Universal Jurisdiction in Europe

Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide
UNIVERSAL JURISDICTION IN EUROPE

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REDRESS

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INTRODUCTION

The Pinochet case has raised the prospect of a person being put on trial in a court in one country, to answer for crimes of torture committed elsewhere. While Spain, France, Belgium and Switzerland have requested General Pinochet's extradition, REDRESS and others have sought his prosecution in the UK.

This briefing explains the concept of "universal jurisdiction" which provides the basis for some of the criminal cases opened against Chile's General Pinochet, and for a number of other prosecutions in European states. According to this principle, certain crimes - such as war crimes and torture - are regarded as so abhorrent that they are categorised as international crimes. When a person suspected of having committed such a crime enters a state's territory, that state is permitted or even obliged under international law to prosecute them or to extradite them to be brought to justice elsewhere.

Universal jurisdiction has been the basis of criminal investigations and trials around Europe, many of them arising out of the conflicts in former Yugoslavia and Rwanda. Since 1993, there have been six completed trials in Switzerland, Denmark, Austria and Germany - resulting in four convictions and two acquittals - and at least five other cases where suspects have been formally charged.

REDRESS views such proceedings as a crucial element of reparation for victims, whose wounds cannot heal so long as there is impunity. Victims have also played a crucial role in initiating prosecutions in a number of states.

It is significant that a number of these cases have proceeded in national courts even where an international criminal tribunal exists which also has jurisdiction over the case. This demonstrates that even once a permanent international criminal court is established, there will still be a role for national courts in prosecuting international crimes.

The first part of the briefing explains the duties placed on states by international law, and uses three key tests to assess whether European states are able and willing to exercise universal jurisdiction effectively. First, we look at the extent to which European states have set in place the necessary legislation and other institutional and judicial mechanisms. Second, we review the case law in order to assess the actual experience in Europe to date. Third, we examine the role played by victims. The second part of the briefing comprises an Annex, detailing the law and recent cases in ten European states.

The picture which emerges is that while prosecutors and the judiciary are increasingly being called upon to deal with allegations raised against persons within their
jurisdiction, and are becoming more and more willing to rise to the challenge, significant obstacles remain to the exercise of universal jurisdiction in many states. The shortcomings of international law, lack of adequate legislation and lack of political and judicial will are among the problems needing to be addressed.

The briefing focuses on criminal proceedings initiated in relation to recent violations of human rights and the laws of war, in countries other than where the violation took place. It does discuss some bases of extra-territorial criminal jurisdiction other than universal jurisdiction, such as the passive personality principle, where a state prosecutes on the basis that the victim of the crime is one of its own nationals. However the report does not discuss war crimes trials relating to events of World War II, such as the trial of Anthony Sawoniuk, concluded on 1st April 1999, the first completed trial in the UK for war crimes.

Prosecuting on the basis of universal jurisdiction for the most heinous of crimes is becoming accepted practice in Europe, but there is a long way to go before the principle of universal jurisdiction is firmly established in European legal systems.
WHAT IS UNIVERSAL JURISDICTION?

The notion that certain crimes are so universally abhorred that they constitute crimes against international law is now widely recognised. War crimes, crimes against humanity, genocide and torture are examples of such crimes. The need to hold individuals accountable for such atrocities has also become an accepted part of international law. Since the Nuremberg and Tokyo trials following World War II, the principle that it is the right or even the duty of states to bring to justice those responsible for international crimes when they are not prosecuted in their own countries has gathered momentum.

Certain international treaties place states parties under a duty to ensure that suspects who come within their borders are brought to justice, either by prosecuting them in their own courts or by extraditing them to stand trial elsewhere. This duty to either prosecute or extradite is contained in the four Geneva Conventions of 1949. States parties to the Geneva Conventions are obliged to seek out and either prosecute or extradite those suspected of having committed "grave breaches" of those Conventions.¹

"Each High Contracting Party shall be under the obligation to search for persons alleged to have committed or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."²

"Grave breaches", as defined in the Conventions, includes wilful killing, torture or inhuman treatment, causing great suffering or serious injury to body or health, and other serious violations of the laws of war.³ A serious weakness in the Conventions is that they only require the exercise of universal jurisdiction for offences committed in international armed conflict, and not in internal armed conflict. However the Statutes of the International Criminal Court and the International Criminal Tribunal for Rwanda do specifically give jurisdiction for these courts over violations committed in an internal armed conflict.⁴

Parties to the UN Convention against Torture are similarly obliged to either extradite or prosecute alleged torturers who come within their borders. Article 7.1 provides:

"The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases

¹ Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Relative to the Treatment of Prisoners of War, and Relative to the Protection of Civilian Persons in Time of War
² This Article is contained in each of the four Geneva Conventions, for instance in Article 146 of the Fourth Geneva Convention
³ For instance, Article 147 of the Fourth Geneva Convention
⁴ Articles 8.2(c) of the ICC Statute and 4 of the ICTR Statute
contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

In addition to these treaties which impose obligations on states parties in relation to specific offences, it is widely recognised that customary international law permits the exercise of universal jurisdiction for genocide and crimes against humanity, and possibly for serious violations of the laws of war in internal armed conflicts. All of these are within the jurisdiction of the International Criminal Court in the Rome Statute of July 1998, and this may encourage states to provide for universal jurisdiction for these offences.

The exercise of universal jurisdiction, whereby a state prosecutes a person regardless of where the crime was committed or against whom, is an example of extra-territorial jurisdiction, and an exception to the normal situation where a state prosecutes for crimes committed within its own territory. Extra-territorial jurisdiction is becoming increasingly common. Typically, European states have legislated to provide extra-territorial jurisdiction for offences such as terrorism, hijacking and hostage taking and, more recently, to tackle international paedophile rings.

Another type of extra-territorial jurisdiction accepted by some states is jurisdiction on the basis of passive personality, according to which a state will prosecute a person for committing a crime against its own nationals, even if the crime was committed abroad. While strictly speaking the passive personality principle is not an example of universal jurisdiction, it is discussed in this report because of its importance in the international enforcement of human rights and international humanitarian law.

International human rights law imposes a duty on states to investigate and prosecute violations committed within their jurisdictions, and the primary duty to end impunity rests with the state authorities where the violation is committed. However all too often, violators are not brought to justice in their own countries. The sight of large scale human suffering and mass violations of human rights and humanitarian law in recent years has given new impetus to international determination to bring violators to justice. Accountability for international crimes is increasingly viewed as a matter of

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5Restatement (Third) of the Foreign Relations Law of the United States, para. 404
6UN General Assembly Resolution 95(1) of 1946, reiterating the principles in the Nuremberg Charter and Judgment. Crimes against humanity has now been defined in the Rome Statute of the International Criminal Court to include a number of acts committed as part of a widespread or systematic attack directed against any civilian population, including murder, enslavement, deportation or forcible transfer of population, imprisonment in violation of international law, torture, rape, sexual slavery, persecution of a group, enforced disappearance and apartheid.
7This is suggested in the Tadic case, where the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia held that customary international law did impose criminal liability for serious violations of Common Article 3 of the Geneva Conventions, which relate to internal armed conflict. Judgment of 2nd October 1995, para 137, 35 ILM (1996) 32.
10There are two additional bases on which states sometimes assume extra-territorial jurisdiction: jurisdiction on the basis of the nationality of the offender, and the protective principle (jurisdiction for acts committed abroad which affect the security of the state)
concern for the international community as a whole, and there has been a trend
towards the establishment of international mechanisms for criminal justice.
International criminal tribunals were established by the UN Security Council in
response to the conflicts in former Yugoslavia and Rwanda, and in July 1998, states
agreed to establish a permanent international criminal court to try perpetrators of war
crimes, crimes against humanity and genocide.

Despite these important moves to create a system of international criminal justice, for
the foreseeable future there will still remain a role for national courts in prosecuting
those suspected of international crimes who come within their borders.\(^1\) We already
have some indications of how this will work. One example is Germany’s proceedings
against suspected war criminals from former Yugoslavia. Since 1992 Germany has
apprehended four individuals suspected of involvement in atrocities in the conflict in
former Yugoslavia. The International Criminal Tribunal for former Yugoslavia in the
Hague only requested the transfer of one, namely Tadic, who was duly transferred and
stood trial. The prosecutions of the others continued in Germany. To date two of the
three, Novislav Djajic and Nikola Jorgic, have been convicted and sentenced.

The effective exercise of universal jurisdiction is one important tool in the struggle to
end impunity for international crimes. Most European states have accepted universal
jurisdiction for the prosecution of war criminals and human rights violators through
ratifying international treaties, and many have exercised jurisdiction on this basis
during the 1990s. Nevertheless, an adequate legal basis for exercising universal
jurisdiction remains lacking in many instances. The following analysis, and the Annex
describing law and case law on a country by country basis, seeks to demonstrate the
strengths and weaknesses of the commitment to universal jurisdiction in ten European
states.

**UNIVERSAL JURISDICTION IN EUROPE IN PRACTICE**

**AUSTRIA . BELGIUM . DENMARK . FRANCE . GERMANY . ITALY .
THE NETHERLANDS . SPAIN . SWITZERLAND . UNITED KINGDOM**

a) Putting international principles into practice: domestic legislation

Most European states are party to both the Geneva Conventions and the Torture
Convention, which oblige states to introduce the necessary legislation to enable them
to exercise universal jurisdiction. Of the ten European states whose practice is
examined in the Annex to this briefing, only Belgium had not ratified the UN

\(^1\) Article 9 of the Statute for the International Criminal Tribunal for former Yugoslavia, adopted by
UN Security Council Resolution 827 of 25/5/93, states that “The International Tribunal and national
courts shall have concurrent jurisdiction ... The International Tribunal shall have primacy over
national courts. At any stage of the procedure, the International Tribunal may formally request
national courts to defer to the competence of the International Tribunal...” The Statute for the
Rwanda Tribunal contains similar terms. The Rome Statute for the ICC, Article 1, states that the
Court shall be complementary to national criminal jurisdictions.
Convention against Torture, although it had signed the Convention. All are party to the Geneva Conventions, and all are subject to Customary International Law which permits the exercise of universal jurisdiction for genocide and crimes against humanity.

In order to put these international law obligations into practice, states must usually enact implementing legislation which will provide a basis in their legal system for bringing prosecutions for international crimes committed abroad. In states where ratified treaties are not automatically incorporated into domestic law, such as the UK, implementing legislation is essential. The UK enacted section 134 of the Criminal Justice Act 1988 when the UK became party to the UN Convention against Torture. This provision creates a criminal offence of torture in UK law, and allows the UK legal system to prosecute for torture even when committed abroad. Without this provision and the codification of the universal jurisdiction principle, any attempted prosecution would fall foul of the territorial principle. According to this principle, a person can normally only be prosecuted in the UK for acts committed in the UK. The UK has also passed implementing legislation under the Geneva Conventions.12

Implementing legislation is also necessary even in states where international treaties, once ratified, do automatically become incorporated into national law, and even where the courts can refer to international law for the definition and scope of an offence. It is necessary in order to enable the state to apply its domestic law and procedure in a particular case. Such legislation should define the crime and the penalties to be imposed on conviction, designate the competent courts, and clearly establish the basis for the exercise of universal jurisdiction. Denmark, for instance, has been criticised for the inadequacy of its implementing legislation both under the Geneva Conventions and the Torture Convention.

States adopt differing methods for implementing their obligations under international human rights and humanitarian law, and the Annex to this briefing indicates how ten European countries have chosen to do so. In order to allow their courts to exercise universal jurisdiction, some states have adopted general provisions by which domestic criminal law can be applied to acts committed abroad in cases where an international treaty to which the state is party obliges it to do so. Austria, Germany and Spain are examples of this approach. Others have adopted more specific provisions, instead of, or in addition to, general provisions. In their reports to the UN Committee against Torture, to which states parties are obliged to report periodically on their implementation of the Convention, some states claim that their ordinary law allows them to exercise universal jurisdiction for torture without the need for specific legislation. This approach has frequently proven inadequate, and has been criticised by the Committee itself.

When defining the international crimes in question, some states simply adopt the definitions of international crimes set out in international law, while others include detailed definitions in their domestic legislation. Switzerland is an example of the former approach, Belgium of the latter. The UK lies somewhere in between these two approaches. Upon becoming party to the UN Convention against Torture, Parliament enacted section 134 of the Criminal Justice Act 1988, as mentioned above. Section

12 Geneva Conventions Act 1957
134 contains a definition of torture which follows that of the Convention in most respects but differs in important aspects. The UK definition is much less detailed, and it differs in allowing a wider scope for defences than is provided for in the Convention. Section 134(4) allows for the defence of “lawful authority, justification or excuse” to torture, whereas the Convention refers only to an exception for “lawful sanctions”. The UK’s formulation - which could open the way for legal authorisation to be given for the use of torture - was subsequently criticised by the UN Committee against Torture, the body which monitors compliance with the Convention.\textsuperscript{13}

Even though many states have taken steps to implement their obligations through legislation, when asked to act in response to allegations against real individuals within their borders, states’ legal systems often face difficulties in turning international law obligations of the state into concrete legal measures. The presence of suspected perpetrators of international crimes in European states in recent years, and the attempts by victims and determined lawyers to invoke the international law provisions on universal jurisdiction, have revealed just how ill-equipped most national legal systems are to prosecute such cases effectively. The inadequacies of national legislation vary, but common problems are a failure to provide specifically for jurisdiction over crimes committed abroad, failure to sufficiently define crimes, and failure to provide penalties. These problems seem to be just as serious in “monist” countries where international law is part of, and even often superior to, national law, as in “dualist” systems such as the UK. The implications of these problems are that states may not be able to initiate and complete criminal proceedings against alleged violators.

Some legal systems have introduced their own limitations to the exercise of universal jurisdiction. The German courts require an extra connection with Germany to be established before they will apply universal jurisdiction. This is in order to prevail against the international law principle of non-interference in the affairs of another state. However the German courts have tended to view the combined interests of the international community in bringing perpetrators of serious violations to justice as sufficient to outweigh the principle of non-interference.\textsuperscript{14}

Obstacles to prosecution can be explained partly by the ad hoc manner in which legislation has been enacted, normally after a state ratifies a particular treaty. None of the states reviewed in this briefing, with the possible exception of Belgium, have a comprehensive, coherent regime for prosecuting the international crimes protected by treaties: war crimes, genocide, torture and crimes against humanity. Few stray from this list of well established crimes to include other serious violations of human rights such as disappearances. The limitations of this ad hoc approach have been seen in the efforts to bring Chile’s former leader Augusto Pinochet to justice in Europe. Of all the terrible acts committed against the Chilean people during his rule, because of the limitations of UK and Spanish law, only torture and conspiracy to torture could be considered by the House of Lords to give rise to universal jurisdiction in this case. Such a result reveals the shortcomings not only of national law but also of international law, as yet there is no treaty obliging states parties to exercise universal jurisdiction over disappearances or extrajudicial killings and other similarly egregious crimes.

\textsuperscript{13} Concluding Observations of the Committee against Torture, 17/1/98, UN Doc CAT/C/UK

\textsuperscript{14} This was established in the Tadic case and followed in other cases. See Annex
The judicial processes initiated against Pinochet in the UK, Spain, Belgium, Switzerland, Germany and France, have also demonstrated the presence of a number of other significant obstacles to effective exercise of universal jurisdiction, among them immunities and prohibitions on the retrospection of legislation. These cases have shown the importance of adequate legislation and co-operation in other areas of law such as extradition. Such experiences have also brought about a realisation of the shortcomings of national legislation. In some countries, such as Belgium, this has provoked pressure to reform the law and in some cases, actually institute new legislation.

Few national legal systems provide specifically for the prosecution of international crimes committed abroad, other than where they are obliged to do so by an international treaty containing universal jurisdiction to which they are party. The Genocide Convention, for instance, does not explicitly provide for universal jurisdiction and while many states have incorporated its provisions into their domestic law, few have gone beyond the Convention and provided for universal jurisdiction for that offence. Austria and France are two examples. Similarly, few have gone beyond the requirement in the Geneva Conventions to adopt universal jurisdiction for grave breaches of the Convention, so as to cover other violations of the Conventions and the Additional Protocols. Switzerland is one exception.

The situation is even more difficult as regards international crimes which are not codified into an international treaty at all. Crimes against humanity and specific human rights violations such as disappearances are examples of such crimes. A few states, notably Austria, Germany and the Netherlands, have wider provisions allowing extraterritorial jurisdiction for crimes in certain circumstances. Belgium has very recently, in 1999, added genocide and crimes against humanity to the list of international crimes over which Belgian courts may exercise universal jurisdiction. In Denmark, the Penal Code establishes jurisdiction over genocide, crimes against humanity and violations of the Hague Conventions, but only where another state has requested the extradition of the person and extradition has been refused.15

Almost all of these obstacles are dealt with in the Statute of the International Criminal Court, which all ten of the states examined in this briefing are now signatories. As they prepare legislation to enable them to ratify the Statute, it is hoped that they will take the opportunity to carry out broad revisions of their criminal law in this area.

Despite all these difficulties, more and more cases are being prosecuted on the basis of universal jurisdiction in European states.

b) The experience so far: Cases in European states in the 1990s

Universal jurisdiction has been the basis of a number of criminal investigations and trials around Europe, most of them arising out of the conflicts in former Yugoslavia

15 Article 8(6), Danish Penal Code. See Annex
and Rwanda or from military dictatorships in Latin America. Details of these cases are available in the Annex to this briefing.

Since 1993, there have been six completed trials in Europe, resulting in four convictions and two acquittals. In Germany, two Bosnian Serbs were convicted for crimes committed in former Yugoslavia against Muslims. Novislav Djajic was convicted in May 1997 and sentenced to five years' imprisonment for war crimes, and Nikola Jorgic was convicted in September 1997 and sentenced to life imprisonment for genocide and murder. In November 1994, a Danish court convicted a Bosnian Muslim, Refik Saric, of brutally torturing prisoners of war in a Croat-run prison camp in Bosnia, and sentenced him to eight years' imprisonment. And in April 1999 a Swiss military court convicted N, a Rwandan national, of having committed war crimes in Rwanda. Two Bosnian Serbs have been tried and acquitted of crimes, Dusko Cvjetkovic in Austria and G.G. in Switzerland.

There are ongoing criminal proceedings in at least four other cases in Belgium, France, Germany and the Netherlands. All of these cases relate to the conflicts in former Yugoslavia and Rwanda. In May 1999, charges were dropped in a process taking place in the United Kingdom. A Sudanese national had been charged in September 1997 with torture allegedly committed in Sudan following the coup which brought the National Islamic Front to power there in 1989. He was awaiting trial in Scotland in connection with alleged torture of detainees at a secret detention centre in Sudan until the Scottish prosecution authorities decided to discontinue the prosecution for unknown reasons. At least ten further suspects are known to be currently under investigation in several European states. In addition, investigations have been opened against persons not physically present in the country where the process is taking place, the most notable example being the ongoing cases against Pinochet in several European states.

This Briefing does not cover cases relating to war crimes committed during the Second World War, although even in the 1990s there have been a number of criminal processes initiated in European states. For example, the trial of Anthony Sawoniuk took place in February and March 1999 in London.

Almost all of the ongoing cases where suspects are in custody relate to the conflicts in former Yugoslavia and Rwanda. The entry of waves of refugees from all sides of these conflicts into Europe has inevitably resulted in victim and perpetrator encountering each other. European legal systems have been challenged to respond to this situation by implementing principles they have committed themselves to in the international arena. Most have managed to live up to the challenge even where this has meant breaking new ground in terms of national law.

The cases show a dynamic interplay between the existing international criminal tribunals (for former Yugoslavia and Rwanda) and national courts. Most European states enacted legislation in order to be able to co-operate with the international tribunals. Several have handed over suspects to the international tribunals. For example, Germany transferred the suspect Tadic to the International Criminal Tribunal for former Yugoslavia in 1994.
The cases show national courts grappling with the most difficult points of international law and displaying confidence in doing so. In Dijajic, the Bavarian High Court in Germany considered whether or not the conflict in former Yugoslavia constituted a conflict of an international nature or not, and determined that it did. On this point it reached a different conclusion than the ICTY had in the case of Tadic. The Swiss Military Tribunal in the case of G.G. also determined that the conflict was of an international nature at the relevant time.

Some countries, notably Switzerland and the Netherlands, view their military tribunals as the appropriate courts for adjudicating cases involving war crimes. In the leading case which determined that the Dutch courts can exercise universal jurisdiction over war crimes, the Supreme Court said that only a military ordinary judge would be equipped to deal with the technical military issues involved in such cases. It said that such questions form the basis not only of the question of guilt but also inform sentencing.

The problems that can be caused by the absence of adequate implementing legislation were illustrated in France. The French courts were deterred from investigating allegations of war crimes against Bosnian Serbs by the absence of specific French legislation to give effect to the Geneva Conventions. In March 1996, the French Supreme Court, the Cour de Cassation, confirmed this ruling.

Nevertheless some of the cases show domestic courts addressing and overcoming some of the shortcomings of international law or of implementing legislation identified in this briefing. One example is the willingness of courts in Austria, Germany and Spain to exercise jurisdiction over genocide despite the absence of explicit provision for the exercise of universal jurisdiction by national courts of another state in the Genocide Convention itself. Article 6 of the Convention provides only for jurisdiction to be exercised by the territorial state or by a relevant international tribunal. The Austrian Supreme Court in 1994 expressed its satisfaction that the Austrian courts were entitled to exercise jurisdiction because there was no functioning criminal justice system in the state where the crime was committed, and nor was there a competent international criminal tribunal at the time. The German court in the case of Jorgic in 1997 found that Article 6 of the Genocide Convention was generally regarded as not excluding the possibility of national courts exercising jurisdiction. It also found jurisdiction on the basis of the German Law on Co-operation with the International Criminal Tribunal for Former Yugoslavia. The Spanish national criminal court, the Audiencia Nacional, hearing an appeal in the Pinochet case, also found that the lack of explicit provision in the Convention did not exclude the possibility of a state party exercising jurisdiction, and said that it would be contrary to the spirit of the Genocide Convention to consider Article 6 as limiting the freedom of national courts to prosecute for genocide committed abroad.

Courts will not normally rely on customary international law alone to found jurisdiction. For instance the Swiss courts, in the case of N, were not willing to base charges of genocide and crimes against humanity on customary international law alone. In rare cases, national courts have found a basis for exercising universal jurisdiction drawing directly on international law principles. For instance, a Belgian judge investigating former Chilean Head of State Augusto Pinochet decided in November
1998 that international law gave his court jurisdiction over crimes against humanity committed abroad.\textsuperscript{16}

A number of the other ongoing cases relate to human rights violations such as disappearances and torture, committed during military dictatorships in several Latin American states, particularly Chile and Argentina. While these regimes were replaced by democracy, most of those responsible for the violations have not been punished. In both Chile and Argentina, amnesty laws were passed that purported to remove the possibility of criminal proceedings against the military leaders. While some leaders were tried in Argentina, they were later pardoned. Some of the European cases have arisen out of the strong links between the states in question. For instance, a number of Italian and Spanish nationals were victims of the harsh regimes in Argentina and Chile during the 1970s and 1980s. Other cases arose out of the refugee communities which formed in most European countries during the years of these repressive regimes.

Most of these investigations have been initiated, at the instigation of victims or their families, without the physical presence of the suspect. For example, examining magistrates in Spain, France, Switzerland and elsewhere have initiated criminal investigations into violations allegedly committed by General Pinochet even though he was not physically within their territory, and then subsequently sought his extradition from the UK. In some cases it has been possible to obtain custody of the accused at a later stage in the investigation. For instance in Spain, Argentinean Navy Officer Adolfo Scilingo was arrested in October 1997 after admitting to involvement in blowing up the military regime out of an aeroplane.

Courts have not always proved willing to initiate investigations on the basis of universal jurisdiction in the absence of an accused person. For instance, the French Cour de Cassation ruled in March 1996 that the French courts could only exercise universal jurisdiction over war crimes and other crimes which France was obliged to prosecute under international treaties, where the accused was actually present in France. It was only where exercising jurisdiction on the basis of the passive personality principle - for violations against French nationals - that French courts have initiated proceedings in the absence of the accused. On this basis an investigation was opened into Chile’s Augusto Pinochet in October 1998 which led to a request for his extradition from the UK, and in 1990, Argentine Captain Alfredo Astiz was convicted and sentenced to life imprisonment for his role in the torture and disappearance in Argentina of two French nuns. Since France allows trials \textit{in absentia}, Alfredo Astiz was tried, convicted and sentenced in his absence.

In a number of cases, investigators and the court itself have made visits to the crime site to collect witness testimony and other evidence. For instance, the Swiss Court visited Rwanda in March 1999 during the trial of a Rwandan national.

An important lesson to be learnt from the cases is that it is not only the presence or absence of adequate implementing legislation that is important in determining whether a state will be able to effectively exercise jurisdiction on the basis of universal

\textsuperscript{16} Decision of investigating magistrate Vandermeersch of the Tribunal of First Instance, Brussels, 8/11/98
jurisdiction. Other aspects of a country’s legal system will also be important, including the capacity and willingness of those authorities charged with investigating and prosecuting criminal offences to prosecute cases involving violations of human rights and humanitarian law committed abroad. Most European states use an investigating judge system, whereby crimes are investigated under the direct supervision of a judge including collection of evidence. Such systems tend to be more open to victims of crime, who are able to exercise greater influence in the initiation of an investigation and the pursuit of a prosecution, than in a system such as that of the UK where non-judicial organs are responsible for criminal investigations. In the case of the Sudanese doctor charged in Scotland with having committed torture in Sudan, the decision of the Scottish Crown Office in May 1999 not to continue the prosecution was taken without consultation with the victims, and without any possibility of judicial review.

Despite the difficulties encountered, many of the cases described in this briefing serve to strengthen arguments for universal jurisdiction because they demonstrate that fair and speedy conviction of war criminals in national courts is possible.

c) The Role of the Victim

Victims and their legal representatives have played a key role in encouraging national authorities in Europe to exercise universal jurisdiction for international crimes. In many instances, they have taken steps to initiate criminal proceedings and to press states to comply with their obligations under international law. Yet in some cases they have faced obstacles in playing a full role in the proceedings.

In most European states other than the UK, the criminal justice system enables victims to play an active and central role in the criminal proceedings, in addition to their role as witnesses. They can often not only trigger a criminal investigation but also join the criminal process as a full party and seek reparation. Such provisions reflect a consensus among European states. In 1985, in Recommendation R (85) 11, the Council of Ministers of the Council of Europe recommended that the needs of the victim should be taken into account to a greater degree throughout all stages of the criminal justice process. According to this document, measures should be taken by the police, the prosecution authorities and the court to keep victims informed at all stages, and give them a meaningful role in the decision to prosecute as well as prosecution process itself, and victims should be able to obtain compensation within the criminal justice process. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985 also calls on judicial and administrative processes to be responsive to the needs of victims by, *inter alia*, keeping them informed and allowing their views and concerns to be presented and considered at appropriate stages of the proceedings.

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17 Committee of Ministers Recommendation No.R(85)11 of 28 June 1985
18 UN Declaration 40/34, adopted by the UN General Assembly on 29 November 1985,
The prosecuting authorities have an obligation to inform the victim of his/her rights in the criminal justice system in a number of countries.\textsuperscript{19} Where a victim may be joined as a party to the proceedings, he/she must be informed of this right.\textsuperscript{20} The victim often has the right to be informed in cases where the prosecuting authority takes the decision not to prosecute.\textsuperscript{21} This is important for a number of reasons. It may be important for the victim to know that the defendant is at large. Or the victim may wish to take alternative action such as claiming compensation in a civil suit. More generally, it is a way of showing respect for and sensitivity to the victims.

In some states the victim has the right to appeal the prosecutor's decision to a superior authority\textsuperscript{22} or to a court, which may order the prosecutor to take over the case if it finds for the victim.\textsuperscript{23} In some countries there is also a right to initiate private prosecution, although this right is rarely exercised.\textsuperscript{24} In cases where it is decided that an offence is so minor that there is insufficient public interest in a prosecution by the state, many countries provide for the possibility of victims initiating their own private prosecution.\textsuperscript{25}

Once a criminal prosecution has been initiated by the state, several states allow victims to have an advocate or "support person", especially in cases of sexual assault/rape.\textsuperscript{26} In others, victims may make suggestions regarding the investigation process, propose or submit evidence, provide input regarding the examination of witnesses, subpoena witnesses and be heard in court regarding the charges and the emotional, social and economic costs of the crime. Such a possibility exists in Austria, France, Germany, Sweden and Norway. In Italy the victim may make representations at the end of the trial.

In several European states victims are permitted an even greater level of participation. A \textit{partie civile} system operates in France, Belgium, Italy and Germany, by which a victim is permitted to join criminal proceedings as a full party in the case. In France, parties other than the victim may be joined as \textit{parties civiles} as well; some examples are organisations dedicated to combating racism, sexual violence and child abuse. After being joined to the proceedings in France, the \textit{partie civile} has the same right to be informed about the progress of the case as has the defendant, as well as the right to be informed about evidence collected. He or she has the right to be represented by a lawyer and legal aid is available. Other rights include the right to address the court and

\textsuperscript{19} See the Codes of Criminal Procedure of Hungary and Poland. In Germany, such duties are provided for in guidelines published by the Ministry of Justice. The French Ministry of Justice published a book called \textit{Guide des droits des victimes} in 1982 which informs victims about court procedures as well as provisions for compensation by the state. In the Netherlands, similar guidelines for dealing with victims of serious crimes were published by the Ministry of Justice in 1986. The UK also provides for victims to be informed of their rights.

\textsuperscript{20} E.g. the Codes of Criminal Procedure of Austria, Finland, Germany, Norway and Sweden

\textsuperscript{21} Provided for in Denmark, Finland, France, Germany and Sweden. In Hungary, the victim must also be told if police procedures are terminated

\textsuperscript{22} E.g. the Codes of Criminal Procedure of Hungary, the Netherlands and Poland

\textsuperscript{23} E.g. the Codes of Criminal Procedure of Belgium, France, Luxembourg, Spain and Turkey

\textsuperscript{24} Provided for in Cyprus, Finland and the UK

\textsuperscript{25} In Austria, Norway and Sweden, victims have such a secondary right of prosecution. Similar rights are provided for in Denmark, Germany, Hungary, Iceland, Poland and UK

\textsuperscript{26} E.g. the Danish, Norwegian and Swedish Codes of Criminal Procedure
tell his/her version of events, and to make representations regarding the appropriate sentence.

In other states, too, victims joined as parties civiles are permitted access to official documentation. In the Netherlands, once a summons has been issued, the victim may examine the police files.

Many states place a formal obligation on the police or other agencies to give victims certain information at various points during an investigation and trial, as called for in the Council of Europe's Recommendation R (85) 11. However a recent comparative study has revealed that despite the consideration importance attached to notification by victims, actual implementation is often lacking. The study concludes that the most important factor is the attitude of the authorities towards their informative duties, and that in countries where victims have an official status as party to the proceedings, their chances of being informed are greater.

Even in the UK, where victims have traditionally had less of a role in criminal proceedings, the present Government has committed itself to more sensitive treatment of victims in the criminal justice system, and is instituting measures aimed at providing information and explanations to victims as a criminal case progresses. The Government is exploring a number of options including introducing victim impact statements, and is even looking at the advantages of the partie civile system.

A key aspect of the partie civile system is that it enables victims to seek reparation through the proceedings. In France, a victim may initiate criminal proceedings to this end through an intervention by sending a registered letter to the court. This ability to be joined to a criminal prosecution allows for a cheaper and quicker way to obtain compensation than recourse to the civil courts. Most European jurisdictions offer victims the possibility of claiming compensation within the framework of the criminal process. Compensation awarded in cases relating to violations of human rights or humanitarian law is usually regarded as symbolic. In the trial in absentia of Argentinean Captain Astiz in France, for instance, victims joined as parties civiles were awarded one franc each by way of moral damages (à titre du préjudice moral), and were also awarded the costs of the civil action.

Even in the UK, where the partie civile system is not available, criminal courts are empowered to make compensation orders, and compensation is available for victims of violent crime under the Criminal Injuries Compensation Scheme. Similar state compensation schemes exist in most European states for victims of violent crime.

Despite these sometimes far-reaching rights afforded to victims in European criminal justice systems in theory, in reality victims have experienced difficulties in exercising

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27 Austria, France, Italy, Norway
29 See for example the Labour Party Manifesto 1997 and the Criminal Justice System Strategic Plan 1999-2002
30 See for example research commissioned by the Home Office from the University of Bristol, Evaluation of the 'one stop shop' and victim statement pilot projects, 1998
the rights given to them by law. This has occurred in several of the cases described in the Annex to this report. In Italy, for instance, groups representing relatives of the disappeared in Argentina were denied their applications to join proceedings. In Switzerland, the spouse of a victim who had died in the Rwandan genocide withdrew as partie civile from the case against N. when forced to choose between becoming an ordinary witness and gaining the right to witness protection measures, or remaining as partie civile and not being eligible for such protection. There are also disincentives for victims to apply to be partie civile. For instance, in Belgium if victims initiate an investigation from which no prosecution results, the victims are obliged to pay the costs of the investigation. Any compensation orders made in such cases are also difficult to enforce.

REDRESS believes that it is particularly important for victims of crimes involving gross violations of human rights to feel involved in the judicial process actively. Such involvement can be an essential part of the process of healing and rehabilitation for victims, creating a sense of empowerment and closure. So long as it does not interfere with the rights of the defendant and the interests of a fair trial, it can be an effective way to ensure that justice is done from the point of view of the victims.
ANNEX
Law and Cases in Ten European Countries

AUSTRIA

Domestic Legislation

Austrian criminal law has a remarkably wide reach. Article 64 of the Austrian Penal Code deals with offences which can be prosecuted in the Austrian courts even though committed abroad. The extra-territorial application of Austrian criminal law is extended to specific listed offences (such as treason, kidnapping, offences against the armed forces) and Article 64.6 adds: “other punishable criminal acts which Austria is under an obligation to punish even when they have been committed abroad”.31 Such an obligation is created by a number of international treaties to which Austria is party, including the UN Convention against Torture and the Geneva Conventions. In addition, certain international crimes are specifically defined in the Penal Code, for instance the offence of genocide is defined in Article 321 (but does not include provision for universal jurisdiction). There appears to be no implementing legislation relating to war crimes, although Austria is a party to the Geneva Conventions.

Even more wide-reaching, Article 65.1.2. of the Penal Code provides that Austrian criminal law may apply in respect of offences committed abroad, so long as the acts are also punishable in the place where they are committed (the “double criminality” requirement), and provided the offender, if a foreigner, is present in Austria and cannot be extradited to the other state due to reasons other than the nature and characteristics of the offence (such as the fact it is a political crime, which is a bar to extradition). This leaves a wide scope for the application of extra-territorial jurisdiction.

Cases

Austria conducted the first trial relating to the conflict in former Yugoslavia conducted on the basis of universal jurisdiction in a national court outside Yugoslavia. In July 1994, Dusko Cvetkovic, a Bosnian Serb who had sought asylum in Austria was arrested and charged after a Muslim refugee from Bosnia recognised him in the street near Salzburg and accused him of participating in a practice of “ethnic cleansing” of Muslims in Bosnia.32 He was accused of killing at least one person in the village of Kucice in Bosnia in July 1992, of deporting two others to a concentration camp where they died, and of arson. He was initially charged with genocide, murder and arson but not, perhaps surprisingly, with war crimes under the provisions of the Geneva Conventions.

Cvetkovic challenged the validity of the arrest warrant on the grounds that the Austrian courts lacked jurisdiction over the case, and this question was referred to the

31 Austria’s Initial Report to the UN Committee against Torture, UN document CAT/C/5/Add.10, p.5
32 Reuters News Service, March 29, 1995
Austrian Supreme Court. The Prosecutor had based jurisdiction not on Article 64 of the Penal Code - for which he would have had to have demonstrated that Austria was "under an obligation to punish" - but on Article 65.1.2, described above. In order to rely on this provision, he had to show that cvjetkovic could not be extradited to Bosnia-Herzegovina for reasons that did not relate to the nature of the crime. The Prosecutor relied on the fact that judicial co-operation with Bosnia-Herzegovina was not possible since there were no mail or telephone communications between the judicial authorities of the two countries due to the war, and that there was no orderly administration of criminal justice in the place where the offences were committed. Further, he argued that the double criminality requirement was satisfied, and that the crime of genocide was not a political crime, since Article 7 of the Genocide Convention specified that it should not be considered as such.

The Court accepted these arguments, and went on to consider whether there was a basis for jurisdiction under Article 6 of the Genocide Convention, which provides that persons charged with genocide shall be tried by the courts of the state where the act was committed or by an international tribunal, but does not specifically envisage trial in the courts of another national state. The Court found that this provision presupposed that there was a functioning criminal justice system in the state where the crime was committed. Since in the present case this was not so, and as yet there was no functioning international criminal tribunal, then the purpose of the Convention would be thwarted if the Austrian courts did not exercise jurisdiction. On 13th July 1994, the Austrian Supreme Court held that the Austrian courts were entitled to exercise jurisdiction over Cvjetkovic.

Following this decision, an indictment was issued against Cvjetkovic on 27th July 1994 in the District Court of Salzburg and his trial proceeded on charges of genocide and murder. The jury found that insufficient evidence had been produced to determine his role in the Bosnian genocide, and on 31st May 1995 acquitted him on all the charges.

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33 Judgment of the Oberster Gerichtshof, Vienna, 13 July 1994
34 Republic of Austria v. Cvjetkovic, Landesgericht, Salzburg
Domestic Legislation

Belgian courts accept jurisdiction on the basis of the (Belgian) nationality of the victims of a crime (passive personality). Belgien has also legislated specifically to introduce universal jurisdiction for certain international crimes. So far as international humanitarian law is concerned, Belgium is party to the Geneva Conventions of 1949 and Additional Protocols I and II, and these had effect in municipal law after being published in legislation in 1952 and 1986 respectively. Implementing legislation came later. A law was enacted in 1993 for the repression of Grave Breaches of the Geneva Conventions of 1949 and of Additional Protocols I and II. The law detailed the relevant offences committed in armed conflict which could be tried in Belgium, and the corresponding penal sanctions they would attract. The Belgian courts have jurisdiction over these offences no matter where such offences are committed, by whom or against whom. The Belgian Government also established an interdepartmental Commission for Humanitarian Law in 1987, to study national measures for implementing the Geneva Conventions and its Protocols.

On 3rd February 1999, the Belgian Parliament adopted a law which adds genocide and crimes against humanity to the international crimes over which Belgian courts exercise universal jurisdiction. The motivation behind the introduction of new legislation was to implement Belgium’s obligations under the Genocide Convention, and to enable Belgium to act firmly in the face of the genocide in Rwanda. However the Government decided to take the opportunity to make other serious violations of international humanitarian law subject to the procedures in the 1993 law, including universal jurisdiction. The 1999 law defines genocide and crimes against humanity in line with the Statute for the International Criminal Court (ICC) adopted in Rome in July 1998, making Belgium the first state to begin to adapt its law in order to comply with the Statute. When introducing the law, the Belgian Government stressed the need to ensure that Belgium could prosecute those accused of international crimes even after a permanent international criminal court is established; the ICC will play a subsidiary role to domestic jurisdictions.

Even in the absence of the 1999 law, there is a real possibility of prosecution where an offence is criminalised by international customary law as a crime against humanity.

35 Article 10.5, Code de Procédure Pénale
36 Moniteur belge, 26 September 1952, pp 6822-6953, and 7 and 22 November 1986, pp 15196-15252 and pp 15845-15846
37 Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions (Moniteur Belge, 5 août 1993)
38 Ibid, Chapitre II.7
39 Proposition de loi relative à la répression des violations graves du droit international humanitaire, Belgian Senate 1st December 1998, 1-749/4
41 Report of the Justice Commission, p.14
This view now has considerable force in Belgian law. Concerned to ensure that the measures being introduced would have retrospective effect - so that Belgian courts would be able to exercise jurisdiction in relation to genocide and crimes against humanity committed prior to the entry into force of the new law - the Government informed the Senate’s Justice Commission that in its view the 1999 law reflected existing treaty and customary international law. Furthermore, it asserted, this international law could be applied directly in the Belgian courts.\textsuperscript{43} In accepting the Justice Commission’s report, the Belgian Parliament was giving an authentic interpretation of international law applicable in Belgian courts. The Belgian courts have since confirmed that prosecution of offences criminalised by customary international law is possible, even where the 1999 law does not apply.

Belgium has yet to become party to the UN Convention against Torture, so is not bound under that Convention to exercise universal jurisdiction over torture. The 1999 law includes torture in its definition of crimes against humanity, and extends this to acts committed in time of peace as well as in time of war. However in order to constitute a crime against humanity, it must be “committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack” (adopting the definition in the ICC Statute). This leaves an area of doubt concerning acts of torture not falling within this definition.

The 1999 law includes a provision that no immunity based on official capacity will prevent the application of the law, also based on a provision in the ICC Statute. The Belgian Government expressed the view that the principle that no immunities would apply to persons accused of genocide or crimes against humanity was already established under international law.\textsuperscript{44}

**Cases**

An investigating magistrate has completed criminal investigations against several Rwandans for violations of Additional Protocol II to the Geneva Conventions in the context of the conflict in Rwanda.\textsuperscript{45} In 1995 four Rwandan nationals were arrested in Brussels in relation to massacres in Rwanda of persons protected by the Geneva Conventions of 1949 and the Additional Protocols of 1977. Of these four Rwandans arrested, three were requested by and duly transferred to the International Criminal Tribunal for Rwanda on the basis of Belgian legislation introduced in 1996.\textsuperscript{46} Proceedings were initiated in Belgium against the fourth, Vincent Ntezimana.

The action against the four Rwandans was initiated in early 1995 at the order of the Belgian Minister of Justice. He had been publicly accused of complicity in genocide after the public prosecutor failed to act upon a criminal complaint deposited in July

\textsuperscript{43} Report of the Justice Commission, pp.18-20
\textsuperscript{44} Report of the Justice Commission, pp.20-21
\textsuperscript{45} Luc Reydams, "De Belgische wet ter bestraffing van inbreuken op het internationaal humanitair recht: een papieren tijger?", 7 Zoeklicht 4 (1998)
\textsuperscript{46} Loi relative à la reconnaissance du Tribunal international pour l’ex Yougoslavie et le Tribunal international pour le Rwanda, 22 March 1996, Moniteur belge 27 April 1996
1994 by victims residing in Belgium. The victims joined the case as parties civiles as permitted by Belgian law.

During the investigation, the court sought evidence in several African countries and interviewed suspects in the custody of the International Criminal Tribunal for Rwanda. In August 1996, the Belgian Courts heard a motion to dismiss the case against Ntezimana who was charged with perpetrating acts of genocide during the 1994 killings. Ntezimana argued that the failure to extradite him to the International Criminal Tribunal for Rwanda demonstrated that there was neither sufficient nor credible evidence to support the alleged accusations. The Belgian Court dismissed the motion, finding that evidence discovered by the Belgian Investigating Magistrate explicitly pointed to his involvement in genocide, and ordered that the action could continue.

Belgian requested the extradition of a further Rwandan, Bernard Ntuyahaga, from Tanzania where he was being held. However in May 1999 Tanzania agreed to extradite to Rwanda to face trial there instead. Ntuyahaga is a suspect in the killing of ten Belgian peace-keepers in 1994 and of Rwanda’s former prime minister.

On 1st November 1998, six Chilean exiles living in Belgium filed a criminal complaint against General Augusto Pinochet of Chile for crimes under international criminal law as defined in the 1993 Geneva Conventions Law, requesting an international warrant for his arrest with a view to his extradition to Belgium. Pinochet was at that time being held in the UK pending a request for his extradition to Spain. On 8th November, investigating judge D. Vandermeersch decided that he had jurisdiction over the offences, and could proceed with an investigation. In his decision judge Vandermeersch confirmed that the 1993 law gave the Belgian courts competence to exercise universal jurisdiction, and that its provisions were applicable to offences committed before their entry into force because they merely related to competence and were therefore of a procedural nature. The alleged acts themselves - murder, assault, abduction and torture, hostage taking - were already punishable under Belgian law. However he determined that the Geneva Conventions and the Additional Protocols required the existence of armed conflict, whether international or internal, and since there was no armed conflict (as defined in Additional Protocol II) in Chile during General Pinochet’s regime, the 1993 law was not applicable.

The judge looked to see whether the facts alleged could constitute another crime under international law punishable in Belgium, and found that they could indeed be characterised as crimes against humanity. He then considered whether this crime, which was a crime under international law, could be viewed as directly applicable in Belgian internal law, since the 1999 law (which created universal jurisdiction over crimes against humanity) was not yet in force. He concluded that customary international law could be applied directly in Belgium, and found:

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47 Rwanda wins extradition tussle, The Independent newspaper, 11th May 1999
48 Tribunal de Première Instance de Bruxelles, Decision of investigating magistrate D. Vandermeersch, 8th November 1998

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"... that as a matter of customary international law, or even stronger as a matter of *jus cogens*, universal jurisdiction over crimes against humanity exists, authorising national judicial authorities to prosecute and punish the perpetrators in all circumstances."  

In reaching this conclusion, he gave weight to the international consensus that it was the responsibility of all states to take the necessary measures to repress crimes against humanity. This found expression in the principle *aut dedere aut judicare* (the obligation to try or extradite), and in UN General Assembly resolution 3074: Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.  

Judge Vandermeersch also considered whether or not Senator Pinochet had immunity as a former head of state, and decided that although Senator Pinochet was immune from prosecution for all official acts committed in the exercise of his functions as head of state:

"[T]he alleged crimes could not possibly be considered official acts performed in the normal exercise of the function as Chief of State, whose task precisely consists in protecting his subjects."

This decision, in line with the conclusions of the Senate’s Justice Commission, mirrors the decision of the House of Lords in the UK which held that Pinochet, as a former head of state, was not immune from prosecution for torture. Judge Vandermeersch added that the principle of state immunity would appear not to apply to crimes against international law.

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49 Unofficial translation by Luc Reydams, University of Notre Dame, forthcoming article in the American Journal of International Law
50 GA resolution 3074 of 3rd December 1973
**DENMARK**

**Domestic Legislation**

The scope for criminal prosecution of aliens for international crimes committed abroad is fairly limited in Danish Law. Article 8(5) of the Danish Penal Code establishes the jurisdiction of Danish Courts over certain crimes when Denmark is obliged by an international treaty to prosecute, including grave breaches of the Geneva Conventions and the Additional Protocols. Article 8(6) establishes jurisdiction over genocide, crimes against humanity and violations of the Hague Conventions, but only where another state has requested the extradition of the person, extradition has been refused, and the alleged behaviour is a crime under Danish law. Articles 245 and 246 of the Penal Code impose penal sanctions for offences relating to injury to the person, with a maximum sentence of eight years imprisonment, but make no specific reference to crimes under international humanitarian law. So, for instance, there are no maximum and minimum penalties for crimes committed during armed conflict, and some war crimes would not be covered at all by the Penal Code and therefore could not be prosecuted in Denmark. In light of these defects, the Danish Red Cross concluded in a report published in 1997 that the obligation to adopt efficient penal sanctions for the repression of war crimes is insufficiently implemented in Danish law.\(^{52}\) The report recommended that a study be made to consider the possibility of adopting specific legislation or amending the Penal Code so as to ensure satisfactory implementation of international humanitarian law.

Denmark is party to the UN Convention against Torture, but has been criticised by the UN Committee against Torture for failing to enact implementing legislation incorporating the provisions of the Convention into domestic law, and for failing to introduce into its penal system a specific offence of torture.\(^{53}\) The Danish Government assured the Committee that every aspect of the Convention is more than adequately covered under existing law, and any act falling under the definition of torture in Article 1 of the Convention would be punishable in a Danish Court. Since Denmark has a dualist system, under which international agreements to which Denmark becomes party are not automatically incorporated into national legislation, the prospects for invoking the Convention before the Danish courts are left in doubt.

**Cases**

Despite the limitations of Danish Law, a Bosnian Muslim was successfully prosecuted in Denmark for war crimes committed abroad. In November 1994 the case of Prosecution v Refik Sarić was concluded.\(^{54}\) Sarić was convicted and sentenced to eight

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\(^{52}\) Implementation of international humanitarian law by Denmark, International Review of the Red Cross, No.320, 1 September 1997, p.583

\(^{53}\) Concluding observations of the Committee against Torture on the third periodic report of Denmark, May 1997, UN doc A/52/44, paras 179-180, 184

\(^{54}\) Public Prosecutor against N.N., High Court (Ostre Landsrets) 3rd Division, judgment of 25th November 1994
years imprisonment by the Danish High Court in Copenhagen for brutally torturing detainees in a Croat-run prison camp in Bosnia in 1993. He was found guilty in relation to three cases, two of which had resulted in death and the third in serious injury. Saric had himself been taken prisoner in the camp but was promoted to guard duty, possibly because he was married to a Croatian woman. He was recognised by former camp inmates after seeking asylum in Denmark.

Jurisdiction was based on the grave breaches provisions in Articles 129 and 130 of the Third Geneva Convention, and on Articles 146 and 147 of the Fourth Geneva Convention in conjunction with Article 8(5) of the Danish Penal Code. Rafic appealed the decision, disputing the jurisdiction of the Danish courts on the grounds that the facts which formed the basis of the charges on which he had been convicted were not serious enough to fall within the definition of grave breaches in the Geneva Conventions. The court disagreed and confirmed the verdict in September 1995. Rafic will be expelled from Denmark upon completion of the sentence.

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55 Second periodic report of Denmark to the UN Committee against Torture, 13 June 1995, paragraphs 11-13
56 The Times, November 23 1994, Denmark: Muslim jailed for Bosnia atrocities
57 Public Prosecutor against T, Appeal Court (Hojesteret), judgment of 15 August 1995
Domestic Legislation

Criminal jurisdiction in France rests on the territorial, active personality and passive personality principles. Thus any offence committed in France, or committed outside France by a French national or against a French national, invokes the jurisdiction of the French courts.58

There are very few provisions explicitly providing the basis for universal jurisdiction in French law. The Criminal Procedure Code Article 689 governs the circumstances in which those who commit crimes abroad may be prosecuted in France, including where an international convention gives French courts jurisdiction over the crime. Upon ratifying the UN Convention against Torture, France enacted Article 689-2 of the Criminal Procedure Code which provides:

"Whoever, outside the territory of the Republic, commits acts qualified as crimes or offences which constitute torture within the meaning of article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted at New York on 10 December 1984, may be prosecuted and tried by French courts if he is found in France".59

Nevertheless, France was criticised by the UN Committee against Torture for failure to adopt a definition of torture in line with Article 1 of the Convention into its penal code.60

In relation to other international crimes the basis for universal jurisdiction under French law remained uncertain until the French Supreme Court (Cour de Cassation) affirmed its applicability on 6th January 1998 in the case of Wenceslas Munyeshyaka (below). The Munyeshyaka decision, which found the basis for universal jurisdiction in a French law implementing the UN Security Council resolution establishing the international criminal tribunal for Rwanda, left open the question of whether French courts would exercise jurisdiction in other cases where there was no corresponding international tribunal, no implementing French legislation and no link with French nationals. The French Penal Code has specifically incorporated penal sanctions for certain offences recognised as international crimes. For instance, in the new Penal Code of 1994, genocide and other crimes against humanity are specified as offences in France.61 However this legislation makes no mention of universal jurisdiction. Although the French legal system is monistic and accords international treaties an authority superior to that of national laws (article 55 of the Constitution), it is unclear whether the ratification by France of treaties incorporating universal jurisdiction provisions, such as

58 Article 113-7, Code de Procédure Pénale
59 Enacted in Article 72 of Act No. 35-1407 of 30 December 1985, in Belgian Initial Report to the UN Committee against Torture, UN Document CAT/C/5/Add. 2, p. 14
60 Conclusions and recommendations of the Committee against Torture on the second periodic report of France, May 1998, UN doc CAT/C/17/Add. 18
61 Nouveau Code Pénal, 1 March 1994, Livre II, Titre Premier, Chapitre I and II, Articles 211 and 212
the Genocide Convention, is in itself sufficient to make it applicable in France without implementing legislation.\(^{62}\) A further potential obstacle will be the principle of non-retroactivity, on the basis of which French courts might decline to allow prosecution for crimes committed before the relevant acts were criminalised in French law.

In France, criminal investigations may be triggered by a complaint filed by victims, and victims may also join the criminal proceedings as parties civiles for the purposes of seeking reparation.

**Cases**

In May 1994 French Investigating Judge Jean-Paul Getti began an investigation into allegations of war crimes and torture brought by five Bosnian Moslems against Bosnian Serbs. On 20 July 1993, five Bosnians resident in France had raised a complaint for war crimes, torture, genocide and crimes against humanity, allegedly committed against them in 1992 in Bosnia-Herzegovina. Judge Getti ruled that he was competent to probe allegations relating to war crimes on the basis of the universal jurisdiction provisions in the Geneva Conventions. He also declared himself competent to probe charges of torture under the amendment to the Criminal Procedure Code, which provides for universal jurisdiction over acts of torture. However he did not find a basis in French law for investigating crimes against humanity or genocide committed outside France. Judge Getti accepted applications from two associations to join as parties civiles.

The matter was appealed and the Paris Court of Appeal declared that the Investigating Judge was not competent to investigate these crimes. In the absence of implementing legislation giving effect to the Geneva Conventions in French law, Article 689 of the French Penal Code, governing jurisdiction over offences committed abroad, could not be applied. On 26th March 1996 the Cour de Cassation agreed, ruling that French courts did not have jurisdiction in this particular case to consider the allegations relating to acts committed in former Yugoslavia based on universal jurisdiction.\(^{63}\) The Court confirmed that the facts alleged to have taken place did fall within those crimes specified in UN Security Council resolution 827 establishing the international criminal tribunal for former Yugoslavia, given effect in French law on 2nd January 1995 (war crimes, crimes against humanity and genocide). But the court held that the French courts would only have jurisdiction under this law, and under Article 689 of the Penal Code, where those accused of such crimes were actually present in France. Jurisdiction could not be based only on the presence in France of victims of the crimes. It was up to the victims to prove that specific perpetrators were in France. Until they were able to do so, there was no basis for jurisdiction of the French courts.

As a consequence of this decision, the National Consultative Commission on Human Rights issued an Opinion on 16th February 1998. It called on the French Government

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\(^{62}\) Compétence des juridictions françaises pour juger un étranger accusé de tortures au Rwanda, commentary by Dr Jean-François Roulot, in La Semaine Juridique Édition Générale, No.41, 7 October 1998, p.1760


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to legislate to ensure the adequate implementation of international humanitarian law and a better definition of the conditions for exercise of universal jurisdiction by French courts.\(^{64}\) In particular, the Commission recommended the enactment of implementing legislation under the Geneva Conventions. The difficulties faced by victims in proving the presence in France of alleged perpetrators of violations were noted. The Commission urged that complaints by victims in such cases be accepted by the courts, and recommended steps to ensure that the burden of proving the presence of suspects did not fall on the victims.

In July 1995 an Investigating Judge opened criminal investigations against a Rwandan priest, Wenceslas Munyeshyaka for his alleged role in the 1994 massacres against Tutsis in Kigali. He was to be investigated for genocide, crimes against humanity on the basis of articles 211 and 212 of the French Penal Code, and Article 689 of the Criminal Procedure Code. The prosecutor appealed against the decision for lack of jurisdiction and the investigation was suspended. The Nimes Appeal Court held on 20th March 1996 that only the crime of genocide was applicable here, and that there was no basis in French law for universal jurisdiction in respect of this crime.

On 6th January 1998 the Cour de Cassation reversed this decision and ordered that the investigation could continue.\(^{65}\) The court said the lower court had erred in limiting the criminal charges to genocide, when the acts alleged could also be deemed to constitute other crimes. It found that jurisdiction was established on the basis of French Law 96-432 of 22nd May 1996, enacted pursuant to UN Security Council Resolution 955 (establishing the International Criminal Tribunal for Rwanda), which allowed perpetrators of grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity who are present in France to be prosecuted in France by the application of French law. The relevant bases in French law, the Court said, could be found in article 689 of the Criminal Procedure Code (torture) and article 211 of the Penal Code (genocide). The case was sent back to the chambre d’accusation for the process to continue. Subsequently, Munyeshyaka has been charged with torture, and the investigation continues. To date, the International Criminal Tribunal for Rwanda has not sought his transfer.

In an earlier case, jurisdiction for human rights violations was based on the nationality of the victims (passive personality), not on the principle of universal jurisdiction. On 16th March 1990, Argentine Captain Alfredo Astiz was convicted and sentenced *in absentia* by the Assise Court to life imprisonment for his role in the torture and disappearance in Argentina of two French nuns whose bodies were never found.\(^{66}\) He was tried in his absence after Britain refused the French authorities permission to question him when its navy took Astiz prisoner during the war over the Falklands/Malvinas Islands in 1982, and the Argentinean authorities also refused to respond to any request for assistance. An international arrest warrant was issued in 1985, which could be executed should he leave Argentina.

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\(^{64}\) Avis sur l’adaptation de l’ordre juridique francais aux conventions de droit humanitaire, adopted by the Plenary Assembly of the Commission Nationale Consultative des Droits de l’Homme on 16 February 1998

\(^{65}\) Judgment of the Cour de Cassation, Chambre Criminelle, of 6 January 1998, No. X96-32.491 PF

\(^{66}\) Judgment of the Cour D’Assises de Paris, 16th March 1990
On 26th October 1998, following the arrest of Chile’s former dictator General Pinochet in London pending a request for his extradition to Spain, a number of family members of French victims of his regime filed a criminal complaint in Paris against him. Competence of the French courts was based not on universal jurisdiction but on the fact that the victims were French nationals (the passive personality principle). The families sought an investigation into the torture and disappearance of three French nationals in Chile, and General Pinochet’s extradition from the UK to face charges of crimes against humanity. On 4th November 1998 a French court requested that a provisional warrant for the arrest of General Pinochet be transmitted to the British authorities. A second request for an arrest warrant was issued on 20th November, in relation to the disappearance and torture of a further French national on the day of the military coup of 11th September 1973.

The case law leaves open the question of whether French courts would exercise jurisdiction in other cases where there is no corresponding international tribunal, no implementing French legislation and no link with French nationals.

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67 Letters of 26th October 1998 from William Bourdon, advocate, to the Minister of Justice and to the Procureur of the Tribunal de Grande Instance de Paris
Domestic Legislation

German courts will have jurisdiction where victims of a crime are of German citizenship or origin (passive personality). In addition, Germany’s Penal Code allows universal jurisdiction for certain crimes committed abroad against internationally protected legal values. A number of specific crimes are listed, including acts of genocide committed abroad. A general clause provides that German criminal law will be applied to offences committed by non-nationals outside of Germany if such offences are made punishable by the terms of an international treaty binding on Germany. The obligation to prosecute on the basis of universal jurisdiction must be stated expressly in the treaty in question.

A wider provision under Article 7.2 of the Penal Code allows for prosecution of foreigners apprehended in Germany for crimes committed abroad who are not extradited because a request for extradition was never made, or was refused, or because extradition is not feasible.

The German Government has reported to the UN that these provisions are sufficient legal basis for exercising jurisdiction over torture committed abroad. A definition of genocide and applicable penalties are included in Article 220a of the Penal Code. However similar implementing legislation has not been enacted with regard to other international treaties. For instance, the UN Committee against Torture has criticised Germany for not integrating a precise definition of torture in line with Article 1 of the Convention into its legal order. In practice, the absence of implementing legislation has not prevented the German Courts from exercising jurisdiction, for instance over war crimes under the Geneva Conventions of 1949.

Further, the German courts have stated that in order for these provisions permitting jurisdiction over acts committed abroad to apply, some additional connection to Germany is required in order to outweigh the principle of non-interference in the affairs of another state. So for instance the mere temporary presence of a suspect in Germany would not by itself be sufficient basis for a prosecution in Germany. In the case of Dusko Tadic, later handed over to the international criminal tribunal for former Yugoslavia in the Hague to face charges of genocide, the Bundesgerichtshof (Germany’s highest criminal court) found that the fact that the accused had been living in Germany for several months, together with the serious nature of the crime and the

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68 §71 Strafgesetzbuch (Penal Code)
69 §6, Penal Code
70 §6(9), Penal Code
71 §7(2) No. 2 Penal Code
72 Report of Germany to the UN Committee against Torture, UN Document CAT/C/12/Add.1 of 17 March 1992, p.13
73 Concluding observations on the second periodic report of Germany, UN Committee against Torture, May 1998, UN Doc A/53/44, paras 185, 190
serious efforts of the international community to stop the genocide and bring the perpetrators to justice, were sufficient factors establishing a connection to Germany.\textsuperscript{74}

Cases

In Germany four prosecutions have been initiated, all relating to the conflict in former Yugoslavia. One (Tadic) was transferred to the International Criminal Tribunal for former Yugoslavia in the Hague after being indicted in the Bavarian High Court under Article 6.1 of the Penal Code which establishes universal jurisdiction for genocide. The other three have proceeded in the German courts in the absence of a request for their transfer from the international tribunal.

On 23rd May 1997, the Bavarian High Court convicted Novislav Djagic, a Bosnian Serb, to five years imprisonment for his role in aiding and abetting the killing of 14 Muslim men in Eastern Bosnia in April 1992.\textsuperscript{75} The men were shot on a bridge by Serb soldiers, as an act of revenge designed to terrorise the Muslim population. Djagic was acquitted of the crime of genocide, since the court was unable to establish the required intent “to destroy, in whole or in part, a national, racial, religious or ethnically distinct group”. The international obligation to prosecute Djagic, required in order to found jurisdiction under Article 6.9 of the German Penal Code (crimes for which universal jurisdiction is provided under an international treaty), was the Fourth Geneva Convention Articles 146 and 147, and Additional Protocol One. The Court considered whether victims were protected persons under Article 4 of the Fourth Geneva Convention. In this context the Court determined that the armed conflict was an international one. The Court also found that jurisdiction could be established on the basis of Article 7.2 of the Penal Code.

The Court reiterated that the nature of the crimes and the international efforts to stop human rights violations in Bosnia-Herzegovina were strong grounds for establishing a connection to Germany for the purposes of establishing jurisdiction, and stated: “it would be intolerable if the perpetrator of a crime under international law committed against civilians, who had moved into German territory, would be ... left in peace or extradited to a state that is patently not willing to prosecute him”. Both Djagic and the Prosecutor appealed against the decision.

On 26th September 1997, Nikola Jorgic was convicted and sentenced to life imprisonment by the Dusseldorf High Court.\textsuperscript{76} He was found guilty on 11 counts of genocide (including killing members of a group and subjecting the group to conditions of life likely to bring about its physical destruction in whole or in part), murder, assault and deprivation of liberty. Jorgic, a former leader of a Serb paramilitary group, was found to have been actively involved in the elimination and expulsion of the Muslim population of the Bosnian region of Doboj in the summer of 1992. His actions included opening fire on a crowd with a machine gun resulting in the deaths of 22 men, women and children.

\textsuperscript{74} Decision of 13/2/1994 in the case of Dusko Tadic
\textsuperscript{75} Public Prosecutor v Djagic, Bayrisches Oberlandesgericht, 23 May 1997
\textsuperscript{76} Public Prosecutor v Jorgic, Oberlandesgericht Dusseldorf, 26 September 1997
Jurisdiction for genocide was based on Article 6.1 of the Penal Code. Although Article 6 of the Genocide Convention did not explicitly provide for universal jurisdiction over genocide, Article 6 of the Convention was generally regarded as not excluding the possibility of national courts exercising jurisdiction. Because of this, and because the Statute of the International Criminal Tribunal for Former Yugoslavia - in relation to which Germany had enacted a Law on Co-operation - also included jurisdiction over genocide, the Court found that no prohibition on prosecution could be derived from international law. The Court found that the accused had the relevant intention "to destroy, in whole or in part, a national, racial, religious or ethnically distinct group" required by the definition of genocide contained in Article 2 of the Genocide Convention and repeated in Article 220a of the German Penal Code.

With regard to the other charges, which included murder and assault, jurisdiction was based on Article 6.9 of the German Penal Code (crimes for which universal jurisdiction must be exercised under an international treaty): grave breaches of the Geneva Conventions.

In terms of the link with Germany, in addition to the interest Germany had in prosecuting international crimes, Jorgic had previously lived in Germany between 1969 and 1992 and was married to a German national. Evidence was given against him by Muslim witnesses as well as journalists. The international criminal tribunal in the Hague declined to take over the case. Jorgic has appealed against his conviction.

A third case is pending against a Bosnian Serb, charged with genocide before the Dusseldorf High Court, and at least two other criminal investigations are reported to be ongoing in relation to crimes committed in former Yugoslavia.

Three German citizens filed criminal charges against former Chilean dictator General Pinochet alleging kidnapping and ill-treatment in Chile following the military coup of 1973. Competence of the German courts was based not on universal jurisdiction but on the fact that the victims of the crime were German nationals. The Bundesgerichtshof, Germany's highest criminal court, assigned the case to the Regional Court of Dusseldorf on 18th November 1998. While it did not make any finding on the question of immunity, the court could have refused to allow the case to proceed if it had taken the view that Pinochet would certainly enjoy immunity.

77 Section 7(1) State Law
Domestic legislation

According to the Penal Code, Italian courts may prosecute a foreign national for crimes committed abroad where there is a specific law or international convention which establish the applicability of Italian criminal law. However the steps taken to date by the Italian legislature to implement international treaties containing universal jurisdiction provisions may not be adequate to ensure that prosecutions could be carried out in practice.

For instance, legislation was enacted in 1988 to implement the provisions of the UN Convention against Torture when Italy ratified the Convention. This legislation gives jurisdiction to Italian courts over acts of torture committed abroad where the accused is an Italian citizen, the victim is an Italian citizen or: “the accused is not an Italian citizen but is present in Italian territory and is not to be extradited”. Proceedings are at the request of the Minister of Justice. However this implementing legislation does not contain any provision introducing and defining a specific crime of torture, nor does it establish penalties. It is arguable that the Torture Convention should be viewed as a self-executing treaty, and therefore applicable directly in national law without the need for further legislation. Nevertheless there remains considerable doubt as to how far the Italian courts would be ready to apply the international treaty norms directly, in the absence of a specific and separate crime of torture and the fixing of penalties. The UN Committee against Torture shares this concern, and has requested Italy to include a specific crime of torture in its criminal law. Draft legislation which would amend the Penal Code so as to include the offence of torture has been presented to the Italian Parliament but has not yet been enacted.

Similar difficulties arise when it comes to the status of the Geneva Conventions under Italian law. While legislation was enacted in order to allow ratification of the Conventions and the Additional Protocols, no specific provisions were adopted to make the necessary changes to the relevant domestic law, which would be the Wartime Military Penal Code. A Working Group was set up in 1986 charged with the task of drafting legislation to bring Italian law into line with international humanitarian law, and a draft bill was finally approved by the Council of Ministers in December 1997 and transmitted to Parliament in early 1998, but is currently still in Parliament. The bill includes no provision relating to universal jurisdiction. If it is enacted in its present form, those wishing to invoke universal jurisdiction will be forced to rely on Article 7.5 of the Penal Code, with no certainty of success in the courts.

79 Article 7.5, Penal Code
80 Law of 3rd November 1988 No.498, upon ratification of the UN Convention against Torture, Article 3
81 Antonio Marchesi, L’Italia e gli obblighi internazionali di repressione della tortura in Rivista di diritto internazionale, 1999
82 Recommendations of the Committee against Torture on consideration of Italy’s second periodic report, 1995, UN Doc A/50/44, 21
83 Law no 1739 of 27 October 1951 regarding the Geneva Conventions, and Law no.762 of 11 December 1985 regarding the Additional Protocols
The implementation of the Genocide Convention under Italian law is more satisfactory, with two laws enacted establishing the specific crimes and related penalties, though no specific provision regarding universal jurisdiction.\textsuperscript{84}

The situation under Italian law may be improved once implementing legislation is introduced following Italy’s ratification of the Statute for the International Criminal Court (ICC). Draft legislation adopted by the Italian cabinet on 8 October 1998 sets out the framework for provisions to be enacted within six months of Italy ratifying the Statute. The draft says that criminal provisions should be introduced to make all the criminal offences referred to in the Statute punishable under national law, including penalties, competence, jurisdiction and other matters.\textsuperscript{85}

Although Italian law does not recognise passive personality as a basis for jurisdiction as such, the Penal Code provides that an Italian or foreign national who commits certain “political crimes” on foreign territory can be punished according to Italian law, at the request of the Minister of Justice.\textsuperscript{86} A political crime is defined as one which “offends the political interests of the state or a political right of the citizen, or if the crime is driven in whole or in part by political motives” (unofficial translation). This law - introduced in the 1930s for use against opponents of the Fascist regime then in power - has in recent years been used as the basis for cases relating to human rights violations in Argentina during the military regime. The question of who is an Italian citizen for the purposes of the law has proved to be controversial.

\textit{Cases}

REDRESS is not aware of any case where the principle of universal jurisdiction has been relied on by the Italian courts to prosecute for violations of human rights or humanitarian law committed abroad. However the “political crimes” basis for extraterritorial jurisdiction under Article 8 of the Penal Code has been invoked in attempts to indict persons responsible for committing human rights violations against Italian nationals.

Investigations have been opened in Italy into human rights violations committed in Argentina. As early as 1983, the Minister of Justice requested the Public Prosecutor to investigate those responsible for political crimes in Argentina against Italian citizens or those of Italian origin.\textsuperscript{87} The \textit{magistratura} in Rome started to investigate the disappearance of more than one hundred Italians and the kidnapping of ten babies of Italian descent born in prison during the period of military rule. It produced a list of 89 members of the armed forces accused of planning and carrying out the disappearances, torture and kidnapping. An enormous volume of documentation was collected including personal accounts from witnesses and evidence from relatives of

\textsuperscript{84} Law no.962 of 9 October 1967
\textsuperscript{85} Draft Bill for the ratification of the Statute establishing the International Criminal Court, translated into English on the web site of No Peace Without Justice; Ratification Monitor page
\textsuperscript{86} Article 8, Penal Code
\textsuperscript{87} Redress is grateful to the International League for the Rights and Liberation of Peoples in Rome for information about these cases
the disappeared, exiles and human rights organisations. Some relatives of the disappeared applied to be joined as *partie civile*. The investigation has been limited to alleged violations against Italian citizens, because it has been based on Article 8 of the Penal Code concerning "political crimes", which is limited in scope to offences against the Italian state or Italian citizens.

Efforts were made by the Italian judicial authorities to seek the co-operation of the Argentinean authorities in the investigation. However in 1994 the Federal Court of Appeal in Argentina issued an injunction preventing two Italians who had travelled to Buenos Aires, a judge and a prosecutor, from carrying out investigations in relation to the case in Argentina.

Since then the case has proceeded slowly. In 1995 the public prosecutor sought the dismissal of the case on the grounds it had continued for years with no outcome. This was opposed by lawyers representing the victims, and the court refused to close the case. In July 1997 the Tribunale di Roma accepted seven cases of disappearance and two cases of kidnapping of babies, and preliminary hearings began. In June 1998 the State of Italy itself applied to be joined as *partie civile*, and on 20th January 1999 the Investigating Judge ruled that only the State could be accepted as *partie civile*, rejecting requests from groups representing relatives of the disappeared to also be joined in the case.

Preliminary hearings to establish the responsibility of members of the Argentinean military continued in the Tribunale di Roma, and on 20 May 1999 seven persons were indicted for murder and kidnapping. Their trial, which is expected to be conducted in their absence as permitted under Italian law, is due to commence in October 1999.

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88 Derechos Human Rights, Press Release, 21 May 1999
THE NETHERLANDS

Domestic Legislation

Despite the Netherlands being party to the main international treaties which confer universal jurisdiction for violations of international humanitarian law, the Dutch authorities and courts initially had difficulty in implementing this principle in practice.

The Criminal Law in Wartime Act, enacted in 1952, is the main statute governing international humanitarian law in the Netherlands. Article 8 of the Act is concerned with war crimes, and is remarkably wide. It criminalises all violations of the laws and customs of war, including violations of the Geneva Conventions of 1949 and Protocol 1 to the Convention, and other violations of international humanitarian law whether violations of customary international law or of treaties. Thus its reach is not limited to grave breaches of the Geneva Conventions, or to conflicts of an international character. Crimes against humanity are mentioned in Article 8, though only insofar as such crimes constitute a factor aggravating war crimes. The Act imposes maximum penalties, and provides a framework for investigating and adjudicating such offences.

A major problem with the Criminal Law in Wartime Act is that it incorporated into Dutch law provisions of the Geneva Conventions in a manner implying that the Act would only apply in relation to acts committed in a war in which the Netherlands is involved.89 When the case of the Bosnian Serb Darko Knezevic reached the Supreme Court in 1997, the Court had to interpret this provision, and its relationship to the principle of universal jurisdiction. The Supreme Court upheld the lower court’s view that the intention of the government in introducing the Act had been to comply with its treaty obligations, including the obligation to try war crimes in Dutch courts irrespective of where and by whom the crime was committed. In its Explanatory Memorandum when introducing the draft law, the Government had confirmed that this provision must be regarded as an application of the universality principle. Therefore, the Court held, the Government in enacting this law had specifically intended to implement the provision relating to universal jurisdiction. It stated that the Act must be taken to mean that the limitation to war in which the Netherlands is involved does not relate to provisions intended to make it possible to effectively punish violations of the Geneva Conventions.90 In this particular case, the court concluded, the Dutch courts did have competence to exercise jurisdiction and the case could continue.91

The Netherlands also, in 1988, enacted specific legislation in order to comply with the universal jurisdiction provisions contained in Article 5.2 of the UN Convention against Torture. The legislation included the following provision:

90 Ibid, p.605
91 De Hoge Raad der Nederlanden, Decision No. 3717, 11 November 1997; Decision in the appeal to the Supreme Court against the decision of the Arnhem Court of Justice, Military Chamber, of 19 March 1997

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"Dutch criminal law shall apply to any person who commits outside the Netherlands one of the criminal offences described in Sections 1 and 2 of this Act"  

The definition of torture contained in the legislation closely follows the language of the Convention. Specific legislation was also enacted in 1964 implementing the Genocide Convention, making genocide a crime in the Netherlands. The legislation closely follows the definitions in the Convention and providing applicable penalties, but no provision was added specifically enabling the Dutch courts to exercise universal jurisdiction for genocide.

The Dutch Criminal Code also specifies that Dutch criminal law applies to Dutch nationals who commit offences abroad, but criminal jurisdiction cannot be established on the basis of the (Dutch) nationality of the victim alone (passive personality).

Cases

In May 1994, a criminal complaint was filed against the former Chilean President, General Augusto Pinochet, under the UN Convention against Torture for alleged crimes committed in Chile in the 1970's and the 1980's. Pinochet was recognised in his hotel on a visit to Amsterdam and a complaint was immediately filed with the public prosecutor concerning Pinochet's complicity in two cases of torture. However, the prosecutor did not act and Pinochet left the country. The decision not to prosecute became the subject of a complaint procedure heard by the Amsterdam Court of Appeal. The Court found the decision justified, on the basis that a prosecution would have encountered too many juridical obstacles. The Netherlands was subsequently questioned by the UN Committee against Torture in April 1995 concerning the reasons for its failure to apply the universal jurisdiction provisions contained in the Convention in this case.

The only case to come before the Dutch courts to date has been that of Darko Knezevic. On the 11th November 1997 the Hoge Raad (Supreme Court of the Netherlands) ruled that Darko Knezevic, a Bosnian Serb, could be tried by a Dutch Military Court for war crimes committed during the Balkan Conflict, upholding the universal jurisdiction provisions under the grave breaches regime of the four Geneva Conventions. The investigation against Knezevic which had been initiated in 1995 was allowed to proceed. The Hoge Raad decided that military chambers were the competent forum to hear such cases and not the ordinary Dutch Courts. Knezevic is accused of killing two Moslems, threatening others and transferring them to a concentration camp, and attempting to rape two sisters, all while part of an armed group serving as part of the Bosnian Serb militias in the Prijedor area of Bosnia in 1992.

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92 Initial Report of the Netherlands under the UN Convention against Torture, UN Document CAT/C/9/Add.1, p.20
93 Decision of the Hoge Raad Der Nederlanden, 11 November 1997, Criminal Division, No.3717
Besch, unofficial translation in Yearbook of International Humanitarian Law, Vol 1, 1998

35
The Dutch Minister of Justice has confirmed that allegations raised against a large number of other individuals are currently under investigation in the Netherlands.
Domestic Legislation

The Spanish Law on Judicial Power contains two provisions relating to extraterritorial jurisdiction for international crimes. Spanish Courts have jurisdiction over criminal acts committed abroad where this is provided for in Spanish Law or where Spain is obliged to exercise jurisdiction under international treaties. Jurisdiction can also be founded on a separate provision, Article 23, introduced in 1985, which confers jurisdiction on Spanish courts over crimes committed outside Spain when such crimes constitute genocide, terrorism or other crimes which Spain is obliged to prosecute according to an international treaty. This provision came into operation with regard to the crime of torture. Torture was incorporated into the Penal Code in 1978, and when Spain subsequently ratified the UN Convention against Torture in 1987, it thereby accepted the obligation to exercise jurisdiction over torture, wherever committed.

Treaties that have been ratified by Spain and officially published become part of Spanish domestic law. After Spain ratified the Geneva Conventions, the two Additional Protocols and the Genocide Convention, relatively little implementing legislation was enacted, other than a few measures introduced into the Penal Code fixing penalties and limitation periods.

International treaty norms have been invoked to found jurisdiction in claims filed on behalf of victims of human rights violations committed in Argentina, Chile and Honduras. Spain’s highest court, the Audiencia Nacional, has confirmed that the Spanish courts can exercise jurisdiction over the international crimes of genocide, terrorism and torture. Spanish law does, therefore, provide for universal jurisdiction for international crimes, so long as the obligation to do so is included in an international treaty, and the particular act falls under the definition of a crime characterised in Spanish law. The fact that victims of a crime are Spanish is not itself a basis for jurisdiction in Spanish law (i.e., the passive personality principle does not apply).

Spanish law provides opportunities for victims of crimes to directly initiate criminal investigations without requiring the permission of the Public Prosecutor. The Spanish constitution and legislation allow citizens to set criminal processes in motion by initiating an acción popular, ("popular action"), following which the applicant may pursue a private prosecution if the public prosecutor does not take up the case.

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94 Ley Orgánica del Poder Judicial, Ley orgánica 6/1985, Article 65
95 Article 23, Ley Organica
96 Spanish Constitution 1978, Article 96
97 Article 125, Spanish Constitution as amended 27 August 1992, Criminal Procedure Law Articles 101 and 270
Cases

Spanish investigating judges have played an active role in opening judicial inquiries into human rights violations against Spanish and non-Spanish nationals, committed during military dictatorships in Argentina, Chile and Honduras. In some of these cases, the investigations were initially conducted while the alleged perpetrator was not physically present within Spanish jurisdiction. Sometimes steps could be taken to obtain the presence of the defendant at a later stage in the proceedings.

In June 1996, Judge Balthazar Garzon accepted popular actions filed on behalf of groups and individuals, and began investigating the disappearance of Spanish nationals in Argentina between 1976 and 1983. In the name of 10 victims, the investigation expanded to more than 300 Spanish nationals murdered or disappeared during the “dirty war”. While the process was initiated by and on behalf of Spanish victims, the investigation very soon expanded to include violations against non-Spanish nationals.

Extensive investigations led to more perpetrators being named and the arrest of certain individuals being sought. In March 1997, Judge Balthazar issued an international arrest warrant for former Argentine leader General Galtieri, and sought his extradition from Argentina to stand trial in Spain for the disappearance of Spanish nationals. Argentina refused to co-operate. In October 1997 a Spanish judge ordered the arrest pending inquiries of former Argentine Navy Officer Adolfo Scilingo, who had visited Spain and agreed to give testimony in a Spanish court, where he repeated his admission, made in Buenos Aires, that he had participated in throwing dissidents from planes into the River Plate. In his testimony, the commander confessed to participating in the military war against leftists and political dissidents. Grave human rights were violated, including the disappearances of over 9,000 civilians, over 4,000 of whom he claimed were drugged, chained and thrown into the Atlantic Ocean.

In July 1996 investigating judge Manuel Garcia-Castellon had also opened an investigation into General Augusto Pinochet and other members of the ruling junta of Chile from 1973 for genocide, torture and murder of Spanish nationals. The proceedings were initiated by groups and individuals representing Spanish victims. In October 1998 judge Garcia-Castellon ordered the transfer of the case to be consolidated with judge Garzon’s case relating to Argentina. One of the reasons for this move was the linkage between the two cases in Operation Condor.

The Public Prosecutor had challenged the basis of jurisdiction of the Spanish courts to proceed with regard to events in both Argentina and Chile. In each case the Central Instructing Judge confirmed that his court did have jurisdiction on the basis of the Law

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98 Information concerning the cases regarding Argentina and Spain is taken mainly from R. Wilson, Spanish Criminal Prosecutions use International Human Rights Law in Ko’aga Ronç’eta se iii, v.5(1996) and from court documents and unofficial translations provided by the organisation Derechos Human Rights.
99 Operation Condor was a conspiracy to commit murders in Argentina, the US, Spain, Italy and elsewhere
on Judicial Power. On 30th October 1998 the Audiencia Nacional, the national criminal court, heard an appeal challenging the jurisdiction of the Spanish courts in both cases, brought by the Public Prosecutor.

One question addressed by the Court in its decision relating to the Chilean cases was whether a national court had jurisdiction under the Genocide Convention. Article 6 of the Genocide Convention provides only for those accused of genocide to be tried "by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction". However, the Court said, it would be contrary to the spirit of the Convention to consider this a limiting provision as regards jurisdiction, particularly in relation to a crime of this magnitude which was of concern to the entire international community. The fact that the possibility of jurisdiction being exercised by national courts (other than in the state where the act was committed) was not explicitly provided for in the Convention does not exclude the possibility of a State Party exercising jurisdiction.

Another issue raised by the Public Prosecutor was that Article 23 of the Law on Judicial Power, which gives the Spanish courts jurisdiction over acts committed abroad where provided for in Spanish Law or under international treaties, was only introduced in 1985 and could not be applied retrospectively in respect of crimes committed before it was in effect. The Audiencia Nacional held that Article 23 of the Law was a procedural norm and as such was not affected by the fact that acts took place prior to its introduction. So far as torture was concerned, the Court was satisfied that it was part of the crimes of genocide and terrorism and did not need to be considered as an independent ground for jurisdiction.

The Audiencia Nacional also considered the scope of the crimes of genocide, terrorism and torture and concluded that all charges were well founded in Spanish law. The Court responded to the argument that the acts did not fall under the definition of genocide accepted under international and Spanish law: certain acts committed with intent to destroy, on whole or in part, a national, ethnic, racial or religious group. The concept of genocide was incomplete, the Court held, if the definition of the "group" suffering persecution was limited. In the two situations before the Court, relating to events in Argentina and Chile, the regime had identified a distinct group and set out to destroy it, even if the group in question could not be characterised as a national, ethnic, racial or religious group in accordance with the definition contained in the Genocide Convention.

On November 4th and 5th, the entire panel of judges of the Audiencia Nacional decided unanimously that the Spanish courts did have jurisdiction, confirming the decisions of the two judges in the cases relating to Chile and Argentina.

On 16th October 1998 judge Garzon sought and obtained a provisional warrant for General - now Senator - Pinochet's arrest in the UK where he was visiting, pending an application for his extradition to Spain to answer charges of murder of Spanish citizens.

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100 In the proceedings relating to Chile, decision of Judge Manuel Garcia-Castellon, Judge-Magistrate of the Central Investigatory Court number six, Madrid, Summary Proceeding 1/98-J, 20 September 1998.
in Chile following the coup on 11th September 1973. On 22nd October 1998 a second provisional warrant was obtained alleging further crimes of torture and hostage taking during 1988 to 1992. The Spanish Government issued a formal Request for extradition which covered acts going back to the period prior to the coup of 11th September 1973, including conspiracy to commit torture, and acts committed outside Chile in pursuance of Operation Condor. The charges in the second warrant and the request were not limited to offences against Spanish victims. The question of whether or not Senator Pinochet, as a former head of state, is immune from arrest and extradition proceedings in the UK in respect of acts committed when he was head of state, was resolved by the House of Lords on 24th March 1999.\textsuperscript{101}

In August 1998, lawyers representing Milton Jimenez Puerto, a Honduran citizen, applied to a Spanish court seeking the arrest and criminal investigation of Billy Joya for the torture of Mr Puerto and other students whilst allegedly a member of the B3-16 Death Squad in Honduras.\textsuperscript{102} Joya fled Honduras after being charged there, and sought political asylum in Spain. Honduras sought to extradite Joya but was unable to do so in the absence of an extradition treaty. The universal jurisdiction provisions of the UN Convention against Torture formed the basis of the claim filed with the court.

\textsuperscript{101} Proceedings in the UK courts are described in the section on the United Kingdom, below.
\textsuperscript{102} Unofficial translation of the denunciation filed with the Instructing Court of Madrid on 4th August, 1998.
**SWITZERLAND**

*Domestic Legislation*

Switzerland introduced amendments to its Military Penal Code to ensure that war crimes could effectively be prosecuted under the Geneva Conventions of 1949. In a revision of 1968, the Swiss Military Penal Code was extended and Articles 108 and 109 now contain a generic clause referring to international humanitarian law and the laws and customs of war, probably covering violations committed in non-international as well as in international armed conflicts. They provide for the application of the principle of universal jurisdiction; civilians or members of foreign forces who committed offences against international law during armed conflict may be tried in Swiss Military Tribunals. Certain specific international crimes are also listed as punishable.

The principle of universal jurisdiction is also included under ordinary criminal law in Article 6 bis of the Swiss Criminal Code, which states that the Code is applicable to crimes committed abroad which Switzerland is obliged to pursue under an international treaty, provided that the act is also punishable in the State where it was committed, the perpetrator is present in Switzerland and is not extradited. The Swiss Government has asserted that this provision operates to confer jurisdiction over torture committed abroad.

Swiss law also includes the active and passive personality bases for jurisdiction: crimes committed by or against Swiss nationals are punishable in Switzerland under the Penal Code (Articles 4-6).

Switzerland has yet to ratify the Genocide Convention, although it may do so in the near future.

*Cases*

Switzerland has carried out a number of investigations, handed over a suspect to the International Criminal Tribunal for Rwanda in May 1997, and pursued at least two cases in its own courts.

In July 1997, G.G. was tried and acquitted for war crimes committed at the Serbian run detention camps of Omarska and Keraterm in North Western Bosnia during the summer of 1992. G was arrested in Geneva in 1995 having being identified by

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103 American Journal of International Law, Vol.92, p.79, case note by Andreas Ziegler
104 Article 2.9, Military Penal Code Book 1
105 Code Pénal Suisse of 21 December 1937, article 6bis al.1
106 Switzerland's Initial Report to the UN Committee against Torture, UN document CAT/C/5/Add.17, p.8
107 *La Suisse peut-elle juger un homme accusé de génocide?*, Fati Mansour, Le Temps, 13 April 1999
109 American Journal of International Law, Vol.92, p.78, case note by Andreas Ziegler
Muslim refugees as a former camp guard. He was charged under the Swiss Military Penal Code of violating the laws and customs of war, including beating and injuring civilian prisoners and submitting them to degrading treatment in violation of the Geneva Conventions and the two Additional Protocols. He claimed that this was a case of mistaken identity and that he was already in Europe at the time of the alleged offences. The confused evidence and testimonies at the trial led to his acquittal on all charges. The Court further ordered he be paid 100,000 swiss francs compensation for material and moral damages, though this was reduced by 20,000 on appeal.\textsuperscript{110}

Before reaching its verdict the Military Tribunal considered whether the law governing international armed conflict applied in this case, rather than the more restrictive protections available in non-international conflicts. The Tribunal decided that the conflict was of an international character. The Court also confirmed that in any event it was competent to deal with the case under Article 109 of the Military Penal Code, which extended to all armed conflicts. The decision of the Swiss Military Tribunal was the first in criminal proceedings pursuant to Switzerland’s exercise of universal jurisdiction over war crimes.

In July 1998 a Rwandan, N, was charged with crimes against humanity, war crimes and genocide.\textsuperscript{111} He was accused of taking part in the killings in 1994 whilst mayor of a community in the Gitarama province of Rwanda, including inciting his fellow citizens to kill. Granted political asylum in Switzerland, he was subsequently arrested in August 1996 after allegations were raised against him. An investigation ensued by Swiss military magistrates when the International Criminal Tribunal for Rwanda did not seek his referral. His trial commenced in the Military Tribunal of Lausanne on 12 April 1999. Two rogatory missions had been to Rwanda to collect testimony and other evidence, and the court itself visited Rwanda. Exceptional measures were taken to ensure the protection of witnesses, who came from Rwanda and elsewhere in Europe to give evidence at the trial.

On the eve of the trial, several applications were made by victims to join as parties civiles, as permitted by Swiss law. The Court permitted only one person, whose spouse died during the genocide, to be constituted as partie civile. The others, the Court decided, had come forward too late and too ill prepared, and it was not right to delay the trial in order to accommodate them. However, later in the trial the one individual permitted to become partie civile withdrew, preferring to maintain their status as a witness in order to be eligible for witness protection measures. Parties civiles were not entitled to such measures.

In presenting the charges, the prosecution argued that the charge of genocide was based on customary international law, since Switzerland was not party to the UN Convention on Genocide. Similarly, the charge of crimes against humanity was based on customary international law. The charges relating to war crimes were based on Swiss law. The defence contested the jurisdiction of the Swiss courts over genocide and crimes against humanity purely on the basis of customary international law. The

\textsuperscript{110} Judgment of the Military Court of Cassation, 5 September 1997
\textsuperscript{111} Information on this case is based on reports in the Swiss media, particularly Le Temps of 10 and 13 April 1999
Court agreed, finding that despite Switzerland’s international obligations, the lack of provision under Swiss law for jurisdiction over genocide and crimes against humanity, and the lack of equivalent crimes under domestic law, made prosecution for these crimes impossible. Only the charges based on violations of the Geneva Conventions could proceed.

On 30 April 1999, N was found guilty of war crimes in breach of the Geneva Conventions, and sentenced to life imprisonment.112

Further prosecutions can be expected to take place in Switzerland. On announcing the charges in the case of N, the Chief military prosecutor confirmed that a number of nationals of former Yugoslavia were also the subject of investigation within Switzerland, although no formal charges had yet been brought.

On 26th October 1998, a Geneva court sought a warrant for the arrest of General Pinochet in London, following a complaint filed by the widow of a Swiss national, Alexei Jaccard, who disappeared in Chile in 1977. Procureur Bernard Bertossa founded jurisdiction on the principle of passive personality, based on the Swiss nationality of the victim (he had dual Swiss and Chilean nationality). Switzerland subsequently submitted a formal extradition request, joining the list of countries seeking Pinochet’s extradition from the UK.

112 Coupable de crimes de guerre et d’assassinat, le maire rwandais est condamné à la perpétuité, Le Temps newspaper, 1 May 1999
Domestic legislation

Universal jurisdiction is provided for in legislation incorporating the Geneva Conventions, the two Additional Protocols and the Torture Convention into UK law. The Geneva Conventions Act of 1957 makes punishable certain grave breaches of the Geneva Conventions wherever committed. The Geneva Conventions (Amendment) Act 1995, which came into force in 1998, extended universal jurisdiction to grave breaches of the First Additional Protocol of 1977. However this Act did not extend universal jurisdiction to breaches of the Second Additional Protocol, Relating to the Protection of Victims of Non-International Armed Conflicts. Attempts to persuade the Government to introduce legislation to extend the application to acts committed in internal armed conflicts have so far failed.\textsuperscript{113}

A War Crimes Act was enacted in 1991, giving the UK courts jurisdiction over certain offences committed during the Second World War. Jurisdiction is limited to offences of homicide constituting a violation of the laws and customs of war, committed by a British citizen or resident, and committed in Germany or German-occupied territory between September 1939 and June 1945.

Universal jurisdiction also exists for the offence of torture. Section 134 Criminal Justice Act 1988 was enacted when the UK became party to the UN Convention against Torture, in order to implement its provisions. Section 134 reads:

\begin{quote}
“A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties”
\end{quote}

No prosecution may be brought under this provision without the consent of the Attorney General (Section 135).

The UK is also party to the Genocide Convention, and enacted legislation to give effect to its provisions in 1969.\textsuperscript{114} The Genocide Act reproduces the Genocide Convention, and does not specifically provide for UK courts to have jurisdiction over genocide committed abroad.

Cases

In September 1997 a Sudanese doctor, Mohammed Ahmed Mahgoub, was charged in Scotland in connection with incidents of alleged torture of detainees at a secret detention centre in Sudan following the coup which brought the National Islamic Front to power in 1989. The allegations had been raised by Sudanese refugees in the UK.

\textsuperscript{113} A Geneva Conventions (Amendment) Bill was tabled in the House of Lords on 30th January 1997
\textsuperscript{114} Genocide Act 1969
Mahgoub was the first person to be charged in the UK with torture under Section 134 of the Criminal Justice Act 1988. Preparation for trial reached an advanced stage and trial dates had been set on at least two occasions, but postponed so as to allow the parties further time to prepare their case. On 19th May 1999, the prosecution decided not to pursue the case and dropped the charges against Dr Mahgoub. No reasons were given for this change of mind other than that, on reviewing the case, they had concluded that the available evidence was not sufficient to prove in criminal proceedings that Dr Mahgoub was party to conduct which amounted to an offence under Section 134 Criminal Justice Act 1988.115

A number of attempts were made from 1993 to bring about a prosecution of General Augusto Pinochet during his periodic visits to the UK. In 1994, a request was made on behalf of Chilean victims of the military dictatorship of 1973 to 1990 for General Pinochet to be prosecuted in the UK on the basis of Section 134 of the Criminal Justice Act. A police file was opened but General Pinochet was not arrested and an investigation could not be completed before he left the UK.

In October 1998, Pinochet visited London for a more extended period for purposes including medical treatment. On 16th October 1998 a Spanish court, which had been investigating violations during Pinochet’s rule since 1996, issued an international warrant for his arrest in London pending a full formal request for his extradition. On 22nd October 1998 a second provisional warrant was obtained alleging further crimes of torture and hostage taking during 1988 to 1992.116 A full formal request for extradition was subsequently submitted to the UK authorities in November 1998, containing charges of murder, torture, hostage taking and conspiracy between 1973 and 1990.

The English High Court set aside the first provisional warrant on 28th October 1998, but found that the second warrant was valid since it did disclose offences which constitute extradition crimes, and are subject to extra-territorial jurisdiction, in both Spain and the UK.117 However the High Court ruled that General Pinochet was immune, as a former head of state, from prosecution. This question was appealed to the House of Lords. On 25th November 1998 the House of Lords held by a majority of 3-2 that Pinochet was not entitled to claim immunity, on the basis that torture was not part of the official functions of a head of state for which he would otherwise have had immunity. However on 17th December the House of Lords decided to set aside their decision on the grounds that one of the judges which had heard the case was effectively sitting as a judge in his own cause, since he was a director of a charitable arm of Amnesty International which, as an intervener in the case, was in practice a party to the case. The case was referred for a rehearing.

On 24th March 1999 the House of Lords found for a second time, this time by a majority of 6-1, against Pinochet.118 The Court clearly reaffirmed the principle of

115 Letter dated 28 May 1999 from the Crown Office to Redress
116 Opinion of Lord Slynn in judgment of the House of Lords in R v. Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet, and R v. Evans and another and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet, 25th November 1998
117 Cases CO/4074/87 and CO/4083/98, High Court of Justice Divisional Court, 28th October 1998
118 R v. Bow Street Magistrate, Ex parte Pinochet, HL (No.3), 24th March 1999, 1999 2 WLR 827
universal jurisdiction contained in the Torture Convention and repeated in the UK implementing legislation. According to Lord Brown-Wilkinson: "The purpose of the Convention was to introduce the principle aut dedere aut punire - either you extradite or you punish".

The House of Lords held that, at least as a matter of UK law, a former head of state is not protected by immunity from criminal charges of official torture committed during the period he was head of state. However, the Court significantly narrowed the scope of the charges that could be pursued against General Pinochet. The extradition process could only continue, they held, in relation to charges of torture and conspiracy to torture alleged to have been committed after 8 December 1988.

The decision turned on the Appellate Committee's interpretation of two areas of law: on the one hand, UK extradition law, and on the other, UK and international law relating to state immunity and torture. Interpreting the Extradition Act of 1989, the Court held that only acts committed after the date when they were criminalised in both the UK and Spain could be considered extradition crimes within the meaning of the Act - the "double criminality" principle.\(^{119}\) This only occurred on 29 September 1988 when the implementing legislation under the Convention against Torture, Section 134 of the Criminal Justice Act 1988, came into force.

As regards immunity, while as a result of the UN Convention against Torture a former head of state could not claim the protection of immunity for the international crime of torture, Pinochet only lost his immunity when the Convention against Torture became binding on Spain, Chile and the UK. This occurred on 8 December 1988.

Charges relating to other offences which had been included in the Spanish extradition request were rejected by the House of Lords. Murder was dismissed because it is not an offence for which UK law allows extra-territorial jurisdiction, and it therefore failed to satisfy the requirements of the Extradition Act. There was also a suggestion that there was no basis for the normal immunity afforded an ex-head of state to be lifted in a case of murder. Hostage-taking - which is an offence for which there is extra-territorial jurisdiction in UK law, following the International Convention against the Taking of Hostages - had also been included among the charges but the Court found the alleged acts did not amount to hostage-taking as defined in the Taking of Hostages Act 1982.

As a result of this majority ruling, Pinochet cannot be extradited to face charges relating to acts committed prior to 8 December 1988. After the ruling, the Spanish court added further charges of torture committed after 1988. It has also been argued that certain cases of disappearances committed before 1988 should be taken into account on the basis that unresolved disappearance constitutes a continuing crime of torture both against the disappeared person and against their families. Subsequently, on 15 April 1999, the Home Secretary authorised the extradition process to proceed, and

\(^{119}\) Opinion of Lord Browne-Wilkinson. Lord Hope in his Opinion then analysed the Spanish charges to determine which of them satisfied the double criminality rule, and his reasoning was adopted by the other judges.
the matter was passed into the hands of the Magistrates Court which will carry out a more detailed examination of Spain’s extradition request in September 1999.\textsuperscript{120}

In addition to the Spanish extradition request, the UK authorities have also received requests for Pinochet’s extradition to face trial in Switzerland, France and Belgium.

In parallel to the extradition proceedings, lawyers acting for human rights organisations and individual British victims sought to initiate criminal proceedings against General Pinochet in the UK, invoking the offences of torture and hostage taking for which there is universal jurisdiction in UK law. Extensive evidence, mainly in the form of witness statements, was provided to the Metropolitan Police and the Attorney General in order to substantiate the case. The complainants asked the police to investigate with a view to prosecution, and the Attorney General to give his consent to a prosecution, whether a public or a private prosecution. To date the required consent has been refused, but further evidential materials continue to be supplied and considered.\textsuperscript{121}

\textsuperscript{120} Authority signed by Home Secretary Jack Straw on 14 April 1999
\textsuperscript{121} For instance, letters of 28th October 1998 and 14th January 1999 from the Attorney General’s Chambers to Bindmans