Newsletter

Issue 7 /
July 2010

Inside this issue:

REDRESS

Ending Torture. Seeking Justice for Survivors

fidh

International Federation for Human Rights

EU Update on International Crimes

PROSECUTING INTERNATIONAL CRIMES IN FRANCE: CONTRADICTORY LEGISLATION?

Karine Bonneau, Head of the International Justice Desk, FIDH

Following the joint declaration of the Minister of Foreign Affairs and the Minister of Justice calling for the creation of a specialised unit on crimes against humanity and genocide, published in *Le Monde* on 6 January 2010, the draft legislation was approved by the Council of Ministers in March 2010.

The text provides for the creation of a specialised unit that will permit a better legal treatment of international crimes proceedings. The draft legislation provides for the specialisation of judges, determined to be necessary as a result of the particularities and geopolitical knowledge that is needed for such cases. FIDH has called for the creation of such a unit in France, on the basis that experience shows that specialised units strengthen international crimes prosecutions. The positive experience of other specialised international crimes units was clearly demonstrated and discussed in detail at the FIDH / REDRESS expert meeting, held in Brussels in November 2008.

The draft legislation relating to the specialised unit is still to be debated and adopted by the French Parliament. Together with other non-governmental organisations, FIDH has undertaken a series of meetings with the French authorities to ensure that such a unit would benefit from the experiences of the specialised units already established in Belgium, Canada, Denmark, the Netherlands, Norway, Sweden, the United Kingdom and the United States in terms of staffing, training, capacity-building and budgetary matters.

In France, the specialised unit would have competence over an important number of ongoing national proceedings, half of them relating to the Rwandan genocide. In those investigations, some of which were opened 15 years ago, the investigative judges (or *juges d'instruction*) have repeatedly asked for improved financial and material support. This specialised unit would also work on torture proceedings based on extraterritorial or universal jurisdiction.

Whereas the plans for a specialised unit seem to be a step forward in the fight against impunity in France, other legislative developments are not. Put differently, what will be the use of specialised judges, prosecutors and investigators, when legislation enabling the effective implementation of universal jurisdiction for crimes against humanity and genocide, as well as war crimes, is not adopted?

On 13 July 2010, the French National Assembly examined the French draft implementing legislation of the Statute of the International Criminal Court (ICC) and adopted the text without requiring a number of amendments that had been put forward by civil society groups. In particular, the text include 4 cumulative criteria, which severely weaken the implementation of the principle of universal jurisdiction for the crimes which fall under the ICC jurisdiction. Not only do they undermine existing international law, including customary law, and the universality of these crimes, but in practice, these criteria would make the application of universal jurisdiction in France absolutely impossible.

[con't pg. 5]

THE UN GENERAL ASSEMBLY RESOLUTION 64/117

Hugo Relva, Amnesty International

"Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant."

(Attorney General of Israel v. Eichmann, 36 Int'l L. Rep. 277, 304 (Israel Sup. Ct. 1962).

Last December the UN General Assembly (GA) adopted Resolution 64/117 on 'The scope and application of the principle of universal jurisdiction'. Through that resolution the Secretary-General (SG) was requested to invite member states to submit, before 30 April 2010, information and observations on the scope and application of the principle of universal jurisdiction, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice. The SG was also requested to prepare and submit to the GA, at its 2010 session, a report based on such information and observations. Until today, no public information is available on how many states have replied to the SG's request or the contents of such replies.

Resolution 64/117 was mainly promoted by certain African states, which originally proposed the issue for the consideration of the GA under the title: 'The abuse of universal jurisdiction', later this title was changed to a more neutral one. Among those states which supported the resolution were those whose nationals are being investigated and prosecuted in Europe and North America for crimes under international law, but a number of other states were also in favour of a resolution of that kind.

A few years ago the GA also requested states to provide information to the International Law Commission (ILC) on a related item, the obligation to extradite or prosecute (*aut dedere aut judicare*), which sometimes requires states to exercise universal jurisdiction. Until today, just 23 out of the 192 UN member states have provided information to the ILC on international treaties, domestic legal regulations, judicial practice and crimes or offenses regarding the topic and in most cases such information has been incomplete or flawed.

If, as has been the case with the ILC and its ongoing study on *aut dedere aut judicare,* only a limited number of states provide information to the SG on the scope and application of universal jurisdiction – only member states have been invited to provide such information, excluding civil society, as non-governmental organizations or academia - it is likely that the Report to be discussed later this year by the GA will reflect a partial and restricted view of such a fundamental principle in the fight against impunity. Nearly a decade ago, in 2001, Amnesty International published a study analysing national law and practice concerning universal jurisdiction in 125 countries, demonstrating that almost all of those states provided for universal jurisdiction, and in many cases not only for crimes under international law, but also for ordinary crimes such as murder or kidnapping.

According to the GA resolution, the SG may not take into account that report or other reports issued by NGOs, intergovernmental organizations or academia. That is why it is important that as many states as possible, and in a thorough manner, report to the SG on their enacted legislation providing for universal jurisdiction or the obligation to extradite or prosecute. In addition, all states which have investigated or are investigating human rights violations based on the universal jurisdiction principle should report on such cases, e.g., Argentina (Luo Gan and Jian Zemin case), Canada (Dessiré Munyaneza case), Finland (François Bazaramba case), Norway (Mirsad Repak case), Spain (Ríos Montt case), and Switzerland (Gaspard Ruhumuriza case).

AND THE TRUE SCOPE OF UNIVERSAL JURISDICTION

In addition, all states which have over the last years enacted legislation providing for universal jurisdiction or the obligation to extradite or prosecute including universal jurisdiction should also report to the SG. These states include, and the list is far from exhaustive:

Burkina Faso, which enacted legislation in 2009 implementing the Rome Statute (*Loi n°052-2009 du 3 décembre 2009, portant détermination des compétences et de la procédure de mise en œuvre du statut de Rome relatif à la cour pénale internationale par les juridictions burkinabè*) ;

The Philippines, which enacted Republic Act No.9851, 2009 (Act defining and penalizing crimes against international humanitarian law, genocide and other crimes against humanity);

Timor Leste, which enforced its new Penal Code (*Decreto Lei Governo 19/2009*);

Kenya, which enacted the International Crimes Act, 2008;

The **Republic of Korea**, which passed legislation implementing the Rome Statute into domestic law in 2007;

The **United States of America**, which approved the Genocide Accountability Act in 2007;

Argentina, which passed Law 26.200 in 2007, making crimes under international law criminal under national law and providing for the obligation to extradite or prosecute;

Panama, which enacted its new Penal Code in 2007;

Samoa, which passed its International Criminal Court Act 2007, providing for universal jurisdiction over crimes defined in the Rome Statute;

Senegal, which amended its Criminal Procedural Code (*Loi N0.2007-05 du 12 février 2007 modifiant le Code de la Procédure pénal relative à la mise en œuvre du Traité de Rome instituant la Cour pénale internationale*) ;

Uruguay, which adopted Law 18.026 (2006), providing for universal jurisdiction – through the *aut dedere aut judicare* formula – for crimes defined in the Rome Statute;

Trinidad and Tobago, and its International Criminal Court Act of 2006;

Portugal enacted Law No. 31/2004 of 22 July, providing for the obligation to extradite or prosecute crimes defined in the Rome Statute.

Costa Rica enacted amended its 2003 Penal Code (Law 8272) providing for universal jurisdiction with regard to genocide, crimes against humanity and war crimes.

The Netherlands, which enacted its Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law, including a provision for universal jurisdiction over crimes defined in the Rome Statute.

South Africa, which enacted its Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, providing for universal jurisdiction with regard to crimes covered by the Rome Statute.

New Zealand, which enacted the International Crimes and International Criminal Court Act 2000.

All states which in 1998 agreed that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation' should thoroughly report to the SG on the scope and application of universal jurisdiction and not leave in the hands of a few states – where human rights violations go normally unpunished – the output of the Report and its debate.♦

THE IMPORTANCE OF VIDEO-LINK EVIDENCE

Natalie Parkinson

The use of video-link in war crimes trials has increased over the past years, both in universal jurisdiction trials in domestic courts as well as in the international tribunals. During the FIDH / REDRESS Conference on "***Universal Jurisdiction Trial Strategies: Focus on Victims and Witnesses***", which took place in Brussels on 9 – 11 November 2009, we learnt some more about the video-link practices in relation to the International Criminal Tribunal for the former Yugoslavia (ICTY) and in the United Kingdom.

By video-link evidence we understand a testimony given via satellite-link from a remote location to the seat of the court. The witness will be seen and heard live by the court on monitor screens in the courtroom. The witness will receive live pictures and sound from the courtroom on a monitor screen in the room where he or she is giving evidence. Generally it can be said that the use of video-link has most commonly been reserved for vulnerable witnesses, enabling them to testify without having to be present in court. As universal jurisdiction trials typically take place outside the victim's country of origin, it has become a useful tool in avoiding travel and trial country familiarisation for important witnesses who have serious health problems. For other witnesses whose identity is protected, it might be easier to remain unidentified by the public - including any fellow villagers - if you do not have to leave your home for a prolonged period of time in order to give evidence before a court in a foreign country. Video-link evidence can also, on occasion, be the solution to very practical problems, such as avoiding the loss of income for a farmer who is due to testify in court during a time when he/she also has to get his/her valuable crops in.

The ICTY has extensive experience with video link evidence, although the general rule is that witnesses are physically present to give evidence. Over 6000 witnesses have now testified before the court. Out of these, 145 have given evidence via video-link. Video-link was used as early as 1996, during the first trial against Duško Tadić. His defence requested that potential defence witnesses be allowed to testify via video-link since they indicated unwillingness or great reluctance to come to The Hague. It can be assumed that some of the defence witnesses were afraid of being arrested, if they were to come to the Hague. The Trial Chamber decided that video-link evidence would be allowed if "*a witness shown to be sufficiently important to make it unfair to proceed without it and that the witness is unable or unwilling to come to the International Tribunal.*"[1] Subsequently, this principle has been incorporated into Rule 81*bis* of the ICTY's Rules of Procedure and Evidence, which provides that "*a Judge or Chamber may order, if consistent with the interests of justice, that proceedings be conducted by way of video-conference link.*"

Helena Vranov Schoorl, Senior Support Officer, Victims and Witnesses Section, ICTY, stated during the Conference that testimony by video-link has occurred more frequently during the last years, with 6 to 7 cases running simultaneously at the Tribunal. Most of the witnesses testifying through video-link have done so due to psychological or medical reasons. This should be seen against the background that many of the witnesses who come from the former Yugoslavia are currently 55 years of age or older. Consequently some of them will have some form of health problem or other issue that may prevent them from travelling to The Hague. Helena Vranov Schoorl also stressed that in cases where the video-link has been granted by the Trial Chamber, the Victims and Witnesses Section is always present at the place where the testimony is given, in order to support the witness, if need be.

In England and Wales the law permitting the use of television (or video-) link evidence in court is contained in section 32 of the Criminal Justice Act 1988. The section provides that a court may grant leave for evidence to be given through a television link from abroad and provides that the Judge can specify an individual who is required to be present with the witnesses during "live link":

this may be appropriate to ensure that there is no coercion or duress of the witness. The universal jurisdiction case *R v Zardad* concerned the trial of an Afghan warlord accused of torture and hostage taking. During the first trial many of the witnesses gave their evidence from the British Embassy in Kabul. UK logistical requirements involved weeks of preparation, shipping over necessary equipment and technical expertise, setting up satellite links, ensuring adequate picture and sound quality, as well as holding trial runs to ensure that the link worked with the court. The jury failed to reach a verdict and the prosecution decided to seek a re-trial. A second jury subsequently convicted Zardad and sentenced him to 20 years imprisonment.[2] Commenting on the first hung jury result in Zardad, Mari Reid, Crown Prosecution Service, Counter Terrorism Division, said that the reasons why the jury had not been able to reach a verdict are unknown. However, studies - albeit in relation to child abuse cases - carried out into the use of television link evidence, have ***not*** found evidence that the use of television link evidence adversely affecting the outcome of cases.

Mari Reid also stated that where the television link is used, best practice suggests that a dry run of the link from abroad with victims and witnesses may be useful to alleviate nerves and increase familiarity with the procedure. One precaution which may be required in cases involving concerns about witness protection is the use of encrypted satellite links, so that the evidence of the witnesses cannot be intercepted. It may also be necessary to take into account any time difference between the country where the witnesses are giving evidence and the UK, as this may necessitate arrangements for the witnesses or court to convene at unusual hours.♦

[1] ***Prosecutor v Duško Tadić***, Case IT-94-1-T, "Decision on the Defence Motions to Summon and Protect Witnesses, and on the Giving of Evidence by Video-link", 25 June 1996. The Decision also sets out the procedure to be followed. For instance, a presiding officer has to be present when the evidence is given, to make sure that it is given freely and voluntarily.

[2] ***R v. Zardad***, High Court judgment of 19 July 2005. An appeal was dismissed on 7 February 2007.

PROSECUTING INTERNATIONAL CRIMES IN FRANCE (con't from p. 1)

These 4 cumulative limitations are the following:

1. **The requirement that the suspect has his/her usual residence on French territory** - This condition is inconsistent with the prosecute or extradite requirement for torture that requires only "presence" on the territory.

2. **Only a Prosecutor can initiate proceedings** - This criterion is a radical break with French penal and legal tradition. Consequently, victims of international crimes would not be able to present themselves as civil parties, that is to say initiate proceedings against alleged perpetrators of crimes against humanity, war crimes or genocide. Experience shows that French Prosecutors are reluctant to initiate proceedings, since none of the ongoing proceedings have been opened by a Prosecutor. This criterion may also create inequality between citizens, since those who have suffered the most serious crimes will have less access to justice than other victims of crime in France.

3. **Double criminality** – the act (or criminal inaction) has to be illegal both in France and in the country where the crimes were committed. This condition means that France will implicitly acknowledge impunity, for example, of those committing genocide if such genocide is not punishable by law in the country where the crimes were committed.

4. **Turning around the principle of complementarity** - Finally, the legislation provides that a case cannot be brought before a national court unless the International Criminal Court has expressly deferred its competence. This criterion is contrary to the complementarity principle established in Article 17 of the Rome Statute, which defines the primary responsibility to prosecute as resting on States Parties, the ICC only having competence where the national courts have demonstrated their lack of willingness or ability to prosecute.

These two pieces of legislation, one creating a specialised unit on international crimes and the other making the implementation of universal jurisdiction in France practically impossible, are contradictory. They seem to reflect opposing wills in the fight against impunity of the most serious crimes. Or, should we interpret this as a will to accelerate the ongoing proceedings, in particular proceedings relating to the genocide in Rwanda, while avoiding any future proceedings that would seemingly contradict diplomatic and political interests?♦

HOLDING RWANDAN GENOCIDE SUSPECTS ACCOUNTABLE AND GUARANTEEING JUSTICE FOR SURVIVORS

Jürgen Schurr, REDRESS

The need for accountability of Rwandan genocide suspects, and the ensuing need for justice for survivors of the 1994 genocide remain as important as ever.

In recent years there have been a number of important developments. Courts in Canada, Belgium, Finland, the Netherlands and Switzerland convicted individuals for their role in the 1994 genocide. Police also arrested genocide suspects in Italy, France, Germany and investigations against genocide suspects are ongoing in a number of other countries, including Germany, Norway and France, after courts in these countries denied extradition requests from Rwanda.

In the United Kingdom, a magistrates' court approved the extradition of four genocide suspects to Rwanda, though this decision was later overturned by the High Court, which held that an extradition to Rwanda would risk a violation of the four suspects' right to a fair trial. In Sweden, the Supreme Court as well as the Swedish Government have approved the extradition of a Rwandan genocide suspect to Rwanda. The case is currently pending before the European Court of Human Rights. France has indicated that it will create a specialised unit dedicated to the investigation of serious international crimes, and while it is important that the mandate of such a unit goes beyond the investigation/ prosecution of (only) Rwandan genocide suspects, its establishment is an important signal that France takes its responsibility seriously to no longer provide a safe haven to suspects of the most serious crimes.[1]

Interpol set up a "Rwandan Genocide Fugitive Project" and organised a number of meetings as well as training sessions for law enforcement officials on the investigation of genocide, crimes against humanity and war crimes, while the EU Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes met several times over the past three years to increase the cooperation and collaboration of European law enforcement and prosecution services in the investigation and prosecution of genocide suspects. In the context of its completion strategy, the International Criminal Tribunal for Rwanda (ICTR) stopped taking cases from national jurisdictions and is now actively seeking to transfer certain cases to national jurisdictions.

These developments also helped to identify a number of issues in relation to the accountability of genocide suspects. It appears that national courts, as well as the ICTR, are not yet prepared to extradite suspects or to transfer cases to Rwanda. The main reason for that reluctance is concerns about Rwanda's ability to guarantee that the defence rights of genocide suspects are adequately guaranteed in Rwanda, including the right to call defence witnesses and their trust that they can testify in Rwanda without any fear of repercussions.[2]

The impossibility of transferring cases to Rwanda for the time being means that the ICTR must either look for third countries with jurisdiction to take some of its cases or to continuously extend the deadlines imposed by the completion strategy until the circumstances in Rwanda are such that the Appeals Chamber approves the transfer of cases or until all accused are tried by the Tribunal. Similarly, to avoid providing a safe haven to suspects of the worst crimes, national jurisdictions will need to investigate, and where necessary, prosecute suspects on their territory on the basis of universal jurisdiction as long as the extradition of suspects to Rwanda is determined by those courts faced with extradition requests not to correspond to international human rights standards.

While this can only be an intermediate solution in the face of the large number of genocide suspects currently believed to be living in European and other countries, it is the only way to avoid the impression that suspects are the first benefactors of the deadlock created by the current impossibility to extradite suspects to Rwanda.♦

[1] See the article by K. Bonneau in this edition.

[2] REDRESS and African Rights, ***Extraditing Genocide Suspects From Europe to Rwanda- Issues and Challenges***, September 2008, at www.redress.org/downloads/publications/Extradition_Report_Final_Version_Sept_08.pdf.

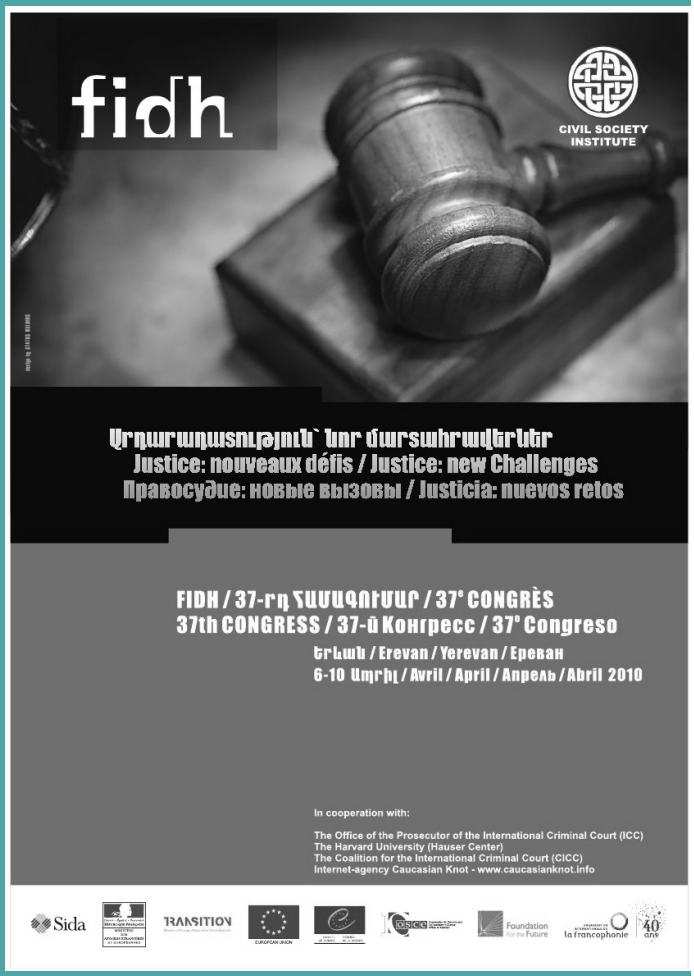
The Right to an Effective Remedy before an Independent Tribunal under discussion at the FIDH Forum in Yerevan, Armenia

Delphine Carlens, FIDH

The International Federation for Human Rights (FIDH) organised, in close cooperation with the Civil Society Institute (CSI), its member organisation in Armenia, a Forum entitled "Justice: New Challenges – the Right to an Effective Remedy before an Independent Tribunal" within the framework of its 37th Congress in Yerevan from 6 to 8 April 2010. It gathered human rights defenders from its now 164 member organisations from more than 100 countries, renowned national and international justice experts and representatives of international and regional courts, as well as international organisations. FIDH opened its Forum and Congress benefiting in particular from the presence of Mr. Abdou Diouf, Secretary-General of La Francophonie, Mr. Štefan Füle, European Commissioner for Enlargement and European Neighbourhood Policy, Mr. Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court and Mrs Françoise Tulkens, Judge of the European Court of Human Rights.[1]

This Forum gave the opportunity for debate and exchange of experiences and analysis relating to the fight against impunity, access to justice for victims of human rights violations and prevention of the most serious crimes, at a time when Armenia was about to commemorate the first genocide of the 20th century. National, regional and international avenues for victims of grave human rights violations to obtain truth, justice and reparation were addressed during these two days discussions.♦

Extra-territorial jurisdiction was one of the justice mechanisms stressed by participants as a remedy for victims of grave human rights violations who are unable to obtain justice in their own country. The *Cavallo* (Mexico/Spain/Argentina)[2] and *Fujimori* (Peru/Chile)[3] cases were described as examples of the triggering effect and impact that such proceedings (initiated abroad) can have on the national justice system when the actors involved join forces. Participants shared lessons learned on different proceedings based on extra-territorial jurisdiction, including the Rwandan cases in Europe and the cases of crimes committed in the Gaza strip. Facing the claims by several States that this principle has been "left open to abuse" and has been often "misguided by political interest", the participants exchanged views on the most effective strategies for a better understanding of this principle and an effective use of the mechanism in support of victims of the most heinous crimes.[4]



A report on the main findings of the FIDH Forum will be published in the coming weeks. For more information on the issues discussed during the FIDH Forum in Yerevan, please see the FIDH website:

http://fidh.org/JUSTICE-NEW-CHALLENGES-The-Right-to-an-Effective

[1] For more information on the Opening Ceremony of the FIDH Congress and Forum, see the FIDH website : http://www.fidh.org/FIDH-37th-Congress-37eme-Congres-de-la-FIDH

[2] For more information on the Cavallo Case, see: http://www.cavalloentrerejas.com/ (ESP)

[3] For more information on the Fujimori Case, visit: http://www.juicioysancionafujimori.org/ingles/albertofujimori.htm

[4] For more information, see in particular the FIDH paper on universal jurisdiction: "A Step by Step Approach to the Use of Universal Jurisdiction in Western European States": http://www.fidh.org/FIDH-PAPER-ON-UNIVERSAL-JURISDICTION-A-Step-by and REDRESS website: http://www.redress.org/smartweb/current-themes/no-safe-havens-for-torturers-the-application-of-universal-jurisdiction

REDRESS/ FIDH
Rue de la Linière 15
1060 Brussels
Belgium

tel. +32 2 609 44 25
fax:+32 2 609 44 33

To view the latest legislative development and jurisprudence related to extraterritorial jurisdiction within the EU and to receive future updates on cases based on universal jurisdiction, send a blank email to: uj-info-subscribe@yahoogroups.com

Our 'EU Update on International Crimes' Newsletter outlines the main developments in the field of international criminal justice with a focus on European countries. At the same time it highlights the activities and competencies of the European Union .

For further information or additional input or comments, please, contact:

Åsa Rydberg van der Sluis
Project Coordinator 'Universal Jurisdiction'
REDRESS/ FIDH
www.redress.org / www.fidh.org
email: asa@redress.org

REDRESS
Seeking Reparation for Torture Survivors

fidh
International Federation for Human Rights

On 13 July 2010, the French Assemblee Nationale adopted implementing legislation of the Statute of the International Criminal Court. The adopted text can be found on the site: http://www.assemblee-nationale.fr/13/ta/ta0523.asp

REALISED WITH THE FINANCIAL SUPPORT OF THE CRIMINAL JUSTICE PROGRAMME OF THE EUROPEAN COMMISSION