carry out “a thorough and effective investigation capable of leading to the identification and punishment of

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<sup>50</sup> International Court of Justice, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment of 14 February 2002, Dissenting Opinion of Judge van den Wyngaert, Para. 34; available online at [http://www.icj-cij.org/icjwww/idocket/icoBE/icobejudgment/icobe\\_ijudgment\\_20020214\\_vdwyngaert.PDF](http://www.icj-cij.org/icjwww/idocket/icoBE/icobejudgment/icobe_ijudgment_20020214_vdwyngaert.PDF) (last accessed March 2007).

<sup>51</sup> Secretary-General, ‘Follow-Up to the Secretary General’s reports under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies’ (SG/Inf (2006)5 and SG/Inf(2006)13) at para. 17; available online at [http://www.coe.int/t/dc/press/source/20060907\\_DocSG\\_en.doc](http://www.coe.int/t/dc/press/source/20060907_DocSG_en.doc) (last accessed March 2007).

those responsible and including effective access for the relatives to the investigatory procedure”.

Conceptually, the requirement to investigate with a view to prosecution is a well-established obligation of States. In addition, holding perpetrators legally accountable for their actions is also a fundamental way of providing some measure of redress for victims and their families. The *Basic principles and guidelines on the right to a remedy and reparations for victims of gross violations of human rights and serious violations of international humanitarian law* provide as follows:

*“...States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish him or her. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.”<sup>52</sup>*

The legal framework for the exercise of jurisdiction over serious crimes under international law is a crucial starting point for extraterritorial investigations. As outlined above, such a framework can include the implementation of international law obligations in domestic legislation, providing national authorities with the legal basis to conduct extraterritorial investigations and empowering victims to participate in this process. Yet the complexity of international crimes such as genocide, crimes against humanity, war crimes and torture poses a number of specific practical challenges, including the location of evidence to prove that the crimes were committed, also taking into account the time that often has passed before the commencement of investigations as well as the context in which these crimes are said to have been committed.

**The challenges involved in such investigations require States to make specific practical arrangements that will ensure that these crimes are investigated on a consistent basis and enabling practitioners to develop expertise and experience.**

### ***II.6.1 Establishing expertise and experience in the investigation and prosecution of serious international crimes in Europe***

The number of cases in which national authorities have undertaken successful investigations and prosecutions has increased considerably since 2000. In 2005 alone, authorities in Belgium, France, The Netherlands, Spain and the United Kingdom have successfully prosecuted seven perpetrators of genocide, torture and war crimes and

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<sup>52</sup> Principle III.4, *supra.*, n. 1.

more investigations are under way in these countries as well as in Denmark and Norway.<sup>53</sup>

The rising number of cases has led some countries to establish and concentrate expertise and experience to overcome some of the major practical difficulties involved in such complex investigations, which require substantial resources, expertise and experienced personnel. In the cases referred to above, the crimes were committed far from the forum State and often years or even decades earlier, with most evidence located in the territorial State. Crimes are typically not brought to the attention of national authorities in the same manner in which ordinary crimes are reported - by way of a complaint to the local police station. Often it is civil society and victims groups who initially draw the cases to the attention of authorities, though there is ample opportunity for suspects to fall through the cracks.

In recent years, a number of countries have developed innovative and creative responses to overcome these challenges. Some of the responses include setting up specialised units within immigration departments which work closely with investigators and prosecutors as well as the establishment of units within police and prosecution services that are specialised in the investigation and prosecution of serious crimes under international law. This has led to successful investigations of war crimes, torture and genocide for instance in Afghanistan, Democratic Republic of Congo, Iraq, Liberia, Rwanda and Uganda.

### ***II.6.2 Notifying national authorities about serious international crimes***

The majority of cases involving international crimes that have proceeded to the investigative stage in Belgium, Denmark, The Netherlands and the United Kingdom involved victims and suspects who entered the country as asylum or visa applicants. The Council of the European Union has identified this problem in its decision on ‘the investigation and prosecution of genocide, crimes against humanity and war crimes’, stating that “the Member States are confronted on a regular basis with persons involved in these crimes.”<sup>54</sup> It urged Member States to “take the necessary measures to ensure that the relevant national law enforcement and immigration authorities are able to exchange the information, which they require in order to carry out their tasks

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<sup>53</sup> For an overview of prosecutions based on universal jurisdiction see, inter alia, REDRESS, “Universal Jurisdiction in Europe, Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide”, 30 June 1999, available online at [www.redress.org/publications/UJEurope.pdf](http://www.redress.org/publications/UJEurope.pdf) (last accessed March 2007); FIDH and REDRESS, “Legal Remedies for Victims of “International Crimes”- Fostering an EU approach to Extraterritorial Jurisdiction”, March 2004, available online at <http://www.redress.org/publications/LegalRemediesFinal.pdf> (English) and <http://www.fidh.org/IMG/pdf/LegalRemedies-Final-french.pdf> (French); FIDH & REDRESS, EU Update on Serious International Crimes, June 2006, available online at <http://www.redress.org/publications/EU%20Report%20vol%201%20June%202006%201%20.pdf> (last accessed March 2007); Human Rights Watch, Universal Jurisdiction in Europe: The State of the Art, available online at <http://hrw.org/reports/2006/ij0606> (last accessed March 2007).

<sup>54</sup> Council Framework Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, 2003/335/JHA, Official Journal L118/12, 14.05.2003, available online at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/L\\_118/L\\_11820030514en00120014.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/L_118/L_11820030514en00120014.pdf).

effectively.”<sup>55</sup> Immigration authorities, often the first to interview applicants, are in a unique position to obtain relevant information concerning serious international crimes and are a key link in notifying investigative authorities about a potential case. Some countries have set up specialised units within immigration departments that apply a set of specific procedures for reviewing visa and asylum applications. In The Netherlands, these procedures include interviewing applicants about their previous employment which might disclose a potential involvement in international crimes.<sup>56</sup> This has led to the investigation and in 2005 to the prosecution, of two Afghan nationals, after immigration authorities had enquired about their previous employment in the Afghan army.<sup>57</sup> In Denmark, applicants are screened against a list of suspects issued by international tribunals or Interpol. This led to the arrest of a Rwandan genocide suspect in Denmark in September 2006.<sup>58</sup> Danish authorities, in collaboration with the Red Cross, distribute leaflets that inform asylum seekers in seven languages about the existence and contact details of a police unit that is specialised in international crimes.<sup>59</sup>

In the United Kingdom, the Immigration and Nationalization Department (IND) has a specialised office to handle allegations of international crimes committed by visa applicants and asylum seekers. The establishment of the office in 2005 was preceded by the arrival of at least four Rwandan genocide suspects who had obtained asylum in the UK in the late 1990s and are currently detained pursuant to extradition requests.<sup>60</sup>

Other countries that have increased cooperation between investigation units and immigration authorities include Norway and Belgium. Similar efforts are under way in Switzerland, where a new provision within the legislation encourages closer cooperation between the immigration and law enforcement authorities.<sup>61</sup>

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<sup>55</sup> Ibid, Article 2.

<sup>56</sup> Human Rights Watch, ‘Universal Jurisdiction in Europe; The State of the Art’, June 2006, page 74.

<sup>57</sup> The Hague Court of Appeal described the immigration procedure at length in the appeal judgement against Heshamuddin Hesam and Habibullah Jalalzoy, 29 January 2007, available online at [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AZ9366&u\\_ljn=AZ9366](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AZ9366&u_ljn=AZ9366) (Hesam) and [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AZ9365&u\\_ljn=AZ9365](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AZ9365&u_ljn=AZ9365) (Jalalzoy) (last accessed March 2007).

<sup>58</sup> Denmark arrests Suspect in Rwanda genocide, 8 September 2006, online at <http://www.genocidewatch.org/RwandaDenmarkArrestsSuspectInRwandaGenocide8Sept2006.htm> (last accessed March 2007).

<sup>59</sup> The leaflet is available online, Special International Crimes Office, <http://www.sico.ankl.dk/ref.aspx?id=641> (last accessed March 2007).

<sup>60</sup> BBC News, ‘Rwanda accused freedom bid fails’, 13 March 2007, available online at [http://news.bbc.co.uk/2/hi/uk\\_news/6447893.stm](http://news.bbc.co.uk/2/hi/uk_news/6447893.stm) (last accessed March 2007).

<sup>61</sup> The new provision will come into force in January 2008; see TRIAL, ‘Une police pour les crimes de guerre : en Suisse aussi ?’, 23 February 2007, at [http://www.trial-ch.org/fr/actions/details/article/une-police-pour-les-crimes-de-guerre-en-suisse-aussi.html?tx\\_ttnews%5BbackPid%5D=6&cHash=5f016ff018](http://www.trial-ch.org/fr/actions/details/article/une-police-pour-les-crimes-de-guerre-en-suisse-aussi.html?tx_ttnews%5BbackPid%5D=6&cHash=5f016ff018) (in French) (last accessed March 2007).

The experience of these countries suggests that having specific procedures and experienced personnel in place within the immigration department can help bring perpetrators of such crimes to justice. Close cooperation between immigration and prosecution authorities greatly diminishes the risk that countries inadvertently provide a safe haven for perpetrators of the worst crimes.

### *II.6.3 Private complaints*

The civil law tradition which permits privately initiated investigations and prosecutions is an important route for victims to access justice. Landmark universal jurisdiction cases, including the case of Augusto Pinochet in Spain<sup>62</sup> and Hissene Habré in Belgium<sup>63</sup> were initiated by victims relying on such provisions. Victims initiated a complaint against Ely Ould Dah who, in 2005, was convicted by a French court to ten years imprisonment for torture committed in Mauritania.<sup>64</sup> In Spain, third parties requested an investigative judge to open an investigation against Adolfo Scilingo for crimes committed during the 'dirty war' in Argentina. He was convicted in 2005 to 640 years imprisonment for crimes against humanity.<sup>65</sup> Although not a civil law country, third parties can initiate a private investigation and prosecution in the United Kingdom, should the police refuse to act on their complaint,<sup>66</sup> though the Attorney-General's consent must be sought prior to the issuance of a summons. In 2005, this procedure led to the issuance of an arrest warrant by a London magistrate against former Israeli General Doron Almog.<sup>67</sup>

To date, private parties have initiated the majority of cases in France and Spain. Despite the importance of 'partie civile' provisions and private prosecutions, existing and proposed reforms in Belgium, France and the United Kingdom have sought to restrict the scope of such procedures. Belgium's universal jurisdiction legislation was repealed in 2003 and the decision to initiate complaints relating to serious crimes under international law on the basis of universal jurisdiction now rests solely with the Federal Prosecutor.<sup>68</sup> In England and Wales, proposals have been made to preclude or

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<sup>62</sup> Writ of the Instructing Court accepting the Jurisdiction in the Pinochet Case, Spanish National Court (Audiencia Nacional), Summary Proceeding 1/98-J, 20 September 1998, available online at <http://www.derechos.org/nizkor/chile/juicio/jurie.html>; a summary of the proceedings is available at <http://www.derechos.net/marga/papers/spain.html> (last accessed March 2007).

<sup>63</sup> For an overview of the proceedings against Hissene Habré see <http://hrw.org/justice/habre/> (last accessed March 2007).

<sup>64</sup> See [http://www.fidh.org/article.php3?id\\_article=1809](http://www.fidh.org/article.php3?id_article=1809) (last accessed March 2007).

<sup>65</sup> National Court, Criminal Chamber, 19 April 2005, available at <http://www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html> (Spanish) (last accessed March 2007).

<sup>66</sup> Prosecution of Offences Act, section 6 (1).

<sup>67</sup> For further information on the case of Doron Almog see, The Palestinian Centre for Human Rights, 'Israeli war crimes suspect evades British justice after UK court issues warrant', 11 September 2005, available online at <http://www.pchrgaza.ps/files/PressR/English/2005/101-2005.htm> (last accessed March 2007);

<sup>68</sup> Belgium: Code of Criminal Procedure, Article 10(5) and 12bis. France: Article 10 of the draft law implementing the ICC Statute « Avant-projet de loi portant adaptation de la législation française au Statut de la Cour pénale internationale et modifiant certaines dispositions du Code pénal, du Code de justice militaire, de la loi du 29 juillet

limit the ability of private parties to apply for an arrest warrant in cases based on universal jurisdiction, if the police fail to act on the complaint.<sup>69</sup>

In the absence of immigration screening procedures and specialised prosecution units for international crimes cases, the role of victims is key to trigger investigations. Certain governments have claimed that private actions should be restricted in order to prevent frivolous and politically motivated claims. However, there are arguably other ways in which to prevent potential abuses, including providing courts with greater decision-making powers.

#### ***II.6.4 Establishing specialised units for the investigation and prosecution of serious international crimes***

The complexity of investigations and prosecutions of genocide, crimes against humanity, war crimes and torture necessitates experienced investigators and prosecutors well-versed in international law and experienced in dealing with traumatised and often marginalised victims and witnesses. The crimes are of a different magnitude, with a larger number of victims and witnesses who may speak a different language and come from different cultures and life experiences.

Specialised investigation and/or prosecution units allows for the concentration of information, development of expertise and experience and an institutional knowledge-base, which in turn can render the criminal justice system more efficient and better able to implement international obligations in practice. The importance of specialised units has been recognised by the European Union in its Framework Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, which requests Member States to “consider the need to set up or designate specialist units within the competent law enforcement authorities with particular responsibility for investigating and, as appropriate, prosecuting the crimes in question”.<sup>70</sup>

The Netherlands, Belgium, Denmark and Norway have established such units. In Norway and The Netherlands, the units are split into special police and prosecution units,<sup>71</sup> while in Denmark, the Special International Crimes Office (SICO) has a staff of seventeen and combines both prosecutors and police investigators, who work in teams

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1881 sur la liberté de la presse et du Code de procédure pénale » : [...] *La poursuite des crimes et délits visés au deuxième alinéa ne peut être exercée qu'à la requête du ministère public.*  
*This article does not appear anymore in the current draft law.*

<sup>69</sup>Haaretz, 'PM to UK.: Enact law prohibiting IDF officers' arrest Britain', 8 February 2007, <http://www.haaretz.com/hasen/spages/823625.html> (last accessed March 2007).

<sup>70</sup> Council Framework Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, 2003/335/JHA, Official Journal L118/12, 14.05.2003, Article 4 online at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/L\\_118/L\\_11820030514en00120014.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/L_118/L_11820030514en00120014.pdf) (last accessed March 2007).

<sup>71</sup> Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*, pp 71-86.

on specific geographical regions.<sup>72</sup> In Belgium, a specialised police unit was established in the context of the rising number of complaints concerning the Rwandan genocide. International crimes cases are always referred to the same investigative judges within the Brussels district, ensuring consistent practice and building of expertise and experience.<sup>73</sup> The anti-terrorist unit of Scotland Yard in the United Kingdom has a number of investigators working on an ad-hoc basis on serious international crimes.<sup>74</sup> Most of the teams have access to specific experts such as historians, country specialists or translators.

Since 2001, specialised units handled more than 80% of all international crimes cases that have resulted in a conviction of the perpetrator. National investigators, investigative judges and prosecutors will hardly find the time to handle these complex and time intensive cases on a regular basis in addition to domestic crimes cases. Without an institutional framework, investigations and prosecutions are dependent on dedicated individuals and possibilities for victims to initiate investigations.

The EU Network of Contact Points could provide organisational support and practical information to countries that have not yet set up a specialised unit but are interested in doing so. It can further assist national investigators abroad by providing practical support and enabling authorities to make use of facilities of EU delegations in third countries, including for instance, premises and translators to take witness statements. Mutual legal assistance agreements with third countries should be considered by the EU as well as including responses and any (non-) compliance with mutual legal assistance requests in its annual human rights report.

### ***II.6.5 Mutual legal assistance***

Usually the evidence will be located in the country where the crimes were committed and investigators will need to obtain the permission of the territorial State to carry out on-site investigations. Requests for mutual legal assistance, ('letters rogatory') can involve lengthy bureaucratic procedures and delay investigations considerably, particularly in respect of third countries with which no mutual legal assistance agreement exists. In order to speed up processes, Dutch investigators have begun to contact their foreign counterparts directly instead of submitting complaints through the different ministries involved and work in close contact with the Dutch Ministry of Foreign Affairs and with the Dutch embassy or consulate in the territorial State which can directly forward requests for investigations to the relevant contacts.<sup>75</sup>

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<sup>72</sup> See website of the Special International Crimes Office, <http://www.sico.ankl.dk/page27.aspx> (last accessed March 2007).

<sup>73</sup> *supra*, n.70, page 40.

<sup>74</sup> The unit has for instance successfully investigated in the case of Zardad.

<sup>75</sup> *Supra*, n.70, page 76

Belgian authorities travelled several times to Rwanda and neighbouring countries, British investigators made 9 trips to Afghanistan in the case of Zardad and Dutch investigators investigated in several countries, including Sierra Leone, Liberia, the Democratic Republic of Congo and Afghanistan. In most cases, witness testimonies proved to be crucial, as physical evidence is hard to find years after the crimes were committed. In particular in the context of sexual crimes, there is a great need for sensitivity in interviewing victims and witnesses and authorities should take into account the lessons learned from international prosecutions. Victims and witnesses based in the forum State as well as local and international NGOs can provide important information and assist in identifying potential witnesses in the territorial State. British investigators aired radio and television spots in Afghanistan to explain their investigation and to encourage witnesses to come forward.<sup>76</sup> Reliable interpreters are crucial to ensure an accurate translation of witness statements taken abroad. Also, investigators need to take particular care not to expose witnesses to any threats, especially in countries with a weak judicial and administrative infrastructure.

In the case of Adolfo Scilingo in Spain and the French case of Ely Ould Dah, sufficient evidence was located within the forum State and provided by witnesses, victims and the NGOs supporting them in their complaint. A mutual legal assistance treaty between Spain and Argentina further allowed witnesses in Argentina to testify via video conference during the trial of Adolfo Scilingo before Spanish courts.<sup>77</sup>

## II.7 The role of victims and civil society

The investigation and prosecution of serious crimes under international law usually involves a large number of victims, yet not all victims will be able to participate in a criminal proceeding. However, it is very important for victims to effectively exercise their right to an effective remedy and to have the ability to participate if they wish to do so. In line with international law, victims should be kept up to date with the investigation and, in particular in universal jurisdiction trials taking place far away and in which not all victims can participate, to inform them about the outcome of the prosecution.<sup>78</sup>

Civil society groups can assist victims in their participation in criminal proceedings and also mediate with authorities if and as necessary. NGOs can further play an important role in providing information about the current situation within a country, enabling those deciding about complementarity or subsidiarity to take a decision with the fullest possible information. In recent years, NGOs have played an increasingly important role in rendering support to victims to bring actions before courts,

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<sup>76</sup> Ibid, page 98.

<sup>77</sup> 'Equipo Nizkor', "Witnesses located in Buenos Aires began to give their testimony by video conference in the trial of Adolfo Scilingo", 14 February 2005, available online at <http://www.derechos.org/nizkor/espana/juicioral/doc/witnesses.html> (last accessed March 2007).

<sup>78</sup> Pre-Trial Chamber 1, 17 January 2006, paragraph 51, Inter-American Court of Human Rights, Blake v. Guatemala, 24/01/1998, Serie C n° 36, paragraph 97, Villagran Morales c. Guatemala, Serie C n° 63, paragraph 227.

particularly in countries with a *partie civile* system. In France for instance, victims supported by NGOs have submitted more than twelve complaints based on the Convention against Torture, all of which are currently pending.<sup>79</sup> Legal representation of victims is problematic as usually there is no legal aid available for these types of cases, which go on for a long period of time and NGOs have often enabled legal representation on a pro bono basis.

## II.8 Prosecuting and defending alleged perpetrators of International crimes on the basis of universal jurisdiction

Beyond the challenges involved in investigations, particular legal challenges can also arise in the context of prosecutions and in the defense of accused persons. The prosecution needs to fit the allegations against the accused within the country's legal framework providing for universal jurisdiction. For example, in the Zardad prosecution in the United Kingdom, the accused was indicted and convicted for hostage-taking and torture.<sup>80</sup> Due to the limited jurisdictional reach of the UK legislation, the prosecution could not prosecute the accused for murder, but instead had to prove that the killing of a person could cause that person such suffering so as to amount to torture as defined under British law. In The Netherlands, Rwandans allegedly involved in the genocide are currently under investigation for war crimes, as Dutch legislation does not provide for universal jurisdiction over genocide committed before 2002.<sup>81</sup>

The accused's right to a fair trial must be guaranteed in proceedings relating to serious international crimes just as in domestic cases. This must include the right to have sufficient time and facilities to prepare the case and the right to adduce his or her own evidence and to confront and examine witnesses. As most of the evidence in universal or other forms of extraterritorial jurisdiction trials is located abroad, safeguards need to be in place, to ensure that the defense has access to that evidence. In common law systems, where it is usually the obligation of the accused to provide exculpatory evidence, the ability of the defense to carry out independent investigations abroad is essential. In civil law systems, it is on the investigative judge or the prosecution to investigate inculpatory as well as exculpatory evidence. Instead of travelling abroad, the defense may put any questions it has for a witness to the investigative judge. Yet even in civil law systems, judicial authorities may need to take into account the location of the evidence, rendering it impossible for the defense to interrogate and test witnesses' credibility, often due to a lack of funds available to

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<sup>79</sup> For universal jurisdiction in France, see FIDH Legal Action Group, [http://www.fidh.org/article.php3?id\\_article=3203](http://www.fidh.org/article.php3?id_article=3203) (last accessed March 2007).

<sup>80</sup> Crown Prosecution Service, 'CPS Secures Historic Torture Conviction', 18 July 2005, [http://cps.gov.uk/news/pressreleases/archive/2005/135\\_05.html](http://cps.gov.uk/news/pressreleases/archive/2005/135_05.html) (last accessed March 2007).

<sup>81</sup> Section 2 (2) of the International Crimes Act 2003; see Jurist, 'Dutch prosecutors charge Rwandan immigrant with war crimes', 10 August 2006, available online at [http://jurist.law.pitt.edu/paperchase/2006\\_08\\_10\\_indexarch.php#115522867495140223](http://jurist.law.pitt.edu/paperchase/2006_08_10_indexarch.php#115522867495140223) (last accessed March 2007).

the defense. This is particularly relevant where the majority of witnesses are only heard in the pre-trial phase. Yet, even where defense lawyers will have the opportunity to travel to the crime scene and interrogate witnesses, past cases have illustrated that it is exceedingly difficult for the defense to find witnesses abroad. This is often due to the fact that potential witnesses are too afraid to testify in favour of the accused, especially in countries where a shift of power has left the defendant and potential supporters in the minority. In the Zardad case, the defense was able to travel to Afghanistan on three different occasions and benefited substantially from being able to investigate at the crime scenes, yet did not succeed in finding any witnesses in support of its client.

Further challenges arise for prosecutors and defense lawyers alike in jury trials as for instance has been the case in Belgium and the United Kingdom. They need to explain complicated legal concepts to lay persons and address unspeakable crimes, committed in a country far away from the country where the trial is taking place. Crimes need to be put into a sociological, cultural and historical context for judges and jury to arrive at a decision. Depending on the legal system, the majority of witnesses might be able to testify via video-conference as for instance in the United Kingdom and Norway, or have to attend the trial in person, as in Belgium, causing considerable logistical challenges. In particular in jury trials, testimonies given via video conference can be problematic: questions and answers need to be translated and for technical reasons, answers can be delayed, thereby lengthening the whole procedure considerably and resulting in witness statements sounding flat and unemotional and potentially as not conveying the truth.<sup>82</sup> As a result, in the Zardad prosecution, three key witnesses were selected to travel from Kabul to London to testify in person during the trial.

Due to the sensitivity and the taboo of sexual crimes in many countries, and sometimes the lack of adequate training of investigators, evidence of acts of physical and sexual violence against women will be challenging to present in court. The prosecution in the case of Zardad for instance could not take any witness statements from women witnesses and therefore did not present any evidence of sexual violence against women to the Court.

**To remedy an imbalance in funds available to the prosecution and defense, defense counsel should be facilitated in visiting crime scenes and interrogating witnesses on the spot.<sup>83</sup> A fund for defense counsel could be established on either a national or European level, to pay for such investigations of the defense abroad.**

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<sup>82</sup> Paul Taylor, 'Only Connect', Speech delivered at the FIDH & REDRESS Conference: 'National and International Responses to Serious International Crimes- Fostering an EU approach', 20-21 November 2006. Annex V of this Report.

<sup>83</sup> The Hague Court of Appeal, Criminal Section, Judgment of 29 January 2007, against Habibullah Jalalzoy, did not find it necessary to provide extra facilities to the defense 'beyond and/or in derogation of the Dutch legislation'. It went on to say that it 'does recognise that the circumstances under which persons were heard in Afghanistan were not optimal ....but it is of the opinion that it cannot be said that the defence has not been able to sufficiently prepare the hearings by the examining magistrate'. The Judgement is available online at [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AZ9365&u\\_ljn=AZ9365](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AZ9365&u_ljn=AZ9365) (last accessed March 2007).

**It is crucial in jury trials that witnesses of both parties-where existing- can testify in person before the court.**

## **II.9 The EU approach to accountability for serious international crimes**

For most of the past decade, the fight against impunity for genocide, crimes against humanity, war crimes and torture was led in the context of the EU's Common Foreign and Security Policy (CFSP). The EU was strongly committed to the establishment of the ICC and remains a key supporter, seeking to strengthen the Court through efforts undertaken for universal ratification and domestic implementation of the Rome Statute. Outside of the ICC context, the support for international human rights treaties is expressed in guidelines adopted on issues such as torture and international humanitarian law. Common to all measures taken under the 'second pillar' of the EU (Common Foreign and Security Policy), is that they are intended to regulate the relationship of the EU and the Member States, with third countries and institutions.

The key aim of the Justice and Home Affairs Council of the EU is the creation of a common 'area of freedom, security and justice'.<sup>84</sup> This is to be accomplished, inter alia, through the adoption of measures under the 'third pillar'<sup>85</sup> of the EU, designed to increase police and judicial cooperation among Member States in criminal matters. Measures adopted under the third pillar can be legally binding for Member States. The competencies of EU institutions under the third pillar initially were mainly applied to fight crimes such as terrorism and drug trafficking. Yet in 2002 and 2003, the Council of the EU on Justice and Home Affairs (JHA) adopted Framework Decisions dealing specifically with the cooperation among Member States in the investigation of serious international crimes.<sup>86</sup> However to date, no legislative measures adopted by the JHA Council seek to approximate Member States' legislation in respect of serious international crimes.

The potential of the EU to promote international criminal justice externally combined with its competencies under the third pillar could enable the EU to become a pioneer in international criminal justice, ensuring that perpetrators do not find a safe haven and that victims of serious international crimes are able to access justice within Europe. Several instruments and mechanisms adopted in the context of the EU's JHA policy have a potential to contribute to these objectives as described below.

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<sup>84</sup> See the website of the Justice and Home Affairs Council at [http://www.consilium.europa.eu/cms3\\_fo/showPage.asp?id=249&lang=en](http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=249&lang=en) (last accessed March 2007).

<sup>85</sup> Since the Treaty of Amsterdam, Justice and Home Affairs related issues such as asylum, immigration and judicial cooperation in civil matters are dealt with primarily under Title IV of the first pillar of the EU. The third pillar of the EU, Title VI, is now devoted solely to police and judicial cooperation in criminal matters. See Paul Graig & Grainne de Burca, 'EU Law- Text, Cases, and Materials', Third Edition, 2003, pp 22-42.

<sup>86</sup> see further below, page 38.

## II.10 Current ‘third pillar’ approach to serious international crimes

### II.10.1 *Competencies*

With the incorporation of Title VI in the EU Treaty, the EU set out to establish an area of freedom, security and justice. According to Article 29 and Article 31 of the EU Treaty, the EU may legislate in criminal matters to improve judicial and police cooperation in criminal matters amongst Member States and to approximate the criminal legislation of the different Member States.<sup>87</sup>

The basis for a Framework Decision on serious international crimes would therefore be Article 29 in combination with Article 31 (e). Both Articles refer to a list of crimes, which does not include crimes against humanity, genocide, war crimes or torture. Yet the language used in the Article such as “shall include” and “in particular” implies that the list is non-exhaustive. This view is further supported by past framework decisions adopted on the same basis and which relate to other ‘non-listed’ crimes such as environmental crimes, money laundering or credit card fraud. In order to justify a framework decision that seeks to approximate Member States’ legislation, it must be shown to be necessary<sup>88</sup> and compatible with other objectives in the creation of a common area of freedom, security and justice, including the prevention of conflicts of jurisdiction between Member States.<sup>89</sup>

**A Framework Decision on serious international crimes that seeks to incorporate the definition of crimes as referred to in relevant international treaties and tackles common procedural bars would ensure greater coherence of the implementation of international law obligations.<sup>90</sup>**

### II.10.2 *Decision making*

The main EU institution with decision-making power under the third pillar is the Justice and Home Affairs Council, which brings together Ministers of the Interior and

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<sup>87</sup>Title VI of the EU Treaty, ‘Provisions on Police and Judicial Cooperation in Criminal Matters’; see Henri Labayle and Anne Weyembergh, ‘Code of Criminal Law of the European Union’, January 2005, p10-15.

<sup>88</sup> Article 29 of the EU Treaty setting out the methods to accomplish the objectives of the ‘third pillar’ reads: “...measures to be taken shall include approximation, where necessary, of rules on criminal matters in the Member States...”.

<sup>89</sup> Article 31 (1) (d) of the Treaty of the EU: ‘Common action on judicial cooperation in criminal matters shall include preventing conflicts of jurisdiction between Member States’.

<sup>90</sup> See Annex VI for the content of a possible Framework decision

Justice.<sup>91</sup> Deciding on most of the matters by unanimity, the Council can request the Commission to submit a proposal on a specific matter that was agreed upon by the Council in its conclusions.<sup>92</sup> The Council acts on the initiative of Member States, in particular the country holding the Presidency of the EU. The Council is bound by the competencies conferred to it by Chapter VI and may not take additional measures as referred to in Article 34. Of these, mainly framework decisions have been adopted to ensure the creation of an area of freedom, security and justice under Article 34 (2) (b). Framework decisions are binding on Member States ‘as to the result to be achieved and seek to approximate Member States’ ‘laws and regulation’.<sup>93</sup>

The Commission can submit a proposal on its own or act on the instruction of the Council. Conclusions of the Council on Justice and Home Affairs can instruct the Commission to draft a legislative proposal on a matter which all Member States agreed to. The Directorate General (DG) on Justice, Freedom and Security is responsible for the creation of a common area of freedom, security and justice and has the right to make legislative proposals alongside Member States. In addition, the DG monitors the implementation by Member States of measures adopted by the JHA Council.<sup>94</sup>

The European Parliament must be consulted in the legislative process. Within the Parliament, it is primarily the committee on ‘Civil Liberties, Justice and Home Affairs’, which is responsible for the establishment of a common area of freedom, security and justice.<sup>95</sup> The European Parliament can scrutinise Council and Commission Actions by putting questions to both and passing resolutions on Justice and Home Affairs related issues.

### **II.10.3      *The Hague Programme***

The Hague Programme for strengthening freedom, security and justice in the European Union was adopted by the European Council on 5 November 2004.<sup>96</sup> It came into force in July 2005 and fixes the priorities of the EU within the creation of an area of freedom, security and justice over a five-year period. These priorities include, inter alia, the fight against terrorism, establishing a common asylum area and the creation

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<sup>91</sup> Article 34 of the Treaty on the European Union, consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community, December 2006, available online at <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf> (last accessed March 2007); website of the JHA Council at [http://www.consilium.europa.eu/cms3\\_fo/showPage.asp?id=249&lang=EN&mode=g](http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=249&lang=EN&mode=g) (last accessed March 2007).

<sup>92</sup> Article 34 (2) of the Treaty on the European Union.

<sup>93</sup> Ibid, 34 (2) (b).

<sup>94</sup> An overview of the responsibilities of the DG is available online at [http://ec.europa.eu/dgs/justice\\_home/index\\_en.htm](http://ec.europa.eu/dgs/justice_home/index_en.htm) (last accessed March 2007)

<sup>95</sup> See also the website of the LIBE committee online at [http://www.europarl.europa.eu/committees/libe\\_home\\_en.htm](http://www.europarl.europa.eu/committees/libe_home_en.htm) (last accessed March 2007)

<sup>96</sup> Council of the European Union, 16054/04, JAI 559, 13 December 2004, The Hague Programme: strengthening freedom, security and justice in the European Union, available online at [http://ec.europa.eu/justice\\_home/doc\\_centre/doc/hague\\_programme\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf) (last accessed March 2007)

of an 'effective European area of justice' for all. No reference to serious international crimes is included in the Programme. The Commission is in charge of the effective implementation of the programme.<sup>97</sup> Since it does not request the Commission to work on any specific instruments covering international crimes, the Commission does not make any legislative proposals in this area, unless a Member State or the Council instructs it to do so. Yet the aim to create an 'area of justice for all' leaves the Commission with some scope to include for instance ICC crimes in the list of legislative instruments designed to improve judicial cooperation among Member States, such as the European Arrest Warrant or the framework decision on the freezing of property and evidence.<sup>98</sup> Further, the Commission can allocate funds to justice related initiatives, including those aimed at providing access to justice for victims of serious international crimes within the EU.<sup>99</sup>

The revision and follow up of the Hague Programme will soon be under way and will be discussed amongst the current and incoming Presidencies,<sup>100</sup> representatives from the Commission, the Council and possibly the European Parliament. The inclusion of the fight against impunity for serious international crimes would be an important political sign that the EU and Member States are committed to international justice and would constitute a crucial step forward to ensure that more specific legislative action can be taken under the third pillar.

#### **II.10.4      *The European evidence warrant***

The main contribution of EU legislative measures to the fight against impunity for serious international crimes is the inclusion of the 'crimes within the jurisdiction of the ICC' and other crimes that could amount to international crimes in certain instruments designed to increase and facilitate cooperation among Member States in the fight against cross-border crime. Existing instruments, such as the European Arrest Warrant (EAW),<sup>101</sup> the framework decision on the freezing of property and evidence<sup>102</sup>

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<sup>97</sup> The Commission presented an action plan to ensure the implementation of the Hague Programme in May 2005, approved by the Council on 2<sup>nd</sup> June 2005, Council of the EU, 10 June 2005, 9778/2/05, JAI 207, 'Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union', available online at [http://ec.europa.eu/justice\\_home/doc\\_centre/doc/action\\_plan\\_jai\\_207\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/doc/action_plan_jai_207_en.pdf) (last accessed March 2007); the Commission adopts 'assessment reports on the implementation of the Hague programme', on 28 June 2006, available at [http://ec.europa.eu/justice\\_home/news/information\\_dossiers/the\\_hague\\_2006/index\\_en.htm](http://ec.europa.eu/justice_home/news/information_dossiers/the_hague_2006/index_en.htm) (last accessed March 2007).

<sup>98</sup> See further below, page 33.

<sup>99</sup> For an overview of funding opportunities in the Justice, Freedom and Security policy areas for the period 2007-2013 see [http://ec.europa.eu/justice\\_home/funding/intro/funding\\_intro\\_en.htm](http://ec.europa.eu/justice_home/funding/intro/funding_intro_en.htm) (last accessed March 2007).

<sup>100</sup> The discussion of a follow up will be initiated under the German Presidency of the EU, see 'Living Europe Safely-Work Programme for the German EU Presidency', page 16, available online at [http://www.eu2007.bmi.bund.de/Internet/Content/Common/Anlagen/EU2007\\_Anlagen/Europa\\_sicher\\_leben\\_en,templateId=raw,property=publicationFile.pdf/Europa\\_sicher\\_leben\\_en.pdf](http://www.eu2007.bmi.bund.de/Internet/Content/Common/Anlagen/EU2007_Anlagen/Europa_sicher_leben_en,templateId=raw,property=publicationFile.pdf/Europa_sicher_leben_en.pdf) (last accessed March 2007).

<sup>101</sup> 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Official Journal L 190, 18/07/2002, P.0001-0020, available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:HTML> (last accessed March 2007).

or the framework decision on the standing of victims in criminal proceedings<sup>103</sup> have not yet been applied in the context of serious international crimes. Since 2004, the main instrument proposed with relevance to serious international crimes is the European Evidence Warrant (EEW), which is currently pending adoption.<sup>104</sup>

The European Evidence Warrant abolishes the requirement of double criminality for a list of thirty-two crimes for obtaining objects, documents and data for use in proceedings in criminal matters.<sup>105</sup> The list is the same as for the European Arrest Warrant (EAW) and includes ‘crimes within the jurisdiction of the ICC’. In line with the ‘mutual recognition of criminal decisions’, the objective of the EEW is to quicken mutual legal assistance procedures through the incorporation of the transfer of evidence in mutual judicial cooperation. Accordingly, requests issued by a judicial authority in one Member State will be ‘directly recognized’ and have to be enforced by the judicial authority of the executing Member State. The EEW, once adopted, will be applicable in respect of any criminal offense and acts that are punishable under the laws of the issuing Member State and that give rise to criminal proceedings in that Member State.

The EEW could be a substantial benefit to national authorities investigating serious international crimes, since evidence in these types of crimes can be spread over several Member States. However, the EEW does not cover witness statements, which still need to be obtained using traditional mutual legal assistance requests between Member States.

## **II.11 Existing cooperation mechanisms and their contribution to the fight against impunity for serious international crimes**

One of the main objectives for the establishment of a common area of freedom, security and justice is to fight trans-border crime more effectively. To accomplish this objective, several cooperation mechanisms were established, seeking to increase judicial as well as police cooperation in criminal matters and to develop ‘common action’ amongst Member States.<sup>106</sup> Two of the measures adopted in this context so far

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<sup>102</sup> 2003/577/JHA, Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, available online at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/L\\_196/L\\_19620030802en00450055.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/L_196/L_19620030802en00450055.pdf) (last accessed March 2007).

<sup>103</sup> 2001/220/JHA, Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings *Official Journal L 082*, 22/03/2001 P. 0001 - 0004 available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001F0220:EN:HTML> (last accessed March 2007).

<sup>104</sup> For instruments adopted before 2004 see FIDH and REDRESS, “Legal Remedies for Victims of “International Crimes”, March 2004, page 14ff, available at <http://www.redress.org/publications/LegalRemediesFinal.pdf> (English) and <http://www.fidh.org/IMG/pdf/LegalRemedies-Final-french.pdf> (French).

<sup>105</sup> Proposal for a framework decision on the European Evidence warrant for obtaining objects, documents and data for use in proceedings in criminal matters, 14.11.2003, COM 2003 /0270 (CNS), available online at [http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003\\_0688en01.pdf](http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0688en01.pdf) (last accessed March 2007).

<sup>106</sup> Article 29-34 of the EU Treaty; for an in-depth discussion of the various cooperation mechanisms established under Article 29, see: REDRESS and FIDH, “Legal Remedies for Victims of “International Crimes”, March 2004, page

are specifically designed to increase cooperation in the investigation and prosecution of serious international crimes.<sup>107</sup> Cooperation mechanisms such as Europol, Eurojust and the European Judicial Network seeking to increase cooperation in criminal matters among Member States, could also bring added value to the fight against impunity.

### **II.11.1 Europol**

The European Police Office (Europol) was established by the Europol Convention in 1995 and became operational in 1999.<sup>108</sup> Its main task is to assist national authorities of Member States in dealing with cross-border serious organised crime, to analyse information and make that information available. In sum, Europol renders operational and practical support to investigating authorities of Member States and fosters cooperation between them but does not yet have investigative powers of its own.

#### ***Europol's mandate:***

The mandate of Europol has been progressively widened since its establishment to include all crimes listed in the Annex to the Europol Convention 'where there are factual indications that an organized criminal structure is involved'.<sup>109</sup> The competence of Europol therefore appears to be limited to organised crimes; serious international crimes such as genocide, crimes against humanity, war crimes or torture are not included in the Annex. However, the mandate of Europol continues to be widened and the 'third protocol', signed in 2003, provides for an extension of the 'competence for Europol to deal with additional crimes other than those listed in the current Annex to the Convention'.<sup>110</sup> The third protocol will enter into force on 18 April 2007. Further, Europol will be able to request Member States to undertake investigations and to participate in joint investigations teams as of 29 March 2007.<sup>111</sup>

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17ff, available at <http://www.redress.org/publications/LegalRemediesFinal.pdf> (English) and <http://www.fidh.org/IMG/pdf/LegalRemedies-Final-french.pdf> (French) (last accessed March 2007).

<sup>107</sup> 2002/494/JHA- Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (Official Journal 167, 26.06.2002, p. 1-2; available online at [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002D0494&model=g\\_uichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002D0494&model=g_uichett) (last accessed March 2007); the Framework decision was complemented one year later by the Council Framework Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, 2003/335/JHA, Official Journal 118/12, 14.05.2003, available online at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/L\\_118/L\\_11820030514en00120014.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/L_118/L_11820030514en00120014.pdf) (last accessed March 2007) ; see further below, page 38.

<sup>108</sup> <http://www.europol.europa.eu>; the Europol Convention (as published in Official Journal C 316, 27/11/1995, p.0002- 0032) is available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41995A1127\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41995A1127(01):EN:HTML) (last accessed March 2007).

<sup>109</sup> Article 2 (1) of the Europol Convention.

<sup>110</sup>Third Protocol, (Official Journal, C 2 of 6.1.2004 p. 1), available online at <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=CNS/2002/0814> (last accessed March 2007).

<sup>111</sup> In accordance with the Second Protocol to amend the Europol Convention (Official Journal, C 312 of 16.12.2002 p. 2), available online at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=42002A1216\(01\)](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=42002A1216(01))

Further substantial changes to the current make up of Europol are underway, in line with the proposal to replace the Europol Convention with a Decision of the Council of the EU by January 2008.<sup>112</sup> These changes would provide Europol with the same legal basis as other cooperation mechanisms such as Eurojust and CEPOL (European Police College). They will hasten the process of amending the mandate of Europol, which could then be more easily adapted to changing circumstances. Should the Council decide to follow a proposal for a draft decision as submitted by the Commission,<sup>113</sup> Europol's mandate would no longer be limited to organised crime and could be extended to cover the additional crimes listed in the 'European Arrest Warrant as cases where Member States may not refuse to execute a warrant on ground of lack of dual criminality'.<sup>114</sup>

The proposed changes would therefore extend Europol's mandate to include 'crimes within the jurisdiction of the ICC'<sup>115</sup> and enable Europol to assist Member States in the investigation and prosecution of genocide, crimes against humanity and war crimes. Europol could also initiate requests for such investigations.

### **II.11.2 Eurojust**

Eurojust was created on 28 February 2002 by a Council decision based on Article 31 of the EU Treaty and is designed to "reinforce the fight against serious crime" and to stimulate and improve the coordination of investigations and prosecutions between Member States.<sup>116</sup> Other objectives include reinforcing cooperation between Member States by facilitating the execution of international mutual legal assistance and the implementation of extradition requests to render more effective the investigations and prosecutions of Member States.<sup>117</sup>

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[&model=guichett](#) (last accessed March 2007); for an overview of the protocol and proposed changes to the Convention see 'Outcome of Proceedings' of the Europol Working Party of the Council at <http://www.statewatch.org/news/2007/jan/europol-5560-07.pdf> (last access March 2007); for a discussion of the proposed changes see: Steve Peers, 'The final Step in the creation of an 'Investigative and Operational European Police Force, January 2007, available online at <http://www.statewatch.org/news/2007/jan/europol-analysis.pdf> (last accessed March 2007).

<sup>112</sup> Council Conclusions of 4 -5 December 2006, available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/jha/91997.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/91997.pdf) (last accessed March 2007).

<sup>113</sup> Proposal {COM(2006)817 final} 'Commission staff working document Council Decision establishing the European Police Office', available online at <http://www.statewatch.org/news/2007/jan/europol-com-impact-assess.pdf> (last accessed March 2007).

<sup>114</sup> Article 2 (2) of the Council Framework Decision on the European Arrest warrant and the surrender procedures between member states (2002/584/JHA-Official Journal L 190, 18.07.2002 p.0001-0020), available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:HTML> (last accessed March 2007).

<sup>115</sup> Ibid

<sup>116</sup> Council decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/817/JHA), available online at [http://eurojust.europa.eu/official\\_documents/Eurojust\\_Decision/L\\_06320020306en00010013.pdf](http://eurojust.europa.eu/official_documents/Eurojust_Decision/L_06320020306en00010013.pdf) (last accessed March 2007).

<sup>117</sup> For more extensive discussion of the role of Eurojust see REDRESS and FIDH, "Legal Remedies for Victims of "International Crimes", March 2004, page 19-20, available at

Eurojust is a permanent judicial unit composed of one national member seconded by each Member State. As such, it brings together all criminal justice systems of the EU. The national members constitute the ‘College’, which has its seat in The Hague.<sup>118</sup>

As part of the ‘Europeanisation’ of criminal justice, Eurojust ensures that criminal procedure is a judicial, rather than an administrative process.<sup>119</sup> Although the risk of competing jurisdictions is less relevant when it comes to exercising universal jurisdiction over serious crimes under international law, Eurojust is positioned to play an important role in bringing together national authorities to determine which competent authorities should take the lead to investigate and prosecute a particular case.<sup>120</sup>

Although Eurojust does not yet have any of its own operational powers, Eurojust can request Member States to initiate an investigation of a list of crimes, which does not yet include serious international crimes. Its focus is on crimes listed in Article 29 and 31, in particular money laundering, drug crimes, trafficking and terrorism. Serious international crimes do not appear to be a priority. However, the mandate of Eurojust permits it to deal with other crimes provided that a Member State refers a case to it.

### ***II.11.3 European judicial network***

The European Judicial Network (EJN) in criminal matters was established by a joint action of the Council on 29 June 1998.<sup>121</sup> It seeks to assist national judges and prosecutors to carry out cross-border investigations and prosecutions, thereby improving judicial cooperation in relation to transnational crime. The EJN is a network of national contact points, mostly magistrates or representatives of judicial authorities of the Member States and who are responsible for international judicial cooperation. As opposed to Eurojust, the EJN is not a permanent structure. It has a secretariat, which is located with the Eurojust secretariat in The Hague but functions as a separate unit, fulfilling its tasks independently from Eurojust.

The ‘mandate’ of the EJN is limited to providing information and assisting national authorities and, unlike Europol and Eurojust, it does not have any judicial competencies of its own. EJN’s contact points meet three times a year to share

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<http://www.redress.org/publications/LegalRemediesFinal.pdf> (English) and <http://www.fidh.org/IMG/pdf/LegalRemedies-Final-french.pdf> (French).

<sup>118</sup> See also website of Eurojust at <http://eurojust.europa.eu/> (last accessed March 2007).

<sup>119</sup> An example for such a development is the European Evidence Warrant where decisions on mutual legal assistance are taken by judges, not political or administrative officials.

<sup>120</sup> The ‘Prestige case’, in which Spain and France sought to prosecute, is one example where Eurojust’s intervention succeeded in solving a jurisdictional dispute, see [http://www.eurojust.europa.eu/press\\_releases/2005/23-11-2005.htm](http://www.eurojust.europa.eu/press_releases/2005/23-11-2005.htm) (last accessed March 2007).

<sup>121</sup> Joint Action 98/428 JHA of 29 June 1998, available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998F0428:EN:HTML> (last accessed March 2007); website of the EJN: <http://www.ejn-crimjust.europa.eu/>

information on the various legal systems of Member States and to exchange experiences in the provision of judicial assistance. Information tools are developed by EJM that seek to support direct cooperation, such as to whom a request for judicial assistance or a European Arrest Warrant should be sent.<sup>122</sup>

Eurojust and the EJM both play a vital role to foster mutual trust and confidence amongst Member States in each others' criminal justice system and thereby render an important contribution to strengthening practical cooperation.

## **II.12 The Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes**

The Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes ("the Network") was established by a framework decision adopted by the Council on 13 June 2002.<sup>123</sup> Similar to the European Judicial Network, the Network is not a permanent structure. It is composed of contact points of each Member State "for the exchange of information concerning the investigation of genocide, crimes against humanity and war crimes." A primary function of the Network is to enhance the cooperation among national authorities involved in the investigation and prosecution of serious international crimes.

The Network brings together prosecutors, investigators, and officials from immigration departments and representatives from the Ministry of Justice, all focused to a certain extent on serious international crimes. Article 1 (1) of the Decision requires Member States to appoint a contact point and to notify the Council Secretariat of this person or persons.<sup>124</sup> The list of contact points is updated and circulated by the Council Secretariat among contact points, enabling each to know whom to contact in another country in cases involving serious international crimes.

**The Composition of the Network with a wide range of contact points from different institutions may lead to different views on what issues to discuss during meetings. Yet such composition is a unique opportunity for investigators, prosecutors and policy makers alike to benefit from each others experience and expertise. In order**

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<sup>122</sup> The 'EAW Atlas' information tool for instance provides online contact details for practitioners, see [http://www.ejm-crimjust.eu.int/eaw\\_atlas.aspx](http://www.ejm-crimjust.eu.int/eaw_atlas.aspx); other important mutual legal assistance tools are also available online at [http://www.ejm-crimjust.eu.int/ejm\\_tools.aspx](http://www.ejm-crimjust.eu.int/ejm_tools.aspx) (last accessed March 2007).

<sup>123</sup> 2002/494/JHA- Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (Official Journal 167, 26.06.2002, p. 1-2; available online at [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002D0494&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002D0494&model=guichett) (last accessed March 2007); the Framework decision was complemented one year later by the Council Framework Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, 2003/335/JHA, Official Journal 118/12, 14.05.2003, available online at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/L\\_118/L\\_11820030514en00120014.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/L_118/L_11820030514en00120014.pdf) (last accessed March 2007).

<sup>124</sup> Ibid, Article 1 (1).

to ensure focussed discussions and that the agenda of the meetings tackles the most urgent issues relevant to investigators, prosecutors and policy makers, a variety of actors, including contact points, representatives of the ICC and international courts and tribunals and civil society, should be consulted in advance to provide input for the agenda of upcoming Network meetings.

Since the adoption of the Decision setting up the Network, the contact points have met three times, with a fourth meeting to be held under the German Presidency in the first half of 2007. Since the first Network meeting in November 2004, not every Presidency has considered it necessary to organise a meeting of the Network, yet meetings at regular intervals enable contact points to exchange experiences, practices and methods of investigation and prosecution, and would maintain the momentum.<sup>125</sup> Past Network meetings were devoted to a wide variety of issues, including presentations by contact points of the current legal situation within their home countries in respect of the possibilities to investigate and prosecute serious international crimes, the cooperation between national war crimes units and 'ethnic' groups, the exchange of experiences made and lessons learned from investigations abroad as well as the challenges involved in obtaining mutual legal assistance from third countries.

The Network has enhanced substantially cooperation among Member States in the investigation and prosecution of serious international crimes.<sup>126</sup> It has facilitated personal contacts amongst national authorities within Europe as well as with experts of third countries such as Canada. The third Network meeting already indicated in its conclusions that the agenda of future Network meetings should build on previous meetings and focus on practical issues, including lessons learned in respect of access to information in the field, mutual legal assistance with specific third countries, investigating in different cultural regions, training of investigators and prosecutors and developing standards for best and coherent practice.

Accordingly, the fourth meeting of the Network in 2007 will focus on practical issues involved in the investigation and prosecution of the genocide committed in Rwanda. Participants will discuss, inter alia, issues such as witness protection abroad, the need for specialised units, fair trial concerns and cooperation with authorities in Rwanda.

The role the EU can play to further improve mutual legal assistance with third countries should be addressed in the context of the Network meetings. Bridging the competence of the Network contact points with the experience and resources of Eurojust and Europol will be crucial to ensure that Member States benefit from all cooperation mechanisms. Close cooperation with the Office of the Prosecutor of the

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<sup>125</sup> Article 5 (2), Council Framework Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, 2003/335/JHA, Official Journal 118/12, 14.05.2003, available online at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/L\\_118/L\\_11820030514en00120014.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/L_118/L_11820030514en00120014.pdf) (last accessed March 2007).

<sup>126</sup> See also Human Rights Watch, Universal Jurisdiction in Europe: The State of the Art, June 2006, page 22; available online at <http://hrw.org/reports/2006/ij0606> (last accessed March 2007).

ICC as well as other international tribunals should be established and the participation of relevant representatives at Network meetings should be ensured.

Previous meetings have illustrated that conclusions adopted by the contact points are not always implemented by Member States or the European Union institutions. Neither have meetings been convened regularly. Contact points may often not be well positioned to encourage their colleagues in other Ministries to urge the Presidency of the EU to convene a follow up meeting. A small secretariat, to be based within Eurojust in The Hague should therefore be considered as it could substantially contribute to the follow up of conclusions and ensure that meetings are held regularly, irrespective of the holder of the Presidency of the EU. The European Judicial Network was also situated at its outset with the Council Secretariat, however, once the EJM was up and running, it was provided with its own secretariat, hosted by Eurojust. After five years of existence and four meetings, the Network already is an established mechanism and what worked for the EJM should now be considered for the Network. While this will require a change in the legislative framework of both the EU Network and Eurojust, the future of Eurojust is currently being discussed and a proposal regarding the EU Network should be incorporated into those discussions.

## **II.13 Promotion of international criminal justice within the EU's Common Foreign and Security Policy**

In contrast with the occasional attention to international criminal justice in the context of the EU's Justice and Home Affairs Policy, express commitment to the fight against impunity in general and the ICC in particular can be found in the context of the EU's Common Foreign and Security Policy (CFSP). The European Union contributed substantially to the establishment of the International Criminal Court and continues to support the court politically, financially and also provides practical cooperation and support to the ICC.

Measures adopted within the context of the CFSP such as the Guidelines on Torture and other cruel, inhumane or degrading treatment<sup>127</sup> and the Guidelines to promote the compliance with International Humanitarian Law, designed to govern the EU's policy on these matters towards third countries, complement the commitment to the ICC and contribute to the 'external' commitment of the EU to international criminal justice.

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<sup>127</sup> For a summary of the purpose of the Guidelines see: <http://www.consilium.europa.eu/uedocs/cmsUpload/TortureGuidelines.pdf> (last accessed March 2007).

### ***II.13.1 The Guidelines on the promotion of Compliance with International Humanitarian Law***<sup>128</sup>

The Guidelines were adopted in December 2005 on an initiative of the Swedish Government with the aim to address compliance with international humanitarian law by third countries. The Guidelines request all bodies of the EU in their relation with third States to monitor situations where international humanitarian law might be applicable. The EU Heads of Mission or Commanders of EU Military Operations as well as EU Special Representatives for instance are obligated to monitor and assess compliance with international humanitarian law and to report on the situation about a given State or conflict.<sup>129</sup> Point 16 of the Guidelines provides for numerous mechanisms for the EU in case it seeks to take action to promote compliance with international humanitarian law, including political dialogue (16 (a)), demarches (16 (c)), training and education in third countries (16 (h)) and sanctions (16 (d)). In the same context, point 16 (g) refers to individual criminal responsibility and emphasises that the EU should ensure that there is no impunity for war crimes and that it should encourage 'third states to enact national penal legislation to punish violations of international humanitarian law'.

The International Committee of the Red Cross (ICRC) plays a crucial role in informing the EU about specific situations. Due to the particular role of the ICRC, it will not recommend which action the EU should take but it can draw the attention of States to their obligations. Only in exceptional circumstances will the ICRC denounce the quality of a political dialogue publicly, as happened for instance in respect of Uzbekistan. The ICRC can further assist the EU in the implementation of the Guidelines, which is particularly relevant, taking into account that they have not yet been applied since their adoption. Such assistance could include providing certain 'compliance criteria' that will make it easier for the EU and its bodies to assess and report on a particular situation.

As they have been adopted under the second pillar, the Guidelines do not have any binding effect on Member States' legislation. However, Article 2 highlights that the 'Guidelines are in line with the commitment of the EU and its Member States to international humanitarian law' and that 'all Member States are Parties to the Geneva Conventions and their additional Protocols and thus under the obligation to abide by their rules'.<sup>130</sup>

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<sup>128</sup> European Union Guidelines on promoting compliance with international humanitarian law (IHL), 2005/C 237/04, 23/12/2005, Official Journal C 327/4, available online at [http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/c\\_327/c\\_32720051223en00040007.pdf](http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/c_327/c_32720051223en00040007.pdf) (last accessed March 2007).

<sup>129</sup> Ibid, Article 15 (b).

<sup>130</sup> Ibid, Article 2 .

## ***II.13.2 The EU support of the International Criminal Court and the cooperation and assistance agreement between the EU and the ICC***

### ***General support***

The conclusion of the Cooperation and Assistance Agreement between the EU and the ICC on 26 April 2006 was preceded by several other measures adopted in the context of the EU's support for the ICC, including the common position on the ICC, adopted on 18 June 2003 and which seeks to 'uphold the effective functioning of the International Criminal Court and to promote universal support for it by encouraging universal acceptance of the Rome Statute'.<sup>131</sup> The common position and other relevant measures adopted in the context of the CFSP are designed to regulate ICC related activities of the EU and Member States' foreign policy vis-à-vis third countries. Although measures adopted in the context of the CFSP do not require Member States to take legislative action, they are important policy indicators for the EU and Member States.<sup>132</sup>

An Action Plan was adopted in February 2004 to follow up the common position and to regulate EU activities, to ensure universality and integrity of the Rome Statute and the independence and effective functioning of the ICC.<sup>133</sup> As part of the Action Plan, EU and national focal points for the ICC were established. They meet regularly in the context of the "ICC sub-area of the working group on public international law" (COJUR) to advance the EU strategy on the ICC and other international tribunals.

Another component of the EU's external commitment to international criminal justice and the ICC are the '*ICC-clauses*', which the Commission seeks to negotiate in certain 'partnership and cooperation agreements' between the EU and third countries and which are designed to encourage third countries to ratify and implement the Rome Statute.<sup>134</sup> Indeed, in February 2005, the EU and ACP (African-Caribbean- Pacific) countries agreed to include a commitment to the ICC in the revised Cotonou Agreements, which were adopted by the Council in June 2005 and set out the terms for EU assistance, development cooperation and partnership with ACP countries.<sup>135</sup> ICC clauses or clauses relating to international justice in more general terms are also

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<sup>131</sup> The Council Common Position 2003/444/CFSP of 18.06.2003 repealed and replaced two previous common positions adopted in 2001 and 2002. It is available online at [http://consilium.eu.int/uedocs/cmsUpload/L\\_15020030618en00670069.pdf](http://consilium.eu.int/uedocs/cmsUpload/L_15020030618en00670069.pdf) (last accessed March 2007).

<sup>132</sup> The common position appears to assume that Member States have implemented the Rome Statute as its Article 2 (3) asks Member States to "share with all interested States their own experiences on the issues related to the implementation of the Statute and, when appropriate, provide other forms of support to that objective".

<sup>133</sup> The Action Plan to follow up on the common position on the International Criminal Court is available online at <http://www.consilium.europa.eu/uedocs/cmsUpload/ICC48EN.pdf> (last accessed March 2007).

<sup>134</sup> See the website of the European Commission, DG External Relations: "The EU's Human Rights and Democratisation Policy", at [http://ec.europa.eu/comm/external\\_relations/human\\_rights/icc/index.htm](http://ec.europa.eu/comm/external_relations/human_rights/icc/index.htm) (last accessed March 2007).

<sup>135</sup> See the "Information Note on the Revision of the Cotonou Agreement", available online at [http://ec.europa.eu/development/body/cotonou/pdf/negotiation\\_20050407\\_en.pdf#zoom=100](http://ec.europa.eu/development/body/cotonou/pdf/negotiation_20050407_en.pdf#zoom=100) (last accessed March 2007).

negotiated in partnership and cooperation agreements between the EU and Indonesia, Singapore, Thailand and the Philippines. In the context of the ‘European Neighbourhood Policy’, ICC clauses or clauses referring to international criminal law have been inserted in bilateral ‘Action Plans’ with 11 of the EU’s neighbours.<sup>136</sup>

The Council on General Affairs and External Relations on 30 September 2002 adopted conclusions on the ICC, setting out the EU’s commitment to the ‘integrity of the ICC’. As part of that commitment, a set of Guiding Principles were developed on United States’ proposals to sign bilateral immunity agreements with ICC States Parties. The principles are designed to assist Member States when considering the ‘necessity and scope of possible agreements or arrangements in responding to the United States’ proposal’.<sup>137</sup>

### ***The Cooperation and Assistance Agreement between the EU and the ICC***

Following on from the support described above, the conclusion of the ‘Agreement between the International Criminal Court and the European Union on Cooperation and Assistance’ (the “Agreement”) on 28 April 2006 is a logical step further. The Agreement is legally binding on both parties, setting out the circumstances for the cooperation, support and assistance between the EU and ICC.<sup>138</sup>

The main contribution the EU as an institution can provide in practical terms is the provision of information to ICC investigators, services such as translators and offices of EU delegations in third countries and potentially security where the EU has a military mission in a third country. It is not an agreement between Member States and the ICC, but with the EU as an institution. Consequently, the Agreement does not provide for cooperation which is better suited to States. For example, the EU as an institution cannot provide certain services directly, such as victim protection or prison facilities.<sup>139</sup>

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<sup>136</sup> These include: Armenia, Azerbaijan, Egypt, Georgia, Israel, Jordan, Lebanon, Moldova, Morocco, Palestinian Authorities, Tunisia, Ukraine. For information on the Action Plans see [http://ec.europa.eu/world/enp/documents\\_en.htm#3](http://ec.europa.eu/world/enp/documents_en.htm#3) (last accessed March 2007); for further measures taken in the context of the CFSP designed to strengthen international justice see ANNEX III, Sarah Ludford, Opening Speech, ‘How to foster an EU approach to Serious International Crimes’, 20 November 2006; for other instruments adopted in order to strengthen the ICC, see the website of the European Commission, DG External Relations: “The EU’s Human Rights and Democratisation Policy”, at [http://ec.europa.eu/comm/external\\_relations/human\\_rights/icc/index.htm](http://ec.europa.eu/comm/external_relations/human_rights/icc/index.htm) (last accessed March 2007).

<sup>137</sup> 30 September 2002, General Affairs and External Relations Council conclusions, available online at [http://ec.europa.eu/comm/external\\_relations/human\\_rights/gac.htm#hr300902](http://ec.europa.eu/comm/external_relations/human_rights/gac.htm#hr300902) (last accessed March 2007).

<sup>138</sup> The Agreement between the International Criminal Court and the European Union on Cooperation and Assistance’ Official Journal, 28.4.2006, L 115/50-56, available online at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l\\_115/l\\_11520060428en00500056.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_115/l_11520060428en00500056.pdf) (last accessed March 2006).

<sup>139</sup> The EU Commission could, in the context of its programme “European Initiative for Democracy and Human Rights” provide financial assistance to third countries and Member States to ensure victim and witness protection outside the Agreement.

So far, the EU has received few requests. Under the terms of the Agreement, the Prosecutor of the ICC shall address request for information to the Secretary General/High Representative of the Council. The information made available by the EU may be used by the Prosecutor 'solely for the purpose of generating new evidence'.<sup>140</sup>

The agreement will be reviewed in five years' time and cooperation and assistance can then be further improved according to the experiences made.<sup>141</sup>

## **II.14 International approaches to accountability**

Various initiatives have been taken by international actors outside the EU to ensure that perpetrators of the worst crimes do not go unpunished. These concentrate either on legal issues, as for instance the study undertaken within the International Law Commission on the principle of 'aut dedere, aut judicare' and the Council of Europe's Pilot Project on State Practice Regarding State Immunity, or are very practice orientated as Interpol's working group on genocide, war crimes and crimes against humanity.

### ***II.14.1 The Interpol working group on genocide, war crimes and crimes against humanity***

As the world's biggest police organisation, with 186 member countries, Interpol facilitates cross-border police cooperation and supports and assists all organisations and authorities that seek to prevent or combat international crimes. A global police communication network as well as various databases ensure cooperation between the member countries. Interpol staff also can provide operational police support.

With the resources available and the support of its member countries, Interpol is an important component in ensuring global accountability for international crimes. It assists the ad-hoc tribunals in the location and apprehension of criminals wanted for genocide, war crimes and crimes against humanity, primarily through the publication of 'Red Notices'<sup>142</sup> or through the provision of investigative assistance. Cooperation agreements have been signed between Interpol and the ICC, the Special Court for Sierra Leone and the UN Mission in Kosovo.

In 2003, Interpol initiated its 'Special International Crimes Project' on genocide, war crimes and crimes against humanity, intended to provide international coordination

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<sup>140</sup> Article 11 (2) and (3) of the Agreement.

<sup>141</sup> Article 19 of the Agreement.

<sup>142</sup> One example of how Red Notices can facilitate an arrest of suspects is the case of former Croatian Army General Ante Gotovina, who was arrested in December 2005, after a Red Notice for war crimes and crimes against humanity had been published at the request of the ICTY in 2001. Red Notices can be accessed online at <http://www.interpol.int/Public/Wanted/Default.asp> (last accessed March 2007).

and support to member countries' law enforcement agencies responsible for the investigation and prosecution of serious international crimes. A working group on genocide, crimes against humanity and war crimes was established after a first 'Expert meeting' in March 2004.<sup>143</sup> The working group established three main tools to enhance the coordination of the fight against impunity for serious international crimes:

1) A list of contact points in member countries

In 2004, Interpol sent a questionnaire to all member countries to identify national points of contact and to provide information concerning their legal mandate. More than 50 countries have responded, with their information available to contact points on Interpol's (secure) website.

2) An increased use of Interpol's databases

In addition to using the 'Interpol Criminal Information System' which is used to support other international investigations, contact points and other practitioners can use the 'Structured Exchange of Information Form'. The form is designed to assist practitioners in a structural and practical way, to know who is investigating what, to improve sharing of information of events, physical evidence and witnesses.

3) Preparation of a best practice manual

A draft index for a best practice manual was prepared. To speed up the process, the investigators' manual of the 'Institute for International Criminal Investigations', based in San Francisco, together with the Institute for Criminal Investigations Foundation in The Hague was put up on the website of Interpol.

According to a list of the Rwandan prosecution services, 93 alleged perpetrators are currently residing in countries other than Rwanda, 60 of whom are referred to in Interpol Red Notices. Interpol is hoping to revitalise its 'Rwanda Genocide Fugitive Project' and to increase investigative efforts against fugitive suspects. Interpol will provide training to the National Central Bureau in Kigali to publish Red Notices for the remaining genocide fugitives and identify means to make funding and training available to the Rwandan National Police to assist Rwanda's fugitive unit.

Interpol's initiative can provide crucial support to investigators of serious international crimes. In particular its broad membership of 186 countries can contribute to make information available more easily, provided that member countries send relevant information to Interpol's databases. Training initiatives as well as establishing best practice manuals will also render important assistance. With its focus on investigators and wide membership, Interpol's 'working group' is an excellent

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<sup>143</sup> See also <http://www.interpol.int/Public/CrimesAgainstHumanity/default.asp> (last accessed March 2007); a third meeting of International Experts on genocide, crimes against humanity and war crimes will take place in Ottawa on 6-7 June 2007.

complement to the EU Network of Contact Points, whose mandate and composition is broader and allows for focused discussions and case studies. Working group meetings of Interpol, bringing together investigators from different regions in the world will further facilitate contacts and thereby render potential future requests for mutual legal assistance less formal and time consuming and more efficient.

## **II.14.2      *The Council of Europe***

The Council of Europe was established in 1949 and is comprised of 46 European countries.<sup>144</sup> Its objectives include defending human rights and developing a ‘continent-wide agreement to standardise Member States’ social and legal practice’.

To accomplish these objectives, a special Committee of Legal Advisors on Public International Law (CAHDI) was set up, which brings together Member States’ foreign affairs legal advisers as well as representatives from observer States and organisations. CAHDI meets twice a year and seeks to, inter alia, create a framework for international cooperation and to share experience and practice through exchange of ‘views on topical issues.’

Recent activities of the CAHDI included the consideration of immunities of heads of State and other Government officials and the obligations of States to prosecute those accused of international crimes.<sup>145</sup> It has also considered developments regarding the international criminal tribunals and the ICC. As such, it is closely linked to and liaises with the COJUR working group of the Council of the European Union.<sup>146</sup>

In 2002, the CAHDI initiated a pilot project on State practice regarding State Immunities, which analyses material submitted by 27 Member States and one Observer State of the Council of Europe, including decisions of national courts, relevant legislation and other documents.<sup>147</sup> This study did not include the question of whether immunity should be available in cases concerning allegations of serious international crimes. This issue recently arose in the Council of Europe in the context of the question on ‘secret detention and transport of detainees suspected of terrorist acts.’ The Secretary-General stated in his recommendations that ‘international law should not regard it as being contrary to the dignity or sovereignty equality of nations to

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<sup>144</sup> See <http://www.coe.int/DefaultEN.asp> (last accessed March 2007).

<sup>145</sup> CAHDI (2002) 3, Meeting report of 23rd Meeting on 4/5 March 2002, available online at [http://www.coe.int/t/e/legal\\_affairs/legal\\_cooperation/public\\_international\\_law/texts\\_&\\_documents/2002/CAHDI\\_2002\\_8E.pdf](http://www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/texts_&_documents/2002/CAHDI_2002_8E.pdf) (last accessed March 2007).

<sup>146</sup> See website of the CAHDI for further details at <http://www.coe.int/t/e/legal%5Faffairs/legal%5Fco%2Doperation/public%5Finternational%5Flaw/General/> (last accessed March 2007).

<sup>147</sup> Gerhard Hafner, Marcelo G. Kohen and Susan Breau (eds.), “State Practice Regarding State Immunities”, 2006; the national contributions are available online on the CAHDI’s website: Database on State Practice regarding State immunity. [http://www.coe.int/t/e/legal\\_affairs/legal\\_cooperation/public\\_international\\_law/State\\_Immunities/default.asp#TopOfPage](http://www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/State_Immunities/default.asp#TopOfPage) (last accessed March 2007).

respond to claims against them'.<sup>148</sup> The Secretary-General went further to note that: "We need to establish clear exceptions to State immunity in cases of serious human rights abuses. This work should be done through co-operation between governments at European level."<sup>149</sup>

### ***II.14.3 The International Law Commission and the obligation to extradite or prosecute***

The International Law Commission (the "Commission") was established in 1949 and seeks to foster the progressive development and codification of international law.<sup>150</sup> It is comprised of 34 members who are elected by the UN General Assembly and who act in their own capacity, rather than as representatives of governments.<sup>151</sup>

In 2004, the Commission identified the topic "Obligation to extradite or prosecute (aut dedere aut judicare)" for inclusion in its long term programme of work and appointed a Special Rapporteur on this topic.<sup>152</sup> The first report of the Special Rapporteur was considered by the Commission at its 2899<sup>th</sup> to 2903<sup>rd</sup> meetings from 25 July to 2 August 2006.<sup>153</sup>

#### ***- General duty to extradite or prosecute?***

One of the issues highlighted by the Rapporteur was the question whether the obligation to extradite or prosecute derives solely from the relevant treaty or whether it was a general obligation under international law. Although no consensus on this question could be established, a growing number of scholars support the concept of an international 'extradite or prosecute obligation' as a general duty, at least with respect to a certain category of crimes. Some members of the Commission agreed that the obligation to extradite or prosecute had acquired customary status as far as crimes under international law were concerned.

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<sup>148</sup> Secretary-General, 'Follow-Up to the Secretary General's reports under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies' (SG/Inf (2006)5 and SG/Inf(2006)13) at para. 17; available online at [http://www.coe.int/t/dc/press/source/20060907\\_DocSG\\_en.doc](http://www.coe.int/t/dc/press/source/20060907_DocSG_en.doc) (last accessed March 2007).

<sup>149</sup> Ibid., at para. 17(a).

<sup>150</sup> For further background see the website of the "International Law Commission, at <http://www.un.org/law/ilc/> (last accessed March 2007).

<sup>151</sup> For a list of current members see <http://www.un.org/law/ilc/> (last accessed March 2007).

<sup>152</sup>The UN General Assembly approved the work programme of the Commission in its resolution 60/22 of 23 December 2005, see [http://untreaty.un.org/ilc/guide/7\\_6.htm](http://untreaty.un.org/ilc/guide/7_6.htm).

<sup>153</sup> International Law Commission, fifty-eighth Session (1 May to 9 June and 3 July to 11 August 2006), <http://untreaty.un.org/ilc/sessions/58/58sess.htm>; A copy of the Preliminary report on the 'Obligation to extradite or prosecute ("aut dedere aut judicare")', A/CN.4/571, by Zdzislaw Galicki, Special Rapporteur, 7 June 2006, is available online at <http://untreaty.un.org/ilc/sessions/58/58docs.htm> (last accessed March 2007).

### **- Difference between the obligation to extradite or prosecute and universal jurisdiction**

The majority of Members of the Commission agreed that the obligation to extradite or prosecute should be distinguished from the obligation to exercise universal jurisdiction, which extends to a more limited number of crimes. However, as far as certain categories of crimes are concerned, both concepts are applicable and have received 'general recognition' amongst States. A study on the different aspects and forms of universal jurisdiction, in particular whether it is permissive or compulsory should be considered and take into account whether universal jurisdiction could 'only be exercised when the person was present in a particular state or whether any state could request the extradition of a person from another state on grounds of universal jurisdiction'.

### **III. Universal jurisdiction in practice: an overview of case developments in Europe since 2004**

Over the past three years, the exercise of universal and other forms of extraterritorial jurisdiction has become more established. Within the EU, such investigations and prosecutions have occurred in Western European countries, with no documented cases or complaints in the new Member States. This might change with the ongoing law reform programmes of such countries and other changes brought about by the ratification of the ICC Statute and EU accession processes.

At the time of writing, victims and prosecutorial authorities resorted to universal or other forms of extraterritorial jurisdiction in at least 38 instances since 2004.<sup>154</sup> The following is an overview of the issues involved in some of these cases:

#### **- Initiating a complaint:**

Victims filed at least 25 complaints in Belgium, France, Germany, Spain, Sweden, and the United Kingdom. Most cases relate to Spain and France, as the main countries that utilise 'partie civile' or acción popular'. Immigration authorities in The Netherlands referred at least four cases to the prosecution authorities.<sup>155</sup> Media reports and NGO pressure about the presence of four suspects alleged to be involved in the Rwandan

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<sup>154</sup> The real number is likely to be much higher than this, as for instance the Danish Special International Crimes Office on its website reports about 129 cases since its establishment in 2002, see <http://www.sico.ankl.dk/page34.aspx> (last accessed March 2007). Yet details about individual cases are difficult to obtain and these 34 complaints have received media and NGO attention. As they affect a relatively large number of European countries, they will be taken as a representative sample of the issues involved in universal jurisdiction/ international crimes cases.

<sup>155</sup> These include the cases of Heshamuddin Hesam and Habibullah Jalalzoy, supra n. 55 and 87 respectively, the case of 'Joseph M', a Rwandan national arrested in Amsterdam in August 2006, supra n. 80; the case of 'Abudallah F', an Afghan national arrested on 31 March 2006, further information available at [http://kabulpress.org/English\\_letters16.htm](http://kabulpress.org/English_letters16.htm); the case of Sebastien Nzapali, convicted in 2004 for torture to 30 months imprisonment, see [http://www.trial-ch.org/en/trial-watch/profile/db/facts/sebastien\\_nzapali\\_47.html](http://www.trial-ch.org/en/trial-watch/profile/db/facts/sebastien_nzapali_47.html) (last accessed March 2007).

genocide led to an arrest pursuant to an extradition request in the United Kingdom.<sup>156</sup> Prosecution initiated investigations combined with media reports led to the investigation and issuance of arrest warrants in two cases involving “extraordinary renditions” in Italy<sup>157</sup> and Germany<sup>158</sup> and an investigation against a Rwandan suspect in Denmark, where authorities discovered that Sylvaire Ahorugeze was living in Denmark after going through a list of alleged perpetrators issued by the Rwandan Prosecution services.<sup>159</sup> The International Criminal Tribunal for Rwanda officially requested two countries, Norway and The Netherlands, to consider to accept a referral of the case of Michel Bagaragaza.<sup>160</sup>

The results of the complaints vary. At least 20 of the cases are ongoing with authorities either continuing investigations or complaints pending before a court. In six cases, investigations have been closed and in 10 further cases, investigations resulted in prosecutions and convictions. Some of the cases that have been closed were re-opened when victims filed another complaint, as happened in the case against Donald Rumsfeld, which was dismissed by the German Federal Prosecutor in 2005 and re-filed in November 2006.<sup>161</sup>

#### **- Ongoing cases:**

According to publicly available information, a number of universal jurisdiction investigations are ongoing in Denmark, Germany, Italy and The Netherlands. Cases are pending before prosecution authorities or courts in France, Spain and The United Kingdom. Of these, France is the country with the highest number of ongoing investigations or pending cases involving serious international crimes. More than 13 cases, in which FIDH is representing victims and some of which have been filed as long as 12 years ago, are currently pending before French courts.<sup>162</sup> The slowness of

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<sup>156</sup> Jon Swain, ‘Hunt on in Britain for more Rwanda genocide suspects’, The Sunday Times, 31 December 2006, available online at [http://www.timesonline.co.uk/tol/newspapers/sunday\\_times/britain/article1265386.ece](http://www.timesonline.co.uk/tol/newspapers/sunday_times/britain/article1265386.ece) (last accessed March 2007).

<sup>157</sup> EU- wide warrant over ‘CIA kidnap’, BBC NEWS, 23 December 2005, at <http://news.bbc.co.uk/2/hi/europe/4555660.stm> (last accessed March 2007); Spiegel Online, ‘Renditions Victim speaks out: CIA Kidnapping Leaves Ex-Terror Suspect a Broken Man’, 19 March 2007, online at <http://www.spiegel.de/international/0,1518,472495,00.html> (last accessed March 2007).

<sup>158</sup> Spiegel Online, “US displeased over German Hunt for CIA Agents”, 5 March 2007, online at <http://www.spiegel.de/international/0,1518,469884,00.html> (last accessed March 2007).

<sup>159</sup> Denmark arrests suspect in Rwanda genocide, online at <http://www.genocidewatch.org/RwandaDenmarkArrestsSuspectInRwandaGenocide8Sept2006.htm> (last accessed March 2007).

<sup>160</sup> See above, page 8/9 and [http://www.trial-ch.org/en/trial-watch/profile/db/facts/michel\\_bagaragaza\\_378.html](http://www.trial-ch.org/en/trial-watch/profile/db/facts/michel_bagaragaza_378.html) (last accessed March 2007).

<sup>161</sup> Supra n. 44.

<sup>162</sup> Ongoing cases include the case of Khaled Ben Said (Tunisia), the ‘Disappeared of the Beach case’ (Republic of Congo Brazzaville), a case against Chilean officials, cases against Rwandan suspects including Wenceslas Munhyeshyaka, Callixte Mbarushimana and cases against two Algerian nationals, Abdelkader Mohamed and Hocine Mohamed; for more information on these and other cases see [http://www.fidh.org/rubrique.php?id\\_rubrique=367](http://www.fidh.org/rubrique.php?id_rubrique=367) and <http://www.trial-ch.org/en/trial-watch/search.html>; for information on Universal Jurisdiction in France see FIDH Legal Action Group, ‘Implementing the principle of universal jurisdiction in France’, 29 March 2006, available online at [http://www.fidh.org/IMG/pdf/universal\\_juris.pdf](http://www.fidh.org/IMG/pdf/universal_juris.pdf) (last accessed March 2007).

proceedings has been attributed to a lack of resources available to French investigative judges, an absence of prosecutorial strategy and in some instances political interference. On the application by the victims in the case of Wenceslas Munyeshyaka, the European Court of Human Rights condemned France for the slowness of proceedings as violating the right of the victims to a hearing in due time.<sup>163</sup>

Proceedings against several Guatemalan nationals, including former President Rios Montt, have been ongoing in Spain for the past 8 years. With the Spanish prosecution opposed to the proceedings, victims were forced to file several appeals against court decisions dismissing the case for a lack of jurisdiction. It was only after September 2005, when the Constitutional Court recognized Spain's jurisdiction over the case, that the case started to move forward.<sup>164</sup> However, the international arrest warrants issued by the Spanish investigative judge against several suspects, including Rios Montt, has yet to be complied with by the Guatemalan authorities.<sup>165</sup>

Investigations against one Afghan and one Rwandan national are currently underway in The Netherlands<sup>166</sup> while Danish investigators commenced an investigation against a person suspected of participation in the Rwandan genocide which is still ongoing.<sup>167</sup>

At least one universal jurisdiction trial will commence in 2007 in Belgium, where court proceedings against Bernard Ntuyahaga will start on 19 April 2007.<sup>168</sup>

#### **- Dismissals and closed cases**

Several cases have been dismissed by the competent authorities. Following the dismissals, several complainants filed appeals in cases in Belgium, France, Germany and Spain.

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<sup>163</sup> European Court of Human Rights, *Mutimura v France* (application no 46621/99), 8 June 2004, Press Release available at <http://www.echr.coe.int/eng/Press/2004/June/AnnounceJudgments080604.htm> (last accessed March 2007).

<sup>164</sup> Constitutional Tribunal, judgement of 26 September 2005; for an Analysis of the Judgment see : Hervé Ascensio, 'The Spanish Constitutional Tribunal's Decision in Guatemalan Generals- Universality is back' , *Journal of International Criminal Justice* 4 (2006), pp586-594.

<sup>165</sup> Spain judge charges ex-generals in Guatemala genocide case, 8 July 2006, online at <http://jurist.law.pitt.edu/paperchase/2006/07/spain-judge-charges-ex-generals-in.php> (last accessed March 2007); other ongoing cases in Spain include the complaint filed against several Chinese officials by Tibetan victims and member of the Falun Gong; for further information, see FIDH & REDRESS, EU Update on Serious International Crimes, June 2006, page 7, available online at <http://www.redress.org/publications/EU%20Report%20vol%201%20June%202006%201%20.pdf> (last accessed March 2007); complaints have been filed by Spanish and Rwandan victims against high ranking officers of the Rwandan Patriotic Army, see [http://www.veritasrwandaforum.org/prensa\\_en.htm](http://www.veritasrwandaforum.org/prensa_en.htm) (last accessed March 2007).

<sup>166</sup> *Supra*, n. 156.

<sup>167</sup> *Supra*, n.160.

<sup>168</sup> The trial of Bernard Ntuyahaga is scheduled to begin on 19 April 2007, see <http://www.hirondelle.org/arusha.nsf/LookupUrlEnglish/442766D9BA5E745AC12572980025EBFD?OpenDocument> (last accessed March 2007).

Reasons for closing cases included a lack of jurisdiction in the case of Michel Bagaragaza, who was to be transferred from the ICTR to Norway.<sup>169</sup> The German Federal prosecutor dismissed a complaint against Zokirjon Almatov in Germany, arguing that there was no possibility to investigate abroad (in Uzbekistan) and that the case would therefore be dismissed. Victims appealed this decision and the case is currently pending in front of the Higher Regional Court.<sup>170</sup> In the case against Donald Rumsfeld, dismissed in February 2005, the German Federal Prosecutor argued that the crimes referred to in the complaint were already investigated by US authorities and that accordingly no investigation could be opened.<sup>171</sup>

A complaint filed by Somali victims against Abdi Hassan Awale for war crimes in Sweden on 16 October 2005 led to his arrest on the same day. However, he was released three days later and the case was dismissed due to a lack of evidence.<sup>172</sup> On 23 January 2006, two Swedish human rights organizations filed a complaint against Vjatjeslav Sucharev for crimes against humanity and war crimes, allegedly committed during the armed conflict in Chechnya. Swedish authorities dropped the case three days later, arguing that as a guest of the Swedish Government, Sucharev would benefit from immunity and that therefore the chances to obtain the 'Government's consent for proceeding with the prosecution were slim'.<sup>173</sup>

The Spanish National Court ('Audiencia Nacional') on 20 December 2006 held that it did not have jurisdiction to hear the case of Ricardo Miguel Cavallo, who was previously extradited from Mexico to Spain for 'acts of terrorism and genocide crimes'. His extradition to Argentina is currently pending and was appealed by the complainants.<sup>174</sup>

### **- Convictions**

Over the past three years, 9 investigations led to convictions for torture, war crimes, crimes against humanity and genocide.

The first Dutch universal jurisdiction case that resulted in a conviction was the case of Sebastien Nzapali, who, on 7 April 2004, was convicted for torture and sentenced to

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<sup>169</sup> Supra n. 16.

<sup>170</sup> Human Rights Watch, 'Germany: Victims appeal decision on Uzbek Ex-Minister', 2 February 2007, available online at [http://hrw.org/english/docs/2007/02/02/german15232\\_txt.htm](http://hrw.org/english/docs/2007/02/02/german15232_txt.htm) (last accessed March 2007).

<sup>171</sup> The Decision of the Federal Prosecutor in the first case against Donald Rumsfeld of 24 June 2005 is available online at <http://www.diefirma.net/download.php?8651010ea2af5be8f76722e7f35c79de&hashID=44b8c6eba6a3530e554210fa10d99b3a> (German) and on [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/german\\_appeal\\_english\\_tran.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/german_appeal_english_tran.pdf) (English).

<sup>172</sup> 'Sweden arrests Somali man for war crimes', 18 October 2005, <http://www.somaliland.org/ns.asp?ID=05101806> (last accessed March 2007).

<sup>173</sup> Suspected War Criminal avoids investigation, 26 January 2006, <http://shc.mediaonweb.org/en/1/60/339/?tpl=64> (last accessed March 2007).

<sup>174</sup> For an overview of the case against Ricardo Miguel Cavallo see [http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/ricardo-miguel\\_cavallo\\_48.html](http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/ricardo-miguel_cavallo_48.html) (last accessed March 2007).

30 months imprisonment.<sup>175</sup> In 2005 Dutch authorities prosecuted two Afghan nationals, who were convicted and sentenced to 12 and 9 years respectively for war crimes and their convictions were confirmed on appeal.<sup>176</sup> The case of Frans van Anraat concerned a Dutch national who, on 12 December 2005, was convicted by a Dutch court to 15 years imprisonment for complicity in war crimes. The war crimes unit in The Netherlands succeeded in establishing that van Anraat provided Saddam Hussein's regime with chemical supplies, which were used during the 'Anfal Campaign' against the Kurds in 1988.<sup>177</sup>

In the United Kingdom, Faryadi Zardad, was convicted on 19 July 2005 of hostage-taking and torture in Afghanistan during the 1990s and sentenced to 20 years imprisonment. Investigators of the British anti-terrorist unit as well as members of the Crown Prosecution Service and the defense carried out several investigative trips to Afghanistan, where they investigated under the protection of the British army.<sup>178</sup>

On 19 April 2005, Adolfo Scilingo was convicted by the Spanish *Audiencia Nacional* to 640 years imprisonment for crimes against humanity committed during Argentina's dirty war in the 1970s.<sup>179</sup>

In Belgium, Etienne Nzabonimana and Samuel Ndashyikirwa were convicted to 12 and 9 years imprisonment respectively on 9 May 2005.<sup>180</sup>

On 1<sup>st</sup> July 2005 in France, the Cour d'assises (criminal court) of Nîmes sentenced the Mauritanian Captain Ely Ould Dah to ten years in prison, the maximum term, for torturing Black-African servicemen in 1990 and 1991.<sup>181</sup>

#### IV. Legislative overview of 'new' European Union Member States

Following the accession to the EU by 10 States on 1 May 2004, Romania and Bulgaria joined on 1 January 2007, bringing the total of EU Member States to 27.<sup>182</sup> Several of

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<sup>175</sup> Supra n.156.

<sup>176</sup> Ibid

<sup>177</sup> Saddam's 'Dutch link', 23 December 2005, [http://news.bbc.co.uk/2/hi/middle\\_east/4358741.stm](http://news.bbc.co.uk/2/hi/middle_east/4358741.stm) (last accessed March 2007).

<sup>178</sup> R v Zardad, Central Criminal Court, Judgment of 19 July 2005, see <http://www.redress.org/news/Zardad%20Case%20Comment%2019%20July%202005.pdf> (last accessed March 2007).

<sup>179</sup> Audiencia Nacional, Criminal Chamber, File No 19/1997, 19 April 2005, available online in Spanish at <http://www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html> (last accessed March 2007).

<sup>180</sup> Cour d'Assises, 29 June 2005; see also 'Rwandans sentenced over genocide', 29 June 2005, <http://news.bbc.co.uk/2/hi/africa/4635637.stm> (last accessed March 2007).

<sup>181</sup> International Federation for Human Rights, 'Ely Ould Dah convicted after six years of proceedings', 2 July 2005, available online at [http://www.fidh.org/article.php?id\\_article=1809](http://www.fidh.org/article.php?id_article=1809) (last accessed March 2007).

<sup>182</sup> The European Commission, 'Past enlargements', [http://ec.europa.eu/enlargement/enlargement\\_process/past\\_enlargements/index\\_en.htm](http://ec.europa.eu/enlargement/enlargement_process/past_enlargements/index_en.htm) (last accessed March 2007).

the new Member States have enacted legislation specifically referring to certain international crimes and most enable the exercise of universal or other forms of extraterritorial jurisdiction over some of these crimes. The following is an overview of some of the key issues relating to the legislative framework of a number of the newer Member States.<sup>183</sup>

## Definition of crimes

None of the countries examined incorporated all crimes referred to in the Geneva Conventions, the Convention against Torture or the Rome Statute, nor did they introduce a specialised code incorporating international crimes.

### *- Crimes against Humanity*

Of the crimes referred to in the Rome Statute, crimes against humanity are the least defined within the countries considered. In the Bulgarian Criminal Code, the crime of apartheid is the only one of the acts listed in Article 7 of the Rome Statute to be defined as a crime against humanity.<sup>184</sup> The definition of crimes against humanity found in the Hungarian Criminal Code is limited to an explanation of the crime of apartheid and ‘crimes against a national, ethnic racial or religious group’.<sup>185</sup> The Czech,<sup>186</sup> Estonian<sup>187</sup> and Lithuanian<sup>188</sup> Criminal Codes list several acts as constituting crimes against humanity, with each Code providing less comprehensive definitions than Article 7 of the Rome Statute.<sup>189</sup> The Slovak Criminal Code, which entered into force on 1 January 2006, provides for a definition of crimes against humanity<sup>190</sup> that refers directly to the definition contained in Article 7 of the Rome Statute.

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<sup>183</sup> The countries examined for the purposes of this report are Bulgaria, Czech Republic, Estonia, Hungary, Lithuania, Slovak Republic.

<sup>184</sup> Bulgarian Criminal Code, (as amended by SG 43/20 May 2005), Chapter fourteen, Outrage on Peace and Humanity, Section III, Article 417, 418; available online at [http://www.mvr.bg/NR/rdonlyres/330B548F-7504-433A-BE65-5686B7D7FCBB/0/04\\_Penal\\_Code\\_EN.pdf](http://www.mvr.bg/NR/rdonlyres/330B548F-7504-433A-BE65-5686B7D7FCBB/0/04_Penal_Code_EN.pdf); current law reform procedures will have an impact on the criminal procedural code and the criminal code, see [http://www.mjeli.government.bg/Npk/docs/Concept\\_ReformPenalJustice.pdf](http://www.mjeli.government.bg/Npk/docs/Concept_ReformPenalJustice.pdf) (last accessed March 2007).

<sup>185</sup> Hungarian Criminal Code, Chapter XI, Title I ‘Crimes against the Peace’, Section 157 (Apartheid) and Section 156 (Crime Against a National, Ethnic, Racial or Religious Group).

<sup>186</sup> Czech Republic, Penal Code of 1999, Section 262-265, available online at <http://www.icrc.org/ihl-nat.nsf/WebLAW!OpenView&Start=1&Count=300&Expand=42.2.1#42.2.1> (last accessed March 2007).

<sup>187</sup> Estonia, Penal Code (as of 02.01.2003), Paragraph 89, available online at <http://www.legaltext.ee/en/andmebaas/tekst.asp?loc=text&dok=X30068K6&keel=en&pg=1&ptyyp=RT&tyyp=X&query=code> (last accessed March 2007).

<sup>188</sup> Lithuanian Criminal Code, Section XV ‘Crimes against Humanity and War Crimes, Article 100 (Treatment of People Prohibited under International Law).

<sup>189</sup> The Czech Republic has signed, but not ratified the Rome Statute.

<sup>190</sup> Section 425 (1) of the Slovak Criminal Code reads: ‘Any person who commits a crime against civilians considered to be a crime against humanity under Article 7 of the Rome Statute of the International Criminal Court shall be sentenced to prison term of twelve to twenty-five years or to life term’; unofficial translation of the Ministry for Foreign Affairs of the Slovak Republic.

### **- Genocide**

A definition of genocide is contained in each of the Criminal Codes and definitions in each reflect either Article 6 of the Rome Statute or Article 2 of the Genocide Convention.<sup>191</sup>

### **- War Crimes**

All Criminal Codes examined provide for different definitions of war crimes. As with crimes against humanity, the number of acts constituting war crimes and referred to in the Rome Statute and the Geneva Conventions is longer than the acts mentioned in the Bulgarian,<sup>192</sup> Czech,<sup>193</sup> and Hungarian<sup>194</sup>. Although not identical to the list of crimes referred to in the Geneva Conventions or the Rome Statute, the Lithuanian<sup>195</sup> and Estonian<sup>196</sup> Criminal Codes provide for an extensive definition of war crimes. The provision of the Slovak Criminal Code providing for a definition of war crimes refers directly to Article 8 of the Rome Statute.<sup>197</sup>

### **- Torture**

Torture is the crime that is least defined (as an international crime) of the four international crimes dealt with in this study. It is not referred to as a separate crime in the Penal Codes of Bulgaria, Estonia, Hungary or Lithuania. Where committed in the context of war, torture constitutes a war crime in the Bulgarian Criminal Code<sup>198</sup> and can amount to a crime against humanity and a war crime under Estonian law. Express references to torture as an international crime can be found in the Czech Criminal Code<sup>199</sup> and the Criminal Code of the Slovak Republic.<sup>200</sup>

## **Universal jurisdiction provisions**

The exercise of universal and other forms of extraterritorial jurisdiction is provided for in all criminal (procedural) codes of the countries examined. However, the

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<sup>191</sup> Article 416 of the Bulgarian Criminal Code; Section 259 of the Czech Criminal Code; Paragraph 90 of the Estonian Criminal Code; Section 155 of the Hungarian Criminal Code; Article 99 of the Lithuanian Criminal Code; Section 418 of the Slovak Criminal Code.

<sup>192</sup> Bulgarian Criminal Code, Chapter fourteen, Section II Outrage on the laws and the practice of waging war, Article 410- 415a.

<sup>193</sup> Czech Criminal Code, Section 262-265.

<sup>194</sup> Hungarian Criminal Code, Chapter XI, Title II, Section 158-165.

<sup>195</sup> Lithuanian Criminal Code, Section XV, Article 101-113.

<sup>196</sup> Estonian Criminal Code, Chapter 8 'Crimes against Humanity and International Security, Division 4 'War Crimes, Section 94-109, available online at <http://www.legaltext.ee/en/andmebaas/tekst.asp?loc=text&dok=X30068K6&keel=en&pg=1&ptyyp=RT&tyyp=X&query=code> (last accessed March 2007).

<sup>197</sup> Slovak Criminal Code, Section 433.

<sup>198</sup> Chapter Fourteen of the Bulgarian Criminal Code "Outrage on Peace and Humanity": Section II lists a number of war crimes, Section III refers to Genocide and apartheid.

<sup>199</sup> Czech Criminal Code, Section 259a.

<sup>200</sup> Slovak Criminal Code, Section 420.

circumstances as well as the crimes subject over which it can be exercised, differ substantially. The Bulgarian,<sup>201</sup> Czech,<sup>202</sup> Estonian,<sup>203</sup> Hungarian<sup>204</sup>, Lithuanian<sup>205</sup> and the Slovak<sup>206</sup> Criminal Codes provide for the exercise of universal and other forms of extraterritorial jurisdiction over acts which the States are obliged to prosecute in accordance with an international treaty ratified by the States. All countries have ratified the UN Convention against Torture and the Geneva Conventions and authorities in Bulgaria, Czech Republic, Estonia, Hungary and the Slovak Republic therefore can exercise universal jurisdiction over torture and grave breaches of the Geneva Conventions.

In addition to the 'generic' provisions, express universal and extraterritorial jurisdiction is provided for in several Codes. The Bulgarian Penal Code provides for universal jurisdiction over "crime abroad against the peace and mankind"<sup>207</sup> which is not defined in subsequent Articles and crimes 'of a general nature' where they affect the interests of the Republic of Bulgaria or of a Bulgarian citizen.<sup>208</sup> The Czech Criminal Code provides for absolute universal jurisdiction over the offense of genocide and several war crimes/crimes against humanity (including 'cruelty in war', section 263).<sup>209</sup> Subject to the requirement of double criminality, the Estonian Criminal Code provides for passive and active personality jurisdiction over offences committed outside Estonia, including acts committed by an offender who becomes an Estonian citizen after the commission of the act.<sup>210</sup> Hungarian courts can exercise universal jurisdiction over crimes against humanity as referred to in Chapter XI, which includes genocide, the crime of apartheid and several war crimes.<sup>211</sup> Similarly, Lithuanian courts can exercise universal jurisdiction over the offences referred to in Section XV of the Criminal Code.<sup>212</sup>

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<sup>201</sup> Bulgarian Criminal Code, Chapter one, Objective and Scope of the Penal Code, Section II, Article 6 (2).

<sup>202</sup> Czech Penal Code, Section 20a (1)

<sup>203</sup> Estonian Criminal Code, Paragraph 8.

<sup>204</sup> Hungarian Criminal Code, Section 4.

<sup>205</sup> Lithuanian Criminal Code, Article 7.

<sup>206</sup> Slovak Criminal Code, Section 6, subject to double criminality requirement, 6 (1) (a).

<sup>207</sup> Bulgarian Criminal Code, Article 6 (1).

<sup>208</sup> Bulgarian Criminal Code, Article 5.

<sup>209</sup> Czech Penal Code, Section 19

<sup>210</sup> Estonian Criminal Code, Paragraph 7 (3) available online at <http://www.legaltext.ee/en/andmebaas/tekst.asp?loc=text&dok=X60027K4&keel=en&pg=1&ptyyp=RT&tyyp=X&query=code> (last accessed March 2007).

<sup>211</sup> Hungarian Criminal Code, Section 4.

<sup>212</sup> Lithuanian Criminal Code, Article 7.

The exercise of universal jurisdiction is subject to following criteria:

**- Presence of the suspect on the territory of the forum state**

Although there is no explicit reference to a presence requirement in the Lithuanian Criminal Procedural Code, practitioners have indicated that such presence would be necessary to implement the Code in practice.<sup>213</sup> Similarly, it appears that presence is a requirement for Slovak authorities to exercise universal jurisdiction where they are required to do so under an international agreement binding on the Slovak Republic.<sup>214</sup> No reference is made to a requirement of presence in the Bulgarian or Czech Criminal Code. The Estonian Code of Criminal Procedure lists a number of facts which prevent the investigation of a complaint and does not include the absence of the suspect from Estonian territory.<sup>215</sup> The Code does not require the accused to be present in court hearings where he or she is outside of Estonia and/or absconds and where a court hearing is possible without him or her.<sup>216</sup>

**- Prosecutorial Discretion**

No specific units or departments for the investigation and prosecution of serious international crimes appear to be in place within the countries examined. Prosecution and police authorities can decide whether or not to initiate an investigation of a complaint in the Czech Republic,<sup>217</sup> Estonia,<sup>218</sup> Lithuania<sup>219</sup> and the Slovak Republic.<sup>220</sup> Where there is evidence indicating that a crime has been committed, an investigation is obligatory in Lithuania.<sup>221</sup> In Hungary, the opening of an investigation based on universal jurisdiction requires the consent of the Prosecutor General, who enjoys absolute discretion.<sup>222</sup> In Lithuania, victims have the ability to appeal against the failure to open an investigation and the decision of the prosecutor to close an investigation in the pre-trial phase. Here, a pre-trial judge can overrule a decision taken by a prosecutor, including the Prosecutor General.<sup>223</sup> In the Czech Republic,<sup>224</sup> Estonia,<sup>225</sup> Hungary<sup>226</sup> and the Slovak Republic,<sup>227</sup> victims have to direct their

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<sup>213</sup> E-mail correspondence with Lithuanian practitioner, 20 September 2006.

<sup>214</sup> Slovak Criminal Code, Article 7 in conjunction with Article 6.

<sup>215</sup> Estonian Criminal Code, Paragraph 197.

<sup>216</sup> Estonian Criminal Code, Paragraph 269 2).

<sup>217</sup> Czech Criminal Procedure Code, Section 159a.

<sup>218</sup> Estonian Code of Criminal Procedure, Paragraph 193 (1).

<sup>219</sup> Lithuanian Code of Criminal Procedure, Article 166.

<sup>220</sup> Slovak Code of Criminal Procedure, Section 215.

<sup>221</sup> Lithuanian Code of Criminal Procedure, Article 168; this seems to be contrary to the stipulation of practitioners to require the presence of the suspect to commence an investigation based on universal jurisdiction.

<sup>222</sup> E-mail correspondence with Hungarian practitioner, 29 September 2006.

<sup>223</sup> E-mail correspondence with Lithuanian practitioner, 20 September 2006.

<sup>224</sup> Czech Criminal Procedure Code, Section 172.

<sup>225</sup> Estonian Code of Criminal Procedure, Paragraph 38 (1) in conjunction with Paragraph 204 (1).

<sup>226</sup> E-mail correspondence with Hungarian practitioner, 29 September 2006.

complaints to the superior of the Prosecutor who took the decision not to investigate or to terminate the investigation.

### **- Immunity**

All of the countries examined provide for immunities in accordance with international law. Article 3 (2) of the Penal Code of Bulgaria provides for immunity of foreigners in accordance with the 'norms of the international law' adopted by the Republic of Bulgaria.<sup>228</sup> Article 10 of the Czech Criminal Procedure Act 1961 ('Exemption from Jurisdiction of Law Enforcement Authorities) reflects national and international immunities and exemptions.<sup>229</sup> The Lithuanian Criminal Procedure Code will not be applicable to persons who are entitled to immunity from criminal jurisdiction by norms of international law.<sup>230</sup> The Slovak Criminal Procedure Code provides immunity from criminal procedures for persons 'enjoying immunities and privileges according to laws or international law'.<sup>231</sup>

### **- Statute of Limitation**

There is wide recognition of the inapplicability of statutes of limitation to certain crimes under international law. Yet the practice of States varies, in particular where the crimes are not specifically implemented into domestic law. For instance, torture as a crime that is not defined as an international crime in Estonian law is subject to a limitation period of five years.<sup>232</sup> According to Article 80 (1) of the Bulgarian Penal Code, all crimes under Bulgarian criminal law are subject to statutes of limitation, including international crimes and depending on the length of prison sentence they carry.<sup>233</sup> International crimes, including torture, as referred to in the Criminal Codes of the Czech<sup>234</sup> and Slovak Republic<sup>235</sup> are not subject to limitation periods and persons accused of international crimes can be prosecuted in both countries regardless of any lapse of time. According to Section 33 (2) of the Hungarian Criminal Code, no statutes of limitation are applicable with respect to crimes against humanity as referred to in Chapter XI.<sup>236</sup> Article 95 (5) of the Lithuanian Criminal Code provides for the non-application of time limitations to genocide and most war crimes and crimes against humanity as defined in Chapter XV.<sup>237</sup>

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<sup>227</sup> Slovak Criminal Procedure Code, Section 190.

<sup>228</sup> Bulgarian Criminal Code, Article 3 (2).

<sup>229</sup> Czech Criminal Procedure Act, Section 10.

<sup>230</sup> Lithuanian Criminal Procedure Code, Article 3 (1) (3)

<sup>231</sup> Slovak Criminal Procedure Code, Section 8.

<sup>232</sup> Estonian Code of Criminal Procedure, Paragraph 81 (1) 2), in conjunction with paragraph 122 and 4(3).

<sup>233</sup> Bulgarian Penal Code, Article 80 (1).

<sup>234</sup> Czech Penal Code, Section 67a (a).

<sup>235</sup> Slovak Criminal Code, Section 88. Limitation period may apply for the offence of supporting and promoting groups leading to the suppression of fundamental rights and freedoms (Article 421, 422), defamation of a nation, race or conviction (Section 423), and incitement to national, racial or ethnic hatred (424).

<sup>236</sup> Hungarian Criminal Code, Section 33 (2) (a), (b).

<sup>237</sup> Lithuanian Criminal Code, Article 95 (5).

## V. Conclusion - Closing the impunity gap in Europe

The past two decades have seen an unparalleled progress in ensuring accountability and justice on the basis of international law. International justice mechanisms have begun to put into practice what was agreed upon by the international community more than 50 years ago in the form of international treaties and conventions.

At the same time, 50 years after the Treaty of Rome, the European Union has gained considerable competencies and influence that today allows it to be a key supporter of international justice. European countries are at the forefront in ensuring that perpetrators of genocide, crimes against humanity, war crimes and torture are held accountable and that victims can access justice. The numerous investigations and prosecutions demonstrate that, with sufficient political will, challenges can be overcome and an essential contribution to the fight against impunity can be rendered on a national level.

The practice also shows that not all countries have implemented their international law obligations into domestic law or in practice. While 'new' Member States might be confronted with a considerable body of legislation to implement domestically, assistance should be sought from and rendered by those States that have already done so. New Member States, as well as the majority of 'older' Member States that have not yet done so, should also make sure to benefit from the experiences and expertise of the few Member States that have made progress in the investigation and prosecution of serious international crimes.

The fight against impunity for serious international crimes is of concern to all Member States, as a matter of their international law obligations but also as they will remain attractive 'ports of call' for victims and perpetrators escaping war, armed conflicts and dictatorships.

The European Union should adopt a more coherent internal policy in the fight against impunity to mirror its external commitment to international justice. Lessons learned from the fight against terrorism and organised crime illustrate that the EU can render a crucial contribution to ensure a consistent practice of Member States in the fight against cross-border crimes. The Network of Contact Points indicates the important support the EU is able to provide to Member States in the fight against impunity for serious international crimes and should be viewed as the starting point for collective action.

The first steps towards an EU approach to accountability for genocide, crimes against humanity, war crimes and torture have been taken. That such an approach is warranted and, given its competencies, legitimate within the current legal framework, appears to be beyond debate. The EU is in an excellent position to create a 'seamless web of justice' that takes into account the present legal framework of international law and that ensures that perpetrators do not benefit from the procedural gaps of Member States.

## **VI. Recommendations**

### **To European Union Member States, affiliated and applicant States**

#### **National implementation of international law obligations**

- ❑ Include the broadest possible definitions of crimes under customary and conventional international law. National implementing legislation should abolish statutes of limitation for serious international crimes and include the concept of command and superior responsibility and joint criminal enterprise.
- ❑ Exclude the application of immunities to persons who do not enjoy immunity under international law; exclude the availability of State Immunity for serious international crimes.
- ❑ Include the right of victims to participation and reparation and provide for adequate procedures for obtaining reparation; ensure that the right of victims to initiate proceedings or private prosecutions is not removed where it already exists under domestic law.
- ❑ Provide for civil and criminal universal jurisdiction over genocide, crimes against humanity, war crimes, torture and enforced disappearances, without any requirement that a suspect be present in the forum state at the time of filing the complaint.
- ❑ Consider introducing the requirement of anticipatory presence into domestic legislation where this does already form part of the law or established practice.

#### **Universal / extraterritorial jurisdiction**

- ❑ Increase the investigation and prosecution of serious international crimes and share the challenge of ending safe havens within Europe equally among European countries to the extent possible.
- ❑ Ensure that immigration services screen asylum and visa applicants for potential involvement in serious international crimes; provide for cooperation between immigration authorities, investigation and prosecution services to ensure that persons identified through immigration checks will be investigated and prosecuted, instead of deported.
- ❑ Determine clear and transparent criteria and guidelines for the exercise of prosecutorial discretion. Provide victims and complainants with a possibility to

judicially review the decision of the competent authorities not to investigate (or prosecute) their complaint.

- Ensure that the principle of ‘subsidiarity’ does not lead to impunity and that it is subject to judicial scrutiny rather than prosecutorial discretion.
- Interpret the principle of ‘subsidiarity’ narrowly to provide priority to the first State to assert jurisdiction (on whatever basis of jurisdiction) unless the territorial State can demonstrate that it is able and willing to exercise jurisdiction in a fair and prompt manner.

### **Investigation and Prosecution of Serious International Crimes**

- Establish specific practical arrangements for the investigation of serious international crimes such as specialised units within immigration, police and prosecution authorities that will ensure that serious international crimes are investigated on a consistent basis and enable practitioners to develop experience and expertise in the investigation and prosecution of these crimes.
- Consider setting up a fund for defense counsel to remedy an imbalance in funds available to the prosecution and defense and to pay for investigations of the defense abroad.

### **Network of Contact Points**

- Ensure that a contact point in charge of international crimes is appointed for the Network of Contact Points and attends all Network meetings; ensure that follow up from Network Meetings is discussed in the appropriate Ministries.
- Ensure that - in the absence of a small secretariat for the Network- regular meetings of the Network are convened by the country holding the Presidency or, if necessary, several countries in collaboration with the Council Secretariat of the European Union.

### **To the Council of the European Union**

- Consider the adoption of JHA Council Conclusions that request the Commission to submit a proposal of a Framework Decision on serious international crimes.
- Cooperate with the European Commission to adopt an Action Plan on serious international crimes, setting out an EU strategy on the fight against impunity.
- Ensure cooperation between the COJUR and Article 36 (CATS) working groups and provide for a regular exchange on the fight against impunity between the

General Affairs and External Relations (GAER) and the Justice and Home Affairs (JHA) Council.

- Follow up on conclusions adopted by the Network of Contact Points and include the conclusions in GAER as well as JHA Council discussions.
- Strengthen the Network of Contact Points and provide it with sufficient resources and an independent structure to ensure regular meetings of the Network; consider to appoint a Network Coordinator and to establish a small secretariat within Eurojust to foster the development of a consistent practice within Member States; ensure that necessary changes to Eurojust's legal framework are incorporated into current discussions on Eurojust's mandate.
- Continue to support the International Criminal Court and international criminal justice in negotiations with third countries.
- Cooperate closely with the Council of Europe working group on Public International Law (CAHDI).

## **To the European Commission**

- As participant in Council working group meetings, ensure that the fight against impunity for serious international crimes forms part of the agenda of Council working group meetings; encourage the Justice and Home Affairs Council to adopt conclusions outlining a European Union strategy for the fight against impunity for serious international crimes.
- Cooperate with the Justice and Home Affairs Council towards the draft of a Framework Decision on serious international crimes.
- Cooperate with the Justice and Home Affairs Council to draft an Action Plan on combating serious international crimes, setting out an EU strategy for the fight against impunity.
- Ensure the inclusion of serious international crimes in the follow up to the Hague Programme.
- Provide practical assistance to national authorities investigating serious international crimes abroad, including the use of premises and translation facilities.

- Consider to make funds available for the setting up of a European defense counsel fund, which could pay for investigations carried out by the defense abroad.
- Continue to support the International Criminal Court and international criminal justice in negotiations with third countries.

## **To the European Parliament**

- Consider adopting a resolution on the fight against impunity for genocide, crimes against humanity, war crimes and torture that touches upon the International Criminal Court and the international obligations of EU Member States.
- Include the fight against impunity on the agenda of the relevant committees, in particular the Sub Committee for Human Rights (DROI), Civil Liberties, Justice and Home Affairs (LIBE) and the Foreign Affairs (AFET) Committee.
- Continue to scrutinise Council and Commission activities in respect of serious international crimes and request to be informed about the progress made by the Council and Commission in that respect, in particular about the Network of Contact Points.

## **To the Network of Contact Points**

- Ensure that regular meetings are organised by the country holding the Presidency or, if necessary, by several countries in collaboration with the Council Secretariat of the EU; a provisional date for follow up meetings should be arranged at every Network meeting.
- To determine the agenda of Network Meetings, consult with contact points, experts from the ICC and other international courts and tribunals, civil society and policy makers of the European Union institutions to ensure that the agenda covers the most urgent issues relevant to investigators, prosecutors and policy makers alike.
- Consider how the Network of Contact Points could provide organisational support and practical information to countries that have not yet set up a specialised unit.

- Ensure close cooperation with Interpol and in particular its working group on war crimes, crimes against humanity and genocide, and with Europol and Eurojust.
- Make use of the existing financial programmes within the European Commission to receive training for practitioners through the European Police College, the European Judicial Training Network or the International Institute for Criminal Investigations.

## ANNEX I: Conference Programme



In collaboration with the Committee on Civil Liberties, Justice and Home Affairs  
and the  
Subcommittee on Human Rights

### Fostering an EU approach to Serious International Crimes

#### DAY I - MONDAY, 20 November 2006: EUROPEAN PARLIAMENT

13.45-14.15 Registration

14.15-14.30 Welcoming Address (Baroness Sarah Ludford, LIBE Committee)

14.30 - 14.45 Presentation of Project and conference background paper (Carla Ferstman, Director, REDRESS)

#### 14.45-15.30 PANEL I: Implementing international law obligations

Chair: Luisa Mascia, Europe Coordinator, Coalition for the ICC

Status of implementation of international law obligations by 25 Member States (Jürgen Schurr, FIDH/REDRESS)

Obstacles to the implementation of international law obligations: the example of Poland (Agnieszka Dabrowiecka, Ministry of Justice, Poland)

#### 15:30-16:45 PANEL II: Components of a regular enforcement of international criminal justice

Chair: Hervé Ascensio, Professor of International Law, University of Paris

The complementarity principle of the International Criminal Court (Hakan Friman, Ministry of Justice, Sweden)

Establishing universal jurisdiction as a key mechanism to ensure global accountability (Christopher Hall, Senior Legal Advisor, Amnesty International )

Impediments to the collaboration with International Tribunals (Siri Frigaard, Head of International Crimes Office, Oslo)

16:45-17:00 Coffee Break

#### 17.00-18:30 Panel III: Jurisdiction and admissibility

Chair: Judge Van Den Wyngaert, Judge at the International Criminal Tribunal for the former Yugoslavia

The presence requirement and consequences in practice (Jeanne Sulzer, lawyer and coordination of the FIDH legal action group, Paris)

The application of Prosecutorial Discretion in the context of International Criminal Law - (Alberto Fabbri, Federal Attorney, Switzerland)

The principle of subsidiarity in the context of International Criminal Law (Salvatore Zappala, Professor of International Law, University of Catania)

Immunities in civil cases (Lorna McGregor, International Bar Association)

**18:30-20:00 Reception**

## **DAY II -TUESDAY, 21 November 2006 : EUROPEAN PARLIAMENT**

**09:00-11:00 Hearing in the Sub-Committee for Human Rights (DROI)- The International Criminal Court and International Justice**

Introductory Remarks (Helene Flautre, Chairwoman, DROIT)

Functioning and Challenges of the ICC (Wilbert van Hövell, Senior External Relations Adviser, ICC)

Victims' participation at the ICC (Carla Ferstman, Director, REDRESS)

Victims of International Crimes and their access to justice (Patrick Baudouin, Lawyer and Coordinator of the Legal Action Group, FIDH, Paris)

The role of the EU in supporting and promoting the ICC (Paul Hardy, European Commission, External Relations)

**10:30-11:00 Coffee Break**

**11:00-12.45 PANEL I: Investigation of Serious International Crimes**

Chair: Chantal Joubert (Legal Counsel, Ministry of Foreign Affairs, Netherlands)

EU Member States leading the way: establishing expertise in the investigation and prosecution of Serious International Crimes (Geraldine Mattioli, Advocate, HRW)

The role of victims, their legal representatives and NGOs (Jeanne Sulzer, lawyer and coordination of the FIDH legal action group, Paris, & Carla Ferstman, Director, REDRESS)

Challenges of an investigation of international crimes committed abroad (Martijn van de Beek, Investigator and Head of War Crimes Unit, Netherlands)

Requests for mutual legal assistance from third states in universal jurisdiction cases (Juan Garces, Lawyer, Spain)

**12:45-13:30 Panel II: Prosecuting and defending alleged perpetrators of international crimes**

Chair: Philip Grant (President, TRIAL, Switzerland)

Trying perpetrators by Jury (Paul Taylor, Barrister, UK)

Fair trial issues arising in cases involving universal jurisdiction (Michiel Pestman, Lawyer, Netherlands)

**13:30-14:30 Lunch**

#### **14:30 - 16:00 Panel III National and EU cooperation**

Chair: Hans Nilsson, Head of Judicial Cooperation, Council Secretariat of the EU

The EU Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes: ensuring EU assistance in the investigation and prosecution of international crimes (Birgitte Vestberg, Prosecutor and Head of Special International Crimes Office, Denmark)

Europol, Eurojust and the European Judicial Network and their potential to contribute to a successful investigation and prosecution (Serge de Biolley, Assistant to the Institute for European Studies)

Complementing EU cooperation: the Interpol working group for Serious International Crimes (Atle Spønnich, Criminal Intelligence Officer, INTERPOL)

#### **Coffee Break 16:00-16:15**

#### **16:15-17:30 PANEL IV Unified European Framework**

Chair: Lorenzo Salazar, European Commission, Cabinet Frattini, DG Justice, Freedom and Security

Putting International Humanitarian law into practice: the implementation of the 'EU Guidelines on promoting compliance with International Humanitarian Law' (Stephane Kolanowski, ICRC)

The Cooperation and Assistance Agreement between the EU and the ICC (Diego Canga Fano, Legal Advisor, External Relations, Council Secretariat of the EU)

Exemplary Cooperation? The EU approach to the fight against terrorism (Peter Cullen, Head of Section, European Public and Criminal Law, European Academy of Law, Trier)

#### **17:30 Concluding Remarks**

Closing the impunity gap in the European Union (Karine Bonneau, Head of the International Justice Program, FIDH & Carla Ferstman, Director, REDRESS)



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## ANNEX II: List of Participants

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FRIGAARD Siri	Chief Public Prosecutor - National Authority for Prosecution of organised and other serious crime
FRIMAN Hakan	Deputy Director, Division for criminal cases and international judicial cooperation, Ministry of Justice, Sweden
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ZIAUDDIN Ahmed	Convener - Asian Network for the ICC
ZORN, Klaus	Detective Chief Inspector, Federal Criminal Police, Germany

## **ANNEX III: Fostering an EU approach to serious international crimes - Opening Speech by Baroness Sarah Ludford MEP**

I wish to extend my thanks to REDRESS and the International Federation for Human Rights for inviting me to open today's conference on this very important subject with such a wide range of eminent professionals.

I would like to congratulate REDRESS and FIDH on this important project and the initiative behind this conference. The next two days will see debates on a broad range of issues:

- This afternoon will be focussed on implementing international law obligations; components of enforcing international criminal justice; and, jurisdiction and admissibility.
- Tomorrow morning will be dedicated to a hearing in the Parliament's Human Rights Sub-Committee on the International Criminal Court and international criminal justice before spending the afternoon looking at 1) the investigation of serious international crimes; 2) prosecuting and defending alleged perpetrators of international crimes; 3) national and EU cooperation; and, 4) a unified European framework.

This conference is both timely and necessary. It is essential that those that perpetrate the most serious crimes of international concern -genocide, crimes against humanity, war crimes and torture - do not enjoy impunity by leaving the jurisdiction in which they have committed their crimes and finding safe haven elsewhere.

Perpetrators of international crimes do not recognise national borders. Likewise, as policy-makers we must ensure that states intensify co-operation between law enforcement and judicial services to get rid of the gaps in jurisdiction which can be easily exploited by such criminals. Impunity can only be tackled through coordinated effort at the national, regional and international levels. European states and the European Union must deliver on their commitment to liberty, respect for human rights and fundamental freedoms and the rule of law.

We live in difficult and insecure times, under a threat both of international terrorism and a misjudged response to it, and with daily headlines about atrocities such as in Darfur. The need to cooperate to build a powerful international justice system is more pressing than ever.

In September 2004, the US State Department concluded, perhaps controversially that the events in Darfur constituted 'genocide'. The International Commission of Inquiry on Darfur determined in January 2005 that massive crimes against humanity had taken place there. Yet, militias and government forces continue to operate within impunity.

In Iraq, at the beginning of this month former President Saddam Hussein was handed down a guilty verdict for crimes against humanity against inhabitants of the Iraqi town of Dujail. Yet there is evidence to suggest his trial has been undermined by serious flaws in proceedings, as Human Rights reminds us today.

The recent conflict between Israel and Lebanon also raises questions regarding violations of international humanitarian law. In a report from September this year, Amnesty International stated that: 'Some serious violations of international humanitarian law (...), are war crimes and give rise to international criminal responsibility for the perpetrators. These crimes are subject to universal jurisdiction (they may be prosecuted by any state in its national courts) and fall within the statute of the International Criminal Court.'

These examples clearly demonstrate the need for an international justice system which ensures full respect for the principles of impartiality, fairness, independence, individual criminal responsibility and effectiveness; we need accountability for the worst human rights violations and we need to put victims and their protection at the centre of this.

Important steps have been taken in developing a global justice system to fight impunity, particularly in the form of the International Criminal Court (ICC). The Rome Statute adopted in 1998 and which entered into force in July 2002 is the main instrument of redress for the most serious crimes, as well as acting as a deterrent.

However, its jurisdiction is limited and, under the system of complementarity set out in the Rome Statute, all states have an obligation to bring to justice those responsible for genocide, crimes against humanity and war crimes. The principle of complementarity demands that efforts are made on a national level to make this possible.

During the 1990s, the international community took unprecedented steps to limit the impunity associated with the horrific crimes of the end of the 20th Century. This has included the creation of international justice mechanisms such as the international tribunals for ex-Yugoslavia and Rwanda, the Special Court for Sierra Leone, and the application of universal jurisdiction to hold perpetrators of the most serious crimes to account.

The tribunals for the former Yugoslavia and Rwanda have made an important contribution to the prosecution of international crimes. The jurisprudence of the tribunals has established important precedents for international criminal law which are key for the fight against impunity. However, these tribunals need strong financial and political support as well as the full cooperation of countries in which crimes have been perpetrated if they are to complete their work successfully by the end of 2010.

On 1 November 2006, 104 states were party to the Rome Statute of the ICC. This is an important number of ratifications, yet universality will remain little more than a long-term objective until the US, China, Turkey, Russia, Japan and the countries of North Africa and the Middle East, amongst others, sign up to the ICC. Ultimately, its success depends on the support of states worldwide.

The ICC, together with national courts, international tribunals, mixed tribunals or other international accountability mechanisms have become a nascent 'system of international justice'.

As a member of the European Parliament's civil liberties, justice and home affairs committee and Liberal Democrat European justice spokeswoman, my main concern is what role the EU should be playing in promoting international justice, in ensuring that the international criminal justice system functions and in closing impunity gaps. What can the EU do to strengthen the rule of law and the protection of human rights worldwide?

The EU has two fundamental roles in promoting reconciliation, justice, peace and security in the world - an external role and an internal role. Let me briefly expand on these two issues.

Externally, the EU has contributed to the fight against impunity through bilateral and regional demarches to foster human rights. In addition to its human rights dialogues and making respect for human rights a cornerstone of its international contractual relations, it has undertaken specific initiatives such as adopting an EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment.

The EU has also used its leverage with third countries to foster support for international justice. For example, EU pressure has contributed to improvements in the countries of the Western Balkans' cooperation with the ICTY. The EU suspended entry talks with Croatia in March 2005 until Croatia intensified its cooperation with the ICTY, and most importantly handed over General Gotovina. Meanwhile, talks remain on hold with Serbia as this country has still failed to arrest war crimes suspect General Mladic. Full cooperation with the Tribunal has been an explicit and fundamental condition for deepening relations between the EU and the Western Balkan countries under the Stabilisation and Association Process. As a member of the European Parliament's delegation for South East Europe, I can testify to just how crucial this process is for people across the Balkans.

In the light of this good record, it is even more puzzling though that we allowed the US to go round the Balkans twisting arms for bilateral immunity agreements.....

Further afield, the EU has played an important role providing financial support to the Special Court for Sierra Leone - indeed, as the European Parliament noted in its resolution on the Special Court for Sierra Leone, EU member states have contributed more than \$30 million to support the functioning of the Court. On a diplomatic level, we called on the EU and its member states to build international pressure in order to bring about the extradition of Charles Taylor indicted on 17 counts of war crimes and crimes against humanity for his role in contributing to the death, rape, abduction, and mutilation of thousands of civilians during Sierra Leone's civil war from 1991 to 2002. It was a victory for international justice that Nigeria finally gave up Charles Taylor in March, paving the way for his trial at the ICC.

In the face of hostility from the US, the EU has been a leading force in the establishment and the strengthening of international justice mechanisms such as the ICC. Through its Common Positions and Action Plan the EU has come forward with concrete measures to achieve the objective of worldwide adherence to the Rome Statute and to preserve its integrity from any attempt to undermine its letter and spirit. The EU has also encouraged partner countries to make clear their commitment to the ICC, including a joint commitment to the ICC in the revised Cotonou Agreement signed with the African, Caribbean and Pacific countries last year.

As an active member of the parliament's informal grouping 'Friends of the ICC', I can assure you that through our many resolutions and initiative to include and increase provisions for the ICC in the EU budget, MEPs have been consistent in advocating the establishment, good functioning and worldwide adherence to the ICC and the values enshrined in the Rome Statute.

Finally, I would like to say a few words on the EU's role promoting international justice within the EU. One of the main challenges within the European Union is to ensure that victims' access to justice and the likelihood of perpetrators of international crimes not escaping impunity does not vary depending on the member state in which individuals find themselves. It is imperative that the patchwork of legal systems which makes up the EU does not make the EU a safe haven. Rather, we must work towards a single area of justice.

Important initiatives already undertaken in this respect include:

- The 2002 decision to set a network of contact points in respect of persons responsible for genocide, war crimes and crimes against humanity. This mechanism is designed to assist member states' national authorities to investigate and prosecute the most serious crimes of concern to the international community.
- This has been complemented by the 2003 Council decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, stepping up cooperation between member states' law-enforcement and prosecution services to work effectively in the criminal investigation and prosecution of the actual or suspected perpetrators of these crimes. Regrettably, however, only 4 MSS have complied and set up specialised units, and the lack of Commission powers to enforce this instrument illustrates the weakness of 'Third pillar' measures in this regard.
- The EU can also make a concrete contribution to the fight against impunity, equal access to justice and protection for victims through general judicial cooperation in criminal law. For example, the European Arrest Warrant applies to crimes under the Rome Statute, the European Evidence Warrant should facilitate the exchange of evidence and the Framework decision on the standing of victims in criminal proceedings from 2001 should facilitate access to legal advice and information for victims. Europol, Eurojust and the European Judicial Network can all also contribute to the effort of cooperation

However, initiatives undertaken to date are far too limited - both in scope and number. It is clear that more needs to be done within the European Union and member states must decide if they are willing to put to one side concerns over protecting their national sovereignty in order to build an effective EU response to the most serious of international crimes.

For example, by failing to include in the Hague programme the need for specific EU instruments covering international crimes, the member states effectively prevent the EU institutions from making more headway in this respect.

I remain deeply concerned by the weakness of democratic scrutiny, accountability and judicial oversight in this field. Initiatives under the third pillar of police and judicial co-operation in criminal matters are negotiated secretly through intergovernmental procedures. Thus the directly elected EP has only marginal influence, limited as it is to a consultative role with no real power in the decision-making process. National parliaments get even less of a look in than we do. It is a short-sighted view to imagine that fighting for international justice and the protection of human rights is best served by policy-makers huddling behind closed doors.

The EP has a major role to play in defending and further developing the advances in international justice that we have seen in the 1990s. The EP strongly supports the building of a European area of freedom, security and justice to meet the challenge of globalisation and serious international crime.

However, the EP cares equally strongly about not cutting corners on individual rights.

History will not look back on us kindly if we fail to do everything in our power to ensure that those who commit grave international crimes are punished, and to ensure that our justice procedures and systems are sufficiently robust to act as a strong deterrent. In that context, I should emphasise in conclusion how essential it is that we establish the truth about allegations of European collusion in the US programme of illegal 'extraordinary rendition' and hosting of secret prisons. The EU and its Member States cannot maximise their contribution to catching criminal human rights abusers from around the world while laying under a cloud of suspicion themselves.

## ANNEX IV: The Complementarity Principle of the International Criminal Court - Håkan Friman, Ministry of Justice, Sweden

It is a true pleasure for me to address this distinguished audience today concerning the principle of complementarity which is of course a corner stone of the ICC Statute. This principle appears in the Preamble of the Statute as well as in the opening article (art. 1). The substantive content is contained in article 17 of the Statute.

At the core is a shared responsibility for combating impunity for international crimes - States and the ICC - and primacy for national investigations and prosecutions. The ICC may proceed only in case of 'unwillingness or inability of the State genuinely to prosecute' (art. 17).

Nonetheless, this represents compromise language and different interpretations are possible. It is worth taking note of, however, that the requirements for unwillingness and inability in art. 17 are strict. And the principle is not restricted to States Parties. It furthermore applies from earliest stage of the proceedings and even into the trial.

Another interesting aspect, which did not receive much attention at Rome, was the possibility that States would refer situations (crimes) allegedly committed on their own territories to the ICC. So-called self-referrals. How does that relate to the principle of complementarity? Is such a State really unwilling or unable? Is there a risk for 'dumping' of unpleasant cases on the ICC? In practice these self-referrals have been accepted by the Court. And a widely held view is that the principle of complementarity, to be applicable, requires that domestic investigation and/or prosecution is or has been undertaken. If no such action is taken, there is no case of inadmissibility. In any case, however, the suspect's right to challenge the admissibility should be retained. But he or she does not have a right to choose jurisdiction.

We will hear more about this later in the conference.

Complementarity is a clever but also very difficult concept and it differs fundamentally from the relationship between international and domestic jurisdictions with regard to the ICTY, ICTR and Special Court for Sierra Leone. There the international jurisdiction is afforded primacy.

Apart from being a necessary element to reach a Statute of a permanent international criminal court at Rome, it would be unrealistic to work on the assumption that the ICC would have the capacity to deal with all crimes, and perpetrators, of this kind. The bulk of investigations and prosecutions must take place at a national level. The ICC Statute reflects this, *inter alia*, by the additional requirement of crimes of sufficient gravity in art. 17. The ICC Prosecutor has also adhered to a certain priorities in his prosecutorial strategy (available at the ICC webpage).

Positive aspects of the complementarity principle is the stick and carrot element that is built in and the widespread view that, generally, it is better to address these crimes domestically - the proceedings take place closer to the crimes and to the victims, reconciliation effects (and measures other than prosecution) are perhaps more likely, and it may promote the restoration (or introduction) of the rule of law in post-conflict societies. Another benefit is the increased focus on and introduction of 'war crimes legislation' domestically.

But scepticism may well stem from lack of capacity, lack of will (a dismal record), and insufficient fair trial standards. In practice, third States rather than the territorial States have often taken on the task of investigation and prosecution. And what benefits to post-conflict societies does that bring?

Complementarity is a difficult concept. It requires measures by States undertaken in good faith. While it is the ICC that determines the complementarity criteria - the admissibility of the case - but it is

difficult to collect and assess information (evidence) regarding domestic measures. Such assessment must be made by the Prosecutor but also by the Judges/Chambers.

The Prosecutor has expressed a 'positive approach' to complementarity; seeking cooperation rather than confrontation (a more aggressive complementarity practice) when this is possible. He has also encouraged domestic action. This also reflects realism as to the very difficult task of conducting an ICC investigation when the territorial State denies cooperation or provide an absolute minimum of support. Darfur may serve as an example.

National measures require legislation (or direct application of international law). But the ICC Statute does not in itself impose an obligation for States to implement the crimes; there is some preambular language but no explicit obligation set forth in an operative provision of the Statute on this matter of utmost importance. There is also no regulation of the national criminal jurisdiction with respect to these crimes. However, an obligation to introduce the crimes in national penal law may stem from other treaty obligations (the Geneva Conventions and Additional Protocols, the Genocide Convention, the Torture Convention) and perhaps even from customary international law.

Nevertheless, the complementarity principle is a very strong incentive for the introduction of the crimes (and criminal jurisdiction) in national law. This issue has been discussed in every instance when ratification of the ICC Statute has been considered - a key consideration. States have generally been interested in being able to benefit from the principle and thereby to with their own cases and nationals. A policy consideration but arguably also a moral responsibility.

But the substantive issues are very difficult. The crimes are complex and not always well-defined. In addition, there are differences when one compares the law of the ICTY/ICTR and that of the ICC (and perhaps also vis-à-vis customary international law) which complicates the matter further. Which law should be introduced and reflected? Should one stick with the (imperfect) ICC definitions or create new ones?

Yet another consideration is that the ICC-list of crimes is selective. Should also other crimes be introduced? Are there treaty (or other) obligations that go further than the ICC selection? And what about the general principles of criminal law to be applied (*mens rea*, defences, delimitations of criminal responsibility and modes of participation in the crimes, superior orders and command responsibility, etc.)? And immunities (or rather non-immunity) and statutes of limitations?

The States must also consider whether to introduce special provisions on international crimes or to rely upon 'ordinary crimes' under national law. An interesting decision is the one addressing the referral of a case from the ICTR to Norway - Bagaragaza - which was refused due to the lack of a specific genocide crime in Norwegian law (instead the crime of homicide was applicable). This concerns the application of a different legal framework, however, and art. 17 ICC does not contain a requirement that the international crimes are specifically criminalised in domestic law (indeed, such a requirement was proposed but rejected). Still very strong policy reasons speak in favour of introducing the international crimes as such due to their particular nature and gravity. These crimes also motivate exceptions from otherwise applicable principles regarding, *inter alia*, immunities, statutes of limitation, jurisdiction, etc.

In conclusion, States have freedom - under the ICC Statute - to choose if and how to implement the 'core crimes'. And the ICC has arguably a quite limited scope to declare a case admissible when a State is taking (or has taken) domestic measures. Hence, it is particularly important to seek influencing that good substantive laws are passed and the good practices are adopted.

## **ANNEX V: The prosecution of serious international Crimes - Paul Taylor, Barrister, United Kingdom**

### **ONLY CONNECT**

The theme for this presentation is taken from the preface to a novel written by E M Forster called Howards' End. That theme is: ONLY CONNECT.

### **Introduction**

I was one of the two barristers who presented the prosecution's case in the People v Faryadi Zardad. The trial took place at the Old Bailey in the summer of 2005. Zardad was charged with conspiracy to commit acts of torture and hostage taking in Afghanistan between 1992 and 1996 during the civil war which engulfed the country after the withdrawal of the Soviet Union.

The prosecution's case, found proved by the jury, was that he was the war lord with power over a great expanse of land spreading south and east from Kabul almost to the borders of Pakistan. He abused that power by stopping travellers and traders on the roads he controlled. His men systematically terrorised thousands of people, making them hand over their money and goods at gun point. Where Zardad and his men thought they could get a ransom they took people hostage. They put them in makeshift prisons - caves, shipping containers and within basements in his bases. There they would be tortured and forced to write letters to make their families pay ransoms. Many were killed.

Because English law only permitted the charges of hostage taking and torture to be prosecuted he was not indicted for murder even though there was clear evidence that he had personally shot one man in the head for talking back to him. Many were murdered; they were disappeared by his order. The rationale of the English rule was that the jurisdiction for trying crimes committed abroad by people who were not British citizens should be restricted to cases where the defendant committed wrongdoing whilst he was acting in an official capacity. That created a situation which right thinking people were bound to think was bizarre - that an act of murder would only prove the case if death was not instantaneous as the definition of torture required the victim to suffer severe pain. So, when I was questioning the witness who had seen Zardad shoot a man in the head I no doubt made the witness think that all English men are mad because I had to ask him whether the victim was in pain or not.

Let me now turn to how the prosecution prepared for the trial but in the typically round about way lawyers deal with things. I say that because I will start long before the trial started. In the February before the trial started in the summer I went to Afghanistan to see where these crimes took place and to see what Afghan people and Afghan society were like. Before I went I was not convinced it was necessary. What I saw there changed my mind completely and for good. What I saw there turned out to have direct relevance to the way the trial in London had to be carried out. What I saw there gave me the opportunity to understand the maxim: ONLY CONNECT.

I saw a society with which I was wholly unfamiliar. I saw women with no role in their society but to be wives and mothers. I saw children aged 5 or 6 doing hard physical labour. I saw men gathered in groups with no work to do and I saw other working men who were visibly afraid of their superiors. This was a land of grinding poverty, short life expectancy and completely different social norms wholly unfamiliar to a professional man living in the luxury and freedom of western Europe. How then to connect? And why try?

Let me tackle the second question first. Why try? Selfishly, I knew that I had to have an understanding of the people who would give evidence by a video link from the British Embassy in Kabul if I was going to get the best out of them. Only by getting the best out of them would the prosecution be able to get the case across to a London jury which had not had the benefit of seeing the witnesses in their own surroundings and their own political/economic situation. Seeing the people of Afghanistan over a period of a week or gave me an insight into the character of the people - of what we could achieve and what

was impossible. There can be few people in Afghanistan who are untouched by conflicts going back for decades - the Soviet incursion, the civil war, the Taliban and the current situation following 9/11. The visible effect of this was to create a flattening of emotional reaction and response when Afghans relate the most harrowing experiences. To succeed we felt that we had to make sure that a jury did not think that because witnesses were flat in their delivery of their evidence that they weren't telling the truth.

There was an additional problem with the presentation of the testimonies of the witnesses. Nearly all the witnesses gave evidence by a video link. That created its own problems. There was a time gap of about 2 seconds between the question being spoken in London and being heard in Kabul. Then the question in English had to be translated. When the speaker in Kabul answered the question there was a further two second delay. Then the reply had to be translated. As you will imagine, these delays added further to the flat, unemotional and unemotive effect of the witnesses' evidence. We had excellent interpreters, itself an important issue in the trial process. This is a vital area of trial preparation which needs sorting out well before the trial. Meeting people in Afghanistan and knowing how the technology would affect the presentation at least told us what the problems were going to be. The solutions were less easy.

That deals with the why try to connect, let me move on to the how to connect and how to get the case across. Firstly, meeting Afghans provided an opportunity to see them, get a better understanding of them and finally acquire a stake in their past. Simply being there and seeing the people and the country gave me a commitment to presenting their case as well as we could. Being driven past the football stadium where each weekend mass executions took place was just one of the things I saw which gave me a determination to present the case for the Afghani people who had suffered. Apart from that ill defined intellectual shift brought about by being in Afghanistan there were sound practical benefits derived from the visit.

Travelling around the country visiting the scenes of war crimes served a dual purpose. On a basic level it equipped me with the technical knowledge as to the geography of the area which was to figure large in the defence of Zardad. On another level it demonstrated just how remote many of the witnesses were from Kabul, the place where they would have to come to give their evidence. That was relevant for two principal reasons. Firstly, it affected evidence gathering as taking statements was difficult and it was important to get it right first time, if possible. On a broader level it also demonstrated that half the population would be unavailable as witnesses and their story would not be told: there was an unexpressed horror in the case which never surfaced - the acts physical and sexual violence against women. Within the framework which governed our case it was impossible to bring to a court room any female witnesses; it went further, it was not even possible to take witness statements from them. Obtaining the testimony of women is ultimately a cultural issue rooted in their place in societies like Afghanistan. I can do no more than flag up the issue for others to consider.

I said that the solution to the emotional flatness of witnesses was the hardest part to deal with. What was the solution? The role of Prosecution counsel in British trials is to present the facts and not to strive for a guilty verdict. There is a saying: "The Crown gain no victories nor suffer any defeats". This was a trial at The Old Bailey. It was the first war crimes trial of a non-UK citizen for crimes committed beyond the jurisdiction. The spotlight was on the trial. The prosecution had to present its case within appropriate emotional bounds. To continue the golfing metaphor, the fairway had a certain width - and we exploited it to the full. So, that was the first step - the prosecution did not hide its commitment to its case from the jury. The second step was to select a small number of witnesses from Kabul to bring to London. We found a witness who had been a hostage negotiator in Afghanistan and had dealt with Zardad over the payment of ransom to secure the release of hostages; we found a high ranking military official who had seen Zardad's rise to power from his beginning to his end; we found Afghanistan's most eminent surgeon who had treated Zardad for his injuries who gave important evidence as to his powerbase and his wealth; we found European foreign aid workers who had seen Zardad's men taking hostages and robbing travellers at gun point; finally, we found a witness who had been tortured by Zardad, who had fled Afghanistan and had settled in the UK. These witnesses brought immediacy to the proceedings. It would have been inappropriate to bring all the witnesses to the UK and could have led

to suggestions by the defence that their testimony was being bought by a prospect of political asylum. The careful selection of a small number of live witnesses added much to the impact of the prosecution's case

**Concluding remarks**

The prosecution's ambition was to become a conduit for ordinary Afghani citizens to get their case across to a jury in London. The prosecution achieved that ambition by connecting with the people of Afghanistan and then allowing them to connect with twelve people on a jury in London, thousands of miles away, geographically and culturally.

## Annex VI: Elements of a possible Framework Decision on breaches of international human rights and international humanitarian law<sup>238</sup>

### *Core provisions*

#### *Preamble*

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

#### *Purpose clause*

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

#### *Scope*

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

#### *Definitions*

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

#### *Offences*

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

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<sup>238</sup> Presented at FIDH and REDRESS Conference "Fostering an EU Approach to Extraterritorial Jurisdiction", Brussels, 24/25 November 2003, by Professor Steve Peers, Human Rights Centre, University of Essex.

are on these lists? Or should these offences be added to the 'white list' by means of a separate clause setting out amendments to the other framework decisions?

#### *Inchoate offences*

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

#### *Immunity and privilege*

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

#### *Limitations clause*

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

#### *Penalties*

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

#### *Penalties for legal persons*

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

#### *Jurisdiction*

- all Framework Decisions have jurisdictional provision; standard approach in Framework Decisions is to require territorial and active personality jurisdiction, but then specify that the latter is optional; but some go further, especially Framework Decision on terrorism
- start with universal jurisdiction over all crimes defined in Framework Decision? Or more limited approach?
- need for rules/guidelines on priority jurisdiction: for example, see framework decision on terrorism for fullest set of guidelines. Should these be binding rules?
- also probable need for rule about relationship with ICC: content of rule?
- *lis pendens*: can refer to Framework Decision on 'ne bis in idem' principle, which contains rules (or rather guidelines); or is there a need for different guidelines or binding rules in this area?

- International *ne bis in idem*: is there a need to derogate from Schengen rules/Framework Decision?
- Provision regarding extension of these rules to third states? (nb general *ne bis in idem* rules in Schengen apply to Norway/Iceland and possibly soon Switzerland); possible limits upon or total lack of EU competence on this (cf *Opinion 1/2003*, pending before ECJ, on parallel civil law issue)

#### *Final provisions*

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

#### *Further issues*

##### *Role of ministries:*

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

##### *Victims:*

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

##### *Mutual assistance, et al:*

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

##### *Safeguard clause*

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

##### *External relations*

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

### *Rome Statute exception*

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

### *Civil law*

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

### *Rules on judicial jurisdiction and recognition of judgments*

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

### *Rules on choice of law*

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

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

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

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

- some prior examples of harmonization of tort liability (1985 directive on product liability; proposal for Directive on environmental liability at advanced stage of EC legislative procedure; possible forthcoming proposal on liability of service providers generally; specific provisions in e-commerce Directive)
- however, it is possible that issue of civil liability for “international crimes” is outside the competence of the EC under Article 65 EC or 95 EC (internal market power) because of a) insufficient link with internal market/cross-border effects, and b) the EC power to adopt legislation on ‘compatibility’ of MS’ civil law is insufficient?
- could be stronger argument for EC competence for measure essentially concerned with civil liability for acts committed within EU, but limited use of such a measure re: “international crimes”
- note that opt-out by Denmark required, opt-out by UK and Ireland possible; also use of ‘flexibility’ provisions is possible; though the flexibility powers cannot be used if the EC lacks any competence
- issues which could be addressed (based on July 2003 conference report):
  - o a) substantive law re conditions for civil liability
  - o b) limitation periods
  - o c) immunities