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# EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION

## A STUDY OF THE LAWS AND PRACTICE IN THE 27 MEMBER STATES OF THE EUROPEAN UNION

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## Table of Abbreviations

CC	Criminal Code
CCAIL	Code of Crimes against International Law (Voelkerstrafgesetzbuch, VStGB) (Germany)
CCP	Code of Criminal Procedure
CFSP	Common Foreign and Security Policy
EU	European Union
ICC	International Criminal Court
ICCA	International Criminal Court Act 2001 UK)
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
JHA	Justice and Home Affairs
MFA	Ministry of Foreign Affairs
MoJ	Ministry of Justice
SICO	Special International Crimes Office (Denmark)
TPCCP	First Title of the Criminal Procedure Code (Belgium)
UN	United Nations
ZBKV	Central Unit for the Fight against War Crimes and further offences pursuant to the Code of Crimes Against International Law (Germany)

# I. Introduction

This report aims to increase general knowledge of the issues surrounding the exercise of extraterritorial jurisdiction, and universal jurisdiction in particular, in the European Union (“EU”). It will give an overview of the current laws and practices of EU member states concerning extraterritorial jurisdiction for prosecution of crimes under international law, assess the extent to which there are similarities or differences in the legislation, and aims to identify common hurdles or issues requiring action and to assess whether additional measures are needed. Part VI gives a summary of key legislation and procedural issues related to extraterritorial jurisdiction in each of the states surveyed. It is hoped that this will provide a helpful reference guide and a useful starting point for victims, non-governmental organisations, lawyers and government agencies alike.

This report examines the legislation and practice of the 27 EU member states, as well as that of Norway and Switzerland. For convenience throughout the report references and observations as to the law and practice of “EU member states” will be taken to include consideration of these two additional countries.

The primary research for this report was conducted by way of two questionnaires sent to each member state, and to Norway and Switzerland. A detailed questionnaire, addressing the full remit of law and practice concerning extraterritorial jurisdiction for prosecuting crimes under international law, was sent to the Ministry of Justice (“MoJ”) or Ministry of Foreign Affairs (“MFA”) for each state. Another questionnaire, focussing more on practice, experience of prosecuting international crimes and cooperation, was sent to relevant contacts among police and investigators in each state. In each case, officials were asked to provide copies of the relevant legislation. Twenty-one responses were received from state authorities to the MoJ/MFA questionnaire and 17 responses were received from state authorities to the police/investigator questionnaire. Where responses were not received from official bodies, lawyers and academics in the relevant jurisdiction were approached and asked to complete the questionnaires for their jurisdiction. Seven responses were received in this manner.

In addition, research visits were made in 2008 and 2009 to Bulgaria, the Czech Republic, Hungary, Romania, Slovenia and Slovakia to discuss the law and practice of those states with government officials.

The draft findings of the report were presented at a conference held in Brussels on 1 December 2010, attended by over 50 specialists from across the EU member states. Various issues addressed in the report were discussed at the conference, and points raised in those discussions have been incorporated where appropriate into the final report.

Finally, various public sources have also been referred to in compiling the overviews of state legislation and practice. These are referenced in the report. While every effort has been made to ensure the accuracy of the information presented, readers are advised to confirm the currency of any provisions cited.

The research for this Report was carried out primarily by Åsa Rydberg van der Sluis, Project Coordinator of the REDRESS and FIDH joint project on universal jurisdiction in Europe. The report was mainly written by Sarah Fulton of REDRESS, with specific contributions to sections prepared by Juergen Schurr and Cecile Jeffries, both of REDRESS.

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## Summary of findings

The report reveals that many states, much more so than a decade ago, are exercising extraterritorial jurisdiction in relation to crimes under international law, and/or have a better capacity to do so.

Given the relative advances of such investigations and prosecutions in several countries in Europe (as compared to some other parts of the world), there is a tendency to believe that member states are zealous, sometimes overly so, in their pursuit of suspects of crimes under international law, or that any legal or practical impediments which may have hindered investigations or prosecutions in the past have been overcome. Indeed the opposite is true: the vast majority of suspects of crimes under international law living or travelling to European countries are untouched by investigations and/or prosecutions; in the great majority of cases, member states exhibit reluctance to exercise extraterritorial jurisdiction. The analysis of whether to exercise such jurisdiction typically contemplates national (local) as opposed to universal interests, despite the universal nature of the crimes. In short, much more needs to be done. States cannot be complacent that the few successes achieved so far amount to an end of European safe havens for the worst crimes, or more importantly, to an end of impunity for crimes under international law.



A survey of ‘successes’ with investigations and prosecutions reveals the major role played by specialised international crimes units. These units have not only managed to centralise expertise, they have also cultivated a core of committed professionals dedicated to the pursuit of justice for crimes under international law. Such units have also been important for streamlining international cooperation and facilitating communications with victims and the public. The EU Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes has been an extremely useful vehicle to foster communications and cooperation and share best practice amongst specialised units and other investigators, prosecutors and judicial officials. Now that a permanent secretariat for the Network has been established, it is important that member states provide it with the necessary support.

The requirement to domesticate the crimes set out in the Rome Statute for the International Criminal Court has provided a useful impetus to states to review and amend national legislation on crimes under international law and many states have taken this opportunity to carry out extensive reforms. Yet, the survey of state legislation reveals that there remain EU member states where the definitions of crimes - especially in relation to crimes against humanity - are not in line with the Rome Statute. Also, states have not specifically criminalised enforced disappearances outside the context of a crime against humanity, and a number of states also do not include torture as a separate offence.

Many states, while providing for universal jurisdiction, have legislated procedural hurdles to restrict its availability. This is a worrying trend in which new procedural or jurisdictional barriers have been made applicable only to crimes under international law, making it more difficult for such crimes to be prosecuted.

A number of states, for example Spain and Belgium, now require a ‘nexus’ to the forum state (though this counters the very meaning of universal jurisdiction which tackles crimes specifically because of their ‘universal’ concern). A new concept of ‘subsidiarity’ has been developed by certain states such as Belgium, Germany, France and Spain to give priority jurisdiction to courts of the territorial state or the nationality of the offender and/or international tribunals ahead of extraterritorial investigations or prosecutions. In 2005 the German Federal Prosecutor rejected a complaint against former United States Secretary of Defence Donald Rumsfeld, arguing that United States authorities, though not investigating specifically against Donald Rumsfeld nor the specific crimes referred to in the complaint, were investigating the ‘complex’ as a whole and therefore German authorities, under the principle of subsidiarity, could not exercise jurisdiction in that specific case. Some states have introduced restrictions on who may initiate the opening of an investigation. Belgium and France, for example, have explicitly restricted the civil party prosecution mechanism in relation to international crimes or crimes committed abroad. In the UK, the government plans to remove the right of a private party to seek the issuance of an arrest warrant for crimes over which the courts can exercise universal jurisdiction based solely on presence in the jurisdiction, including war crimes and torture.

In many EU member states the rules in relation to prosecutorial or executive discretion for prosecutions based on extraterritorial jurisdiction are different to those operating for ordinary domestic or 'territorial' crimes. An added layer of prosecutorial and/or executive discretion opens the way for political interference and decisions being made on grounds of policy or politics rather than justice. Certain states have failed to recognise that retrospective prosecutions are allowed under international law when the crimes were recognised at the time of commission as crimes under international law. In December 2010, Norway's Supreme Court determined that its law allowing for retrospective universal jurisdiction violated the Norwegian constitution. In other states, restrictive limitation periods have stymied prosecutions and/or civil claims stemming from the crimes.

Other issues tied to the exercise of universal jurisdiction - such as the recognition by certain states of state and other forms of immunities in criminal and civil cases despite the *jus cogens* nature of the crimes have impeded proceedings. In reality, most decisions about immunity in extraterritorial cases in Europe are taken by prosecutors, rather than courts. This has important practical ramifications. Sometimes the reasoning for these decisions is not written down, so the basis for the decision is not known by the complainant and cannot be challenged. In many cases when considering whether or not to open an investigation, the prosecutor will ask the opinion of the Ministry of Foreign Affairs. This has on a number of occasions been leaked to the suspect, allowing them to flee the jurisdiction, even where the opinion has later been returned that no immunity is available. A number of prominent suspects have not been investigated or prosecuted on the grounds of immunity, even where this immunity is not required by international law.

Other practical and systemic obstacles to justice exist, ranging from the lack of clear criteria for an investigation of crimes under international law as well as the lack of political will and at times poor technical skills to undertake the practical steps required for investigations and prosecutions. At times, the apparent reluctance of certain officials to progress investigations or prosecutions has been masked through inaction or inordinate delays in following up on information received, leading suspects to flee the jurisdiction. In Germany in 2008, prosecutors failed to begin an investigation against Uzbekistan's Minister of Interior while he was in the country, and, once he left, dismissed the complaints of crimes against humanity and torture on the basis that the investigation would be unsuccessful because he would be unlikely to return to Germany. In Austria in 2008 a complaint of torture was made against the Chechen Vice President Ramzan Kadyrov; prosecutors first refused to receive the complaint, then refused to open an investigation on a weekend. By the time Kadyrov left the country no arrest warrant had been issued. In the UK, despite changes to the criminal law enabling the UK to exercise jurisdiction over crimes committed in the context of the Rwandan genocide, the state has thus far preferred to await a (second) extradition request from the Government of Rwanda, even though a first extradition request failed on human rights grounds. In the mean time, the suspects are living freely in the UK. In France, French investigative judges are currently investigating eighteen cases of Rwandan suspects allegedly involved in the 1994 genocide. None of these investigations have led to trial so far, although France was criticised by the European Court of Human Rights on 8 June 2004 for the slow pace of the proceedings, in violation of Articles 6(1) and 13 of the European Convention of Human Rights.

## II. The international law obligations of member states regarding crimes under international law

There is international consensus that certain crimes - including genocide, crimes against humanity, war crimes and torture - constitute crimes under international law, and that perpetrators of these crimes must be held accountable. These crimes are considered so abhorrent that the international community has a universal interest in repressing and punishing them, an interest which is reflected in obligations imposed on states by customary international law and by the international treaties and conventions to which they are party.

### a. The relevant treaties and customary international law

States have obligations arising both under customary international law and treaties to which they are party to repress, investigate, prosecute or extradite alleged perpetrators of crimes under international law. They also have certain obligations to co-operate (with each other and with international courts and tribunals) to ensure that alleged perpetrators do not escape justice.

This report will consider the law and practice of EU member states in relation to war crimes, crimes against humanity, genocide, torture and enforced disappearances. These crimes have affected large numbers of victims on a massive scale and are recognised as core crimes under international law; yet, often they go unpunished. Throughout the report these will be collectively referred to as “crimes under international law”.<sup>1</sup>

Along with overarching customary international law obligations, states’ obligations have been set out in relation to specific crimes by treaties entered into relating to those crimes. The most important treaties in relation to crimes under international law in the EU context are as follows:

- the Geneva Conventions in relation to war crimes and their two additional Protocols<sup>2</sup>
- Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”)<sup>3</sup>
- the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the “Torture Convention”)<sup>4</sup>

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<sup>1</sup> Other crimes under international law for which extraterritorial jurisdiction may be exercised, such as piracy and terrorism, are not considered except in passing, although it is recognised that there is an important link between the exercise of extraterritorial jurisdiction for these crimes and the other crimes considered in this report.

<sup>2</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force 21 October 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force October 21 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force October 21 1950; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force 21 October 1950 (together the “Geneva Conventions”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force 7 December 1978; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted on 8 June 1977, entered into force 7 December 1978.

<sup>3</sup> Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, entered into force 12 January 1951.

<sup>4</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entered into force 26 June 1987.

- the International Convention for the Protection of All Persons from Enforced Disappearance (the “Enforced Disappearance Convention”)<sup>5</sup> and
- the Rome Statute of the International Criminal Court (the “Rome Statute”).<sup>6</sup>

All member states of the EU have ratified the relevant treaties (apart from the Enforced Disappearance Convention, which only came into force in December 2010<sup>7</sup>) and therefore they have the same obligations to comply effectively with the obligations arising under these treaties.<sup>8</sup>

In addition to obligations under these treaties, it is increasingly recognised that customary international law obliges states to search for and bring to trial or extradite alleged perpetrators of grave breaches of the Geneva Conventions,<sup>9</sup> requires states to co-operate to prevent and punish the most serious crimes under international law including genocide and crimes against humanity,<sup>10</sup> and permits the exercise of universal jurisdiction for all crimes under international law.<sup>11</sup>

## b. Criminalisation under Domestic Law

Ratification of a treaty without implementing the obligations and ensuring respect for its provisions is practically meaningless. As a first step, states must therefore ensure that the crimes outlawed under the treaty are considered ‘criminal’ and can be prosecuted and punished under their domestic law.<sup>12</sup>

<sup>5</sup> International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20 December 2006, entered into force 23 December 2010.

<sup>6</sup> Rome Statute of the International Criminal Court, adopted on 17 July 1998, entered into force 1 July 2002.

<sup>7</sup> In terms of EU member states, the convention has been ratified by France, Germany and Spain.

<sup>8</sup> Every member state has ratified the Geneva Conventions and the first Protocol, the Torture Convention, the Genocide Convention and the Rome Statute.

<sup>9</sup> Cassese, Antonio, *International Criminal Law*, 2003, Oxford University Press, p 302, referring to the International Court of Justice’s Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996 at paragraph 78. As was stated by Jean-Marie Henckaerts, Legal adviser in the Legal Division of the International Committee of the Red Cross (ICRC) and head of the ICRC’s project on customary international humanitarian law, “*The obligation to establish universal jurisdiction over the grave breaches is not a purely technical aspect of the Geneva Conventions. This obligation is fundamental for the protection of the human person as it seeks to avoid safe havens for persons suspected of grave breaches. Its primary purpose is thus to combat impunity for grave breaches. On the basis of the existing state practice, including the universal ratification of the Geneva Conventions and the consideration that this is a ‘fundamental’ rule of the Geneva Convention, it is submitted that it too reflects customary international law.*” [Henckaerts, JM, ‘The Grave Breaches Regime as Customary International Law’ 7(4) *J Int Criminal Justice* (2009) 683-701 at p. 699].

<sup>10</sup> Cassese, *Ibid.*, p 303. See also, Orentlicher, Diane, *Report of the independent expert to update the Set of Principles to combat impunity*, UN Doc. E/CN.4/2005/102 of 18 February 2005 at paragraph 38: ‘In larger perspective, the general obligation of States to ensure prosecution of individuals responsible for serious crimes under international law entails a duty not only to institute proceedings against suspects in a State’s jurisdiction if the suspects are not handed over for trial by another court, but also, when applicable, to provide appropriate forms of cooperation to other States, international tribunals, and internationalized courts in connection with their criminal proceedings.’

<sup>11</sup> Cassese, *Id.*, pp 293-295 and p 303. See also, Amnesty International, *Universal Jurisdiction: The duty of States to enact and implement legislation* (London, September 2001), Chapter One (Definitions), pp. 11-12.

<sup>12</sup> Article 1 of each of the Geneva Conventions: “*The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances*”; Genocide Convention, Article 5: “*The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3*”; Torture Convention, Article 4: “*(1) Each State Party shall ensure that all acts of torture are offences under its criminal law... (2) Each state party shall make these offences punishable by appropriate penalties which take into account their grave nature.*”; Enforced Disappearance Convention, Article 4: “*Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law*” and Article 7(1) “*Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.*”; the Preamble of the Rome Statute emphasises that the ICC “*shall be complementary to national criminal jurisdictions*” and Article 88 provides that: “*States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part*”.

States use different approaches to implement treaty obligations into domestic law. In 'monist' legal systems, such as Estonia, Germany or Hungary, international law enjoys priority over domestic law and in theory, international law is directly applicable in the courts of those countries. In 'dualist' legal systems, such as Ireland, Malta and the United Kingdom, specific implementation into domestic law of the offences and relevant jurisdictional rules is an essential requirement for their application in practice. Even in monist legal systems there is a strong impetus for states to expressly include the relevant offences into domestic legislation, to ensure that treaty obligations are complied with and that courts are willing to exercise jurisdiction in line with those obligations.

Section III.1 gives an overview of the laws in place in EU member states criminalising crimes under international law, briefly outlining the progress made and opportunities for improvement.

### c. Prosecute or Extradite

When a crime under international law is committed, international law imposes duties on states to investigate and prosecute that crime. This duty may fall on a range of states in any particular case - the state where the crime was committed, the state of which the suspect is a national, the state where the suspect is located or any and every state.

Primary responsibility for ending impunity for crimes under international law falls on the state where the crime was committed (the 'territorial' state). However, in our modern world of travel and migration, victims and alleged perpetrators alike may end up in other countries or continents, particularly at the end of a period of conflict, and extradition back to the territorial state will not always be an option. The next section gives an overview of the source and nature of obligations on states other than the territorial state to extradite or prosecute individuals accused of war crimes, crimes against humanity, genocide, torture and enforced disappearance. This provides the context for the consideration in the rest of the Report of EU member states' practice in combating impunity for crimes under international law.

### i. War Crimes

States have a clear duty to prosecute or extradite alleged perpetrators of war crimes under the four Geneva Conventions of 1949 and Protocol I to the Geneva Conventions. All states parties are obliged to seek out and either prosecute or extradite those suspected of having committed "grave breaches" of those Conventions, no matter where the crime took place or whether there is any connection to the state:

*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.*<sup>13</sup>

This obligation to seek out persons suspected of having committed grave breaches is not limited to the territory of the state party.<sup>14</sup>

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<sup>13</sup> This Article is contained in each of the four Geneva Conventions, for instance in Article 146 of the Fourth Geneva Convention.

<sup>14</sup> See, Amnesty International, *Universal Jurisdiction: The duty of States to enact and implement legislation* (London, September 2001), Chapter Three (War crimes: The legal basis for universal jurisdiction), p. 18.

"*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.<sup>15</sup>

The grave breaches provisions create procedural obligations on states for a number of specific acts or omissions considered as particularly serious violations of the laws of war. It has been progressively recognised, however, that such obligations also extend to such acts or omissions carried out in non-international armed conflicts. The International Criminal Tribunal for the former Yugoslavia recognised that: "...*customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.*"<sup>16</sup>

It can therefore be said that the obligation to seek out and either prosecute or extradite perpetrators of grave breaches of the Geneva Conventions applies equally to those who have committed those breaches in non-international armed conflicts.

## ii. Torture & Enforced Disappearance

The special status of the absolute prohibition of torture is well established in international law. Torture is widely recognised as a crime under international law<sup>17</sup> for which individuals, as well as states, have responsibility at the international level.

In certain contexts, torture can constitute a war crime and/or a crime against humanity, giving rise to universal jurisdiction. But, even outside of such circumstances, individual acts of torture are recognised as also giving rise to universal jurisdiction. As was stated by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Furundzija* case,

*... at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime.*<sup>18</sup>

The Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment ('Torture Convention') has to date been ratified by 146 states, including all 47 member states of the Council of Europe. Parties to the Torture Convention are obliged to

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<sup>15</sup> For instance, Article 147 of the Fourth Geneva Convention. For grave breaches of Protocol I, see articles 11 and 85 of that Protocol.

<sup>16</sup> See, *Prosecutor v. Tadic* (No. IT-94-1-T (Yugoslavia Tribunal, Appeals Chamber, 2 October, 1995, Tadic Appeal on Jurisdiction, paragraph 134.

<sup>17</sup> E.g. Arts. 4-9 of the UN Torture Convention; Arts. 7(1)(f) and 8(2)(a)(ii) of the Rome Statute Establishing the International Criminal Court ('Rome Statute').

<sup>18</sup> *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T (Trial Chamber, 10 December 1998), paragraph 156.

extradite or prosecute alleged torturers - not only when the crime was allegedly carried out in the forum state or where the alleged perpetrator is a national of that state, but also where an alleged perpetrator comes within the forum state's borders.<sup>19</sup> The obligation to prosecute an alleged perpetrator does not depend on the prior existence of a request for his extradition.<sup>20</sup>

The Torture Convention requires that each state party detain or take other measures against torture suspects present in their territory to assure their presence to permit criminal or extradition proceedings. Article 6 provides:

1. *Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present, shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.*
2. *Such State shall immediately make a preliminary inquiry into the facts.*

...

The new Enforced Disappearances Convention imposes on states parties the same obligations to extradite or prosecute in relation to those alleged to have committed the crime of enforced disappearance.<sup>21</sup>

### iii. Crimes Against Humanity and Genocide

Article VI of the Genocide Convention provides that a person may 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*”, but does not impose a direct obligation on other states to investigate and prosecute or extradite suspects of crimes committed abroad.

Similarly, there is no explicit treaty obligation to investigate and prosecute or extradite suspects of crimes against humanity committed abroad. Unlike war crimes, genocide and torture, there is currently no overarching treaty in relation to crimes against humanity.<sup>22</sup> In fact, there are currently eleven international texts defining the concept. Certain underlying acts which constitute crimes against humanity may, however, overlap with treaties concerning war crimes, genocide, torture and enforced disappearance.

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<sup>19</sup> See Arts. 5 (2) and 7(1) of the Torture Convention.

<sup>20</sup> See, Communication No. 181/201, *Suleymane Guengueng et al. v. Senegal*, 17 May 2006, paragraph 9.7 (CAT/C/36/D/181/2001). The International Law Commission, when commenting on the Committee Against Torture's finding in the Guengheng case, indicated that, “[t]his interpretation of article 5, paragraph 2, of the 1984 Convention is an official interpretation of the Convention and, moreover, is consistent with the International Law Commission's statement in its draft Code of Crimes against the Peace and Security of Mankind concerning the suppression of such crimes”. ILC, The obligation to extradite or prosecute (aut dedere aut judicare), Comments received from governments, A/CN.4/612 of 26 March 2009, at p. 6.

<sup>21</sup> See in particular Articles 10 and 11.

<sup>22</sup> Note however, the efforts underway by a number of distinguished academics and experts to establish such a treaty. See, in particular, the Declaration on the Need for a Comprehensive Convention on Crimes Against Humanity, 12 March 2010, available at <http://law.wustl.edu/crimesagainsthumanity/index.aspx> (last accessed December 2010).

It is well recognised that states *may* investigate and prosecute the crimes of genocide and crimes against humanity, where those crimes were committed abroad.<sup>23</sup>

One of the justifications for this rule of international law is that the crimes are crimes against the international community as a whole and, as such, each member of the international community has an inherent interest and responsibility to ensure that perpetrators of such crimes do not evade justice or fail to provide reparations to the victims and their families.

There is also a growing recognition by states, intergovernmental organizations and international and national courts that there is a customary international law *obligation* on all states to investigate and prosecute crimes under international law, including crimes against humanity, genocide and torture, whether there is a link to the state or not. Increasing numbers of commentators and some states have already recognised genocide and crimes against humanity as imposing an obligation *erga omnes* on states to exercise jurisdiction.<sup>24</sup> This position is reflected in the *Third Restatement of the Foreign Relations Law of the United States*,<sup>25</sup> and has become apparent in discussions at the International Law Commission on the topic of the obligation to extradite or prosecute, where it has been reported that:

*a large and growing number of scholars joins the opinion supporting the concept of an international legal obligation 'aut dedere aut judicare' as a general duty based not only on the provisions of particular international treaties, but also on generally binding customary norms, at least as it concerns certain categories of crimes.*<sup>26</sup>

This is supported too by a long list of General Assembly resolutions regarding the universal repression of serious crimes,<sup>27</sup> culminating in Principle 4 of resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. In this resolution, the General Assembly proclaimed that:

*In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. ...*<sup>28</sup>

EU states, all of which have ratified the Rome Statute, have a further impetus to prosecute or extradite alleged crimes under international law. Through the principle of

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<sup>23</sup> See, e.g. Randall, Kenneth, *Universal Jurisdiction under International Law*, 66 Tex. L. Rev. 785 (1987-1988), in particular pp. 834-37 (on genocide) and pp. 800 et seq. (on war crimes and crimes against humanity).

<sup>24</sup> See, eg. Bassiouni, Cherif, 'Crimes Against Humanity' in *Crimes of War 2.0: What the Public Should Know, Revised and Expanded Edition*, Roy Gutman (Editor), David Rieff (Editor), Anthony Dworkin (Editor), W. W. Norton; Rev edition, 2007. Available online at <http://www.crimesofwar.org/thebook/crimes-against-humanity.html> (last accessed December 2010).

<sup>25</sup> Restatement (Third) of the Foreign Relations Law of the United States (1987).

<sup>26</sup> International Law Commission, *Second Report on the Obligation to Extradite or Prosecute*, UN Doc. A/CN.4/585, 11 June 2007 at paragraph 26. 'Aut dedere aut judicare' refers to the principle of extradite or prosecute.

<sup>27</sup> See discussion of these in Akhavan, Payam, 'Whither National Courts? The Rome Statute's Missing Half' 8 *JICJ* 1245-1266 (2010) at 1260-1262. See also, Amnesty International, *Universal Jurisdiction: The duty of States to enact and implement legislation* (London, September 2001).

<sup>28</sup> 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law'. General Assembly Resolution 60/147, UN Doc A/RES/60/147, 16 December 2005.



complementarity central to the ICC system, states bear the primary responsibility for bringing the alleged perpetrators of crimes under the Rome Statute to justice.

The ICC's jurisdiction is complementary to that of national courts, so the ICC will only intervene where a state that has jurisdiction is unwilling or unable genuinely to try a case.<sup>29</sup> This principle of complementarity is emphasised in the Preamble of the Rome Statute which provides that "*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*".<sup>30</sup> This duty has recently been re-emphasised in the resolution of the Assembly of State Parties at the ICC Review Conference in Kampala, which referred to the "*primary responsibility of states to investigate and prosecute the most serious crimes of international concern*".<sup>31</sup>

#### **d. Extradition and Transfer**

When an alleged perpetrator of crimes is within its borders, a state must consider whether to extradite or prosecute; either option would satisfy the obligation. Yet, extradition may not always be an option. Sometimes, the territorial state will not be interested in undertaking a prosecution and will not seek extradition. Even when they do seek extradition, there may be difficulties for the requested states to honour extradition requests in cases where the legal frameworks for extradition have not been agreed between the two countries or where there are serious fair trial concerns.<sup>32</sup>

Extradition and transfer of an individual must be in accordance with norms of international law and the person's human rights. A state apprehending an individual must have a legal basis to do so, and the person detained must be able to challenge the basis for the deprivation of liberty in contemplation of transfer.<sup>33</sup> States may not transfer an individual to a state where he or she is at real risk of torture or other inhumane treatment, enforced disappearance, persecution or arbitrary deprivation of life. A person subject to an extradition request must be able to challenge the transfer on this basis before an independent decision maker prior to the transfer taking place.<sup>34</sup>

States have developed formal procedures by way of treaties under which suspects of crimes are surrendered by one state to another. These treaties may also give rise to obligations to extradite certain individuals on request, if certain criteria are met. Many extradition treaties and domestic laws impose other restrictions on extradition including prohibitions on extraditing nationals, not extraditing those accused of political offences and only extraditing where the alleged crime is a crime in both states.

In 2005 all EU member states replaced the prior extradition system between them with the European Arrest Warrant, a framework decision requiring each national judicial authority to recognise, with a minimum of formalities, requests for the surrender of a

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<sup>29</sup> See Rome Statute, Article 17.

<sup>30</sup> Preamble of the Rome Statute.

<sup>31</sup> Res RC/Res.1, 8 June 2010; available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf) (last accessed December 2010).

<sup>32</sup> See, in relation to the challenges of extraditing Rwandan genocide suspects to Rwanda, REDRESS and African Rights, *Extraditing Genocide Suspects from Europe to Rwanda - Issues and Challenges*, September 2008; available at: [http://www.redress.org/downloads/publications/Extradition\\_Report\\_Final\\_Version\\_Sept\\_08.pdf](http://www.redress.org/downloads/publications/Extradition_Report_Final_Version_Sept_08.pdf) (last accessed December 2010).

<sup>33</sup> International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, Articles 9 and 14. See Center for Human Rights and Global Justice, *Legal Advisory: Minimum Standards for Transfer: International Law Concerning Rendition in the Context of Counter-Terrorism*, June 2009, at p 7; available at: <http://www.chrgj.org/projects/docs/legaladvisory.pdf> (last accessed December 2010).

<sup>34</sup> See *Chahal v. The United Kingdom* (1996), European Court of Human Rights, at paragraph 80; *Agiza v Sweden* (2005), UN Committee Against Torture, at paragraph 13.5, cited by Center for Human Rights and Global Justice, *ibid.*, at p 7-8.

person made by the judicial authority of another member state.<sup>35</sup> Under the Framework Decision establishing the European Arrest Warrant, the crimes under the jurisdiction of the ICC are specifically mentioned as crimes for which a double criminality requirement may not apply.<sup>36</sup>

## **e. Cooperation with International Tribunals and the International Criminal Court**

States are required to cooperate to prevent and punish crimes under international law.<sup>37</sup> Without such cooperation the process of international justice - execution of arrest warrants, compelling witnesses, seizure of evidence and enforcement of penalties - may be impossible in the international context.

States have particular duties to co-operate with international tribunals and the ICC, which, lacking domestic enforcement powers, would be unable to function without such cooperation.

### **i. International Criminal Tribunals**

Backed by Chapter VII authority of the UN Security Council, statutes of ad-hoc criminal tribunals such as the ICTY and ICTR imposed general duties of cooperation on states, without specifying in detail what that cooperation had to consist of. Judges of international criminal tribunals may direct binding orders to states, including on issues such as the handing over of evidence and arrest of suspects.<sup>38</sup> In the face of such orders states do not have the ability to rely on traditional methods of refusing cooperation such as the requirement of double criminality or the nationality of the person committing the offence,<sup>39</sup> and if they refuse to cooperate they may be referred to the Security Council.<sup>40</sup>

### **ii. The International Criminal Court**

The Rome Statute also sets out a general duty to cooperate,<sup>41</sup> and sets out a non-exhaustive list of areas in which states must comply with requests for assistance including locating people or items, taking evidence, questioning of suspects, service of documents, facilitating appearance of witnesses or experts, examination of places or sites, execution of searches and seizures, provision of documents and records, protection of victims and witnesses and the preservation of evidence and the identification of assets.<sup>42</sup>

If a state party fails to comply with a request to cooperate by the Court, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.<sup>43</sup>

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<sup>35</sup> Note that Norway and Switzerland are not a part of this scheme.

<sup>36</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), Article 2(2).

<sup>37</sup> Cassese, *International Criminal Law*, pp 302-303. Statute of the International Tribunal for the Former Yugoslavia, adopted 25 May 1993, Article 29(1); Statute of the International Tribunal for Rwanda, adopted 8 November 1994, Article 28(1).

<sup>38</sup> See *Prosecutor v. Tihomir Blaskic, Decision on the Objection of the Republic of Croatia to the issuance of subpoena duces tecum*, IT-95-14-PT, 18 July 1997, at paras. 14 - 50.

<sup>39</sup> See Cassese, *International Criminal Law*, at p 357.

<sup>40</sup> See *Prosecutor v. Tihomir Blaskic*, 18 July 1997, at paragraph 62.

<sup>41</sup> Article 86.

<sup>42</sup> Article 93(1).

<sup>43</sup> Article 87(7).

### III. Overview of the laws and practices relating to extraterritorial jurisdiction in EU member states

The movement to end impunity for crimes under international law has led to the growing recourse to foreign courts through proceedings in states other than where the crime was committed. In this, prosecuting authorities and courts in some EU member states have taken a leading role. As discussed in the previous section, states are permitted and in some cases required to investigate and prosecute alleged perpetrators of crimes under international law, even where the crime was not committed in the state's territory. This exercise of 'extraterritorial jurisdiction' by national courts is a necessary complement to territorial proceedings and cases before international or internationalised courts, both of which leave significant gaps in their coverage of which alleged perpetrators have had advantage.

This section examines the laws and practices of EU member states in relation to the exercise of extraterritorial jurisdiction over international crimes.

#### III.1 Domestic legislation criminalising crimes under international law

Progress has been made in recent years in EU member states towards specific domestic criminalisation of crimes under international law, however further harmonisation is needed.<sup>44</sup> Some states have well-developed legislation specifically criminalising each of the crimes under international law, and incorporating the international treaty definitions of those crimes, while others still fall back to ordinary crimes under domestic law such as murder and rape.

Across these categories, there remain EU member states where the definitions of crimes - especially in relation to crimes against humanity - are not in line with the Rome Statute. States have not specifically criminalised enforced disappearances outside the context of a crime against humanity, and a number also do not include torture as a separate offence.

The country reports at Section VI of this Report give the text of the relevant provisions of domestic law criminalising international crimes for each of the countries studied. Overall, this shows that:

- **nineteen countries have now implemented special international crimes codes or have amended their existing penal code to bring it largely into line with the Rome Statute**

These criminalise (at least) the offences of genocide, crimes against humanity and war crimes, generally in line with the definitions of these crimes set out in the Rome Statute. The pace of legislative reform has increased with the coming into force of the Rome Statute and the commencement of operations of the ICC. Some countries, including Germany and the Netherlands, have complete codes in relation to international crimes.<sup>45</sup> Others, including the UK and Ireland, have enacted separate legislation criminalising crimes under the jurisdiction of the ICC and setting out procedural and jurisdictional rules in relation to those crimes, while retaining older

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<sup>44</sup> Compare FIDH/REDRESS Report: "Legal Remedies for Victims of 'International Crimes'", March 2004.

<sup>45</sup> In Germany, the Code of Crimes against International Law - Part 2 criminalises the specific offences; in the Netherlands see the International Crimes Act 2003.

legislation in relation to crimes outlawed by other treaties, for example, the crime of torture.<sup>46</sup> The remainder have amended their criminal codes (or enacted new criminal codes), incorporating (for the most part) the crimes as defined in the Rome Statute. Belgium,<sup>47</sup> Cyprus,<sup>48</sup> the Czech Republic,<sup>49</sup> Estonia,<sup>50</sup> Finland,<sup>51</sup> France,<sup>52</sup> Germany,<sup>53</sup> Ireland,<sup>54</sup> Lithuania,<sup>55</sup> Malta,<sup>56</sup> the Netherlands,<sup>57</sup> Norway,<sup>58</sup> Portugal,<sup>59</sup> Romania,<sup>60</sup> Slovakia,<sup>61</sup> Slovenia,<sup>62</sup> Spain,<sup>63</sup> Switzerland<sup>64</sup> and the United Kingdom<sup>65</sup> are within this first category.

This is the most effective way of incorporating international crimes into domestic law, and, because of the harmonisation of definition of offences, the approach most promising for cooperation between states. Specific criminalisation most closely respects the principle of legality, since it provides the most clarity and predictability, including in terms of penalties. It also simplifies and clarifies the work of law enforcement personnel by relieving them of the burden of research, comparison and interpretation in the field of international law.

Not all implementation has been complete, however, and not all definitions of crimes accord with the definitions in the relevant treaties, including the Rome Statute (or even more preferably, the most progressive definitions in international law).

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<sup>46</sup> International Criminal Court Act 2001 (UK) and International Criminal Court Act 2006 (Ireland).

<sup>47</sup> Amendments to the Belgian Criminal Code (hereinafter the words “Criminal Code” will be abbreviated to “CC”) were introduced in 2003.

<sup>48</sup> CC (amendments introduced by Law 23(III)/2006).

<sup>49</sup> See the CC (Act No. 40/2009), Sections 400 to 417.

<sup>50</sup> A new Criminal Code entered into force in September 2002 which incorporates extensive definitions of genocide, war crimes and crimes against humanity under the section “Offences against Humanity and International Security”. The Criminal Code also provides for the non-applicability of statutory limitation to offences against humanity.

<sup>51</sup> CC, Chapter 11, Sections 1-9: war crimes and crimes against humanity are defined by reference to the international agreements binding on Finland or the established rules of public international law.

<sup>52</sup> Law No 2010-930, 9 August 2010.

<sup>53</sup> Code of Crimes against International Law, Chapter 2.

<sup>54</sup> International Criminal Court Act 2006.

<sup>55</sup> A new Criminal Code was introduced in May 2003 - in relation to international crimes see Part XV.

<sup>56</sup> The Rome Statute crimes were specifically incorporated into the Criminal Code by the ICC Act 2002.

<sup>57</sup> International Crimes Act 2003.

<sup>58</sup> A new chapter was introduced into the Criminal Code in February 2008 (and entered into force 7 March 2008), with provisions based on the definitions in the Rome Statute (although more extensive in that they also include certain crimes considered as war crimes under international customary law that are not in the Rome Statute).

<sup>59</sup> Criminal Law Concerning Offences against International Humanitarian Law (22 July 2004).

<sup>60</sup> A new Criminal Code was passed in 2009, but this is not yet in force: see Articles 438-444.

<sup>61</sup> The Criminal Code was amended in 2002 to incorporate specific reference to the Rome Statute crimes, and this entered into force on 1 January 2010. See Chapter 12 of the CC.

<sup>62</sup> The Criminal Code was amended in 2004 to incorporate specific reference to the Rome Statute crimes. See articles 100-102.

<sup>63</sup> Amendments introduced to the Criminal Code in 2003 incorporated specific reference to the Rome Statute crimes: see CC Part XXIV.

<sup>64</sup> Following amendments made to the Criminal Code in March 2010, which are expected to come into force on 1 January 2011.

<sup>65</sup> International Criminal Court Act 2001. This relates to implementation in England, Wales and Northern Ireland. The corresponding Act of the Scottish Parliament is the International Criminal Court (Scotland) Act 2001 (asp 13).

Importantly too, criminalisation of itself is not enough if it is made difficult to prosecute alleged perpetrators. A worrying trend linked to the legislative action to incorporate international crimes into domestic law has been the associated raising of new procedural or jurisdictional barriers applicable only to international crimes, making it harder for those crimes to be prosecuted. A stark example of this is the recent amendments to the French penal code, which, while introducing definitions of crimes compatible with the Rome Statute, block civil parties' ability to trigger an investigation into those crimes (discussed further below, at Section III.4(b)). Such procedural issues are examined in the next section of the Report.

- **three countries have general provisions which criminalise or allow punishment of international crimes by referring specifically to the relevant provisions of international treaties, international law in general or the particular area of international law**

Although this approach is simple and economical, general criminalisation in this way does have its difficulties. It gives rise to problems concerning the principle of legality, particularly as this method does not permit differentiation of the penalty in accordance with the gravity of the act, unless this is left to be decided by the judge in application of strict criteria laid down by law. It also requires national judges to specify and interpret the applicable internal law in light of international law obligations, leaving them with considerable room for manoeuvre, though this flexibility may be an advantage in certain circumstances.

An example of this type of approach is Austria, which has a specific provision in its penal code criminalising genocide, but which does not explicitly define war crimes or crimes against humanity as crimes under national law. The courts have held that by virtue of Article 64 Paragraph 1(6) of the Penal Code, which enables Austria to exercise universal jurisdiction in accordance with its international obligations, conduct constituting a grave breach of the Geneva Conventions would be subject to universal jurisdiction.<sup>66</sup> (The Ministry of Justice is considering an amendment to the Austrian Penal Code to include all crimes under the Rome Statute, but although this was planned by the Austrian government in 2008, at the time of writing, no concrete steps have yet been taken.<sup>67</sup>)

Austria, Denmark<sup>68</sup> and Italy<sup>69</sup> fall within this second category.

- **seven countries rely on their existing penal (and/or military) code already in force**

Although many modern European penal codes provide for the punishment of these offences, either explicitly<sup>70</sup> or by reference to the underlying offences, offences under domestic criminal law often do not fully cover the relevant acts prohibited under international law - for example, national war crimes legislation often does not include

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<sup>66</sup> Judgment of the Oberster Gerichtshof, 13 July 1994, 15 Os 99/94. Republic of Austria v. Cvjetkovic, Landesgericht, Salzburg, 31 May 1995. For analysis of the case see Axel Marschik, "The Politics of Prosecution: European National Approaches to War Crimes", in Timothy L.H. McCormack & Gerry J. Simpson, eds, *The Law of War Crimes*, 1997, 65 at pp 79-81.

<sup>67</sup> See the summary produced by the Coalition for the International Criminal Court, available at [www.iccnw.org/?mod=country&iduct=10](http://www.iccnw.org/?mod=country&iduct=10) (last accessed December 2010).

<sup>68</sup> Note that Denmark does have specific domestic legislation criminalising genocide (Act No. 132 of 29 April 1955) and war crimes (Military Criminal Code 1973)).

<sup>69</sup> Crimes of international concern committed abroad are punishable under Italian criminal law if included in international Conventions implemented by Italy (CC, Article 7).

<sup>70</sup> See, for example, Chapter XIV of the Bulgarian CC ("*Crimes against peace and humanity*") which criminalises genocide, war crimes and crimes against humanity.

all the acts that violate the international laws of armed conflict. The elements of the crimes do not also always correspond to the requirements of the relevant treaties nor are the penalties always appropriate to the underlying context. For example, although the Bulgarian Criminal Code has a section dealing with crimes against peace and humanity,<sup>71</sup> it does not define crimes against humanity other than the crime of apartheid, and consequently a number of crimes against humanity are ‘missing’ (including murder, rape and enforced disappearance) and would be prosecuted as ordinary crimes. Similarly Poland has a very limited provision relating to crimes against humanity, and the maximum punishment provided for that offence is 5 years.<sup>72</sup>

Bulgaria,<sup>73</sup> Greece,<sup>74</sup> Hungary,<sup>75</sup> Latvia,<sup>76</sup> Luxembourg, Poland<sup>77</sup> and Sweden fall into this category, although the majority of these jurisdictions are considering some form of legislative action to specifically incorporate crimes as defined under the Rome Statute into their domestic law.

In relation to other treaties considered in this report, the crime of torture as defined in the Torture Convention is generally - although not universally - incorporated into domestic law but, given the relative novelty of the Enforced Disappearances Convention, and the fact that it has only recently entered into force, the crime of enforced disappearance (when not a crime against humanity) is not specifically criminalised in domestic law.

While progress has therefore been made in terms of the number of states that have criminalised international crimes in line with international law, even in many of those states further action is required to ensure that legislation is comprehensive and fully compatible with accepted definitions. It is difficult to advocate a state to amend its criminal code. However, this is a task that all parties to the Rome Statute (including all EU member states) will need to consider following the recent agreement on a definition of the crime of aggression under the jurisdiction of the ICC. This is an important opportunity for states to fix other flaws in the legislation - such as incomplete definitions of crimes against humanity - and indeed for NGOs and other interested parties to advocate for such changes.

## III.2 Forms of extraterritorial jurisdiction

States exercise extraterritorial jurisdiction on different bases. These were referred to in passing in the previous section, and include:<sup>78</sup>

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<sup>71</sup> CC, Chapter XIV.

<sup>72</sup> CC, Article 119.

<sup>73</sup> See Chapter XIV of the Bulgarian CC.

<sup>74</sup> A draft bill harmonising the Criminal Code with the Rome Statute has been prepared but has not been passed by Parliament.

<sup>75</sup> Researchers have been told that the Hungarian government elected in April 2010 has expressed the desire to implement a new Criminal Code, and that it is likely that work towards this may begin in January 2011. If so, a revision of the articles on war crimes and crimes against humanity can be expected, to bring them in line with the Rome Statute.

<sup>76</sup> The Coalition for the ICC reports that “*Complementarity amendments were prepared and transmitted to the Parliament in October 2008. Amendments include the addition of a section on crimes against humanity in accordance with Art 7 of the Rome Statute; a more detailed definition of war crimes with reference to international and humanitarian law; criminal liability for the public incitement to commit genocide, crimes against humanity and war crimes; and the denial of the commission of those crimes.*” Available at: [http://www.iccnw.org/documents/Global\\_Ratificationimplementation\\_chartApr2010\\_\(3\).pdf](http://www.iccnw.org/documents/Global_Ratificationimplementation_chartApr2010_(3).pdf) (last visited December 2010).

<sup>77</sup> A new Criminal Code was enacted in 2005, but the definitions of the crimes covered by the Rome Statute differ substantially from it. For the relevant provisions see Sections 117 to 119.

<sup>78</sup> On the different bases of extraterritorial jurisdiction, see, Amnesty International, *Universal Jurisdiction: The duty of States to enact and implement legislation* (London, September 2001), Introduction, p. 5. States sometimes assume extraterritorial jurisdiction on an additional basis: the protective principle (based on harm to the forum State’s own national

- (i) “active personality jurisdiction”: based on the nationality of the suspect;
- (ii) “passive personality jurisdiction”: based on the nationality of the victim; and
- (iii) “universal jurisdiction”: not linked to the nationality of the suspect or victim or to harm to the forum State’s own national interests: for the purposes of this report, any provision allowing for jurisdiction over a foreign national for crimes committed abroad and not involving a victim from the state in question are considered ‘universal jurisdiction’ provisions.

This study examined the bases on which prosecuting authorities and courts can exercise extraterritorial jurisdiction over crimes under international law under their domestic law. The following table shows the extent to which states have made available the different types of jurisdiction - *in at least some circumstances for at least one serious international crime* - in each of the countries reviewed. This is followed by a brief discussion of the considerations generally taken into account for the exercise of each type of jurisdiction and the role of each in relation to the prosecution of crimes under international law in EU member states.

**Table 1: Bases of jurisdiction available in EU member countries (in relation to at least one crime under international law)**

State	Active Personality Jurisdiction	Passive Personality Jurisdiction	Universal Jurisdiction
Austria	Yes.	Yes.	Yes. <sup>79</sup>
Belgium	Yes.	Yes.	Yes.
Bulgaria	Yes.	Yes.	Yes.
Cyprus	Yes.	No.	Yes.
Czech Republic	Yes.	Yes.	Yes.
Denmark	Yes.	No data.	Yes.
Estonia	Yes.	Yes.	Yes.
Finland	Yes.	Yes.	Yes.
France	Yes.	Yes.	Yes.
Germany	Yes.	Yes.	Yes.
Greece	Yes.	Yes.	Yes.
Hungary	Yes.	No.	Yes.
Ireland	Yes.	Yes.	Yes.
Italy	Yes.	Yes.	Yes.
Latvia	Yes.	Yes.	Yes.
Lithuania	Yes.	No.	Yes.
Luxembourg	Yes.	Yes.	Yes.
Malta	Yes.	Yes (limited).	Yes.
Netherlands	Yes.	Yes.	Yes.
Norway	Yes.	Yes.	Yes.
Poland	Yes.	Yes.	Yes.
Portugal	Yes.	Yes.	Yes.
Romania	Yes.	Yes.	Yes.
Slovakia	Yes.	No.	Yes.
Slovenia	Yes.	Yes.	Yes.
Spain	Yes.	Yes.	Yes.
Sweden	Yes.	No (+ exception).	Yes.
Switzerland	Yes.	Yes.	Yes.
United Kingdom	Yes.	Yes.	Yes.
<b>Total</b>	Y:29 N:0 ND:0	Y:23 N:5 ND:1	Y:29 N:0 ND:0

interests). This is not, however, generally asserted in relation to the international crimes focussed on in this report, which affect humankind as a whole.

<sup>79</sup> Note that the response received to this on the questionnaire was ‘No’, but see s 64(6) of the CC. The Austrian courts have recognised universal jurisdiction over certain international crimes on this basis.

## a. Active Personality Jurisdiction

All EU member states have legislation allowing their courts to try nationals for certain crimes committed abroad. Generally speaking, the provisions fall into three categories. First, and most broadly, are the states that allow trial of nationals for acts committed in another state which are crimes under domestic law, whether or not the act is also considered a crime in that other state. These provisions are generally limited to certain categories of crimes, or crimes attracting a minimum period of imprisonment, but would usually cover any international crimes that have been incorporated into domestic law.<sup>80</sup>

Second are the states which provide generally for nationals to be tried under their own criminal law where the act committed abroad is a crime in the home jurisdiction, and in the state in which it was committed (a 'double criminality' requirement).<sup>81</sup>

Third are countries that provide specific provision for active personality jurisdiction in relation to crimes under international law. Countries that have implemented international criminal codes or have recently amended their criminal codes in relation to crimes under international law (eg. to implement their obligations under the Rome Statute) tend to fall into this category.<sup>82</sup> For example, in Belgium active personality jurisdiction for ordinary crimes is conditioned on the presence of the national in the jurisdiction,<sup>83</sup> but this is not required in relation to crimes under international law.<sup>84</sup> Denmark's criminal code specifically provides for active personality jurisdiction in relation to acts covered by the Statute of the International Criminal Court,<sup>85</sup> and the Netherlands' International Crimes Act 2003 provides for active personality jurisdiction for crimes under that Act.<sup>86</sup> Ireland and the UK, both states where active personality jurisdiction has traditionally been applied only in a very limited number of cases (such as murder and manslaughter<sup>87</sup>), have also extended it to international crimes to implement treaty obligations. Both the UK and Ireland have legislated for active personality jurisdiction for genocide, crimes against humanity and war crimes.<sup>88</sup>

## b. Passive Personality Jurisdiction

The survey of EU member states has confirmed that the majority have provisions allowing for foreign nationals to be tried for crimes committed abroad against the state's own

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<sup>80</sup> See, for example, the Criminal Codes of Bulgaria (Article 4), France (Article 113-6), Hungary (Article 3), Italy (Article 9), Latvia (Section 4), Lithuania (Article 5), Poland (Article 109), Romania (Article 4), Slovenia (Article 12).

<sup>81</sup> See, for example the Criminal Codes of Austria (Section 65(1)), Belgium (Article 7), Cyprus (Article 5), Estonia (Article 7), Finland (Article 6), Germany (Article 7), Greece (Article 6), Luxembourg (Article 5 of the CCP), Portugal (Article 4) and Sweden (Chapter II, Section 2).

<sup>82</sup> Others do not refer specifically to active personality jurisdiction, but provide rather for universal jurisdiction: see, eg. the German Code of Crimes Against International Law, Section 1.

<sup>83</sup> CCP, Article 7.

<sup>84</sup> As referred to in CC, Book II, Title Ibis and CCP, Article 6 bis.

<sup>85</sup> Article 8a.

<sup>86</sup> International Crimes Act 2003, Section 2.

<sup>87</sup> For both states see their respective Offences Against the Person Act 1861, Section 9.

<sup>88</sup> See the International Criminal Court Act 2001 (UK), Section 51 and International Criminal Court Act 2006 (Ireland), Section 12.



nationals.<sup>89</sup> The exercise of this jurisdiction is, however, usually conditioned on the crime also being punishable in the state where the crime was committed (although in the case of international crimes, this may be held by courts to be sufficient to fulfil this 'double criminality rule'<sup>90</sup>).

Although this ground of jurisdiction has been criticised as an incongruous basis on which to prosecute crimes against humanity, genocide and torture (which injure humanity as a whole)<sup>91</sup> it has played an important role for trials *in absentia*. 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 if 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.<sup>92</sup>

This ground of jurisdiction is also becoming increasingly important in Spain, one of the jurisdictions which has been most active in international criminal prosecutions. In 2009 legislation was enacted restricting the availability of extraterritorial jurisdiction and introducing requirement of a 'link' to Spain for extraterritorial cases (discussed further below, at Section III.3(a)). One of the ways in which to show this link is in effect passive personality - that is, that the victim was Spanish. The majority of the cases now before the Spanish courts which have been allowed to proceed have an element of passive personality jurisdiction.<sup>93</sup>

### c. Universal Jurisdiction

States may assert universal jurisdiction to investigate and prosecute crimes under international law. This is the most wide-reaching form of jurisdiction, and one that is recognised as necessary to close the impunity gap that continues to exist for crimes under international law.

Despite the strong legal basis for universal jurisdiction, its application is still patchwork across the various crimes under international law in the different EU member states. Although all EU countries have the same international obligations and interests in combating impunity for crimes under international law, member states have taken different approaches and have adopted varying interpretations of their international obligations to extradite or prosecute alleged perpetrators and/or to end impunity for international crimes. This has led in practice to differing degrees of access to justice from state to state and even from crime to crime, causing confusion and, in some cases, creating safe havens.

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<sup>89</sup> See the table above for a breakdown of the States by type of jurisdiction afforded.

<sup>90</sup> Discussed further, below, at Section III.3(d).

<sup>91</sup> See Cassese, Antonio, *International Criminal Law*, 2003, Oxford University Press, pp 283-284.

<sup>92</sup> 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 *in absentia*, Alfredo Astiz was tried, convicted and sentenced in his absence.

<sup>93</sup> See the discussion of current cases by Manuel Ollé Sesé in 'Summary of the universal jurisdiction reforms in Spain', in the November 2010 edition of the REDRESS and FIDH *EU Update on International Crimes* at pp 5-7; available at: [http://www.fidh.org/IMG/pdf/EU\\_Newsletter\\_Nov\\_2010.pdf](http://www.fidh.org/IMG/pdf/EU_Newsletter_Nov_2010.pdf) (last accessed December 2010). The cases currently ongoing include cases concerning Argentina (Scilingo and Cavallo), Chile (Pinochet), Guatemala, El Salvador Jesuits, the Couso case (involving the death of a Spanish reporter in Iraq), the Sahara, Rwanda-DRC, Guantánamo, the SS Totenkopf and a case concerning the attack on the 'Freedom Flotilla' to Gaza. In each of these cases there was a Spanish victim or Spanish victims. Cases which have been dismissed since the introduction of the new law include a Tibet case, a case concerning Burma and the Aminatou Haidar case - in these cases the court found a relevant connection with Spain did not exist.

Despite the absence of such requirements under international law, many EU member states require jurisdictional rules to be incorporated into domestic legislation in order for courts to exercise universal jurisdiction.<sup>94</sup> Furthermore, some states, while providing for universal jurisdiction, have introduced legislative restrictions on its availability - ranging from the requirement of a 'nexus' to the forum state (though this counters the very meaning of universal jurisdiction which tackles crimes specifically because of their 'universal' concern). Others have introduced restrictions on who may initiate the opening of an investigation (approaching some form of passive personality) and wide executive or prosecutorial discretion in the decision whether to initiate a prosecution, raising concerns about political interference in the judicial process. Other issues tied to the exercise of universal jurisdiction - such as the recognition by certain states of state and other forms of immunities in criminal and civil cases despite the *jus cogens* nature of the crimes and the application of statutes of limitation to crimes under international law despite international law interdictions<sup>95</sup> - have not been adequately addressed in some cases, and may severely impact on the practical availability of universal jurisdiction in certain countries.

Other practical and systemic obstacles to justice exist, ranging from the lack of clear criteria for an investigation of crimes under international law as well as the lack of political will and at times poor technical skills to undertake the practical steps required for investigations and prosecutions.

The practice of the different member states in relation to these obstacles - amounting to practical and procedural hurdles barring justice - is examined in the next sections of the Report. Worryingly, although some progress has been made towards greater accountability, pressure has and is being exercised by a variety of states to narrow domestic legislation providing for extraterritorial jurisdiction and to limit the role of victims and NGOs in relying on such jurisdiction.

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<sup>94</sup> While few EU member states have constitutionally-based dualist legal systems explicitly requiring domestic implementation, many of their courts refuse to recognise their own competence over universal jurisdiction cases without it (France, for example).

<sup>95</sup> See, e.g., the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968) ; the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (Strasbourg, 1974); Article 29 (non-applicability of statute of limitations) of the Rome Statute of the International Criminal Court (1998); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, Principle 6.

**Table 2: Categories of crime subject to universal jurisdiction in EU member countries**

State/ Universal jurisdiction	UJ with regard to ordinary crimes	UJ with regard to crimes of international concern identified in treaties (eg. hostage-taking, hijacking)	UJ with regard to at least one crime under international law (eg. war crimes, crimes against humanity, genocide, torture, enforced disappearance)
Austria	Yes.	Yes.	Yes.
Belgium	Yes.	Yes.	Yes.
Bulgaria	No.	Yes.	Yes.
Cyprus	No.	Yes.	Yes.
Czech Republic	Yes.	Yes.	Yes.
Denmark	Yes.	Yes.	Yes.
Estonia	Yes.	Yes.	Yes.
Finland	No.	Yes.	Yes.
France	No.	Yes.	Yes.
Germany	No. <sup>96</sup>	Yes.	Yes.
Greece	No.	Yes.	Yes.
Hungary	Yes.	Yes.	Yes.
Ireland	No.	No.	Yes.
Italy	Yes.	Yes.	Yes.
Latvia	No.	Yes.	Yes.
Lithuania	No.	Yes.	Yes.
Luxembourg	Yes.	Yes.	Yes.
Malta	Yes.	Yes.	Yes.
Netherlands	No.	Yes.	Yes.
Norway	Yes.	Yes.	Yes.
Poland	Yes.	Yes.	Yes.
Portugal	Yes.	Yes.	Yes.
Romania	Yes.	Yes.	Yes.
Slovakia	No.	Yes.	Yes.
Slovenia	Yes.	Yes.	Yes.
Spain	No.	Yes.	Yes.
Sweden	Yes.	Yes.	Yes.
Switzerland	No.	Yes.	Yes.
United Kingdom	No.	Yes.	Yes.
Total	Y:15 N:14 ND:0	Y:28 N:1 ND:0	Y:29 N:0 ND:0

Although the availability of universal jurisdiction is broadening, it is not yet recognised as applicable to all of the major international crimes in all member states. As the following table shows, universal jurisdiction is *generally* available in relation to war crimes, genocide, crimes against humanity and torture, but is not generally available for enforced disappearances (except as a crime against humanity). Universal jurisdiction for crimes against humanity and genocide is still not recognised as available in seven EU member states.

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Except where carried out in connection with a crime for which universal jurisdiction is available.

**Table 3: Types of international crime subject to universal jurisdiction in EU member states**

State/ Universal jurisdiction	War crimes	Crimes against humanity	Genocide	Torture	Enforced disappearances <sup>97</sup>
Austria	Yes.	Yes.	Yes.	Yes.	No.
Belgium	Yes.	Yes.	Yes.	Yes.	No.
Bulgaria	Yes.	Yes.	Yes.	Yes.	No.
Cyprus	Yes.	Yes.	Yes.	Yes.	No.
Czech Republic	Yes.	Yes.	Yes.	Yes.	No.
Denmark	Yes.	Yes.	Yes.	Yes.	No.
Estonia	Yes.	Yes.	Yes.	Yes.	No.
Finland	Yes.	Yes.	Yes.	Yes.	No.
France	Yes.	Yes.	Yes.	Yes.	No.
Germany	Yes.	Yes.	Yes.	Yes.	No.
Greece	No.	No.	No.	Yes.	No.
Hungary	Yes.	No.	Yes.	Yes.	No.
Ireland	Yes.	No.	No.	Yes.	No.
Italy	Yes.	No.	No.	Yes.	No.
Latvia	Yes.	Yes.	Yes.	Yes.	No.
Lithuania	Yes.	Yes.	Yes.	Yes.	No.
Luxembourg	Yes.	No.	Yes.	Yes.	No.
Malta	Yes.	Yes.	Yes.	Yes.	No.
Netherlands	Yes.	Yes.	Yes.	Yes.	No.
Norway	Yes.	Yes.	Yes.	Yes.	No.
Poland	Yes.	No.	Yes.	Yes.	No.
Portugal	Yes.	Yes.	Yes.	Yes.	No.
Romania	Yes.	Yes.	Yes.	Yes.	No.
Slovakia	Yes.	Yes.	Yes.	Yes.	No.
Slovenia	Yes.	Yes.	Yes.	Yes.	No.
Spain	Yes.	Yes.	Yes.	Yes.	No.
Sweden	Yes.	No.	Yes.	No.	No.
Switzerland	Yes.	Yes. <sup>98</sup>	Yes.	Yes. <sup>99</sup>	No.
United Kingdom	Yes.	Yes.	Yes.	Yes.	No.
Total	Y:28 N:1 ND:0	Y:22 N:7 ND:0	Y:26 N:3 ND:0	Y:28 N:1 ND:0	Y:29 N:0 ND:0

### III.3 Key Procedural Hurdles Arising in the Exercise of Extraterritorial Jurisdiction

Although based on established principles of international law, the application of universal and other forms of extraterritorial jurisdiction is fraught with hurdles for victims who seek to initiate investigations and for prosecutors seeking to progress cases. While these vary, past instances in which national authorities have failed to open or progress investigations illustrate some of the key obstacles. Some of the key obstacles are described below.

#### a. The Requirement of Some States for the Case to have a Link or Connection with the State

The principle of universal jurisdiction defies territorial borders. The presence of the accused person on the territory of the investigating state (the forum state) is therefore not a precondition for the exercise of such jurisdiction under international law. Indeed, as described above, the Geneva Conventions, 1949 positively require states to “seek out and prosecute” those said to be responsible for grave breaches.<sup>100</sup> The ‘*extradite or prosecute*’

<sup>97</sup> ‘No’ is recorded where it would be theoretically possible to prosecute using constituent ordinary crimes.

<sup>98</sup> From 1 January 2011.

<sup>99</sup> Although this is controversial.

<sup>100</sup> Geneva Convention (I), Article 49; Geneva Convention (II), Article 50; Geneva Convention (III), Article 129; Geneva Convention (IV), Article 146.

clauses in other treaties are more nuanced, neither obliging states to initiate investigations outside of the territory of the forum state and/or requesting extradition, nor denying such possibilities,<sup>101</sup> whereas under customarily international law it is clear that states are permitted to exercise universal jurisdiction for crimes under international law.

Despite this, many European states require some sort of nexus or link between the alleged perpetrator and the state for jurisdiction to be exercised. In Spain and Belgium - member states where numerous cases have been lodged based on universal jurisdiction - new nexus requirements have been introduced by legislation where they did not previously exist. In Belgium, universal jurisdiction may only be exercised if the accused is Belgian or has primary residence in Belgian territory, if the victim is Belgian or had lived in Belgium for at least three years at the time the crimes were committed, or if Belgium is required by treaty to exercise jurisdiction over the case.<sup>102</sup> The Spanish legislation was amended in 2009 so that (unless Spain is required by treaty to prosecute) it must be shown that the victim was Spanish, or that the alleged perpetrator is in Spain, or that there is a significant nexus with Spain.<sup>103</sup> The Spanish authorities do retain the power, however, to prosecute cases in any event where the acts reported are not being investigated effectively by an international court or by any other competent country.<sup>104</sup>

### (i) Presence

The 'presence' link introduced in Spain is a nexus requirement found in many other EU member states, though as indicated, there is no requirement under international law that there be 'presence'; indeed, the 'requirement' is inconsistent with the grave breaches provisions of the Geneva Conventions and with the notion of *universal* jurisdiction. The table at page 39 of this Report shows that at least 20 of the states considered have some sort of presence requirement for the exercise of universal jurisdiction.

'Presence' may be required by certain states at different stages of the investigation and proceedings. For instance, in the Netherlands and Finland suspects need to be present from the outset of the investigation.<sup>105</sup> In Germany, while presence is not a direct requirement, the prosecutor may refrain from investigating an alleged crime where the suspect's presence cannot be confirmed or anticipated.<sup>106</sup> In France the suspect needs to be present at the time of the filing of the complaint,<sup>107</sup> but not during trial. In Denmark

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<sup>101</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entered into force 26 June 1987, Articles 4-5; International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20 December 2006, entered into force 23 December 2010, Articles 10-11.

<sup>102</sup> Amended CCP, Article 6(1° bis), Article 10(1bis) and Article 12bis in conjunction with the amended CC, Book II, Title Ibis.

<sup>103</sup> Organic Act 1/2009 of 3 November 2009 introduces amendments to Sections 4 and 5 of Article 23 of the Organic Law of the Judiciary (*LOPJ - Ley Organica del Poder Judicial*). See the discussion of the effect of these provisions in Manuel Ollé Sesé, 'Summary of the universal jurisdiction reforms in Spain', in the November 2010 edition of the REDRESS and FIDH *EU Update on International Crimes* at pp 5-7. Available at: [http://www.fidh.org/IMG/pdf/EU\\_Newsletter\\_Nov\\_2010.pdf](http://www.fidh.org/IMG/pdf/EU_Newsletter_Nov_2010.pdf) (last accessed December 2010).

<sup>104</sup> See Manuel Ollé Sesé, 'Summary of the universal jurisdiction reforms in Spain', in the November 2010 edition of the REDRESS and FIDH *EU Update on International Crimes* at p 5.

<sup>105</sup> In relation to the relevant provision of the Netherlands Act see: Kaleck, Wolfgang, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008' 30 *Michigan Journal of International Law* 927-980 (2009) at 943.

<sup>106</sup> When the Code of Crimes against International Law is read in conjunction with Section 153f of the CCP: see Kaleck, Wolfgang, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008' 30 *Michigan Journal of International Law* 927-980 (2009) at 951.

<sup>107</sup> In France, two circulars, namely Circular of 10 February 1995, Article 2.2.1 (published in the *Journal Officiel*, 21 February) and Circular of 22 July 1996, Article 1 (*Journal Officiel*, 31 August), edited after the adoption of Law no. 95-1 of 2 January 1995 and Law no. 96-432 of 22 May 1996, respectively, allow during preliminary investigations the interview and the medical examination of victims who have taken refuge in France, even if the suspect has not yet been found in the territory of the Republic.

the accused must be present for the initiation of formal legal proceedings (“*at the time when charges are raised*”).<sup>108</sup> In Belgium, where the accused is not present in Belgium, the prosecutor has a discretion to dismiss a case if it is not in the interests of justice to pursue it.<sup>109</sup> In other countries, such as the United Kingdom (in relation to torture and grave breaches of the Geneva Conventions) and Germany, the anticipated presence of the suspect on the territory is sufficient to initiate an investigation but the accused must be present during the trial.

The presence requirement, in whatever form, can deny justice to victims. It is not required by international law, and greatly restricts the forums in which perpetrators of crimes under international law may be brought to justice.

The requirement is particularly damaging where it is a pre-condition to the opening of an investigation, or is in practice treated as such by prosecuting authorities. It also serves as a serious practical barrier where complaints are made (or investigations initiated) only once the alleged perpetrator is in the territory, even where the law would have allowed an investigation to begin earlier. If suspects are only present for a short period of time, national authorities that have not already opened investigations may not have sufficient time to investigate and produce evidence to apply for an arrest warrant within the duration of the suspect’s presence, which has in a number of cases enabled suspects to flee the territory, even in the face of clear obligations on the state to investigate and extradite or prosecute the suspect (for example, under the Torture Convention).

This happened in relation to a complaint of torture made against then Israeli Minister Ami Ayalon in May 2008 during a visit to the Netherlands. The public prosecutor did not initiate an investigation before Ayalon left the jurisdiction.<sup>110</sup> In Germany in 2008, prosecutors failed to begin an investigation against Uzbekistan’s Minister of Interior while he was in the country, and, once he left, dismissed the complaints of crimes against humanity and torture on the basis that the investigation would be unsuccessful because he would be unlikely to return to Germany.<sup>111</sup> In Austria in 2008 a complaint of torture was made against the Chechen Vice President Ramzan Kadyrov, who planned to attend football matches in Austria, and an arrest warrant requested. The prosecutors first refused to receive the complaint, then refused to open an investigation on a weekend. By the time Kadyrov left the country no arrest warrant had been issued. The complainant was murdered in January 2009.<sup>112</sup>

It is also imperative that where such a requirement exists that the authorities, rather than only the victims, have systems in place to alert them to the presence of suspects. The burden to prove such presence should not be on the victim. The Convention against Torture for instance does not impose an obligation on victims or their legal representatives to put in place methods of surveillance and detection to inform authorities of the movements of their torturers; indeed it is the authorities themselves who are best placed to undertake such investigations. The complainants, immigration authorities, diaspora communities, Interpol and/or authorities of other countries can be useful contacts in establishing such presence. As is envisioned by the Geneva Conventions, prosecution authorities could and should cooperate in order to allow one of them to

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<sup>108</sup> CC, Section 8a.

<sup>109</sup> CCP, Article 7.

<sup>110</sup> See Kaleck, ‘From Pinochet to Rumsfeld’, at 944.

<sup>111</sup> *Ibid.*, at 952.

<sup>112</sup> See ECCHR, ‘ECCHR condemns Austria for refusing to issue arrest warrant arrest Kadyrov’, 11 February 2009, available at: <http://www.kavkaz.tv/eng/content/2009/02/11/10538.shtml> (last accessed December 2010), and discussion of the case in Kaleck ‘From Pinochet to Rumsfeld’ at 953-954.

prepare a convincing prima facie case, which could serve as a basis for an extradition request.

## **(ii) Residency**

Another even more restrictive nexus required by some EU states is that the suspect is not just present in the forum country, but is a ‘resident’ of the country where the proceedings are to be brought. A ‘residence’ requirement has been introduced by both France<sup>113</sup> and the UK in the legislation enacted to cover the crimes coming within the jurisdiction of the Rome Statute.

The provisions of the UK Act outlawing crimes under the jurisdiction of the ICC committed abroad only apply to nationals, residents, and those subject to UK service jurisdiction.<sup>114</sup> Prior to a recent amendment to the UK law, this ‘residency’ requirement meant that suspects of genocide and crimes against humanity living in the UK since the 1990s who were deemed not to be resident, and other suspects present in the UK who were refused residency status but who could not be removed for human rights reasons, were effectively immune from prosecution.<sup>115</sup>

The Act has recently been amended to include a broader definition of ‘resident’ than that under the general law.<sup>116</sup> The definition of resident now includes those with indefinite leave to remain in the UK or those who have made an application for such leave, those who have leave to be in the UK for work or study, those who have made an asylum claim, ‘illegal entrants’ and those detained within lawful custody in the UK.

## **b. The Concept of ‘Subsidiarity’**

The concept of ‘subsidiarity’ has been used in certain states such as Belgium and Germany to give priority jurisdiction to courts of the territorial state or the nationality of the offender and/or international tribunals ahead of extraterritorial investigations or prosecutions. The concept has no basis in international law yet the main objective is said to be the protection of state sovereignty - by promoting non-interference in national affairs, exhaustion of domestic remedies and the protection of local remedies. Yet the principle of subsidiarity is based on the presumption that the territorial states or other states with ‘priority’ of jurisdiction will do what is required to prevent and punish crimes under international law within their own territory (which rarely, if ever, is the case) and that courts or prosecutors are able to determine whether authorities of another state are in fact carrying out good faith investigations or prosecutions (which may be a very difficult task to determine).

The concept has led prosecutors to decide not to proceed with a prosecution and judges to deny jurisdiction, at times with very little consideration of whether the territorial state had actually taken any good faith efforts towards prosecution. In 2005 the German Federal Prosecutor rejected a complaint against former United States Secretary of Defence Donald Rumsfeld, arguing that United States authorities, though not investigating specifically against Donald Rumsfeld nor the specific crimes referred to in the complaint, were

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<sup>113</sup> To be prosecuted for these crimes in France, the suspect must be ‘ordinarily resident’ in France: CCP, Article 689-11.

<sup>114</sup> International Criminal Court Act 2001, Section 51.

<sup>115</sup> See Aegis Trust, Justice and REDRESS, ‘Torturers not welcome in Britain’s shopping malls, but mass-murderers may be: Peers, human rights organisations and former DPP battle to close shameful loophole in UK Law’, October 2009; available at: [http://www.redress.org/downloads/publications/Torturers\\_not\\_welcomeOct2009.pdf](http://www.redress.org/downloads/publications/Torturers_not_welcomeOct2009.pdf) (last accessed December 2010).

<sup>116</sup> See the new Section 67A of the International Criminal Court Act 2001, inserted by the Coroners and Justice Act 2009, Section 70.

investigating the ‘complex’ as a whole and therefore German authorities, under the principle of subsidiarity, could not exercise jurisdiction in that specific case.<sup>117</sup> In Spain, in the case against former Guatemalan president Rios Montt,<sup>118</sup> the Spanish Constitutional Court ruled that Spanish courts could exercise universal jurisdiction provided that the complainants could present reasonable evidence demonstrating a lack of judicial activity in the territorial state.<sup>119</sup> However, new Spanish legislation now provides that universal jurisdiction proceedings must be ‘shelved’ if it is shown that proceedings have commenced in another country with a nexus to the crime.<sup>120</sup> In line with this, simply filing a complaint in the country where the crimes were committed would suffice to suspend the proceedings in Spain for an undetermined period of time, during which the courts must decide if the legal proceedings initiated by this complaint are a sham or effective.<sup>121</sup> The principle has recently been applied by the courts to ‘shelve’ a case brought in Spain in relation to an Israeli attack on the Al Daraj neighbourhood in Gaza.<sup>122</sup>

The concept has been reflected in legislation in Spain,<sup>123</sup> and is now enshrined in French legislation in relation to crimes within the jurisdiction of the ICC.<sup>124</sup> Responses to REDRESS and FIDH questionnaires in this project suggested that the concept may also be applicable (either formally, or informally at the investigation stage) in other states including Bulgaria,<sup>125</sup> Denmark, Finland, Italy, Malta, Norway, Slovenia and Sweden.<sup>126</sup>

Positive competition among states to exercise jurisdiction is a largely theoretical possibility because most of the time the states that are most directly involved - where the crime occurred or where the alleged perpetrator resides - do their best to avoid initiating a prosecution. From this point of view, it is arguable that the state that acts first should have priority. This approach respects the victims’ right to an effective remedy - the victims could also be entitled to decide whether the courts of their country are likely to offer them redress. The “Disappeared of the Beach” case<sup>127</sup> brought in France provides an

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<sup>117</sup> See Kaleck, ‘From Pinochet to Rumsfeld’, at 952. The Decision of the Federal Prosecutor in the first case against Donald Rumsfeld of 24 June 2005 is available at [www.diefirma.net/download.php?8651010ea2af5be8f76722e7f35c79de&hashID=44b8c6eba6a3530e554210fa10d99b3a](http://www.diefirma.net/download.php?8651010ea2af5be8f76722e7f35c79de&hashID=44b8c6eba6a3530e554210fa10d99b3a) (in German, last accessed December 2010).

<sup>118</sup> Judgment, Rios Montt case, Tribunal Supremo, 25 February 2003.

<sup>119</sup> Constitutional Tribunal, judgment of 26 September 2005; for an Analysis of the Judgment see: Ascensio, Hervé, ‘The Spanish Constitutional Tribunal’s Decision in Guatemalan Generals- Universality is back’, *Journal of International Criminal Justice* 4 (2006), pp 586-594.

<sup>120</sup> Common Law 1/2009, concerning reformation of legislation for the implementation of the new judicial office, amending Common Law 6/1985 concerning Judicial Power, Article VI.1. See the discussion of current cases by Manuel Ollé Sesé in ‘Summary of the universal jurisdiction reforms in Spain’, in the November 2010 edition of the REDRESS and FIDH *EU Update on International Crimes* at pp 5-7.

<sup>121</sup> Carlens, Delphine, ‘Spain: Changes to Universal Jurisdiction Legislation Uncovered: FIDH interviews Manuel Ollé Sesé, Spanish lawyer, President of APDHE’ in the February 2010 edition of REDRESS and FIDH’s *EU Update on International Crimes*, available at: [http://www.fidh.org/IMG/pdf/EU\\_Newsletter\\_February\\_2010.pdf](http://www.fidh.org/IMG/pdf/EU_Newsletter_February_2010.pdf) (last accessed December 2010).

<sup>122</sup> Supreme Court decision of 4 March 2010. See the discussion of this case by Manuel Ollé Sesé in ‘Summary of the universal jurisdiction reforms in Spain’, November 2010 edition of the REDRESS and FIDH *EU Update on International Crimes* at p 6.

<sup>123</sup> Constitutional Tribunal, judgment of 26 September 2005; for an Analysis of the Judgment see: Ascensio, Hervé, ‘The Spanish Constitutional Tribunal’s Decision in Guatemalan Generals- Universality is back’, *Journal of International Criminal Justice* 4 (2006), pp 586-594; Common Law 1/2009, concerning reformation of legislation for the implementation of the new judicial office, amending Common Law 6/1985 concerning Judicial Power, Article VI.1.

<sup>124</sup> CCP, Article 689-11: “The prosecution of these crimes can only be exercised by the public prosecutor if no international or national jurisdiction requires the surrender or extradition of the person. To this end, the Crown seeks assurances from the ICC jurisdiction and expressly disclaims and verifies that no other competent international tribunal to try the person has requested his release and no other state does requested his extradition.”

<sup>125</sup> CCP, Article 480.

<sup>126</sup> For a breakdown of this issue by state see the table at page 37 of this report.

<sup>127</sup> Survivors of the 1999 massacre at the Beach of Brazzaville lodged a complaint in December 2001 concerning torture, forced disappearances and crimes against humanity against numerous high Congolese government officials including



apt illustration: since the procedure in France has been made public, the Congolese courts and government have expressed an interest in investigating the allegations.<sup>128</sup> It appears to many that the proceedings in Congo-Brazzaville are designed to stop the proceedings in France, rather than to provide the victims with justice, and the victims want the case to continue in France.

In the absence of clear criteria, any principle of subsidiarity is best placed with judicial, rather than prosecutorial, authorities.<sup>129</sup> Further, where it exists, it should be interpreted narrowly, taking into account the duty of states to prevent and punish crimes under international law and to cooperate in the detection, investigation and prosecution of such crimes. This is especially relevant in scenarios involving universal or other forms of extraterritorial jurisdiction, which exist as a tool precisely to fight judicial inaction in the territorial state. The concept should not imply that states should refrain from exercising universal jurisdiction if there is only a slight possibility that territorial proceedings will be triggered at some point in the future. Unless the specific case has been officially opened in the territorial state and there is evidence that the state has the willingness and capacity genuinely to try the case, there should be no reason for authorities to invoke a concept of ‘subsidiarity’.

### c. Prosecutorial and Executive Discretion

The interrelationship between victims’ access to justice and prosecutorial and executive discretion is crucial, as is the relationship between such discretion and the international law obligation to prosecute certain crimes under international law.<sup>130</sup> For ordinary crimes, the degree to which discretion can be exercised and the manner in which it is exercised is always limited given the need to ensure transparency in approach and consistency in results. Yet, in many EU member states the rules in relation to prosecutorial or executive discretion for prosecutions based on extraterritorial jurisdiction are different to those operating for ordinary domestic or ‘territorial’ crimes. An added layer of prosecutorial and/or executive discretion opens the way for political interference and decisions being made on grounds of policy or politics rather than justice.

The politics relating to the investigation and prosecution of ‘sensitive’ cases has in some cases made them practically difficult to pursue, and has negatively impacted on the perception of international criminal justice as a whole. Diplomatic pressure has been exerted to avoid cases getting to the trial stage.<sup>131</sup> This has, in some cases, resulted in politically strong countries managing to avoid universal jurisdiction prosecutions relating to their officials, contributing to the perception that universal jurisdiction is not truly universal, and is a mere political tool used by strong states against weaker ones. For instance, while universal jurisdiction complaints had been filed against leaders and officials of ‘Western countries’, such as George Bush senior and Donald Rumsfeld, these were dismissed at an early stage.

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President Denis Sassou Nguesso.

<sup>128</sup> Press release, Congo’s Minister of Communication, *Chargé des Relations avec le Parlement, Porte-parole du Gouvernement*, 10 September 2002: “[L]e Doyen des juges d’instruction du Tribunal de Grande instance de Brazzaville a été saisi des faits, celui-ci a déjà accompli à ce jour plusieurs actes d’instruction.”

<sup>129</sup> As is the case under the Rome Statute where it is the Court that determines the inability/ willingness of a State to investigate and prosecute an individual for the crimes listed in the Rome Statute, Article 17 (1).

<sup>130</sup> The obligation to prosecute crimes under international law is well-documented, and reflected in a range of treaties and UN declarations as well as in jurisprudence. For a general review of this area, see, Orentlicher, Diane, *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity*, E/CN.4/2004/88 of 27 February 2004, paras. 26-56.

<sup>131</sup> See, e.g., The Guardian, ‘Wikileaks: US pressured Spain over CIA rendition and Guantánamo torture’, 1 December 2010, [www.guardian.co.uk/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition?intcmp=239](http://www.guardian.co.uk/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition?intcmp=239) (last accessed Dec. 2010).

The issue of discretion can be examined across different variables:

- Timing: discretion in relation to criminal prosecutions usually arises in relation to whether or not to investigate a complaint and/or following investigation, whether or not to prosecute a complaint.
- Body or individual exercising the discretion: in EU member states, discretion usually rests either with the police, the prosecution authorities, the investigating judge and/or the executive.
- Breadth of discretion: the body exercising the discretion may have a very broad discretion - allowing a decision not to proceed with prosecution on any ground - or it may be limited so that it can only be exercised on certain defined grounds.

The survey of EU member states has shown that:

- The majority of countries provide for some form of prosecutorial discretion as to whether or not to investigate or prosecute a complaint on grounds other than lack of evidence. In at least five countries specific legislation exists in relation to crimes committed abroad or crimes under international law allowing for a broader exercise of discretion.
- At least seven countries have some degree of executive discretion as to whether or not to investigate or prosecute a complaint of a crime under international law or crime committed abroad. In four of those countries this is a departure from the general law for ordinary crimes.

#### **(i) Prosecutor's discretion**

In many European countries with a civil law tradition, investigative judges or prosecutors are obliged to investigate and prosecute crimes where evidence suggests that a crime has been committed. They therefore do not have a 'discretion' as to whether or not to prosecute. In common law jurisdictions the police usually investigate criminal allegations and pass a file of evidence to prosecution services for review. The reviewing prosecutor will then decide whether a prosecution can go ahead.

In many countries there are in fact two routes to initiating a prosecution: a 'public prosecution' brought by the prosecutor on behalf of the state, and a 'private prosecution', brought by the victim or representatives. The issue of prosecutor's discretion relates to the first of these options, although in reality the *impact* of the availability of that discretion is tied very closely to whether or not private prosecutions are available: if so, where the prosecutor uses his or her discretion not to pursue the complaint, the victim may pursue it by way of private prosecution. The issue of private prosecutions is considered at Section III.4(b) of this report. This section will look at prosecutor's discretion in the context of public prosecutions.

A second issue relevant to this topic is the opportunity available to victims to review the prosecutor's exercise of discretion. This is also discussed in Section III.4(c), below.

The survey of states shows that the majority provide for some form of discretion at the investigation or prosecution stages. In 11 cases specific legislative provision has been made for the application of a wider discretion in relation to extraterritorial or related crimes under international law.

The rules as to the ambit of discretion may depend on issues such as the type of jurisdiction being exercised or whether or not the suspect is in the jurisdiction. The

country reports at Section VI give the detail of the application of these discretions in each particular case, but the position in a selection of states is outlined briefly below to give some indication of the ‘types’ of discretion contemplated.

Denmark is an example of a country with a general prosecutorial discretion, which is also applicable to crimes under international law. Under Sections 721-722 of the Danish Administration of Justice Act the Danish Public Prosecutor has a discretion to assess whether an indictment should or should not be initiated. The assessment includes consideration of whether a successful prosecution will entail disproportionate difficulties, costs, or time constraints. The Public Prosecutor may also choose to discontinue cases where an indictment has already been issued on these grounds at his or her discretion.<sup>132</sup> More concerning from the perspective of combating crimes under international law are provisions which specifically broaden the prosecutor’s discretion in relation to crimes committed abroad or crimes under international law.

Belgium is an example of a country providing a special procedure for proceedings based on universal or passive personality jurisdiction allowing for prosecutorial discretion based on defined grounds. Under Article 10(5) and 12a of the Preliminary Title Code of Criminal Procedure, the prosecutor must send a complaint to an investigating judge unless it is clearly unfounded, does not show a crime under international law under Belgian law or under a treaty binding on Belgium, an admissible public action cannot result from the complaint, or the facts indicate that the case should be heard by the courts of the state where the crimes were committed or by an international court. In the first three cases the federal prosecutor must inform the Court that the investigation will not proceed, and the court can overrule this and send the case to an investigating judge, however this oversight is not available in relation to the fourth (subsidiarity) ground.

Germany is an example of a country which has an ‘open’ discretion in relation to crimes committed outside the jurisdiction and complaints brought against alleged perpetrators of crimes under international law who are abroad and who are not expected to come to Germany. In such cases the Federal Prosecutor may refrain from investigating a complaint irrespective of the amount of evidence available.<sup>133</sup>

Finland and Romania have similar provisions in relation to extra-territorial cases, by which criminal cases concerning an offence committed abroad (Finland) and certain offences committed abroad (Romania) cannot be tried without the approval of the Prosecutor-General.<sup>134</sup> In Sweden, the Prosecutor-General, designated by the Government, must give authority for prosecution of a crime committed outside of Sweden.<sup>135</sup> Similar provisions apply in other countries including Denmark.<sup>136</sup> Special approval of the Director of Public Prosecutions is also required to try certain international crimes in Ireland.<sup>137</sup>

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<sup>132</sup> Questionnaire response.

<sup>133</sup> Articles 153c and 153f of the German CCP. In the case of former Uzbek Interior Minister Zokirjon Almatov, the German Prosecutor refused to investigate a complaint against Almatov, ignoring the possibility of investigating outside Uzbekistan by interviewing witnesses and victims present in Germany and neighbouring countries; see Human Rights Watch, “Germany: Victims appeal decision on Uzbek Ex-Minister”, 2 February 2007; available at [http://hrw.org/english/docs/2007/02/02/german15232\\_txt.htm](http://hrw.org/english/docs/2007/02/02/german15232_txt.htm) (last accessed December 2010).

<sup>134</sup> Finland: CC, Section 12 of Chapter I. Romania: CC, Section 5.

<sup>135</sup> CC, Chapter 2, Section 5.

<sup>136</sup> Administration of Justice Act, Section 275-1, in conjunction with relevant provisions of the CC.

<sup>137</sup> In Ireland the grave breaches offences provisions in the Geneva Conventions and Protocol I may not be instituted except with the authorisation of the Director of Public Prosecutions (Geneva Conventions Act 1962); likewise for torture (Criminal Justice (United Nations Convention Against Torture) Act 2000), and for ICC crimes (International Criminal Court Act 2006).

Prosecutorial discretion can operate to prevent the filing of frivolous complaints and to make decisions about the allocation of prosecutorial resources. However, clear and transparent criteria should exist to ensure the legitimate and transparent exercise of discretion to investigate or prosecute. Those criteria should not differentiate between victims of crimes under international law committed abroad and victims of ordinary crimes. The publication of reasoned prosecutorial decisions will improve transparency and may lead to the development of guidelines for prosecutors and consistent practice for other, similar cases. Clear and transparent criteria can also provide guidance to victims and organisations when filing complaints, helping those victims and making the justice system more efficient.

## (ii) Executive discretion

Even more concerning for victims' access to justice and for the perception of international criminal justice as a whole are political controls placed on the prosecution of extra-territorial and crimes under international law. At least eight countries surveyed had specific provisions allowing for political interference in the prosecution process in this way.<sup>138</sup>

Countries requiring the exercise of executive discretion include:

- Greece: For political crimes and crimes which can “*adversely affect*” international relations of the state, the Minister of Justice has the right following prior agreement by the Council of Ministers to postpone the commencement of criminal prosecution or revoke criminal prosecution.<sup>139</sup>
- Ireland: The permission of the Attorney General (a political figure) is required with respect to any proceedings - other than remand or custody - against a person who has been charged with grave breaches of the Geneva Conventions and Protocol 1.<sup>140</sup>
- Italy: For cases brought on the basis of the active or passive personality principles, the Minister of Justice triggers the procedure upon the receipt of a complaint or a request for the commencement of proceedings.<sup>141</sup>
- UK: the decision to prosecute any person for grave breaches of the Geneva Conventions,<sup>142</sup> torture,<sup>143</sup> genocide and crimes against humanity must be approved by the Attorney General.<sup>144</sup> This approval is also required for prosecution of other crimes for which universal jurisdiction is available, such as terrorism offences, but is not required for ordinary crimes committed in the UK.

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<sup>138</sup> A fifth country, Slovenia, has a provision by which the Minister of Justice must give approval for the prosecution of certain crimes committed abroad, where the alleged crime does not fulfil the ‘double criminality’ rule, (ie. it is not considered a crime in the country in which the alleged offence was committed): see 1997 CC, Article 124.

<sup>139</sup> Response to questionnaire.

<sup>140</sup> Geneva Conventions Act 1962.

<sup>141</sup> Response to questionnaire.

<sup>142</sup> Under the Geneva Conventions Act 1957 or the International Criminal Court Act 2001.

<sup>143</sup> Under the Criminal Justice Act 1988.

<sup>144</sup> Under the International Criminal Court Act 2001.

Table 4: Breakdown of discretion in the exercise of extraterritorial jurisdiction for crimes under international law in EU member states

Discretion to investigate / prosecute (with regard to UJ cases/ int'l crimes)	Prosecutor's Discretion		Executive Discretion	
	Prosecutor has discretion on grounds other than lack of evidence	Discretion is departure from general law	Executive has discretion	Discretion is departure from general law
Austria	Yes.	Yes.	No data.	No data.
Belgium	Yes .	Yes.	No.	No.
Bulgaria	Yes.	No.	No.	No.
Cyprus	Yes.	Yes.	No data.	No data.
Czech Republic	Yes.	No.	No.	No.
Denmark	Yes.	No.	Yes.	Yes.
Estonia	Yes.	Yes.	No.	No.
Finland	Yes .	Yes.	No.	No.
France	Yes.	No.	No.	No.
Germany	Yes.	Yes.	Yes.	No.
Greece	No.	No.	Yes.	Yes.
Hungary	Yes.	Yes.	No.	No.
Ireland	Yes.	Yes.	Yes.	Yes.
Italy	Yes.	No.	Yes.	Yes.
Latvia	No.	No.	No.	No.
Lithuania	Yes.	No.	No.	No.
Luxembourg	Yes.	No.	No.	No.
Malta	Yes.	Yes.	No.	No.
Netherlands	Yes.	No.	No.	No.
Norway	Yes.	Yes.	Yes.	Yes.
Poland	No.	No.	No. <sup>145</sup>	No.
Portugal	No.	No.	No.	No.
Romania	Yes.	Yes.	No.	No.
Slovakia	No data.	No data.	No data.	No data.
Slovenia	No.	No.	Yes. <sup>146</sup>	Yes.
Spain	No.	No.	No.	No.
Sweden	No.	No. <sup>147</sup>	Yes.	Yes.
Switzerland	Yes. <sup>148</sup>	No.	No.	No.
United Kingdom	Yes.	No.	Yes.	Yes.
Total	Y:21 N:7 ND:1	Y:11 N:17 ND:1	Y:9 N:17 ND:3	Y:8 N:18 ND:3

#### d. Double Criminality

As discussed above in Section III.2, many laws providing for active and passive personality jurisdiction over crimes of all types have a requirement that the crime can be prosecuted both in the territorial state and in the state exercising jurisdiction.<sup>149</sup> Known as a 'double criminality' requirement, it is premised in part on the principle of legality common to all legal systems,<sup>150</sup> and borrowed from extradition law; the purpose is to avoid prosecuting a

<sup>145</sup> Although the Minister of Justice may request that courts of another state take over the case on subsidiarity grounds.

<sup>146</sup> In cases of active or passive jurisdiction where the offence was not an offence in the country where it was committed: CC, Article 124.

<sup>147</sup> In that prosecution for a crime under universal jurisdiction may be instituted only with the authorisation of the Government or a person designated by the Government.

<sup>148</sup> Under the legislation coming into force on 1 January 2011.

<sup>149</sup> This is also often a procedural requirement for extradition of a person to another state.

<sup>150</sup> Cassese, *International Criminal Law*, p 283.

person for a crime which is not considered a criminal offence in the state in which it was perpetrated.<sup>151</sup>

However, the condition of double criminality does not apply to offenses subject to universal jurisdiction. As has been indicated by Theodore Meron, “*once internal atrocities are recognized as international crimes and thus as matters of major international concern, the right of third states to prosecute violators must be accepted*”.<sup>152</sup> Thus, the double criminality principle is overridden to the extent that it can be said that the crime constituted an offence under international law, regardless of the provisions of the domestic law.

Nevertheless, some provisions granting universal jurisdiction over crimes under international law in EU member states specifically require that the double criminality requirement is met, even for crimes under international law. France’s recently introduced amendments to the criminal code import such a restriction.<sup>153</sup> This could, if interpreted strictly, mean that a person could not be prosecuted in France for genocide, where genocide was not specifically criminalised in the domestic law of the state where the genocide was committed.

In some other states, universal jurisdiction for crimes under international law is based on provisions recognising universal jurisdiction over ordinary crimes, which may incorporate double criminality requirements. For example in Hungary, double criminality is required both for ordinary crimes and crimes of international concern.<sup>154</sup>

It may be open to prosecutors and courts to interpret these provisions so that the simple fact of a crime being recognised in international law is enough to satisfy the requirement of double criminality. This was the approach adopted by the Supreme Court of Argentina concerning an extradition: there the court held that the requirement was met because the offence of which the defendant was accused, namely a war crime, was regarded as an international crime.<sup>155</sup>

However, such an approach is not certain, and the double criminality requirement adds a potentially significant barrier to justice in cases of crimes under international law. Such a requirement should not be included in legislation specific to crimes under international law and, where general provisions are relied on to provide universal jurisdiction, exceptions to the principle should be specifically legislated for crimes under international law.

## e. The Use of Statutes of Limitation

There is wide recognition of the inapplicability of statutes of limitations to certain crimes under international law.<sup>156</sup> Nonetheless, the practice of states varies widely.

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<sup>151</sup> Ibid.

<sup>152</sup> Meron, Theodore, ‘The International Criminalization of Internal Atrocities,’ 98 A.J.I.L. 554 (1995), at 576.

<sup>153</sup> France, CCP, Article 689-11.

<sup>154</sup> Hungary, CC, Section 4(1).

<sup>155</sup> See Cassese, *International Criminal Law*, p 283, citing *Priebke (extradition)*, Argentina, Supreme Court of Argentina, decision of 2 November 1995.

<sup>156</sup> UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *entered into force* 11 November 1970; 1974 Convention on lack of applicability of statutes of limitation in war crimes and crimes against humanity of the Council of Europe, Strasbourg, 25 January 1974; Section 4 of the draft Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law, Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, 18 January 2000. [E/CN.4/2000/62]; Article 29 of the Rome Statute of the ICC.

The review of EU member state legislation shows that most states have provisions exempting the crimes under the Rome Statute (war crimes, genocide and crimes against humanity) from statute of limitations. However, there are at least four states where this is not the case. The majority have not, however, removed statutory limitations periods from other crimes under international law. For a full breakdown by state, see the table at page 39 of this Report.

Despite the clear position in international law, some states have specifically introduced provisions applying special statutes of limitation to crimes under international law. In France, for instance, legislation passed in 2010 outlawing crimes within the ICC's jurisdiction also introduced a 30 year statutory limitation for prosecuting war crimes in France,<sup>157</sup> contrary to the Rome Statute.<sup>158</sup>

In other countries, legislation has still not been enacted to exempt crimes under international law from ordinarily applicable statutes of limitation. For instance, torture is not defined as an international crime in Estonian law and is subject to a limitation period of five years.<sup>159</sup> In Greece all crimes come within the generally applicable statutory limitation (20 years for crimes punishable by life imprisonment).<sup>160</sup> In Belgium, while genocide, crimes against humanity and war crimes are not subject to prescription, other crimes fall under general rules, so a 10-year statute of limitation applies to torture, enforced disappearances and extrajudicial executions.<sup>161</sup>

EU member states should be encouraged to ratify the relevant UN and Council of Europe instruments outlawing statutes of limitation for certain “international crimes”,<sup>162</sup> and to amend their laws for “international crimes” not covered by these treaties so that impunity does not result. There is no reason to only abolish statutes of limitations for future crimes only: international law does not impose such a restriction, at least in respect of crimes that have not yet been prescribed.

## **f. Immunities in criminal cases**

The principle of sovereign equality of states means that certain categories of officials, in some circumstances, enjoy immunity from the jurisdiction of other states. Sovereign equality, however, can come into conflict with other principles of international law and fundamental norms of human dignity, such as states' obligations to repress international crimes. Immunities under international law are therefore subject to significant exceptions when it comes to prosecutions for crimes under international law.

Immunities are procedural rules which act as a barrier to the adjudication of disputes and can arise at two points in a case. First, at the adjudicative stage, immunity can have the effect of preventing a court from hearing a case, where it otherwise would have been capable of doing so. This is often termed immunity from jurisdiction or immunity from adjudication. The second point at which immunity may arise is at the moment of the

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<sup>157</sup> CC, Article 462-10, as introduced by Act No. 2010-930 of 9 August 2010 adapting criminal law to the institution of the International Criminal Court.

<sup>158</sup> Article 29.

<sup>159</sup> CCP, Section 81, in conjunction with Sections 122 and 4(3).

<sup>160</sup> CCP, Article 111(2).

<sup>161</sup> CCP, Article 21.

<sup>162</sup> For example, UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted on 26 November 1968, and the European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, adopted on 25 January 1974.

enforcement of the judgment of the court. This is often referred to as immunity from enforcement or immunity from execution. This Report focuses on the immunity of the foreign state from jurisdiction (or adjudication) before domestic courts.

### (i) Immunities in international law

Immunity for individuals can arise in two ways under international law. The first is known as functional immunity: immunity under customary international law which any state official enjoys for any official act. This is based on the idea that a state official is not accountable to other states for acts done in his or her official capacity and must therefore be attributed to the state.<sup>163</sup> This immunity is permanent, meaning that it exists even after the person no longer occupies the official position. However, it is widely recognised that under customary international law, functional immunities are not available in relation to certain categories of crimes under international law, including genocide, war crimes, crimes against humanity and torture.<sup>164</sup>

The second category of immunities (existing under both treaty and custom) are known as personal (or, with regard to diplomatic agents, diplomatic<sup>165</sup>) immunities, which, while that person is in office, cover *any act* that some classes of state officials perform. This includes acts in a private capacity, and is based on the idea that any activity of high-ranking officials or diplomatic agents must be immune from foreign jurisdiction to avoid foreign states either infringing sovereign prerogatives of states or interfering with the official functions of a foreign State agent under pretext of dealing with an exclusively private act.<sup>166</sup> The ICJ ruled in the Arrest Warrant case that these immunities apply, even in relation to crimes under international law, to “*certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs*” while they are in office.<sup>167</sup>

The decision was controversial, with some arguing that its characterisation of personal immunities were overly broad and others arguing that the Court’s consideration of personal immunities should have been led by the nature of the crime as opposed to the nature or level of the Court where jurisdiction is sought to be exercised.<sup>168</sup>

It should also be noted that international law does not prevent an investigation of a person still in office, particularly in order to preserve evidence. Furthermore, immunities do not apply to any person, in whatever capacity, before international criminal tribunals.<sup>169</sup>

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<sup>163</sup> Cassese, Antonio, ‘When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case’ 13 *European Journal of International Law*, 2002, p 862.

<sup>164</sup> Cassese, ‘When May Senior State Officials Be Tried for International Crimes?’, *ibid.*, pp 864-865. See also *Blaškić case*, §41, and *Al Adsani v. the United Kingdom*, European Court of Human Rights, 21 November 2001 (Application no. 35763/97), paragraph 61. See also the judgments of Lord Millett and Lord Phillips of Worth Matravers in the *Pinochet case: R v Bow Street Metropolitan Stipendiary Magistrate & Others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3)* [1999] 2 All ER 97 at pp 171-9 (Lord Millett) and pp 186-90 (Lord Phillips of Worth Matravers).

<sup>165</sup> Governed by the Vienna Convention on Diplomatic Relations, adopted 18 April 1969, entered into force 24 April 1964.

<sup>166</sup> Cassese, ‘When May Senior State Officials Be Tried for International Crimes?’, pp 862-863.

<sup>167</sup> *Arrest Warrant of April 11th 2000* (Democratic Republic of the Congo v Belgium), Judgment, Merits, 41 ILM 536 (2002) (the “Arrest Warrant case”), paragraphs 51-54.

<sup>168</sup> See, e.g., Amnesty International, *Bringing Power to Justice: Absence of Immunity for Heads of State before the International Criminal Court*, IOR 53/017/2010, pp. 25-30.

<sup>169</sup> See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993), Article 7(2); Statute of the International Criminal Tribunal for Rwanda, SC res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994), Article 6(2); Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90, Article 27.



Certain international organisations may also enjoy immunity in order to guarantee their independence and ability to carry out their activities without interference from the host state. Immunity may be provided in the constituent instrument of the international organisation; a multilateral agreement; the headquarters agreement between the host state and the international organisation or under customary international law.

Despite the international position that functional immunities are not available in relation to certain categories of crimes under international law, and the application of personal immunities to at most a very narrow category of persons only for the time that they hold office, in practice many EU member states apply immunities for crimes under international law on a wider basis than that required by international law.

## (ii) National immunities

States may also provide immunities to categories of officials such as government and judicial officers under national legislation. Again, under international law, no such immunity should exist in respect of crimes under international law which the state has an obligation to prevent and punish. Indeed, to implement the Rome Statute, all EU member states have the obligation to remove any such immunities in relation to crimes under the jurisdiction of the ICC.<sup>170</sup>

## (iii) Legislation

Most states have provisions which exclude prosecutions where immunities exist under international law.

Yet, only the Netherlands has a specific provision which addresses the issue of immunities in relation to crimes under international law. Section 16 of its International Crimes Act 2003 contains the provisions for immunity from prosecution for the offences contained in the Act. Relying in part on the *Arrest Warrant Case*, the Act provides that criminal prosecution is excluded for foreign Heads of State, Heads of Government and Ministers of Foreign Affairs as long as they are in office, as well as other persons whose immunity is recognised under customary international law. Immunity is also recognised for those individuals who have been granted immunity under a treaty to which the Netherlands is a party.<sup>171</sup>

Other member states do not address the issue specifically, but rather either reflect their general treaty obligations regarding, for example, diplomatic immunity, in the legislation, and/or incorporate the requirements of international law by reference.

Many states incorporate by reference ‘the requirements of international law’ in relation to immunities.<sup>172</sup> This will usually include the requirements of any treaties entered into by the state, as well as customary international law as interpreted and applied by the Judge. Some of the legislation sets out guidance as to what are seen to be those requirements. For example, in Belgium, prosecutions are barred against those enjoying immunity under international law, and specific reference is made to acting Heads of State, Heads of Government and Foreign Ministers.<sup>173</sup> In Finland legislation provides that the Head of a

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<sup>170</sup> See Article 27.

<sup>171</sup> International Crimes Act 2003, Section 16.

<sup>172</sup> See for example the Bulgarian CCP, Article 5: “procedural actions provided for by this Code may be applied with regard to persons who enjoy immunity from the criminal jurisdiction of the Republic of Bulgaria in compliance with the norms of international law.”; Czech Republic, CCP, Section 10; Denmark, CC, Section 12, by which the exercise of jurisdiction is limited by applicable international law; Slovenia, CC, Article 6.

<sup>173</sup> Act of August 5, 2003 introducing Article 1a, Section 1 in the CCP. Belgium was the state taken to the ICJ in the *Arrest*

foreign State, the Head of the Government, the Minister of Foreign Affairs and other persons of high rank, in the capacity of head or member of a delegation or special mission shall enjoy all the privileges and immunities afforded to such persons by international law and custom.<sup>174</sup>

Other countries, such as Greece and Poland, spell out the categories of people covered by diplomatic and/or consular immunity (agreed to in treaties), without reference to the requirements of international law.<sup>175</sup>

In relation to immunity for its own officials under national law, many EU member states do have such provisions.<sup>176</sup> If applicable to the prosecution of crimes under international law, such provisions are not in conformance with international law, or the Rome Statute, and specific exceptions should be legislated.

#### (iv) Practice

In reality, most decisions about immunity in extraterritorial cases in Europe are taken by prosecutors, rather than courts. This has important practical ramifications. Sometimes the reasoning for these decisions is not written down, so the basis for the decision is not known by the complainant and cannot be challenged.<sup>177</sup> In many cases when considering whether or not to open an investigation, the prosecutor will ask the opinion of the Ministry of Foreign Affairs. This has on a number of occasions been leaked to the suspect, allowing them to flee the jurisdiction, even where the opinion has later been returned that no immunity is available.<sup>178</sup>

Prosecutors have recognised the immunity of diplomats, as well as other state officials. The AU-EU Expert report records that:

*In 2001 the Danish authorities rejected an application for the prosecution of Carmi Gillon, the Israeli ambassador accredited to Denmark, who, in his former capacity as the head of the General Security Services (GSS or Shin Bet), was alleged to have been responsible for acts of torture carried out by the service. The Ministry of Justice stated that the special rules on diplomatic immunity enshrined in the Vienna Convention on Diplomatic Relations 1961 trumped the general rules embodied in the Torture Convention to the extent of the inconsistency.*<sup>179</sup>

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*Warrants* case, as it previously had a clear exception to immunity in cases of crimes under international law. Since the decision of the ICJ it has amended its law as referred to above. The legislation also states that any person officially invited to Belgium by Belgian authorities or an international organization established in Belgium has immunities as recognized in international law (CCP, Article 1a, paragraph 2).

<sup>174</sup> Section 5 of the Act on the Privileges and Immunities of International Conferences and Special Missions: The Act applies to intergovernmental conferences organized in Finland at the invitation or with the consent of the Government of Finland, to delegations of foreign States attending such conferences as well as to special missions of foreign States sent here with the consent of the Government of Finland and with functions mutually agreed upon by the respective States.

<sup>175</sup> For Greece see Article 2 of the CCP. For Poland see CCP, Article 578.1-5. Other immunities as required by international law are an additional basis under the legislation.

<sup>176</sup> For example, in the Czech Republic the President possesses complete immunity for any conduct he/she commits while in the office (even after he/she leaves the office) under Articles 54(3) and 65 of the Constitution. In Italy the President similarly holds immunity under Article 90 of the Constitution.

<sup>177</sup> This is the case in France, for example.

<sup>178</sup> Information from German lawyer, November 2010.

<sup>179</sup> Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, 16 April 2009, 8672/1/09 REV1, (the "AU-EU Expert Report"), at p 26, fn 119; available at [http://www.africa-eu-partnership.org/sites/default/files/rapport\\_expert\\_ua\\_ue\\_competence\\_universelle\\_en\\_0.pdf](http://www.africa-eu-partnership.org/sites/default/files/rapport_expert_ua_ue_competence_universelle_en_0.pdf) (last accessed December 2010).

A number of prominent suspects have not been investigated or prosecuted on the grounds of immunity, even where this immunity is not required by international law. In November 2007, a complaint of torture was filed in France against former United States Secretary of State for Defense Donald Rumsfeld, who was on a private visit to Paris. The prosecutor refused to investigate the complaint on immunity grounds,<sup>180</sup> even though no personal immunity was available under international law (as Rumsfeld was no longer serving as Secretary of Defense), nor was functional immunity available as it is not available in relation to prosecution for crimes under international law. The German Federal Prosecutor refused to open an investigation into allegations of crimes against humanity committed while in office by the former Head of State of China, Jiang Zemin.<sup>181</sup> Similarly, the federal prosecutor declined to open an investigation into a complaint against the Uzbek Chief of Intelligence Service, Rustan Injatow, in 2008, on immunity grounds because he was visiting Germany as part of an official delegation or by invitation.<sup>182</sup>

Courts in EU member states have also taken varying positions on the applicability of immunities in relation to crimes under international law. Courts have in all cases recognised the immunity of serving Heads of State. The AU-EU Expert Report refers to decisions of the Belgian Court of Cassation<sup>183</sup> and lower courts,<sup>184</sup> the French Court of Cassation,<sup>185</sup> the UK magistrates' courts,<sup>186</sup> and the Spanish Audiencia Nacional.<sup>187</sup>

In relation to other types of officials, some national courts have recognised that prosecution for crimes under international law is not barred by ordinary immunities. In 2000, the District Court of Amsterdam in the Netherlands found that immunities do not pose a bar to the prosecution of crimes under international law.<sup>188</sup> In the UK, in the *Pinochet* case, the House of Lords held that immunity from prosecution for torture was not available to Pinochet, Chile's former Head of State.<sup>189</sup>

However, the national caselaw with regard to personal immunities of other high-ranking

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<sup>180</sup> The Prosecutor stated that: "*The services of the Ministry of Foreign Affairs have [...] indicated that, pursuant to the rules of customary international law established by the International Court of Justice, immunity from criminal jurisdiction for Heads of State and Government and Ministers for Foreign Affairs subsists after the expiration of their functions in respect of acts performed in an official capacity. As the former Secretary of Defence, Mr. Rumsfeld, by extension, should therefore enjoy the same immunity for acts performed in the exercise of his functions.*" See Decision of the Public Prosecutor to the Paris Court of Appeal with regard to appeal against the decision of the District Prosecutor to dismiss the case of November 16, 2007 (27 February 2008), Reference: 2007/09216/SGE, and its criticism in Gallagher, K, 'Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture' 7 *Journal of International Criminal Justice* (2009) at 1111.

<sup>181</sup> Decision of 24 June 2005, cited in International Law Commission, *Immunity of State officials from foreign criminal jurisdiction: Memorandum by the Secretariat*, 31 March 2008, UN Doc. A/CN.4/596, p 122.

<sup>182</sup> See Kaleck, Wolfgang, 'From Pinochet to Rumsfeld', at 963.

<sup>183</sup> *Abbas Hijazi et al v Sharon et al*, 127 ILR 110, 121, 12 February 2003, Court of Cassation (although this was in relation to a serving Head of State).

<sup>184</sup> The AU-EU Expert Report states that "A number of complaints filed in Belgium by private parties, before the Sharon case and the amendments of 5 August 2003 to the Code of Criminal Procedure, were dismissed on the basis of respect for the immunity of a foreign head of state: see the complaints against Cuban President Fidel Castro, Iraqi President Saddam Hussein, Ivorian President Laurent Gbagbo, Mauritanian President Maouya Ould Sid'Ahmed Taya, Rwandan President Paul Kagame, President of the Central African Republic Ange-Félix Patasse and President of the Republic of Congo Denis Sassou Nguesso. A complaint filed against Yasser Arafat, President of the Palestinian Authority, was dismissed on analogous grounds." (at p 25, fn 115).

<sup>185</sup> *SOS Attentats et Béatrice Castelnau d'Esnault c. Gadafy*, 125 ILR 490, 508, 13 March 2001, Court of Cassation.

<sup>186</sup> *Re Mugabe*, ILDC 96 (UK 2004), 14 January 2004, Bow Street Magistrates' Court.

<sup>187</sup> In relation to a complaint brought against Fidel Castro: Order of 4 March 1999 (no. 1999/2723).

<sup>188</sup> *Wijngaarde et al. v Bouterse*, order of 20 November 2000, District Court of Amsterdam. The order was quashed on other grounds by the Supreme Court on 18 September 2001. See AU-EU Expert Report, pp 24-25.

<sup>189</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [1999] 2 All ER 97, 24 March 1999, House of Lords.

officials is mixed.<sup>190</sup> In 2004 and 2005, in two cases before England’s Bow Street Magistrate’s Court, the Magistrate relied on the reasoning of the ICJ in the *Arrest Warrant case*, though extending its reach to other ministers not considered by the ICJ decision. In the first case, *Re General Shaul Mofaz*, the Magistrate concluded that “*a Defence Minister would automatically acquire State immunity in the same way as pertaining to a Foreign Minister*”, especially in light of the fact that “*many States maintain troops overseas and there are many United Nations missions to visit in which military issues do play a prominent role between certain States*” and the fact that “*the roles of defence and foreign policy are very much intertwined, in particular in the Middle East*”.<sup>191</sup> The second decision was adopted with regard to an arrest warrant against Bo Xilai, the incumbent Minister for Commerce and International Trade of China, holding that he would enjoy immunity “*as he would not be able to perform his functions unless he was able to travel freely*”.<sup>192</sup> The main reason for the decision to grant him immunity was that Bo was a member of a Special Mission, enjoying immunity under the 1969 Convention on Special Missions. Similarly, Jean-Francois Ndengue was found by the Court of Appeal of France to be immune from the jurisdiction of the court because, on the basis of documents provided by the French Ministry of Foreign Affairs, it was considered that he was on a special mission in France.<sup>193</sup> This decision was later overturned by the Court of Cassation.<sup>194</sup>

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<sup>190</sup> See for example International Law Commission, *Immunity of State officials from foreign criminal jurisdiction: Memorandum by the Secretariat*, 31 March 2008, UN Doc. A/CN.4/596, paragraphs 134-135. This lists (among other cases): decision of the Italian Supreme Court (Court of Cassation) in the case of *Public Prosecutor (Tribunal of Naples) v Milo Djukanović* which rejected that immunity granted under customary international law to incumbent Heads of State, Heads of Government and Ministers of Foreign Affairs would extend to individuals serving as officials in entities that did not have a status of sovereign State (as was the case with Montenegro as part of the Serbia and Montenegro political union); decision of the British Divisional Court in *R (on the application of Diepneye Solomon Peter Alamiyeseigha) v The Crown Prosecution Service* in 2004 (which similarly decided against broad interpretation of immunity, both cases cited in the Memorandum by the Secretariat); in 2008 Spanish Audiencia Nacional upheld the immunity of Mr Kagame, Rwandan Head of State, whereas the question of immunity of other Rwandan military members was not raised (Juzgado Central De Instrucción Núm. Cuatro - Audiencia Nacional, pp 151-181).

<sup>191</sup> *Application for Arrest Warrant against General Shaul Mofaz*, Judgment of 12 May 2004, Bow Street Magistrate’s Court, paragraphs 14,15.

<sup>192</sup> *Application for Arrest Warrant against Bo Xilai*, Judgment of 8 November 2005, Bow Street Magistrate’s Court.

<sup>193</sup> Judgment of 22 November 2004.

<sup>194</sup> Judgment of 10 January 2007.

## g. Overview chart

**Table 5: Breakdown of procedural issues arising in the exercise of extraterritorial jurisdiction for crimes under international law in EU member states**

State/ Procedural requirements (with regard to UJ cases/ int'l crimes)	Presence requirement	Subsidiarity taken into account in determining jurisdiction	Broader discretion than for ordinary crimes (P=Prosecutorial / E=Executive)	Applicability of statute of limitations to ICC crimes	Applicability of statute of limitations to other crimes under international law	Legislation provides for immunity including re. crimes under international law
Austria	Yes.	Yes.	Yes (P).	Yes. <sup>195</sup>	Yes. <sup>196</sup>	Yes.
Belgium	Yes.	Yes.	Yes (P).	No.	Yes.	Yes.
Bulgaria	Yes.	Yes.	No.	No.	Yes.	Yes.
Cyprus	No.	No data.	Yes (P).	No data.	No data.	No data.
Czech Republic	No.	No.	No.	No.	Yes.	Yes.
Denmark	Yes.	Yes (no provision).	Yes (E).	Yes.	No (torture).	Yes.
Estonia	Yes.	No.	Yes (P).	No.	Yes. <sup>197</sup>	No data.
Finland	No. <sup>198</sup>	Yes (no provision).	Yes (P).	No.	Yes. <sup>199</sup>	Yes.
France	Yes.	Yes.	No.	No (except war crimes).	Yes.	Yes.
Germany	Yes.	Yes.	Yes (P).	No.	Yes.	Yes.
Greece	No.	Yes.	Yes (E).	Yes.	Yes.	Yes.
Hungary	No.	No.	Yes (P).	No.	Yes.	Yes.
Ireland	No.	No.	Yes (P & E).	No.	No.	Yes.
Italy	Yes (with exception).	Yes.	Yes (E).	No.	Yes. <sup>200</sup>	Yes.
Latvia	No.	No.	No.	No.	Yes.	Yes.
Lithuania	No.	No.	No.	No.	Yes.	Yes.
Luxembourg	Yes (with exception).	No.	No.	Yes (except war crimes.)	Yes.	Yes.
Malta	Yes.	Yes.	Yes.	No.	Yes.	No data.
Netherlands	Yes.	Yes.	No.	No.	No (torture).	Yes.
Norway	Yes (with exception).	Yes.	Yes (P & E).	No.	Yes.	Yes. <sup>201</sup>
Poland	Yes.	No data.	No.	No.	No (torture).	Yes.
Portugal	Yes (with exceptions).	No.	No.	No.	Yes.	Yes.
Romania	Yes.	No.	Yes (P).	No.	Yes.	Yes.
Slovakia	No.	No data.	No data.	No data.	No data.	No data.
Slovenia	Yes.	Yes.	Yes (E).	No.	Yes.	Yes.
Spain	Yes (as one alternative basis).	Yes.	No.	No.	Yes.	Yes.
Sweden	Yes.	Yes (no provision).	Yes (E).	No.	Yes.	Yes.
Switzerland	Yes.	Yes.	No.	No.	Yes.	Yes.
United Kingdom	Yes.	Yes.	Yes (E).	No.	No.	Yes.
Total	Y:20 N:9 ND:0	Y:17 N:9 ND:3	Y:17 N:11 ND:1	Y:4 N:23 ND:2	Y:22 N:5 ND:2	Y:25 N:0 ND:4

<sup>195</sup> Unless punishable by life imprisonment.

<sup>196</sup> Unless punishable by life imprisonment.

<sup>197</sup> Unless punishable by life imprisonment.

<sup>198</sup> Although there are exceptions.

<sup>199</sup> Unless punishable by life imprisonment.

<sup>200</sup> Unless punishable for 30 years or more.

<sup>201</sup> In relation to Diplomats protected by the Vienna Convention.

### III.4 The procedural rights of victims and other parties and their experience of the process

The investigation and prosecution of crimes under international law usually involves a large number of victims. Not all victims will be able to participate in a criminal proceeding. However, it is important for victims to exercise their right to an effective remedy and to have the ability to participate if they wish to do so. In line with international law, victims should be kept up to date with the investigation and, in particular in universal jurisdiction trials taking place far away from here the majority of victims may be located and in which not all victims can participate, to be informed about the outcome of the prosecution.<sup>202</sup>

Civil society groups can assist victims in their participation in criminal proceedings and also mediate with authorities if and as necessary. NGOs can further play an important role in providing information about the current situation within a country, enabling those deciding about complementarity or considering whether a territorial state is taking adequate and effective measures to investigate or prosecute, with the fullest possible information. In recent years, NGOs have played an increasingly important role in rendering support to victims to bring actions before courts, particularly in countries with a *partie civile* system. Legal representation of victims is problematic as usually there is no legal aid available for these types of cases, which go on for a long period of time and NGOs have often enabled legal representation on a pro bono basis.

#### a. Victims' ability to initiate criminal investigations

Mechanisms which allow private parties to trigger an investigation have proved invaluable in the prosecution of crimes under international law in EU member states. Victims and their representatives have a real interest in seeing that justice is done, they have knowledge of the alleged crimes, and often have notice of the presence of the accused in the jurisdiction.

In all jurisdictions where responses were received on this issue victims can report crimes under international law directly to the police authorities. In some cases there are specific offices who can receive such complaints - for example the Netherlands has a central intake desk for complaints with regard to international crimes (although victims can also file a complaint with the local police authorities). In Sweden a victim (or her attorney) can file a complaint on the basis of a crime of genocide or war crime directly with the police or the federal prosecutor's office.

However, the filing of a complaint does not necessarily trigger the opening of an investigation. In states such as Hungary, Denmark and the UK, the police will initiate an investigation to establish whether there is sufficient evidence to prosecute. In many states the decision as to whether or not to open an investigation rests with the prosecutor. For example, in Belgium, the complaint is forwarded to the competent court (the federal prosecutor in the case of serious violations of international humanitarian law); in Bulgaria, the complaint is forwarded to the competent prosecutor and in Romania, it is sent to the Public Ministry.

Even where an investigation can be opened by police upon the victim's complaint, the decision as to whether to *prosecute* is generally taken by the prosecution authorities. This

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<sup>202</sup> See, e.g. *Ilhan v. Turkey*, (App. No. 22277/93) 27 June 2000, paragraph 92; *Ognyanova and Choban v. Bulgaria*, (App. No. 46317/99, 23 February 2006), paragraph 107.

raises the issues as to the availability and exercise of the prosecutor's discretion, as addressed in Section III.3(c).

## b. Victim (Private) Prosecutions

Some states have mechanisms which allow private parties to *automatically* trigger an investigation by an investigating judge, or trigger a prosecution or arrest. These procedures for private prosecutions are seen as important safety valves when the ordinary system of public prosecution fails to act or acts too slowly. In some states, however, the rules for triggering prosecutions or arrests based on extraterritorial jurisdiction are circumscribed - making them more restrictive than those operating for the majority of ordinary domestic or 'territorial' crimes.

### i. Instigation by civil party

In some civil law countries such as Belgium, France and Spain prosecutions may ordinarily be started in one of two ways: either by the prosecutor (on his or her own motion or following a complaint) or by the private party directly.

For example, in France and Belgium, a victim of an ordinary crime may file a "*plainte simple*", which leaves the prosecutor free to decide on the opportunity to prosecute, or by a "*constitution de partie civile a titre principal*" (instigation by civil party) by which a victim<sup>203</sup> automatically triggers the prosecution. An investigating magistrate is brought into the case either by the issue of a warrant by the prosecutor (*requisitoire afin d'informer*) or by the receipt of a complaint from the victim (*complainte avec constitution de partie civile*). The latter was used in all universal jurisdiction cases in Belgium and France.

Responses to the survey of EU member states showed that a form of civil party prosecution is available in thirteen jurisdictions for the prosecution of crimes under international law committed abroad. In Spain, Spanish citizens with an interest in a particular case or acting on behalf of a victim may bring private prosecutions, known as "*accion popular*".<sup>204</sup> In Austria, a victim can generally appear as a "*subsidiary prosecutor*" - requesting an investigating magistrate to conduct or continue an investigation if the public prosecutor has declined to open a formal investigation or has closed it without filing charges.<sup>205</sup> In Finland, victims may bring a private prosecution if the public prosecutor has decided not to carry out or to discontinue the criminal investigation.<sup>206</sup> Similar provisions apply in Luxembourg, where on the failure of the State Prosecutor to prosecute, the victim may make a complaint to the investigating judge who is obliged to carry out an investigation.<sup>207</sup>

Other jurisdictions also provide for private prosecutions: where this is available in relation to crimes under international law these are set out in the table at page 55 and are discussed in further detail in relation to each jurisdiction in the relevant country report in Section VI. Other countries, such as Germany, Bulgaria and Lithuania, provide for private prosecutions only in relation to a limited number of offences, which do not extend to crimes under international law.<sup>208</sup>

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<sup>203</sup> Or NGO in France.

<sup>204</sup> Constitution, Article 125; Organic Law 6/1985, Article 20.3; CCP, Articles 101 and 270.

<sup>205</sup> Euro Justice, 'Country Report Austria', Chapter II, available at: [http://www.euro-justice.com/member\\_states/austria/country\\_report/1363/](http://www.euro-justice.com/member_states/austria/country_report/1363/) (last accessed December 2010).

<sup>206</sup> CCP, Chapter I, Sections 14(1) and 15.

<sup>207</sup> Response to questionnaire.

<sup>208</sup> For Germany see CCP, Section 374; for Lithuania see CCP, Articles 407-409; for Bulgaria see CCP, Articles 76 -78.

Landmark universal jurisdiction cases, including the case of Augusto Pinochet in Spain<sup>209</sup> and Hissene Habré in Belgium<sup>210</sup> were initiated by victims relying on such provisions. Victims initiated a complaint against Ely Ould Dah who, in 2005, was convicted by a French court to ten years imprisonment for torture committed in Mauritania.<sup>211</sup> In Spain, third parties requested an investigative judge to open an investigation against Adolfo Scilingo for crimes committed during the ‘dirty war’ in Argentina. He was convicted in 2005 to 640 years imprisonment for crimes against humanity.<sup>212</sup>

Despite (or perhaps because of) the importance of the private prosecutions in previous international criminal law cases there has been a tendency to explicitly restrict the civil party prosecution mechanism in relation to international crimes or crimes committed abroad. In 2010 the French Criminal Code was amended to remove the “*constitution de partie civile a titre principal*” for crimes under the Rome Statute so that only the prosecution authorities may decide on the opportunity to prosecute.<sup>213</sup> A similar amendment was made to the Belgian legislation.<sup>214</sup> This has been described as a “*radical break with French penal and legal tradition*” leading to 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.<sup>215</sup> Experience shows that French prosecutors are reluctant to initiate proceedings of their own motion: previous prosecutions for crimes under international law in France have either been initiated through the civil party prosecution mechanism, or after notification to the prosecutor that it was intended that such procedure would be followed if the prosecutor did not initiate the prosecution.<sup>216</sup>

## ii. Arrest Warrants

In common law jurisdictions such as the United Kingdom and Ireland, the decision as to whether to investigate a case is usually taken by the police, and the prosecution authorities decide whether to prosecute. However, it is open to any private individual to bring what is called a ‘private prosecution’ by applying to a magistrate.<sup>217</sup> Normally the application would be for a summons to the defendant to attend court, but there is the alternative of issuing an arrest warrant if the offence is serious, or if the suspect might not answer to a summons.<sup>218</sup>

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<sup>209</sup> Writ of the Instructing Court accepting the Jurisdiction in the Pinochet Case, Spanish National Court (Audiencia Nacional), Summary Proceeding 1/98-J, 20 September 1998, available online at <http://www.derechos.org/nizkor/chile/juicio/jurie.html>; a summary of the proceedings is available at <http://www.derechos.net/marga/papers/spain.html>.

<sup>210</sup> For an overview of the proceedings against Hissene Habré see <http://hrw.org/justice/habre/>.

<sup>211</sup> See [http://www.fidh.org/article.php?id\\_article=1809](http://www.fidh.org/article.php?id_article=1809).

<sup>212</sup> National Court, Criminal Chamber, 19 April 2005, available at <http://www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html> (Spanish).

<sup>213</sup> See the CCP, Article 689-9 (in relation to active and passive jurisdiction) and 689-11 (in relation to universal jurisdiction) (adopted in August 2010).

<sup>214</sup> See CCP, Article 6(1° bis), 10(1° bis) and 12bis (although this does not apply where the accused is Belgian or a resident of Belgium).

<sup>215</sup> French Coalition for the ICC, ‘Those accused of international crimes must be tried in France at last’; available at [http://www.iccnw.org/documents/Those\\_accused\\_of\\_international\\_crimes\\_must\\_be\\_tried\\_in\\_France\\_at\\_last.pdf](http://www.iccnw.org/documents/Those_accused_of_international_crimes_must_be_tried_in_France_at_last.pdf) (last accessed December 2010).

<sup>216</sup> Comment by Clémence Bectarte at December 2010 conference organised by FIDH/REDRESS in Brussels.

<sup>217</sup> Note that in relation to Ireland it would appear that a private prosecution could only be brought in relation to *minor* breaches of the Geneva Conventions: see Ministry of Justice of the UK, ‘Arrest warrants - universal jurisdiction: Note by the Ministry of Justice’, 17 March 2010, at p 9, available at <http://www.justice.gov.uk/publications/docs/arrests-warrants.pdf> (last accessed December 2010).

<sup>218</sup> Ministry of Justice of the UK, ‘Arrest warrants’, *ibid.*, p. 2.



This is an important legal tool used by lawyers acting on behalf of victims of crime in cases of urgency, to ensure that a suspect is apprehended who might otherwise escape from the jurisdiction - particularly important in prosecuting crimes under international law where the alleged perpetrator is only in the jurisdiction for a short period of time. Without this power, victims fear that in most cases an effective legal process will never start, for the simple reason that the suspect will flee abroad. Specifically, in cases of crimes under international law, it has been particularly important to prevent a suspect from escaping while the police and/or Crown Prosecution Service make a fully informed decision whether to devote resources to an investigation. The police are naturally reluctant at relatively short notice to arrest such suspects using their ordinary powers of arrest. But where victims can secure the suspect's arrest, this ensures that time is available for the Crown Prosecution Service and/or the Attorney General to consider the matter carefully and decide whether they will take over and/or consent to the prosecution of the suspect.

In England and Wales, a magistrate has the power to issue an arrest warrant in relation to a person suspected of a crime if there are reasonable grounds to suspect that an offence has been committed by the named suspect, admissible evidence has been presented which (if uncontradicted) establishes the elements of the alleged offence, and she or he has jurisdiction to issue the warrant and has ruled out any immunity of the suspect.<sup>219</sup> Arrest warrants have been issued in this way in the UK on two known occasions (out of ten known applications<sup>220</sup>). In September 2005, a warrant was issued for the arrest of Israeli General Doron Almog for alleged war crimes. He was warned of the warrant and refused to disembark from his aircraft when he landed in the UK.<sup>221</sup> In December 2009, a London magistrate issued an arrest warrant for former Israeli foreign minister Tzipi Livni over war crimes Israel allegedly committed in Gaza earlier in the year. It had been based on an alleged grave breach of the Fourth Geneva Convention, which is a criminal offence under the UK's Geneva Conventions Act 1957.<sup>222</sup>

However, the UK government plans to remove the right of a private party to seek the issuance of an arrest warrant for crimes over which the courts can exercise universal jurisdiction based solely on presence in the jurisdiction, including war crimes and torture.<sup>223</sup> The government presented a bill to Parliament in December 2010, by which the consent of the Director of Public Prosecutions will be required for the issuance of an arrest warrant in such cases.<sup>224</sup>

### **c. Ability for victims and others to review decisions of the prosecutor or other governmental body**

Where victims and their representatives do not have the opportunity to instigate (or continue) a prosecution as a private prosecutor, it is vital that they are able to seek

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<sup>219</sup> Prosecution of Offences Act 1985, Section 25(2).

<sup>220</sup> UK House of Commons, Hansard, Volume No. 518, Part No. 67, Written Answers, 9 November 2010; available at: <http://services.parliament.uk/hansard/Commons/bydate/20101109/writtenanswers/part006.html> (last accessed December 2010).

<sup>221</sup> BBC, 'Police feared 'airport stand-off'', 19 February 2008, available at <http://news.bbc.co.uk/1/hi/uk/7251954.stm> (last accessed December 2010).

<sup>222</sup> Guardian, 'British court issued Gaza arrest warrant for former Israeli minister Tzipi Livni', 14 December 2009; available at <http://www.guardian.co.uk/world/2009/dec/14/tzipi-livni-israel-gaza-arrest> (last accessed December 2010).

<sup>223</sup> For crimes under the ICC Act 2003 (genocide, war crimes and crimes against humanity) a further residence requirement must be proved. These bill has therefore been drafted so as not to include charges brought under that Act.

<sup>224</sup> The Guardian, 'Ministers move to change universal jurisdiction law', 30 May 2010; available at <http://www.guardian.co.uk/uk/2010/may/30/change-universal-jurisdiction-law> (last accessed December 2010).

review of the police or prosecutor's decision not to investigate or prosecute a crime, particularly in politically sensitive cases.

The survey of EU states showed that some type of review of a prosecutor's decision is available in most cases. This review may be judicial or administrative.

Some countries provide for direct review of a prosecutor's decision by a court. For example, in Germany, under Section 172 of the Criminal Procedure Code, if the prosecution declines to open an investigation, this decision can be challenged before the court. This avenue was used in 2006 to challenge the federal prosecutor's 2005 decision not to open criminal investigation into former Uzbek Interior Minister Zokir Almatov's responsibility for crimes against humanity.<sup>225</sup>

Likewise, in the Netherlands, the complainant may appeal a decision by the prosecution not to investigate a complaint to the appeal court, which may order an investigation if it considers it appropriate.<sup>226</sup> In England and Wales, a complainant may also seek judicial review of the decision of the police not to investigate, or the Crown Prosecution Service not to prosecute. The Court will consider whether the decision has been reasonable and in the public interest.<sup>227</sup>

In other states, the victim or their representative may first apply to the prosecutor's office for review of the decision, and failing a reversal of the decision may apply to the court. This is the case in Estonia.<sup>228</sup> In Latvia the decision of the pre-trial investigation officer to refuse to initiate a pre-trial investigation may be appealed to the prosecutor, and the resolution of the prosecutor may be appealed to the pre-trial investigation judge. The judgment of the pre-trial investigation judge may be appealed to the regional court under the procedure established by the Code of Criminal Procedure.

However, victims may not always be able to take part in review proceedings. For example in Belgium, a prosecutor's decision not to open an investigation is reviewed by the indicting chamber, but the private parties filing the complaint are not allowed to intervene in the review to present their case, and the chamber will base its decision on the reasons set out by the prosecutor only.<sup>229</sup>

Difficulties also arise for victims if the prosecutor does not provide written reasons or grounds for the decision not to investigate. This makes it almost impossible for the decision to be judicially reviewed, even where such review is formally available.<sup>230</sup>

In other cases there is no judicial review of the decision. Sometimes victims may seek review of a decision not to investigate from the governmental bodies concerned. For example, in Norway, a victim may appeal to the regional prosecutor if the police decide not to investigate. A further appeal can be made to the director general of prosecution,

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<sup>225</sup> Human Rights Watch, 'Germany: Challenge to Ruling on Uzbek Ex-Minister: Almatov Case Tests Commitment to International Justice, 21 June 2006'. Available at: <http://www.hrw.org/en/news/2006/06/21/germany-challenge-ruling-uzbek-ex-minister> (last accessed December 2010).

<sup>226</sup> CCP 1994, Article 1213.

<sup>227</sup> See Human Rights Watch, 'Universal Jurisdiction in Europe; The State of the Art, Section XIII: UK (England and Wales)', 27 June 2006, referring to *R v. Director of Public Prosecutions, ex parte C* (1995) 1 CrAppR 136; available at <http://www.hrw.org/en/node/11297/section/15> (last accessed December 2010).

<sup>228</sup> See CCP, Section 207 (Contestation of refusal to commence or termination of criminal proceedings in Public Prosecutor's Office) and Section 208 (Contestation of refusal to commence or termination of criminal proceedings in circuit court).

<sup>229</sup> See Human Rights Watch, 'Universal Jurisdiction in Europe; The State of the Art, Section VI: Belgium'.

<sup>230</sup> Comment, in relation to her experience in France, by Clémence Bectarte at the FIDH/REDRESS conference organised on the topic in Brussels on 1 December 2010.

although no appeal may be brought against his or her decision.<sup>231</sup> In others, there is no review at all: in Luxembourg the State Prosecutor receives complaints and, in accordance with his or her prosecutorial discretion (and subject to the rights of the injured party) decides on the follow-up.<sup>232</sup> In certain circumstances, such as when there is only a limited social harm, when the object of the offence is insignificant, or when the offender acted for especially excusable motives, the State Prosecutor may decide that prosecution is inappropriate. There is no judicial remedy against this decision.

#### **d. The ability for victims to join a prosecution as civil party**

Separately to initiating a private prosecution in the absence of, or additional to, a public prosecution, it is possible in many EU member states for a victim or representative to join a public prosecution as a civil party. In most countries with a civil law tradition, victims can lodge claims as '*partie civile*', for damages resulting from the criminal act. In common law jurisdictions such as Ireland and the UK this avenue is not available (although victims may be able in some circumstances to receive some compensation from any fine imposed on the convicted person). In those jurisdictions the victims' role is restricted to that of witness, and entirely separate civil proceedings are usually required in order to seek reparation from the accused.

The review of EU member states shows that victims can join civil claims to criminal cases initiated by the prosecutor in the vast majority of states surveyed. A breakdown of the states in relation to this issue is provided at page 55, showing only four states which responded that this avenue is not available.

The extent of the victim's involvement in the proceedings themselves varies greatly, however. In some cases it extends to the right to be separately represented, and to question witnesses. In others, it is restricted to making a claim for damages which will be pursued on the victim's behalf by the prosecutor. For example:

- in Denmark, a victim can lodge civil claims which will be pursued by the prosecutor. The victim does not have the right to participate in the criminal aspect of the proceedings, but can be legally represented in terms of the compensation to be awarded.<sup>233</sup>
- in Belgium where a civil party joins a criminal prosecution seeking compensation for damage<sup>234</sup> this also affords him or her certain rights in the criminal proceedings, including the right to be kept informed of developments, the right of access to the criminal record and the right to request the completion of further investigative action.<sup>235</sup>
- in Latvia, the victim has the right to submit an application regarding compensation for an injury at any stage of criminal proceedings up to the commencement of a court investigation.<sup>236</sup>
- in Slovenia, a victim may make a claim for indemnification in the criminal procedure provided that the determination of such a claim does not significantly protract the procedure. If the evidence collected in criminal procedure does not

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<sup>231</sup> Act of Criminal Procedure 1981, Section 59a.

<sup>232</sup> CCP, Article 23-1.

<sup>233</sup> See Human Rights Watch, 'Universal Jurisdiction in Europe, Part VII: Denmark'.

<sup>234</sup> Article 67 of the CCP.

<sup>235</sup> Response from MoJ. See, for example, Article 61 of the CCP.

<sup>236</sup> Response from MoJ, referring to the CCP.

provide a reliable basis to award either full or partial indemnification, the court will instruct the injured party that he or she may seek full satisfaction in civil proceedings.<sup>237</sup>

The ability of victims and their representatives to pursue civil claims in criminal proceedings has certain advantages for them. It means that prosecutors, rather than the victims, are responsible for collecting evidence and can spend the requisite resources on doing so. It means that victims do not face the possibility of large legal costs for the proceedings in the event that the claim is unsuccessful. It also means that victims have only one set of proceedings (in that jurisdiction) in which to give evidence.

However, recent judgments indicate a divergent practice of national courts in dealing with the procedural aspects of civil reparation claims attached to criminal proceedings, and in particular whether the territorial law or the law of the forum state is to apply.

The law to be applied to the civil part of the claim can make a vital difference to the success of the claim. This arises, for example, in relation to the issue of limitation periods. If the civil limitation period is applied by the criminal court this may bar the civil component of the claim, as these are generally much shorter than any limitation period applying for criminal matters (if they exist at all). Further, the length of the civil limitation period may be different depending on whether the law of the territorial state is applied (on the basis of the rules of private international law<sup>238</sup>), or the law of the forum state.

This was an issue in relation to the civil claims brought alongside the criminal trial of Joseph Mpambara for torture and war crimes in the Netherlands.<sup>239</sup> The statute of limitations for civil claims in the Netherlands (the forum state) is five years, which had already passed by the time the evidence against Mpambara had been gathered. However, the statute of limitations in Rwanda (the territorial state) is 30 years. The latter was applied by the court, meaning that the claims were not statute-barred. A finding that the law of the territorial state should be applied has also meant that in some cases judges have dismissed civil claims on the grounds that they would unnecessarily complicate the criminal proceedings by requiring an extensive analysis of foreign law.<sup>240</sup> This has meant that victims are left with the prospect of raising separate civil proceedings to receive reparation.

A different approach has been taken in other jurisdictions where civil claims have been attached to criminal prosecutions, such as France and Spain. In these countries, according to those consulted, no distinction has been drawn in relation to the law applying to the criminal charges and the civil claims attached to the criminal proceedings, including in relation to statutes of limitation.

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<sup>237</sup> Response to Questionnaire.

<sup>238</sup> See Article 4 of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), 11 July 2007, L199/40, 31 July 2007, by which the law of the place where the damage occurred applies.

<sup>239</sup> *Public Prosecutor v Joseph Mpambara*, Hague District Court, 23 March 2009; available at: [www.rechtspraak.nl](http://www.rechtspraak.nl), in Dutch. See Zegveld, Liesbeth, 'Prosecution of international crimes of sexual violence in Dutch courts', 2 *Equality of Arms Review* 12 (2009), at 13; available at: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=504B8448-1995-4A3D-A0B2-AECE8D23F116> (last accessed December 2010).

<sup>240</sup> Judgment Van Anraat, Court of Appeal of The Hague, 9 May 2007, at paragraph 18; Judgment Van Anraat, Supreme Court of the Netherlands, 30 June 2009, at paragraph 13. See also Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts: Incompatible Values?' 8 *JICJ* 79 (2010) at 100.

## e. In-Court measures to protect victims and witnesses

Victims and witnesses play a key role in the prosecution of serious crimes, and their testimony is usually central to a successful prosecution. However, victims and witnesses who participate in trials of crimes under international law committed abroad face significant challenges. Very often oral evidence is required at trial (both legally and practically) and the process of giving evidence and of being cross-examined or interrogated can further traumatise people who have already suffered terrible crimes. Practical difficulties and a sense of alienation may be compounded by the different language and culture and geography of the legal process. Victims and witnesses very often also face threats to their own personal safety from the defendant or through the defendant's supporters as a result of testifying.<sup>241</sup>

These difficulties, although particularly acute in prosecutions of crimes under international law, are faced by witnesses in other types of legal proceedings. National legal systems have developed different mechanisms to protect vulnerable witnesses - both from further traumatising by the process and from threats to their security arising because of their engagement in their process. However, in all cases the rights of the victims and witnesses must be balanced with the right of the accused to a fair trial.

In-court measures in relation to vulnerable witnesses are generally aimed at (i) shielding the witness from giving evidence in public or in front of the accused; (ii) limiting the travel required to be taken by the witness; (iii) protecting the witness from unduly harsh cross-examination; and (iv) protecting the witness's identity or other personal details, either from the general public or from the accused.

The survey of EU member states showed that many have a well-developed set of rules allowing for the protection of witnesses. Of course, the key question is the extent to which these rules are actually implemented. The following section will give some examples of the types of provisions existing in the different EU member states and how they have been used in practice in relation to the prosecution of crimes under international law.

### **(i) limiting the travel required to be taken by the witness and shielding the witness from giving evidence in public or in front of the accused**

Many states have provisions by which testimony may be given in a different location from where the proceedings take place.<sup>242</sup> In some cases the court and parties will go to the witness, but often the evidence will be taken by video link. Sometimes the written statement of the witness will be accepted as their evidence.<sup>243</sup> These provisions are often engaged where the witness is in ill health or frail, or in other reasonable circumstances where it is not desirable or reasonable for the witness to attend court. In cases of trials for crimes under international law those reasonable circumstances might include the additional trauma that travelling may impose on a victim or witness, the cost of such travel - particularly where there are a large number of witnesses, and the practical

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<sup>241</sup> Hester van Bruggen, a Prosecutor at the National Prosecution Office, Department for International Crimes, the Netherlands, commented in 2009 that '[i]n practically every case we have worked on, witnesses have been threatened and intimidated'. See REDRESS & FIDH, *Universal Jurisdiction Trial Strategies: Focus on victims and witnesses*. A report on the Conference held in Brussels, 9-11 November 2009, at p 24. Available at: [http://www.redress.org/downloads/publications/Universal\\_Jurisdiction\\_Nov2010.pdf](http://www.redress.org/downloads/publications/Universal_Jurisdiction_Nov2010.pdf) (last accessed December 2010).

<sup>242</sup> See, for example, Austria: CCP Section 160(1) and 247a; Belgium: CCP Chapter VII quater of Book One titled « Recueil de déclarations au moyen de médias audiovisuels »; Hungary: CCP Sections 244a and 304(1); Poland: CCP Article 177.2; Slovenia: CCP Section 244a; Sweden: Code of Judicial Procedure, Chapter V, Section 10.

<sup>243</sup> See, for example, Hungary: CCP Article 296(1).

difficulties that a victim or witness might face in terms of language and culture by travelling to the forum state. Some states have also considered the risk that a victim or witness will make an asylum claim if entering the territory of the forum state as a reason to take testimony of victims and witnesses from abroad.<sup>244</sup>

Such provisions have been used in a number of prosecutions in Europe for crimes under international law committed elsewhere. For example, a mutual legal assistance treaty between Spain and Argentina allowed witnesses in Argentina to testify via video conference during the trial of Adolfo Scilingo before Spanish courts.<sup>245</sup> Evidence has similarly been taken remotely in universal jurisdiction cases in Denmark (where a prosecutor, defence lawyer and judge travelled to Uganda to take videotaped witness testimony, later shown to the court), Belgium (where some of the witnesses in cases concerning Rwanda gave their evidence via video-link) and the UK (where witnesses gave evidence via video-link from the British embassy in Kabul to a court in London).<sup>246</sup>

The same or similar provisions allowing for the giving of evidence by video-link or telephone may also be used to shield the witness from giving evidence in front of the accused or the public. In some circumstances the witness will be allowed to give evidence from a separate room,<sup>247</sup> or for pre-recorded testimony to be played, or a written statement to be read, to the court.<sup>248</sup> In others the witness will be in the court room, but hidden from the accused by a screen.<sup>249</sup> Some rules of procedure allow for parties or witnesses to apply for a matter to be held *in camera*, so that the public is excluded.<sup>250</sup> Sometimes these provisions are restricted to minors, or those who have been subject to certain types of crime such as sexual violence.<sup>251</sup>

## (ii) protecting the witness from unduly harsh cross-examination or interrogation

Falling into this category are provisions limiting the role of the public prosecutor and the defendant's counsel in relation to questioning the witness directly. For example, in Austria during the investigative or trial phases, it is possible for a witness to be interrogated by the Judge, with the prosecutor and defendant's counsel following the testimony and asking questions via the Judge or an interrogation expert.<sup>252</sup> In order to shield the witness from the accused the testimony is usually given in a different room to the room in which the parties are, and the parties follow the proceedings by video-link. Other states have rules about the types of questions that may be asked of the witness, for example, in relation to their sexual history.<sup>253</sup>

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<sup>244</sup> Although it is noted that if an asylum claim is well-founded this should not be a consideration.

<sup>245</sup> 'Equipo Nizkor', 'Witnesses located in Buenos Aires began to give their testimony by video conference in the trial of Adolfo Scilingo', 14 February 2005, available online at <http://www.derechos.org/nizkor/espana/juicioral/doc/witnesses.html>.

<sup>246</sup> Human Rights Watch, 'Universal Jurisdiction in Europe; The State of the Art, Section II', June 2006.

<sup>247</sup> See, for example: Germany: CCP Sections 168e and 247a; Hungary: CCP Section 244b; Finland: Code of Judicial Procedure, Chapter XVII, Section 34.

<sup>248</sup> See, for example: Germany: CCP Sections 58a, 251 and 255a; Latvia: CCP Article 501.

<sup>249</sup> See, for example: United Kingdom (England & Wales): Youth Justice and Criminal Evidence Act 1999, Sections 23-30.

<sup>250</sup> For example in Belgium, the trial court may order an *in camera* hearing at the request of one party or the victim when the proceedings are in relation to indecent assault or rape: CCP Article 190(1) and Article 280(3). See also Finland: Code of Judicial Procedure, Chapter XVII, Section 34; Latvia: CCP, Article 450; Lithuania: CCP, Article 9.

<sup>251</sup> See, for example: Greece: CCP Article 226a; Ireland: Criminal Evidence Act; Lithuania (response to questionnaire).

<sup>252</sup> Section 165(3) CCP.

<sup>253</sup> See, for example in England and Wales: Youth Justice and Criminal Evidence Act 1999, Section 41.

**(iii) protecting the witness's identity or other personal details, either from the general public or from the accused**

Many states have provisions aimed at protecting a witness's identity or personal details where they have been or may be threatened or intimidated. These provisions fall into two main categories: first, provisions in relation to the recording of personal data of the witness on the court file; and second, provisions allowing the witness a degree of anonymity.

The first type of provision may enable or oblige officials to remove personal data, such as the address of the victim or witness, from the court file.<sup>254</sup> Likewise the victim or witness may be allowed to elect to give an alternative address, such as the police station, instead of listing their residential address.<sup>255</sup>

The second type of protection is anonymity of witnesses. When lawyers refer to 'anonymous witnesses' it can mean one of two things: (i) where the prosecution can use witnesses whose identities are not known to the defendant or his/her defence, but are known only to the judge, or (ii) where the identity of the witness is known to the defendant, but not to the public. To avoid confusion of these two very different measures, it would be helpful to have a common definition or terminology within the EU distinguishing these different types of anonymity.

Although the openness of judicial proceedings is a fundamental principle of the right to a fair trial, granting a witness anonymity is not necessarily incompatible with that right.<sup>256</sup> Provision for the first type of anonymous witness has recently been introduced in Bulgaria, where this proved controversial.<sup>257</sup> Under the new Bulgarian law, the court will interrogate a witness whose identity is kept secret and must take all possible precautions to keep the identity secret, including conducting interrogations by video conference or telephone conference if the interrogation is performed abroad. Copies of the record of interrogation without the witness's signature are to be provided to the accused and his or her counsel, who have the right to question the witness in writing.<sup>258</sup> This extensive type of witness anonymity is also available in Romania, where it is mainly used in trafficking and terrorism cases,<sup>259</sup> and in Estonia, where anonymous witnesses are assigned a fictitious name and are heard in court by telephone using voice distortion equipment if necessary.<sup>260</sup> Other countries have provision for anonymous witnesses, including Austria,<sup>261</sup> Belgium,<sup>262</sup> France,<sup>263</sup> Germany,<sup>264</sup> Hungary,<sup>265</sup> Lithuania,<sup>266</sup> Netherlands,<sup>267</sup> Norway,<sup>268</sup> Poland,<sup>269</sup>

<sup>254</sup> This is possible in Finland, for example (response to questionnaire). See also Hungary: CCP, Section 96.

<sup>255</sup> This is available in France: CCP, Article 706-57.

<sup>256</sup> *Van Mechelen and Others v. The Netherlands*, 55/1996/674/861-864, European Court of Human Rights, 23 April 1997, paragraphs 52-55; available at: <http://www.unhcr.org/refworld/docid/3ae6b6778.html> (last accessed December 2010).

<sup>257</sup> See CCP, Article 123 and Article 141.

<sup>258</sup> CCP, Article 141.

<sup>259</sup> CCP, Article 86.

<sup>260</sup> CCP, Section 67.

<sup>261</sup> CCP, Section 162 - anonymity may be granted if it is feared that the witness or a third person would be exposed to a danger to their life, health, physical integrity or freedom by the disclosure of the identity.

<sup>262</sup> CTC, Article 294 and CCP, Articles 86 and 86 ter. This measure may be granted to a witness who is at risk because of his testimony and is permitted only for a limited list of crimes (including serious violations of international humanitarian law). The court must be satisfied that omitting certain identifying information in the minutes of the hearing does would not be sufficient to guarantee the protection of the witness and the testimony is necessary to discover the truth. Such a witness cannot be compelled to testify before the Court.

<sup>263</sup> CCP, Article 706-58

<sup>264</sup> CCP, Section 68.

Portugal<sup>270</sup> and the UK.<sup>271</sup> Many of these provide that if the anonymous witness is to give evidence in court or to answer questions asked on behalf of the accused, the witness can appear by video link or telephone using technology to disguise their voice and identity.<sup>272</sup>

An example of the second type of anonymity - from the public, but not the parties - exists in Finland.<sup>273</sup> However, while the identity is not kept secret from the defendant, the contact information of a witness or victim may be kept confidential and be removed from the court and police files.

**Table 6: Modes of producing evidence available to victims and witnesses in EU member states for prosecutions of crimes under international law**

State/ Modes of providing evidence	Oral statement	Written statement	Sound/ recording video	Phone/ video link	Other
Austria	No.	No.	No.	Yes.	Yes.
Belgium	Yes.	Yes.	No.	Yes.	No.
Bulgaria	Yes.	Yes.	Yes.	No.	Yes.
Cyprus	Yes.	Yes.	No.	Yes.	Yes.
Czech Republic	No data.	No data.	No data.	No data.	No data.
Denmark	Yes.	Yes.	Yes.	No data.	No data.
Estonia	Yes.	Yes.	Yes.	No.	No.
Finland	No (exceptions).	No (exceptions).	No.	Yes.	Yes.
France	Yes.	Yes.	No.	Yes.	No.
Germany	Yes.	Yes.	Yes.	Yes.	No.
Greece	Yes.	Yes.	Yes.	No.	No.
Hungary	No.	No.	No.	Yes.	No.
Ireland	No.	No.	Yes.	Yes.	Yes.
Italy	Yes.	Yes.	Yes.	No.	No.
Latvia	Yes.	Yes.	Yes.	Yes.	No.
Lithuania	Yes.	No.	Yes.	No.	Yes.
Luxembourg	No.	No.	Yes.	No.	No.
Malta	Yes.	Yes.	No.	No.	No.
Netherlands	Yes.	Yes.	No.	No.	No.
Norway	Yes.	Yes.	No.	Yes.	No.
Poland	Yes.	Yes.	No.	No.	Yes.
Portugal	Yes.	Yes.	No.	Yes.	No.
Romania	Yes.	Yes.	Yes.	Yes.	No.
Slovakia	No data.	No data.	No data.	No data.	No data.
Slovenia	No.	No.	Yes.	Yes.	No.
Spain	Yes.	Yes.	No.	Yes.	No.
Sweden	No.	No.	No.	Yes.	No.
Switzerland	No data.	No data.	No data.	Yes.	No data.
United Kingdom	Yes.	Yes.	Yes.	Yes.	Yes.
Total	Y:19 N:7 ND:3	Y:18 N:8 ND:3	Y:13 N:13 ND:3	Y:17 N:9 ND:3	Y:8 N:17 ND:4

<sup>265</sup> CCP, Section 244C(5), and Section 96.

<sup>266</sup> CCP, Article 199.

<sup>267</sup> Response to Police/Investigation Questionnaire.

<sup>268</sup> CCP, Section 130a.

<sup>269</sup> CCP, Article 184.

<sup>270</sup> Law nr. 94/99, 14 July 1999.

<sup>271</sup> Coroners and Justice Act 2009, Sections 86 to 98.

<sup>272</sup> See, for example: France, CCP, Article 706-61.

<sup>273</sup> Response to questionnaire.



## f. Out-of-Court measures to protect victims and witnesses

Victims, witnesses and their families can face very real dangers out of court due to the highly political contexts in which international crimes are often committed. These can both be threats and intimidation prior to giving evidence and reprisals during or afterwards. Measures can be taken by the authorities of the investigating state both during the investigative stage and following trial to protect witnesses from threats and violence.

Measures will differ depending on the location of the victim or witness. If they are located within the prosecuting state, there will usually be legislation in place allowing for the ordering of protective measures, such as provision of security by the state or relocation of the victim. Many states have a witness protection program designed to ensure the safety of witnesses, both before and after trial.

Authorities from the prosecuting state are much more restricted in the protection that can be provided to victims and witnesses located in other states (for example, the state in which the crime was committed). There the authorities do not have enforcement powers, and must rely to a large extent on the cooperation of the authorities of that state.

### (i) Measures in the prosecuting state

The survey of EU member states showed the following types of protective measures that are available to victims and witnesses (and in some cases their family members) who face a threat to their safety or security:

- provision of physical security and guarding of property by state forces;<sup>274</sup>
- the issuing of restraining orders;<sup>275</sup>
- securing against unsanctioned wiretapping and interference with correspondence;<sup>276</sup>
- temporary accommodation in a safe place;<sup>277</sup>
- change of residence, working place, or educational establishment;<sup>278</sup>
- change of identity;<sup>279</sup>
- financial assistance;<sup>280</sup>
- relocation to another state;<sup>281</sup>

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<sup>274</sup> See, for example, Bulgaria: Law of Protection of Persons Threatened in Connection with Criminal Procedure; Cyprus: Protection of Witnesses Law, Law No. 95(I)/2001; Latvia: Special Protection of Persons Law; Lithuania: Law on Protection of Participants of Criminal Proceedings and Tactical Operations, Officers of Law Enforcement and Justice Against Criminal Acts of the Republic of Lithuania, 15 May 2008.

<sup>275</sup> Available in Finland (response to questionnaire) and Germany: Act on Protection Against Violence, Sections 1 and 2.

<sup>276</sup> Latvia: Special Protection of Persons Law.

<sup>277</sup> See, for example, Bulgaria: Law of Protection of Persons Threatened in Connection with Criminal Procedure.

<sup>278</sup> See, for example, Bulgaria: Law of Protection of Persons Threatened in Connection with Criminal Procedure; Cyprus: Protection of Witnesses Law, Law No. 95(I)/2001; Latvia: Special Protection of Persons Law.

<sup>279</sup> See, for example, Bulgaria: Law of Protection of Persons Threatened in Connection with Criminal Procedure. The response to the questionnaires in relation to Cyprus and Finland stated that this is available in those states.

<sup>280</sup> See, for example, Lithuania: Law on Protection of Participants of Criminal Proceedings and Tactical Operations, Officers of Law Enforcement and Justice Against Criminal Acts of the Republic of Lithuania, 15 May 2008.

<sup>281</sup> See, for example, Bulgaria: Law of Protection of Persons Threatened in Connection with Criminal Procedure; Latvia: Special Protection of Persons Law. The response to the questionnaires in relation to Cyprus and Finland stated that this is also available in those states.

- timely information about the release from custody of a prisoner or arrested person.<sup>282</sup>

Many of the states surveyed have specific national witness protection programs in place.<sup>283</sup> These include Austria,<sup>284</sup> Belgium,<sup>285</sup> Bulgaria,<sup>286</sup> Cyprus,<sup>287</sup> Czech Republic,<sup>288</sup> Estonia,<sup>289</sup> Germany,<sup>290</sup> Hungary,<sup>291</sup> Italy,<sup>292</sup> Lithuania,<sup>293</sup> Netherlands,<sup>294</sup> Norway,<sup>295</sup> Poland,<sup>296</sup> Portugal,<sup>297</sup> Romania,<sup>298</sup> Slovenia,<sup>299</sup> Sweden<sup>300</sup> and Switzerland.<sup>301</sup>

Not all states have legislated for comprehensive witness protection measures, however. For example, in Luxembourg the authorities can provide physical protection to threatened witnesses, but there is no legal basis for this and no legal framework for more extensive witness protection measures. The UK, while having extensive witness protection measures available, does not have a national witness protection programme. Local forces may, however, have Witness Protection Units staffed by specially trained officers.<sup>302</sup>

Even where there are witness protection measures available, states may need to cooperate with each other to keep witnesses and victims safe. This cooperation may be achieved on the basis of mutuality, or through specific agreements. For example, in relation to Estonia, it was mentioned that the small size of the country makes it difficult to relocate and give a new identity to witnesses and victims. Cooperation with its

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<sup>282</sup> For example in Finland (response to questionnaire).

<sup>283</sup> Although some of these are available only in relation to certain crimes, such as organised crime and terrorism: eg. Greece: Law 2928/2001.

<sup>284</sup> Victim at Highest Risk Program.

<sup>285</sup> Established under Chapter VIter Book I of the CCP.

<sup>286</sup> The Programme for Protection of Threatened Persons was established by the Law of Protection of Persons Threatened in Connection with Criminal Procedure.

<sup>287</sup> Established under the Protection of Witnesses Law, Law No. 95(I)/2001.

<sup>288</sup> Introduced in 2001: see Radio Praha, 'Parliament passes extensive witness protection law', 2 March 2001; available at <http://www.radio.cz/en/section/curraffrs/parliament-passes-extensive-witness-protection-law> (last accessed December 2010).

<sup>289</sup> Established since 2005 (response to questionnaire).

<sup>290</sup> See the Act on the Harmonization of the Protection of Witnesses at Risk.

<sup>291</sup> Act LXXXV on the Protection Programme for the Helpers of the Jurisdiction (2001).

<sup>292</sup> Law No. 45 of 13 February 2001.

<sup>293</sup> Established by Law on Protection of Participants of Criminal Proceedings and Tactical Operations, Officers of Law Enforcement and Justice Against Criminal Acts of the Republic of Lithuania, 15 May 2008.

<sup>294</sup> Response to Police/Investigation Questionnaire.

<sup>295</sup> Response to MoJ/MFA Questionnaire.

<sup>296</sup> The existence of the program is confirmed in UNHCR, 'Trafficking in Persons Report 2010 - Poland', 14 June 2010; available at <http://www.unhcr.org/refworld/country,,,POL,4562d8b62,4c1883cd26,0.html>.

<sup>297</sup> Law on Witness Protection, Law No. 93/99, 14 July 1999.

<sup>298</sup> Law No. 682/2002.

<sup>299</sup> Response to MoJ/MFA Questionnaire.

<sup>300</sup> Although the details are kept strictly confidential: Response to Police/Investigation Questionnaire.

<sup>301</sup> CCP, entry into force 1 January 2011.

<sup>302</sup> Crown Prosecution Service, Witness Protection and Anonymity: Legal Guidance, 14 August 2008; available at [http://www.cps.gov.uk/legal/v\\_to\\_z/witness\\_protection\\_and\\_anonymity/#a07](http://www.cps.gov.uk/legal/v_to_z/witness_protection_and_anonymity/#a07) (last accessed December 2010).

neighbours Latvia and Lithuania, through a formal agreement, has enabled this to happen.<sup>303</sup>

## (ii) Measures outside the prosecuting state

The reality is that many victims and witnesses are not within the jurisdiction of the investigating or prosecuting state prior to or after a trial (and in some cases during a trial). Often, given the political context of many international crimes, the person being investigated or prosecuted has significant power or connections within the state in which the victims and witnesses are located. The victim or witness is therefore at a great deal of risk from intimidation and threatened or actual violence, and to a large extent the usual measures provided for witness protection within the state's own jurisdiction are unavailable, except with the cooperation of the territorial state.

Human Rights Watch interviewed investigators who had been involved in prosecuting crimes under international law committed abroad and noted that they felt that *“the very visibility of their investigations in the territorial state might increase the risks to victims and witnesses by attracting unwanted attentions. For example, when Belgian investigators were seen together with a victim in her local community in Rwanda, she was subsequently forced to leave her community due to threats”*.<sup>304</sup>

Investigators and prosecutors have therefore been creative in trying to reduce the attention drawn to those cooperating in the investigation. As noted in the Human Rights Watch report:

*Dutch and British investigators took statements in secure or neutral places such as embassies and United Nations (UN) compounds and placed emphasis on not being seen together with witnesses in public. In some instances witnesses were given pretexts that might explain their visit to a foreign embassy to anyone who asked. Other precautionary measures used included equipping witnesses with mobile phones while the authorities were investigating in the relevant country, and providing funds for a witness to leave the country for a certain period of time.*<sup>305</sup>

Where threats are made to victims and witnesses in the state where the crimes took place it has been possible on some occasions to cooperate with the local authorities in an attempt to provide some protection to the witness. A prosecutor from the Netherlands recalled how during the investigation of a case concerning genocide and torture in Rwanda,<sup>306</sup> it became apparent that at least three of the witnesses in Rwanda had been approached by family members of the suspect (from as far away as Finland and Mali) and were threatened unless they changed their testimony. The prosecutor from the Netherlands sought the cooperation of the Rwandan authorities to move the witness who could still be found to safety, and a safe house was found for the witness. The Dutch prosecutor sent police officers to Mali, Finland and Rwanda and, with the cooperation of the Rwandan authorities, obtained a list of incoming telephone calls on the witness's telephone to determine who had been calling him. Within a week and a half after the witness had received threatening calls, the suspect's cousin was incarcerated in Finland,

<sup>303</sup> Response to MoJ/MFA Questionnaire. See the Trilateral Treaty of the Government of the Republic of Lithuania, The Government of the Republic of Estonia and the Government of the Republic of Latvia on Cooperation in Implementing Witness and Victim Protection, ratified 24 May 2001.

<sup>304</sup> Human Rights Watch, 'Universal Jurisdiction in Europe; The State of the Art, Section II', June 2006; available at: <http://www.hrw.org/en/node/11297/section/4> (last accessed December 2010).

<sup>305</sup> Ibid.

<sup>306</sup> Joseph Mpambara, The Hague District Court, 23 March 2009.

and the suspect, his brother (who was in detention in Mali), and a family member in Rwanda had been warned about approaching the witness, stressing that this would harm the suspect's case. However, the prosecutor noted that it was difficult to do more than this.<sup>307</sup>

Where witnesses and victims are under serious threat it may be possible to move them to the jurisdiction of the prosecuting state, and put them under available witness protection programmes. However this is a very extreme measure, particularly for somebody from a different culture, language and background, and in some cases witnesses - understandably - do not take up the opportunity to enter the programme.

From past experience, prosecutors have stressed the importance of being completely honest and open with witnesses about limitations in protection right from the start. Along with this, cooperation is key: it is vital to have a real commitment in terms of financial and other resources and transfer of know-how to cooperating with local authorities.<sup>308</sup>

Witnesses need practical solutions - like assuring them that if anything happens or they feel threatened they can call a police officer from the prosecuting country, a local police officer or somebody who is knowledgeable about witness protection.<sup>309</sup> In the Netherlands a new initiative means that a police officer is on duty all day seven days a week, and witnesses can use the Dutch police officer's hotline if something is wrong. This has reportedly been very successful in some of the more recent cases. Finally, where information is received indicating that a witness has been threatened or intimidated, it is vital that this is investigated properly, so that the information can be conveyed to the court, and the suspect can be made aware such conduct is out in the open.<sup>310</sup>

In the end, police and prosecutors are reliant on the courage and commitment of individual witnesses, in the face of severe pressures, both psychological and in terms of physical security. Creative, proactive and practical support can be provided, however - with a strong understanding of the particular local context and a real commitment to working with local authorities wherever politically possible.

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<sup>307</sup> See the comments of Hester van Bruggen at the November 2009 FIDH/REDRESS Conference, reported in REDRESS & FIDH, *Universal Jurisdiction Trial Strategies: Focus on victims and witnesses: a report on the Conference held in Brussels, 9-11 November 2009*, at p 25. Available at: [http://www.redress.org/downloads/publications/Universal\\_Jurisdiction\\_Nov2010.pdf](http://www.redress.org/downloads/publications/Universal_Jurisdiction_Nov2010.pdf) (last accessed December 2010).

<sup>308</sup> Comments of Ms. van Bruggen , *ibid.* at p 25.

<sup>309</sup> *Id.*, p 26.

<sup>310</sup> *Id.*

## g. Overview chart

**Table 7: Roles and rights of victims and witnesses in EU member countries**

State/ Role & Rights	Possibility of civil party prosecutions for crimes under international law subject to UJ	Possibility of raising civil claims in criminal cases	National witness protection programme applicable to crimes under international law
Austria	Yes.	Yes.	Yes.
Belgium	No. <sup>311</sup>	Yes.	Yes.
Bulgaria	Yes.	Yes.	Yes.
Cyprus	No data.	No.	Yes.
Czech Republic	No.	Yes.	Yes.
Denmark	No.	Yes.	No.
Estonia	No data.	Yes.	Yes.
Finland	Yes.	Yes.	No.
France	No. <sup>312</sup>	Yes.	No.
Germany	Yes.	Yes.	Yes.
Greece	No. <sup>313</sup>	Yes.	No.
Hungary	Yes.	Yes.	Yes.
Ireland	No.	No. <sup>314</sup>	No.
Italy	No.	Yes.	Yes.
Latvia	No.	Yes.	No.
Lithuania	No.	Yes.	Yes.
Luxembourg	Yes.	Yes.	No.
Malta	No.	No.	No data.
Netherlands	No.	Yes.	Yes.
Norway	Yes (with exceptions).	Yes.	Yes.
Poland	Yes.	Yes.	Yes.
Portugal	Yes.	Yes.	Yes.
Romania	No. <sup>315</sup>	Yes.	Yes.
Slovakia	No data.	No data.	Yes.
Slovenia	Yes.	Yes.	Yes.
Spain	Yes.	Yes.	No data.
Sweden	No.	Yes.	Yes.
Switzerland	Yes. <sup>316</sup>	Yes.	No.
United Kingdom	Yes (arrest warrant only).	No.	No.
Total	Y:13 N:13 ND:3	Y:24 N:4 ND:1	Y:18 N:9 ND:2

## IV. The European Union and Extraterritorial Jurisdiction

Within the EU, the investigation and prosecution of crimes under international law has long been considered as an ‘external’ issue and as such, features primarily within the EU’s Common Foreign and Security Policy (CFSP).

Having shown considerable commitment to the establishment of the ICC, the EU today supports the ICC particularly by way of promoting the universality and integrity of the Rome Statute and the independence and effective functioning of the ICC, for instance by way of demarches, political dialogues and including so called ‘ICC clauses’ in negotiating

<sup>311</sup> Unless the accused is Belgian or has primary residence in Belgium.

<sup>312</sup> Except in relation to torture.

<sup>313</sup> Although response to the questionnaire indicated that private prosecutions were available, the legislation provides that the prosecution is initiated by the public prosecutor at his or her discretion upon receipt of the relevant petition by the alleged victim or third party.

<sup>314</sup> Although upon conviction the court may order the offender to pay compensation for any personal injury or loss resulting from the offence: Criminal Justice Act 1993, Section 6. The victim may make an application to the court for the amount of compensation to be increased.

<sup>315</sup> Although the victim may complain to the court if the prosecutor discontinues the prosecution.

<sup>316</sup> As of 1 January 2011.

mandates with third States.<sup>317</sup> In addition to its ICC commitment, the EU also supports other justice mechanisms such as the Extraordinary Chambers of the Courts of Cambodia<sup>318</sup>, the Special Tribunal for Lebanon<sup>319</sup> and created a justice reform project in Eastern Democratic Republic of Congo.<sup>320</sup> A direct support for universal jurisdiction is found in the EU's financial contribution to the trial of former Chadian dictator Hissène Habré in Senegal.<sup>321</sup> The EU's promotion of international justice within CFSP is further enhanced with a Council working group bringing together ICC experts from the Ministries of Foreign Affairs of the 27 member states meeting approximately six times a year.<sup>322</sup> Equally, the European Parliament has adopted resolutions underlining its support for the ICC.<sup>323</sup>

The institutional commitment to international justice within CFSP is not complemented by the EU's Justice and Home Affairs (JHA) policy. The lack of a coherent EU JHA policy on international justice became apparent for instance when the African Union asked the European Union to discuss "*the abuse of universal jurisdiction*" by some EU member states. A report by AU and EU experts on the principle of universal jurisdiction indicated that within the EU, "*the exercise of jurisdiction in matters of criminal law is to a large extent a subject matter falling under the respective national competences of the 27 Member States of the Union*".<sup>324</sup> The report further stated that in "*Title VI of the Treaty on the European Union (TEU) EU Member States have agreed to cooperate in relation to police and judicial co-operation in criminal matters, as a result of which the EU is competent to undertake common action on judicial co-operation in criminal matters*".<sup>325</sup>

Accordingly, it is only in the area of judicial cooperation in criminal matters where there are some indications of an emerging EU JHA approach to international justice. Two Council Decisions have been adopted specifically referring to crimes under international law and gradually activities are being carried out within JHA that are designed to support EU member states in their exercise of extraterritorial jurisdiction over crimes under international law.

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<sup>317</sup>See for an outline of EU support of the ICC: Speech by Fernando Valenzuela, Head of the Delegation of the European Commission to the United Nations, International Criminal Court (ICC) Seminar, Ambassadorial lunch, United Nations, on "The Relationship between the EU institutions and the ICC", 19 May 2009, at [www.europa-eu-un.org/articles/en/article\\_8743\\_en.htm](http://www.europa-eu-un.org/articles/en/article_8743_en.htm); see also booklet published by the Council of the EU on "The European Union and the International Criminal Court", May 2010, at [www.consilium.europa.eu/uedocs/cmsUpload/ICC\\_may%2010\\_internet.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/ICC_may%2010_internet.pdf).

<sup>318</sup>EU Statement- United Nations: Pledging Conference for Extraordinary Chambers of the Courts of Cambodia (ECCC), 25 May 2010, at [http://www.europa-eu-un.org/articles/en/article\\_9787\\_en.htm](http://www.europa-eu-un.org/articles/en/article_9787_en.htm).

<sup>319</sup> Press Release, 3048<sup>th</sup> Council Meeting, Foreign Affairs, 22 November 2010, p.7, at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/EN/foraff/117948.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/foraff/117948.pdf).

<sup>320</sup> The European Commission in 2006 for instance approved a contribution of 7.9 million Euro to the programme for the restoration of the judicial system in Eastern Congo (REJUSCO), see "The European Commission contributes to the restoration of justice in the East of the Democratic Republic of Congo", Brussels, 26 June 2006.

<sup>321</sup> Afrique en ligne, "Hissene Habre's trial: Donors pledge 5.6 billion CFA for Hissene Habre's trial", 26 November 2010, at <http://www.afriquejet.com/news/africa-news/hissene-habre's-trial:-donors-pledge-5.6-billion-cfa-f-for-hissene-habre's-trial-2010112662031.html>.

<sup>322</sup> For further information on the EU's approach to accountability in the context of its CFSP policy see REDRESS and FIDH, "Fostering a European Approach to Accountability for genocide, crimes against humanity, war crimes and torture- Extraterritorial Jurisdiction and the European Union, April 2007, pp.42-46.

<sup>323</sup> See for instance Resolution adopted by the European Parliament on 19 May 2010 on "the Review Conference on the Rome Statute of the International Criminal Court, in Kampala, Uganda", at <http://www.europarl.europa.eu/document/activities/cont/201006/20100601ATT75393/20100601ATT75393EN.pdf>

<sup>324</sup> The Council of the European Union, "The AU- EU Expert Report on the Principle of Universal Jurisdiction", 16 April 2008, paragraph 42.

<sup>325</sup> Ibid, paragraph 43.

## IV.1 The Lisbon Treaty

The Treaty on the Functioning of the European Union (“Lisbon Treaty”) introduced significant changes to the EU’s JHA policy.<sup>326</sup> Since its coming into force on 1 December 2009, matters such as judicial cooperation in criminal matters and police cooperation which previously have been subject to a unanimity vote by the Council, without any decision making power of the European Parliament, are now subject to a qualified majority voting procedure in the Council and full co-legislative powers of the European Parliament.<sup>327</sup> This has a significant impact on the legislative process, as governments of EU member states no longer enjoy exclusive competence, rendering the process increasingly transparent by enabling the European Parliament to discuss legislative proposals in relevant committees- particularly the Committee on Civil Liberties, Justice and Home Affairs, adopt reports and comment on and amend relevant legislative proposals.

The European Commission still has a right of initiative to propose new legislative texts. However, the Lisbon Treaty also provides that a quarter of EU member states can propose new legislative acts in the area of judicial cooperation in criminal matters and police and administrative cooperation.<sup>328</sup>

It is too early to predict what possible impact these changes may have on the investigation and prosecution of crimes under international law by EU member states. The new role of the European Parliament may provide new opportunities for civil society to work with the Parliament to put the fight against impunity on the agenda of the EU’s JHA policy. The introduction of qualified majority voting at Council level, combined with the possibility of a quarter of member states to put forward legislative proposals can result over time in a more progressive approach of the EU’s JHA policy to the fight against impunity. Ideally, such an approach will reflect the EU’s external commitment to international justice as well as member states’ obligations under international law and encourage and actively support cooperation of national authorities in the investigation and prosecution of crimes under international law. Such an approach can further contribute to a JHA policy that reflects the values of the Union as enshrined in Article 1a of the Treaty, stating that “*the Union is founded on values of respect for human dignity, freedom, democracy, the rule of law and respect for human rights, including the rights of persons belonging to minorities*”.<sup>329</sup>

## IV.2 Stockholm Programme

The Stockholm Programme sets out the priorities of the EU’s JHA policy for the period 2010-2014.<sup>330</sup> These priorities include building a “*Europe of Justice*” that facilitates EU citizens’ access to justice as well as further developing cooperation between judicial authorities in criminal and civil cases. The Stockholm programme further seeks to develop

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<sup>326</sup> For an overview of the changes introduced by the Lisbon Treaty see General Secretariat of the Council of the EU- Background- The Lisbon Treaty’s impact on the Justice and Home Affairs (JHA) Council: More co-decision and new working structures, December 2009, at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/111615.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111615.pdf)

<sup>327</sup> Article 69 A of the Lisbon Treaty.

<sup>328</sup> Article 61 I of the Lisbon Treaty.

<sup>329</sup> Article 1a of the Lisbon Treaty.

<sup>330</sup> The Stockholm Programme- An open and secure Europe serving and protecting citizens, Official Journal C115, 04/05/2010 P.0001-0038, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:01:EN:HTML>.

an “*internal security strategy*” with a focus on fight against cross- border crime, including trafficking in human beings, drugs, sexual abuse, cyber-crime and economic crime.<sup>331</sup>

The Stockholm Programme also provides a framework for the European Commission’s activities within JHA over five years. The programme asserts that the Union is an area of shared values, “*values which are incompatible with the crimes of genocide, crimes against humanity and war crimes*”.<sup>332</sup> While all previous five year programmes were silent on the fight against impunity, the Stockholm Programme for the first time explicitly invites the Commission, among other EU institutions, to “*continue to support and promote Union and Member States’ activity against impunity and to fight against crimes of genocide, crimes against humanity and war crimes; in that context to promote cooperation between the Member States, third countries and the international tribunals in this field, and in particular the International Criminal Court, and develop exchange of judicial information and best practices in relation with the prosecution of such crimes, through the European Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes*”.<sup>333</sup>

The European Commission adopted an Action Plan on the implementation of the Stockholm Programme.<sup>334</sup> The Action Plan will guide the Commission’s activities aimed at “*delivering all the political objectives set out by the European Council in the Stockholm Programme*”. Specifically in relation to serious international crimes, the European Commission undertakes to publish an evaluation report in 2011 on the implementation of the Council Decision 2003/335/JHA on the “*investigation and prosecution of genocide, crimes against humanity and war crimes*”.<sup>335</sup> It will also evaluate the European network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes, a process which at the time of writing was ongoing.<sup>336</sup> Together with member states, the Commission is currently examining the impact of the Lisbon Treaty on the review process, and how that process can best lead to an expanded and improved working of the EU Network.<sup>337</sup>

While the need for more cooperation in the fight against impunity has been ignored by previous JHA framework programmes, the Stockholm Programme reflects to some extent the need for further EU commitment to international justice within its JHA policy. However, that commitment is still minimal in comparison with the support to the fight against impunity within its external policy. No institutional framework exists for instance within the European Commission’s DG Justice and Citizen Rights that explicitly includes the fight against impunity for crimes under international law and the European Commission currently does not actively promote and support member states in the fight against impunity for crimes under international law. The JHA unit within the Council Secretariat of the EU does not currently have the resources to include these issues beyond the EU Network. Relevant meetings of the JHA ministers of member states and preparatory meetings of their representatives do not usually address issues related to the

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<sup>331</sup> Ibid.

<sup>332</sup> The Stockholm Programme, Article 2.1.

<sup>333</sup> Ibid.

<sup>334</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions- Delivering an area of freedom, security and justice for Europe’s citizens- Action Plan Implementing the Stockholm Programme, 20 April 2010, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF> (last accessed December 2010).

<sup>335</sup> Ibid, p.10.

<sup>336</sup> Ibid, p.10.

<sup>337</sup> Belgian Ministry of Justice representative at FIDH and REDRESS conference, 1 December 2010, Brussels.



fight against impunity, as this is still considered to be mainly an external issue within the domain of the EU's CFSP.

### IV.3 Eurojust

Eurojust was created on 28 February 2002 by a Council decision based on Article 31 of the EU Treaty.<sup>338</sup> It is designed to “reinforce the fight against serious crime” and to stimulate and improve the coordination of investigations and prosecutions between member states. Other objectives include reinforcing cooperation between member states by facilitating the execution of international mutual legal assistance and the implementation of extradition requests to render more effective the investigations and prosecutions of member states.<sup>339</sup>

Eurojust's competence covers terrorism, drug trafficking, trafficking in human beings, counterfeiting and other serious crime, organised crime, and its work is principally in the areas of organised crime, terrorism and other cross border crime. To date, it has only rendered marginal support to member states' investigations and prosecutions of serious international crimes, for instance by hosting meetings by the European Network of Contact Points in relation to persons responsible for genocide, crimes against humanity and war crimes (“EU Network”). This may change in the future, when the permanent secretariat of the EU Network will be placed with Eurojust in The Hague. The secretariat, while functioning as a separate unit may draw on the administrative resources of Eurojust.<sup>340</sup> The future EU Network Co-ordinator will be “responsible for setting up, maintaining and improving of the Genocide Network's information and communication channels, in consultation with the relevant units within Eurojust. The Coordinator will also be responsible for supporting the EU Presidency in the organisation of meetings of the Genocide Network”.<sup>341</sup>

Furthermore, calls for the establishment of an EU Liaison Office abroad to coordinate investigations and prosecutions of carried out by EU member states may also see greater involvement of Eurojust.<sup>342</sup> At a meeting of the “Coordinating Committee in the area of police and judicial cooperation in criminal matters” (CATS or “Article 36 Committee”) on 3-4 September 2009, EU member states discussed various solutions of how best to address the presence of a large number of Rwandan genocide suspects in EU member states. Accordingly, “general interest was expressed by Member States in enhancing cooperation with Rwandan authorities (including the possibility of placing an EU liaison office in Rwanda) as well as among the relevant authorities of the Member States, inter alia by improving the exchange of information. Stress was laid on the role of Eurojust and the EU Network as [sic] contact points in respect of persons responsible for genocide, crimes against humanity and war crimes”.<sup>343</sup>

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<sup>338</sup> Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, [http://eurojust.europa.eu/official\\_documents/Eurojust\\_Decision/2009/NewEJDecision2009-EN.pdf](http://eurojust.europa.eu/official_documents/Eurojust_Decision/2009/NewEJDecision2009-EN.pdf).

<sup>339</sup> Ibid.

<sup>340</sup> Ibid, Article 25a (2).

<sup>341</sup> Eurojust, Vacancy notice of the post of: Genocide Network Secretariat Co-ordinator, Reference: 10/EJ/CA/04, Contact agent- FGIV M/F, at <http://www.eurojust.europa.eu/recruitment/vacancies/2010/10-EJ-CA-04.pdf>.

<sup>342</sup> Some Member States have raised the need for such an office in the context of investigations and prosecutions carried out in Rwanda in relation to genocide suspects residing in Member States. Accordingly, the Liaison office would be located in Kigali, and liaise between national authorities of Member States (as well as Norway and Switzerland) and the Rwandan prosecution services. A potential legal basis for the establishment of such an office, according to some Member States, could be Article 27 (a) of the amended Eurojust decision.

<sup>343</sup> Council of the European Union, Article 36 Committee, 3 and 4 September 2009, outcome of proceedings, p.7, at [http://www.milieuloket.nl/9353000/1/j4nvgs5kjg27kof\\_j9vvhurbs7rzkg9/vi8r7wsrwhzr/f=/\\_pdf](http://www.milieuloket.nl/9353000/1/j4nvgs5kjg27kof_j9vvhurbs7rzkg9/vi8r7wsrwhzr/f=/_pdf).

Some member states are opposed to the establishment of an EU Liaison office in Kigali, arguing that cooperation on a bilateral basis with Rwandan authorities is working well and that an EU Liaison office will add another layer of bureaucracy to cooperation, while not offering additional practical benefits. Other member states, particularly those without an embassy in Kigali and with only little or no experience in the investigation and prosecution of such crimes, expressed their support for the establishment of a liaison office between European authorities and the Rwandan Federal Prosecutor, as it would facilitate cooperation and coordination of investigations and prosecutions and assist in the preparation of rogatory missions to Rwanda.

It would therefore be important that reliance on the EU Liaison office will be on a purely voluntary basis, enabling member states to rely on bilateral cooperation procedures where this is preferred. However, while the details of the establishment of such an office will need to be discussed, including the number and qualification of staff, the location of the office and its precise mandate, there seem to be apparent benefits in establishing the office, given in particular that approximately 10 European countries are currently investigating crimes committed in Rwanda, and that some of these do not have any experience in the investigation and prosecution of crimes committed in Rwanda.

#### **IV.4 Council Decision 2002/494/JHA on the establishment of a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes**

The establishment and subsequent development of the EU Network represents the most significant progress made within the EU's JHA policy in relation to accountability for serious international crimes. Established by Council Decision 2002/494/JHA of 13 June 2002<sup>344</sup>, the Network aims to improve cooperation of member states in combating crimes under international law and to promote national capacity for prosecution and mutual legal assistance. The Decision requests member states to designate a contact point "*for the exchange of information concerning the investigation of genocide, crimes against humanity and war crimes*" and to "*notify the General Secretariat of the Council in writing of its contact point within the meaning of this Decision*".<sup>345</sup>

According to the FIDH and REDRESS survey, the majority of member states have implemented the Decision and appointed a contact point within their respective authorities, while Bulgaria, Greece, and Latvia have yet to do so.<sup>346</sup> Italian practitioners have participated in Network meetings in the past, as has the Italian representative to Eurojust, yet no specific contact point for crimes under international law has been nominated.<sup>347</sup> Slovakia very recently appointed a contact point within its Ministry of Justice.<sup>348</sup> Countries with experience in the investigation and prosecution of crimes under international law have nominated several contact points in different national authorities.

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<sup>344</sup> Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, Official Journal L 167, 26/06/2002, P.0001-0002, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002D0494:EN:HTML>.

<sup>345</sup> Ibid., Article 1 (1) and (2).

<sup>346</sup> Response to FIDH and REDRESS questionnaire.

<sup>347</sup> Italian Ministry of Justice response to FIDH and REDRESS questionnaire.

<sup>348</sup> Slovakia, Ministry of Justice response to FIDH and REDRESS questionnaire.

Belgium, Germany and The Netherlands for instance nominated contact points within their Ministries of Justice as well as Federal Prosecution services and/ or police services.<sup>349</sup>

Finland is currently considering appointing a prosecutor within the Prosecutor's Office in Helsinki as a contact point in addition to the already nominated police officer so as to ensure that Finland can cooperate fully with requests for assistance in the context of investigations into serious international crimes.<sup>350</sup>

The list of contact points is not public, yet practitioners have voiced concerns in the past that some countries generally designate a police body, rather than a specific person, as contact points, thereby not facilitating requests for mutual legal assistance. Furthermore, the list of contact points is not kept up to date, as member states do not always inform the Council Secretariat if a contact point changes. Some member states appear to have appointed their Eurojust representative to attend Network meetings, thereby not taking into account the specific focus of the meetings on crimes under international law.

Meetings of the Network are generally organised by the Member State holding the six month rotational Presidency of the EU, though some member states have failed to convene a meeting during the term of their presidency and the Network has met nine times since its establishment in June 2002. Future presidencies will be supported by the Network secretariat in organising a meeting of the EU Network. Furthermore, contact points concluded at the 7<sup>th</sup> meeting under the Swedish Presidency that a 'trio Presidency' develops a "*coordinated programme for 18 months*", so as to ensure continuity of the Network's work as well as more regular meetings. Accordingly, the Swedish, Spanish and Belgian presidencies worked together, convening one meeting under each presidency. At the 9<sup>th</sup> meeting, the Network encouraged the next trio Presidency- Hungary (January -June 2011); Poland (July -December 2011); Denmark (January 2012- June 2012) - to continue the efforts of the previous trio presidency and to equally develop an 18 months programme. The 10<sup>th</sup> meeting of the Network therefore is scheduled to take place under the Hungarian Presidency during the first half of 2011.<sup>351</sup>

Non-EU countries, including Canada, the United States, Switzerland and Norway have observer status with the EU Network and regularly attend Network meetings, as do representatives of NGOs, the ICTY, ICTR, the Special Court for Sierra Leone and the ICC. The Network presents a unique platform for practitioners from these countries and institutions, as well as experts from civil society, to share practical experiences, discuss best practices and how to address legal and practical challenges. Accordingly, past meetings focussed on investigations and prosecutions of suspects in relation to a specific conflict, such as the 1994 genocide in Rwanda, as well as specific challenges, such as identification and access to witnesses abroad, witness and victim protection, the international framework for international co-operation and cooperation with the ad-hoc tribunals, the ICC and NGOs.<sup>352</sup> The meetings are usually divided into an open part in which NGOs contribute to the discussions, and a closed part to enable national authorities to discuss specific cases and exchange confidential information. By bringing together practitioners, the EU Network furthermore enables informal cooperation and exchange of information outside formal Network meetings. The creation of a 'human Network' for

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<sup>349</sup> Response to FIDH and REDRESS questionnaire.

<sup>350</sup> Finnish Ministry of Justice response to FIDH and REDRESS questionnaire.

<sup>351</sup> Eurojust - Belgian Presidency Joint Press Release on "9<sup>th</sup> Genocide Network meeting", 26 October 2010, at [http://www.eurojust.europa.eu/press\\_releases/2010/26-10-2010.htm](http://www.eurojust.europa.eu/press_releases/2010/26-10-2010.htm).

<sup>352</sup> See e.g., Eurojust Press Release on 7<sup>th</sup> Meeting of the European Union Genocide Network, 22 December 2009, at [www.eurojust.europa.eu/press\\_releases/2009/22-12-2009.htm](http://www.eurojust.europa.eu/press_releases/2009/22-12-2009.htm); Eurojust - Belgian Presidency Joint Press Release on "9<sup>th</sup> Genocide Network meeting", 26 October 2010, at [www.eurojust.europa.eu/press\\_releases/2010/26-10-2010.htm](http://www.eurojust.europa.eu/press_releases/2010/26-10-2010.htm).

instance enabled Norwegian prosecutors to directly contact the Belgian contact point to enquire about information on a specific suspect, rather than going through lengthy rogatory mission procedures. Similarly, when a Rwandan genocide suspect was discovered in Finland, Finnish prosecutors, who were previously unfamiliar with the legal, practical and political complexities of such cases, participated in a meeting of the Network that focussed specifically on Rwanda, thereby providing crucial information at the outset of their investigation and prosecution.

The Network has developed from a paper body to a real tool of practical relevance to prosecutors, police investigators and ministries of justice alike. The real benefits are underscored by an increasing number of participants to its meetings, while the establishment of its own secretariat has further increased the Network's potential. The revision of the Council Decision in the context of the Stockholm Programme has been appreciated by Contact Points at the 9<sup>th</sup> meeting of the Network. Contact Points recommended that a review should consider introducing provisions on regular, biannual meetings of the EU Network, the possibility of ad hoc meetings on specific matters, as well as the role of the secretariat of the Network<sup>353</sup> and an expansion of the Network's mandate so as for the Network to discuss accountability of natural and/ or legal persons suspected of having committed serious international crimes, irrespective of their nationality.<sup>354</sup>

The conclusions of the EU Network frequently request member states as well as EU institutions to support practitioners in the investigation and prosecution of crimes under international law. However, especially due to the absence of an institutional framework to address these issues on an EU (and, indeed, often also on a national) level, Network conclusions are usually simply reported to relevant JHA Council meetings and most often are not implemented. This is particularly true for instance in relation to training of contact points. The new Secretariat should take a leading role in addressing the issue of non- implementation and follow up on conclusions, report conclusions at relevant Council working group meetings and ensure distribution of conclusions to the Ministries of Justice of EU member states.

## IV.5 Council Decision on the investigation and prosecution of serious international crimes

On 8 May 2003, the Council adopted a decision "*on the investigation and prosecution of genocide, crimes against humanity and war crimes*".<sup>355</sup> The decision reinforces the establishment of the EU Network and aims to increase cooperation among national authorities in the investigation and prosecution of such crimes. It underlines that the "*investigation and prosecution of, and exchange of information on, genocide, crimes against humanity and war crimes is to remain the responsibility of national authorities, except as affected by international law*". The Decision then identifies steps that member states are encouraged to take in order to ensure that they are not providing a safe haven to suspects of serious international crimes, given that "*Member States are being confronted on a regular basis with persons who were involved in such crimes and who are*

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<sup>353</sup> On the role of the secretariat, see also joint letter by Amnesty International, REDRESS, CICC, Human Rights Watch and FIDH to Contact Points, "Upcoming meeting of the EU Network of contact points on Genocide, Crimes against Humanity and War Crimes", 27 November 2009.

<sup>354</sup> Conclusions of the 9<sup>th</sup> meeting of the European Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes, 14-15 October 2010, The Hague; copy on file with the authors.

<sup>355</sup> Council Decision 2003/335/JHA, 8 May 2003, on the investigation and prosecution of genocide, crimes against humanity and war crimes, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:118:0012:0014:EN:PDF>.

*trying to enter and reside in the European Union*". These steps include close cooperation between national law enforcement authorities and immigration authorities where necessary, ensuring that both authorities have "*appropriate resources and structures*" to facilitate such cooperation, as well as the setting up of "*specialised units within the competent enforcement authorities with particular responsibility for investigating and, as appropriate, prosecuting the crimes in question*".<sup>356</sup>

While the Decision is binding and obliges member states to implement the Decision by 8 May 2005, it is almost free of obligations on member states. Accordingly, implementation by member states has been varied: while 15 member states have responded that they have implemented the decision, Greece is in the process of doing so and France has not implemented the decision yet. However, even where member states have responded that they implemented the Decision, often not all recommended steps have actually been taken. For instance, only 6 member states<sup>357</sup> have indeed established a specialised unit within their respective law enforcement authorities as recommended in Article 4.<sup>358</sup> Only five member states - Belgium, The Netherlands, United Kingdom, Sweden, and Denmark - appear to have ensured that immigration authorities have the appropriate resources, and specific cooperation procedures between immigration and law enforcement authorities to support investigations are in place in only seven member states.

The original draft decision proposed by the Danish government included two important obligations in this respect: (1) the obligation to investigate and prosecute, and (2) the obligation to provide resources. A review of the implementation of the Decision, as foreseen in the Commission's Action Plan, should therefore take into account the experiences made by national authorities to date, and provide more specific definitions of, for instance, what constitutes a specialised unit, set out in detail cooperation procedures between immigration authorities and law enforcement authorities, and also, at a minimum, oblige member states to investigate and, where appropriate, prosecute crimes under international law in accordance with their obligations under international law.

## **V. The practicalities of identifying, investigating and prosecuting individuals suspected of serious international crimes**

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

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<sup>356</sup> Ibid, Article 4.

<sup>357</sup> Norway has also established a specialized war crimes unit.

<sup>358</sup> These are Denmark, Sweden, Belgium, The Netherlands, France and Germany.

Over the past decade, European police and prosecution authorities carried out a considerable number of investigations and, to a lesser extent, prosecutions of serious international crimes. The Danish Special International Crimes Office (SICO), for instance carried out 224 investigations since its establishment in 2002, in relation to crimes committed in more than 30 countries, primarily in the former Yugoslavia, the Middle East, Afghanistan and Rwanda.<sup>359</sup> SICO secured the conviction of a Ugandan national for armed robbery and abduction in 2004.<sup>360</sup> In Germany, the war crimes unit established in the 1990s investigated against 177 suspects in relation to crimes committed in the former Yugoslavia, leading to the conviction of four perpetrators for war crimes and/ or genocide. The restructuring and expansion of the ZBKV to seven investigators working full time on cases of crimes under international law in April 2009 led to the prosecution of a suspect accused of involvement in genocide in Rwanda and of two suspects accused of crimes against humanity allegedly committed in Eastern Congo.<sup>361</sup>

In The Netherlands, five suspects were convicted for war crimes, torture and crimes against humanity committed in the former Zaire, in Rwanda, Afghanistan and Iraq.<sup>362</sup> All convictions were preceded by lengthy investigations, often taking several years and involving frequent travel to the relevant territorial states. Following the establishment of a specialised unit in Norway, a Bosnian national was convicted by a Norwegian court for war crimes committed during the war in the former Yugoslavia<sup>363</sup> and further investigations by the specialised units are currently ongoing against suspects from Rwanda as well as the former Yugoslavia.<sup>364</sup> Similarly, it was due to investigations carried out by the Belgian specialised unit within the national police that to date seven perpetrators were convicted by Belgian courts for their involvement in the 1994 genocide.<sup>365</sup>

Approximately 18 complaints regarding Rwandan genocide suspects living in France are currently pending before French investigative judges. Some of these cases have been pending for as long as 15 years, yet due to a lack of resources, hardly any progress has been made in any of the cases.<sup>366</sup> Private parties relying on French legislation providing for victims and third parties to bring complaints were behind the only two prosecutions of crimes under international law in France to date, effectively taking over the role of prosecutors.<sup>367</sup> The same is true for Spain, where private parties submitted a complaint to

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<sup>359</sup> Website of SICO (as of 30 September 2010), at <http://www.sico.ankl.dk/page34.aspx>.

<sup>360</sup> Due to the absence of implementing legislation in Denmark, SICO investigates and prosecutes all complaints on the basis of ordinary crimes as defined in the Danish Penal Code; see [www.sico.ankl.dk/page34.aspx](http://www.sico.ankl.dk/page34.aspx).

<sup>361</sup> All three prosecutions were ongoing at the time of writing.

<sup>362</sup> See FIDH & REDRESS, "Developments in the field of international criminal justice – August 2007-July 2008", available at [www.fidh.org/IMG/pdf/UJ\\_developments\\_Aug07-July08.pdf](http://www.fidh.org/IMG/pdf/UJ_developments_Aug07-July08.pdf).

<sup>363</sup> Judgment of the Oslo District Court, 2 December 2008, Case No 08-018985MED-OTIR/08, English translation at [www.haguejusticeportal.net/Docs/NLP/Norway/Repak-Mirsad\\_Verdict\\_EN\\_2-12-2008.pdf](http://www.haguejusticeportal.net/Docs/NLP/Norway/Repak-Mirsad_Verdict_EN_2-12-2008.pdf); Repak's conviction was overturned by Norway's Supreme Court on 3 December 2010 as the Court held that the relevant legislation relied upon for his conviction could not be applied retroactively, see The Telegraph, "Norway court cancels Bosnian's war crimes sentence", at [www.telegraph.co.uk/news/worldnews/europe/bosnia/8179811/Norway-court-cancels-Bosnians-war-crimes-sentence.html](http://www.telegraph.co.uk/news/worldnews/europe/bosnia/8179811/Norway-court-cancels-Bosnians-war-crimes-sentence.html).

<sup>364</sup> See Human Rights Watch, "Universal Jurisdiction in Europe – The State of the Art," July 2006.

<sup>365</sup> Judgment of the Oslo District Court, 2 December 2008, Case No 08-018985MED-OTIR/08.

<sup>366</sup> See website of the "Collectif des Parties Civiles pour le Rwanda" for an overview of Rwandan cases currently pending before French investigative judges, at [www.collectifpartiescivilesrwanda.fr/affairesjudiciaire.html](http://www.collectifpartiescivilesrwanda.fr/affairesjudiciaire.html); the European Court of Human Rights in 2004 in the case of Wenceslas Munyeshyaka ruled that France violated the rights of one of the victims to be heard promptly and her right to compensation, at [www.haguejusticeportal.net/Docs/NLP/France/Munyeshyaka\\_CEDH\\_judgement\\_8-9-2004.pdf](http://www.haguejusticeportal.net/Docs/NLP/France/Munyeshyaka_CEDH_judgement_8-9-2004.pdf).

<sup>367</sup> See the case of Ely Ould Dah, convicted by a French court in July 2005 to ten years imprisonment for torture committed in Mauritania, at [www.fidh.org/Ely-Ould-Dah-convicted-after-six-years-of](http://www.fidh.org/Ely-Ould-Dah-convicted-after-six-years-of); and the case of Khaled Ben Saïd, convicted by a French court in September 2010 to twelve years imprisonment for having given instructions to commit acts of torture in Tunisia, at [www.fidh.org/Conviction-of-Khaled-Ben-Said-A-victory-against](http://www.fidh.org/Conviction-of-Khaled-Ben-Said-A-victory-against).

the investigative judge, leading to the prosecution and conviction of Adolfo Scilingo for crimes against humanity in 2005.<sup>368</sup> More than 10 cases of crimes under international law are currently pending before Spanish judges,<sup>369</sup> though hardly any progress has been made by investigative judges over the past five years due to a lack of resources. None of the pending cases have led to a prosecution of the suspect.<sup>370</sup>

Ad hoc arrangements in the United Kingdom and in Finland led to the conviction of an Afghan warlord<sup>371</sup> and a Rwandan ‘génocidaire’ in 2005 and 2010 respectively. As no dedicated war crimes team exists in either country, resources were made available specifically for these cases. In the United Kingdom, two investigators working on crimes under international law as well as terrorism related crimes selected a team of investigators from the Counter-Terrorism Branch and coordinated their investigation in the United Kingdom as well as in Afghanistan.<sup>372</sup> Resources made available to the Finnish police and prosecution authorities allowed the investigation and prosecution of Francois Bazaramba over a period of three years. During the trial, which lasted from June 2009 to April 2010, the court heard 68 witnesses from the United States, Canada, Belgium, Switzerland, Kenya, Germany, Holland, Zambia, Rwanda and Tanzania.<sup>373</sup> Similarly, ad hoc arrangements led to the conviction of Fulgence Niyonteze by a Swiss court in 2001 for war crimes committed in Rwanda during the 1994 genocide.<sup>374</sup>

## V.1 The Governmental Body Leading the Investigation

The practice of member states varies as to which body leads investigations related to crimes under international law - whether prosecutors, police, investigative judiciary or magistrates.

In ten states who responded on this issue, the police, or a specialised agency or unit of the police, leads the investigation. These states include Austria,<sup>375</sup> Belgium,<sup>376</sup> Cyprus,<sup>377</sup> Estonia,<sup>378</sup> Finland,<sup>379</sup> Greece,<sup>380</sup> Hungary,<sup>381</sup> Ireland,<sup>382</sup> Portugal,<sup>383</sup> and the UK.<sup>384</sup> In a

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<sup>368</sup> National Court, Criminal Chamber, 19 April 2005, judgment available in Spanish at [www.derechos.org/nizkor/espana/juicial/doc/sentencia.html](http://www.derechos.org/nizkor/espana/juicial/doc/sentencia.html).

<sup>369</sup> For further information on cases currently pending in Spain, see FIDH & REDRESS, “EU Update on Serious International Crimes”, Issue 8, Winter 2010, at [www.fidh.org/IMG/pdf/EU\\_Newsletter\\_Nov\\_2010.pdf](http://www.fidh.org/IMG/pdf/EU_Newsletter_Nov_2010.pdf).

<sup>370</sup> Ibid.

<sup>371</sup> *R v Zardad*, High Court Judgment of 19 July 2005; an appeal was dismissed on 7 February 2007.

<sup>372</sup> Human Rights Watch, “Universal Jurisdiction in Europe- The State of the Art, p. 97.

<sup>373</sup> See Press Release of the District Court of ITÄ- UUSIMAA, 11 June 2010, “Judgment in a criminal case of genocide, Prosecutor v Francois Bazaramba (R 09/404).

<sup>374</sup> Cour militaire de cassation: arrêt, 27 April 2001, at [www.haguejusticeportal.net/eCache/DEF/6/667.html](http://www.haguejusticeportal.net/eCache/DEF/6/667.html).

<sup>375</sup> Austrian Federal Ministry of the Interior’s Criminal Investigation Service and Federal Agency for State Protection and Counter Terrorism.

<sup>376</sup> Federal Judicial Police.

<sup>377</sup> Criminal Investigations Department - Department C of the Police Headquarters.

<sup>378</sup> Security Police Board for crimes against humanity and genocide and the Military Police for war crimes.

<sup>379</sup> National Bureau of Investigation - a national police unit.

<sup>380</sup> Preliminary investigations may be carried out by investigative officers, including officers of the Hellenic Police Force, upon written order of the public prosecutor or as provided by law without the prosecutor’s order (who is afterwards informed and conducts the criminal prosecution). Specialised agencies (for example in relation to organised crime) may be involved in investigating cases of serious international crime.

<sup>381</sup> National Bureau of Investigation.

number of other states, investigations are conducted by the police, under the direction and supervision of prosecutors. These states include Germany, Latvia,<sup>385</sup> Lithuania,<sup>386</sup> Luxembourg,<sup>387</sup> Netherlands,<sup>388</sup> Romania,<sup>389</sup> Slovakia,<sup>390</sup> Slovenia,<sup>391</sup> Sweden,<sup>392</sup> and Switzerland.<sup>393</sup>

Denmark has a Special International Crimes Office (SICO), which is in charge of investigations of serious crimes committed abroad by Danish citizens and residents. The office is staffed by prosecutors, investigators, analysts and clerical staff.<sup>394</sup> In Bulgaria, for international crimes and other complex crimes, an investigating magistrate will lead the investigation, under the guidance and supervision of the public prosecutor.<sup>395</sup> In France, judicial police officers carry out preliminary inquiries either on the instructions of the district prosecutor, or on their own initiative. Once proceedings are initiated, the prosecutor seizes an investigating judge with the investigation. In Switzerland investigations in relation to war crimes are carried out by military judiciary.

## V.2 Cooperation between Police, Prosecution Service and Immigration Authorities

The majority of cases involving international crimes that have proceeded to the investigative stage in Belgium, Denmark, The Netherlands, Sweden, Germany, France and the United Kingdom involved victims and suspects who entered the country as asylum or visa applicants.

Immigration authorities, often the first to interview applicants, are in a unique position to obtain relevant information concerning crimes under international law and are a key link in notifying investigative authorities about a potential case. Some countries have set up

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<sup>382</sup> The Irish police would receive the complaint of international crimes and would then investigate in the usual way, submitting a file to the Director of Public Prosecutions if their investigations uncover an offence for which Ireland has jurisdiction.

<sup>383</sup> Criminal Investigation Police.

<sup>384</sup> In England and Wales the police investigate criminal allegations and pass a file of evidence to the Crown Prosecution Service (CPS) for review. The reviewing crown prosecutor will then decide whether a prosecution can go ahead.

<sup>385</sup> Security Police and the Prosecutor General.

<sup>386</sup> The Lithuanian Criminal Police Bureau, a specialised police agency, conducts the investigation; all pre-trial investigation is controlled by the prosecutor's office.

<sup>387</sup> Judicial Police Service under the aegis of the public prosecutor.

<sup>388</sup> National War Crimes Team of the Dutch National Crimes Squad conducts the investigations, although the public prosecutor of the National Public Prosecutor's Office is in charge of all criminal investigations concerning international crimes.

<sup>389</sup> The Public Ministry, which is an independent body in relation to other authorities, is in charge of criminal prosecution, supervising criminal investigations carried out by the police and filing claims in criminal cases.

<sup>390</sup> The investigation of all crimes is carried out by the police force under the aegis of the Public Prosecution Service (penal law department and international department).

<sup>391</sup> The Criminal Police Directorate, which has a special working group joining criminal police officers from all regions. The Office of the Prosecutor directs the investigation of these crimes in the same way that it directs all other criminal investigations.

<sup>392</sup> The Prosecution Authorities - International Chamber - who delegate and supervise the work of the National Criminal Police or the local police authorities.

<sup>393</sup> Investigations with regard to genocide are carried out by the Federal Judicial Police under the auspices of the Federal Prosecutor.

<sup>394</sup> Website of SICO at <http://www.sico.ankl.dk/page22.aspx>

<sup>395</sup> CCP, Article 194(I)(1).



specialised units within immigration departments that apply a set of specific procedures for reviewing visa and asylum applications. In the Netherlands, these procedures include interviewing applicants about their previous employment which might disclose a potential involvement in international crimes.<sup>396</sup> This cooperation led to the investigation, and in 2005 to the prosecution and conviction, of two Afghan nationals, after immigration authorities had enquired about their previous employment in the Afghan army.<sup>397</sup> Further, if the immigration service invokes Article 1F of the UN Refugee Convention to deny an alien a refugee status on the grounds of involvement in serious crimes, this decision is shared with the National Public Prosecutor's Office.<sup>398</sup> A leaflet distributed by Dutch immigration authorities similarly informs asylum seekers in 13 languages about the Dutch war crimes unit.<sup>399</sup>

In Denmark applicants are screened against a list of suspects issued by international tribunals or Interpol. In September 2006, this led to the arrest of a Rwandan genocide suspect in Denmark.<sup>400</sup> Danish authorities, in collaboration with the Red Cross, distribute leaflets that inform asylum seekers in seven languages about the existence and contact details of a police unit that is specialised in international crimes.<sup>401</sup>

In Finland and Sweden, immigration authorities are bound by an agreement to inform police if they receive information from any person indicating involvement in war crimes. The police then contact the prosecution services who decide on further action. The specialised war crimes unit within the Swedish National Criminal Police received over 35 reports on suspected war criminals from the national migration authority.<sup>402</sup> Similarly in Switzerland, the immigration and courts are required by law to report any significant information in this regard to the judiciary.<sup>403</sup>

Cyprus reported that its Aliens and Immigration Unit, within the Police authorities, cooperates with the Migration Department and the Ministry of the Interior. The Unit is responsible for the “*stop-list/alert list*” (national database of individuals sanctioned for or suspected of crimes under international law according to resolutions or European/International Arrest Warrants).

In the United Kingdom, the UK Border Agency has a specialised office to handle allegations of international crimes committed by visa applicants and asylum seekers. The establishment of the office in 2005 was preceded by the arrival of at least four Rwandan

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<sup>396</sup> Email correspondence with Dutch official, 13 December 2010; on the specialised unit within the Dutch National Police and the prosecution services, see below.

<sup>397</sup> The Hague Court of Appeal described the immigration procedure at length in the appeal judgement against Heshamuddin Hesam and Habibullah Jalalzoy, 29 January 2007, available online at [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AZ9366&u\\_ljn=AZ9366](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AZ9366&u_ljn=AZ9366) (Hesam) and [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AZ9365&u\\_ljn=AZ9365](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AZ9365&u_ljn=AZ9365) (Jalalzoy).

<sup>398</sup> Email correspondence with Dutch official, 13 December 2010; on the specialised unit within the Dutch National Police and the prosecution services, see below.

<sup>399</sup> See [www.ind.nl/en/Images/KLPD%20Folder%20Oorlogsmisdaden%2013%20talen\\_tcm6-183962.pdf](http://www.ind.nl/en/Images/KLPD%20Folder%20Oorlogsmisdaden%2013%20talen_tcm6-183962.pdf).

<sup>400</sup> Denmark arrests Suspect in Rwanda genocide, 8 September 2006, online at <http://www.genocidewatch.org/RwandaDenmarkArrestsSuspectInRwandaGenocide8Sept2006.htm>.

<sup>401</sup> The leaflet is available online, Special International Crimes Office, <http://www.sico.ankl.dk/ref.aspx?id=641>.

<sup>402</sup> Amnesty International, “Sweden: End impunity through universal jurisdiction: No safe haven series No. 1” <http://www.amnesty.org/en/library/asset/EUR42/001/2009/en/35c14013-eeec8-11dd-b1bd-6368f1b61c3f/eur420012009en.pdf>, January 2009, p. 82 “Special Police or Prosecutor Unit”.

<sup>403</sup> The new provision came into force in January 2008; see TRIAL, ‘Une police pour les crimes de guerre : en Suisse aussi ?’, 23 February 2007, at [http://www.trial-ch.org/fr/actions/details/article/une-police-pour-les-crimes-de-guerre-en-suisse-aussi.html?tx\\_ttnews%5BbackPid%5D=6&cHash=5f016ff018](http://www.trial-ch.org/fr/actions/details/article/une-police-pour-les-crimes-de-guerre-en-suisse-aussi.html?tx_ttnews%5BbackPid%5D=6&cHash=5f016ff018) (in French).

genocide suspects who had obtained asylum in the UK in the late 1990s.<sup>404</sup> From its establishment until February 2010, the War Crimes Unit had screened 3,490 case files, had recommended refusal or exclusion from the Refugee Convention in 513 cases, and had referred 51 cases to the police.<sup>405</sup>

Other countries that have defined cooperation between investigation units and immigration authorities include Norway and Belgium<sup>406</sup>.

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

However, not all member states have clear procedures established to enable cooperation. It was noted during the research that responses from many of the EU member states surveyed on this issue reported that there was cooperation, without elaborating on how this is done. Some states noted that there is cooperation 'where required'<sup>407</sup> or 'if suspicion exists'<sup>408</sup>, suggesting that the cooperation is not seen as necessary in most cases, and is reactive to requests in respect of particular suspects, rather than proactive in identifying suspects. Four countries reported that they did not have a cooperation arrangement in place,<sup>409</sup> and three of these countries (Hungary, Slovakia and Slovenia) referred to the fact that not many refugees or asylum seekers come to these countries, other than in 'transit' to their final destination, so it was not necessary for the prosecution and police to become involved.

Research suggests that this is an area in which more should be done in those states without clear procedures for cooperation, even where it appears that there are not currently large numbers of relevant immigration, asylum or visa applications. First, without specific procedures in place, it will always be difficult, if not impossible, for a government to estimate how many suspects might actually be on its territory. Second, even if only present in a country in transit to another country, a state has an obligation to investigate and prosecute or extradite a person because of that presence. Third, it is not unreasonable to expect that the geographical distribution of asylum seekers, immigrants and visa applicants will extend across the EU in coming years, leading to an even more pressing need for cooperation on these issues between the relevant agencies.

### **V.3 The Establishment of Specialised Units to Investigate and Prosecute Serious Crimes Under International Law**

The detection, investigation and prosecution of suspects of these crimes requires special knowledge, skills and a long term commitment. Witnesses are most often located in the

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<sup>404</sup> BBC News, 'Rwanda accused freedom bid fails', 13 March 2007, available online at [http://news.bbc.co.uk/2/hi/uk\\_news/6447893.stm](http://news.bbc.co.uk/2/hi/uk_news/6447893.stm).

<sup>405</sup> This could be in relation to refusal of citizenship, of leave to enter/remain, or exclusion from the Refugee Convention. See Home Department Written Answers and Statements, Hansard, HC Deb, 24 March 2010, c351W.

<sup>406</sup> The cooperation between immigration authorities and the police is done through federal prosecution authorities, which can request and receive information from the Office of the Commissioner General for Refugees and Stateless persons.

<sup>407</sup> Response to questionnaire from Germany.

<sup>408</sup> Response to the questionnaire from Austria.

<sup>409</sup> Luxembourg, Hungary, Slovakia and Slovenia.

territorial state; victims are often traumatised and may require specific counselling. The crimes are not normally reported to the local police station like ordinary crimes. Even though victims and NGOs may bring the cases to the attention of relevant authorities, there is ample opportunity for suspects to fall through the cracks.

In line with Council Decision 2003/335 JHA, six countries - Denmark, Belgium, The Netherlands, France, Germany and Sweden- had established specialised units within their police and/or prosecution services, composed of staff working full time on cases involving crimes under international law. The Netherlands is the only country that also tasked a special investigative judge to work exclusively on such cases.<sup>410</sup> These units carried out investigations into crimes under international law committed worldwide, including in Afghanistan, Rwanda, Uganda, Democratic Republic of Congo, Chad, Iraq, Liberia, Sierra Leone, Sri Lanka as well as countries of the former Yugoslavia.

The specialised units established within police and/or prosecution services differ in mandate and composition. The Danish SICO for instance brings together both, investigators and prosecutors, thereby combining investigative and legal expertise. Its mandate is specifically focused on serious crimes committed abroad and as such covers a wide range of crimes, including genocide, crimes against humanity, war crimes, torture, rape, homicide as well as acts of terrorism.<sup>411</sup> SICO has a staff of 17, including a State Prosecutor, a deputy state prosecutor, a chief superintendent, as well as analysts, investigators and administrators.<sup>412</sup>

Police and prosecution services are separated in most other countries with specialised units. In Belgium, the Federal Prosecution Service enjoys exclusive competence over crimes under international law and one senior prosecutor guides investigations carried out by a special investigative team within the “judicial police” in Brussels. While no specific budget is allocated to the police for cases of crimes under international law, there are five police investigators working on these types of cases on a permanent basis.<sup>413</sup>

The Dutch International Crimes Unit (“*Team Internationale Misdrijven*”, TIM) within the Dutch National Crimes Squad includes 30 experienced investigators. The unit also employs an expert of African Studies, a jurist and two experts of international relations and public administration respectively. Further experts are employed on a case by case basis in relation to specific countries, such as Afghanistan, Rwanda and Iraq.<sup>414</sup> The Unit is complemented by a team of prosecutors located within the National Public Prosecutor’s office in Rotterdam, where four prosecutors are in charge of all criminal investigations and prosecutions of serious international crimes.<sup>415</sup> Trials of crimes under international law are centralised in The Hague District and Appeals court, where a specialised investigative judge is leading probes into serious international crimes. Similarly, in Belgium, crimes under international law are always referred to the same investigative judges within the Brussels district, thereby ensuring consistent practice and building expertise and experience.

As in Belgium and the Netherlands, the exclusive competence of the investigation and prosecution of crimes under international law in Germany lies with the Federal

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<sup>410</sup> Norway, as a non- EU Member States, also established a specialized unit within its police and prosecution authorities.

<sup>411</sup> The Special International Crimes Office (SICO) Annual Report 2009, Summary in English, p.1.

<sup>412</sup> See website of SICO, at <http://www.sico.ankl.dk/page27.aspx>.

<sup>413</sup> Belgian Ministry of Justice, response to FIDH and REDRESS Questionnaire, copy on file with the authors.

<sup>414</sup> E-mail correspondence with Dutch official, 8 December 2010.

<sup>415</sup> Dutch National Crimes Squad, response to FIDH and REDRESS questionnaire, on file with the authors.

Prosecution Service.<sup>416</sup> A team of two prosecutors supervises investigations into these crimes, which are carried out by the “*Central Unit for the Fight against War Crimes and further offences pursuant to the Code of Crimes Against International Law*” (ZBKV). Further prosecutors will be selected from the Federal Prosecution Service on a case by case basis. At the time of writing, an additional four prosecutors were working on serious international crimes.<sup>417</sup> The ZBKV, located within the Federal Crimes Office, currently employs seven investigators and analysts working exclusively on serious international crimes.<sup>418</sup>

In Sweden, a war crimes unit with eight police investigators, one analyst and one administrator was established in March 2008. It is complemented by four prosecutors within the International Public Prosecution Office in Stockholm.<sup>419</sup> Both units have nationwide jurisdiction and their activities and performance will be reviewed in March 2011.<sup>420</sup>

In France a specialised unit was established in September 2010, with three investigators working full time on the investigation of crimes under international law within the *Section de Recherches* of the Paris Gendarmerie. The unit can rely on a staff of 70 from the *Section de Recherches* if cases require more resources.<sup>421</sup>

## V.4 Training of investigators, prosecutors, judges

Most staff of specialised units benefit from specific training courses designed to master evidentiary as well as the key legal challenges that may arise. Staff of the German<sup>422</sup> and Dutch units<sup>423</sup> for instance participated in courses offered by the Institute for International Criminal Investigation (IICI),<sup>424</sup> in addition to training organised by Interpol.<sup>425</sup> Staff of the Dutch unit also participated in trainings of the “*Justice Rapid Response*” mechanism.<sup>426</sup> The Danish, Norwegian and Swedish units organised several joint training sessions on issues such as open source research, the use of specific research software products, the gathering of evidence as well as collection of information on specific countries.<sup>427</sup> British prosecutors, though not working full time on such crimes, received in-house training from a British judge who served at the ICTY as well as lawyers working abroad on international humanitarian law issues.<sup>428</sup>

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<sup>416</sup> Paragraph 120 (1) Nr. 8 Gerichtsverfassungsgesetz together with paragraph 142a (1) Gerichtsverfassungsgesetz.

<sup>417</sup> Email correspondence with German official, 30 November 2010.

<sup>418</sup> Ibid.

<sup>419</sup> Email correspondence with Swedish official, 14 December 2010.

<sup>420</sup> FIDH & REDRESS interview with Ingemar Isaksson, Detective Superintendent of the Swedish National Criminal Police War Crimes Unit, in “EU Update on Serious International Crimes”, Issue 4, Summer 2008.

<sup>421</sup> Information provided by French official to FIDH & REDRESS, November 2010.

<sup>422</sup> German Ministry of Justice, response to FIDH and REDRESS Questionnaire, copy on file with the authors.

<sup>423</sup> Dutch Police, response to FIDH and REDRESS Questionnaire, copy on file with the authors.

<sup>424</sup> Institute for International Criminal Investigation (IICI), at <http://www.iici.info/pages/index.php>.

<sup>425</sup> See: [www.interpol.int/Public/CrimesAgainstHumanity/default.asp](http://www.interpol.int/Public/CrimesAgainstHumanity/default.asp).

<sup>426</sup> Dutch Police, response to FIDH and REDRESS questionnaire, copy on file with the authors; further information on the Justice Rapid Response Mechanism available here: <http://www.justicerapidresponse.org/>

<sup>427</sup> Danish Special International Crimes Office, Annual Report 2009, English Summary, at [http://www.sico.ankl.dk/media/SICO\\_2009\\_-\\_Summary\\_in\\_English.pdf](http://www.sico.ankl.dk/media/SICO_2009_-_Summary_in_English.pdf).

<sup>428</sup> Crown Prosecution Service, response to FIDH & REDRESS questionnaire, copy on file with the authors

## VI. Legislation and Practice of the States Surveyed

### **Austria**

#### Overview

Austria has not criminalised crimes under international law, other than genocide,<sup>429</sup> under its domestic law. However, the Constitution provides that, “*the generally recognized rules of international law are regarded as integral parts of Federal law.*”<sup>430</sup> The Government also views the Torture Convention as being directly enforceable under Austrian law.<sup>431</sup>

The Ministry of Justice is considering an amendment to the Austrian Penal Code to include all crimes under the Rome Statute, but although this was scheduled by the Austrian government in 2008, no concrete steps have yet been taken.<sup>432</sup>

The Criminal Code provides for universal jurisdiction for certain criminal offences under Austrian law,<sup>433</sup> regardless of the law of the place where the acts were committed. Included in the list of crimes, is a mention of crimes which Austria is *bound to prosecute* even if they had been committed abroad.<sup>434</sup> This phrase could apply to several crimes under international law, such as grave breaches of the 1949 Geneva Conventions and torture under the Torture Convention. The Government has in fact asserted that this provision “*is the legal basis for the fulfilment of the obligations established by article 5 of the [Torture] Convention*”.<sup>435</sup>

Additionally, Austrian courts are able to exercise universal jurisdiction over other crimes under Austrian law, as long as the act is also punishable in the place where it was committed. If the suspect is a foreign national upon the commencement of the criminal procedure, Austrian courts would only have jurisdiction if certain criteria can be satisfied: 1) the suspect must be found on Austrian territory; and 2) he or she cannot be extradited “*for reasons other than the type or nature of the act.*”<sup>436</sup> This provision could, and has been, applied to offences such as genocide, which is a crime under Austrian law.<sup>437</sup>

Passive personality jurisdiction is available for all crimes where an Austrian has committed the crime against another Austrian if both of them have their domicile or general residence in Austria.<sup>438</sup> Active personality jurisdiction is available for certain terrorist offences,<sup>439</sup> and all crimes that are also punishable in the state of commission.<sup>440</sup>

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<sup>429</sup> CC, Article 321.

<sup>430</sup> Constitution, Article 9(1).

<sup>431</sup> Austria’s initial State party report to the Committee against Torture (CAT/C/5/Add.10), paragraph 7ff.

<sup>432</sup> See the summary produced by the Coalition for the International Criminal Court, at <http://www.iccnw.org/?mod=country&iiduct=10>.

<sup>433</sup> CC, Article 64 - These include offences against the state, hijacking and air piracy, espionage and terrorism, extortive abduction, and the sexual abuse of minors, among others.

<sup>434</sup> CC, Article 64(6).

<sup>435</sup> Austria’s initial State party report to the Committee against Torture (CAT/C/5/Add.10), paragraph 24.

<sup>436</sup> CC, Article 65(1)(2). (Translation found on the website of the International Committee of the Red Cross at <http://www.icrc.org/ihl-nat.nsf/0/e1cb1944e1871a23c1256ab20031fc2c?OpenDocument>.)

<sup>437</sup> CC, Article 321. The Supreme Court (*Oberster Gerichtshof*) has recognised Austrian jurisdiction under Article 65(1)(2) over a genocide case that was based on universal jurisdiction. (Judgment of the Supreme Court, 15Os99/94, 13 July 1994, as found in REDRESS, “Universal Jurisdiction in Europe: Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide,” 30 June 1999, pp. 16-17; available at <http://www.redress.org/downloads/publications/UJEurope.pdf> (last accessed December 2010)).

<sup>438</sup> CC, Article 64(7).

<sup>439</sup> CC, Article 64(9) and (10).

## Issues

**Nexus requirements (including presence or residence):** Offences which Austria is under an obligation to prosecute do not require presence in the jurisdiction (for example grave breaches of the Geneva Conventions). However, other international obligations to prosecute may be conditioned on the presence of the accused. Alternatively, to engage universal jurisdiction over a foreign national for crimes under international law under Article 65(1)(ii), presence is required.

Presence during the criminal trial is required except if the alleged offence carries a prison sentence of no more than three years and the defendant was summoned to appear by a court and already underwent a court interrogation. In such circumstances, the trial could proceed even if the defendant fails to appear.<sup>441</sup>

**Double criminality:** A double criminality requirement exists under Article 65, but only for crimes other than those specified in Article 64. It is therefore not applicable to any crimes which Austria is bound to prosecute.<sup>442</sup>

**Subsidiarity:** Austrian courts have held that Austria should only prosecute crimes committed abroad when the territorial state does not.<sup>443</sup>

**Prosecutorial and Executive discretion:** Under Austrian law the prosecutor must do everything necessary to bring about the conviction of an offender whenever the prosecutor has received information of a criminal offence. The prosecutor may not dismiss the charges “*simply because he or she regards the case as unimportant or because the offender does not seem to merit punishment*”.<sup>444</sup>

However, an important exception to this principle applies in relation to crimes committed abroad.<sup>445</sup>

**Statutes of limitation:** Article 57 of the Criminal Code establishes statutes of limitation of between 1-20 years for the prosecution of all offences under Austrian law except those punishable by life imprisonment.

**Immunities:** Given that the Constitution provides that, “*the generally recognized rules of international law are regarded as integral parts of Federal law*”,<sup>446</sup> immunities, insofar as they are recognised by the general rules of international law, may apply.

**Victims’ role in proceedings:** Austrian legislation authorises civil party prosecutions by victims and third parties acting on their behalf and enables them to raise civil claims initiated by a prosecutor or an investigative judge. They are entitled to legal aid for civil party prosecutions and/or for bringing claims for compensation or other forms of reparation. Section 67 of the Austrian Criminal Procedure Code provides that a victim may become a private participant (Privatbeteiligter) to the criminal proceedings by declaration in order to request compensation for the damages sustained or the infringement of rights. The declaration must specify the claims and can be filed at the police or at the

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<sup>440</sup> CC, Article 65(1)(i).

<sup>441</sup> CCP (*Strafprozeßordnung (StPO)*), Article 427, in conjunction with Criminal Code, Article 17.

<sup>442</sup> CC, Article 64(6).

<sup>443</sup> See Bibas, Stephanos and William W. Burke-White, ‘International Idealism Meets Domestic-Criminal-Procedure Realism’, 12 February 2009, p. 19; available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1277&context=upenn\\_wps](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1277&context=upenn_wps) (last accessed December 2010), citing Oberster Gerichtshof [OGH] [Supreme Court] July 13, 1994, No. 150s99/94, affirmed; Landesgericht Salzburg [LG Salzburg] [trial court] 31 May 1995, No. 150s99/94.

<sup>444</sup> See, ‘Prosecution: Comparative Aspects - The Decision To Prosecute - Prosecutor, Court, Victim, Charges, Criminal, and Prosecutors’ available at <http://law.jrank.org/pages/1855/Prosecution-Comparative-Aspects-decision-prosecute.html#ixzz18K07ISND> (last accessed December 2010).

<sup>445</sup> See, ‘Prosecution: Comparative Aspects’, *ibid*.

<sup>446</sup> Constitution, Article 9(1).

prosecution service during the preliminary investigation proceedings or at the court after the indictment. The declaration must be filed before the end of the procedure of taking evidence.

**Victim and witness protection:** The Criminal Procedure Code also provides for in-court and out-of-court protection for victims of ordinary crimes, including violent acts, dangerous threats or sexual offences, as well as protection for their spouses and close relatives. These include questioning under protected conditions<sup>447</sup>, by audio or video-link<sup>448</sup> and in closed session hearings,<sup>449</sup> and protecting the privacy and identity of victims and witnesses.<sup>450</sup> They are also entitled to free psychological and judicial assistance in preparation for the proceedings and subsequently.<sup>451</sup>

A state protection programme exists for victims at very high risk (VHR) as well as a witness protection programme for both victims and witnesses. Protection could continue subsequent to the proceedings. The VHR programme works at the international level and provides for the relocation of foreign victims within Austria, as well as the transfer of victims from Austria to another state. The witness protection programme also provides the possibility to move abroad in cooperation with other states' police authorities. These procedures are mainly dealt with under the Austrian Code of Police Law.

**Specialised War Crimes Unit:** The Austrian Federal Ministry of the Interior's Criminal Investigation Service ('*Bundeskriminalamt*') and the Federal Agency for State Protection and Counter-Terrorism<sup>452</sup> are in charge of crimes under international law in Austria. The latter is a security agency which protects the constitutional facilities of the Republic of Austria, as well as their capability to act. It is in charge of cooperation with foreign security agencies and intelligence services. Its main objective is the fight against extremism, terrorism, espionage and international arms trade, trade with nuclear material and organized crime in these cases, but it is also responsible for the coordination and the implementation of personal security, security services, as well as the protection of foreign country representatives, international organizations and other subjects of public international law. It has also been involved in investigations in connection with both war crimes and crimes against humanity (such as World War II and the Balkan Wars). Indeed, complaints of victims regarding criminal offences against persons of Jewish faith during World War II have been filed repeatedly.

**Participation in EU Genocide Network:** Austria has implemented the EU Framework Decision on the standing of victims in criminal proceedings, as well as the EU Council Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes. Austria has also designated an EU Contact Point who has, either personally or through another designated person, participated in all the Network meetings so far. The Federal Ministry of Justice is in charge of dealing with these crimes and for appointing persons to attend such meetings.<sup>453</sup>

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<sup>447</sup> CCP, Articles 165 and 250.

<sup>448</sup> CCP, Article 247a.

<sup>449</sup> CCP, Article 229(1).

<sup>450</sup> CCP, Articles 10(3), 161(1), 51(2) and 162.

<sup>451</sup> CCP, Article 66(2).

<sup>452</sup> Founded in 2002.

<sup>453</sup> MoJ questionnaire response.

## Cases

A case was brought before Austrian courts based on universal jurisdiction against Bosnian Serb **Dusko Cvjetkovic** for genocide, murder and arson allegedly committed in Bosnia and Herzegovina. The Supreme Court declared the case admissible under the Genocide Convention and Article 65(1)(2) of the Penal Code.<sup>454</sup>

In August 1999, actions were taken against high Iraqi official **Issat Ibrahim Khalil (a.k.a. Al Doori)**, who was in Austria for medical attention. The United States government reportedly requested Austrian authorities to arrest him. He was rumoured to have been the military commander in charge of a 1988 poison gas attack on Kurds, among other crimes. A local Austrian official then filed a complaint with the Public Prosecutor alleging his responsibility in the torture of two Iraqi citizens.<sup>455</sup> The prosecutor reportedly initiated an investigation, but Al Doori left the country a few days later.<sup>456</sup>

In another case, an investigation was instituted but not concluded against a Croatian citizen living in Austria. In 1993, a Croatian court convicted him in absentia for war crimes under the Croatian Penal Code and handed down a ten-year prison sentence. The suspect moved from Austria to Hungary, and in September 2001 was extradited to Croatia, where he is currently serving out his prison sentence. The Austrian case has been suspended.<sup>457</sup>

In Austria in 2008 a complaint of torture was made against the Chechen Vice President **Ramzan Kadyrov**, who came to Austria to attend a football match, and an arrest warrant was requested. The prosecutors first refused to receive the complaint, then refused to open an investigation on a weekend. By the time Kadyrov left the country no arrest warrant had been issued. The complainant was murdered in January 2009.<sup>458</sup>

In April 2010, Prosecutors in Austria indicted three men in connection with the killing of the complainant.

## Relevant Legislation

### JURISDICTION

#### Criminal Code

Section 64 - Criminal offences abroad punishable irrespective of the laws which are valid at the place of commission

1) The Austrian penal laws are applicable regardless of the penal laws which are valid for the scene of the crime to the following offences being committed abroad:

1. espionage of a trade or business secret in favour of foreign countries (sect. 124), high treason (sect. 242), preparations for high treason (sect. 244), subversive associations (sect. 246), attacks on the high instruments of state (sects. 249 to 251), treason to the country (sects. 252 to 258) and criminal offences against the Federal Armed Forces (sects. 259 and 260);

2. criminal offences committed against an Austrian public officer (sect. 74 n.4) during or for the execution of his

<sup>454</sup> Judgment of the Supreme Court, 150s99/94, 13 July 1994, *supra*. The case eventually failed on the merits, as none of the five prosecution witnesses could identify the defendant. (Republic of Austria v. Cvjetkovic, Landesgericht Salzburg, 31 May 1995, as found in REDRESS, "Universal Jurisdiction in Europe: Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide," 30 June 1999, p. 17.)

<sup>455</sup> Case report to the Public Prosecutor Vienna concerning Izzat Ibrahim Khalil Al Door, submitted by Peter Pilz, 13 August 1999 (as found in Amnesty International, "Universal Jurisdiction - the duty of states to enact and enforce legislation," AI Index: IOR 53/002/2001, 1 September 2001.).

<sup>456</sup> As reported in Amnesty International, "Universal Jurisdiction - the duty of states to enact and enforce legislation," *supra*.

<sup>457</sup> Higher Regional Court Vienna, 22dVR4575/01.

<sup>458</sup> See ECCHR, 'ECCHR condemns Austria for refusing to issue arrest warrant arrest Kadyrov', 11 February 2009, available at: <http://www.kavkaz.tv/eng/content/2009/02/11/10538.shtml> (last accessed December 2010), and discussion of the case in Kaleck, Wolfgang, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008' 30 *Michigan Journal of International Law* 927-980 (2009) at 953-954.



functions and committed by an Austrian public officer;

3. false testimony before a court (sect. 288) and perjury or false deposition under oath before an administrative authority (sect. 289) in proceedings pending in an Austrian court or in an Austrian administrative authority;

4. extortionate kidnapping (sect. 102), surrender to a foreign power (sect. 103), slave trade (sect. 104), traffic in persons (sect. 104a), transnational trafficking with prostitution (sect. 217), money counterfeiting (sect. 232), the forgery of particularly protected securities punishable under section 232

(sect.237), criminal organization (sect. 278a para.1) and the criminal offences punishable under sects. 28 para.2 to 5, 31 para.2 and 32 para.2 of the drug law if Austrian interests have been violated or if the perpetrator cannot be extradited;

4a. gross sexual abuse of minors (sect. 206), sexual abuse of minors (sect. 207) and pornographic representations with minors pursuant to sect. 207a para. 1 and 2, sexual abuse of adolescent persons pursuant to sect. 207b para. 2 and 3 and promotion of prostitution and pornographic presentation of minors (sect. 215a), if the perpetrator is an Austrian citizen residing generally in the homeland;

4b. production and distribution of weapons for mass extermination (sect. 177a) if the perpetrators are Austrian citizens, but as to nuclear weapons only so far as the offence did not be committed by order or at the responsibility of a contracting party of the treaty against the distribution of nuclear weapons, Federal Law Gazette Nr. 258/1970, which is a state with nuclear weapons;

5. hijacking (sect. 185) and criminal offences against life and limb in this connection or against the freedom of aviation and its intentional endangering (sect. 186) if:

a) the criminal offence is directed against an Austrian aircraft;

b) the aircraft lands in Austria and the perpetrators are still on board;

c) the aircraft has been rented out to someone without a crew who has his business seat in Austria or - in default of such a seat resides permanently in Austria; or

d) the perpetrator is in Austria and cannot be extradited.

6. other criminal offences for which Austria is bound to prosecution even if they have been committed abroad, irrespective of the laws which are valid for the scene of the crime.

7. criminal offences which commits an Austrian against an Austrian if both of them have their domicile or general residence in Austria.

8. participation (sect. 12) in a criminal offence which has been committed by the direct perpetrator at home as well as receiving stolen goods (sect. 164) and money laundering (sect. 165) referring to an offence being committed at home;

9. terrorist association (sect. 278b) and terrorist criminal offences (sect. 278c) as well as criminal offences under sections 128 to 131, 144 and 145 and 223 to 224, which have been committed in this connection, if:

a) the perpetrator has been an Austrian at the time of the offence or he has gained the Austrian citizenship afterwards and is still in its possession at the time of the institution of penal proceedings;

b) the perpetrator has his domicile or general residence at home;

c) the offence has been committed in favour of a legal entity having its seat in Austria;

d) the offence has been committed against the National Parliament, the Federal Parliament, the Federal Assembly, the Federal Government, a Provincial Parliament, a Provincial Government, the Constitutional Court, the Administrative Court, the Supreme Court, any other court or administrative authority or against the people of the Republic of Austria;

e) the offence has been committed against an authority of the European Union or against an entity under the treaties for the institution of the European Communities or the treaty on the European Union, having its seat in the Republic of Austria;

f) the perpetrator has been a foreigner at the time of the offence, is now in Austria and cannot be extradited.

10. financing of terrorism (sect. 278d) if:

a) the perpetrator has been an Austrian at the time of the offence or he has gained the Austrian citizenship afterwards and is still in its possession at the time of the institution of penal proceedings; or

b) the perpetrator has been a foreigner at the time of the offence, is now in Austria and cannot be extradited.

(2) If the penal laws mentioned in para. 1 cannot be applied only for the reason that there has been committed a criminal offence which is punished by a severer sanction, the offence being committed abroad shall be punished nevertheless irrespective of the penal laws which are valid for the scene of the

crime pursuant to the Austrian penal laws.

*(As amended by Federal Law Gazette Nr. 1987/605, 1996/762, I 1997/112, I 1998/153, I 2000/34 and I 2002/134 ad BGBl I 2004/15).*

Section 65 - Criminal offences committed abroad which are subject to prosecution only if they are liable to prosecution according to the laws which are valid at the scene of the crime

(1) For other criminal offences committed abroad than those referred to in sections 63 and 64 applies the Austrian

criminal law, if the offences are also liable to persecution according to the laws which are valid for the scene of the crime:

1. if the offender has been Austrian at the time of the offence or if he has acquired Austrian citizenship at a later date and if he still holds citizenship at the time of initiation of the criminal proceedings;

2. if the offender has been a foreigner at the time of the offence, was found out inland and cannot be extradited to a foreign state for other reasons than the nature or characteristics of the offence.

(2) The penalty is to be determined so that the perpetrator in general is not treated less favorably than he would have been according to the laws of the state where he committed the offence.

(3) It is sufficient that the offence is liable to persecution according to Austrian law if there is no penal power at the place where the criminal act was committed.

(4) The punishability ceases to exist:

1. if the punishability of the offence has been extinct according to the laws which are valid for the scene of the crime;

2. if the offender has been acquitted or the prosecution has been abandoned by a court of the state, in which the offence had been committed;

3. if the offender has been sentenced legally binding by a foreign court and if the penalty has been executed totally or in case the penalty has not been executed, if the penalty has been accepted or if the enforceability has been time-barred according to the foreign law;

4. as long as the enforceability of the penalty imposed by the foreign court is set out totally or partially.

(5) If the preconditions apply, preventive sanctions according to Austrian laws have to be imposed against an Austrian person, even if this person cannot be punished inland according to the reasons mentioned in the previous paragraph.

#### CRIMES UNDER INTERNATIONAL LAW

##### Criminal Code

##### Genocide - Article 321:

Whoever, with the intent to exterminate a group, on the basis of its affiliation with a church or a religious society, to a race, to an ethnicity, or to a national group, as such, in whole or in part, kills members of the group,<sup>□</sup>or causes them heavy physical (§ 84 abs.1 ) or mental damage,<sup>□</sup>or deliberately imposes living conditions intended to cause the death of all members or a section of the group,<sup>□</sup>or imposes measures intended to prevent births within the group,<sup>□</sup>or transfers by force or by threat of force children of the group into another group, is to be punished with life-long imprisonment.

(2) who arranges the common execution of one of the punishable actions defined in the exp. 1 with another, is to be punished with imprisonment for one to ten years.

## Belgium

### Overview

Belgium pioneered modern universal jurisdiction prosecutions in Europe of crimes under international law, using its well-known and wide-ranging universal jurisdiction law. This law was repealed in August 2003 and replaced, in far more restrictive form, with amendments to the Belgian Criminal Code.

The changes in the law meant that many of the claims that had previously been filed could no longer proceed. The new legislation did, however, include a transitory provision allowing a limited category of advanced cases to continue, including those concerning the Rwandan genocide (referred to below) and the killing of two Belgian priests in Guatemala, as well as the complaints filed against ex-Chadian dictator Hissène Habré.

The amended Criminal Code criminalises genocide,<sup>459</sup> crimes against humanity,<sup>460</sup> war crimes<sup>461</sup> and torture.<sup>462</sup>

Belgian law provides for universal jurisdiction over summary and indictable offences under Belgian law that are also offences under the law of the place of commission, as long as the alleged perpetrator has primary residence in Belgium, the public prosecutor orders the prosecution, and either the victim or his/her family has filed a complaint or the State where the offence took place has advised Belgian authorities to prosecute.<sup>463</sup>

Belgian law also provides for passive personality jurisdiction over a foreigner who has committed a crime abroad against a Belgian citizen, provided that the foreigner is in Belgium<sup>464</sup> and the act is punishable under the law of the place of commission by at least five years imprisonment.<sup>465</sup>

However, additional specific provisions exist for certain crimes, including crimes under international law. Under Article 12*bis*, Belgium will have universal jurisdiction over any offence where international treaty or customary law require that it should be submitted to Belgian authorities, regardless of the country in which it was committed and of the nationality of the perpetrator.<sup>466</sup> Under this provision, for example, Belgian courts have jurisdiction to prosecute or extradite a person found on its territory accused of committing torture.<sup>467</sup> Belgium also believes that “*there are customary obligations requiring States to incorporate rules of universal jurisdiction in their domestic law in order to try persons suspected of crimes of such seriousness that they threaten the*

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<sup>459</sup> CC, Article 136*bis*.

<sup>460</sup> CC, Article 136*ter*.

<sup>461</sup> CC, Article 136*quarter*.

<sup>462</sup> CC, Article 417*bis*.

<sup>463</sup> 17 April 1878 - Law Containing the First Title of the Criminal Procedure Code (17 Avril 1878 - *Loi contenant le titre préliminaire due Code de procédure pénale*), as amended by the 5 August 2003 - Law Relating to Grave Breaches of International Humanitarian Law, (“TPCCP”) Article 7. Note that when the offence is committed during war, this rule differs slightly (See Art. 7(2) of the same Code).

<sup>464</sup> TPCCP, Article 12.

<sup>465</sup> TPCCP, Article 10(5).

<sup>466</sup> TPCCP, Art. 12*bis*.

<sup>467</sup> See Belgium’s reply to the Secretary General on ‘Observations by Belgium on the scope and application of the principle of universal jurisdiction’, UN Series A/65/181, paragraph 10; available at: [http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri\\_StatesComments/Belgium\\_E.pdf](http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Belgium_E.pdf) (last accessed December 2010).

*international community as a whole, such as grave crimes under international humanitarian law*”, as long as the perpetrators are present on the state’s territory.<sup>468</sup>

Second, for certain crimes including genocide, crimes against humanity and war crimes (as defined in the Criminal Code), active, passive and universal jurisdiction are available under two separate provisions. Belgian courts have jurisdiction in these cases if the accused is Belgian or has primary residence in Belgium (Article 6(1*bis*),<sup>469</sup> or if the victim is Belgian, is a refugee recognised by Belgium or had lived in Belgium for at least three years at the time the crimes were committed (Article 10(1*bis*).<sup>470</sup> To prosecute in the first of these cases (Article 6(1*bis*)), there must have been an official notification to the Belgian authorities by foreign authorities.

Belgian courts are also able to exercise universal jurisdiction over certain other crimes, including against minors, where the person is found in Belgium.<sup>471</sup>

## Issues

**Nexus requirements (including presence or residence):** Usually, to exercise extraterritorial jurisdiction under Belgian law, the alleged perpetrator must be “*found in Belgium*”.<sup>472</sup> However, this does not apply where jurisdiction is taken under the provisions relating specifically to crimes under international law - Article 12*bis* (where required by treaty without a presence requirement),<sup>473</sup> Article 6(1*bis*) (extended active personality jurisdiction) and Article 10(1*bis*) extended passive personality jurisdiction.<sup>474</sup>

The presence of the alleged perpetrator in the territory is not required in any event for the prosecutor to carry out a preliminary investigation prior to initiating the prosecution.<sup>475</sup>

Unless Belgium is required by treaty or customary international law to prosecute,<sup>476</sup> or the victim was Belgian or lived in Belgium for three years,<sup>477</sup> the suspect must be a national or permanent resident to be tried for a crime under international law committed abroad.<sup>478</sup>

**Subsidiarity:** This concept is reflected in Belgian law in the fourth criteria by which the federal prosecutor may take the decision not to issue legal proceedings (see “*Prosecutorial and Executive discretion*”, below).<sup>479</sup>

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<sup>468</sup> Ibid., paragraph 11. Belgium relies on the fourth, sixth and tenth preambular paragraphs, along with articles 1 and 5, of the Rome Statute, as evidence of the existence of this customary obligation, particularly in respect of the suppression of crimes against humanity.

<sup>469</sup> TPCCP, Art. 6(1° *bis*), in conjunction with the amended Penal Code, *supra*, Book II, Title *Ibis* (Grave Breaches of International Humanitarian Law (*Des violations graves du droit internationale humanitaire*)), which establishes and defines these crimes under Belgian law.

<sup>470</sup> TPCCP, Art. 10(1*bis*), in conjunction with the amended Penal Code, Book II, Title *Ibis*.

<sup>471</sup> Law Containing Provisions Regarding the Repression of Trafficking in Human Beings and of Child Pornography of 13 April 1995 (*Loi du 13 avril 1995 contenant des dispositions en vue de la repression de la traite des êtres humains et de la pornographie enfantine*), Art. 8. Other offences include sexual mutilation of females; non-respect for certain rules applicable to the activities of marriage bureaux; acts of corruption; acts of terrorism: see Belgium’s reply to the Secretary General, *supra*.

<sup>472</sup> TPCCP, Article 12.

<sup>473</sup> Although note that Belgium’s view is that nearly all obligations to exercise universal jurisdiction under international law arise only upon presence: response to questionnaire and Belgium’s reply to the Secretary General, *supra*.

<sup>474</sup> TPCCP, Article 12.

<sup>475</sup> CCP, Articles 24 and 28*bis*.

<sup>476</sup> TPCCP, Article 12*bis*. Note that Belgium considers that even where states are required by treaty to prosecute irrespective of the location of the accused (such as under the Geneva Conventions) under Belgian law jurisdiction is limited to cases where the alleged perpetrator is found on Belgian soil: response to MoJ questionnaire.

<sup>477</sup> TPCCP, Article 10(1*bis*).

<sup>478</sup> TCPP, Articles 6(1*bis*) and 7.

The alternative forum must display qualities of independence, impartiality and equity. It is up to the federal prosecutor, under the control of the indictment chamber, to evaluate, with regard to international law, the guarantees offered by the territorial state or the state of nationality.<sup>480</sup>

Practice has shown that the subsidiarity concept will be invoked only where there is effective submission of a case to the court of an international or foreign jurisdiction; the theoretical competence of another jurisdiction is not sufficient.<sup>481</sup>

**Double criminality:** Double criminality is required under the general extraterritorial jurisdiction provisions in CCP Articles 7 and 10(5), but is not required by the special provisions applicable to prosecution of crimes under international law.

**Prosecutorial and Executive discretion:** Unless the prosecution is brought under Article 6(1bis) because the accused is Belgian or has his primary residence in Belgium,<sup>482</sup> the decision as to whether to proceed with any complaint concerning genocide, crimes against humanity or war crimes rests entirely with the state prosecutor.<sup>483</sup>

Legal proceedings based on these provisions must be brought by the federal prosecutor, either as a result of his own initiative or because a complaint has been lodged. When a complaint is lodged before a federal prosecutor, he or she is required to petition an examining magistrate to conduct the preliminary inquiry, except in four specified cases:

- (i) where the complaint is manifestly unfounded;
- (ii) where the facts relied on in the complaint do not correspond to an offence described in Book II, Title *Ibis* of the Penal Code (serious violations of humanitarian international law) or of any other international offence incriminated by a treaty involving Belgium;
- (iii) where an admissible public action cannot derive from the complaint; or
- (iv) where it is apparent from the specific circumstances of the case that, in the interests of the proper administration of justice and in respect for Belgium's international obligations, this case should be brought either before international courts, or before the court in the place where the acts were committed, or before a court of the State of which the perpetrator is a national or of the place where he can be located, in so far as such court demonstrates the attributes of independence, impartiality and equity which accord, in particular, with the relevant international commitments between Belgium and that State.

For ordinary crimes under Belgian law, an order from the office of the public prosecutor is required for prosecutions based on universal jurisdiction to take place, even where the accused has primary residence in Belgium.<sup>484</sup>

**Ability to review decisions of the prosecutor or other governmental body:** If the federal prosecutor decides not to prosecute for reasons (i) to (iii), he or she must seize the indictment chamber of the Brussels Court of Appeal to demonstrate that there is no case to prosecute or that public action is not admissible. The chamber may overturn the prosecutor's decision and commission an examining magistrate to prepare the case for judgment. The federal prosecutor has a period of fifteen days to lodge an appeal against the ruling delivered by the indictment chamber. Private parties filing the complaint are

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<sup>479</sup> These apply to prosecutions under Article 10(1bis) and 12bis, but not 6(1bis).

<sup>480</sup> Response to MoJ questionnaire.

<sup>481</sup> Response to MoJ questionnaire.

<sup>482</sup> In which case there must have been an official notification from a foreign state in any event.

<sup>483</sup> TPCCP, Articles 6(1bis), 10(1bis) and 12bis.

<sup>484</sup> See paragraph 2 of Article 7.

not allowed to intervene to present their case in relation to the review, and the chamber will base its decision on the reasons set out by the prosecutor only.<sup>485</sup>

If the federal prosecutor decides not to prosecute for reasons (iii) or (iv), the Minister of Justice is notified of the ruling of the indictment chamber declaring the public action inadmissible or of the decision of the federal prosecutor to dismiss. No judicial review is possible in respect of (iv) - where the prosecutor decides not to investigate because the facts of the case indicate that the case should be heard by the courts of the territorial state or by an international court.<sup>486</sup>

**Statutes of limitation:** The crimes of genocide, crimes against humanity and war crimes are not subject to limitation periods under Belgian law. Acts of torture and enforced disappearances are regulated by the rules of the general law and are therefore subject to a limitation period of 10 years.<sup>487</sup>

**Immunities:** The previous Belgian universal jurisdiction law excluded the application of any immunities in relation to those accused of serious violations of humanitarian international law.<sup>488</sup>

This rule was modified after the judgment of the International Court of Justice against Belgium in the *Case concerning the arrest warrant of 11 April 2000*.<sup>489</sup> The law now states that legal proceedings cannot be taken against persons benefiting from immunity by virtue of treaty or customary international law.<sup>490</sup> Heads of State, heads of government, foreign secretaries and secretaries of state are explicitly referred to, as are those who benefit from immunity, total or partial, based on a treaty involving Belgium, as far as international law recognises their benefiting from international immunity.

Further, no person officially invited in Belgium by Belgian authorities or an international organization established in Belgium and with which Belgium has agreed a headquarter agreement, can have a sentence executed against them, as far as international law recognises them as benefiting from international immunity.<sup>491</sup>

The King, federal, community and regional ministers, and Members of the House of Representatives and the Senate enjoy certain immunities under national law.<sup>492</sup>

**Victims' role in proceedings:** The requirement that universal jurisdiction proceedings for crimes under international law be initiated by the federal prosecutor (see above) considerably reduces victims' ability to obtain direct access to the courts, as compared to procedure in place prior to the 5 August 2003 amendments in which victims could initiate proceedings through "*constitution de partie civile*".

To claim compensation for damages, victims can bring a civil action as part of ongoing criminal proceedings.<sup>493</sup> The status conferred by bringing a civil action also offers the victim certain rights in the context of criminal proceedings, including the right to be kept

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<sup>485</sup> See *Cour d'Arbitrage*, Judgment Nr 62, March 23, 2005, cited in Human Rights Watch, 'Universal Jurisdiction in Europe; The State of the Art, Belgium', June 2006; available at: <http://www.hrw.org/en/node/11297/section/4> (last accessed December 2010).

<sup>486</sup> *Ibid.*

<sup>487</sup> Article 21 of the TPCPP states that "*Except for offences defined under articles 136bis (crimes of genocide), 136ter (crimes against humanity) and 136quater (war crimes) of the penal code, public action will be subjected by limitation to lapse of time for 10 years, 5 years or six months, from the day the infraction is committed (...) onward*".

<sup>488</sup> Article 5, §3, of the law dated 16 June 1993, as modified by the law dated 10 February 1999.

<sup>489</sup> Judgment of the International Court of Justice, 14 February 2002.

<sup>490</sup> TPCPP, Article 1bis, §1.

<sup>491</sup> TPCPP, Article 1bis, §2.

<sup>492</sup> Constitution, Articles 58, 59, 88 and 120.

<sup>493</sup> For the specific rights and conditions, see the amended Criminal Procedure Code, Arts. 4, 66 and 67, among others.

informed about the way the case is evolving, the right to access the criminal file and the right to request complementary investigative actions to be carried out.<sup>494</sup>

**Victim and witness protection:** Under certain conditions, a hearing may be conducted by the public prosecutor's office or the examining magistrate through a video-conference,<sup>495</sup> a closed-circuit television,<sup>496</sup> or a phone conference.<sup>497</sup> These technologies allow a witness under threat, or a witness, expert or suspect living abroad, to be heard in those cases when it is not advisable or possible for him or her to appear in person. Hearings conducted through phone conference or video-conference or closed-circuit television involving image and voice alteration may also be decided upon by the jurisdiction handling the judgment.<sup>498</sup>

The Code of Criminal Instruction also contains special provisions concerning the hearing of underage minors who have witnessed or have been the victims of certain offences.<sup>499</sup>

Under certain circumstances, complete anonymity may be allowed for witnesses.<sup>500</sup> This is only allowed for a limited list of offences (which include serious violations of international humanitarian law), provided that: first, omitting certain identification data in the statement of offence of the hearing is not enough to ensure the protection of the witness; and second, the testimony of that person is necessary for the truth to be known. The reliability of the witness is previously accounted for by the examining magistrate. A witness who has benefited from measures related to the anonymous testimony in accordance with articles 86*bis* and 86*ter* of the Code of Criminal Procedure cannot be forced to testify in court. If he or she agrees to do so, the president may take whatever steps are necessary to guarantee his or her anonymity.

In other circumstances, the examining magistrate may allow partial anonymity.<sup>501</sup> In cases when it appears that the witness or a person close to him or her could suffer harm if his or her identity would be revealed, the examining magistrate may, either automatically or at the witness' petition, decide not to record certain identification details that should normally be written down in the statement of offence of the hearing. A witness granted partial anonymity within the process of examination, in accordance with article 75*bis* of the Code of Criminal Procedure, keeps the benefit of this measure when he or she testifies before the Court of Assizes.

Belgium has a witness protection system established under the Criminal Code, but this only applies to witnesses who reside in Belgium.<sup>502</sup> Family members and other relatives of the protected witnesses may also benefit from measures of protection granted the witness. In exceptional cases, protection can also be offered to other persons in a situation of danger.<sup>503</sup>

Two types of protection measures may be granted: ordinary protection measures and special protection measures. The first kind of measures includes, for example, advice

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<sup>494</sup> Response to MoJ questionnaire.

<sup>495</sup> Article 112, §1 of the CCP. The use of audiovisual means to collect statements is regulated by Chapter VII*quater* of Book 1<sup>o</sup> of the CCP titled "Compendium of statements obtained by audiovisual means" (« Recueil de déclarations au moyen de médias audiovisuels »).

<sup>496</sup> CCP, Article 112, §2.

<sup>497</sup> CCP, Article 112*bis*.

<sup>498</sup> CCP, Articles 158*ter*, §5; 158*bis*, §6; 298 and 299.

<sup>499</sup> CCP, Articles 91*bis* ff.

<sup>500</sup> CCP, Articles 86*bis*, 86*ter*, and 294.

<sup>501</sup> CCP, Articles 75*bis* and 296.

<sup>502</sup> Chapter VIII*ter* of the 1<sup>st</sup> Book of the Criminal Code.

<sup>503</sup> CCP, Article 104, §1.

being given to the person, the assignment of a contact person, preventive police patrols, a secret mobile phone number being provided the person and relocation during a period of time not exceeding 45 days.<sup>504</sup> When the statements of the witness concern certain types of offences, including serious violations of international humanitarian law and terrorist offences, special protection measures may be granted, including the relocation of the person involved for a period exceeding 45 days and change of identity.<sup>505</sup> Financial aid measures can also be granted.

The situation differs when proceedings are under international criminal jurisdiction. For example, Belgium signed an agreement with the International Criminal Court concerning witness protection in Africa. The cost of this protection is assumed by Belgian authorities, which makes its implementation possible.<sup>506</sup>

**Specialised War Crimes Unit:** There is no special unit in charge of handling files related to crimes under international law. However, within the Brussels federal judicial police there is a team that deals specifically with all files concerning serious violations of international humanitarian law. The team is made up of five judicial police officers. The federal prosecutor has competence over crimes under international law, and one senior prosecutor works solely on these crimes.

**Participation in EU Genocide Network:** Two contact points have been appointed to represent Belgium in the meetings of the EU Genocide Network. These are the assistant federal prosecutor and the chief of the humanitarian international law service of the Federal Public Service. They attend the meetings of the network on a regular basis and take an active part in the work undertaken by its members.

## Cases

As indicated, prior to the changes in the law, Belgium had strong universal jurisdiction provisions. This resulted in numerous complaints being filed in Belgian courts. Known complaints based on universal jurisdiction have been filed against: Israeli Prime Minister Ariel Sharon and others for their alleged role in a massacre, carried out by Israeli-allied Christian militia, in the Sabra and Shatila refugee camps; former head of the Palestinian Preventive Security Service Muhammad Dahlan for alleged terrorism and incitement to murder Israelis; former Chadian President Hissène Habré for alleged torture and crimes against humanity during his rule from 1982 to 1990; the oil company TotalFinaElf for its logistical and financial support of the Burmese military, which was allegedly responsible for crimes such as forced labour, murder, torture and extrajudicial executions amounting to crimes against humanity in Burma (Myanmar); former Chinese President Jiang Zemin for allegations of torture, genocide and crimes against humanity allegedly committed against Falun Gong practitioners; former US President George Bush, Sr., Vice President Dick Cheney, Secretary of State Colin Powell and General Norman Schwarzkopf for allegations of war crimes during the first Gulf War; US General Tommy Franks for allegations of war crimes under his command during the recent Gulf War; three former Khmer Rouge leaders for alleged genocide and crimes against humanity in Cambodia; Congolese Foreign Minister (at the time the case was brought) Yerodia Abdoulaye Ndombasi, former Iranian President Ali Akbar Hachémi-Rafsandjani, former Chilean President Augusto Pinochet, former Moroccan Interior Minister Driss Basri, President of Rwanda Paul Kagame, President of Congo (Brazzaville) Denis Sassou Nguesso, Iraqi leader (at the time the case was brought) Saddam Hussein, Cuban President Fidel Castro, President of the Ivory Coast Laurent Gbagbo, his predecessor Robert Gueï and two ministers, President of the Central African

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<sup>504</sup> See article 104 of the CCP.

<sup>505</sup> CCP, Article 104, §2 paragraph 2.

<sup>506</sup> Response to MoJ questionnaire.



Republic Ange-Felix Patassé, and Mauritanian President Maaouya Ould Sid'Amhed Taya, among others.

Following the changes to Belgian law, numerous complaints that had been filed were closed, though a few were left open as a result of transitory provisions.

To date, four trials have been carried out in Belgium, either totally or partially, on the basis of universal jurisdiction. These trials, organised before the Brussels Court of Assizes in 2001, 2005, 2007 and 2009, concerned crimes committed in Rwanda during the 1994 genocide. They resulted in eight convictions,<sup>507</sup> although these were convictions for war crimes, rather than genocide, as it was held that the crime of genocide under Dutch law could not be applied retroactively.

The first case was sent to the Brussels Court of Assizes on the basis of Article 7 of the law of 16 June, 1993, establishing Belgium's universal jurisdiction over serious violations of humanitarian international law. On 8 June 2001, the four Rwandan nationals were found guilty of having engaged in serious violations of humanitarian international law.

The second trial, which took place after the 1993 law was abrogated by a law dated 5 August 2003, was carried out on the basis of present Article 6, 1° *bis* of the TPCPP, read in combination with article 29 of the law dated 5 August 2003. The latter article provides for a preliminary investigation of the case for eventual judgment being pursued before the law dated 5 August 2003 came into force, in such cases when at least one of the alleged perpetrators has his main place of residence in Belgium before that date. The trial brought about the conviction of the accused for war crimes on 29 June 2005.

The third ruling was rendered by the Brussels Court of Assizes on 5 May 2007. The Court based its competence on Articles 6, 1° *bis* (extended active personality jurisdiction) and 10, 1° *bis* of the TPCPP (extended passive personality jurisdiction), read in combination with Article 29, §§2 and 5 of the law dated 5 August 2003. This ruling led to the accused being condemned for war crimes.

A fourth trial led to the accused being condemned on 1 December 2009, on the basis of article 6, 1° *bis* of the TPCPP (extended active personality jurisdiction). The accused objected to the ruling though he died prior to the date for rehearing.

The claim that had been filed by victims in 2000 against Hissène Habré was another one of the cases that was allowed to remain open pursuant to the transitory provisions of the new legislation. Habré was residing in Senegal, and a criminal complaint had also been filed there, though Senegalese courts determined that Senegal had no competence over the extraterritorial charges. Claims filed in Chad had been ignored. Following investigations carried out by Belgian investigating judges, including visits to Chad, Belgium issued an international arrest warrant for Hissène Habré, charging him with genocide, crimes against humanity, war crimes, torture, and serious violations of international humanitarian law and requested his extradition from Senegal. Instead of proceeding with the extradition request, Senegal referred the matter to the African Union. The UN Committee Against Torture, in response to an individual complaint filed by victims, concluded that Senegal had violated the UN Convention Against Torture by failing to extradite or prosecute, and Belgium brought the matter further to the International Court of Justice, in which it requested precautionary measures to prevent Senegal from allowing Habré to leave the country pending a resolution of the matter (leading Senegal to pledge not to allow Habré to leave Senegal pending the court's judgment on the merits).<sup>508</sup>

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<sup>507</sup> The last conviction will never be final, the accused having died after objecting to the verdict.

<sup>508</sup> See, HRW, *Chronology of the Habré Case*, at: <http://www.hrw.org/en/news/2009/02/12/chronology-habr-case> (last accessed December 2010).

Belgian authorities have also carried out rogatory missions to Guatemala to investigate the killing of two Belgian priests in that state.

## Relevant Legislation

### JURISDICTION

#### Preliminary Title of the Code of Criminal Procedure

CHAPITRE II. - DE L'EXERCICE DE L'ACTION PUBLIQUE A RAISON DES CRIMES OU DES DELITS COMMIS HORS DU TERRITOIRE DU ROYAUME.<sup>509</sup>

Art. 6. Pourra être poursuivi en Belgique [tout Belge ou toute personne ayant sa résidence principale sur le territoire du Royaume] qui, hors du territoire du royaume, se sera rendu coupable : <L 2003-08-05/32, art. 14, 016; En vigueur : 07-08-2003>

1° [D'un crime ou d'un délit contre la sûreté de l'Etat;] <L 04-08-1914, art. 3>

[1°bis. d'une violation grave du droit international humanitaire définie dans le livre II, titre Ibis, du Code pénal;] <L 2003-08-05/32, art. 14, 016; En vigueur : 07-08-2003>

[1°ter d'une infraction terroriste visée au Livre II, Titre Iter, du Code pénal.] <L 2003-12-19/34, art. 13, 017; En vigueur : 08-01-2004>

2° [D'un crime ou d'un délit contre la foi publique prévu par les chapitres Ier, II et III du titre III du livre II du Code pénal ou d'un délit prévu par les articles 497 et 497bis, si le crime ou le délit a pour objet [l'euro] soit des monnaies ayant cours légal en Belgique ou des objets destinés à leur fabrication, contrefaçon, altération ou falsification, soit des effets, papiers, sceaux, timbres, marques ou poinçons de l'Etat ou des administrations ou établissements publics belges. <L 2001-04-04/39, art. 12, 011; En vigueur : 03-07-2001>

3° D'un crime ou d'un délit contre la foi publique prévu par les mêmes dispositions, si le crime ou le délit a pour objet soit des monnaies n'ayant pas cours légal en Belgique ou des objets destinés à leur fabrication, contrefaçon, altération ou falsification, soit des effets, papiers, sceaux, timbres, marques ou poinçons d'un pays étranger.

La poursuite, dans ce dernier cas, ne pourra avoir lieu que sur l'avis officiel donné à l'autorité belge par l'autorité étrangère.] <L 12-07-1932, art. 2, a>

[Art. 6. *Criminal proceedings may be brought against [any Belgian national or any person having their main residence on the territory of the Kingdom] who is guilty, outside of the territory of the Kingdom : <L 2003-08-05/32, art. 14, 016; Entry into force: 07-08-2003>*

(...)

[1°bis. *of a grave violation of international humanitarian law defined in volume II, title Ibis, of the Criminal Code;] <L 2003-08-05/32, art. 14, 016; Entry into force : 07-08-2003>*

(...)]

Art. 7. <L 16-03-1964, art. 2> § 1. [tout Belge ou toute personne ayant sa résidence principale sur le territoire du Royaume] qui, hors du territoire du Royaume, se sera rendu coupable d'un fait qualifié crime ou délit par la loi belge pourra être poursuivi en Belgique si le fait est puni par la législation du pays où il a été commis. <L 2003-08-05/32, art. 15, 016; En vigueur : 07-08-2003>

§ 2. Si l'infraction a été commise contre un étranger, la poursuite ne pourra avoir lieu que sur réquisition, du ministère public et devra, en outre, être précédée d'une plainte de l'étranger offensé ou de sa famille ou d'un avis officiel donné à l'autorité belge par l'autorité du pays où l'infraction a été commise.

Dans le cas où l'infraction a été commise, en temps de guerre, contre un ressortissant d'un pays allié de la Belgique au sens du deuxième alinéa de l'article 117 du Code pénal, l'avis officiel peut également être donné par l'autorité du pays dont cet étranger est ou était ressortissant.

Art. 8. [Abrogé] <L 16-03-1964, art. 2>

Art. 9. Tout Belge qui se sera rendu coupable d'une infraction en matière forestière, rurale, de pêche ou de chasse sur le territoire d'un Etat limitrophe, pourra, si cet Etat admet la réciprocité, être poursuivi en Belgique, sur la plainte de la partie lésée ou sur un avis officiel donné à l'autorité belge par l'autorité du pays où l'infraction a été commise.

Art. 10. [Hormis dans les cas visés aux articles 6 et 7, § 1er, pourra être poursuivi en Belgique l'étranger qui aura commis hors du territoire du Royaume :] : <L 2003-08-05/32, art. 16, 016; En vigueur : 07-08-2003>

1° [Un crime ou un délit contre la sûreté de l'Etat;] <L 19-07-1934, art. 4>

[1°bis. une violation grave du droit international humanitaire visée au livre II, titre Ibis du Code pénal, commise contre une personne qui, au moment des faits, est un ressortissant belge [ou un réfugié reconnu en Belgique et y ayant sa résidence habituelle, au sens de la Convention de Genève de 1951 relative au statut des réfugiés et son Protocole additionnel,] ou une personne qui, depuis au moins trois ans, séjourne effectivement, habituellement et légalement en Belgique. <L 2006-05-22/37, art. 2, 1°, 023; En vigueur : 31-03-2006>

[Les poursuites, en ce compris l'instruction, ne peuvent être engagées qu'à la requête du procureur fédéral qui apprécie les plaintes éventuelles.] <L 2006-05-22/37, art. 2, 2°, 023; En vigueur : 31-03-2006>

Saisi d'une plainte en application des alinéas précédents, le procureur fédéral requiert le juge d'instruction d'instruire cette plainte sauf si :

<sup>509</sup> Where available, the English translation is provided in italics at the end of the relevant Article.

1° la plainte est manifestement non fondée; ou  
2° les faits relevés dans la plainte ne correspondent pas à une qualification des infractions visées au livre II, titre Ibis, du Code pénal; ou  
3° une action publique recevable ne peut résulter de cette plainte; ou  
4° des circonstances concrètes de l'affaire, il ressort que, dans l'intérêt d'une bonne administration de la justice et dans le respect des obligations internationales de la Belgique, cette affaire devrait être portée soit devant les juridictions internationales, soit devant la juridiction du lieu où les faits ont été commis, soit devant la juridiction de l'Etat dont l'auteur est ressortissant ou celle du lieu où il peut être trouvé, et pour autant que cette juridiction présente les qualités d'indépendance, d'impartialité et d'équité, tel que cela peut notamment ressortir des engagements internationaux relevant liant la Belgique et cet Etat.

[Si le procureur fédéral est d'avis qu'une ou plusieurs des conditions énoncées à l'alinéa 3, 1°, 2° et 3° sont remplies, il prend devant la chambre des mises en accusation de la cour d'appel de Bruxelles des réquisitions tendant à faire déclarer, selon les cas, qu'il n'y a pas lieu à poursuivre ou que l'action publique n'est pas recevable. Le procureur fédéral est seul entendu.

Lorsque la chambre des mises en accusation constate qu'aucune des conditions énoncées à l'alinéa 3, 1°, 2° et 3° n'est remplie, elle désigne le juge d'instruction territorialement compétent et indique les faits sur lesquels portera l'instruction. Il est ensuite procédé conformément au droit commun.

Le procureur fédéral a le droit de former un pourvoi en cassation contre les arrêts rendus en application des alinéas 4 et 5. Dans tous les cas, ce pourvoi sera formé dans les quinze jours à compter du prononcé de l'arrêt.

Dans le cas prévu à l'alinéa 3, 3°, le procureur fédéral notifie au Ministre de la Justice l'arrêt de la chambre des mises en accusation, lorsque cet arrêt n'est plus susceptible de recours. Lorsque les faits ont été commis après le 30 juin 2002, le Ministre de la Justice informe la Cour pénale internationale des faits.

Dans le cas prévu à l'alinéa 3, 4°, le procureur fédéral classe l'affaire sans suite et notifie sa décision au Ministre de la Justice. Cette décision de classement sans suite n'est susceptible d'aucun recours. Lorsque les faits ont été commis après le 30 juin 2002, le Ministre de la Justice informe la Cour pénale internationale des faits.]] <L 2003-08-05/32, art. 16, 2°, 016; En vigueur : 07-08-2003> <L 2006-05-22/37, art. 2, 2°, 023; En vigueur : 31-03-2006>

(NOTE : par son arrêt n° 62/2005 du 23-03-2005 (M.B. 08-04-2005, p. 14835-14838), la Cour d'Arbitrage a annulé l'article 16, 2° de la L 2003-08-05/32)

2° [Un crime ou un délit repris au 2° de l'article 6;

3° Un crime ou un délit repris au 3° de l'article 6.

La poursuite, dans ce dernier cas, ne pourra avoir lieu que sur l'avis officiel donné à l'autorité belge par l'autorité étrangère.] <AL 12-07-1932, art. 2>

4° [En temps de guerre, contre un ressortissant belge, un étranger résidant en Belgique au moment de l'ouverture des hostilités, ou un ressortissant d'un pays allié de la Belgique au sens de l'alinéa 2 de l'article 117 du Code pénal, une infraction d'homicide ou de lésion corporelle volontaires, de viol, d'attentat à la pudeur ou de dénonciation à l'ennemi.] <L 02-04-1948, art. 1>

5° [Un crime contre un ressortissant belge, si le fait est punissable en vertu de la législation du pays où il a été commis d'une peine dont le maximum dépasse cinq ans de privation de liberté.] <L 12-07-1984, art. 1>

[6° Une infraction visée à l'article 2 de la Convention européenne pour la répression du terrorisme, faite à Strasbourg le 27 janvier 1977, qui a été commise sur le territoire d'un Etat partie à la Convention, lorsque l'auteur présumé se trouve sur le territoire belge et que le Gouvernement belge n'a pas accordé l'extradition à cet Etat pour une des raisons mentionnées à l'article 2 ou à l'article 5 de la Convention précitée, à l'article 11 de la Convention européenne d'extradition, faite à Paris le 13 décembre 1957 ou parce que l'extradition est susceptible d'avoir des conséquences d'une gravité exceptionnelle pour la personne réclamée, notamment en raison de son âge ou de son état de santé.] <L 2003-03-13/63, art. 2, 015; En vigueur : 29-05-2003>

[Art. 10. [Other than in the cases specified in articles 6 and 7, § 1, Criminal proceedings may be brought in Belgium against any foreigner who is guilty outside of the territory of the Kingdom :] : <L 2003-08-05/32, art. 16, 016; Entry into force : 07-08-2003>

(...)

[1° bis. of a grave violation of international humanitarian law defined in volume II, title Ibis of the Criminal Code, against a person who, at the time the offence is committed, is a Belgian national (or a refugee recognised in Belgium and having their habitual residence there, within the meaning of the 1951 Geneva Convention and Protocol relating to the Status of Refugees) or a person who has been effectively habitually and legally residing in Belgium for at least three years. <L 2006-05-22/37, art. 2, 1°, 023; Entry into force : 31-03-2006>

[The proceedings, including any judicial investigation, can only be brought at the request of the federal prosecutor, who shall assess any complaints.] <L 2006-05-22/37, art. 2, 2°, 023; Entry into force : 31-03-2006>

When the federal prosecutor has received a complaint in accordance with the preceding paragraphs, he shall ask the investigating judge to investigate the complaint, unless :

1° the complaint is manifestly ill-founded ; or

2° the facts described in the complaint do not correspond to an offence as specified in volume II, title Ibis of the Criminal Code; or

3° the complaint cannot lead to an admissible criminal prosecution ; or

4° it appears from the practical circumstances of the case that, in the interests of the proper administration of justice and in accordance with Belgium's international obligations, the case should be brought before either the international courts, the courts of the place where the offence was committed or the courts of the country of which the perpetrator is a national or of the country where he may be located, on condition that these courts offer the standards of independence, impartiality and fairness required under the international commitments linking Belgium to the state concerned.

[If the federal prosecutor considers that one or more of the conditions specified in paragraph 3, 1°, 2° and 3° apply, he shall apply to the criminal section of the court of appeal to declare that the case should not be prosecuted or that criminal proceedings are inadmissible. Only the federal prosecutor shall be heard.

If the criminal section of the court of appeal decides that none of the conditions specified in paragraph 3, 1°, 2° and 3° apply, it shall nominate the investigating judge with territorial jurisdiction and inform him of the facts that should be investigated. The proceedings shall then continue in accordance with the law.

The federal prosecutor may appeal on points of law against decisions handed down in accordance with paragraphs 4 and 5. Such appeals must be lodged within fifteen days of the handing down of the decision.

In cases specified in paragraph 3, 3°, the federal prosecutor shall notify the Minister of Justice of the decision of the criminal section, once it is no longer subject to appeal. In the case of offences committed after 30 June 2002 that fall within the material jurisdiction of the International Criminal Court, the Minister of Justice shall inform that Court of the facts of the case.

In cases specified in paragraph 3, 4°, the federal prosecutor shall take no further action on the case and notify his decision to the Minister of Justice. No appeals may be lodged against such decisions. In the case of offences committed after 30 June 2002 that fall within the material jurisdiction of the International Criminal Court, the Minister of Justice shall inform that Court of the facts of the case.]] <L 2003-08-05/32, art. 16, 2°, 016; Entry into force: 07-08-2003> <L 2006-05-22/37, art. 2, 2°, 023; Entry into force: 31-03-2006>

(NOTE : by its decision n° 62/2005 of 23-03-2005 (Belgian Gazette 08-04-2005, p. 14835-14838), the Court of Arbitration quashed article 16, 2° of the L 2003-08-05/32)

(...)

4° [If cases of murder, physical injuries, rape, indecent assault or denunciation to the enemy committed in time of war against a Belgian national, a foreigner residing in Belgium at the time of the opening of hostilities, or a national of a country allied to Belgium in accordance with paragraph 2 of article 117 of the Criminal Code.] <L 02-04-1948, art. 1> (...)]

Art. 10bis. <L 14-07-1951, art. 1> Toute personne soumise aux lois militaires qui aura commis une infraction quelconque sur le territoire d'un Etat étranger, pourra être poursuivie en Belgique.

Il en est de même des personnes qui sont attachées, à quelque titre que ce soit, à une fraction de l'armée se trouvant en territoire étranger ou de celles qui sont autorisées à suivre un corps de troupe qui en fait partie.

Art. 10ter. <L 2000-11-28/35, art. 34, 010; En vigueur : 27-03-2001> Pourra être poursuivie en Belgique toute personne qui aura commis hors du territoire du Royaume :

1° une des infractions prévues aux articles 379, 380, 381 [383bis, §§ 1er et 3, 433sexies, 433septies et 433octies du Code pénal]; <L 2005-08-10/61, art. 23, 020; En vigueur : 12-09-2005>

2° une des infractions prévues aux articles 372 à 377 et 409, du même Code si le fait a été commis sur la personne d'un mineur;

3° une des infractions prévues [aux articles 77ter, 77quater et 77quinquies], de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers et par les articles 10 à 13 de la loi du 9 mars 1993 tendant à réglementer et à contrôler les activités des entreprises de courtage matrimonial.

[4° une des infractions prévues aux articles 137, 140 et 141 du Code pénal commise contre un ressortissant ou une institution belge, ou contre une institution de l'Union européenne ou d'un organisme créé conformément au traité instituant la Communauté européenne ou au traité sur l'Union européenne et qui a son siège dans le Royaume.] <L 2003-12-19/34, art. 14, 017; En vigueur : 08-01-2004>

Art. 10quater. <L 2007-05-11/42, art. 7, 026; En vigueur : 08-06-2007> § 1er. Pourra être poursuivie en Belgique toute personne qui aura commis hors du territoire :

1° une infraction prévue aux articles 246 à 249 du Code pénal;

2° une infraction prévue à l'article 250 du même Code, lorsque la personne exerçant une fonction publique dans un Etat étranger ou dans une organisation de droit international public est belge ou lorsque l'organisation de droit international public pour laquelle la personne exerce une fonction publique a son siège en Belgique.

§ 2. Tout Belge ou toute personne ayant sa résidence principale sur le territoire du Royaume qui, hors du territoire du royaume, se sera rendu coupable d'une infraction prévue à l'article 250 du code pénal pourra être poursuivie en Belgique, à condition que le fait soit puni par la législation du pays où il a été commis.

Art. 11. L'étranger coauteur ou complice d'un crime commis hors du territoire du royaume, par un Belge, pourra être poursuivi en Belgique, conjointement avec le Belge inculqué, ou après la condamnation de celui-ci.

Art. 12. [Sauf dans les cas prévus [article 6, 1°, 1° bis et 2°, article 10, 1°, 1° bis et 2° et article 12bis], ainsi qu'à l'article 10bis, la poursuite des infractions dont il s'agit dans le présent chapitre n'aura lieu que si l'inculqué est trouvé en Belgique.] <L 14-07-1951, art. 2> <L 2003-08-05/32, art. 17, 016; En vigueur : 07-08-2003>

[Toutefois, lorsque l'infraction a été commise en temps de guerre, la poursuite pourra avoir lieu, si l'inculqué est Belge, dans tous les cas, même s'il n'est pas trouvé en Belgique, et, si l'inculqué est étranger, en plus des cas prévus à l'alinéa 1, s'il est trouvé en pays ennemi ou si son extradition peut être obtenue.] <L 30-04-1947, art. 2>

Art. 12bis. <L 17-04-1986, art. 5> [[Hormis les cas visés aux articles 6 à 11, les juridictions belges sont également compétentes] pour connaître des infractions commises hors du territoire du Royaume et visées par une [règle de droit international conventionnelle ou coutumière] [ou une règle de droit dérivé de l'Union européenne] liant la Belgique, lorsque [cette règle] lui impose, de quelque manière que ce soit, de soumettre l'affaire à ses autorités compétentes pour l'exercice des poursuites.] <L 2001-07-18/43, art. 2, 013; En vigueur : 11-09-2001> <L 2003-08-05/32, art. 18, 016; En vigueur : 07-08-2003> <L 2003-12-22/42, art. 378, 018; En vigueur : 10-01-2004>

[[Les poursuites, en ce compris l'instruction, ne peuvent être engagées qu'à la requête du procureur fédéral qui apprécie les plaintes éventuelles.] <L 2006-05-22/37, art. 3, 1°, 023; En vigueur : 31-03-2006>

Saisi d'une plainte en application des alinéas précédents, le procureur fédéral requiert le juge d'instruction d'instruire cette plainte sauf si :

1° la plainte est manifestement non fondée; ou

2° les faits relevés dans la plainte ne correspondent pas à une qualification des infractions visées au livre II, titre Ibis, du Code pénal [ou à toute autre infraction internationale incriminée par un traité liant la Belgique]; ou <L 2003-12-22/42, art. 378, 018; En vigueur : 10-01-2004>

3° une action publique recevable ne peut résulter de cette plainte; ou

4° des circonstances concrètes de l'affaire, il ressort que, dans l'intérêt d'une bonne administration de la justice et dans le respect des obligations internationales de la Belgique, cette affaire devrait être portée soit devant les juridictions internationales, soit devant la juridiction du lieu où les faits ont été commis, soit devant la juridiction de l'Etat dont l'auteur est ressortissant ou celle du lieu où il peut être trouvé, et pour autant que cette juridiction présente les qualités d'indépendance, d'impartialité et d'équité, tel que cela peut notamment ressortir des engagements internationaux relevant liant la Belgique et cet Etat.

[Si le procureur fédéral est d'avis qu'une ou plusieurs des conditions énoncées à l'alinéa 3, 1°, 2° et 3° sont remplies, il prend devant la chambre des mises en accusation de la cour d'appel de Bruxelles des réquisitions tendant à faire déclarer, selon les cas, qu'il n'y a pas lieu à poursuivre ou que l'action publique n'est pas recevable. Le procureur fédéral est seul entendu.

Lorsque la chambre des mises en accusation constate qu'aucune des conditions énoncées à l'alinéa 3, 1°, 2° et 3° n'est remplie, elle désigne le juge d'instruction territorialement compétent et indique les faits sur lesquels portera l'instruction. Il est ensuite procédé conformément au droit commun.

Le procureur fédéral a le droit de former un pourvoi en cassation contre les arrêts rendus en application des alinéas 4 et 5. Dans tous les cas, ce pourvoi sera formé dans les quinze jours à compter du prononcé de l'arrêt.

Dans le cas prévu à l'alinéa 3, 3°, le procureur fédéral notifie au Ministre de la Justice l'arrêt de la chambre des mises en accusation lorsque cet arrêt n'est plus susceptible de recours. Lorsque les faits ont été commis après le 30 juin 2002 et qu'ils relèvent de la compétence matérielle de la Cour pénale internationale, le Ministre de la Justice informe la Cour pénale internationale des faits.

Dans le cas prévu à l'alinéa 3, 4°, le procureur fédéral classe l'affaire sans suite et notifie sa décision au Ministre de la Justice. Cette décision de classement sans suite n'est susceptible d'aucun recours. Lorsque les faits ont été commis après le 30 juin 2002 et qu'ils relèvent de la compétence matérielle de la Cour pénale internationale, le Ministre de la Justice informe la Cour pénale internationale des faits.]] <L 2003-08-05/32, art. 18, 4°, 016; En vigueur : 07-08-2003> <L 2006-05-22/37, art. 3, 2°, 023; En vigueur : 31-03-2006>

(NOTE : par son arrêt n° 62/2005 du 23-03-2005 (M.B. 08-04-2005, p. 14835-14838), la Cour d'Arbitrage a annulé l'article 18, 4° de la L 2003-08-05/32)

[Art. 12bis. <L 17-04-1986, art. 5> [[Other than in cases specified in articles 6 to 11, the Belgian courts also have jurisdiction] to try offences committed outside the territory of the Kingdom that are specified in [rules of international law established by convention or custom] [or rules of European Union secondary law] binding Belgium, when [such rules] require it, by whatever means, to bring the relevant case before the competent authorities to launch proceedings.] <L 2001-07-18/43, art. 2, 013; Entry into force : 11-09-2001> <L 2003-08-05/32, art. 18, 016; Entry into force : 07-08-2003> <L 2003-12-22/42, art. 378, 018; Entry into force : 10-01-2004>

[[The proceedings, including any judicial investigation, can only be brought at the request of the federal prosecutor, who shall assess any complaints.] <L 2006-05-22/37, art. 3, 1°, 023; Entry into force : 31-03-2006>

When the federal prosecutor has received a complaint in accordance with the preceding paragraphs, he shall ask the investigating judge to investigate the complaint, unless :

1° the complaint is manifestly ill-founded ; or

2° the facts described in the complaint do not correspond to an offence as specified in volume II, title Ibis of the Criminal Code [or any other international criminal offence specified in a treaty to which Belgium is a party]; or <L 2003-12-22/42, art. 378, 018; Entry into force : 10-01-2004>

3° the complaint cannot lead to an admissible criminal prosecution ; or

4° it appears from the practical circumstances of the case that, in the interests of the proper administration of justice and in accordance with Belgium's international obligations, the case should be brought before either the international courts, the courts of the place where the offence was committed or the courts of the country of which the perpetrator is a national or of the country where he may be located, on condition that these courts offer the standards of independence, impartiality and fairness required under the international commitments linking Belgium to the state concerned.

[If the federal prosecutor considers that one or more of the conditions specified in paragraph 3, 1°, 2° and 3° apply, he shall apply to the criminal section of the court of appeal to declare that the case should not be prosecuted or that criminal proceedings are inadmissible. Only the federal prosecutor shall be heard.

If the criminal section of the court of appeal decides that none of the conditions specified in paragraph 3, 1°, 2° and 3° apply, it shall nominate the investigating judge with territorial jurisdiction and inform him of the facts that should be investigated. The proceedings shall then continue in accordance with the law.

The federal prosecutor may appeal on points of law against decisions handed down in accordance with paragraphs 4 and 5. Such appeals must be lodged within fifteen days of the handing down of the decision.

In cases specified in paragraph 3, 3°, the federal prosecutor shall notify the Minister of Justice of the decision of the criminal section, once it is no longer subject to appeal. In the case of offences committed after 30 June 2002 that fall within the material jurisdiction of the International Criminal Court, the Minister of Justice shall inform that Court of the facts of the case.

In cases specified in paragraph 3, 4°, the federal prosecutor shall take no further action on the case and notify his decision to the Minister of Justice. No appeals may be lodged against such decisions. In the case of offences committed after 30 June 2002 that fall within the material jurisdiction of the International Criminal Court, the Minister of Justice shall inform that Court of the facts of the case.]] <L 2003-08-05/32, art. 18, 4°, 016; Entry into force: 07-08-2003> <L 2006-05-22/37, art. 3, 2°, 023; Entry into force: 31-03-2006>

(NOTE : by its decision n° 62/2005 du 23-03-2005 (Belgian Gazette 08-04-2005, p. 14835-14838), the Court of Arbitration quashed article 18, 4° of the L 2003-08-05/32)]

Art. 13. <AL 05-08-1943, art. 4> Sauf en ce qui concerne les crimes et délits commis en temps de guerre, les dispositions précédentes ne seront pas applicables lorsque l'inculpé, jugé en pays étranger du chef de la même infraction aura été acquitté ou lorsqu'après avoir été condamné il aura subi ou prescrit sa peine [ou aura été gracié ou amnistié]. <L 12-07-1984, art. 2>

Toute détention subie à l'étranger par suite de l'infraction qui donne lieu à la condamnation en Belgique, sera toujours imputée sur la durée des peines emportant privation de la liberté.

Art. 14. Dans tous les cas prévus par le présent chapitre, l'inculpé sera poursuivi et jugé d'après les dispositions des lois belges.

## **CRIMES UNDER INTERNATIONAL LAW**

### **Criminal Code**

Title Ibis. - Serious violations of international humanitarian law. <inserted by L 2003-08-05/32, art. 6; Entry into force : 07-08-2003>

Art. 136bis. <inserted by L 2003-08-05/32, art. 6; Entry into force : 07-08-2003> Genocide, as defined below, whether committed in time of peace or in time of war, is a crime under international law and is punished in accordance with the provisions of this title. In accordance with the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and without prejudice to the criminal provisions applicable to offences committed by negligence, the crime of genocide means any of the following acts, committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such :

- 1° killing members of the group;
- 2° causing serious bodily or mental harm to members of the group;
- 3° deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- 4° imposing measures intended to prevent births within the group ;
- 5° forcibly transferring children of the group to another group.

Art. 136ter. <inserted by L 2003-08-05/32, art. 7; Entry into force : 07-08-2003> A crime against humanity, as defined below, whether committed in time of peace or in time of war, is a crime under international law and is punished in accordance with the provisions of this title. In accordance with the Statute of the International Criminal Court, crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack :

- 1° murder;
- 2° extermination;
- 3° enslavement;
- 4° deportation or forcible transfer of population;
- 5° imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- 6° torture;
- 7° rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity ;
- 8° persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in articles 136bis, 136ter and 136quater;
- 9° enforced disappearance of persons;
- 10° the crime of apartheid;
- 11° other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Art. 136quater. <inserted by L 2003-08-05/32, art. 8; Entry into force : 07-08-2003> (NOTE : the third paragraph of article 136quater enters into force on the day of the entry into force for Belgium of the Second Protocol relating to the Hague Convention of 1954 on the protection of cultural property in the event of armed conflict, adopted in the Hague on 26 March 1999 ; see L 2003-08-05/32, art. 29, §2) § 1. Crimes under international law, punished in accordance with the provisions of this title, are war crimes mentioned in the Conventions adopted in Geneva on 12 August 1949 and under the additional Protocols I and II to these Conventions, adopted in Geneva on 8 June 1977, by the laws and customs applicable to armed conflicts, as defined under article 2 of the Conventions adopted in Geneva on 12 August 1949, under article 1 of the additional Protocols I and II to these Conventions adopted in Geneva on 8 June 1977, as well as under article 8, § 2, f) of the Statute of the International Criminal Court, and listed below, when these endanger, by any act or omission, the protection of persons or of property guaranteed by these Conventions, Protocols, laws and customs respectively, without prejudice to the criminal provisions applicable to offences committed by negligence :

- 1° wilful killing;
- 2° torture or other inhuman treatment, including biological experiments;
- 3° wilfully causing great suffering, or serious injury to body or health ;
- 4° committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions or a serious violation of article 3 common to these Conventions;
- 5° other outrages upon personal dignity, in particular humiliating and degrading treatment;
- 6° forcing a prisoner of war, a civilian protected by the Convention on the protection of civilians in times of war or a person protected as such by additional Protocols I and II to the Geneva Conventions of 12 August 1949 to serve in armed forces or armed groups of the hostile power or of the hostile party ;
- 7° conscripting or enlisting children under the age of fifteen years into the national armed forces or armed groups, or using them to participate actively in hostilities;
- 8° depriving a prisoner of war, a civilian protected by the Convention on the protection of civilians in times of war or a

person protected as such by additional Protocols I and II to the Geneva Conventions of 12 August 1949, of the rights of fair and regular trial in accordance with the provisions of these instruments;

9° unlawful deportation or transfer or unlawful confinement of a civilian protected by the Convention on the protection of civilians in times of war or a person protected as such by additional Protocols I and II of the Geneva Conventions of 12 August 1949;

10° intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

11° taking of hostages;

12° destroying or seizing the enemy's property, in the event of an international armed conflict, or of an adversary, in the event of an armed conflict not of an international character, unless such destruction or seizure be imperatively demanded by the necessities of war;

13° destruction and appropriation of property not justified by military necessity as allowed by the law of nations and carried out unlawfully and wantonly;

14° intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

15° intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems provided for by humanitarian international law in conformity with international law;

16° utilizing the presence of a civilian or another person protected by international humanitarian law to render certain points, areas or military forces immune from military operations;

17° intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

18° acts of omission, not legally justified, likely to compromise the health and physical or mental integrity of persons protected by international humanitarian law, in particular any medical act not justified by the health of these persons or not in compliance with generally recognised medical practices ;

19° unless justified in the conditions set out under article 18, acts subjecting persons mentioned under article 18, even with their consent, to physical mutilation or to medical or scientific experiments or to the removal of tissue or organs for transplantation, with the exception of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes.

20° intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities ;

21° intentionally directing attacks against places where the sick and wounded are collected, provided they are not military objectives ;

22° intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated, without prejudice to the criminality of the attack whose damaging effects, even proportional to the expected military advantage, are incompatible with the principles of the law of nations, derived from established custom, from the principles of humanity and from the dictates of public conscience;

23° intentionally launching an attack against structures or installations containing hazardous forces, in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated, without prejudice to the criminality of the attack whose damaging effects, even proportional to the expected military advantage, are incompatible with the principles of the law of nations, derived from established custom, from the principles of humanity and from the dictates of public conscience;

24° attacking or bombarding, by whatever means, demilitarised areas or towns, villages, dwellings or buildings which are undefended and which are not military objectives;

25° pillaging a town or place, even when taken by assault;

°26 killing or wounding a combatant who has laid down his arms;

27° killing or wounding treacherously individuals belonging to the enemy nation or army or a combatant adversary ;

28° declaring that no quarter will be given;

29° making improper use of a distinctive emblems of the Red Cross or of the Red Crescent or other protective signs recognised by international humanitarian law resulting in death or serious personal injury;

30° making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, resulting in death or serious personal injury ;

31° the transfer, directly or indirectly, by the Occupying Power, in the case of an international armed conflict, or of the occupying authority, in the case of a non international armed conflict, of parts of its own civilian population into the territory it occupies;

32° delaying the repatriation of war prisoners or civilians without any justification,

33° exercising apartheid or other inhuman or degrading practices based on racial discrimination and resulting in outrages upon human dignity;

34° intentionally directing attacks against clearly recognisable historic monuments, works of art and buildings dedicated to religion that make up the cultural or spiritual heritage of mankind and to which enhanced protection has been granted by virtue of a particular arrangement when there is no proof of violation by the hostile party of the ban on the use of this property in support of the military effort and when these properties are not situated in the immediate vicinity of military objectives ;;

35° intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, provided they are not military objectives;

36° employing poison or poisoned weapons;

37° employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

38° employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does

not entirely cover the core or is pierced with incisions;

39° declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party

40° employing weapons, projectiles and materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and materials and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to the Statute of the International Criminal Court.

§ 2. Crimes under international law that are punished in accordance with the provisions of this title are grave violations of article 3 common of the Conventions signed in Geneva on 12 August 1949 in the case of an armed conflict defined by this article 3 common and listed below, when these violations endanger, by an act or omission, the protection of the persons guaranteed by these Conventions, without prejudice to the criminal provisions applicable to offences committed by negligence:

1° violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

2° committing outrages upon personal dignity, in particular humiliating and degrading treatment;

3° taking of hostages;

4° the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

§ 3. Crimes under international law punished in accordance with the provision of this title are serious violations defined under article 15 of the Second Protocol relating to the Hague Convention of 1954 for the protection of cultural goods in the case of armed conflict, adopted in the Hague on 26 March 1999, committed in the case of armed conflict, as defined under article 18, §§ 1 and 2, of the Hague Convention of 1954 and article 22 of the aforementioned Second Protocol and listed below, when these violations undermine, by an act or omission, the protection of goods guaranteed by these Convention and Protocol, without prejudice to criminal provisions applicable to offences committed by negligence:

1° making cultural property under enhanced protection the object of attack;

2° using cultural property under enhanced protection or its immediate surroundings in support of military action ;

3° extensive destruction or appropriation of cultural property protected under the Convention and the Second Protocol.

Art. 136quinquies. <inserted by L 2003-08-05/32, art. 9, Entry into force : 07-08-2003> (NOTE : the last paragraph of article 136quinquies enters into force on the day of the entry into force for Belgium of the Second Protocol relating to the Hague Convention of 1954 on the protection of cultural property in the event of armed conflict, adopted in the Hague on 26 March 1999, see L 2003-08-05/32, art. 29, §2) The offences listed under articles 136bis and 136ter are punishable by life imprisonment.

The offences listed under 1°, 2°, 15°, 17°, 20° to 24° and 26° to 28° of paragraph 1 of article 136quater are punishable by life imprisonment.

The offences listed under 3°, 4°, 10°, 16°, 19°, 36° to 38° and 40° of the same paragraph of the same article are punishable by a prison term of twenty to thirty years. They are punishable by life imprisonment if they result in the death of one or several persons.

The offences listed under 12° to 14° and 25° of the same paragraph of the same article are punishable by a prison term of fifteen to twenty years. The same offence as that mentioned under 29° and 30° of the same paragraph of the same article are punishable by a prison term of twenty to thirty years if they result in either an illness which appears incurable, permanent incapacity for work, absolute loss of an organ or grave mutilation. They are punishable by life imprisonment if they result in the death of one or several persons.

The offences listed under 6° to 9°, 11° and 31° of the same paragraph of the same article are punishable by a prison term of ten to fifteen years. In cases of aggravating circumstances listed under the previous paragraph, they are punishable, on a case by case basis, by the sentences provided for under this paragraph.

The offences listed under 5° and 32° to 35° of this paragraph of this same article are punishable by a prison term of ten to fifteen years, unless more severe criminal provisions punishing serious outrages upon human dignity are applicable.

The offence provided for under 18° of the same paragraph of the same article is punishable by a prison term of ten to fifteen years. It is punishable by a prison term of fifteen to twenty years when it resulted in serious consequences for public health.

The offence listed under 39° of the same paragraph of the same article is punishable by a prison term of between ten and fifteen years.

The offence listed under 1° of paragraph 2 of article 136quater is punishable by life imprisonment.

The offences listed under 2° and 4° of the same paragraph of the same article are punishable by a prison term of between ten and fifteen years, unless more severe criminal provisions punishing serious outrages upon human dignity are applicable.

The offence listed under 3° of the same paragraph of the same article is punishable by a prison term of between ten and fifteen years. The same offence is punishable by a prison term of between twenty and thirty years if it resulted either in an illness which appears incurable, a permanent incapacity for work, absolute loss of use of an organ or a serious mutilation. It is punishable by life imprisonment if it resulted in the death of one or several persons.

The offences listed under 1° to 3° of paragraph 3 of article 136quater are punishable by a prison term of between fifteen and twenty years.

Art. 136sexies. <inserted by L 2003-08-05/32, art. 10; Entry into force : 07-08-2003> Persons who manufacture, hold or transport an instrument, device or object of any kind, put up a construction or transform an existing construction in the knowledge that the instrument, device, object, construction or transformation is used to commit any of the offences provided for under articles 136bis, 136ter and 136quater or to facilitate its perpetration, are punishable by the sentence provided for the offence whose perpetration they permitted or facilitated.

Art. 136septies. <inserted by L 2003-08-05/32, art. 11; Entry into force : 07-08-2003> The following are punishable by the sentence provided for the offence committed :



- 1° the order, even not acted upon, to commit one of the offences provided for by articles 136bis, 136ter and 136quater;
- 2° the proposal or the offer to commit such an offence and the acceptance of such proposal or offer;
- 3° the incitement to commit such an offence, even when not acted upon;
- 4° participation, within the meaning of articles 66 and 67, in such an offence, even when not acted upon;
- 5° failure to act within the limits of their possibility of action by those who were aware of the orders given with a view to the committing of such an offence or of facts that trigger the execution, and could prevent the offence from being committed or put an end to it ;
- 6° the attempt, within the meaning of articles 51 to 53, to commit such an offence.

Art. 136octies. <inserted by L 2003-08-05/32, art. 12; Entry into force : 07-08-2003> § 1er. Without prejudice to the exceptions set out under points 18°, 22° and 23° of article 136quater, § 1er, no interest, no necessity of a political, military or national nature can justify the offences defined under articles 136bis, 136ter, 136quater, 136sexies and 136septies, even if they are committed in retaliation.

§ 2. The fact that the accused acted on the order of its government or of a superior does not grant them exemption from their responsibility if, in the given circumstances, the order could clearly lead to one of the offences set out under articles 136bis, 136ter and 136quater being committed.

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*Article 417 bis defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.*<sup>510</sup>

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<sup>510</sup> Belgium’s report to the Committee Against Torture, ‘Second Reports of States Parties under Article 19 of the Convention’, 14 August 2007, CAT/C/BEL/2, paragraph 1; available at: <http://www2.ohchr.org/english/bodies/cat/cats41.htm> (last accessed December 2010).

## Bulgaria

### Overview

Bulgaria is party to the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, as well as the Rome Statute. Under the Bulgarian Constitution, these treaties, once ratified, are integrated into the Bulgarian legal system and, in the event they conflict with national legislation, the treaties take precedence.<sup>511</sup> However, their direct applicability within the domestic legal system is dependent on the nature of the provisions, “*whether self-executing or not, and on the place of the act of expression of consent to be bound in the hierarchy of the domestic legal system in conformity with the Constitution and the laws of the land*”.<sup>512</sup> Additional legislation may therefore be necessary to give effect to the international treaty within the domestic legal system.<sup>513</sup>

Active personality jurisdiction for all crimes is provided for under Article 4.1 of the Bulgarian Criminal Code, by which the Criminal Code applies to all Bulgarian citizens and for all crimes committed by them abroad.

Passive personality jurisdiction for all crimes is provided for under Article 5, which deals with crimes of a general nature perpetrated against either the interests<sup>514</sup> of the Republic of Bulgaria or against Bulgarian citizens abroad.

Universal jurisdiction is dealt with under Article 6. According to Article 6.1, Bulgarian courts have jurisdiction over crimes against peace and humanity, as described in Chapter XIV of the Code (‘Outrage against peace and humanity’), committed anywhere in the world, affecting the interests of another state or citizens of another state. Article 6.2 stipulates that Bulgarian courts shall exercise universal jurisdiction when Bulgaria is obliged to do so by virtue of binding international treaties.

Crimes under Chapter XIV are divided into three sections: outrage on peace, outrage on laws and the practice of waging war, and genocide and apartheid against groups of the population. The first two sections deal with war crimes, although these are more limited than those defined in the Rome Statute. Genocide is provided for in the final section and is defined in line with the Rome Statute.

### Issues

**Nexus requirements (including presence or residence):** For grave intentional crimes (which include those in Chapter XIV), the suspect must be present within the territory of Bulgaria for court proceedings.<sup>515</sup>

**Subsidiarity:** In Bulgarian penal theory the principle of territoriality takes precedence over the principle of universal jurisdiction. In order to avoid infringement of the *ne bis in idem* principle, the competent Bulgarian authorities will always take into account whether there is an international investigation or prosecution, for instance before the International Criminal Court. Further, if a prosecutor receives information from the authorities of a state where a crime was committed for which proceedings have been or will be instituted

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<sup>511</sup> Bulgarian Constitution, Article 5.4.

<sup>512</sup> International Treaties of the Republic of Bulgaria Act, Article 26.3. English text available at: <http://solicitorbulgaria.com/index.php/international-treaties-of-the-republic-of-bulgaria-act> (visited December 2010).

<sup>513</sup> <http://solicitorbulgaria.com/index.php/international-treaties-of-the-republic-of-bulgaria-act>, Article 27 (visited December 2010).

<sup>514</sup> Public, economic and other interests.

<sup>515</sup> CCP, Article 269.1.

in that state, the prosecutor must decide whether the Bulgarian authorities will exercise their power under Article 4.1 to institute criminal proceedings for the same crime.<sup>516</sup>

**Double Criminality:** There is no double criminality requirement for the exercise of extraterritorial jurisdiction.

**Prosecutorial and Executive discretion:** There are no specific procedural rules for the institution of an investigation into a universal jurisdiction case, but for all crimes prosecutors have discretion under Bulgarian law as to whether to prosecute or not. Article 213.1 of the Criminal Code of Procedure provides that the prosecutor may refuse to institute pre-trial proceedings, and under Article 243.1 the prosecutor may choose to terminate proceedings which have already commenced. The prosecutor also has the power to suspend proceedings under Article 244.1.

The Bulgarian Ministry of Justice, as part of the executive power, has no competence to exercise any control over the decisions taken by the independent judiciary.

**Ability to review decisions of the prosecutor or government body:** Decrees of investigative bodies may be appealed before the prosecutor.<sup>517</sup> Prosecutorial decrees which are not subject to judicial review are appealed before a prosecutor of a superior position whose decree is not subject to further appeal.<sup>518</sup> Appeals are filed through the entity which issued the decree or directly to the prosecutor competent to examine it.<sup>519</sup> Where a prosecutor refuses to institute pre-trial proceeding either of his or her own motion or following appeal,<sup>520</sup> this decision may be reversed by a prosecutor of more senior authority.

These appeals are seen to be neither judicial nor administrative in nature (not judicial because there is no appeal before a court, and not administrative because the rules of the Bulgarian Administrative Procedural Code do not apply). They are simply defined as a specific appeal procedure which takes place within the framework of the instituted pre-trial proceedings.

**Statutes of limitation:** Article 79.2 of the Bulgarian Criminal Code stipulates that there is no statute of limitation for crimes against peace and humanity (Chapter XIV).

**Immunities in criminal cases:** Immunities still constitute a bar for Bulgarian courts in investigating or prosecuting offenders who may continue to enjoy immunities under international law. Article 3.2 of the Bulgarian Criminal Code stipulates that the issue of responsibility of foreigners having immunity from the criminal jurisdiction of the Republic of Bulgaria shall be resolved according to the norms of international law adopted by it.<sup>521</sup>

Similarly, Article 5 of the Code of Criminal Procedure provides that criminal action in relation to persons enjoying immunity from the criminal jurisdiction of the Bulgarian courts may only be instituted in compliance with the norms of international law. Under the Code of Criminal Procedure, no individual enjoying immunity is to be constituted as an accused party; and criminal prosecution should be suspended until the individual is

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<sup>516</sup> CCP, Article 480.

<sup>517</sup> CCP, Article 200.

<sup>518</sup> CCP, Article 200.

<sup>519</sup> CCP, Article 201.2.

<sup>520</sup> CCP, Article 213.

<sup>521</sup> English version of the CCP available at <http://www.legislationline.org/documents/section/criminal-codes> (last accessed December 2010).

divested of immunity, if no other bars are present.<sup>522</sup> When an accused acquires immunity after investigations or prosecutions have commenced, these must be discontinued.<sup>523</sup>

Those who may benefit from immunity include members of the National Assembly, the President, Vice President of the State, as well as officials who exercise diplomatic and consular functions.<sup>524</sup> Military officers are also entitled to a particular form of immunity which is regulated in the Law on Defence and Armed Forces of the Republic of Bulgaria.<sup>525</sup> This provides that they may not be detained without the prior consent of the Minister of Defence.<sup>526</sup>

**Victims' role in the proceedings:** Under the general rules of the Criminal Procedure Code, the victim has the right to initiate a private prosecution or to act as a private complainant in criminal cases.

*As a private prosecutor:* A victim who has suffered property damage or personal injury as a result of a crime has the right to participate in the public criminal procedure as a private prosecutor.<sup>527</sup> This right passes to his or her heirs if deceased. The private prosecutor may maintain the indictment at the same time as the prosecutor, and may continue to maintain it after the prosecutor has declared not to proceed.<sup>528</sup> A private prosecutor is granted certain rights, such as to submit evidence, to make objections, and to appeal the decisions of the court where his rights and interests are harmed.<sup>529</sup>

*As a private complainant:* An injured party may bring an indictment before the court as a private complainant.<sup>530</sup> This right passes to his or her heirs if deceased. The complaint must be submitted within six months from the day on which the injured party experienced or learned about the crime, or from the day on which the injured party received notice of discontinuation of the trial proceedings on the ground that the crime shall be subject to prosecution by means of complaint. The private complainant has certain rights, such as to submit evidence, to make objections, to appeal the decisions of the court where his or her interests are harmed, and to withdraw the complaint.<sup>531</sup> The private complainant may also act as a *civil claimant* in the case and apply for damages.<sup>532</sup>

*As a civil claimant:* An injured party and his or her heirs, as well as legal persons who suffered harm as a result of the crime, may file a civil claim for compensation and establish themselves as civil claimants in the public criminal procedure.<sup>533</sup> The claim must be filed according to the Civil Procedure Code. The civil claim in the court procedure may be filed against the defendant, as well as against other persons bearing civil liability for damages caused by the crime.<sup>534</sup> Article 87 provides the same rights for the civil claimant as for the private complainant or private prosecutor.

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<sup>522</sup> CCP, Article 220.1.

<sup>523</sup> CCP, Article 220.2. Article 220 should be read in conjunction with Article 5: there are no obstacles to launching procedural actions against persons who enjoy immunity after waiving their immunity in accordance with national and international procedures.

<sup>524</sup> Questionnaire response from the MoJ.

<sup>525</sup> This came into force on 12 May 2009.

<sup>526</sup> Prom. SG. 35/12 May 2009, latest amendment SG.16/26 February 2010.

<sup>527</sup> CCP, Article 76.

<sup>528</sup> CCP, Article 78.

<sup>529</sup> CCP, Article 79.

<sup>530</sup> CCP, Article 80.

<sup>531</sup> CCP, Article 82.1.

<sup>532</sup> CCP, Article 82.2.

<sup>533</sup> CCP, Article 84.1.

<sup>534</sup> CCP, Article 86.

**Victim and witness protection:** Witness identities are to be kept secret during interrogation and testimony may be performed by means of video link or telephone conference.<sup>535</sup> Bulgarian legislation also provides for the protection of witnesses under Article 123 of the Criminal Procedure Code where the giving of testimony may give rise to a real threat to the life, health or property of the witness or close associates. The article provides for personal physical protection by the authorities of the Ministry of the Interior, and for ensuring that the identity of the witness is kept secret. Such witness protection would be temporary.

In addition, further specific measures for the protection of the witness may be imposed under the 2004 Law of Protection of Persons Threatened in Connection with Criminal Procedure.<sup>536</sup> This applies to both “in court” and “out of court” protection for victims and witnesses. It is complementary to the measures under Article 123 of the Criminal Procedure Code and is aimed to protect persons in cases where the evidence, explanations or the information that they provide offer proof of essential importance in criminal procedures for serious intentional crimes, including crimes specified in Chapter XIV of the Criminal Code (“*Crimes against peace and humanity*”). Measures may include temporary accommodation in a safe place or a change of workplace or place of education. It may also involve a complete identity change and relocation to another state, if protection is not possible within the territory of Bulgaria.<sup>537</sup>

**Participation in the EU Genocide Network:** There appears to have been no participation in this network on the part of Bulgaria.

## Cases

In April 2005, Colonel Cedomir Brankovic, a member of the Serb-Montenegro military delegation to Bulgaria, was arrested in Sofia. He was wanted by the Croatian government in connection with alleged war crimes in his capacity as former commander of the Yugoslav army, which included the killing of civilians and the destruction of civilian objects and churches committed during the conflict of 1991 in the territory of Croatia. Although he was subsequently brought to trial, the Sofia City Court ruled that as a member of a special military mission he was immune from criminal jurisdiction and should be released from custody. A further decision issued by the Sofia Appellate Court in May 2005 confirmed the same. The judges stated that Colonel Brankovic was included on the list of the members of the Serbian military mission approved by the Bulgarian authorities, and as such was protected by Article 29 of the Convention on Special Missions of 1969.<sup>538</sup>

## Relevant legislation

### Jurisdiction

Bulgarian Criminal Code

Article 4

1) The Penal Code shall apply for the Bulgarian citizens and for the crimes committed by them abroad.

<sup>535</sup> CCP, Article 141.1.

<sup>536</sup> Amended October 2009.

<sup>537</sup> Relocation to another state is dealt with under Article 26 of the Law of Protection of Persons Threatened in Connection with Criminal Procedure, on the basis of international agreement to which Bulgaria is a party, or under conditions of mutuality.

<sup>538</sup> Information based on the online article Serbian News Network, ‘Freeing the Colonel’, 9 May 2005; available at: <http://www.mail-archive.com/news@antic.org/msg07507.html> (last accessed December 2010).

#### Article 5

The Penal Code shall also apply for foreigners who have committed crime of general nature abroad, affecting the interests of the Republic of Bulgaria or of a Bulgarian citizen.

#### Article 6

(1) The Penal Code shall also apply regarding foreigners who have committed crime abroad against the peace and mankind, thus affecting the interests of another country or foreign citizens.

(2) The Penal Code shall also apply for other crimes committed by foreigners abroad wherever stipulated by an international agreement party to which is the Republic of Bulgaria.

### CRIMES UNDER INTERNATIONAL LAW

#### Chapter Fourteen - CRIMES AGAINST PEACE AND HUMANITY

##### Section I

##### Crimes Against Peace

#### Article 407

A person who in any way makes propaganda for war, shall be punished by deprivation of liberty for up to eight years.

#### Article 408

A person who, directly or indirectly, through the press, by speech, over the radio or in any other way, strives to provoke an armed attack by one state on another, shall be punished for abetment to war by deprivation of liberty for three to ten years.

#### Article 409

(Amended, SG No. 153/1998)

A person who plans, prepares or wages an aggressive war, shall be punished by deprivation of liberty for a term of fifteen to twenty years, or by life imprisonment without substitution.

##### Section II

##### Crimes Against the Laws and Customs of Waging War

#### Article 410

A person who in violation of the rules of international law for waging war:

- a) perpetrates or orders the perpetration of, on wounded, sick, shipwrecked persons or sanitary personnel, acts of murder, tortures, or inhuman treatment, including biological experiments, inflicts or orders grave sufferings, mutilation or other impairments of health to be inflicted to such persons;
- b) perpetrates, or orders to be perpetrated, major destruction or appropriations of sanitary materials or installations, (Amended, SG No. 153/1998) shall be punished by deprivation of liberty for a term of from five up to twenty years, or by life imprisonment without substitution.

#### Article 411

A person who in violation of the rules of international law for waging war:

- a) perpetrates or orders to be perpetrated with regard to prisoners of war murder, tortures or inhuman treatment, including biological experiments or causes or orders grave sufferings, mutilation or other impairments of health to be inflicted on such persons;
- b) compels a prisoner of war to serve in the armed forces of the enemy state, or
- c) deprives a prisoner of war of the right to be tried by a regular court and under a regular procedure, (Amended, SG No. 153/1998) shall be punished by deprivation of liberty for a term of from five up to twenty years or by life imprisonment without substitution.

#### Article 412

(Amended, SG No. 153/1998)

A person who in violation of the rules of international law for waging war:

- a) perpetrates or orders with regard to the civil population murders, tortures, inhuman treatment, including biological experiments to be perpetrated, causes or orders grave sufferings, mutilation or other serious impairments of health to be inflicted;
- b) takes or orders hostages to be taken;
- c) carries out or orders unlawful deportations, persecutions or detentions to be effected;
- d) compels a civilian to serve in the armed forces of an enemy state;
- e) deprives a civilian of his right to be tried by a regular court and under a regular procedure;
- f) unlawfully and arbitrarily perpetrates or orders the perpetration of destruction or appropriations of property on a large scale, (Amended, SG No. 153/1998) shall be punished by deprivation of liberty for a term of from five up to twenty years or by life imprisonment without substitution.

#### Article 413

A person who, without having such right, bears the insignia of the Red Cross or of the Red Crescent or who abuses a flag or the insignia of the Red Cross or the Red Crescent or the colour determined for transport vehicles for sanitary evacuation, shall be punished by deprivation of liberty for up to two years.

#### Article 414

(1) A person who, in violation of the rules of international law for waging war destroys, damages or makes unfit cultural or historical monuments and objects, works of art, buildings and equipment intended for cultural, scientific or other humanitarian purposes, shall be punished by deprivation of liberty for one to ten years.

(2) The same punishment shall also be imposed on a person who steals, unlawfully appropriates or conceals objects

indicated in the preceding paragraph or imposes contribution or confiscation with respect to such objects.

#### Article 415

(1) (Supplemented, SG. No. 62/1997, amended and supplemented, SG No. 92/2002) A person who, in violation of the rules of international law for waging war uses or orders nuclear, chemical, bacteriological, biological or toxic weapons or impermissible ways or means for waging war to be used, shall be punished by deprivation of liberty for three to ten years.

(2) (Amended, SG No. 153/1998) If particularly grave consequences have set in therefrom, the punishment shall be deprivation of liberty for a term of from ten up to twenty years or life imprisonment without substitution.

#### Article 415a

(New, SG No. 92/2002)

Anyone who undertakes military preparation for the use of nuclear, chemical, bacteriological, biological or toxic weaponry as means of war, shall be punished by deprivation of liberty from one to six years.

### Section III

(Heading supplemented, SG No. 95/1975)

#### Liquidation of Groups of the Population (Genocide) and Apartheid

#### Article 416

(1) A person who, for the purpose of liquidating, completely or in part, a certain national, ethnic, racial or religious group:

a) causes death, severe bodily injury or permanent derangement of the consciousness of a person belonging to such a group;

b) places the group under living conditions such that lead to its full or partial physical liquidation;

c) takes measures aimed at checking the birth rate amid such a group;

d) forcefully transfers children from one group to another,

(Amended, SG No. 153/1998) shall be punished for genocide by deprivation of liberty for a term of from ten up to twenty years or by life imprisonment without substitution.

(2) (Previous Article 417, - SG, No. 95/1975) A person who commits preparation for genocide shall be punished by deprivation of liberty for two to eight years.

(3) (Previous Article 418, SG No. 95/1975) A person who openly and directly incites genocide, shall be punished by deprivation of liberty for one to eight years.

#### Article 417

(New, SG No. 95/1975, amended, SG No. 153/1998)

A person who with the aim of establishing or maintaining domination or systematic oppression of one racial group of people over another racial group of people:

a) causes death or severe bodily injury to one or more persons of such a group of people, or

b) imposes living conditions of such a nature as to cause complete or partial physical liquidation of a racial group of people,

(Amended, SG No. 153/1998) shall be punished for apartheid by deprivation of liberty for a term of from ten up to twenty years or by life imprisonment without substitution.

#### Article 418

(New, SG No. 95/1975)

A person who for the purpose under the preceding article:

a) unlawfully deprives of liberty members of a racial group of people or subjects them to compulsory labour;

b) puts into operation measures for hindering the participation of a racial group of people in the political, social, economic and cultural life of the country, and for intentional creation of conditions hampering the full development of such a group of people, in particular by depriving its members of the basic freedoms and rights of citizens;

c) puts into operation measures for dividing the population by racial features through setting up of reservations and ghettos, through the ban of mixed marriages between members of different racial groups or through expropriation of real property belonging thereto;

d) deprives of basic rights and freedoms organisations and persons, because they are opposed to apartheid, shall be punished by deprivation of liberty for five to fifteen years.

## Cyprus

### Overview

Cyprus has enacted legislation specifically criminalising genocide, crimes against humanity and war crimes, incorporating by reference the definitions of those crimes in the Rome Statute.<sup>539</sup>

Active personality jurisdiction is available for crimes which are both punishable by imprisonment exceeding two years and also punishable by the law of the country where committed.<sup>540</sup> Passive personality jurisdiction is not provided for.

Universal jurisdiction is provided for under Article 5(1)(e) in relation to certain specified crimes. Article 5(1)(e)(v) extends universal jurisdiction to offences which are crimes under the International Treaties or Conventions to which Cyprus is party.

However, the law implementing the Rome Statute specifically provides the Cypriot Court with universal jurisdiction in respect of genocide, crimes against humanity and war crimes, “*irrespective of the provisions of article 5 of the Criminal Code*”.<sup>541</sup> This jurisdiction is available irrespective of the place that the offence was committed, whether in the territory of the Cyprus Republic or not, and irrespective of whether the offence was committed by a citizen of the Republic or not.<sup>542</sup>

### Issues

**Nexus requirements (including presence or residence):** The law does not impose additional nexus requirements on the exercise of universal jurisdiction.

**Double criminality:** Double criminality is required for the exercise of active personality jurisdiction unless the crime was committed while in the service of the Republic.<sup>543</sup>

**Prosecutorial and executive discretion:** Criminal prosecution for the crime of genocide, war crimes and crimes against humanity may only be exercised by the Attorney-General of the Republic or upon his or her written approval.<sup>544</sup>

**Immunities in criminal cases:** Cyprus ratified the Agreement on Privileges and Immunities of the International Criminal Court, by the enactment of ratifying Law No.56(III)/2004.<sup>545</sup>

**Victims’ role in the proceedings:** Legislation relating to victims, aside from the Criminal Code, includes the Criminal Procedure Law<sup>546</sup> and the Compensation to Crime Victims Law of 2007<sup>547</sup>, although these appear only to deal only with possible awards of compensation<sup>548</sup> to victims in cases where the crime has resulted in deprivation of

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<sup>539</sup> Rome Statute of the International Criminal Court (Ratification) Law of 2002 (Law 8(III)/2002, as amended by Law 23(III)/2006).

<sup>540</sup> CC, Article 5(1)(c) and (d).

<sup>541</sup> Rome Statute (Ratification) Law of 2002, Section 6.

<sup>542</sup> Response to MoJ questionnaire.

<sup>543</sup> CC, Article 5(1)(d)

<sup>544</sup> Rome Statute (Ratification) Law of 2002, Section 7.

<sup>545</sup> Council of Europe, ‘Fourth Consultation on the implications for Council of Europe Member States of the ratification of the Rome Statute of the International Criminal Court, 14-15 September 2006: Progress Report Cyprus’, 2006, available at [http://www.coe.int/t/e/legal\\_affairs/legal\\_co\\_operation/public\\_international\\_law/texts\\_&\\_documents/icc/4th%20ConsultlCC\(2006\)01%20E%20Cyprus.pdf](http://www.coe.int/t/e/legal_affairs/legal_co_operation/public_international_law/texts_&_documents/icc/4th%20ConsultlCC(2006)01%20E%20Cyprus.pdf) (last accessed December 2010).

<sup>546</sup> Articles 171 and 172.

<sup>547</sup> [51(I)/97], as amended by Law 126(I)/2006.

<sup>548</sup> By the state, where not possible by the offender.



property.<sup>549</sup> The Compensation to Crime Victims Law simplifies the procedure for claiming compensation when the injury took place abroad and obliges the relevant authorities to cooperate.<sup>550</sup>

There is not a system allowing victims, or third parties acting on their behalf, to raise civil claims in cases initiated by a prosecutor.<sup>551</sup>

**Victim and witness protection:** The 2001 Protection of Witnesses Law<sup>552</sup> provides for protection in the courtroom by means of special partitions, closed circuit television and any other means which would prevent the witness being seen by the accused or vice versa.<sup>553</sup> This same law provides a scheme for the protection of witnesses and those who assist justice, under the control and supervision of the Attorney General of the Republic, and includes measures such as escorting and guarding persons, as well as change of residence and identity for witness and his or her family.<sup>554</sup> The law does not exclude victims and witnesses of serious crimes.<sup>555</sup>

**Participation in the EU Genocide Network:** An EU contact point was designated within the Cyprus Police, in line with EU Framework Decision 2002/494/JHA. So far no contact point has participated in any Network meetings.

## Cases

There appear to be no relevant cases.

## Relevant legislation

### JURISDICTION

#### Criminal Code:

Article 5(1) The Criminal Code and any other Law creating an offence are applicable to all offences committed-

- (c) in any foreign country by a citizen of the Republic whilst in the service of the Republic, or
- (d) in any foreign country by a citizen of the Republic if the offence is one punishable in the Republic with imprisonment exceeding two years and the act or omission constituting the offence is also punishable by the law of the country where it was committed.
- (e) in any foreign country by any person if the offence is-
  - (i) treason or an offence against the security of the Republic or the constitutional order,
  - (ii) piracy, or
  - (iii) connected with the coin or currency notes of the Republic, or
  - (iv) related to the unlawful dealing in dangerous drugs, or
  - (v) one to which, under any International Treaty or Convention, binding the Republic, the law of the Republic is applicable, or
  - (vi) one that has one of its components an act or omission, the object of which is a property located at the Republic, including conspiracy or attempt or excitement or attempt to incite another to commit an offence, which has one of its components an act or omission, the object of which is a property located at the Republic.

Rome Statute of the International Criminal Court (Ratification) Law of 2002 (Law 8(III)/2002, as amended by Law 23(III)/2006)

<sup>549</sup> Questionnaire response.

<sup>550</sup> Questionnaire response.

<sup>551</sup> Questionnaire response.

<sup>552</sup> Law No. 95(I)/2001.

<sup>553</sup> Law No. 95(I)/2001, Articles 5 and 9.

<sup>554</sup> Protection of Witnesses Law, 2001, Part IV Scheme for the Protection of Witnesses and Those Who Assist Justice, Article 16. Article 18 defines who may be eligible.

<sup>555</sup> Questionnaire response.

Section 6

Irrespective of the provisions of article 5 of the Criminal Code, the Court shall have jurisdiction to determine any offence contrary to this Law whether committed within or outside the territory of the Republic and whether committed by a citizen of the Republic or by some other person.

CRIMES UNDER INTERNATIONAL LAW

Rome Statute of the International Criminal Court (Ratification) Law of 2002 (Law 8(III)/2002, as amended by Law 23(III)/2006)

Section 2

“crime against humanity” means any of the acts specified in article 7 the Rome Statute

...

“genocide” means any of the acts specified in article 6 of the Rome Statute

...

“war crime” means any of the acts specified in article 8.2 of the Rome Statute

Section 4

(1) Any person who commits genocide or a crime against humanity or a war crime is guilty of a felony punishable by life imprisonment.

(2)(a) Any person who commits any act related to an offence contrary to sub-section (1) of the present section is guilty of a felony punishable by life imprisonment.

(b) A person commits an act related to an offence contrary to sub-section (1) of the present section, who –

- (i) participates in the commission thereof by any means, or
- (ii) incites or induces or procures another to commit the said offence, or
- (iii) attempts or conspires with another to commit the said offence, or
- (iv) knowingly conceals the commission of the said offence.

Section 5

In the interpretation and application of articles 6, 7 and 8.2 of the Rome Statute, the Court shall take into consideration any relevant Elements of Crime adopted, pursuant to article 9 of the Rome Statute, by the Assembly of States Parties on 9 September 2002, as they may from time to time be amended, in accordance with article 9 of the Rome Statute.

## Czech Republic

### Overview

The Czech Republic enacted a new Criminal Code in 2009, and this came into force on 1 January 2010.<sup>556</sup> Under the Code, war crimes,<sup>557</sup> genocide,<sup>558</sup> crimes against humanity<sup>559</sup> and torture<sup>560</sup> are criminalised. Enforced disappearance is not specifically criminalised, except in the context of a crime against humanity.<sup>561</sup>

Czech authorities have universal jurisdiction over certain enumerated crimes including all of the crimes under international law listed above.<sup>562</sup> The Code allows these crimes to be tried under Czech law “*when such a crime has been committed in a foreign country by a foreign citizen or a stateless person, who has not been granted permanent residence in the territory of the Czech Republic*”.<sup>563</sup> Section 9 provides further for jurisdiction if required by an international treaty to which the Czech Republic is party.

Section 8 of the Code provides for a more limited form of universal jurisdiction for *all* crimes, subject to the accused being present in the Czech Republic and not extradited to another country with jurisdiction, and the crime being punishable in the territorial state.<sup>564</sup>

Section 6 provides for active personality jurisdiction for any crime committed abroad by a Czech national or stateless person with permanent residence in the Czech Republic, and 7(2) provides for passive personality jurisdiction over all crimes, subject to a double criminality requirement.

### Issues

**Nexus requirements (including presence or residence):** There are no additional nexus requirements to exercise universal jurisdiction for war crimes, genocide, crimes against humanity and torture as defined in the Criminal Code.<sup>565</sup> For other crimes presence is required for the exercise of universal jurisdiction<sup>566</sup> although jurisdiction can be taken in any event if required under an international treaty without this presence.<sup>567</sup> *In absentia* trials are allowed under Czech law.<sup>568</sup>

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<sup>556</sup> See Act No. 40/2009 of the Collection of Laws, the Criminal Code, as Amended by the Act No. 306/2009 of the Collection of Laws.

<sup>557</sup> CC, Sections 411-417.

<sup>558</sup> CC, Section 400.

<sup>559</sup> CC, Section 401.

<sup>560</sup> CC, Section 149.

<sup>561</sup> CC, Section 401. Enforced disappearance not in the context of a crime against humanity would be likely to be prosecuted as one of the two types of false imprisonment provided for in Czech law, i.e. either as restriction of personal liberty (CC, Section 171) or deprivation of personal liberty (CC, Section 170), depending on the specific circumstances of the case.

<sup>562</sup> CC, Section 7(1).

<sup>563</sup> CC, Section 7(1).

<sup>564</sup> A further type of extraterritorial jurisdiction is available for all crimes under this section where the crime was committed for the benefit of a Czech corporation or businessperson.

<sup>565</sup> CC, Section 7(1).

<sup>566</sup> CC, Section 8(1). Only presence at the time of extradition proceedings is required, prosecution after extradition is found inadmissible by a court or after it is denied by the Minister of Justice can be conducted in absentia.

<sup>567</sup> CC, Section 9.

<sup>568</sup> CCP (Act No. 141/1961 of the Collection of Laws, as amended), Sections 302-306a.

**‘Subsidiarity’:** Subsidiarity (in relation to extradition or surrender under the European arrest warrant scheme) is required for the exercise of universal jurisdiction for ordinary offences under Section 8(1) of the Criminal Code. Universal jurisdiction can be exercised and prosecution initiated only if (i) a court did not allow extradition of the suspect and this decision was not challenged by the Minister of Justice at the Supreme Court<sup>569</sup> or (ii) the Supreme Court confirmed the regional or high court’s decision not to allow extradition or itself decided on inadmissibility of the extradition<sup>570</sup> or (iii) the extradition was found admissible by a court but the Minister of Justice denied the extradition.<sup>571</sup>

**Double criminality:** There is no double criminality requirement to exercise universal jurisdiction for war crimes, genocide, crimes against humanity and torture, as defined in the Criminal Code, and for other crimes mentioned in Section 7(1) of the Criminal Code.<sup>572</sup> Double criminality is required for universal jurisdiction over ordinary crimes,<sup>573</sup> and for passive personality jurisdiction.<sup>574</sup>

**Prosecutorial and Executive discretion:** Formally, the Code of Criminal Procedure is based on the principle of legality, that is, that law enforcement authorities are required to investigate and prosecute any criminal offence of which they have knowledge.<sup>575</sup> However, a degree of prosecutorial discretion was introduced into the Code of Criminal Procedure at the same time as the new Criminal Code was enacted.<sup>576</sup> This gives law enforcement authorities the discretion to decide not to institute a criminal prosecution, or to terminate an existing criminal prosecution, if it is clear that the purpose of criminal prosecution has been reached.<sup>577</sup> There are no specific provisions allowing for greater discretion in the case of crimes under international law or extraterritorial jurisdiction.

**Ability to review decisions of the prosecutor or other governmental body:** A prosecutor’s or police authority’s decision not to initiate criminal proceedings is subject to appeal (within 3 days) by the victim of the offence.<sup>578</sup> All decisions of a police authority not to initiate criminal proceedings must be sent to the competent prosecutor (within 48 hours)<sup>579</sup>, who has the right to revoke the decision (within 30 days) if the prosecutor finds that it violated the law.<sup>580</sup> A prosecutor’s decision to forward a case to an administrative or disciplinary body in lieu of prosecution<sup>581</sup> is subject to appeal (within 3 days) by the accused person or by the victim.<sup>582</sup>

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<sup>569</sup> CCP, Section 397(1) and (3).

<sup>570</sup> CCP, Section 397(4).

<sup>571</sup> CCP, Section 399(2).

<sup>572</sup> CC, Section 7(1).

<sup>573</sup> CC, Section 8(1).

<sup>574</sup> CC, Section 7(2).

<sup>575</sup> CCP, Section 2(3).

<sup>576</sup> By Act No. 41/2009 of the Collection of Laws, which is an act accompanying the new Criminal Code 2009 and amending various other acts in connection with the entry into force of the new Criminal Code 2009.

<sup>577</sup> The factors to be taken into account include the importance of the interest protected by the violated provision, the measure of its violation, the manner in which the offence was committed, its consequences and circumstances in which it was committed and the offender’s behaviour after the offence was committed (namely attempts to pay the damages or remove other negative consequences of the offence): CCP, Section 172(2)(c). Prior to the new Criminal Code, sufficient dangerousness of the underlying conduct to the society was one of the substantive elements of a criminal offence.

<sup>578</sup> CCP, Section 159a(7).

<sup>579</sup> CCP, Section 159a(6).

<sup>580</sup> CCP, Section 174(2)(e).

<sup>581</sup> Where the prosecutor is of the opinion that the act in question does not constitute a criminal offence but only a misdemeanor.

<sup>582</sup> CCP, Section 171(2).

A prosecutor's decision to terminate criminal prosecution is also subject to appeal (within 3 days) by the accused person or by the victim.<sup>583</sup> All decisions on termination of the criminal prosecution or on forwarding the case to an administrative or disciplinary body must be also sent, as soon as they become final, to the Supreme Prosecutor's Office.<sup>584</sup> The Supreme Prosecutor can revoke a prosecutor's decision (within 3 months) if it is found that the decision violated the law.<sup>585</sup>

When the case is brought to trial, the court may terminate the criminal proceedings without starting the trial; this decision is subject to appeal (within 3 days) by the prosecutor or the accused person.<sup>586</sup> The court may terminate criminal proceedings also after the trial begins; this decision is subject to appeal (within 3 days) by the prosecutor.<sup>587</sup>

**Statutes of limitation:** Criminal offences mentioned in Chapter XIII of the Criminal Code<sup>588</sup> are not subject to statutes of limitation in relation to both prosecution and enforcement of a sentence.<sup>589</sup> The crimes of genocide, war crimes and crimes against humanity fall within this chapter, however the crime of torture does not. Torture that is not part of a crime against humanity or war crime is therefore subject to the normal limitation period of between five and twelve years, depending on the circumstances of the crime.<sup>590</sup>

**Immunities:** Those enjoying privileges and immunities according to national or international law are excluded from the jurisdiction of law enforcement authorities under the Czech Code of Criminal Procedure.<sup>591</sup> National law immunities exist for the President of the Czech Republic, members of the Parliament and justices of the Constitutional Court.<sup>592</sup>

No specific legislation exists to limit the immunity of those accused of crimes under international law, although attempts were made to have such legislation enacted.<sup>593</sup> It is possible that a court would imply limitations to immunity by interpreting the law in accordance with the Czech Republic's international obligations,<sup>594</sup> including obligations requiring prosecution of crimes under international law against those who would otherwise be covered by immunity. However, this has not been tested in practice.

**Victims' role in proceedings:** According to the Code of Criminal Procedure, victims are considered a civil party to criminal proceedings and enjoy a variety of rights, including the right to file certain appeals (see above). However, there is no private prosecution provided for in the Code of Criminal Procedure. Victims (or anyone who learns about an offence) can file a "*complaint*" with the Police of the Czech Republic or a prosecutor;

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<sup>583</sup> CCP, Section 172(3).

<sup>584</sup> CCP, Section 173a.

<sup>585</sup> CCP, Section 174a(1).

<sup>586</sup> CCP, Section 188(3).

<sup>587</sup> CCP, Section 223.

<sup>588</sup> With the exception of three, but including genocide, war crimes and crimes against humanity.

<sup>589</sup> CC, Sections 35(a) and 95.

<sup>590</sup> CC, Sections 34(1) and 94(1).

<sup>591</sup> CCP, Section 10.

<sup>592</sup> Constitution of the Czech Republic, Sections 28, 54(3), 65 and 86.

<sup>593</sup> Those attempts were made in connection with ratification of the Rome Statute. The Rome Statute was ratified without such changes, relying on Articles 1(2) and 10a of the Constitution of the Czech Republic, providing for priority of certain international treaties over national laws (Article 10) and requiring the Czech Republic (and its authorities) to honour all its obligations under international law (including international customary law; Article 1(2)).

<sup>594</sup> Constitution, Article 1(2).

such complaints are examined by police authorities and by prosecutors to determine whether criminal prosecution is to be instituted.

Victims can apply for damages to be awarded to them by the court in a criminal trial;<sup>595</sup> if damages are not awarded (in full or in part), victims can still sue the offender for damages (or their part) in civil proceedings. Victims can participate in criminal proceedings, including proposing evidence to be collected by police authorities or by the prosecutor, and have access to the file in the same extent as the defendant.<sup>596</sup>

Victims can be represented in criminal proceedings by their attorneys. If the number of victims is especially high, the court may decide that the victims may exercise their right only through a joint attorney (there can be up to six joint attorneys if victims cannot agree on a single joint attorney).<sup>597</sup>

**Victim and witness protection:** The Czech Republic has legislation specifically addressing witness protection, enacted in 2001.<sup>598</sup> The Act provides for special measures to be provided to threatened witnesses and their families including personal protection, relocation and concealing of the protected person's identity.<sup>599</sup>

**Participation in EU Genocide Network:** The Contact Point of the Czech Republic is currently a representative of the Police Presidium of the Czech Republic.<sup>600</sup> During its EU Presidency, the Czech Republic organized the 6th Meeting of the European Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes in The Hague (23 to 26 April 2009).

## Cases

The authors are not aware of any cases of prosecution of crimes under international law in the Czech Republic using either expansive or limited universal jurisdiction. Subsidiary universal jurisdiction is exercised in practice in cases of inadmissibility or denial of extradition (with difficulties described above) but no cases have involved a crime under international law.

## Relevant Legislation

### JURISDICTION

Act No. 40/2009 of the Collection of Laws, the Criminal Code, as Amended by the Act No. 306/2009 of the Collection of Laws

#### Section 6 - Personality Principle

The liability to punishment of an act committed abroad by a citizen of the Czech Republic or by a stateless person with a permanent residence permit in the Czech Republic shall also be considered under Czech law.

#### Section 7 - Principle of Protection and Principle of Universality

(1) Criminality of Torture and Other Inhumane and Cruel Treatment (Section 149), Counterfeiting and Altering Money (Section 233), Passing Counterfeit and Altered Money (Section 235), Production and Possession of Counterfeiting Instruments

<sup>595</sup> CCP, Section 43(3).

<sup>596</sup> CCP, Section 43(1).

<sup>597</sup> CCP, Section 44(2).

<sup>598</sup> Act No.137/2001 Coll. on the special protection of a witness and other persons in connection with criminal proceedings and on the amendment of Act No. 99/1963 Coll. , Civil Legal Code, as amended.

<sup>599</sup> Section 3.

<sup>600</sup> Although there are currently discussions about changing the designated person to the Deputy National Member of the Czech Republic in Eurojust.

(Section 236), Illicit Production of Money (Section 237), Subversion against the Republic (Section 310), Terrorist Attack (Section 311), Terror (Section 312), Sabotage (Section 314), Espionage (Section 316), Violence against a Public Authority (Section 323), Violence against a Public Official (Section 325), Forgery and Altering an Official Document (Section 348), Participation in a Group of Organized Crime under Section 361(2)(3), Genocide (Section 400), Attack against Humanity (Section 401), Apartheid and Discrimination of a Group of Persons (Section 402), Preparation of a War of Aggression (Section 406), Using Prohibited Means of Combat and Leading Illicit Warfare (Section 411), War Cruelty (Section 412), Persecution of Population (Section 413), Plunder in a Combat Area (Section 414), Misuse of Internationally Recognized and State Emblems (Section 415), Misuse of a Flag and of Truce (Section 416) and Assaulting a Negotiator under Flag of Truce (Section 417) shall be assessed under the law of the Czech Republic also when such a crime has been committed in a foreign country by a foreign citizen or a stateless person, who has not been granted permanent residence in the territory of the Czech Republic.

(2) Criminality of a deed committed in a foreign country against a citizen of the Czech Republic or a stateless person, who has been granted permanent residence in the territory of the Czech Republic, shall be assessed under the law of the Czech Republic if the deed is a crime in the place of commission of the deed or if the place of commission of the deed is not subject to any criminal jurisdiction.

#### Section 8 - Subsidiary Principle of Universality

(1) Criminality of a deed committed in a foreign country by a foreign citizen or a stateless person, who has not been granted permanent residence in the territory of the Czech Republic, shall be assessed under the law of the Czech Republic also

a) if the deed is a crime also under the law in force in the territory where it has been committed; and  
b) if the perpetrator has been caught in the territory of the Czech Republic and has not been extradited or surrendered for prosecution to a foreign country or another subject authorized to prosecute.

(2) Criminality of a deed committed in a foreign country by a foreign citizen or a stateless person, who has not been granted permanent residence in the territory of the Czech Republic, shall be assessed under the law of the Czech Republic also if the deed has been committed for the benefit of a legal entity that has its corporate domicile or that has a branch in the territory of the Czech Republic or for the benefit of a natural person, who is an entrepreneur and has an enterprise, its branch or place of business in the territory of the Czech Republic.

(3) However, no sentence more severe than sentence stipulated by the law of the country, where the crime has been committed, may be imposed on the perpetrator.

#### Section 9 - Applicability Stipulated by an International Treaty

(1) Criminality of a deed shall be assessed under the law of the Czech Republic also if so stipulated by an international treaty, which is a part of the legal order (hereinafter referred to as "international treaty").

(2) Provisions of Sections 4 through 8 shall not be applied if an international treaty would not allow it.

### CRIMES UNDER INTERNATIONAL LAW

Act No. 40/2009 of the Collection of Laws, the Criminal Code, as Amended by the Act No. 306/2009 of the Collection of Laws

#### Section 149 - Torture and Other Inhumane and Cruel Treatment

(1) Who, in connection with the exercise of the powers of a state authority, a local authority or a court or another authority of public power, causes to another person bodily or mental suffering by means of torture or other inhumane or cruel treatment shall be punished by imprisonment for six months to five years.

(2) The perpetrator, who

a) commits the act mentioned in Paragraph 1 as a public official;  
b) commits such an act on a witness, an expert or a sworn interpreter in connection with their performance of their duties;  
c) commits such an act on another person by reason of his/her real or perceived race, ethnicity, nationality, political persuasion, religious confession or because he/she is in fact or is perceived to be without a religious confession;  
d) commits such an act with at least two other persons; or  
e) commits such an act repeatedly,  
shall be punished by imprisonment for two to eight years.

(3) The perpetrator, who

a) commits the crime mentioned in Paragraph 1 on a pregnant woman;  
b) commits such an act of a child younger than fifteen years;  
c) commits such an act in an especially brutal or tormenting manner; or  
d) causes grave bodily harm by such an act,  
shall be punished by imprisonment for five to twelve years.

(4) The perpetrator, who causes death by the act mentioned in Paragraph 1, shall be punished by imprisonment for eight to eighteen years.

(5) Preparation is punishable.

#### Section 400 - Genocide

(1) Who with intent to destroy, in whole or in part, a racial, ethnical, national, religious, class or other similar group of people

a) inflicts on the members of such a group conditions of life calculated to bring about their physical destruction in whole or in part;  
b) imposes measures intended to prevent births within such a group;  
c) forcibly transfers children of one such a group to another group.  
d) causes serious harm to or death of a member of such a group;  
shall be punished by imprisonment for twelve to twenty years or by an exceptional punishment.

(2) Who publicly incites to the act mentioned in Paragraph 1 shall be punished in the same way.

(3) Preparation is punishable.

#### Section 401 - Attack against Humanity

(1) Who, within the framework of a of a large-scale or systematic attack directed against civilian population commits

a) extermination of people;  
b) enslavement;  
c) deportation or forcible transfer of a group of population;  
d) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other similar form of sexual violence;  
e) persecution against a group of population on political, racial, national, ethnic, cultural or religious grounds, by reason of gender or for other reasons;  
f) apartheid or other similar segregation or discrimination;  
g) deprivation of physical liberty, abduction to an unknown location or any other restriction of physical liberty followed by enforced disappearance of persons;  
h) torture;  
i) murder; or  
j) another inhumane act of a similar character,  
shall be punished by imprisonment for twelve to twenty years or by an exceptional punishment.

(2) Preparation is punishable.

#### Section 402 - Apartheid and Discrimination of a Group of Persons

(1) Who practices apartheid or racial, ethnic, national, religious or class segregation or other similar discrimination of a group of persons shall be punished by imprisonment for five to twelve years.

(2) The perpetrator, who

a) by the act mentioned in Paragraph 1 places such a group of persons into grave life conditions; or  
b) by such an act exposes such a group of persons to inhumane or degrading treatment, shall be punished by imprisonment for ten to twenty years or by an exceptional punishment.

(3) Preparation is punishable.

#### Section 406 - Preparation of a War of Aggression

Who prepares a war of aggression, in which the Czech Republic is to take part, and thus causes to the Czech Republic danger of war, shall be punished by imprisonment for twelve to twenty years or by an exceptional punishment.

#### Section 411 - Use of Forbidden Means of Combat and Leading Illicit Warfare

(1) Who, in time of war or other armed conflict or in a combat situation,

a) orders to use forbidden means of combat or materiel, of a similar nature or who uses such means or materiel; or  
b) orders to lead illicit warfare or leads such warfare him-/herself,  
shall be punished by imprisonment for two to ten years.

(2) Who, in violation of the provisions of international law on methods and means of war or other armed conflict, intentionally

a) causes harm to civilian population or civilians on their life, health or property by a military operation, or who leads an attack against them as reprisals;  
b) leads an attack against a defenceless place or a demilitarised zone;  
c) destroys or damages a water dam, a nuclear power plant or a similar facility containing dangerous forces; or  
d) destroys or damages premises designed for humanitarian purposes or an internationally-recognised cultural or natural landmark,  
shall be punished in the same way.

(3) The perpetrator, who by the act mentioned in Paragraph 1 or 2 causes

a) grave bodily harm; or  
b) death,  
shall be punished by imprisonment for eight to twenty years or by an exceptional punishment.

(4) Preparation is punishable.

#### Section 412 - War Cruelty

(1) Who, in time of war or other armed conflict, violates provisions of international law by treating defenceless civilian population, refugees, the wounded, the sick, members of armed forces who have laid down their weapons, or prisoners of war inhumanly, shall be punished by imprisonment for five to twelve years.

(2) Who, in time of war or other armed conflict, violates provisions of international law by



a) failing to take effective measures to protect persons who need assistance, particularly children, women, the wounded and the sick or by obstructing such measures; or  
b) preventing or obstructing civil defence organisations of the enemy, a neutral country or another country in the performance of their humanitarian tasks,  
shall be punished in the same way.

(3) The perpetrator, who by the act mentioned in Paragraph 1 or 2 causes  
a) grave bodily harm; or  
b) death,  
shall be punished by imprisonment for eight to twenty years or by an exceptional punishment.

(4) Preparation is punishable.

#### Section 413 - Persecution of Population

(1) Who, in time of war or other armed conflict, practises apartheid or commits other inhumane acts arising from racial, ethnic, national, class or other similar discrimination or terrorises defenceless civilian population with violence or threat of violence, shall be punished by imprisonment for five to fifteen years.

(2) Who, in time of war or other armed conflict,  
a) destroys or seriously disrupts a source of the necessities of life for civilian population in an occupied area or contact zone or wilfully fails to provide assistance to population necessary for their survival;  
b) delays, without grounds, return of civilian population or prisoners of war;  
c) resettles or expels civilian population of an occupied territory without grounds;  
d) settles an occupied territory with population of his/her own country; or  
e) wilfully makes it impossible for offences of civilian population or prisoners of war to be tried in impartial judicial proceedings,  
shall be punished in the same way.

(3) The perpetrator, who by the act mentioned in Paragraph 1 or 2 causes  
a) grave bodily harm; or  
b) death,  
shall be punished by imprisonment for ten to twenty years or by an exceptional punishment.

(4) Preparation is punishable.

#### Section 414 - Plunder in a Combat Area

(1) Who, in an area of war operations, on a battlefield, in places affected by war operations, armed conflict or in an occupied territory  
a) robs the fallen or otherwise seizes another person's thing or another asset; or  
b) wilfully destroys, damages, takes away, hides or misuses another person's property,  
shall be punished by imprisonment for eight to twenty years or by an exceptional punishment.

(2) Preparation is punishable.

#### Section 415 - Misuse of Internationally Recognized and State Emblems

(1) Who, in time of a state of national emergency or a state of war or in time of war or other armed conflict, misuses the insignia of the Red Cross or other signs or colours recognised by international law as designating medical institutions or vehicles used for medical assistance or evacuation, shall be punished by imprisonment for two to eight years.

(2) Who, in time of war or other armed conflict, misuses the sign of the United Nations Organisation or a flag or a state or military emblem, insignia or uniform of a neutral country or other country that is not a party to the conflict, shall be punished in the same way.

(3) The perpetrator, who by the act mentioned in Paragraph 1 or 2 causes  
a) death or grave bodily harm;  
b) large-scale damage;  
c) reprisals of the other warring party or the other party in the armed conflict of the same or similar nature,  
shall be punished by imprisonment for ten to twenty years or by an exceptional punishment.

(4) Preparation is punishable.

#### Section 416 - Misuse of a Flag and of Truce

(1) Who, in time of war or other armed conflict, misuses a flag or a state or military emblem, insignia or uniform of another country that a party to the conflict, shall be punished by imprisonment for one to five years.

(2) Who, in time of war or other armed conflict, abuses declared truce or abuses the flag of truce, shall be punished by imprisonment for two to eight years.

#### Section 417 - Assaulting a Negotiator under Flag of Truce

Who insults a negotiator under flag of truce or a member of his entourage; or unlawfully detains such a person shall be sentenced to a term of imprisonment of up to five years.

#### Section 418 - Responsibility of a Superior

(1) A military or other superior is criminally responsible for a crime of Genocide (Section 400), Attack against Humanity (Section 401), Preparation of a War of Aggression (Section 406), Incitement to a War of Aggression (Section 407), Using Prohibited Means of Combat and Leading Illicit Warfare (Section 411), War Cruelty (Section 412), Persecution of Population (Section 413), Plunder in a Combat Area (Section 414), Misuse of Internationally Recognized and State Emblems (Section 415), Misuse of a Flag and of Truce (Section 416) and Assaulting a Negotiator under Flag of Truce (Section 417) committed by his subordinate over whom he/she exercised his/her jurisdiction and control if, even by negligence, he/she failed to prevent the subordinate, failed to stop the subordinate's commission of such a crime or failed to punish the subordinate for commission of such a crime or failed to hand over the subordinate to an authority competent to impose such a punishment.

(2) Provisions on criminal responsibility and criminality of the subordinate perpetrator shall apply to criminal responsibility and criminality of the military or other superior perpetrator.

## Denmark

### Overview

Denmark does not have a code on international crimes.<sup>601</sup> There are domestic provisions concerning the definition of genocide and war crimes but not of other crimes under international law, such as crimes against humanity and torture.<sup>602</sup>

However, universal jurisdiction may be exercised where an act is covered by an international provision under which Denmark is obliged to exercise criminal jurisdiction.<sup>603</sup> The obligations arise not only from treaties to which Denmark is a party, but also from UN Security Council resolutions and decisions or directives adopted by the Council of the European Union.<sup>604</sup>

Danish criminal legislation also specifically provides for universal jurisdiction where an act is covered by the Statute of the International Criminal Court.<sup>605</sup>

Where an extradition request is rejected, universal jurisdiction is also established subject to the condition that the act is punishable according to the law of the state in which it was committed, it is punishable under Danish law and may be sanctioned with a sentence longer than imprisonment for one year.<sup>606</sup>

Active personality jurisdiction (and universal jurisdiction limited by residence or nationality of a Nordic country) is available in respect of crimes committed in a territory not belonging to any state or crimes committed in a foreign state which are also punishable in that state.<sup>607</sup> Active personality jurisdiction also exists for Rome Statute crimes.<sup>608</sup>

Under Section 12 of the Danish Criminal Code, the exercise of jurisdiction with reference to the above-mentioned provisions is limited by applicable international law. This means that all relevant facts of the case as well as evidence of the state of international law at the time the specific jurisdictional issue arises have to be considered.<sup>609</sup>

### Issues

**Nexus requirements (including presence or residence):** As a general rule universal jurisdiction may only be exercised under existing Danish law when the perpetrator is present on the territory of the Kingdom of Denmark at the time when formal legal proceedings are initiated.<sup>610</sup>

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<sup>601</sup> Presentation given by Brigitte Vestberg (Head of Special International Crimes Office) at FIDH/ REDRESS Conference in Brussels on 3-4 November 2008 on "Strategies for an effective investigation and prosecution of perpetrators of crimes under international law- Setting up specialized war crimes units."

<sup>602</sup> See legislation in the text box below.

<sup>603</sup> CC (*Straffeloven*), Section 8, § 1, no. 6; available in Danish at <https://www.retsinformation.dk/Forms/R0710.aspx?id=121398#Kap1> (last accessed December 2010).

<sup>604</sup> Ministry of Foreign Affairs of Denmark, 'The Scope and Application of the Principle of Universal Jurisdiction', available at [http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri\\_StatesComments/Denmark.pdf](http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Denmark.pdf) (last accessed December 2010).

<sup>605</sup> See CC, Sections 8a, 8b. The perpetrator must either be a Danish national, or have his abode or residence in Denmark or be present in Denmark at the time when charges arise.

<sup>606</sup> CC, Section 8, § 1, no. 6.

<sup>607</sup> CC, Section 7.

<sup>608</sup> CC, Sections 8a, 8b.

<sup>609</sup> Ministry of Foreign Affairs of Denmark, The Scope and Application of the Principle of Universal Jurisdiction, *supra*.

<sup>610</sup> MFA Denmark, The Scope and Application of the Principle of Universal Jurisdiction, *supra*.

**Subsidiarity:** In cases of concurrent jurisdiction, the legitimate interest of Denmark in exercising jurisdiction may be balanced against the interest of other states in retaining (exclusive) jurisdiction on the basis of Section 12 of the Criminal Code.<sup>611</sup>

**Double criminality:** In cases where extradition of a person for prosecution in another country is rejected, the Criminal Code may establish Danish jurisdiction. This is subject to the conditions that the act is punishable not only under Danish law but also according to the law of the state of commission and that it may be sanctioned with a sentence longer than imprisonment for one year.<sup>612</sup>

**Prosecutorial and Executive Discretion:** The Danish Public Prosecutor has prosecutorial discretion to assess whether an indictment should or should not be initiated.<sup>613</sup> Such an assessment includes consideration of whether a successful prosecution will entail disproportionate difficulties, costs, or time constraints. In addition, the indictment may not be initiated if mitigating circumstances would make the indictment unreasonable. The same principles apply to situations where an indictment has been initiated but the evidence and circumstances prove to cause disproportionate difficulties as described above. The Public Prosecutor may then choose to discontinue the case at his discretion.<sup>614</sup>

Prosecutions under Section 8 (4-6) of the Penal Code cannot take place except with the approval of the Minister of Justice, a political appointee.<sup>615</sup> Such discretion may be limited by Section 12 of the same Code, which restricts the application of Section 8 in accordance with “*the applicable rules of international law*”.<sup>616</sup> A decision not to prosecute may not be permitted, for example, where Denmark has a duty to prosecute under international law. This could render discretion in the context of Section 8(5) of the Penal Code meaningless, given that it 8(5) concerns these scenarios in particular.

**Ability to review decisions of the prosecutor:** Where the prosecutor decides not to investigate or prosecute, the complainant can make an appeal to the director of public prosecution if he or she has some link to the crime in question. The director will take into account the reasons given by the prosecutor and the overall handling of the case. This is a purely administrative procedure and no courts are involved.<sup>617</sup>

**Statutes of Limitations:** Denmark has neither signed the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes nor the analogous United Nations treaty.

Sections 93-97 of the Danish Penal Code establish statutes of limitation of 5 to 15 years for the majority of crimes under Danish law. However, serious crimes such as torture, hijacking and murder however are exempt from prescription periods.<sup>618</sup>

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<sup>611</sup> MoJ/MFA Questionnaire.

<sup>612</sup> MFA Denmark, The Scope and Application of the Principle of Universal Jurisdiction, supra. See Section 8 Paragraph 1 Number 6 of the Danish Criminal Code.

<sup>613</sup> Sections 721-722 of the Danish Administration of Justice Act, cf. (consolidation) Act no. 1053 of 29 October 2009; available in Danish at <https://www.retsinformation.dk/Forms/R0710.aspx?id=22053> (last accessed December 2010).

<sup>614</sup> Ibid; MFA Denmark, The Scope and Application of the Principle of Universal Jurisdiction, supra.

<sup>615</sup> Circular letter of the Director of Public Prosecution 3/2002 (*Rigsadvokatens Meddelelse 3/2002*), *Kompetenceregler side 3*, Section 1.4.3.1.

<sup>616</sup> Translation found in Amnesty International, “Universal Jurisdiction - the duty of states to enact and enforce legislation,” AI Index: IOR 53/002/2001, 1 September 2001, Chapter 4 (Part A).

<sup>617</sup> Human Rights Watch, Universal Jurisdiction in Europe, June 2006. <http://www.hrw.org/en/node/11297/section/9> (last accessed December 2010).

<sup>618</sup> FIDH/REDRESS Report: “Legal Remedies for Victims of ‘International Crimes’.” March 2004, p. 48; the law was amended in 2008 so that the limitation period did not apply to torture: see <http://www.sico.ankl.dk/page34.aspx> (last accessed December 2010).

**Immunities in criminal cases:** As mentioned above, the exercise of extraterritorial jurisdiction is limited by applicable international law under Section 12 of the Danish Criminal Code. This provision refers to all relevant rules of international law, including immunity of state officials and diplomatic immunity. Customary rules on immunity, as well as treaties on immunity to which Denmark is a signatory, may exclude the exercise of Danish jurisdiction.<sup>619</sup>

**Victims' role in proceedings:** Victims willing to function as witnesses are of crucial importance for criminal proceedings. Taking this into account, a new law allows for a systematic search in order to identify not only suspected perpetrators of serious crimes, but also victims or witnesses of such an act.<sup>620</sup> In addition, victims and witnesses have the possibility to make reports to the Danish Special International Crimes Office through their webpage.<sup>621</sup>

Victims have different options to seek compensation for personal injury, either within criminal proceedings or in separate civil actions.<sup>622</sup> In criminal proceedings, the Public Prosecutor is obligated to pursue civil claims lodged by the victim, if this can be done without considerable inconvenience.<sup>623</sup> If the victim is a Danish resident or was a civil servant in the Danish Foreign Service at the time of the injury, he or she can also seek compensation for personal injury from public funds.<sup>624</sup> This is possible even if the perpetrator is unknown or cannot be found.<sup>625</sup>

**Specialised War Crimes Unit:** The Danish Government established the 'Special International Crimes Office' (SICO) as part of the Prosecution Service on 1 June 2002.<sup>626</sup> SICO is responsible on a national level for legal proceedings concerning international crimes such as genocide, crimes against humanity, war crimes, acts of terror and other serious crimes committed abroad like homicide, torture, deprivation of liberty, rape, bombing and arson.<sup>627</sup> Quite early on, SICO in consultation with the Immigration Service took the decision only to consider crimes with a possible sentence of at least 6 years imprisonment as "*serious crimes*".<sup>628</sup> Suspects must be residents of Denmark.<sup>629</sup>

The unit is currently composed of 17 staff members, among whom are prosecutors investigators, historians, one analyst as well as administrative personnel. In addition, SICO works in close cooperation with the Immigration Service.<sup>630</sup>

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<sup>619</sup> FIDH/REDRESS MoJ/MFA Questionnaire; MFA Denmark, The Scope and Application of the Principle of Universal Jurisdiction, *supra*.

<sup>620</sup> SICO Annual Report 2009, p. 3. Available at [http://www.sico.ankl.dk/media/SICO\\_2009\\_-\\_Summary\\_in\\_English.pdf](http://www.sico.ankl.dk/media/SICO_2009_-_Summary_in_English.pdf) (last accessed December 2010).

<sup>621</sup> Homepage of the Special International Crimes Office: <http://www.sico.ankl.dk/page22.aspx>. (last accessed November 2010).

<sup>622</sup> Administration of Justice Act (*Retsplejeloven*), Section 991; see FIDH/REDRESS, 'Legal Remedies for Victims of 'International Crimes'', March 2004, p. 46.

<sup>623</sup> Administration of Justice Act, Sections 311.

<sup>624</sup> Consolidated Act on Compensation from the State to Victims of Crimes (*Voldsofferloven*), Section 1(3).

<sup>625</sup> Consolidated Act on Compensation from the State to Victims of Crimes, Section 6.

<sup>626</sup> Presentation given by Brigitte Vestberg (Head of Special International Crimes Office) at the FIDH & REDRESS Conference in Brussels on 3-4 November 2008 on "Strategies for an effective investigation and prosecution of perpetrators of crimes under international law- Setting up specialized war crimes units".

<sup>627</sup> Homepage of the Special International Crimes Office.

<sup>628</sup> Vestberg, Brigitte: Prosecuting and Investigating International Crimes in Denmark. Guest Lecture Series of the Office of the Prosecutor 2006, p. 3.

<sup>629</sup> Homepage of the Special International Crimes Office.

<sup>630</sup> *Ibid*.

## Cases:

Denmark exercised universal jurisdiction under Section 8, § 1, no. 5, of the Danish Criminal Code over an ex inmate of a Croatian camp for war prisoners in 1995.<sup>631</sup> The defendant, who was present in Denmark when the charges against him were raised, was accused of having committed serious violence against fellow inmates while exercising limited authority in the camp. The acts were held to be punishable under the Third and Fourth Geneva Conventions according to which Denmark was obliged to have criminal jurisdiction. The defendant was convicted and sentenced by the Danish Supreme Court to 8 years imprisonment and expelled from Denmark permanently.<sup>632</sup>

In another case from 1998, the Prosecutor General considered the scope of the universal jurisdiction provision in Section 8, § 1, no. 5. A group of Chilean citizens, who were resident in Denmark, had reported former president of Chile, Augusto Pinochet, to the Danish police accusing him of having ordered, designed, or upheld a regime, in which the applicants had been exposed to arrest, torture and degrading treatment in Chile during the years 1973-88. At the time of the police notification, Augusto Pinochet was a British resident. After considering the preparatory works of Section 8, § 1, no. 5 the Prosecutor General concluded that Denmark lacked criminal jurisdiction in the specific case, because the alleged perpetrator was not present in Denmark at the time formal legal proceedings would otherwise be initiated against him. This understanding of the provision was later upheld by the Danish Ministry of Justice.<sup>633</sup>

In 2004, a Ugandan national was convicted in a case involving robbery and abduction in his country of origin. Furthermore, sufficient grounds for an indictment were found in the Al Khazraji case,<sup>634</sup> however the Iraqi commander concerned has since absconded.<sup>635</sup>

A Rwandan national, Sylvere Ahorugeze, was detained for participation in genocide in Rwanda. After investigations were carried out in Europe and Rwanda, he was released on 10 August 2007 due to insufficient evidence to bring a prosecution.<sup>636</sup>

Very recently, in December 2010, a Rwandan man was arrested following a six-month investigation by SICO on suspicion that he committed war crimes in his home country in 1994. The suspect had been living in Denmark since 2001 and had been granted asylum.<sup>637</sup>

## Relevant Legislation:

### JURISDICTION

No English translation available.

### CRIMES UNDER INTERNATIONAL LAW

Act No. 132 of 29 of April 1955 concerning the punishment of genocide  
(Unofficial translation)

<sup>631</sup> See Case No. U1995.838H.

<sup>632</sup> MFA Denmark, The Scope and Application of the Principle of Universal Jurisdiction, *supra*.

<sup>633</sup> *Ibid*.

<sup>634</sup> SICO case no.: 6250-0002.

<sup>635</sup> Homepage of the Special International Crimes Office.

<sup>636</sup> The Hague Justice Portal, <http://www.haguejusticeportal.net/eCache/DEF/10/685.html> (last accessed December 2010).

<sup>637</sup> Associated Press, 'Denmark arrests Rwanda genocide suspect', 8 December 2010.

§ 1. Whoever with the intent to destroy in whole or in part a national, ethnical, racial or religious group as such,  
(a) kills members of the group,  
(b) causes serious bodily or mental harm to members of the group,  
(c) deliberately inflicts on the group conditions of life calculated to bring about its physical destruction in whole or in part,  
(d) imposes measures intended to prevent births within the group,  
(e) forcibly transfers children of the group to another group,  
is punishable for genocide by imprisonment for life or for a time not less than 16 years.

§ 2 Attempt and complicity in the acts enumerated in § 1 shall be punished according to chapter 4 of the civil criminal code.

Act no. 530 of 24/06/2005 Military Penal Code  
(Unofficial translation)

#### Chapter 1

##### *General Part*

§1 The present act shall apply to military personnel in active service and discharged military personnel regarding military duties imposed on such personnel after their discharge.

(2) The present act shall also apply to international military personnel interned in this country and other people who are, according to international agreements accepted by Denmark, entitled to treatment as military personnel.

§2 In an armed conflict, the present act shall also cover:

- 1) Anybody serving in the armed forces or accompanying a unit thereof, and
- 2) Prisoners of war and medical staff and army chaplains who are retained to assist prisoners of war, provided that there are no stipulations to the contrary in current international agreements, and
- 3) anybody who is guilty of a violation of §§ 28-34 and 36-38 of the present act.

§3 The act shall apply to crimes committed within and outside the Danish state.

§4 The act shall also apply to crimes committed against the military forces of other countries cooperating with Danish military forces.

§5 Danish penal authority shall, cf. §§6-12 of the Penal Code, also cover violations of §§28-30 and 32 carried out during armed conflict outside the Danish state regardless of where the offender belongs, unless otherwise provided for in general international law.

(2) Danish penal authority shall furthermore cover violations of §§ 36 and 38 committed outside the Danish state regardless of where the offender belongs, when the violation was committed against Danish military personnel or people covered by § 2 (1) and (2).

§6 Violation of the present act shall be punished when committed deliberately or through gross negligence, unless otherwise provided in the individual stipulations.

§7 §13 (3) of the Penal Code shall be applied to actions necessary to bring about obedience or maintain order.

§8 Anybody who is not covered by the act under §§1 and 2 shall only be punished for aiding the violation of stipulations in the act if the violation may lead to imprisonment for four years or more.

(2) Under similar conditions as stipulated in (1), companies etc. (legal entities) shall be subjected to criminal liability according to the stipulations in chapter 5 of the penal code for aiding a violation of the present act.

§9 The fact that a criminal offence was committed according to order from a superior shall not release the offender from criminal liability, unless the person in question was under an obligation to obey orders from the superior in question and did not know that the order was illegal, and the order was not clearly illegal.

§10 The stipulations of the act regarding armed conflict shall apply when Danish forces in or outside the country are involved in an armed conflict, or when information to this effect has been given under (2) or (3).

(2) In case of imminent prospects of armed conflict, the Minister of Defence shall be able to publish a statement to the effect that the stipulations of the act regarding armed conflict shall apply.

(3) The Minister of Defence can in connection with the stationing of Danish military forces abroad in case of imminent prospects of armed conflict authorise the chief of the stationed military force to state that the stipulations of the act on armed conflict shall apply to the force.

....

##### *Other types of crime during armed conflict*

§36 Anybody who during armed conflict deliberately abuses or does not respect characteristics or designations reserved for people, equipment and materials designated to provide help to people who are wounded or ill shall be punished with imprisonment for life.

(2) Anybody who deliberately uses war methods or procedures contrary to an international agreement signed by Denmark or international customary law shall be punished similarly.

§37 Punishment by imprisonment for up to six years for plundering shall be imposed on anybody who in order to obtain for himself/herself or others unjustified benefits by exploiting the fear of war or the fear of the forces to which the person in question belongs, deliberately

- 1) takes or steals a tangible object from a stranger
- 2) brings such a stolen object to safety or

3) forces anybody to commit an act or an omission which will lead to loss of property for the person attacked or for anybody on whose behalf such a person is acting.

(2) The punishment can be extended to ten years' imprisonment when the plundering is of a particularly grave nature, mainly because of its particularly dangerous nature, the way it is committed, or the extent of the benefit gained or intended, or when a large number of crimes have been committed.

§38 Anybody who deliberately during armed conflict unjustly acquires objects from a person who has been killed in war action shall be punished for robbery from a body with imprisonment for up to 18 months.

(2) The punishment can be extended to six years' imprisonment when the crime is of a particularly grave nature, mainly because of the extent or the method.



## Estonia

### Overview

Section 8 of the Estonian Penal Code<sup>638</sup> expressively provides for universal jurisdiction, if “*the punishability of the act arises from an international agreement binding on Estonia*”.

Although this provision has not yet been applied in practice, it is assumed that it would be applied in connection with provisions set out in Chapter 8 of the Special Part of the Penal Code (“*Offences against Humanity and International Security*”). These include genocide, crimes against humanity, aggression, war crimes and crimes against international security. However, in some respects the acts set out in Chapter 8 are broader than the definitions of international crimes in international agreements, for example in the case of genocide.<sup>639</sup> Thus, each individual case would have to be approached separately, in order to determine the applicability of universal jurisdiction.<sup>640</sup>

Section 8 also enables universal jurisdiction to be applied to other offences in Estonian criminal law, if the punishability arises from a binding international agreement. However, taking into account the lack of practical experience, it seems less probable that this would happen in the case of offences which are not usually regarded as offences against international public order or breaches of *erga omnes* obligations.<sup>641</sup>

Estonian legislation also provides for universal jurisdiction in relation to ‘acts against legal rights in Estonia’, such as the life or health of the population, the defence capability or the environment, subject to the condition that is a criminal offence in the first degree.<sup>642</sup>

Universal jurisdiction is also available where a person has been detained in Estonia but not extradited.<sup>643</sup>

In addition, Estonian legislation provides for active and passive personality jurisdiction - including the cases where the offender acquires Estonian citizenship after the commission of the act or the victim is not an Estonian national but a legal person registered in Estonia.<sup>644</sup>

### Issues

**Nexus requirements:** There are no jurisdictional nexus requirements for the exercise of universal jurisdiction (except where it arises from the fact that a person has been detained in Estonia and not extradited). Procedurally, however, it seems likely that presence is required. The Estonian Code of Criminal Procedure<sup>645</sup> provides that it is legal to try a person *in absentia*, if the accused is outside the territory of the Republic of Estonia and absconds courts proceedings, and a court hearing is possible without him or her.<sup>646</sup> However, taking into account the legally protected interests of the accused person,

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<sup>638</sup> English translation available at <http://www.legislationline.org/documents/section/criminal-codes> (last accessed Dec 2010).

<sup>639</sup> Article 6 of the Genocide Convention prescribes the obligation to punish these crimes of genocide which have been committed on Estonian territory. Therefore it may raise a doubt whether Estonia may punish genocide committed outside Estonian territory. See: Genocide Network Questionnaire, Estonia.

<sup>640</sup> Response of the Permanent Mission of the Republic of Estonia to the United Nations, 26 April 2010.

<sup>641</sup> *Ibid.*

<sup>642</sup> FIDH/REDRESS MoJ-MFA Questionnaire; see Section 9 of the CC.

<sup>643</sup> CC, Section 7(2).

<sup>644</sup> FIDH/REDRESS MoJ-MFA Questionnaire; see Section 7 of the CC.

<sup>645</sup> English translation available at <http://www.legislationline.org/documents/section/criminal-codes> (last accessed Dec 2010).

<sup>646</sup> See Section 269 Paragraph 2 of the Estonian CCP.

it appears unlikely that exercise of universal jurisdiction for crimes under international law *in absentia* could be possible. Hence, in order to be convicted, the accused person should be physically located in the territory of Estonia.<sup>647</sup>

**Double criminality:** Double criminality is required where universal jurisdiction is exercised over a person who has been detained in Estonia and not extradited,<sup>648</sup> but is not required for universal jurisdiction based on treaty obligations.<sup>649</sup>

**Prosecutorial and Executive discretion:** The Principle of mandatory criminal proceedings in Estonian criminal law commands that “*Investigative bodies and Prosecutors’ Offices are required to conduct criminal proceedings upon the appearance of facts referring to a criminal offence (..)*”,<sup>650</sup> unless one of the codified exceptional circumstances apply.

In cases concerning criminal offences committed by foreign citizens or in foreign states, the Public Prosecutor’s Office does have the possibility to terminate proceedings by an order.<sup>651</sup> However, if these cases do have consequences which occurred in the territory of the Republic of Estonia, the proceedings can only be terminated if they may result in serious consequences for the Republic of Estonia or are in conflict with other public interests.<sup>652</sup>

**Ability to review decisions of the prosecutor or other governmental body:** Although under certain circumstances there is a possibility to file an appeal with the Prosecutor’s Office against a refusal to commence or termination of criminal proceedings, this is not the case regarding offences committed by foreign citizens or in foreign states.<sup>653</sup>

**Statutes of limitation:** In Estonian criminal law offences against humanity, war crimes and offences for which life imprisonment is prescribed do not expire.<sup>654</sup>

In all other cases Estonian legislation provides for limitation periods of ten years for first degree offences and five years for second degree offences.<sup>655</sup> However, the limitation period for execution of a conviction does not expire if life imprisonment has been imposed as punishment.<sup>656</sup>

**Victims’ role in proceedings:** Victims and their representatives have the right to file a civil action before termination of examination by court in the county court, while third parties have to start separate proceeding in order to raise civil claims.<sup>657</sup>

**Victim protection:** Taking into account the gravity of a criminal offence or the exceptional circumstances relating thereto, a preliminary investigation judge may declare a witness anonymous in order to ensure the his or her safety. In these cases, a fictitious name is assigned to the victim and in court proceedings, he or she is heard by telephone with voice distortion equipment if necessary.<sup>658</sup>

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<sup>647</sup> FIDH/REDRESS MoJ-MFA Questionnaire.

<sup>648</sup> Under CC, Section 7(2).

<sup>649</sup> CC, Article 8.

<sup>650</sup> Section 6 Estonian CCP.

<sup>651</sup> See section Section 204 Paragraph 1 CCP.

<sup>652</sup> See Section 204 Paragraph 2 CCP.

<sup>653</sup> See Section 207 CCP.

<sup>654</sup> See Section 81 Paragraph 2 of the CC.

<sup>655</sup> See Section 81 Paragraph 1 of the CC.

<sup>656</sup> See Section 82 Paragraph 2 of the CC.

<sup>657</sup> See Section 38 of the CCP. See also, FIDH/REDRESS MoJ-MFA Questionnaire.

<sup>658</sup> See Section 67 of the CCP.

Since 2005 Estonia has had a national witness protection programme to ensure the safety of victims and witnesses of criminal cases. One problem that has been encountered, however, is the small size of the country and small communities which makes an actual relocation with new identity difficult. Close cooperation with the Baltic neighbours, Latvia and Lithuania, has been beneficial.<sup>659</sup>

**Specialised War Crimes Unit:** Estonia does not have a specialised unit with a general mandate for investigation and prosecution of international crimes.<sup>660</sup> However, in 1995 a specialised unit was formed within the Security Police Board in order to deal with war crimes and crimes against humanity committed during the Soviet and German occupations (1940-1941 and 1941-1944), during the March deportation of 1949 as well as crimes against civilians committed by the Forest Brothers<sup>661</sup> during the years 1944-1978.<sup>662</sup> The establishment was preceded by the incorporation of relevant crimes into the Estonian Criminal Code. Between the years 1995- 2008, the unit was composed of four investigators.<sup>663</sup>

The mandate of the Security Police Board has now expanded; it has the right to investigate all crimes against humanity and genocide. War crimes on the other hand are investigated by the Military Police after Estonian Defence Forces.<sup>664</sup>

**Participation in EU Genocide Network:** Representatives of the Republic of Estonia participated in the 8<sup>th</sup> EU Genocide Network meeting in May 2010.

## Cases

So far, there is no relevant case law on exercise of universal jurisdiction.<sup>665</sup>

## Relevant Legislation

<p><u>JURISDICTION</u></p> <p>Criminal Code</p> <p>General Part - Chapter 1 - General Provisions</p> <p>§ 7. Applicability of penal law by reason of person concerned</p> <p>The penal law of Estonia applies to an act committed outside the territory of Estonia if such act constitutes a criminal offence pursuant to the penal law of Estonia and is punishable at the place of commission of the act, or if no penal power is applicable at the place of commission of the act and if:</p> <p>1) the act is committed against a citizen of Estonia or a legal person registered in Estonia;</p>
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<sup>659</sup> FIDH/REDRESS MoJ-MFA Questionnaire.

<sup>660</sup> Ibid.

<sup>661</sup> Resistance movement of Estonian, Latvian and Lithuanian partisans who waged irregular warfare against Soviet rule during the Soviet invasion and occupation of the three Baltic states.

<sup>662</sup> ICTJ Notes on Presentation given by Kurm, Margus (Chief State Prosecutor, Office of the Prosecutor General, Estonia) at the FIDH & REDRESS Conference in Brussels on 3-4 November 2008 on "Strategies for an effective investigation and prosecution of perpetrators of crimes under international law- Setting up specialized war crimes units."

<sup>663</sup> Presentation given by Kurm, Magnus, *ibid.*

<sup>664</sup> FIDH/REDRESS Questionnaire 2010, Answers provided by Kurm, Margus (Chief State Prosecutor, Office of the Prosecutor General).

<sup>665</sup> FIDH/REDRESS MoJ-MFA Questionnaire; Response of the Permanent Mission of the Republic of Estonia to the United Nations, 26 April 2010.

2) the offender is a citizen of Estonia at the time of commission of the act or becomes a citizen of Estonia after the commission of the act, or if the offender is an alien who has been detained in Estonia and is not extradited.

(2) The penal law of Estonia applies to an act committed outside the territory of Estonia if such act constitutes a criminal offence pursuant to the penal law of Estonia and the offender is a member of the Defence Forces performing his or her duties.

#### § 8. Applicability of penal law to acts against internationally protected legal rights

Regardless of the law of the place of commission of an act, the penal law of Estonia shall apply to an act committed outside the territory of Estonia if the punishability of the act arises from an international agreement binding on Estonia.

#### § 9. Applicability of penal law to acts against legal rights of Estonia

Regardless of the law of the place of commission of an act, the penal law of Estonia applies to acts committed outside the territory of Estonia if according to the penal law of Estonia the act is a criminal offence in the first degree and if such act:

- 1) causes damage to the life or health of the population of Estonia;
- 2) interferes with the exercise of state authority or the defence capability of Estonia, or
- 3) causes damage to the environment.

### CRIMES UNDER INTERNATIONAL LAW

#### Criminal Code

#### Special Part - Chapter 8 - Offences Against Humanity and International Security

##### Division 1 - General Provisions

#### § 88. Punishment for offences provided for in this Chapter

(1) For an offence provided for in this Chapter, the representative of state powers or the military commander who issued the order to commit the offence, consented to the commission of the offence or failed to prevent the commission of the offence although it was in his or her power to do so shall also be punished in addition to the principal offender.

(2) Commission of an offence provided for in this Chapter pursuant to the order of a representative of state powers or a military commander shall not preclude punishment of the principal offender.

##### Division 2 - Offences Against Humanity

#### § 89. Crimes against humanity

Systematic or large-scale deprivation or restriction of human rights and freedoms, instigated or directed by a state, organisation or group, or killing, torture, rape, causing health damage, forced displacement, expulsion, subjection to prostitution, unfounded deprivation of liberty, or other abuse of civilians, is punishable by 8 to 20 years' imprisonment or life imprisonment.

#### § 90. Genocide

A person who, with the intention to destroy, in whole or in part, a national, ethnical, racial or religious group, a group resisting occupation or any other social group, kills or tortures members of the group, causes health damage to members of the group, imposes coercive measures preventing childbirth within the group or forcibly transfers children of the group, or subjects members of such group to living conditions which have caused danger for the total or partial physical destruction of the group, shall be punished by 10 to 20 years' imprisonment or life imprisonment.

##### Division 4 - War Crimes

#### § 94. Punishment for offences not provided for in this Division

(1) Offences committed in war time which are not provided for in this Division are punishable on the basis of other provisions of the Special Part of this Code.

(2) A person who commits an offence provided for in this Division shall be punished only for the commission of a war crime even if the offence comprises the necessary elements of other offences provided for in the Special Part.

§ 95. Acts of war against civilian population

A person who attacks civilians in war zones or destroys or renders unusable food or water supplies, sown crops or domestic animals indispensable for the survival of civilian population, or attacks structures or equipment containing dangerous forces, shall be punished by 5 to 15 years' imprisonment or life imprisonment.

§ 96. Illegal use of means of warfare against civilians

A person who uses means of warfare in a manner not allowing to discriminate between military and civilian objects and thereby causes the death of civilians, health damage to civilians, damage to civilian objects or a danger to the life, health or property of civilians shall be punished by 6 to 15 years' imprisonment or life imprisonment.

§ 97. Attacks against civilians

A person who kills, tortures, causes health damage to, rapes, compels to serve in the armed forces or participate in military operations of a hostile state, takes hostage, illegally deprives of liberty or deprives of the right to fair trial a civilian in a war zone or in an occupied territory, or displaces residents of an occupying state in an occupied territory, or displaces residents of an occupied territory, shall be punished by 6 to 20 years' imprisonment.

§ 98. Unlawful treatment of prisoners of war or interned civilians

A person required to take care of prisoners of war or interned civilians who mistreats a prisoner of war or an interned civilian or fails to perform his or her duties and thereby causes the situation of the prisoners of war or interned civilians to deteriorate, but the act does not contain the necessary elements of an offence provided for in § 99 of this Code, shall be punished by a pecuniary punishment or up to 3 years' imprisonment.

§ 99. Attacks against prisoners of war or interned civilians

Killing, torturing, inhuman treatment, causing health damage, compelling to serve in armed forces, deprivation of the right to fair trial, unjustified delay in release or repatriation, if committed against a prisoner of war or an interned civilian, is punishable by 6 to 20 years' imprisonment.

§ 100. Refusal to provide assistance to sick, wounded or shipwrecked persons

Refusal to provide assistance to a sick, wounded or shipwrecked person in a war zone, if such refusal causes the death of or health damage to the person, is punishable by 3 to 12 years' imprisonment.

§ 101. Attack against combatant hors de combat

A person who kills, causes health damage to or tortures enemy combatants after they have laid down their arms and are placed hors de combat by sickness, wounds or another reason, shall be punished by 6 to 15 years' imprisonment.

§ 102. Attacks against protected persons

A person who kills, tortures, causes health damage to or takes hostage a member of a medical unit with proper distinguishing marks, or any other person attending to sick or wounded persons, a minister of religion, a representative of an humanitarian organisation performing his or her duties in a war zone, a civil-defence worker, a member of a parliament, or a person accompanying such person, shall be punished by 6 to 15 years' imprisonment.

§ 103. Use of prohibited weapons

Use of biological, bacteriological or chemical weapons or other weapons of mass destruction, toxic weapons, toxic or asphyxiating gases, booby traps, i.e. explosives disguised as small harmless objects, expanding bullets, weapons injuring by fragments which escape X-rays, or other internationally prohibited weapons, or large-scale use of incendiary weapons under conditions where the military objective cannot be clearly separated from civilian population, civilian objects or the surrounding environment, is punishable by 3 to 12 years' imprisonment.

§ 104. Environmental damage as method of warfare

A person who knowingly affects the environment as a method of warfare, if major damage is thereby caused to the environment, shall be punished by a pecuniary punishment or up to 5 years' imprisonment.

§ 105. Exploitative abuse of emblems and marks designating international protection

Exploitative abuse of an emblem or name of the red cross, red crescent or red lion and Sun, or of a distinctive mark of a structure containing a camp of prisoners of war, a cultural monument, civil defence object or dangerous forces, or of the flag of truce, is punishable by a pecuniary punishment or up to 3 years' imprisonment.

§ 106. Attacks against non-military objects

An attack against an object not used for military purposes, a demilitarised zone, hospital zone, medical institution or unit, a camp of prisoners of war or an internment camp, a settlement or structure without military protection, a neutral cargo vessel, aircraft or hospital ship or aircraft, or any other means of transport used for transportation of non-combatants, is punishable by a pecuniary punishment or up to 5 years' imprisonment.

§ 107. Attacks against cultural property

Destruction, damaging or illegal appropriation of a cultural monument, church or other structure or object of religious significance, a work of art or science, an archive of cultural value, a library, museum or scientific collection not used for military purposes is punishable by a pecuniary punishment or 1 to 5 years' imprisonment.

§ 108. Destruction or illegal appropriation of property in war zone or occupied territory

A person belonging to the armed forces or participating in acts of war who destroys or illegally appropriates property on a large scale in a war zone or an occupied territory, whereas such act is not required by military necessity and lacks the necessary elements of an offence provided for in § 95, 106 or 107 of this Code, shall be punished by a pecuniary punishment or up to 5 years' imprisonment.

§ 109. Marauding

A person who, with the intention of illegal appropriation, removes an object adjacent to a person who has died or sustained wounds on the battlefield, shall be punished by 1 to 5 years' imprisonment.

## Finland

### Overview

Under Finnish Criminal Law, genocide,<sup>666</sup> crimes against humanity,<sup>667</sup> war crimes,<sup>668</sup> and torture<sup>669</sup> are specifically criminalised.

The Finnish Criminal Code provides for both active and passive personality jurisdiction.<sup>670</sup> Section 6 of Chapter 1 of the Code provides for a limited form of active personality jurisdiction and applies the Finnish law to certain offences committed by a Finnish citizen<sup>671</sup> if the offence was committed in territory not belonging to any state. The offence must be punishable under Finnish law by a term of imprisonment exceeding six months.

Passive personality jurisdiction is provided for under Section 5 of the same Chapter, which applies Finnish law where an offence has been committed against a Finnish citizen, a Finnish corporation, foundation or other legal entity, or a foreigner who is permanently resident in Finland, as long as this offence is punishable by more than six months imprisonment under Finnish law.

Article 7 of Chapter 1 provides for universal jurisdiction over certain crimes, regardless of where they are committed, the nationality of the offender or the laws of the place where they are committed. These include crimes which Finland is bound to prosecute under international regulations or agreements. Further provisions of this section are issued by decree. The decree includes an exhaustive list of crimes to which Finnish criminal law can be applied on the basis of universal jurisdiction, as well as of the international conventions providing the legal basis for them.

Most international offences are based on an international agreement that has been ratified by Finland and most of them are also mentioned in the decree.<sup>672</sup> They include crimes against humanity, aggravated crimes against humanity, war crimes and aggravated war crimes,<sup>673</sup> as well as a list of other punishable criminal acts which should be considered as grave breaches of the various Geneva conventions.<sup>674</sup> Also included are the crimes of genocide,<sup>675</sup> torture,<sup>676</sup> and other crimes such as terrorism, nuclear, chemical and biological warfare and piracy.

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<sup>666</sup>CC, Section 7, Chapter 1- see decree (3).

<sup>667</sup>CC, Section 7, Chapter 1- see decree (2).

<sup>668</sup>CC, Section 7, Chapter 1- see decree (2).

<sup>669</sup>CC, Section 7, Chapter 1- see decree (9).

<sup>670</sup>English translation taken from unofficial translation at: <http://www.legislationline.org/documents/section/criminal-codes> (last accessed December 2010).

<sup>671</sup>A person who was permanently resident in Finland at the time of the offence or is permanently resident in Finland at the beginning of the court proceedings, or who was apprehended in Finland and who, at the beginning of the court proceedings, is a citizen of Denmark, Iceland, Norway or Sweden or at that time is permanently resident in one of those countries.

<sup>672</sup> Decree on the application of Chapter 1, Section 7 of the Criminal Code.

<sup>673</sup>As defined in the Rome Statute (Treaties of Finland 56/2002).

<sup>674</sup>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 the 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 as well as the Protocol Additional to the Geneva Conventions and relating to the protection of victims of international armed conflicts (Treaties of Finland 82/1980), (286/2008).

<sup>675</sup>As referred to in the Convention and Punishment of the Crime of Genocide (Treaties of Finland 5/1960)

<sup>676</sup>As referred to Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Treaties of Finland 60/1989).

## Issues

**Nexus requirements (including presence or residence):** The usual presence requirements<sup>677</sup> are not necessary to exercise universal jurisdiction under Chapter 1, Section 7 of the Criminal Code. However, the application of universal jurisdiction under certain other provisions can be conditioned, *inter alia*, on the alleged perpetrator being apprehended in Finland.<sup>678</sup>

**Subsidiarity:** There are no provisions under Finnish law dealing with subsidiarity, although the extradition of an offender to the territorial state might be a reasonable and just alternative to prosecution pursuant to universal jurisdiction in a state that has no connection with the offence, provided that a fair trial is guaranteed in the territorial state. The extradition should not, however, amount to a failure to bring charges against a person who has committed a serious international offence.<sup>679</sup>

**Double criminality:** For active or passive jurisdiction under Sections 5 or 6 to apply, the offence must also be punishable under the law of the place in which it was committed. The punishment imposed must not be more severe than that provided for under the laws of the place where the offence was committed.<sup>680</sup>

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

If the case is not investigated or prosecuted in Finland, extradition may be requested by another State. The Ministry of Justice decides whether or not to extradite.<sup>681</sup>

**Ability to review decisions of the prosecutor or other governmental body:** A decision of the Prosecutor-General not to investigate may not be appealed due to his standing as the supreme prosecutor in Finland. After the prosecution order has been issued by the Prosecutor-General, it is possible to complain about the action of the Prosecutor-General to the Chancellor of Justice of the Government or to the Parliamentary Ombudsman. Although they are unable to change or overturn decisions made by authorities, they may initiate prosecution if serious illegality is involved. This is, however, only a theoretical option, and therefore the decision made by the Prosecutor-General is normally final.<sup>682</sup>

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

**Immunities:** The Criminal Code does not address immunity for foreign officials. However, in accordance with Section 5 of the Act on the Privileges and Immunities of International Conference and Special Missions, the head of a foreign state, the head of the government, the Minister for Foreign Affairs and other persons of high rank, in the capacity of head or member of a delegation or special mission may enjoy all the privileges and immunities accorded to such persons by international law and custom. The Act applies to

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<sup>677</sup>Criminal Investigation Act, Section 17(1) and 22(1) of Chapter 1 ; also Criminal Procedure Act, Sections 1 and 3, Chapter 1, and Section 2, Chapter 6 - for ordinary crimes.

<sup>678</sup>CC, Chapter 1, Section 6(3)(b).

<sup>679</sup>Questionnaire response.

<sup>680</sup> CC, Chapter 1, Section 11(1).

<sup>681</sup> Questionnaire response.

<sup>682</sup> Questionnaire response.



intergovernmental conferences organized in Finland at the invitation or with the consent of the Government of Finland, to delegations of foreign states attending such conferences as well as to special missions of foreign states sent there with the consent of the Government of Finland.

In addition, Section 15, Chapter 1 of the Criminal Code states that international law binding on Finland can restrict the application of Finnish law; it follows that immunities would therefore apply insofar as they are recognised by the general rules of international law. Finland is party to a number of international conventions under which certain persons representing their state or an international organisation enjoy immunity from criminal jurisdiction. Diplomatic agents, for example, enjoy immunity from criminal, civil and administrative jurisdiction as provided for in the Vienna Convention on Diplomatic Relations. In the Finnish legal system, international agreements become applicable law upon their implementation (either by an Act of Parliament or by a governmental Decree). The implementing act may provide that the provisions of the agreement are applicable as such, as was done in the case of the Vienna Convention. In accordance with customary international law, a head of state and certain other high officials, such as a prime minister or a minister for foreign affairs would not be subject to criminal jurisdiction during an official visit to Finland.<sup>683</sup>

**Victims' role in proceedings:** The Criminal Procedure Act allows the victim, as well as close relatives of the victim, to bring a charge in cases where the public prosecutor has decided not to prosecute, or where the investigation authority or prosecutor has decided not to carry out or to continue the criminal investigation.<sup>684</sup> This is also confirmed in the Constitution of Finland where such a decision is unlawful.<sup>685</sup> In addition, Section 14(3) provides that an injured party has the right to endorse a charge brought by the public prosecutor or another injured party and present new circumstances in support of the charge. An injured party may also lodge an appeal against a decision made in the case regardless of whether he/she has made a statement in the case. Finally, an injured party may assume the prosecution of a charge which has been abandoned by the public prosecutor or another injured party.<sup>686</sup>

Third parties, such as the spouse, children, and other close relatives of a person killed as a result of a crime, have the right to bring a charge.<sup>687</sup> These would also have the same right to make a request for prosecution where the injured party died due to other causes, except where the injured party did not wish for a charge to be brought.<sup>688</sup>

A civil claim arising from the offence for which a charge has been brought may be heard in connection with the charge. If such a claim is made separately, the provisions on civil procedure apply.<sup>689</sup>

**Victim and witness protection:** The Code of Judicial Procedure provides in-court protection for victims and witnesses whose life or health are considered at risk, such as video-conferencing or the recording of testimony and closed session hearings.<sup>690</sup> Complete

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<sup>683</sup> Response to MoJ questionnaire.

<sup>684</sup> Criminal Procedure Act, Section 14, Chapter 1.

<sup>685</sup> Chapter 10, Section 118(3): "Everyone who has suffered a violation of his or her rights or sustained loss through an unlawful act or omission by a civil servant or other person for an offence in public office".

<sup>686</sup> Criminal Procedure Act, Section 15, Chapter 1.

<sup>687</sup> Criminal Procedure Act, Section 17, Chapter 1.

<sup>688</sup> Criminal Procedure Act, Section 17, Chapter 1.

<sup>689</sup> Criminal Procedure Act, Section 1, Chapter 3.

<sup>690</sup> Code of Judicial Procedure, Section 34a, Chapter 1 and Section 34, Chapter 17; also Act on the Publicity of General Court Proceedings. According to section 20(1) which restricts the public's attendance at court.

anonymity is not allowed, except from the media or the public - the parties always have the right to know the identity of the victim, albeit his or her contact details will be kept confidential. In certain cases,<sup>691</sup> a qualified person who has no claim in the case may be allowed to attend and provide personal support to the victim both at trial and thereafter.

Protection out of court may be afforded in the form of physical protection, identity change<sup>692</sup> and relocation both nationally and internationally. At the international level, regulation SM-2006-02623/Ri-2 of the Ministry of the Interior delegates the National Bureau of Investigation as the national contact authority in international witness protection cases. A new ministerial regulation is also underway which aims to further define the functions of the National Bureau of Investigation. There is no special victim or witness programme provided by legislation however.

**Specialised War Crimes Unit:** The National Bureau of Investigation deals with the investigation of crimes under international law.<sup>693</sup> There is no entity which deals with war crimes specifically.

**Participation in EU Genocide Network:** Finland has implemented the EU Council Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes and has designated a particular EU Contact Point from the National Bureau of Investigation, who has participated in the meetings regarding these crimes.<sup>694</sup>

## Cases

On 11 September 2003, a group of Falun Gong practitioners resident in Finland filed a criminal complaint against Luo Gan, a Standing Committee member of the Chinese Communist Party's Politburo. During his visit to Finland in early September, Luo Gan was formally notified of the complaint alleging his responsibility for torture and genocide carried out against Falun Gong practitioners in China. However, he returned to China before any further action was taken by Finnish authorities.

A more recent case concerned Francois Bazaramba, a Rwandan national suspected of involvement in the 1994 genocide in his country. He stood accused primarily for genocide and secondarily for 15 counts of murder in connection with the events of 1994, although he denied all charges. Having applied for asylum in Finland in 2003, he had been living there since that time. In April 2007 he was arrested on the basis of being one of those on a list of 93 suspects residing abroad published by the Rwandan authorities in May 2006. He was held in custody in Finland which refused a request for extradition by Rwanda in December 2008. The trial against him began in June 2009 at the East Uusimaa District Court, and on 11 June 2010 he was convicted of genocide and given a life sentence. The decision is to be scheduled for appeal in 2011.<sup>695</sup>

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<sup>691</sup>Sexual offence, manslaughter, killing, infanticide, assault (in particular domestic violence), and other offences directed at life, health or personal liberty, where these are considered sufficiently serious.

<sup>692</sup> Names Act, Section 10, Section 32(c) and (d); also the Population Information Act of 2010 provides the creation of a new identity to a protected person, as well as identity number, where there are extremely serious grounds for doing so, namely due to obvious and permanent threat to a person's health or security.

<sup>693</sup> Police questionnaire response.

<sup>694</sup> Police questionnaire response.

<sup>695</sup> Mehtonen, Susanna, 'The Bazaramba Case in Finland' in *EU Update on International Crimes*, FIDH/REDRESS newsletter, December 2010, available at: <http://www.redress.org/smartweb/newsletters/eu-update-international-crimes> (last accessed December 2010).

## Relevant Legislation

### JURISDICTION

Criminal Code<sup>696</sup>

*Chapter 1 - Scope of application of the criminal law of Finland (626/1996)*

*Section 5 - Offence directed at a Finn*

Finnish law applies to an offence committed outside of Finland that has been directed at a Finnish citizen, a Finnish corporation, foundation or other legal entity, or a foreigner permanently resident in Finland if, under Finnish law, the act may be punishable by imprisonment for more than six months.

...

*Section 6 - Offence committed by a Finn*

(1) Finnish law applies to an offence committed outside of Finland by a Finnish citizen. If the offence was committed in territory not belonging to any State, a precondition for the imposition of punishment is that, under Finnish law, the act is punishable by imprisonment for more than six months.

(2) A person who was a Finnish citizen at the time of the offence or is a Finnish citizen at the beginning of the court proceedings is deemed to be a Finnish citizen.

(3) The following are deemed equivalent to a Finnish citizen:

(1) a person who was permanently resident in Finland at the time of the offence or is permanently resident in Finland at the beginning of the court proceedings;

and

(2) a person who was apprehended in Finland and who at the beginning of the court proceedings is a citizen of Denmark, Iceland, Norway or Sweden or at that time is permanently resident in one of those countries.

*Section 7 - International offence*

(1) Finnish law applies to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland (*international offence*). Further provisions on the application of this section shall be issued by Decree.

(2) Regardless of the law of the place of commission, Finnish law applies also to a nuclear explosive offence or the preparation of an endangerment offence that is to be deemed an offence referred to in the Comprehensive Nuclear Test Ban Treaty (Treaties of Finland 15/2001) (841/2003)

(3) Regardless of the law of the place of commission, Finnish law applies also to trafficking in persons, aggravated trafficking in persons and an offence referred to in chapter 34a committed outside of Finland. (650/2004)

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Decree on the application of chapter 1, section 7 of the Criminal Code (627/1996)

Section 1

[1] In the application of chapter 1, section 7 of the Criminal Code, the following offences are deemed international offences:

(1) counterfeiting currency, the preparation of the counterfeiting of currency, or the use of counterfeited currency, referred to in the International Convention for the Suppression of Counterfeiting Currency (Treaties of Finland 47/1936) and counterfeiting of the euro referred to in article 7, paragraph 2 of the

Council framework decision of 29 May 2000, on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (Official Journal L 140, 14 June 2000), (370/2001)

(2) a crime against humanity, aggravated crime against humanity, war crime and aggravated war crime defined in the Charter of Rome of the International Criminal Court (Treaties of Finland 56/2002) or other corresponding punishable criminal act which should be deemed a grave breach of the Geneva Conventions for the Amelioration of the Condition

<sup>696</sup> Translation obtained from unofficial translation - see: <http://www.legislationline.org/documents/section/criminal-codes> (last accessed December 2010).

of the Wounded and Sick in Armed Forces in the Field, for the Amelioration of the Condition of the 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 (Treaties of Finland 8/1955), as well as the Protocol Additional to the Geneva Conventions, and relating to the protection of victims of international armed conflicts (Treaties of Finland 82/1980),

(286/2008)

(3) genocide and the preparation of genocide referred to in the Convention on the Prevention and Punishment of the Crime of Genocide (Treaties of Finland 5/1960),

(4) a narcotics offence, aggravated narcotics offence, preparation of a narcotics offence, promotion of a narcotics offences, promotion of an aggravated narcotics offence, and concealment offence as referred to in the Single Convention on Narcotic Drugs of 1961 (Treaties of Finland 43/1965), the Protocol amending the Single Convention on Narcotic Drugs of 1961 (Treaties of Finland 42/1975), the Convention on psychotropic substances (Treaties of Finland 60/1976), and the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances (Treaties of Finland 44/1994), (1014/2006)

(5) such seizure of aircraft or other punishable act by which the perpetrator unlawfully, by force or threat thereof, seizes or exercises control of an aircraft, that is to be deemed an offence referred to in the Convention for the suppression of unlawful seizure of aircraft (Treaties of Finland 62/1971),

(6) such criminal traffic mischief or aggravated criminal mischief, preparation of an endangerment offence or other punishable act that is to be deemed an offence referred to in the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Treaties of Finland 56/1973),

(7) murder, assault or deprivation of liberty directed against the person of an internationally protected person, or violent attack upon the official premises, the private accommodation or the means of transport of such a person, or a threat thereof, referred to in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (Treaties of Finland 63/1978), (8) taking of a hostage or other deprivation of liberty referred to in the International Convention against the Taking of Hostages (Treaties of Finland 38/1983),

(9) such torture for the purpose of obtaining a confession, assault, aggravated assault or other punishable act that is to be deemed torture referred to in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Treaties of Finland 60/1989),

(10) such nuclear device offence, endangerment of health, nuclear energy use offence or other punishable act directed at or committed by using nuclear material that is to be deemed an offence referred to in the Convention on the Physical Protection of Nuclear Material (Treaties of Finland 72/1989),

(11) such deprivation of liberty, aggravated deprivation of liberty, abduction, sabotage, endangerment or other punishable act that is to be deemed an offence referred to in the European Convention on the Suppression of Terrorism (Treaties of Finland 16/1990), (353/1997) homicide, assault, deprivation of liberty or robbery directed at a person on board a vessel or aircraft, or seizure, theft or damage of a vessel, aircraft or property on board a vessel or aircraft that is to be deemed piracy as referred to in the United Nations Convention on the Law of the Seas (Treaties of Finland 50/1996), (118/1999)

(12) such violation of the prohibition of chemical weapons referred to in the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Treaties of Finland 19/1997), (118/1999)

(13) such unlawful act directed against the safety of maritime navigation that is referred to in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Treaties of Finland 11/1999), (537/2000)

(13a) such violation of the prohibition of biological weapons referred to in the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (Treaties of Finland 23/1929) and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Treaties of Finland 15/1975), (286/2008)

(14) such unlawful act that is directed against the safety of fixed platforms located on the continental shelf as is referred to in the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Treaties of Finland 44/2000), (739/2001)

(15) such crime against United Nations and associated personnel as is referred to in the Convention on the Safety of United Nations and Associated Personnel (Treaties of Finland 2-3/2001), (510/2002)

(16) such offence against a place of public use, state or government facility, a public transportation system or an infrastructure facility as is referred to in the International Convention for the Suppression of Terrorist Bombings (Treaties of Finland 60/2002),

(17) such financing of terrorism as is referred to in the International Convention for the Suppression of the Financing of Terrorism (Treaties of Finland 74/2002), (859/2003)

(18) such wilful killing or causing of serious injury to civilians as is referred to in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and other Devices as amended on 3 May 1996 (Treaties of Finland 91/1998). (859/2003)

(2) Also a punishable attempt of and punishable participation in an offence referred to in subsection 1 is deemed an international offence

## CRIMES UNDER INTERNATIONAL LAW

### Criminal Code

#### Chapter 11 - War crimes and crimes against humanity (212/2008)

##### Section 1 - *Genocide*

(1) A person who for the purpose of entirely or partially destroying a national, ethnic, racial or religious group or another comparable group

- (1) kills members of the group,
- (2) inflicts grievous bodily or mental illness or injuries on members of the group,
- (3) subjects the group to such living conditions that can cause the physical destruction of the group in whole or in part,
- (4) undertakes forcible measures to prevent procreation among the group, or
- (5) forcibly moves children from one group to another,

shall be sentenced for *genocide* to imprisonment for at least four years or for life.

(2) An attempt is punishable.

##### Section 2 - *Preparation of genocide*

A person who for the purpose referred to in section 1

- (1) conspires with another to commit genocide, or
- (2) makes a plan for genocide

shall be sentenced for *preparation of genocide* to imprisonment for at least four months and at most four years.

##### Section 3 - *Crime against humanity*

A person who, as part of a broad or systematic assault on civilian population,

1) kills or enslaves another, subjects him or her to trade by offer, purchase, sale or rent, or tortures him or her, or in another manner causes him or her considerable suffering or a serious injury or seriously harms his or her health or destroys a population by subjecting it or a part thereof to destructive living

condition or in another manner,

- 2) deports or forcibly transfers population lawfully residing in an area,
- 3) takes a person as a prisoner or otherwise deprives him or her of his or her liberty in violation of fundamental provisions of international law or causes the involuntary disappearance of a person who has been deprived of his or her liberty,
- 4) rapes another, subjects him or her to sexual slavery, forces him or her into prostitution, pregnancy or sterilization or commits other corresponding aggravated sexual violence against him or her,
- 5) engages in racial discrimination or persecutes a recognizable group or community on the basis of political opinion, race, nationality, ethnic origin, culture, religion or gender or on other comparable grounds, shall be sentenced for a *crime against humanity* to imprisonment for at least one year or for life.

An attempt is punishable.

##### Section 4 - *Aggravated crime against humanity*

If in a crime against humanity

- (1) the offence is directed against a large group of persons,
  - (2) the offence is committed in an especially brutal, cruel or degrading manner
- or
- (3) the offence is committed in an especially planned or systematic manner, and the offence is aggravated also when assessed as a whole, the offender shall be sentenced for an *aggravated crime against humanity* to imprisonment for at least eight years or for life.
- (2) An attempt is punishable.

##### Section 5 - *War crime*

(1) A person who in connection with a war or other international or domestic armed conflict or occupation in violation of the Geneva conventions on the amelioration of the condition of the wounded and sick in armed forces in the field, the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, the treatment of prisoners of war or the protection of civilian persons in time of war (Treaties of Finland 8/1955, *Geneva conventions*) or the additional amendment protocols done in 1949 to the Geneva Conventions, on the protection of victims of international armed conflicts and the protection of victims of non-international armed conflicts (Treaties of Finland

82/1980, I and II protocols) or other rules and customs of international law on war, armed conflict of occupation,

1) kills another or wounds or tortures him or her or in violation of his or her interests maims him or her or subjects him or her to a biological, medical or scientific experiment or in another manner causes him or her considerable suffering or a serious injury or seriously harms his or her health,

2) rapes another, subjects him or her to sexual slavery, forces him or her into prostitution, pregnancy or sterilization or commits other corresponding aggravated sexual violence against him or her,

3) destroys, confiscates or steals property arbitrarily and without military need,

4) in connection with an assault or otherwise plunders a town or another corresponding place,

5) takes or recruits children below the age of 18 years into military forces or into groups in which they are used in hostilities,

6) forces a prisoner of war or another protected person to serve in the military forces of the enemy or participate in military action against their own country,

7) denies a prisoner of war or another protected person the rights to a fair and lawful trial or in another manner denies him or her legal guarantees,

8) initiates an attack that causes the loss of human life or injuries or extensive, long-term and serious environmental damage that are clearly excessive in comparison with the anticipated real and direct military benefit,

9) attacks civilian populations, civilians not taking part in hostilities or civilian targets or persons engaged in tasks referred to in the Charter of the United Nations (Treaties of Finland 1/1956) or property used by them,

10) attacks undefended civilian targets or bombs them, attacks places used for religious worship, science, art, medical treatment or charity or historical monuments or attacks persons who are using the symbols referred to in the Geneva conventions or the I or III protocol to the Geneva conventions,

11) misuses a white flag, the flag of the enemy, the flag of the United Nations, military insignia, a military uniform or the symbols referred to in the Geneva conventions or the I or III protocol to the Geneva conventions,

12) holds in unlawful detention or forcibly transfers or deports population or parts thereof,

13) takes persons as hostages, announces that no mercy shall be given, uses civilians or other protected persons in order to protect military targets, prevents civilians from receiving foodstuffs or other supplies necessary for survival or emergency assistance or uses other means of warfare prohibited in

international law, or

14) uses poison or a poison weapon, suffocating or poisonous gases or other corresponding substances, weapons, ammunition or materiel that cause excessive injuries or unnecessary suffering, or chemical, biological or other prohibited weapons or ordnance,

shall be sentenced for a *war crime* to imprisonment for at least one year or for life.

(2) Also a person who commits another act defined under article 8 of the Rome Statute of the International Criminal Court (Treaties of Finland 56/2002) or in another manner violates the provisions of an international agreement on war, armed conflict or occupation that is binding on Finland or the generally recognized and established laws and customs of war in accordance with international law shall be sentenced for a war crime.

(3) An attempt is punishable.

#### Section 6 - *Aggravated war crime*

(1) If the war crime is committed as part of a plan or policy or as part of extensive war crimes and

(1) the offence is directed against a large group of persons,

(2) the offence causes very serious and extensive damage,

(3) the offence is committed in an especially brutal, cruel or degrading manner,

or

(4) the offence is committed in an especially planned or systematic manner, and the offence is aggravated also when assessed as a whole, the offender shall be sentenced for an *aggravated war crime* to imprisonment for at least eight years or for life.

(2) An attempt is punishable.

#### Section 7 - *Petty war crime*

(1) If the war crime, considering the consequence caused or the other relevant circumstances, is petty when assessed as a whole, the offender shall be sentenced for a *petty war crime* to a fine or to imprisonment for at most two years.

(2) An attempt is punishable.

#### Section 8 - *Breach of the prohibition of chemical weapons*

A person, who in breach of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Treaties of Finland 19/1979)

(1) uses chemical weapons in a manner not referred to in sections 5 - 7 of this chapter,

(2) develops, produces, otherwise procures, stockpiles, possesses or transports

chemical weapons, or

(3) participates in military preparations for the use of chemical weapons, shall be sentenced for *breach of the prohibition of chemical weapons* to imprisonment for at least four months and at most six years.

#### Section 9 - *Breach of the prohibition of biological weapons*

A person who

(1) uses a biological or a toxin weapon in a manner not referred to in sections 1 through 3 of this chapter,

(2) unlawfully prepares, transports or delivers a biological weapon or a toxin weapon, or

(3) in violation of an international convention on the development, production and storage of bacteriological (biological) and toxin weapons and on their destruction (Treaties of Finland 15/1975) develops, prepares, otherwise procures, stores or possesses a biological weapon or a toxin weapon or

weapons, devices or equipment for the dissemination of a biological weapon or a toxin weapon, shall be sentenced, unless the same or a more severe penalty for the act has been provided elsewhere in the law, for a *breach of the prohibition of biological weapons* to imprisonment for at least four months and at most six years.

#### Section 10 - *Ethnic agitation*

A person who spreads statements or other information among the public where a certain national, ethnic, racial or religious group or a comparable population group is threatened, defamed or insulted shall be sentenced for *ethnic agitation* to a fine or to imprisonment for at most two years.

#### Section 11 - *Discrimination*

A person who in his/her trade or profession, service of the general public, exercise of official authority or other public function or in the arrangement of a public amusement or meeting, without a justified reason

(1) refuses someone service in accordance with the generally applicable conditions,

(2) refuses someone entry to the amusement or meeting or ejects him or her, or

(3) places someone in an unequal or an essentially inferior position owing to his/her race, national or ethnic origin, colour, language, sex, age, family ties, sexual preference, state of health, religion, political orientation, political or industrial activity or another comparable circumstance shall be sentenced, unless

the act is punishable as extortionate industrial discrimination, for *discrimination* to a fine or to imprisonment for at most six months.

#### Section 12 - *Responsibility of the superior*

A military or other superior shall be sentenced for the offence or the attempt of an offence referred to in section 1, 3 - 7 or 13 in the same way as the offender or participant if forces or subordinates that are factually under the command and supervision of the superior have been guilty of an act as a consequence of the failure of the superior to properly supervise the actions of the forces or subordinates, and if

1) the superior knew or on the basis of the circumstances he or she should have known that the forces or subordinates committed or intended to committed said offences, and

2) the superior did not undertake the necessary measures available to him or her and that could have been reasonably expected of him or her in order to prevent the completion of the offences.

#### Section 13 - *Failure to report the offence of a subordinate*

(1) A military or other superior who neglects to undertake the necessary measures that can be reasonably expected of him or her in order to submit to the authorities for investigation an offence referred to in section 1 or sections 3-7 or the present section suspected to have been committed by a person factually under his or her command and supervision, shall be sentenced for *failure to report the offence of subordinate* to a fine or to imprisonment for at most two years.

(2) However, a superior who is a participant in the offence committed by his or her subordinate or under the conditions referred to in section 12 is an offender or participant in the offence committed by his or her subordinate shall not be sentenced for failure to report the offence of the subordinate.

#### Section 14 - *Order by the Government and command of a superior*

A person who has committed or attempted a war crime, an aggravated war crime or a petty war crime on the order of an authority exercising governmental power or of an entity exercising other public power or on the command of a superior is free of penal liability only if:

1) he or she had had a legal obligation to obey the orders of the Government or the commands of his or her superior,

2) he or she did not know that the order or command is against the law, and

3) the order or command was not clearly against the law.

## France

### Overview

War crimes, genocide, crimes against humanity and torture are punishable under French law.

The French Code of Criminal Procedure provides for universal jurisdiction over specified crimes that France has a duty to prosecute under international treaties, including torture, terrorism, piracy, hijacking, corruption of European officials and offences committed by means of nuclear materials.<sup>697</sup>

The main crime prosecuted in France using universal jurisdiction until August 2010 was the crime of torture, in accordance with Article 5 of the Torture Convention.<sup>698</sup> On this basis, two convictions were issued by French Criminal Courts and about ten cases have been or are still being investigated by investigative judges.

A second important basis for universal jurisdiction is the incorporation of the United Nations Security Council Resolutions 827 and 955 setting up both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR),<sup>699</sup> which led France to enact legislation to comply with the obligation to pursue any suspected criminal of war crimes, crimes against humanity or genocide, if committed in the former Yugoslavia or in Rwanda, when the suspect is present on French territory. On this basis, 18 cases are currently being investigated concerning Rwandan suspects before investigative judges at the *Paris Tribunal de Grande Instance*.

The last and most recent basis for universal jurisdiction was introduced into the Code of Criminal Procedure on 9 August 2010,<sup>700</sup> which incorporated the Rome Statute into French legislation. This legislation creates a whole new set of conditions for the exercise of universal jurisdiction over crimes against humanity, war crimes and genocide: residence of the suspect, a stipulation that only the prosecutor may initiate criminal proceedings, subsidiarity and double criminality.

There are therefore two distinct set of conditions for the exercise of universal jurisdiction.

French criminal legislation provides for active personality jurisdiction<sup>701</sup> and passive personality jurisdiction<sup>702</sup> over all crimes.

### Issues

#### **Nexus Requirements (including presence or residence):**

*For the exercise of universal jurisdiction over the crime of torture* : There has been an important legal debate on the presence requirement in universal jurisdiction cases concerning torture. The issue is whether presence is required at the time the complaint is filed by the victim or at the time the judicial investigation (handled by an investigative judge) is opened. This issue was key in important cases where suspects escaped from French territory, thus raising the question of the jurisdiction of the French Judge over the crimes named in the complaints. The *Cour de cassation* addressed the issue in two

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<sup>697</sup> CCP, Articles 689, 689- 1, 689-2, 689-3, 689-4, 689-5, 689-6, 689-7, 689-8, 689-9, 689-10.

<sup>698</sup> CCP, Article 689-2.

<sup>699</sup> See Law n° 95-1 of 2 January 1995 and Law n° 96-432 of 22 May 1996.

<sup>700</sup> See Law n° 2010-930 of 9 August 2010 amending the Criminal Code and the Code of Criminal Procedure on the Adaptation of the French Criminal Law to the Rome Statute and particularly the Article 689-11 introduced by this Law.

<sup>701</sup> CC, Article 113-6.

<sup>702</sup> CC, Article 113-7.



decisions,<sup>703</sup> stating that presence is only required at the time of the filing of the complaint, as long as the preliminary investigation opened after the filing of the complaint has confirmed the alleged presence of the suspect. This has enabled the French judge to continue to exercise jurisdiction if the suspect escapes between the filing of the complaint and the opening of the judicial investigation.

The investigation can be carried out without the suspect being present on the territory.

*In absentia* trials are allowed in France.

*For the exercise of universal jurisdiction over crimes against humanity, war crimes and genocide:* The law enacted in August 2010 contains a condition of residence of the suspect in France. This condition still needs to be defined and interpreted by the French courts, as cases are submitted on this basis.

**Double criminality:** No double criminality requirement exists under the universal jurisdiction provisions for the crime of torture.

A double criminality requirement exists under the new 2010 law. Under this new law, French courts can exercise jurisdiction over crimes against humanity, genocide or war crimes if the state where the crimes were committed or the state of nationality of the suspect is a party to the Rome Statute or, if this requirement is not met, if the double criminality requirement is fulfilled.<sup>704</sup>

**Subsidiarity:** No subsidiarity requirement exists under the universal jurisdiction provisions for the crime of torture.

The new 2010 law sets out a subsidiarity requirement: the prosecutor who intends to open an investigation on a given case must verify whether any national or international Court asserts jurisdiction over the case by seeking the extradition (or transfer) of the suspect. The prosecutor must also expressly request the International Criminal Court to decline its jurisdiction over the case.<sup>705</sup>

#### **Victims' role in proceedings:**

*For the exercise of universal jurisdiction over the crime of torture:* Victims of torture have two procedural choices to obtain the opening of a judicial investigation: they can either file a complaint with a prosecutor, who will open a preliminary investigation and decide consequently on whether or not to seize an investigative judge to further investigate the crimes denounced in the complaint; or they can file a "*parties civiles* complaint" (*plainte avec constitution de partie civile*) directly to an investigative judge, which automatically triggers the opening of a judicial enquiry into the crimes allegedly perpetrated.

*For the exercise of universal jurisdiction over crimes against humanity, war crimes and genocide:* Victims of crimes against humanity, genocide and war crimes, according to the conditions set up by the new legislation, do not have the possibility to file a "*parties civiles* complaint" directly to an investigative judge. They can only file a complaint to the prosecutor.<sup>706</sup>

**Prosecutorial and Executive Discretion:** When a complaint is filed with the prosecutor, the Code of Criminal Procedure<sup>707</sup> gives the prosecutor a wide prosecutorial discretion. For

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<sup>703</sup> See the decision of the *Cour de cassation* issued on 9 April 2008 (n° 07-86.412) on the Disappeared of the Beach Case and the decision of the *Cour de cassation* issued on 21 January 2009 (n° 07-88.330) on the Ung Boun Ohr Case.

<sup>704</sup> CCP, Article 689-11.

<sup>705</sup> CCP, Article 689-11.

<sup>706</sup> CCP, Article 689-11.

<sup>707</sup> CCP, Article 40-1.

the exercise of universal jurisdiction over the crime of torture, as in all criminal cases, this prosecutorial discretion can be circumvented by the filing of a "*parties civiles* complaint" which automatically triggers the opening of a judicial investigation, by obliging the prosecutor to seize an investigative judge for the opening of such investigation.

However, this possibility is denied to victims of crimes against humanity, genocide or war crimes, under the provisions of the 9 August 2010 Law.<sup>708</sup> Victims of these crimes will therefore only have the procedural choice of filing a complaint to the prosecutor, thus being subject to prosecutorial discretion.

**Ability to review decisions of the prosecutor or other governmental body:** The decision issued by the prosecutor can be reviewed by the General Prosecutor, or by the Ministry of Justice.<sup>709</sup> These authorities cannot order the dismissal of the case, but can order the opening of an investigation when the prosecutor has decided to dismiss the case.

**Statutes of Limitation:** Criminal offences, such as torture, are subject to the normal limitation period of ten years.<sup>710</sup>

War crimes are subject to a period of limitation of thirty or twenty years, according to the nature of the crime.<sup>711</sup>

Crimes against humanity and genocide are not subject to any limitation period, in accordance with the Rome Statute.<sup>712</sup>

**Immunities:** No specific legislation exists regarding the immunity of those accused of crimes under international law. The practice in this regard refers to international customary law. However, experience has shown that the interpretation of international law regarding the question of immunities varies on a case by case basis. The investigative judge or the prosecutor who receive a case involving a potential immunity issue refers the case to the Ministry of Foreign Affairs which issues an opinion on whether the suspect has to be granted immunity or not. The magistrate has then the power to issue a decision on the basis of this legal opinion.

Following a complaint filed with the prosecutor against Donald Rumsfeld in October 2007<sup>713</sup>, the Prosecutor of Paris dismissed the complaint and granted Donald Rumsfeld immunity, in a decision issued in February 2008, on the basis that Mr Rumsfeld was a former US Secretary of Defence. This decision was based on an opinion drafted by the Ministry of Foreign Affairs, which was deprived of any valid legal justification.

**Victim and Witness Protection:** No specific legislation exists on victim and witness protection, except for the possibility to hear a witness anonymously, when there is reasonable evidence establishing that the witness's testimony may endanger him or her.<sup>714</sup>

**Specialised War Crimes Unit:** On 1 September 2010, a specialised unit was officially created within the *Section de Recherches* of the Paris Gendarmerie and at the time of writing, three officers were working on serious international crimes on a full time basis. The unit can rely on a staff of 70 from the *Section de Recherches* if cases require more resources.<sup>715</sup> However, the high number of cases currently pending before French

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<sup>708</sup> CCP, Article 689-11.

<sup>709</sup> CCP, Articles 30 and 36.

<sup>710</sup> CCP, Article 7.

<sup>711</sup> See Article 462-10 of the Criminal Code introduced by the 2010 Law.

<sup>712</sup> CC, Article 213-5.

<sup>713</sup> See the details of the proceedings in France on FIDH website: <http://www.fidh.org/-Rumsfeld-Cases-> (last accessed December 2010).

<sup>714</sup> CCP, Article 706-58.

<sup>715</sup> Information provided by French official to FIDH & REDRESS, November 2010.

investigative judges, with approximately 18 cases concerning Rwanda alone, raises serious doubts as to whether three investigators will be sufficient to handle all of these cases.

## Cases

French investigative judges are currently investigating eighteen cases of Rwandan suspects allegedly involved in the 1994 genocide. None of these investigations have led to trial so far, although France was criticised by the European Court of Human Rights on 8 June 2004 for the slow pace of the proceedings, in violation of Articles 6(1) and 13 of the European Convention of Human Rights.

Besides these cases, approximately ten other cases are being investigated on the basis of universal jurisdiction over the crime of torture, including crimes committed in the Republic of Congo, Algeria and Cambodia.<sup>716</sup> Three convictions have been issued by French Criminal Courts, the first two cases on the basis of universal jurisdiction and the third on the basis of passive personality jurisdiction.

On 1 July 2005, Ely Ould Dah, a Mauritanian officer, was sentenced *in absentia* to ten years in prison for having tortured black African members of the military in 1990 and 1991.<sup>717</sup>

On 24 September 2010, Khaled Ben Said, former head of police in Djendouba, Tunisia, was sentenced to twelve years imprisonment for having given instructions to commit crimes of torture in October 1996. This decision followed an appeal filed by the prosecutor against a decision of conviction issued at first instance in December 2008.<sup>718</sup>

On 17 December 2010, thirteen Chilean officials of the Pinochet dictatorship in Chile were sentenced to prison terms from life imprisonment to 15 years imprisonment for the enforced disappearances (namely arbitrary arrest and detention aggravated by acts of torture, under French legal qualifications) of four French-Chilean nationals in 1973, 1974 and 1975.<sup>719</sup>

## Relevant Legislation

### JURISDICTION

#### Active personality jurisdiction

Criminal Code - Article 113-6

French criminal law is applicable to any felony committed by a French national outside the territory of the French Republic.

It is applicable to misdemeanours committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed.

The present article applies even if the offender has acquired French nationality after the commission of the offence of which he is accused.

#### Passive personality jurisdiction

Criminal Code - Article 113-6

French Criminal law is applicable to any felony, as well as to any misdemeanour punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place.

<sup>716</sup> For more information on these cases, see <http://www.fidh.org/-Universal-Jurisdiction-> (last accessed December 2010).

<sup>717</sup> For more details on this case, see FIDH documentation available on line at <http://www.fidh.org/-Ely-Ould-Dah-Case-> (last accessed December 2010).

<sup>718</sup> For more details on this case, see FIDH documentation available on line at <http://www.fidh.org/-Ben-Said-Case-> (last accessed December 2010).

<sup>719</sup> For more details on this case, see FIDH documentation available online at <http://www.fidh.org/Trial-of-the-Pinochet-dictatorship> (last accessed December 2010).

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Universal jurisdiction:  
Code of Criminal Procedure  
Article 689<sup>720</sup>

Perpetrators of or accomplices to offences committed outside the territory of the Republic may be prosecuted and tried by French courts either when French law is applicable under the provisions of Book I of the Criminal Code or any other statute, or when an international Convention gives jurisdiction to French courts to deal with the offence.

Article 689-1

*(Act no. 75-624 of 11 July 1975 art 12 Official Journal 13 July 1975, in force 1 January 1976); (Act no. 92-1336 of 16 December 1992 art. 60 & 61 Official Journal of 23 December 1992 in force 1 March 1994) ;(Act no. 99-515 of 23 June 1999 Article 30 Official Journal of 24 June 1999)*

In accordance with the international Conventions quoted in the following articles, a person guilty of committing any of the offences listed by these provisions outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts. The provisions of the present article apply to attempts to commit these offences, in every case where attempt is punishable.

Article 689-2

*(Act no. 85-1407 of 30 December 1985 art. 72-i & 94 Official Journal of 31 July 1985 in force 1 February 1986)  
(Act no. 92-1336 of 16 December 1992 art. 60 & 61 Official Journal of 23 December 1992 in force 1 March 1994)  
(Act no. 99-515 of 23 June 1999 Article 30 Official Journal of 24 June 1999)*

For the implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10th December 1984, any person guilty of torture in the sense of article 1 of the Convention may be prosecuted and tried in accordance with the provisions of article 689-1.

Article 689-3

*(Act no. 87-541 of 16 July 1987 art. 1 Official Journal of 18 July 1987)  
(Act no. 92-1336 of 16 December 1992 art. 60 & 61 Official Journal of 23 December 1992 in force 1 March 1994)  
(Act no. 99-515 of 23 June 1999 Article 30 Official Journal of 24 June 1999)*

For the implementation of the European Convention on the Suppression of Terrorism, signed in Strasbourg on 27th January 1977, and the Dublin agreement of 4th December 1979, made between the member states of the European Communities concerning the implementation of the European Convention for the Suppression of Terrorism, any person guilty of any of the following offences may be prosecuted and tried in accordance with the provisions set out in article 689-1:

1° intentional offences against life, torture and acts of barbarity, violence which caused death, mutilation or permanent infirmity or, if the victim is a minor, total incapacity to work for more than eight days, abduction and sequestration punished by Book II of the Criminal Code, and also threats as covered by articles 222-17, paragraph 2, and 222-18 of that Code where the offence is committed against a person entitled to an international protection including diplomatic agents;

2° offences against freedom of movement defined in article 421-1 of the Criminal Code or any other felony or misdemeanour entailing the use of bombs, grenades, rockets, automatic fire weapons, booby-trapped letters or parcels, insofar as this use creates a danger for persons, where the felony or misdemeanour is in relation to an individual or collective undertaking aimed at seriously breaching public order by intimidation or terror.

Article 689-11<sup>721</sup>

Créé par LOI n° 2010-930 du 9 août 2010 - art. 8

Peut être poursuivie et jugée par les juridictions françaises toute personne qui réside habituellement sur le territoire de la République et qui s'est rendue coupable à l'étranger de l'un des crimes relevant de la compétence de la Cour pénale internationale en application de la convention portant statut de la Cour pénale internationale signée à Rome le 18 juillet 1998, si les faits sont punis par la législation de l'Etat où ils ont été commis ou si cet Etat ou l'Etat dont elle a la nationalité est partie à la convention précitée.

La poursuite de ces crimes ne peut être exercée qu'à la requête du ministère public si aucune juridiction internationale ou nationale ne demande la remise ou l'extradition de la personne. A cette fin, le ministère public s'assure auprès de la Cour pénale internationale qu'elle décline expressément sa compétence et vérifie qu'aucune autre juridiction internationale compétente pour juger la personne n'a demandé sa remise et qu'aucun autre Etat n'a demandé son extradition.

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Jurisdiction over crimes committed in former Yugoslavia and Rwanda

Loi n° 95-1 du 2 janvier 1995 portant adaptation de la législation française aux dispositions de la résolution 827 du Conseil de sécurité des Nations Unies instituant un tribunal international en vue de juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991<sup>722</sup>

Article 1

Modifié par Loi n° 96-432 du 22 mai 1996 - art. 4 JORF 23 mai 1996

<sup>720</sup> *(Act no. 75-624 of 11 July 1975 art 11 Official Journal 13 July 1975, in force 1 January 1976); (Act no. 92-1336 of 16 December 1992 art. 60 & 61 Official Journal of 23 December 1992 in force 1 March 1994); (Act no. 99-515 of 23 June 1999 Article 30 Official Journal of 24 June 1999).*

<sup>721</sup> Available only in French.

<sup>722</sup> Available only in French.

Pour l'application de la résolution 827 du Conseil de sécurité des Nations Unies du 25 mai 1993 instituant un tribunal international en vue de juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis le 1er janvier 1991, la France participe à la répression des infractions et coopère avec cette juridiction dans les conditions fixées par la présente loi.

Les dispositions qui suivent sont applicables à toute personne poursuivie à raison des actes qui constituent, au sens des articles 2 à 5 du statut du tribunal international, des infractions graves aux conventions de Genève du 12 août 1949, des violations des lois ou coutumes de la guerre, un génocide ou des crimes contre l'humanité.

#### Article 2

Modifié par Loi n°96-432 du 22 mai 1996 - art. 5 JORF 23 mai 1996

Les auteurs ou complices des infractions mentionnées à l'article 1er peuvent être poursuivis et jugés par les juridictions françaises en application de la loi française, s'ils sont trouvés en France. Ces dispositions sont applicables à la tentative de ces infractions, chaque fois que celle-ci est punissable.

Toute personne qui se prétend lésée par l'une de ces infractions peut, en portant plainte, se constituer partie civile dans les conditions prévues par les articles 85 et suivants du code de procédure pénale, dès lors que les juridictions françaises sont compétentes en application des dispositions de l'alinéa précédent.

Le tribunal international est informé de toute procédure en cours portant sur des faits qui pourraient relever de sa compétence.

#### Article 3

Les demandes du tribunal international aux fins de dessaisissement des juridictions françaises d'instruction ou de jugement sont adressées, en original et accompagnées de toutes pièces justificatives, au ministre de la justice, qui, après s'être assuré de leur régularité formelle, les transmet au procureur général près la Cour de cassation.

Ces demandes sont signifiées aux parties qui ont un délai de quinze jours pour déposer un mémoire au greffe de la Cour de cassation.

Le dossier de la procédure est transmis sans délai au parquet général de la Cour de cassation.

#### Article 4

Lorsque la chambre criminelle de la Cour de cassation, saisie par requête du procureur général près cette cour, constate que les faits, objet de la demande de dessaisissement de la juridiction française d'instruction ou de jugement, entrent dans le champ d'application de l'article 1er de la présente loi et qu'il n'y a pas d'erreur évidente, elle ordonne le dessaisissement et renvoie la connaissance de l'affaire au tribunal international.

La chambre criminelle statue dans le mois de la requête.

#### Article 5

Lorsque le dessaisissement est ordonné, le dossier de la procédure est adressé par le ministre de la justice au tribunal international.

Lorsque la demande de dessaisissement est accompagnée d'une demande de remise, le dessaisissement vaut décision de remise de l'intéressé si celui-ci est détenu en raison de faits entrant dans le champ d'application de l'article 1er de la présente loi.

Dans ce cas, les mandats délivrés par les juridictions d'instruction ou de jugement conservent leur force exécutoire jusqu'à la remise effective de l'intéressé.

La remise s'effectue dans les délais et conditions prévus au second alinéa de l'article 15.

#### Article 6

Le dessaisissement de la juridiction ne fait pas obstacle au droit de la partie civile de faire application des dispositions des articles 4 et 5-1 du code de procédure pénale.

Lorsque la juridiction dessaisie est une juridiction de jugement, celle-ci demeure compétente, sur la demande de la victime qui s'est constituée partie civile avant le dessaisissement, pour statuer sur l'action civile, après que le tribunal international s'est définitivement prononcé sur l'action publique.

Loi n°96-432 du 22 mai 1996 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis en 1994 sur le territoire du Rwanda et, s'agissant des citoyens rwandais, sur le territoire d'Etats voisins<sup>723</sup>

#### Article 1

Pour l'application de la résolution 955 du Conseil de sécurité des Nations unies du 8 novembre 1994 instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda, ainsi que les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins, entre le 1er janvier et le 31 décembre 1994, la France participe à la répression des infractions et coopère avec cette juridiction dans les conditions fixées par la présente loi.

Les dispositions qui suivent sont applicables à toute personne poursuivie à raison des actes qui constituent, au sens des articles 2 à 4 du statut du tribunal international, des infractions graves à l'article 3 commun aux conventions de Genève du 12 août 1949 et au protocole additionnel II auxdites conventions en date du 8 juin 1977, un génocide ou des crimes contre l'humanité.

#### Article 2

Les articles 2 à 16 de la loi n°95-1 du 2 janvier 1995 portant adaptation de la législation française aux dispositions de la résolution 827 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes

<sup>723</sup> Available only in French.

présümées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991 sont applicables aux personnes visées à l'article 1er.

Toutefois, dans le texte des articles 2, 4, 5 et 13 de cette même loi, les références à l'article 1er doivent s'entendre comme visant les faits qui entrent dans le champ d'application de l'article 1er de la présente loi.

#### CRIMES UNDER INTERNATIONAL LAW

##### War crimes

Criminal Code - Article 461-1<sup>724</sup>

Créé par LOI n° 2010-930 du 9 août 2010 - art. 7

Constituent des crimes ou des délits de guerre les infractions définies par le présent livre commises, lors d'un conflit armé international ou non international et en relation avec ce conflit, en violation des lois et coutumes de la guerre ou des conventions internationales applicables aux conflits armés, à l'encontre des personnes ou des biens visés aux articles 461-2 à 461-31.

##### Crimes against humanity

Criminal Code - Article 212-1<sup>725</sup>

Le premier alinéa de l'article 212-1 du même code est remplacé par douze alinéas ainsi rédigés :

« Constitue également un crime contre l'humanité et est puni de la réclusion criminelle à perpétuité l'un des actes ci-après commis en exécution d'un plan concerté à l'encontre d'un groupe de population civile dans le cadre d'une attaque généralisée ou systématique :

« 1° L'atteinte volontaire à la vie ;

« 2° L'extermination ;

« 3° La réduction en esclavage ;

« 4° La déportation ou le transfert forcé de population ;

« 5° L'emprisonnement ou toute autre forme de privation grave de liberté physique en violation des dispositions fondamentales du droit international ;

« 6° La torture ;

« 7° Le viol, la prostitution forcée, la grossesse forcée, la stérilisation forcée ou toute autre forme de violence sexuelle de gravité comparable ;

« 8° La persécution de tout groupe ou de toute collectivité identifiable pour des motifs d'ordre politique, racial, national, ethnique, culturel, religieux ou sexiste ou en fonction d'autres critères universellement reconnus comme inadmissibles en droit international ;

« 9° L'arrestation, la détention ou l'enlèvement de personnes, suivis de leur disparition et accompagnés du déni de la reconnaissance de la privation de liberté ou de la dissimulation du sort qui leur est réservé ou de l'endroit où elles se trouvent dans l'intention de les soustraire à la protection de la loi pendant une période prolongée ;

« 10° Les actes de ségrégation commis dans le cadre d'un régime institutionnalisé d'oppression systématique et de domination d'un groupe racial sur tout autre groupe racial ou tous autres groupes raciaux et dans l'intention de maintenir ce régime ;

« 11° Les autres actes inhumains de caractère analogue causant intentionnellement de grandes souffrances ou des atteintes graves à l'intégrité physique ou psychique. »

##### Genocide

Criminal Code - Article 211-1

Genocide occurs where, in the enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion, one of the following actions are committed or caused to be committed against members of that group :

- wilful attack on life ;

- serious attack on psychological or physical integrity ;

- subjection to living conditions likely to entail the partial or total destruction of that group ;

- measures aimed at preventing births ;

- enforced child transfers.

Genocide is punished by criminal imprisonment for life.

The first two paragraphs of article 132-23 governing the safety period apply to the felony provided for by the present article.

##### Torture

Criminal Code - Article 222-1

The subjection of a person to torture or to acts of barbarity is punished by fifteen years' criminal imprisonment.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

<sup>724</sup> Only available in French.

<sup>725</sup> Only available in French.

## Germany

### Overview

In order to bring German criminal law in accordance with the Rome Statute of the ICC, German legislators created the German Code of Crimes against International Law (Voelkerstrafgesetzbuch, VStGB) (“CCAIL”),<sup>726</sup> which entered into force in June 2002.<sup>727</sup> Besides active and passive personality jurisdiction the law expressly provides for the ‘true’ universality principle in its first section. The crimes contained in the CCAIL are genocide, (Section 6 CCAIL), crimes against humanity (Section 7) and war crimes (Sections 8-12).

Additional crimes that can trigger universal jurisdiction are mentioned in Section 6 of the German Criminal Code (Strafgesetzbuch, StGB).<sup>728</sup> The so called ‘crimes under national law of international concern’ include serious offences involving nuclear energy, explosives or radiation, assaults against air or sea traffic, trafficking in human beings, unauthorised distribution of narcotics, dissemination of pornographic writings, counterfeiting, subsidy fraud as well as acts committed abroad if they are prosecutable on the basis of a binding international agreement, such as torture under the Torture Convention.<sup>729</sup> In addition, the provision functions as universal jurisdiction legislation for crimes committed before 2002.<sup>730</sup>

German courts may also exercise universal jurisdiction over other crimes, including ordinary crimes under national law (e.g. murder, assault), which were carried out by someone who concomitantly committed one of the above acts.<sup>731</sup> Furthermore, when an act is prosecutable under a binding international agreement but is not defined as a crime in German law, it may be possible to exercise universal jurisdiction over any crime under German law that constitutes the said act (e.g. murder constituting a war crime).<sup>732</sup>

Furthermore, the Criminal Code provides for the exercise of jurisdiction over all crimes defined under German criminal law (‘ordinary crimes’) under the active and passive personality principle as well as on the basis of either where the perpetrator was subsequently naturalised as a German citizen or where the perpetrator was a foreigner apprehended in Germany and could not be extradited for trial.<sup>733</sup>

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<sup>726</sup> Available in English at <http://www.iuscomp.org/gla/statutes/VoeStGB.pdf> (last accessed November 2010).

<sup>727</sup> FIDH/REDRESS MoJ-MFA Questionnaire.

<sup>728</sup> CCIL, supra.

<sup>729</sup> See: *Amnesty International*, Germany: End Impunity through Universal Jurisdiction [No Safe Haven Series No. 3], *AI Index: EUR 23/003/2008*, 2008, p. 29. *Germany is signatory party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

<sup>730</sup> FIDH/REDRESS Report on Legal Remedies for Victims of ‘International Crimes’. March 2004, p. 54; *Amnesty International*, *Germany: No Safe Heaven Series No. 3*, p. 23.

<sup>731</sup> In the Jorgic case, the Federal High Court held that because it had jurisdiction over the crime of genocide it could “annex” jurisdiction over the concomitantly committed crime of murder. (Section 1, Judgment, Jorgic case, Federal High Court, 30 April 1999.) Subsequent to the introduction of the CCIL, it would seem that such annexation remains possible as long as the *actus reus* of the crime being annexed is covered by the principal crime. See FIDH/REDRESS Report on Legal Remedies for Victims of ‘International Crimes’, March 2004, p. 54.

<sup>732</sup> For example, due to the fact that grave breaches did not exist per se as crimes under German domestic law, they were instead prosecuted as crimes under national law such as murder. (See Judgment, Djajic Case, High Court of Bavaria, 23 May 1997.)

<sup>733</sup> See Section 7 of the Criminal Code. According to German legal doctrine, Section 7 paragraph 2 No. 2 does not codify a jurisdictional rule, but clarifies, in which cases representative criminal justice is possible by the German judicial authorities (*stellvertretende Strafrechtspflege*). See *Amnesty International*, *Germany: No Safe Heaven Series No. 3*, 2008, p. 24.

## Issues

**Nexus requirements:** Procedurally, during investigation proceedings the presence of the suspect on the territory of Germany is not required.<sup>734</sup> During the trial stage the presence of the accused is mandatory,<sup>735</sup> however there are some exceptions to this, for example if the defendant wilfully and culpably placed himself in a condition precluding his fitness to stand trial.<sup>736</sup> Where the suspect is not on the territory the prosecutor has a wider discretion as to whether or not to institute proceedings (as to which, see below).

**Subsidiarity:** There is no legal requirement that the ability or willingness of the territorial state to investigate and/or prosecute has to be taken into account. However, this issue may influence the prosecutor when exercising his or her discretion (see below), as happened in 2005, when it was decided that Germany has no jurisdiction to prosecute the then US Secretary of Defense, Donald Rumsfeld.<sup>737</sup>

**Double criminality:** The double criminality principle does not apply to genocide, crimes against humanity or war crimes committed after 30 June 2002 or to prosecutions of crimes of international concern pursuant to the Criminal Code. However, it applies to prosecutions of ordinary crimes based on passive personality and universal jurisdiction pursuant to Section 7 of the Penal Code.

In German law, double criminality means that the corresponding rule in another legal system must prohibit a comparable conduct and establish as legal consequence a threat of punishment. It is not sufficient for the conduct to be a mere regulatory offence or a violation of a regulation with a character completely different from German criminal law.<sup>738</sup>

**Prosecutorial and Executive discretion:** In general, the Public Prosecution Service in Germany is obliged to “take action in the case of all criminal offences which may be prosecuted, provided there are sufficient factual indications”.<sup>739</sup> However, when it comes to open a case via universal jurisdiction the Code of Criminal Procedure gives the federal prosecutor a wide discretion.<sup>740</sup> Concerning CCAIL crimes, this is particularly the case when the suspect is not present in Germany and a future presence is not to be expected.<sup>741</sup> This discretion, and the way it has been applied in practice, has led to a *de facto* presence requirement for the exercise of universal jurisdiction.

So far, the Prosecution Service has rejected all complaints submitted by victims of crimes under international law and by NGOs including one against former Interior Minister of Uzbekistan Zakir Almatov in 2005<sup>742</sup> and twice a complaint against former US Secretary of Defense, Donald Rumsfeld.<sup>743</sup>

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<sup>734</sup> FIDH/REDRESS MoJ-MFA Questionnaire.

<sup>735</sup> See Section 230 Paragraph 1 of the Code of Criminal Procedure (Strafprozessordnung, StPO), available in English at [http://www.gesetze-im-internet.de/englisch\\_stpo/index.html](http://www.gesetze-im-internet.de/englisch_stpo/index.html) (last accessed December 2010).

<sup>736</sup> See Section 231a Paragraph 1 of the Code of Criminal Procedure.

<sup>737</sup> Press release of Federal Prosecutor, “Keine deutschen Ermittlungen wegen der angezeigten Vorfaelle in Abu Graib”, 10 February 2005, <http://www.generalbundesanwalt.de/de/showpress.php?newsid=163> (in German, last accessed December 2010).

<sup>738</sup> Amnesty International, *Germany: No Safe Heaven Series No. 3*, 2008, p. 69.

<sup>739</sup> See Section 152(2), Code of Criminal Procedure.

<sup>740</sup> Questionnaire given to German representatives on the 8<sup>th</sup> Genocide Network Meeting on 27, 28 May 2010.

<sup>741</sup> Cf.: Sections 153 f, 153c Code of Criminal Procedure.

<sup>742</sup> Human Rights Watch: Universal Jurisdiction in Europe, Germany. <http://www.hrw.org/en/node/11297/section/11>. (last accessed December 2010).

<sup>743</sup> Press release of Federal Prosecutor, “Kein Ermittlungsverfahren wegen der angezeigten Vorfälle in Abu Ghraib“, supra.



**Ability to review decisions of the prosecutor or other governmental bodies:** There is no opportunity to appeal to the courts against the decision of the federal prosecutor not to investigate.<sup>744</sup>

**Statutes of Limitations:** Section 5 of the CCAIL provides that the prosecution of criminal offences pursuant to the codification and the execution of sentences imposed on their account shall not be subject to any statute of limitations. Limitation periods do apply, however, to all other ordinary crimes committed in conjunction with these serious crimes, including, crimes against humanity and war crimes committed before the entry into force of the CCAIL. In these cases, the statute of limitations is inapplicable only to murder (Section 211 of the Criminal Code) and genocide (former Section 220 lit. a).<sup>745</sup>

**Immunities in criminal cases:** German law recognises the general rules of public international law on sovereign immunity.<sup>746</sup>

**Victims' role in proceedings:** The victims of crimes have several possible ways to participate in criminal proceedings: In respect of various ordinary offenses, an aggrieved party may bring a private prosecution without needing to have recourse to the public prosecution office first.<sup>747</sup> In proceedings initiated by a public prosecutor the victim has the possibility of asserting a claim for damages against the wrongdoer by means of a so-called "*adhesive procedure*".<sup>748</sup> Each mechanism can be utilised in universal jurisdiction cases, especially involving crimes in the CCAIL.<sup>749</sup>

**Victim Protection:** The Code of Criminal Procedure and the Courts Constitution Act contain a large number of provisions on the protection of witnesses, and hence on the protection of victims, who will frequently be the most important witnesses. Over and above the protection of victims/witnesses, these statutes also contain provisions specifically benefiting the victims of criminal offences independently of their role as witnesses:

The protective provisions range from the duty of examination which is as little intrusion as possible,<sup>750</sup> through to the removal of the accused and the exclusion of the public during examination.<sup>751</sup> In individual cases, witnesses may be permitted to only reveal part of their identity, or not at all<sup>752</sup>. The Witness Protection Act (*Zeugenschutzgesetz*) of 1998, created the possibility to make a recording of witness testimony on an audio-visual medium and to play the video recording in the main hearing in place of examining the witness again.<sup>753</sup> For reasons of protection, the examination may also take place separately from the other parties to the proceedings by the witness being in a different place and there being a simultaneous audio-visual transmission of the examination to the

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<sup>744</sup> Section 172 Paragraph 2 of the Code of Criminal Procedure.

<sup>745</sup> Amnesty International, *Germany: No Safe Heaven Series No. 3*, 2008, p. 66; see Section 78 Paragraph 2 of the Criminal Code.

<sup>746</sup> See Section 20(2) of the Courts Constitution Act of Germany.

<sup>747</sup> See Section 374 of the Code of Criminal Procedure.

<sup>748</sup> Criminal Procedure Code, Section 403 ff.

<sup>749</sup> Amnesty International, *Germany: No Safe Heaven Series No. 3*, 2008, p. 44; FIDH/REDRESS MoJ-MFA Questionnaire.

<sup>750</sup> Sections 68a, 238, 241a and 242 of the Code of Criminal Procedure.

<sup>751</sup> See Section 247 of the Code of Criminal Procedure, Sections 171b and 172 - 174 of the Courts Constitution Act.

<sup>752</sup> Section 68 of the Code of Criminal Procedure.

<sup>753</sup> See Sections 58a and 255a of the Code of Criminal Procedure.

hearing.<sup>754</sup> Finally, a lawyer may be appointed for a witness for the duration of the examination under certain pre-conditions.<sup>755</sup>

With child witnesses, a number of the above provisions (e.g. removal of the accused or exclusion of the public during examination of the witness) are applicable with easier pre-conditions.<sup>756</sup>

Outside court, victims of unlawful intentional violence, unlawful intentional threat of violence or victims of stalking or unreasonable harassment may apply to the civil courts for a protective measure. The court can issue an order pursuant to which the perpetrator is prohibited from coming within a certain proximity of the dwelling of the aggrieved person or entering it, visiting places which are frequented by the victim or establishing contact which covers all types of communication.<sup>757</sup>

In addition, witness protection offices have been established by national and federal authorities. Within the witness protection programme, the resettlement of persons at risk is one of the measures which are taken regularly. However, a victim's inclusion into the programme requires that a Public Prosecution Office in Germany has instituted investigation proceedings in the case at issue.<sup>758</sup>

**Specialised War Crimes Unit:** The establishment of the “Central Unit for the Fight against War Crimes” in 2003 coincided with the entering into force of the new German Code of Crimes against International Law (CCAIL) and the commencement of the work of the ICC.<sup>759</sup> The unit was initially staffed with only one police investigator responsible for serious international crimes cases as well as for cooperation requests from other jurisdictions.<sup>760</sup> The unit was restructured in April 2009 and is now called “Central Unit for the Fight against War Crimes and further offences pursuant to the Code of Crimes Against International Law” (ZBKV)<sup>761</sup> growing to a staff of seven permanent police investigators.

The exclusive competence of the investigation and prosecution of serious international crimes in Germany lies with the Federal Prosecution Service.<sup>762</sup> A team of two prosecutors supervises investigations into these crimes, which are carried out by the ZBKV. Further prosecutors will be selected from the Federal Prosecution Service on a case by case basis. At the time of writing, an additional four prosecutors were working on serious international crimes.<sup>763</sup>

**Participation in EU Genocide Network:** German representatives have participated in meetings of the EU Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes.<sup>764</sup>

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<sup>754</sup> See Sections 168e and 247a of the Code of Criminal Procedure.

<sup>755</sup> Section 68b of the Code of Criminal Procedure.

<sup>756</sup> FIDH/REDRESS MoJ-MFA Questionnaire.

<sup>757</sup> See Sections 1, 2 of the Act on Protection against Violence (Gewaltschutzgesetz).

<sup>758</sup> FIDH/REDRESS MoJ-MFA Questionnaire; see Section 1 of the Act on the Harmonization of the Protection of Witnesses at Risk (*Gesetz zur Harmonisierung des Schutzes gefährdeter Zeugen*).

<sup>759</sup> Information provided by the “Central Unit for the Fight against War Crimes and further offences pursuant to the Code of Crimes against International Law” within the German Federal Criminal Police, 10 Nov. 2010.

<sup>760</sup> Human Rights Watch, *Universal Jurisdiction in Europe: the State of the Art*, July 2006, p. 66, available at <http://hrw.org/reports/2006/ij0606> (last accessed December 2010).

<sup>761</sup> *Supra*, n. 759.

<sup>762</sup> Paragraph 120 (1) Nr. 8 Gerichtsverfassungsgesetz together with Paragraph 142a (1) Gerichtsverfassungsgesetz.

<sup>763</sup> Email correspondence with German official, 30 November 2010.

<sup>764</sup> Questionnaire given to German representatives on the 8<sup>th</sup> Genocide Network Meeting on 27,28 May 2010.

## Cases

Prior to the coming into force of the CCAIL, German practitioners in 128 cases investigated crimes committed in the former Yugoslavia and heard 4,500 witnesses during the period from 1993 to 2003, including a large number of refugees in Germany and Austria as well as people who had returned to Bosnia-Herzegovina.<sup>765</sup>

Germany was the first country to investigate, prosecute and convict a perpetrator for genocide on the basis of universal jurisdiction in the case of Nikola Jorgic, a Bosnian Serb, who was sentenced to life imprisonment. He was found guilty of eleven counts of genocide in 1997.<sup>766</sup> In May 1997, Mr. Novislav Djajic<sup>767</sup> was charged in relation to the shooting of 15 Bosnian Muslims on a bridge and thereafter throwing them in the river Drina. While he was found guilty of murder, he was acquitted of genocide, since he was found to have lacked genocidal intent.

Two further convictions were obtained in 1999: of Maksim Sokolovic, a Bosnian Serb, who was sentenced to nine years in prison for having taken part in 1992 in genocide and other crimes on the territory of the FY;<sup>768</sup> and Djuradj Kusljic,<sup>769</sup> a Bosnian Serb and former chief of the police station in Vrbanjci in northern Bosnia, who was found guilty of genocide in conjunction with six counts of murder. He received a life sentence.

Since the restructuring of the ZBKV in April 2009, three Rwandan nationals have been arrested in Germany. Two, Ignace Murwanyashyada and Straton Musoni, will be tried in Spring 2011 for their alleged involvement in crimes against humanity and war crimes committed in Eastern Democratic Republic of Congo.<sup>770</sup> Onésphore Rwabukombe is in pre-trial custody and has been charged with genocide committed in Rwanda.<sup>771</sup>

## Relevant Legislation:

### JURISDICTION

Code of crimes against international Law (CCAIL)

Article 1

Part 1 - General Provisions

Section 1 - Scope of application

This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.

Criminal Code

<sup>765</sup> Human Rights Watch: Universal Jurisdiction in Europe, Germany.

<sup>766</sup> Higher Regional Court of Duesseldorf, 26 September 1997, re J., IV - 26/96. Upheld on 30 April 1999 by the Federal Court of Justice (BGH, 3 StR 215/98F) on appeal. Full text of FJC decision available at <http://www.hrr-strafrecht.de/hrr/3/98/3-215-98.php3> (last accessed December 2010).

<sup>767</sup> Court of Appeal of Bavaria, Germany 23 May 1997.

<sup>768</sup> Higher Regional Court of Duesseldorf, 29 November 1999. Upheld on 21 February 2001 by the Federal Court of Justice (BGH, 3 StR 372/00) on appeal. Full text of FJC decision available at <http://www.hrr-strafrecht.de/hrr/3/00/3-372-00.php3> (last accessed December 2010).

<sup>769</sup> Bavarian Higher Regional Court, Germany, 15 December 1999; appeal rejected by the Federal Court of Justice (Bundesgerichtshof (BGH), 21 February 2001).

<sup>770</sup> Klaus Zorn, Chief Superintendent, ZBKV, at FIDH & REDRESS conference on "Extraterritorial Jurisdiction in Europe", 1 December 2010.

<sup>771</sup> All-Africa, 'Germany Charges Rwabukombe for Genocide', 20 August 2010, available at <http://allafrica.com/stories/201008200950.html> (last accessed December 2010).

#### Section 5 Acts Abroad Against Domestic Legal Interests

German criminal law shall apply, regardless of the law of the place the act was committed, to the following acts committed abroad:

1. preparation of a war of aggression (Section 80);
2. high treason (Sections 81 to 83);
3. endangering the democratic rule of law:
  - (a) in cases under Sections 89 and 90a subsection (1), and Section 90b, if the perpetrator is a German and has his livelihood in the territorial area of applicability of this law; and
  - (b) in cases under Sections 90 and 90a subsection (2);
4. treason and endangering external security (Sections 94 to 100a);
5. crimes against the national defense:
  - (a) in cases under Sections 109 and 109e to 109g; and
  - (b) in cases under Sections 109a, 109d and 109h, if the perpetrator is a German and has his livelihood in the territorial area of applicability of this law;
6. abduction and casting political suspicion on another (Sections 234a, 241a), if the act is directed against a person who has his domicile or usual residence in Germany;
- 6a. child stealing in cases under Section 235 subsection (2), no. 2, if the act is directed against a person who has his domicile or usual residence in Germany;
7. violation of business or trade secrets of a business located within the territorial area of applicability of this law, an enterprise, which has its registered place of business there, or an enterprise with its registered place of business abroad, which is dependent on an enterprise with its registered place of business within the territorial area of applicability of this law and constitutes with it a group;
8. crimes against sexual self-determination:
  - (a) in cases under Section 174 subsections (1) and (3), if the perpetrator and the person, against whom the act was committed are Germans at the time of the act and have their livelihoods in Germany; and
  - (b) in cases under Sections 176 to 176b and 182, if the perpetrator is a German;
9. termination of pregnancy (Section 218), if the perpetrator at the time of the act is a German and has his livelihood in the territorial area of applicability of this law;
10. false unsworn testimony, perjury and false affirmations in lieu of an oath (Sections 153 to 156) in a proceeding pending before a court or other German agency within the territorial area of applicability of this law, which is competent to administer oaths or affirmations in lieu of an oath;
11. crimes against the environment in cases under Sections 324, 326, 330 and 330a, which were committed in the area of Germany's exclusive economic zone, to the extent that international conventions on the protection of the sea permit their prosecution as crimes;
- 11a. crimes under Section 328 subsection (2), nos. 3 and 4 subsections (4) and (5), also in conjunction with Section 330, if the perpetrator is a German at the time of the act;
12. acts, which a German public official or a person with special public service obligations commits during his official stay or in connection with his duties;
13. acts committed by a foreigner as a public official or as a person with special public service obligations;
14. acts which someone commits against a public official, a person with special public service obligations, or a soldier in the Federal Armed Forces during the discharge of his duties or in connection with his duties;
- 14a. bribery of a member of parliament (Section 108e) if the perpetrator is a German at the time of the act or the act was committed in relation to a German;
15. trafficking in organs (section 18 of the Transplantation Law), if the perpetrator is a German at the time of the act.

#### Section 6 Acts Abroad Against Internationally Protected Legal Interests

German criminal law shall further apply, regardless of the law of the place of their commission, to the following acts committed abroad:

1. genocide (Section 220a);
2. serious criminal offenses involving nuclear energy, explosives and radiation in cases under Sections 307 and 308 subsections (1) to (4), Section 309 subsection (2) and Section 310;
3. assaults against air and sea traffic (Section 316c);
4. trafficking in human beings (Section 180b) and serious trafficking in human beings (Section 181);
5. unauthorized distribution of narcotics;
6. dissemination of pornographic writings in cases under Section 184 subsection (3) and (4);
7. counterfeiting of money and securities (Sections 146, 151 and 152), payment cards and blank Eurochecks (Section 152a subsections (1) to (4), as well as their preparation (Sections 149, 151, 152 and 152a subsection (5));
8. subsidy fraud (Section 264);
9. acts which, on the basis of an international agreement binding on the Federal Republic of Germany, shall also be prosecuted if they are committed abroad.

#### Section 7 Applicability to Acts Abroad in Other Cases

(1) German criminal law shall apply to acts, which were committed abroad against a German, if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement.

(2) German criminal law shall apply to other acts, which were committed abroad if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement and if the perpetrator:

1. was a German at the time of the act or became one after the act; or
2. was a foreigner at the time of the act, was found to be in Germany and, although the Extradition Act would permit extradition for such an act, is not extradited, because a request for extradition is not made, is rejected, or the extradition is not practicable.

#### CRIMES UNDER INTERNATIONAL LAW

Code of crimes against international Law (CCAIL)

Article 1

Part 2 - Crimes against International Law

Chapter 1 - Genocide and crimes against humanity

Section 6 - Genocide

(1) Whoever with the intent of destroying as such, in whole or in part, a national, racial, religious or ethnic group

1. kills a member of the group,
2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in section 226 of the Criminal Code,
3. inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part,
4. imposes measures intended to prevent births within the group,
5. forcibly transfers a child of the group to another group

shall be punished with imprisonment for life.

(2) In less serious cases referred to under subsection (1), numbers 2 to 5, the punishment shall be imprisonment for not less than five years.

Section 7 - Crimes against humanity

(1) Whoever, as part of a widespread or systematic attack directed against any civilian population,

1. kills a person,
  2. inflicts, with the intent of destroying a population in whole or in part, conditions of life on that population or on parts thereof, being conditions calculated to bring about its physical destruction in whole or in part,
  3. traffics in persons, particularly in women or children, or whoever enslaves a person in another way and in doing so arrogates to himself a right of ownership over that person,
  4. departs or forcibly transfers, by expulsion or other coercive acts, a person lawfully present in an area to another State or another area in contravention of a general rule of international law,
  5. tortures a person in his or her custody or otherwise under his or her control by causing that person substantial physical or mental harm or suffering where such harm or suffering does not arise only from sanctions that are compatible with international law,
  6. sexually coerces, rapes, forces into prostitution or deprives a person of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,
  7. causes a person's enforced disappearance, with the intention of removing him or her from the protection of the law for a prolonged period of time,
    - (a) by abducting that person on behalf of or with the approval of a State or a political organisation, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure immediately to give truthful information, upon inquiry, on that person's fate and whereabouts, or
    - (b) by refusing, on behalf of a State or of a political organisation or in contravention of a legal duty, to give information immediately on the fate and whereabouts of the person deprived of his or her physical liberty under the circumstances referred to under letter (a) above, or by giving false information thereon,
  8. causes another person severe physical or mental harm, especially of the kind referred to in section 226 of the Criminal Code,
  9. severely deprives, in contravention of a general rule of international law, a person of his or her physical liberty, or
  10. persecutes an identifiable group or collectivity by depriving such group or collectivity of fundamental human rights, or by substantially restricting the same, on political, racial, national, ethnic, cultural or religious, gender or other grounds that are recognised as impermissible under the general rules of international law
- shall be punished, in the cases referred to under numbers 1 and 2, with imprisonment for life, in the cases referred to under numbers 3 to 7, with imprisonment for not less than five years, and, in the cases referred to under numbers 8 to 10, with imprisonment for not less than three years.

(2) In less serious cases under subsection (1), number 2, the punishment shall be imprisonment for not less than five years, in less serious cases under subsection (1), numbers 3 to 7, imprisonment for not less than two years, and in less serious cases under subsection (1), numbers 8 and 9, imprisonment for not less than one year.

(3) Where the perpetrator causes the death of a person through an offence pursuant to subsection (1), numbers 3 to 10, the punishment shall be imprisonment for life or for not less than ten years in cases under subsection (1), numbers 3 to 7, and imprisonment for not less than five years in cases under subsection (1), numbers 8 to 10.

(4) In less serious cases under subsection (3) the punishment for an offence pursuant to subsection (1), numbers 3 to 7, shall be imprisonment for not less than five years, and for an offence pursuant to subsection (1), numbers 8 to 10, imprisonment for not less than three years.

(5) Whoever commits a crime pursuant to subsection (1) with the intention of maintaining an institutionalised regime of systematic oppression and domination by one racial group over any other shall be punished with imprisonment for not less than five years so far as the offence is not punishable more severely pursuant to subsection (1) or subsection (3). In less serious cases the punishment shall be imprisonment for not less than three years so far as the offence is not punishable more severely pursuant to subsection (2) or subsection (4).

Chapter 2 - War crimes

Section 8 - War crimes against persons

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. kills a person who is to be protected under international humanitarian law,
2. takes hostage a person who is to be protected under international humanitarian law,
3. treats a person who is to be protected under international humanitarian law cruelly or inhumanly by causing him or her substantial physical or mental harm or suffering, especially by torturing or mutilating that person,
4. sexually coerces, rapes, forces into prostitution or deprives a person who is to be protected under international humanitarian law of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,

5. conscripts children under the age of fifteen years into the armed forces, or enlists them in the armed forces or in armed groups, or uses them to participate actively in hostilities,

6. departs or forcibly transfers, by expulsion or other coercive acts, a person who is to be protected under international humanitarian law and lawfully present in an area to another State or another area in contravention of a general rule of international law,

7. imposes on, or executes a substantial sentence in respect of a person who is to be protected under international humanitarian law, in particular the death penalty or imprisonment, without that person having been sentenced in a fair and regular trial affording the legal guarantees required by international law,

8. exposes a person who is to be protected under international humanitarian law to the risk of death or of serious injury to health

(a) by carrying out experiments on such a person, being a person who has not previously given his or her voluntary and express consent, or where the experiments concerned are neither medically necessary nor carried out in his or her interest,

(b) by taking body tissue or organs from such a person for transplantation purposes so far as it does not constitute removal of blood or skin for therapeutic purposes in conformity with generally recognised medical principles and the person concerned has previously not given his or her voluntary and express consent, or

(c) by using treatment methods that are not medically recognised on such person, without this being necessary from a medical point of view and without the person concerned having previously given his or her voluntary and express consent, or

9. treats a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner shall be punished, in the cases referred to under number 1, with imprisonment for life, in the cases referred to under number 2, with imprisonment for not less than five years, in the cases referred to under numbers 3 to 5, with imprisonment for not less than three years, in the cases referred to under numbers 6 to 8, with imprisonment for not less than two years, and, in the cases referred to under number 9, with imprisonment for not less than one year.

(2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character, wounds a member of the adverse armed forces or a combatant of the adverse party after the latter has surrendered unconditionally or is otherwise placed hors de combat shall be punished with imprisonment for not less than three years.

(3) Whoever in connection with an international armed conflict

1. unlawfully holds as a prisoner or unjustifiably delays the return home of a protected person within the meaning of subsection (6), number 1,

2. transfers, as a member of an Occupying Power, parts of its own civilian population into the occupied territory,

3. compels a protected person within the meaning of subsection (6), number 1, by force or threat of appreciable harm to serve in the forces of a hostile Power or

4. compels a national of the adverse party by force or threat of appreciable harm to take part in the operations of war directed against his or her own country

shall be punished with imprisonment for not less than two years.

(4) Where the perpetrator causes the death of the victim through an offence pursuant to subsection (1), numbers 2 to 6, the punishment shall, in the cases referred to under subsection (1), number 2, be imprisonment for life or imprisonment for not less than ten years, in the cases referred to under subsection (1), numbers 3 to 5, imprisonment for not less than five years, and, in the cases referred to under subsection (1), number 6, imprisonment for not less than three years. Where an act referred to under subsection (1), number 8, causes death or serious harm to health, the punishment shall be imprisonment for not less than three years.

(5) In less serious cases referred to under subsection (1), number 2, the punishment shall be imprisonment for not less than two years, in less serious cases referred to under subsection (1), numbers 3 and 4, and under subsection (2) the punishment shall be imprisonment for not less than one year, in less serious cases referred to under subsection (1), number 6, and under subsection (3), number 1, the punishment shall be imprisonment from six months to five years.

(6) Persons who are to be protected under international humanitarian law shall be

1. in an international armed conflict: persons protected for the purposes of the Geneva Conventions and of the Protocol Additional to the Geneva Conventions (Protocol I) (annexed to this Act), namely the wounded, the sick, the shipwrecked, prisoners of war and civilians;

2. in an armed conflict not of an international character: the wounded, the sick, the shipwrecked as well as persons taking no active part in the hostilities who are in the power of the adverse party;

3. in an international armed conflict and in an armed conflict not of an international character: members of armed forces and combatants of the adverse party, both of whom have laid down their arms or have no other means of defence.

#### Section 9 - War crimes against property and other rights

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character pillages or, unless this is imperatively demanded by the necessities of the armed conflict, otherwise extensively destroys, appropriates or seizes property of the adverse party contrary to international law, such property being in the power of the perpetrator's party, shall be punished with imprisonment from one to ten years.

(2) Whoever in connection with an international armed conflict and contrary to international law declares the rights and actions of all, or of a substantial proportion of, the nationals of the hostile party abolished, suspended or inadmissible in a court of law shall be punished with imprisonment from one to ten years.

#### Section 10 - War crimes against humanitarian operations and emblems

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. directs an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law, or

2. directs an attack against personnel, buildings, material, medical units and transport, using the distinctive emblems of the Geneva Conventions in conformity with international humanitarian law

shall be punished with imprisonment for not less than three years. In less serious cases, particularly where the attack does not take place by military means, the punishment shall be imprisonment for not less than one year.

(2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character makes improper use of the distinctive emblems of the Geneva Conventions, of the flag of truce, of the flag of the military

insignia or of the uniform of the enemy or of the United Nations, thereby causing a person's death or serious personal injury (section 226 of the Criminal Code) shall be punished with imprisonment for not less than five years.

#### Section 11 - War crimes consisting in the use of prohibited methods of warfare

- (1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character
1. directs an attack by military means against the civilian population as such or against individual civilians not taking direct part in hostilities,
  2. directs an attack by military means against civilian objects, so long as these objects are protected as such by international humanitarian law, namely buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, or against undefended towns, villages, dwellings or buildings, or against demilitarised zones, or against works and installations containing dangerous forces,
  3. carries out an attack by military means and definitely anticipates that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated,
  4. uses a person who is to be protected under international humanitarian law as a shield to restrain a hostile party from undertaking operations of war against certain targets,
  5. uses starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival or impedes relief supplies in contravention of international humanitarian law,
  6. orders or threatens, as a commander, that no quarter will be given, or
  7. treacherously kills or wounds a member of the hostile armed forces or a combatant of the adverse party
- shall be punished with imprisonment for not less than three years. In less serious cases under number 2 the punishment shall be imprisonment for not less than one year.
- (2) Where the perpetrator causes the death or serious injury of a civilian (section 226 of the Criminal Code) or of a person who is to be protected under international humanitarian law through an offence pursuant to subsection (1), numbers to 6, he shall be punished with imprisonment for not less than five years. Where the perpetrator intentionally causes death, the punishment shall be imprisonment for life or for not less than ten years.
- (3) Whoever in connection with an international armed conflict carries out an attack by military means and definitely anticipates that the attack will cause widespread, longterm and severe damage to the natural environment on a scale out of proportion to the concrete and direct overall military advantage anticipated shall be punished with imprisonment for not less than three years.

#### Section 12 - War crimes consisting in employment of prohibited means of warfare

- (1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character
1. employs poison or poisoned weapons,
  2. employs biological or chemical weapons or
  3. employs bullets which expand or flatten easily in the human body, in particular bullets with a hard envelope which does not entirely cover the core or is pierced with incisions
- shall be punished with imprisonment for not less than three years.
- (2) Where the perpetrator causes the death or serious injury of a civilian (section 226 of the Criminal Code) or of a person protected under international humanitarian law through an offence pursuant to subsection (1), he shall be punished with imprisonment for not less than five years. Where the perpetrator intentionally causes death, the punishment shall be imprisonment for life or for not less than ten years.
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### Criminal Code

#### Section 220a Genocide

- (1) Whoever, with the intent of destroying as such, in whole or in part, a national, racial or religious group or one characterized by its folk customs by:
1. killing members of the group;
  2. inflicting serious physical or emotional harm, especially of the type indicated in Section 226 on members of the group;
  3. placing the group in living conditions capable of leading, in whole or in part, to their physical destruction;
  4. imposing measures which are intended to prevent births within the group;
  5. forcibly transferring children of the group into another group,
- shall be punished with imprisonment for life.
- (2) In less serious cases under subsection (1), numbers 2 to 5, the punishment shall be imprisonment for not less than five years.

## Greece

### Overview

The crimes of genocide, crimes against humanity, war crimes and enforced disappearance have not been incorporated into the Greek Criminal Code.

Article 28 (1) of the Greek Constitution provides that all generally accepted rules of international law and the international treaties that have been approved by an Act of Parliament constitute part of domestic Greek law and supersede any contrary provision of domestic law.<sup>772</sup>

However, it appears that international treaties ratified by Greece which introduce international crimes and establish the jurisdiction of Greece but at the same time require implementing legislation, do not enable Greek courts to exercise jurisdiction without the prior adoption of such implementing legislation.<sup>773</sup> Greece has ratified the Rome Statute in domestic legislation<sup>774</sup> but has not yet passed implementing legislation. A bill is in process which will specifically criminalise genocide, crimes against humanity and war crimes. These crimes will be subject to universal jurisdiction.<sup>775</sup>

Torture is specifically criminalised in the Criminal Code.<sup>776</sup>

Greek law provides for active personality jurisdiction over all “*misdemeanours*” and “*felonies*”, and applies even when the perpetrator was Greek when he or she committed a crime and now is a foreigner, or when the perpetrator acquired Greek citizenship after the offence took place.<sup>777</sup>

Greek law also provides for passive personality jurisdiction over all “*misdemeanours*” and “*felonies*” in relation to acts committed abroad by a foreigner against a Greek citizen.<sup>778</sup>

Universal jurisdiction is available under the Criminal Code for a list of enumerated crimes (including piracy and terrorism, but not making reference to the crimes under international law considered in this report) and “[a]ny other crime to which Greek penal laws apply, by virtue of special provisions or international conventions, signed and ratified by the Greek State”.<sup>779</sup>

Other legislation also provides for universal jurisdiction in relation to specified crimes. For example, Article 2 of Law No. 1782/1988 incorporating the Torture Convention in Greek law provides that Greek criminal law applies to both Greek citizens and aliens for the crime of torture under Article 4 of the Torture Convention in accordance with Article 8 of the Criminal Code.

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<sup>772</sup> Some treaties, such as the European Convention of Human Rights and the UN Covenant on Civil and Political Rights are self-executing and so may be directly invoked, while others, such as international criminal law treaties, must be approved by legislation.

<sup>773</sup> Response to questionnaire by Professor Constantine Antonopoulos, University Demokritos of Thrace, 2010. The incorporation of a non-self-executing treaty in Greek law by Act of Parliament is not necessarily followed by implementing legislation.

<sup>774</sup> Law No 3003/2002.

<sup>775</sup> MoJ questionnaire response.

<sup>776</sup> CC, Articles 137A and 137B.

<sup>777</sup> CC, Article 6.

<sup>778</sup> CC, Article 7.

<sup>779</sup> CC, Article 8.



## Issues

**Nexus requirements (including presence or residence):** Article 8 of the Criminal Code does not impose any nexus requirements for the exercise of universal jurisdiction.

Procedurally, an investigation may commence in the absence of the suspect and the presence of the suspect is necessary only when a primary examination has been ordered.<sup>780</sup> If the suspect is summoned to present his or her defence at the examination but does not appear, and the examining magistrate judges that there is sufficient evidence, the investigation can be considered concluded with the issue of a warrant for arrest or by forceful appearance of the accused.<sup>781</sup>

For trial, the presence of the accused is not required, as long as he or she has given written authorisation to an attorney at law.<sup>782</sup>

**Subsidiarity:** Article 9 provides that no prosecution for a crime committed abroad shall commence if (a) the accused stood trial abroad and was either acquitted or, if sentenced, has served his/her sentence, (b) he or she was pardoned or the crime is subject to statutory limitation according to the foreign law, or (c) no indictment was made or it has been withdrawn.<sup>783</sup>

**Double criminality:** Double criminality is required for the exercise of active personality and passive personality jurisdiction under Articles 6 and 7 of the Criminal Code, but is not required for universal jurisdiction under Article 8.

**Prosecutorial and Executive discretion:** When the District Attorney receives charges or a report he or she will (if satisfied that sufficient grounds exist) instigate a criminal prosecution by ordering a preliminary investigation or inquiry (or, for less serious misdemeanours, through direct summons to the accused to appear in court).<sup>784</sup>

The executive has a discretion in relation to the prosecution of political crimes and crimes in relation to which the international relations of the state may be adversely affected. For these crimes, the Minister of Justice has the right, with the prior agreement of the Council of Ministers, to postpone the commencement of criminal prosecution or revoke criminal prosecution. However, the prosecution cannot be revoked after the commencement of proceedings in court.<sup>785</sup>

**Ability to review decisions of the prosecutor or other governmental body:** If a District Attorney dismisses an indictment on the grounds that there is not sufficient evidence to instigate a criminal prosecution this is done by way of a substantiated decree, which is served on the plaintiff.<sup>786</sup> The plaintiff can appeal the decree before the competent district attorney of the Court of Appeals. This is considered a judicial and not an administrative procedure.<sup>787</sup>

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<sup>780</sup> CCP, Article 270. For misdemeanours the presence of the suspect is not required at any stage of the proceeding (except the misdemeanor of involuntary manslaughter), as long as the suspect has given a written authorisation to an attorney at law.

<sup>781</sup> CCP, Article 270.

<sup>782</sup> CCP, Article 340(2).

<sup>783</sup> Paragraph 2 of Article 9 provides that the provision of the preceding paragraph shall not apply to crimes under Article 8 of the Criminal Code. The Supreme Court of Greece (*Areios Pagos*) has ruled in Judgment No. 1426/1998 that paragraph 2 of Article 9 is no longer applicable as it has been superseded by Article 14 (7) of the UN Covenant on Civil and Political Rights.

<sup>784</sup> CCP, Article 43.

<sup>785</sup> CCP, Article 30(2).

<sup>786</sup> See CCP, Articles 47, 48 and 243(2).

<sup>787</sup> MoJ questionnaire response.

**Statutes of limitation:** There are no special provisions for crimes under international law. The Criminal Code imposes a statutory limitation of 20 years for felonies punishable by the death penalty or life imprisonment, fifteen years for all other felonies, five years for misdemeanours, and one year for minor offences.<sup>788</sup> For the crime of torture the statutory limitation period is therefore fifteen years. The limitation period is suspended for as long as prosecution is materially impossible to commence or pursue and for the duration of trial.

**Immunities:** Immunities apply and supersede Article 8 of the Criminal Code. Heads of State, diplomats and their families, diplomatic personnel accredited to Greece and their families, domestic staff (provided they possess the same nationality as the diplomatic personnel) and every person enjoying immunity from prosecution under international treaties or customary law are granted immunity under the Criminal Procedure Code.<sup>789</sup> Members of Parliament, Cabinet members and Undersecretaries also enjoy immunities under national law.<sup>790</sup>

**Victims' role in proceedings:** Greek law allows victims and third parties acting on their behalf to file a complaint with prosecution services. The prosecution is initiated by the Public Prosecutor at his or her discretion on receipt of the relevant petition by the alleged victim or third party.<sup>791</sup>

Victims and third parties acting on their behalf may bring civil claims both when the prosecution is initiated ex officio by the Public Prosecutor and when prosecution is requested by the victim or third party.<sup>792</sup> A civil claim by the State may only be presented by the Public Prosecutor.

**Victim and witness protection:** Testimony is generally given orally. Special protective procedures exist in court for minors who have been victims of sexual crimes.<sup>793</sup> Outside court, laws exist providing protective measures for witnesses and victims of domestic violence,<sup>794</sup> human trafficking and sexual exploitation<sup>795</sup> and organised crime.<sup>796</sup> This last act provides for measures such as personal guarding by suitably trained police staff, depositions made through the use of electronic audio-visual means or solely its audio transmission, the non-inclusion in the report of the investigation of the name, place of birth, residence, work profession and age, and transfer or relocation of the witness.<sup>797</sup>

## Cases

There have been no cases of prosecution of individuals for crimes under international law under the principle of universal jurisdiction.

Greece did request mutual legal assistance from the competent authorities of Bosnia Herzegovina regarding an investigation into the participation of Greek volunteer soldiers in

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<sup>788</sup> CC, Article 111.

<sup>789</sup> CCP, Article 2.

<sup>790</sup> Constitution, Articles 61, 62 and 86.

<sup>791</sup> CC, Article 118; response to questionnaire by Professor Constantine Antonopoulos, University Demokritos of Thrace, 2010.

<sup>792</sup> See CC, Articles 63-70 and 82-90.

<sup>793</sup> CCP, Article 226a.

<sup>794</sup> Law No. 3500/2006.

<sup>795</sup> Law No. 3064/2002.

<sup>796</sup> Law No. 2928/2001.

<sup>797</sup> Law No. 2928/2001, Article 12.

genocide at Srebrenica, after the request of the investigative judge of the 27th Department of the Court of First Instance of Athens.<sup>798</sup>

## Relevant Legislation

### JURISDICTION

#### Criminal Code

Article 6 : Crimes committed by Greek nationals in a foreign country

Greek penal laws also apply to an act that is characterized thereby as a felony or a misdemeanor and which was committed by a Greek national in a foreign country, in the event that such act is also punishable pursuant to the laws of the country where it was committed or if such act was committed in a country that has no established constitution.

Prosecution is also brought against a foreign national who, while committing a punishable act, held the Greek nationality. It is also brought against a person who obtained the Greek nationality after having committed such action.

In case of misdemeanors, in order for the provisions of paragraph 1 and 2 to apply, the victim has to file a complaint or the country, where such misdemeanors were committed, has to file a respective petition.

Minor offences committed in a foreign country are punished only in cases specifically defined by the law.

Article 7 : Crimes committed by foreign nationals in a foreign country

Greek penal also apply to a foreign national for an act committed in a foreign country and characterized by such laws as a felony or a misdemeanor, in the event that such act was committed against a Greek citizen and it is punishable under the laws of the country where it was committed, or if such act was committed in a country that has no established constitution. The provisions of paragraphs 3 and 4 of the previous article apply also in this case.

Article 8 : Crimes committed in a foreign country, always punished under Greek laws

Greek penal laws apply to Greek and foreign nationals alike, irrespective of the applicable laws of the country where the act was committed, for the following crimes:

High treason, treason against the Greek State and terrorists acts (art. 187A);

Crimes concerning military service and the obligation for conscription (special part, Section H);

Punishable acts, perpetrated by persons in their capacity as civil servants of the Greek state;

Acts committed against a Greek civil servant in the exercise of his/ her official duties or connected to his/ her service;

Perjury in the context of proceedings pending before Greek authorities;

Piracy;

Crimes against the currency (special part, section I);

Slave trade, trafficking in human beings, forced prostitution or sexual abuse of minors for profit, child sex tourism or child pornography;

Illegal trafficking in narcotic drugs;

Illegal circulation of and trafficking in obscene publications;

Any other crime to which Greek penal laws apply, by virtue of special provisions or international conventions, signed and ratified by the Greek State.

Article 9: No prosecution for crimes committed in a foreign country

Penal prosecution for an act committed in a foreign country is excluded:

in the event that the offender has been judged for such offence in a foreign country and was acquitted or, in the event that he/ she had been convicted and he/ she has served the whole sentence imposed.

in the event that, pursuant to foreign legislation, such act has been barred by the statute of limitations or pardon has been granted.

in the event that, according to foreign legislation, a complaint is necessary in order to prosecute such act, and such a complaint has never been filed or it has been revoked.

These provisions are not applicable to the acts stipulated in article 8.

### CRIMES UNDER INTERNATIONAL LAW

See the following summary of the provisions on torture produced by Amnesty International:

Article 137A-D of the Penal Code, dealing with "Torture and other attacks on human dignity" defines torture as "... any systematic infliction of acute physical pain, or of physical exhaustion endangering the health of a person, or of mental suffering capable of leading to severe psychological damage, as well as any illegal use of chemicals, drugs or other natural or artificial means with the aim of bending the victim's will" (Article 137A paragraph 2) - when perpetrated by a "an official or military whose duties include the prosecution, interrogation or investigation of criminal offences or breaches of discipline or the execution of punishments or the guarding or the custody of detainees...[on] a person who is in his power

<sup>798</sup> MoJ questionnaire response.

with the aim of a) extorting from this person or a third person a confession, testimony, information or statement, repudiation or acceptance of a political or other ideology; b) punishing c) intimidating the person or a third person” (Article 137A paragraph 1). The prescribed penalty, in principle, for someone found guilty of torture is from three years’ to life imprisonment. The penalty is of at least 10 years in the most serious cases (such as for example the use of the *falanga* or electric-shock equipment - Article 137B paragraph 1a) and life imprisonment if the victim dies (Article 137B paragraph 3). Less serious cases involving “Physical injury, injury to the health, the use of illegal physical or psychological force and any other serious attack on human dignity, which is committed by persons under the conditions and for the purposes defined in paragraph 1”, are punished by three to five years’ imprisonment (Article 137A paragraph 3). Additionally, persons convicted of torture are automatically deprived of their political rights and dismissed from their jobs (137C ). Under Article 137D paragraph 4 “the victim of the offences [defined] in articles 137A and 137B has a right to demand from the individual and the state which are entirely responsible compensation for damages done to him/her and pecuniary satisfaction for psychological and moral damage”.<sup>799</sup>

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<sup>799</sup> Amnesty International, *The alleged ill-treatment of two young Roma, Theodoros Stephanou and Nikos Theodoropoulos, by police on the island of Cephalonia*, AI Index: Eur 25/005/2001, September 2001, pp 5-6; at: [www.greekhelsinki.gr/bhr/english/special\\_issues/roma\\_corelli\\_cephalonia/ai\\_cephalonia.doc](http://www.greekhelsinki.gr/bhr/english/special_issues/roma_corelli_cephalonia/ai_cephalonia.doc) (last accessed Dec. 2010).

## Hungary

### Overview

Hungary has a monist legal system, by which international criminal law may be directly applied. Theoretically, it is therefore not necessary to specifically define and criminalise international crimes in the Criminal Code. However, judges may be reluctant to proceed directly based on international law, and are more likely to use the “closest” Hungarian provision in the Criminal Code.<sup>800</sup>

The Criminal Code specifically criminalises genocide<sup>801</sup> and some grave breaches of the Geneva Conventions.<sup>802</sup> Torture is not specifically criminalised, and neither are crimes against humanity as defined in the Rome Statute (although the Criminal Code does make reference to “*crimes against humanity*”). The closest provision to enforced disappearance is “*unlawful detention*”, although this does not cover the requirement that the detention is accompanied by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, as the crime is defined in international law.<sup>803</sup>

The Criminal Code provides for active personality jurisdiction over all crimes which are deemed criminal under Hungarian law.<sup>804</sup>

Universal jurisdiction is available for crimes defined in Chapter XI (war crimes and genocide) and all crimes that are to be prosecuted under an international treaty.<sup>805</sup> Universal jurisdiction is also available for all acts which are punishable both in Hungary and in the place where the act was committed, and for crimes against the state.<sup>806</sup>

It is possible that the current government (elected in April 2010) will introduce a new Criminal Code. If so, a revision of the articles on war crimes and crimes against humanity can be expected, to bring them more in line with the Rome Statute. The crime of aggression, as concluded in Kampala, will also need to be incorporated.<sup>807</sup>

### Issues

**Nexus requirements (including presence or residence):** The universal jurisdiction provisions do not require any additional nexus to Hungary (although a link such as presence may be required to engage a treaty provision if relying on such a treaty).

Further, under the Criminal Procedure Code, presence is not required to launch criminal proceedings.<sup>808</sup> The prosecutor may proceed with the investigation in the absence of the accused as long as certain conditions are met.<sup>809</sup> If the accused is abroad and cannot be extradited or handed over based on a European arrest warrant or such extradition or

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<sup>800</sup> Meeting with representatives of MoJ and MFA and academic lawyers 14 September 2010.

<sup>801</sup> CC, Section 155.

<sup>802</sup> CC, Chapter XI.

<sup>803</sup> See CC, Section 228 and compare to Article 2 of the Enforced Disappearance Convention.

<sup>804</sup> CC, Section 3(1).

<sup>805</sup> CC, Section 4(c).

<sup>806</sup> CC, Section 4(a) and (b).

<sup>807</sup> Meeting with representatives of MoJ and MFA and academic lawyers 14 September 2010.

<sup>808</sup> CCP, Section 73(1).

<sup>809</sup> CCP (Law No 19 of 1998), Section 527(1).

handing over is denied, the prosecutor may request that the trial is held in the absence of the accused.<sup>810</sup>

**Subsidiarity:** The concept of subsidiarity is not taken into account in considering whether to exercise jurisdiction ahead of the state where the crime was committed. The principle does appear, however, in legislation in relation to international criminal tribunals and the ICC.<sup>811</sup>

**Double criminality:** If a crime does not fall under Chapters X or XI of the Criminal Code or is not considered as required to be prosecuted under a treaty, double criminality must be met for the exercise of universal jurisdiction.<sup>812</sup> If double criminality is met any crime may be prosecuted using universal jurisdiction.

**Prosecutorial and Executive discretion:** All universal jurisdiction prosecutions must be initiated by the Attorney General.<sup>813</sup>

**Ability to review decisions of the prosecutor or other governmental body:** If a victim lodges a complaint requesting an investigation to be launched and the complaint is rejected, the victim may file a request to order the investigation.<sup>814</sup> Likewise, if the prosecutor terminates an investigation, the victim may file a protest to order the commencement of the investigation.<sup>815</sup> These are administrative procedures: both complaints are filed at the prosecutor's office. The prosecutor or the superior prosecutor either accepts the complaint and orders the commencement of the investigation or to press charges, or rejects the complaint if it is determined to be unfounded.<sup>816</sup>

**Statutes of limitation:** Section 33 of the Criminal Code provides that no statute of limitation applies for certain crimes, including those in Chapter XI (war crimes and genocide), homicide of severe degree, kidnapping or assault of a superior officer or public official and terrorism. In other cases the statute of limitation is 20 years for a crime punishable by life imprisonment, or (for other crimes) it expires upon the lapse of time equal to the highest sentence prescribed, or not less than three years.

**Immunities:** The Criminal Code provides that: "*The criminal prosecution of persons enjoying diplomatic immunity and other forms of exemption based on international law shall be governed by international agreements, or if non-available, by internationally accepted practice. A definition of internationally accepted practices shall be provided by the Minister of Justice*".<sup>817</sup> Members of Parliament, judges and the Ombudsman enjoy immunities under national law.<sup>818</sup>

**Victims' role in proceedings:** A victim may act as a "*substitute private accuser*" if the victim's complaint is rejected, the investigation is terminated, charges are not brought because the prosecutor determines that the crime is not one to be tried by public accusation, are brought in respect of only part of the complaint or if the charges are

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<sup>810</sup> CCP, Section 532(1).

<sup>811</sup> See Act XXXIX of 1996 on the International Tribunal for Yugoslavia and Act CI of 1999 on the International Tribunal for Rwanda. See also CCP, Section 188(1)(g) which allows the Hungarian prosecutor to suspend the investigation if "*in respect of a case falling under its jurisdiction, the international criminal court requests the Hungarian authority to transfer the criminal proceedings*".

<sup>812</sup> CC, Section 4(a).

<sup>813</sup> CC, Section 4(3).

<sup>814</sup> CCP, Article 198 (1).

<sup>815</sup> CCP, Article 198 (2).

<sup>816</sup> CCP, Article 199 (1) (a)-(b).

<sup>817</sup> CC, Section 5.

<sup>818</sup> Law No 55 of 1990 on the immunity of members of parliament, Article 5; Law No 32 of 1989 on the judges of the Constitutional Court, Article 14; Law No 59 of 1993 on the General Ombudsman, Article 11 (1).

dropped.<sup>819</sup> In the event of the death of the substitute private accuser, he or she may be replaced by a relative, a spouse, life partner or legal representative.<sup>820</sup>

Victims (or their heirs) can bring civil claims in criminal proceedings, although these claims may also be enforced by the prosecutor.<sup>821</sup>

Victims may be represented by a non-profit organization established to represent their interests.<sup>822</sup>

**Victim and witness protection:** In principle, witnesses (including victims) make their testimonies orally, however it is possible for the Judge to order that the testimony is made in writing after or instead of the oral testimony,<sup>823</sup> or that the witness's previous testimony is read out.<sup>824</sup> It is also possible for witnesses to be examined by video-link.<sup>825</sup>

If there are concerns about a victim's safety it may be ordered that the personal data of the witness - except for his or her name - be handled separately and confidentially among the documents. In "*exceptionally justified cases*", the confidential treatment of the name of the witness may also be ordered.<sup>826</sup> In such a case the defendant and his or her counsel will not know the identity of the witness.

Hungary has a national witness protection programme established under Law No. 85 of 2001. It provides for special protective measures for threatened witnesses including personal protection, confidentiality of personal data, change of name or personal identity and relocation, including to another state.<sup>827</sup>

Participation in EU Genocide Network: Hungary has designated a contact point for the EU Genocide Network.<sup>828</sup>

## Cases

A civil party prosecution was filed at the General Prosecutor's Office against the government of Israel for acts committed during the operation in Gaza in 2008 and 2009, based on universal jurisdiction. No information is available about the decision of the General Prosecutor but it is understood that the civil party prosecution was rejected.<sup>829</sup>

## Relevant Legislation

### JURISDICTION

Act IV of 1978 on the Criminal Code

<sup>819</sup> CCP, Section 53(1).

<sup>820</sup> CCP, Section 53(2).

<sup>821</sup> CCP, Section 54.

<sup>822</sup> CCP, Section 58(3).

<sup>823</sup> CCP, Section 85(5).

<sup>824</sup> CCP, Section 296(1).

<sup>825</sup> CCP, Section 244/A (1)-(2).

<sup>826</sup> CCP, Section 96(1).

<sup>827</sup> Section 16 (1).

<sup>828</sup> Meeting with representatives of MoJ and MFA and academic lawyers 14 September 2010.

<sup>829</sup> Referred to in presentation by Dr Réka Varga at the REDRESS/FIDH Conference, 'Extraterritorial Jurisdiction in Europe: Presentation of a draft report and discussions on the role of the European Union', Brussels, 1 December 2010.

### Section 3

- (1) Hungarian law shall be applied to crimes committed in Hungary, as well as to any conduct of Hungarian citizens abroad, which are deemed criminal in accordance with Hungarian law.
- (2) Hungarian law shall also be applied to criminal acts committed on board of Hungarian ships or Hungarian aircraft situated outside the borders of the Republic of Hungary.

### Section 4

- (1) Hungarian law shall be applied to any act committed by non-Hungarian citizens in a foreign country, if:
- it is deemed a felony in accordance with Hungarian law and is also punishable in accordance with the laws of the country where committed;
  - it is a crime against the state (Chapter X), excluding espionage against allied armed forces (Section 148), regardless of whether or not it is punishable in accordance with the law of the country where committed;
  - it is crime against humanity (Chapter XI) or any other crime that is to be prosecuted under the strength of an international treaty.
- (2) Espionage (Section 148) against allied armed forces by a non-Hungarian citizen in a foreign country shall be punishable according to Hungarian penal laws, provided that such offense is also punishable by the law of the country where committed.
- (3) In the cases described in Subsections (1)-(2) the indictment shall be ordered by the Attorney General.

## CRIMES UNDER INTERNATIONAL LAW

### Act IV of 1978 on the Criminal Code

#### Chapter XI - Crimes Against Humanity Title I - Crimes Against Peace

#### Incitement to War - Section 153

- (1) Any person who engages in incitement to war or otherwise displays war propaganda is guilty of a felony punishable by imprisonment between two to eight years.
- (2) The punishment shall be imprisonment between five to fifteen years if the crime is committed in broad publicity.
- (3) Any person who engages in preparations for incitement to war is guilty of a felony punishable by imprisonment for up to three years.

...

#### Genocide - Section 155

- (1) Any person who - with the ultimate aim of the total or partial extermination of a national, ethnic, racial or religious group:
- kills the members of the group;
  - causes serious bodily or mental injury to the members of the group for reasons of their affiliation with the group;
  - constrains the group into living conditions threatening the demise of the group on the whole or certain members of it;
  - takes any action aimed to prevent births within the group;
  - separates the children of the group and installs them into another group;
- is guilty of a felony punishable by imprisonment between ten to twenty years or life imprisonment.
- (2) Any person who engages in preparations for genocide is guilty of a felony punishable by imprisonment between two to eight years.

#### Apartheid - Section 157

- (1) Any person who - with the aim to establish dominion and maintain rule of a racial group of people over another racial group of people or with the aim of the regular oppression of the other racial group:
- kills the members of a racial group or groups;
  - constrains the racial group into living conditions threatening the physical annihilation of the group or groups on the whole or to any extent;
- is guilty of a felony punishable by imprisonment between ten to twenty years or life imprisonment.
- (2) Any person who commits another crime of apartheid is guilty of a felony punishable by imprisonment between five to ten years.
- (3) The punishment shall be imprisonment between ten to twenty years or life imprisonment, if the criminal act of apartheid described in Subsection (2) has given rise to serious consequences.
- (4) For the purposes of Subsections (2) and (3), 'apartheid' shall mean the crimes of apartheid defined in Article II a)/(ii), a)/(iii), c), d), e), and f) of the International Convention on the Suppression and Punishment of the Crime of Apartheid adopted on 30 November 1973 by the General Assembly of the United Nations Organization in New York, promulgated by Law-Decree No. 27 of 1976.

#### Title II - War Crimes

#### Violence Against the Civilian Population - Section 158

- (1) Any person who applies violence in a theater of war or occupied area against civilian persons or prisoners of war, displays inhuman treatment or otherwise gravely abuses his power is guilty of a felony punishable by imprisonment between five to ten years, if such act does not result in a criminal act of greater gravity.
- (2) The punishment shall be imprisonment between ten to fifteen years or life imprisonment if the crime defined in Subsection (1) results in any death.
- (3) For the purposes of this Section 'inhuman treatment' shall mean, in particular:
- settlement of the civilian population of the occupying power in the occupied territory, or resettlement of the population of the occupied territory;
  - deprivation of the civilian population and prisoners of war from their right to trial in a normal and unbiased procedure;
  - undue delay of the repatriation of prisoners of war or civilian persons.



#### War-time Looting - Section 159

(1) Any person who engages in looting the property of civilians in a theater of operations or occupied territory, or causes grave detriment to the population by the enforcement of services or in another manner is guilty of a felony punishable by imprisonment between two to eight years, if such act does not result in a criminal act of greater gravity.

(2) The punishment shall be imprisonment between five to ten years if the crime is committed by force of arms or in a group.

#### Commission of War Crimes - Section 160

Any military commander who, in violation of the rules of the international law of warfare:

a) engages in the conduct of any war operation causing serious damage in the life, health or property of the civilian population, in facilities containing dangerous forces;

b) launches an offensive against a area without defense or a weapon-free zone;

is guilty of a felony punishable by imprisonment between ten to fifteen years or life imprisonment.

#### Use of Weapons Prohibited by International Convention - Section 160/A

(1) Any person who uses or orders the use of a weapon or instrument of war prohibited by international convention in a theater of military operation or in an occupied territory against the enemy, civilians or prisoners of war is guilty of a felony punishable by imprisonment between ten to fifteen years or life imprisonment.

(2) Any person who engages in preparations for the use of a weapon prohibited by international convention is guilty of a felony punishable by imprisonment for up to five years.

(3) For the purposes of Subsections (1)-(2) the following shall be construed as weapons prohibited by international convention:

a) asphyxiating, poisonous and other gases and bacteriological methods of warfare as set forth in the protocol signed at Geneva on 17 June 1925 on the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, as promulgated by Law-Decree 20 of 1955;

b) the bacteriological (biological) and toxin weapons specified in Article 1 of The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction adopted by the General Assembly during its twenty-sixth session on 10 December 1971, as promulgated by Law-Decree 11 of 1975;

c) the following weapons listed in the protocols to the convention signed in Geneva on 15 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, as promulgated by Law-Decree 2 of 1984:

1) weapons causing injury by fragments which cannot be detected by X-ray, as specified in Protocol I;

2) mines, remotely-delivered mines, anti-personnel mines, booby-traps and other devices specified in Points 1-5 of Article 2 of the Amended Protocol II, as promulgated by Act CXXXIII of 1997;

3) incendiary weapons specified in Point 1 of Article 1 of Protocol III;

4) blinding laser weapons specified in Article 1 of Protocol IV;

d) chemical weapons and chemical instruments of war specified in Points 1 and 7 of Article 2 of the convention signed in Paris on 13 January 1993 on the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, as promulgated by Act CIV of 1997;

e) anti-personnel mines specified in Point 1 of Article 2 of the convention signed in Oslo on 18 September 1997 on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, as promulgated by Act X of 1998.

#### Violation of the International Protection of Cultural Property - Section 160/B

(1) Any person who, at the time of war:

a) makes cultural property under international protection the object of attack;

b) uses cultural property under international protection in support of military action;

c) makes cultural property under international protection the object of theft or pillage;

d) makes cultural property under international protection the object of destruction or vandalism,

is guilty of a felony punishable by imprisonment between five to ten years.

(2) Any person who uses the immediate surroundings of cultural property under international protection in support of military action shall be punishable in accordance with Subsection (1).

(3) The punishment shall be imprisonment between five to fifteen years if the crime referred to in Subsection (1) is committed in connection with cultural property placed under special or enhanced protection by international convention.

(4) Any person who uses the immediate surroundings of cultural property under special or enhanced protection in accordance with international convention in support of military action shall be punishable in accordance with Subsection (3).

(5) For the purposes of Subsections (1)-(4):

1. 'cultural property' shall mean the cultural property defined in Article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict signed in the Hague on 14 May 1954, and promulgated by Law-Decree No. 14 of 1957;

2. 'cultural property under special protection' shall mean the cultural property defined in Article 8 of the Convention referred to in Point 1;

3. 'cultural property under enhanced protection' shall mean the cultural property defined in Article 10 of the Second Protocol to the Convention referred to in Point 1.

#### Battlefield Looting - Section 161

Anyone who loots the fallen, injured or sick people on the battlefield is guilty of a felony punishable by imprisonment between two to eight years.

#### Infringement of Armistice - Section 162

(1) Any person who infringes the conditions of armistice is guilty of a felony punishable by imprisonment between one to five years.

(2) The punishment shall be imprisonment between five to ten years if the infringement of the armistice leads to particularly grave consequences.

Violence Against a War Emissary - Section 163

(1) Any person who insults, illegally restrains the war emissary of the enemy or his companion, or otherwise applies violence against him is guilty of a felony punishable by imprisonment for up to three years, if such act does not result in a criminal act of greater gravity.

(2) Any person who kills a war emissary or his companion shall be punishable by imprisonment between ten to fifteen years, or life imprisonment.

Misuse of the Red Cross - Section 164

Any person who in war-time misuses the sign of the red cross (red crescent, red lion and sun) or other signs serving a similar purpose and recognized internationally, or commits a violent act against a person or thing under the protection thereof, is guilty of a felony punishable by imprisonment between one to five years.

Other War Crimes - Section 165

Other war crimes are governed in Decree No. 81/1945 (II.5.) ME, enacted by Act VII of 1945 and amended and supplemented by Decree No. 1440/1945 (V.1.) ME.

Unlawful Detention - Section 228

(1) Any public official who unlawfully deprives another person of his personal freedom is guilty of a felony punishable by imprisonment for up to five years.

(2) The punishment shall be imprisonment between two to eight years, if the unlawful detention is committed:

- a) for a malicious motive or purpose;
- b) with the torment of the injured party;
- c) causing a grave consequence.

## ***Ireland***

### **Overview**

**War crimes, genocide, crimes against humanity and torture** are criminalised under Irish legislation.

Under Irish law, Irish courts can exercise **universal jurisdiction** over grave breaches of the Geneva Conventions and their first additional protocol<sup>830</sup> and torture.<sup>831</sup> Universal jurisdiction is not available in relation to other crimes under the Rome Statute, or enforced disappearances.<sup>832</sup>

**Active personality jurisdiction** has traditionally applied only in a very limited number of cases, however in recent years, largely due to the proliferation of international agreements concerning extraterritorial jurisdiction, the number has been extended. Crimes relevant to crimes under international law to which active personality jurisdiction extends include murder and manslaughter,<sup>833</sup> minor breaches of the Geneva Conventions,<sup>834</sup> and crimes under the Rome Statute.<sup>835</sup>

**Passive personality jurisdiction** applies only in a limited number of cases of recent origin arising out of international treaty obligations. The crimes for which this type of jurisdiction is available include organised crime offences,<sup>836</sup> terrorist offences<sup>837</sup> and human trafficking.<sup>838</sup>

### **Issues**

**Nexus requirements (including presence or residence):** The provisions allowing for universal jurisdiction over war crimes and torture do not impose a presence requirement (in relation to torture, going beyond the grounds provided for in the Convention itself). However, Irish law does not permit trials in absentia.

**Subsidiarity:** The legislation allowing the exercise of universal jurisdiction does not impose any requirements in relation to subsidiarity. The International Criminal Court Act 2006 makes provisions for dealing with requests for surrender by the ICC.

**Double criminality:** Double criminality is not required to exercise universal jurisdiction.

**Prosecutorial and Executive discretion:** In general, prosecutions are a matter for the Director of Public Prosecutions, an independent statutory officer theoretically independent of the Government, and for the police, who are operationally independent of Government. The Director of Public Prosecutions has the discretion to decide whether to

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<sup>830</sup> Geneva Conventions Act, 1962, as amended by the Geneva Conventions (Amendment) Act 1998, Section 3; International Criminal Court Act 2006, section 66, which provides for jurisdiction over grave breaches in accordance with the terms of the Conventions and the Protocol.

<sup>831</sup> Criminal Justice (United Nations Convention Against Torture) Act, 2000, Sections 2 and 3.

<sup>832</sup> The only other crimes for which universal jurisdiction is available are piracy (at common law) and offences against UN workers (Criminal Justice (Safety of United Nations Workers) Act 2000, Sections 2 to 4).

<sup>833</sup> Offences Against the Person Act 1861, Section 9.

<sup>834</sup> Geneva Conventions Act 1962, Section 4.

<sup>835</sup> International Criminal Court Act 2006, Section 12(1).

<sup>836</sup> Section 71 of the Criminal Justice Act 2006 as amended by section 4 of the Criminal Justice (Amendment) Act 2010.

<sup>837</sup> Criminal Justice (Terrorist Offences Act) 2005, Sections 6, 9, 10, 11 and 13.

<sup>838</sup> Criminal Law (Human Trafficking) Act 2008, Section 7, subsections 2, 5 and 7.

prosecute an indictable offence, and must make this decision on the basis of the sufficiency of the available evidence and the public interest.

However, specific authorisation is required for prosecutions on the basis of extraterritorial jurisdiction. The grave breaches offences provisions in the Geneva Conventions and Protocol 1 may not be instituted except with the authorisation of the Director of Public Prosecutions; the permission of the Attorney General is required with respect to any proceedings - other than remand or custody - against a person who has been charged with such an offence.<sup>839</sup> Additionally, the Geneva Conventions Act specifies that the Minister of Foreign Affairs has sole authority to determine whether the Act is applicable to a particular case.<sup>840</sup>

With respect to torture and ancillary offences, the consent of the Director of Public Prosecutions is required in order to proceed with a prosecution beyond the initial charge and arrest.<sup>841</sup>

**Statutes of limitation:** Irish criminal law does not provide for limitation periods, except in the case of minor crimes.<sup>842</sup>

**Immunities:** Specific legislation on immunities is found in the Diplomatic Relations and Immunities Act 1967, which provides for immunity from criminal jurisdiction and/or from civil claims for reparation in accordance with the terms of the Vienna Convention on Diplomatic Relations. The 1967 Act as amended also makes provision for immunities in relation to persons connected with international organisations. The International Criminal Court Act 2006 also makes provision for immunities in accordance with the Rome Statute of the International Criminal Court and the Agreement on privileges and Immunities of the ICC.

There is no legislation on the immunity of states or state officials, but state immunity is recognised at common law and pursuant to the provisions of Article 29.3 of the Constitution, which provides that “*Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States*”. While there has been caselaw recognising the restrictive theory of state immunity, this caselaw does not deal with the crimes under international law or crimes in relation to which universal jurisdiction applies.<sup>843</sup>

The President is immune from prosecution for the exercise and performance of the powers and functions of his or her office or for any act done or purporting to be done in the exercise or performance of those functions,<sup>844</sup> but this is subject to the provisions of Article 29.9 of the Constitution permitting Ireland to ratify the Rome Statute of the International Criminal Court.

**Victims’ role in proceedings:** Prosecutions are taken by the State. There is no legislative provision for victims or other third parties to initiate criminal prosecutions but private citizens may lay a complaint before a court which may only go so far as to summons the alleged wrongdoer before it. No further step can be taken save by the Director of Public Prosecutions.<sup>845</sup>

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<sup>839</sup> Under the amended Geneva Conventions Act, *supra*, Section 3(3).

<sup>840</sup> Geneva Conventions Act 1962, Section 5.

<sup>841</sup> Criminal Justice (United Nations Convention Against Torture) Act, 2000, Sections 5(2).

<sup>842</sup> Response to MoJ questionnaire.

<sup>843</sup> Response to MoJ questionnaire.

<sup>844</sup> Article 13.8.1 of the Constitution.

<sup>845</sup> Response to MoJ questionnaire.

Under Section 6 of the Criminal Justice Act 1993, there is a general provision for compensation orders on conviction. On the conviction of an offender, the court may make an order requiring the offender or, where appropriate, a parent or guardian, to pay compensation for any personal injury or loss resulting from the offence to any person who has suffered any such injury or loss. This order may be in addition to, or in place of, any other order the court may make with respect to the offender, including the imposition of a fine, or a term of imprisonment. The court may, on the application of the injured party and having regard to any representations made by the convicted person or on their behalf, increase the amount to be paid under a compensation order. However, if a court chooses not to award compensation, it is under no obligation to explain its reasons.<sup>846</sup>

Victims may also initiate civil claims on their own behalf in relation to pursuing a person for compensation. Such cases are private actions and are separate from the prosecution case initiated by the State.

**Victim and witness protection:** Under provisions of the Criminal Evidence Act 1992, the court may allow any person who is in fear or who is liable to be intimidated to give evidence through a live television link. Under the same Act, the court may allow any person, including any victim or witness, who is outside Ireland, to give evidence through a live television link.

Irish law makes specific provisions, in the Criminal Evidence Act 1992, to distinguish vulnerable persons from others. Vulnerable persons are defined under that Act as those who are intellectually disabled and children under 18 years of age. Vulnerable persons can give evidence in criminal proceedings for sexual, violent or human trafficking offences through a live television link or through an intermediary and a video recording of any statement made by a vulnerable person in respect of whom an offence is alleged to have been committed in an interview with a member of the police or another competent person is admissible at a trial.<sup>847</sup>

The International Criminal Court Act provides that the measures specified in paragraphs 1 and 5 of Article 68 of the Rome Statute (protection of victims and witnesses and their participation in proceedings) shall, where appropriate, be taken during the investigation and prosecution of offences under the Act, and that the court concerned shall, where appropriate, take the measures specified in paragraphs 1 to 3 and 5 of that Article.<sup>848</sup>

An administrative arrangement exists where vulnerable victims or witnesses can be provided with the protection to secure their safety, however there is no statutory national programme in place. It is a crime to harm or to threaten someone who is assisting *An Garda Síochána* (the Irish national police force) with an investigation, or a witness, a juror, or any family member of a victim. *An Garda Síochána* takes measures to ensure the security of victims and witnesses outside the court confines, including provisions such as transport to and from court venues, and personal protection. If special protection measures are required outside the jurisdiction of Ireland, *An Garda Síochána* can liaise with its counterparts in the relevant jurisdictions.<sup>849</sup>

**Specialised War Crimes Unit:** Ireland does not have a specialised unit dealing with crimes under international law. The Irish police would receive a complaint of international crimes

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<sup>846</sup> M.E.I. Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)), Chapter 12: Ireland, Section 5.2.

<sup>847</sup> Although this last provision does not apply to children over 14 years of age.

<sup>848</sup> International Criminal Court Act 2006, Section 14.

<sup>849</sup> Response to MoJ questionnaire.

and would then investigate in the usual way, submitting a file to the Director of Public Prosecutions if their investigations uncover an offence for which Ireland has jurisdiction.

**Participation in EU Genocide Network:** Ireland has designated a Contact Point and it is Ireland's practice to participate at meetings of the Network.

## Cases

The authors are not aware of any cases using universal jurisdiction brought in Ireland.

## Relevant Legislation

### JURISDICTION

#### **Geneva Conventions Act, 1962, as amended by the Geneva Conventions (Amendment) Act 1998**

##### Section 3

(1) Any person, whatever his or her nationality, who, whether in or outside the State, commits or aids, abets or procures the commission by any other person of a grave breach of any of the Scheduled Conventions or Protocol I shall be guilty of an offence and on conviction on indictment—

(a) in the case of a grave breach involving the wilful killing of a person protected by the Convention or Protocol in question, shall be liable to imprisonment for life or any less term,

(b) in the case of any other grave breach, shall be liable to imprisonment for a term not exceeding 14 years.

(1A) Any person, whatever his or her nationality, who, whether in or outside the State, fails to act, when under a duty to do so, to prevent the commission by another person of a grave breach of any of the Scheduled Conventions or Protocol I shall be guilty of an offence and on conviction on indictment shall be liable to imprisonment for a term not exceeding 10 years.

(1B) For the purposes of this section—

(a) a grave breach of any of the Scheduled Conventions is anything referred to as a grave breach of the Convention in the relevant Article, that is to say—

(i) in the case of the Convention set out in the First Schedule to this Act, Article 50,

(ii) in the case of the Convention set out in the Second Schedule to this Act, Article 51,

(iii) in the case of the Convention set out in the Third Schedule to this Act, Article 130,

(iv) in the case of the Convention set out in the Fourth Schedule to this Act, Article 147, and

(b) a grave breach of Protocol I is anything referred to as a grave breach of the Protocol in paragraph 4 of Article 11, or paragraph 2, 3 or 4 of Article 85, of the Protocol.

(2) In the case of an offence under this section committed outside the State, a person may be proceeded against, indicted, tried and punished therefor in any place in the State as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.

(3) Proceedings for an offence under this section shall not be instituted except by, or on behalf of, or with the consent of the Attorney General.

(4) A person charged with an offence under this section shall be tried by the Central Criminal Court.

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#### **Criminal Justice (United Nations Convention Against Torture) Act 2000**

##### Section 2

(1) A public official, whatever his or her nationality, who carries out an act of torture on a person, whether within or outside the State, shall be guilty of the offence of torture.

(2) A person, whatever his or her nationality, other than a public official, who carries out an act of torture on another person, whether within or outside the State, at the instigation of, or with the consent or acquiescence of, a public official shall be guilty of the offence of torture.

(3) A person guilty of the offence of torture shall be liable on conviction on indictment to imprisonment for life.

### Section 3

A person, whatever his or her nationality, whether within or outside the State, who—

(a) attempts to commit or conspires to commit the offence of torture, or

(b) does an act with the intent to obstruct or impede the arrest or prosecution of another person, including a person who is a public official, in relation to the offence of torture, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.

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## International Criminal Court Act 2006

### PART 2

#### Domestic Jurisdiction in ICC Offences

#### Interpretation Part 2 .

6.— (1) In this Part, unless the context otherwise requires—

“ court ” means, as appropriate, the Central Criminal Court, Special Criminal Court or, in relation to persons subject to military law, a court-martial, whether held inside or outside the State;

“crime against humanity ” means any of the acts specified in Article 7;

“genocide ” means any of the acts specified in Article 6;

“war crime ” means any of the acts specified in Article 8.2 (except subparagraph (b)(xx)).

(2) In Articles 7 and 8 references to murder shall be construed as references to the killing of a person in such circumstances as would, if committed in the State, constitute murder.

Genocide, crimes against humanity and war crimes.

7.— (1) Any person who commits genocide, a crime against humanity or a war crime is guilty of an offence.

(2) The Genocide Act 1973 (the “1973 Act”) is repealed.

(3) The repeal effected by subsection (2) is without prejudice to the obligations of the State under the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations on 9 December 1948, the text of which is set out in Schedule 4.

(4) Notwithstanding subsection (2), proceedings under the 1973 Act may be taken after the passing of this Act for an offence under that Act committed before such passing.

Offences ancillary to genocide, crimes against humanity and war crimes.

8.-(1) Any person who does any act specified in paragraph 3 of Article 25 (crimes ancillary to genocide, crimes against humanity and war crimes) is guilty of an offence (in this Act referred to as an “ancillary offence”).

(2) Subsection (1) is without prejudice to section 7 (penalties for assisting offenders) of the Criminal Law Act 1997 .

Proceedings for ICC offence.

9.-(1) In this Act “ ICC offence ” means genocide, a crime against humanity, a war crime or an ancillary offence.

(2) No further proceedings (other than a remand in custody or on bail) shall be taken in relation to a person charged with an ICC offence except by or with the consent of the Director of Public Prosecutions.

(3) Proceedings for an ICC offence committed outside the State may be taken in any place in the State, and the offence may for all incidental purposes be treated as having been committed in that place.

(4) Without prejudice to section 7 (4), proceedings may not be taken in respect of conduct constituting an ICC offence if the conduct occurred before the passing of this Act.

...

Extra-territorial jurisdiction.

12.— (1) An Irish national who does an act outside the State that, if done within it, would constitute an ICC offence or an offence under section 11 (1) is guilty of that offence and liable to the penalty provided for it.

(2) Subsection (1) also applies in relation to a person of any other nationality who does an act outside the State that, if done within it, would constitute both—

(a) a war crime under subparagraph (a) (grave breaches of the Geneva Conventions) or (b) (other specified serious violations of the laws and customs applicable in international armed conflict) of Article 8.2, and

(b) an offence under section 3 (grave breaches of the Geneva Conventions and Protocol I thereto) of the Geneva Conventions Act 1962 .

(3) An act which—

(a) is done outside the State on board an Irish ship or Irish controlled aircraft, and

(b) if done within it, would constitute an ICC offence,

is deemed for the purposes of this Act to have been done within the State.

(4) The reference in subsection (2)(b) to section 3 of the Geneva Conventions Act 1962 is to that section as amended by section 3 of the Geneva Conventions (Amendment) Act 1998 and by paragraph 2 of Schedule 3.

(5) In this section—

“ Irish controlled aircraft ” has the meaning given to it by section 1(1) of the Air Navigation and Transport Act 1973 ;

“ Irish ship ” has the meaning given to it by section 9 of the Mercantile Marine Act 1955 .

Applicable law.

13.— (1) The law (including common law) of the State shall, subject to subsection (2), apply in determining whether a person has committed an offence under this Part.

(2) Article 27 (application of Statute to all persons without any distinction based on official capacity) and paragraphs (a) and (b) of Article 28 (responsibility of commanders and other superiors for crimes within the jurisdiction of the International Criminal Court) shall apply, as appropriate and with any necessary modifications, in relation to any such determination.

(3) This section is without prejudice to section 3 (1).

## **CRIMES UNDER INTERNATIONAL LAW**

### **Criminal Justice (United Nations Convention Against Torture) Act 2000**

#### **Section 1**

...

“torture” means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person—

(a) for such purposes as—

(i) obtaining from that person, or from another person, information or a confession,

(ii) punishing that person for an act which the person concerned or a third person has committed or is suspected of having committed, or

(iii) intimidating or coercing that person or a third person,

or

(b) for any reason that is based on any form of discrimination,

but does not include any such act that arises solely from, or is inherent in or incidental to, lawful sanctions.

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**Geneva Conventions Act, 1962, as amended by the Geneva Conventions (Amendment) Act 1998**

See above

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**International Criminal Court Act 2006**

See above

## Italy

### Overview

Genocide and some war crimes, including grave breaches of the Geneva Conventions, have been specifically criminalised in Italian law.<sup>850</sup>

Italian courts can exercise universal jurisdiction over torture (though it must be prosecuted using ordinary crimes under Italian law),<sup>851</sup> any crime under Italian law that carries a prison term of at least three years,<sup>852</sup> and “*any other crime for which special legal provisions or international agreements specify that Italian criminal law applies*”.<sup>853</sup> There is debate, however, as to whether the latter can be applied without the incorporation into Italian law of the relevant jurisdictional provisions.<sup>854</sup>

Somewhat more limited jurisdictional provisions can also be found in military statutes. For example, the Wartime Military Code, establishes that, “[t]he provisions of Title IV [on offences against war laws and usage], Book Three [on military offences in particular] of this code concerning offences committed against wartime laws and customs, also apply to military personnel and any other member of the enemy armed forces when any of these offences have been committed to the detriment of [...] an allied state or a subject thereof.”<sup>855</sup>

Italian law also provides for active personality<sup>856</sup> and passive personality jurisdiction.<sup>857</sup>

### Issues

**Nexus requirements (including presence or residence):** In order to exercise universal jurisdiction over torture,<sup>858</sup> the perpetrator must be present in Italian territory and not extradited.<sup>859</sup> Similarly, the ability to exercise universal jurisdiction over any crime under Italian law that carries a prison sentence of at least three years is restricted by a requirement that the alleged perpetrator be present in Italian territory and that no extradition to the territorial or home state has been ordered.<sup>860</sup> In contrast, no presence requirement is stipulated for the prosecution of crimes that Italy is obliged to prosecute under international agreements in accordance with Article 7(5) of the Penal Code.

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<sup>850</sup> See Law No. 962 of 9 October 1967 (*Legge 9 ottobre 1967, n.962*) (genocide) and 1941 Wartime Military Criminal Code (*Codice Penale Militare de Guerra*), as amended in 2002 (war crimes).

<sup>851</sup> Law No. 498 of 3 November 1988 (*Legge 3 novembre 1988, n.498*), Article 3(1)(c); and CC, Article 10. In its initial report to the Committee against Torture, Italy noted that both of these provisions cover, at least in part, the obligation established in Article 5(2) of the Torture Convention. Torture is not defined as a crime, however, under Italian law and therefore would need to be prosecuted as an ordinary crime under Italian law. (Italy’s initial state party report (CAT/C/9/Add.9), Paragraph 36; as reiterated in *Third periodic reports of States parties due in 1998: Italy. 15/12/98* (CAT/C/44/Add.2), 15 December 1998, paragraph 9.)

<sup>852</sup> CC, Article 10.

<sup>853</sup> CC, Article 7(5).

<sup>854</sup> See, for example, Amnesty International, “Universal Jurisdiction - the duty of states to enact and enforce legislation,” AI Index: IOR 53/002/2001, 1 September 2001, Chapter 4, Part B, p. 10.

<sup>855</sup> Article 13.

<sup>856</sup> CC, Article 9.

<sup>857</sup> CC, Article 10.

<sup>858</sup> Under Law No. 498 of 3 November 1988.

<sup>859</sup> Article 3(1)(c).

<sup>860</sup> CC, Article 10(1) and (3).

Procedurally, in the absence of jurisdictional presence requirements, the accused does not have to be present on the territory, either when the case is first referred to court, nor when judgment is rendered, and the sentence may be pronounced *in absentia*.<sup>861</sup>

**Subsidiarity:** If a State requests extradition, Italy will relinquish its competence acquired by virtue of universal jurisdiction.<sup>862</sup>

**Double criminality:** Double criminality is not a jurisdictional requirement for the exercise of universal jurisdiction.

**Prosecutorial and Executive discretion:** Generally, the Public Prosecutor (*Pubblico Ministero*) is obligated to exercise criminal action once a criminal complaint has been lodged and then to submit the case to an investigating judge for prosecution, unless Italian courts would not have jurisdiction over the facts or the allegations are manifestly unfounded.<sup>863</sup>

However, to prosecute someone for torture under Article 3(1)(c) of Law No. 498 of 3 November 1988, or for ordinary crimes under Penal Code Article 10, the Minister of Justice must first issue a request for the prosecution to take place.

**Ability to review decisions of the prosecutor or other governmental body:** Decisions of the prosecutor not to prosecute can be challenged.<sup>864</sup>

**Statutes of limitation:** Offences requiring a life sentence or sentence exceeding 30 years are not subject to a limitation period. It has also been accepted that war crimes also do not prescribe, independently of the sentence provided for, applying norms of international law as generally recognised even if they are not formally incorporated into domestic law.<sup>865</sup>

**Immunities:** Immunities recognised in international law would also be applied to crimes under international law prosecuted in Italy.<sup>866</sup> The President of Italy also enjoys immunity under national law.<sup>867</sup>

**Victims' role in proceedings:** Civil claims for compensation and restitution can be brought either in the context of criminal proceedings<sup>868</sup> or separately before civil courts. The relationship between these two types of proceedings is set out in Article 75 of the Criminal Procedure Code. A civil party cannot institute a criminal prosecution.<sup>869</sup>

**Victim and witness protection:** Framework decision 2001/220/JAI of the Council concluded on 15 March 2001 has been transposed into Italian law.<sup>870</sup> This framework decision provides for some protection for victims, including that their testimony be taken in the own state and for testimony to be taken by video.<sup>871</sup>

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<sup>861</sup> Response to questionnaire.

<sup>862</sup> Response to questionnaire.

<sup>863</sup> Constitution, Article 112 ("The public prosecutor has the duty to initiate criminal proceedings.").

<sup>864</sup> Criminal Procedure Code, Arts. 408 to 410.

<sup>865</sup> Response to questionnaire; see Constitution Article 10(1).

<sup>866</sup> Response to questionnaire.

<sup>867</sup> Constitution, Article 90.

<sup>868</sup> CC, Article 185; and Criminal Procedure Code, Arts. 74, 90, 101, 394, 396.

<sup>869</sup> Response to questionnaire.

<sup>870</sup> By laws dated 22 March 2006, 22 March 2004, and 22 March 2002.

<sup>871</sup> Response to questionnaire

Law 45 dated 13 February 2001 introduced modifications to the rules on the protection of witnesses. Following these changes, special protective measures, including relocation, are available to witnesses and their families.

## Cases

In 2006 Italian prosecutors charged a United States soldier, Mario Lozano, with the murder of an Italian special forces agent in Iraq. The United States refused an extradition request and the trial commenced *in absentia* in April 2007. The Court dismissed the charges in October 2007, holding that the multinational forces in Iraq were under the exclusive jurisdiction of the country that sent them.<sup>872</sup>

In 2007 a Montenegrin Army battleship captain, Ilija Brčić, was taken into custody at Rome airport on an arrest warrant issued by Croatian authorities. He was visiting Italy with a Montenegrin delegation for a NATO-led military exercise. He had been under investigation by Croatian prosecutors since 1992, and was sentenced to 15 years imprisonment by the Split District Court in 1993 for war crimes committed against civilians. However, the Court of Appeal in Rome upheld his appeal against an extradition order, and he was released from custody in 2008.<sup>873</sup>

In 2009 a Rwandan priest, Emmanuel Uwayezu, was arrested in Italy. He was wanted in Rwanda for genocide, conspiracy to commit genocide, complicity in genocide and crimes against humanity. Rwanda requested his extradition but this was denied on 29 January 2010 on the grounds that the application lacked sufficient evidence to proceed.<sup>874</sup>

During 2009 and 2010 former Chilean military prosecutor Alfonso Podlech Michaud has been on trial in Rome for the disappearance and presumed murder of Italian citizen Omar Venturelli Leonelli, over 36 years previously in Temuco, Chile. The trial will continue in January 2011.

## Relevant Legislation

### JURISDICTION

Criminal Code (Unofficial translation<sup>875</sup>)

Article 7 - Offences committed abroad.

A citizen or alien who commits any of the following offences in foreign territory shall be punished according to Italian law:

- (1) crimes against the personality of the Italian State;
- (2) crimes of counterfeiting the seal of the State and of using such counterfeited seal;
- (3) crimes of counterfeiting money which is legal tender in the territory of the State, or duty-bearing paper or Italian public credit securities;
- (4) crimes committed by public officers in the service of the State by abusing the powers or violating the duties pertaining to their office; or

<sup>872</sup> BBC, 'Italians 'cannot try US soldier'', 25 October 2007; available at: <http://news.bbc.co.uk/1/hi/world/europe/7061731.stm> (last accessed December 2010).

<sup>873</sup> See Balkan Insight, 'Italy frees Montenegro War Crimes Suspect', 25 July 2008; available at: <http://www.balkaninsight.com/en/article/italy-frees-montenegro-war-crimes-suspect> (last accessed December 2010); Dalje.com, 'Italian Judiciary protects war criminal Brcic', 1 August 2008; available at: <http://dalje.com/en-croatia/italian-judiciary-protects-war-criminal-brcic/168698> (last accessed December 2010).

<sup>874</sup> See the summary of the case at TRIAL's website: [http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profile.html?tx\\_jbtrial\\_pi2%5Btab%5D=legal-procedures&tx\\_jbtrial\\_pi2%5Bprofile%5D=emmanuel\\_uwayezu\\_855&cHash=21c7e2da4b](http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profile.html?tx_jbtrial_pi2%5Btab%5D=legal-procedures&tx_jbtrial_pi2%5Bprofile%5D=emmanuel_uwayezu_855&cHash=21c7e2da4b) (last accessed December 2010).

<sup>875</sup> Based on the translation of the articles in Rocco, Alfredo, *The Italian penal code*; translated from the Italian by Edward M. Wise in collaboration with Allen Maitlin, London, Sweet and Maxwell, 1978.

(5) any other offense for which specific provisions of law or international conventions prescribe the applicability of Italian penal law.

#### Article 8 - Political Crimes Committed Abroad.

A citizen or alien who commits in foreign territory a political crime not among those specified in subparagraph (1) of the preceding Article shall be punished according to Italian law on demand of the Minister of Justice.

With respect to crimes punishable on complaint of the victim, in addition to such demand, a complaint shall also be required.

For purposes of penal law, a political crime shall be any crime which injures a political interest of the State, or a political right of a citizen. A common crime inspired, in whole or in part, by political motives shall also be deemed a political crime.

#### Article 9 - Common Crimes by Citizens Abroad.

A citizen who, apart from the cases specified in the two preceding articles, commits in foreign territory a crime for which Italian law prescribes [the punishment of death,<sup>876</sup>] life imprisonment or imprisonment for a minimum of not less than three years, shall be punished according to that law, provided he is within the territory of the State.

With respect to crimes for which a punishment restrictive of personal liberty for a lesser period is prescribed, the offender shall be punished on demand of the Minister of Justice, or on petition or complaint of the victim.

If, in a case designated in the preceding provisions, the crime was committed to the detriment of the European Communities, a foreign State or an alien, the offender shall be punished on demand of the Minister of Justice, provided his extradition has not been granted, or has not been accepted by the Government of the State in which he committed the crime.

#### Article 10 - Common Crimes by Aliens Abroad.

An alien who, apart from the cases specified in Articles 7 and 8, commits in foreign territory, to the detriment of the State or a citizen, a crime for which Italian law prescribes [the punishment of death or<sup>877</sup>] life imprisonment, or imprisonment for a minimum of not less than one year, shall be punished according to that law, provided he is within the territory of the State and there is a demand by the Minister of Justice, or a petition or complaint by the victim

If the crime was committed to the detriment of the European Communities, a foreign State or an alien, the offender shall be punished according to Italian law, on demand of the Minister of Justice, provided

(1) he is within the territory of the State,

(2) the crime is one for which the punishment prescribed is [death or] life imprisonment, or imprisonment for a minimum of not less than three years; and

(3) his extradition has not been granted, or has not been accepted by the Government of the State in which he committed the crime, or by that of the State to which he belongs.

### CRIMES UNDER INTERNATIONAL LAW

Law No. 962 of 9 October 1967 (Unofficial translation)<sup>878</sup>

#### Article 1 Acts intended to commit genocide.

Whoever, in order to destroy in whole or in part, a national, ethnical, racial or religious group, commits acts intended to cause bodily injury to persons belonging to the group, shall be punished with imprisonment from ten to eighteen years.

Whoever, in order to destroy in whole or in part, a national, ethnical, racial or religious group, commits acts intended to cause death or grievous bodily harm to members of the group, shall be punished with imprisonment for twenty-four to thirty years. The same penalty applies to those who, for the same purpose, imposes on the group conditions of life calculated to determine the physical destruction in whole or in part of the group.

<sup>876</sup> The death penalty for crimes under the Criminal Code was abolished by D.Lgs.Lgt. No 224/1944.

<sup>877</sup> The death penalty for crimes under the Criminal Code was abolished by D.Lgs.Lgt. No 224/1944.

<sup>878</sup> See the Italian and unofficial translation at: <http://www.preventgenocide.org/it/legge.htm> (last accessed December 2010).

## Latvia

### Overview

Under Latvia's Criminal Code, genocide,<sup>879</sup> crimes against humanity<sup>880</sup> and war crimes<sup>881</sup> are specifically criminalised.

Latvian criminal law provides for both active and passive personality jurisdiction.<sup>882</sup> Latvian citizens (and non-citizens, and third-country nationals or stateless persons who are permanent residents in the Republic of Latvia) are liable under Latvian criminal law for criminal offences committed in the territory of another state.<sup>883</sup> Third-country nationals and stateless persons who do not have permanent residence and who commit serious offences against the Republic of Latvia or against the interests of Latvian inhabitants in another state are criminally liable under Latvian law irrespective of the laws of the other state, unless they have been held criminally liable or committed to trial in that state.<sup>884</sup>

Article 4(4) of the Latvian Criminal Code provides for universal jurisdiction. It provides that third-country nationals who have committed offences abroad are liable under Latvian criminal law for crimes provided for *under international agreements* which are binding on Latvia, irrespective of the laws of the state in which the offence was committed, unless they have been held criminally liable for such offences or have been committed to trial in that state.

### Issues

**Nexus requirements (including presence or residence):** There is no requirement for presence if the accused is located in another state, if his or her whereabouts is unknown, or if it is not possible to ensure his or her attendance at court.<sup>885</sup> However, the law also provides that the presence of the accused is necessary when informing him or her that a decision has been taken to initiate proceedings.<sup>886</sup>

**Subsidiarity:** Where third-country nationals are held criminally liable or committed to trial in another state for crimes committed in that state, Latvian criminal law will not apply.<sup>887</sup> Similarly, where such a person has been convicted or acquitted for the same offence in a foreign state with which Latvia has an agreement regarding mutual recognition of criminal judgments or an agreement regarding the observance of the principles of *ne bis in idem*.<sup>888</sup> These rules apply to crimes in general.

**Double criminality:** There is no double criminality requirement for crimes provided for under international agreements.<sup>889</sup>

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<sup>879</sup> CC, Article 71.

<sup>880</sup> CC, Article 71(2).

<sup>881</sup> CC, Article 74.

<sup>882</sup> Translation of Latvian Criminal Law to be found online at: <http://www.legislationline.org/documents/section/criminal-codes>.

<sup>883</sup> CC, Article 4(1) and (2).

<sup>884</sup> CC, Article 4(3).

<sup>885</sup> CCP, Article 465.

<sup>886</sup> MoJ questionnaire response.

<sup>887</sup> CC, Article 4 (3) and (4).

<sup>888</sup> CCP, Article 25(6).

<sup>889</sup> CC, Article 4(4).

**Prosecutorial and Executive discretion:** There are no specific rules for offences falling under universal jurisdiction. These would therefore be dealt with as ordinary crimes under the Criminal Procedure Law.<sup>890</sup> The Public Prosecutor would be bound to initiate proceedings for crimes, where to do so would be in the interests of society.<sup>891</sup> This may also be done at the request of the person who suffered harm for certain crimes<sup>892</sup> and where, due to mental or physical incapacity, that person is unable to so request.

The Criminal Procedure Law also provides that criminal proceedings may be authorised by officials of institutions specified in the law who have been granted authorisation to do so in connection with their office.<sup>893</sup>

**Ability to review decisions of the prosecutor or other governmental body:** The Criminal Procedure Law enables persons to appeal the decisions of officials granted authorisation to perform criminal proceedings.<sup>894</sup>

**Statutes of limitation:** There is no limitation for crimes against humanity, crimes against peace, war crimes or genocide.<sup>895</sup>

**Immunities:** Certain rights of immunity are provided for generally under the Criminal Procedure Law.<sup>896</sup> However, the Rome Statute, to which Latvia is party, does not permit immunity for any person in relation to crimes under international law.<sup>897</sup> Furthermore, the Criminal Procedure Law prescribes the possibility of voiding immunity from criminal proceedings, as well as instigating proceedings with regard to crimes included under the Rome Statute.<sup>898</sup>

**Victims' role in proceedings:** The Criminal Procedure Law allows the victim to claim compensation, but where he or she has not been awarded compensation, he or she has the right to request it in line with procedures specified under Civil Procedure Law.<sup>899</sup> There appear to be no specific rules enabling victims to initiate criminal proceedings or to join prosecution as a civil party, however.

**Victim and witness protection:** The Criminal Procedure Law provides for in-court protection for persons involved in criminal proceedings.<sup>900</sup> This would include such methods as video-conferencing or the recording of testimony,<sup>901</sup> or closed court sessions.<sup>902</sup> There is also special legislation which affords protection out of court, such as providing security guards, alternative identities, and the transfer of the person to another state in accordance with international agreements entered into with that state.<sup>903</sup>

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<sup>890</sup> CCP, Article 7.

<sup>891</sup> CCP, Article 7(1).

<sup>892</sup> CC, Articles 90, 130, 131, 132, 159, 160, 168, 169, 180, 197, 200, 260 - includes a variety of crimes ranging from interfering with voting rights and traffic offences, to theft, fraud, rape and sexual assault, theft, and fraud, among others.

<sup>893</sup> Questionnaire response.

<sup>894</sup> Questionnaire response.

<sup>895</sup> CC, Article 57.

<sup>896</sup> CCP, Article 116.

<sup>897</sup> Rome Statute, Article 27.

<sup>898</sup> CCP, Chapter 8.

<sup>899</sup> Questionnaire response.

<sup>900</sup> CCP, Article 450(5).

<sup>901</sup> CCP, Articles 140 and 501 - particularly applicable in relation to child victims.

<sup>902</sup> CCP, Article 450(5) - "*to ensure protection of persons involved in criminal proceedings*" - particularly applicable in relation to child victims.

<sup>903</sup> Special Protection of Persons Law, Article 16.

**Specialised War Crimes Unit:** The Security Police and the Prosecutor General are in charge of investigating crimes under international law in Latvia. The Security Police, created in 1994, is a separate and independent unit, subordinate to the Ministry of the Interior. It is separate from the criminal department of the Prosecutor General whose prosecutors investigate/prosecute war crimes, crimes against the humanity, peace and genocide in line with Criminal Procedure Law.<sup>904</sup>

**Participation in EU Genocide Network:** Latvia has implemented the EU Council Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes. It has not, however, designated a particular EU Contact Point, although the Prosecutor of the General Prosecution's International Division has participated in several meetings and seminars regarding these crimes.<sup>905</sup>

## Cases

The authors are not aware of any cases of prosecution of crimes under international law in Latvia using either expansive or limited universal jurisdiction.

## Relevant Legislation

### JURISDICTION

Criminal Law<sup>906</sup>

Applicability of the Criminal Law outside the territory of Latvia

Article 4

- 1) Latvian citizens, non-citizens and third-country nationals who have a permanent residence permit for the Republic of Latvia, shall be held liable in accordance with this Law for a criminal offence committed in the territory of another state or outside the territory of any state.
- 2) Soldiers of the Republic of Latvia who are located outside the territory of Latvia shall be held liable for criminal offences in accordance with this Law, unless it is provided otherwise in international agreements binding upon the Republic of Latvia.
- 3) Third-country nationals who do not have permanent residence permits for the Republic of Latvia and who have committed serious or especially serious crimes in the territory of another state which have been directed against the Republic of Latvia or against the interests of its inhabitants, shall be held criminally liable in accordance with this Law irrespective of the laws of the state in which the crime has been committed, if they have not been held criminally liable or committed to stand trial in accordance with the laws of the state where the crime was committed.
- 4) Third-country nationals persons who do not have a permanent residence permit for the Republic of Latvia and who have committed a criminal offence in the territory of another state, in the cases provided for in international agreements binding upon the Republic of Latvia, irrespective of the laws of the state in which the offence has been committed, shall be held liable in accordance with this Law if they have not been held criminally liable for such offence or committed to stand trial in the territory of another state.

### CRIMES UNDER INTERNATIONAL LAW

Criminal Code

Crimes against Humanity and Peace, War Crimes and Genocide

Section 71. Genocide

For a person who commits genocide, that is, commits intentional acts for purposes of the destruction in whole or in part of any group of persons identifiable as such by nationality, ethnic origin, race, or a defined religion, by killing members of the group, inflicting upon them physical injuries hazardous to life or health or causing them to become mentally ill, intentionally causing conditions of life for such people as result in their physical destruction in whole or in part, utilising measures the purpose of which is to prevent the birth of children in such group, or transferring children on a compulsory basis from one group of persons into another, the applicable sentence is life imprisonment or deprivation of liberty for a term of not less than three and not exceeding twenty years.

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<sup>904</sup> Questionnaire response.

<sup>905</sup> Questionnaire response.

<sup>906</sup> Unofficial translation - see: <http://www.legislationline.org/documents/section/criminal-codes>.



#### Section 71.1 Incitement to Genocide

For a person who commits incitement to genocide, the applicable sentence is deprivation of liberty for a term not exceeding eight years.

#### Section 71.2 Crimes against Humanity

For a person who commits crime against humanity, that is, for an activity which is performed as a part of vast or systematic offensive to civilians and which has been expressed as homicide, extermination, enslavement, deportation or forced movement, unlawful deprivation or limitation of liberty, torture, rape, involvement of a person into sexual slavery, compelling the engaging in prostitution, forced fertilisation or sterilisation, or sexual violence of similar degree of severity, apartheid, persecution of any group of people or union on the basis of political, racial, national, ethnical, cultural, religious or gender affiliation or other reasons which have been recognised as inadmissible in the international law, in relation to any activity indicated in this Section or genocide, or war crime or other activity provided for in the international law binding upon the Republic of Latvia, which causes serious physical or mental suffering, the applicable sentence is life imprisonment or deprivation of liberty for a term of not less than three and not exceeding twenty years.

#### Section 72. Crimes against Peace

For a person who commits crimes against peace, that is, commits planning, preparation or instigation of, or participation in, military aggression, or commits conducting of a war of aggression in violation of international agreements binding upon the Republic of Latvia, or commits participation in a conspiracy for the purpose of committing crimes mentioned in this Section, the applicable sentence is life imprisonment or deprivation of liberty for a term of not less than three and not exceeding twenty years.

#### Section 73. Manufacture, Amassment, Deployment and Distribution of Weapons of Mass Destruction

For a person who commits manufacture, amassment, deployment or distribution of nuclear, chemical, biological, bacteriological, toxic or other weapons of mass destruction, the applicable sentence is life imprisonment or deprivation of liberty for a term of 37 not less than three and not exceeding twenty years.

#### Section 74. War Crimes

For a person who commits war crimes, that is, commits violation of provisions or law, in regard to prohibited conduct in war, comprised in international humanitarian law binding upon the Republic of Latvia, including murder, torture of a person protected by humanitarian law or inhuman treatment of such person, taking of hostages, unlawful deportation, movement, limitation of liberty, unjustifiable destruction of cities and other entities, or other prohibited activity - the applicable sentence is life imprisonment or deprivation of liberty for a term of not less than three and not exceeding twenty years.

#### Section 74<sup>1</sup>. Acquittal of Genocide, Crime against Humanity

For a person who commits public glorification of genocide, crime against humanity, crime against peace or war crime or public denial or acquittal of implemented genocide, crime against humanity, crime against peace or war crime - the applicable sentence is deprivation of liberty for a term of not less than five years or community work.

## Lithuania

### Overview

Lithuania has specific provisions in its Criminal Code criminalising genocide,<sup>907</sup> crimes against humanity<sup>908</sup> and war crimes.<sup>909</sup> Torture and enforced disappearance are criminalised in the context of crimes against humanity and war crimes, but not as crimes in their own right.

Lithuanian criminal law<sup>910</sup> provides for both active personality and protective jurisdiction in relation to all crimes. Article 5 of the Criminal Code provides for active personality jurisdiction and limited universal jurisdiction, by which citizens of the Republic of Lithuania and other permanent residents are liable for crimes committed abroad. Article 6 provides for protective jurisdiction, whereby third-country nationals will be liable for crimes they commit against the State of Lithuania.<sup>911</sup>

Article 7 of the Criminal Code provides for universal jurisdiction. It provides that anyone is liable under the Code, regardless of citizenship and place of residence, place of commission of the crime or whether the act committed is punishable under the laws of that place, where the crimes are liable to punishment under treaty agreement. Specific reference is made to the crimes contained in Articles 99-113 of the Criminal Code, which include genocide, crimes against humanity and war crimes.

### Issues

**Nexus requirements (including presence or residence):** The Code of Criminal Procedure usually requires the presence and participation of the suspect both in pre-trial investigation and at the trial stage, also at the summons stage except in exceptional circumstances.<sup>912</sup> However, where the accused is not in the territory of the Republic of Lithuania and where he or she specifically avoids attending court, he or she may be tried *in absentia*,<sup>913</sup> although such trial may be postponed if it becomes apparent during trial that the case cannot be solved without his or her participation. These requirements are for crimes generally. There are no residence requirements, except in relation to the limited universal jurisdiction in Article 5.

**Subsidiarity:** There do not appear to be any rules on subsidiarity in Lithuanian legislation. Article 8 of the Criminal Code only excludes persons who have committed crimes under universal jurisdiction where he or she has already served a sentence, or part of a sentence, or has been released or acquitted in relation to those crimes.

**Double criminality:** A double criminality requirement exists under Article 8(1) of the Criminal Code for jurisdiction under Articles 5 (active personality and limited universal

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<sup>907</sup> CC, Article 99.

<sup>908</sup> CC, Article 100.

<sup>909</sup> CC, Articles 101-113.

<sup>910</sup> See translation of Lithuanian Criminal Code at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=366707](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=366707) (last accessed December 2010).

<sup>911</sup> “The aliens who do not have a permanent residence in the Republic of Lithuania shall be liable under a criminal law where they commit crimes abroad against the State of Lithuania as provided for in Articles 114-128 of this Code”. The crimes for which ‘aliens’ will be liable under this article consist of offences against the state, namely espionage, treason, disclosure of state secrets and violation of international sanctions, among others. Some of these crimes may be committed by citizens of the Republic of Lithuania.

<sup>912</sup> CCP, Articles 21, 22, 245, 246 - exceptional circumstances at the summons stage include imprisonment, force majeure, death of close family and illness, among others. Other reasons may be deemed valid at the discretion of the pre-trial investigator, prosecutor or pre-trial investigative judge (Articles 18, 35, 19 respectively) or a court of law.

<sup>913</sup> CCP, Articles 246-433 (questionnaire response - no translation of CCP being available).

jurisdiction) and 6 (protective jurisdiction). Double criminality is not required for universal jurisdiction under Article 7.

**Prosecutorial and Executive discretion:** There are no specific rules for offences falling under universal jurisdiction. These would therefore be dealt with as ordinary crimes under the Criminal Code of Procedure. The Prosecutor or pre-trial investigator in charge of initiating pre-trial investigations has discretion to refuse to initiate investigations in cases where the facts about the crime committed are apparently false or where circumstances provided for under Lithuanian law makes criminal process impossible.<sup>914</sup>

**Ability to review decisions of the prosecutor or other governmental body:** Where a pre-trial investigator refuses to initiate investigations, this may be appealed to the prosecutor, whose decision not to proceed may further be appealed to the pre-trial judge. This decision may again be appealed to a regional court.<sup>915</sup>

**Statutes of limitation:** There is no statute of limitation for crimes against humanity, including genocide and certain war crimes as provided for and described in the section “*Crimes against humanity and war crimes*” (see table below).<sup>916</sup>

**Immunities:** Immunity is provided for certain persons<sup>917</sup> under the Lithuanian Constitution. People who enjoy immunity from criminal jurisdiction under international legal norms cannot be detained or arrested.<sup>918</sup>

**Victims’ role in proceedings:** The Code of Criminal Procedure enables private prosecution cases,<sup>919</sup> although these are limited to the victims of certain ordinary crimes only.<sup>920</sup> However, if the criminal acts are of public importance or inflict harm on a person who is unable to defend his own legal interests, the prosecutor will initiate the criminal proceedings. Private prosecutions cannot be initiated with respect to crimes which are subject to universal jurisdiction.<sup>921</sup>

Persons who have suffered material or immaterial harm as a result of a crime are entitled to submit a civil lawsuit against the suspect or accused. This will be tried alongside the criminal case.<sup>922</sup> Where the civil lawsuit is rejected by the ruling in the criminal case, the civil complainant will be unable to submit the same lawsuit under civil procedure; conversely, where it is rejected under the civil procedure, the complainant may not submit the same civil lawsuit within the criminal case.<sup>923</sup>

**Victim and witness protection:** The Code of Criminal Procedure provides for the protection of victims and witnesses in relation to crimes generally.<sup>924</sup> Victims or witnesses in the context of universal jurisdiction crimes will be provided for under the same rules. These include in-court protective measures such as allowing testimony to be given remotely or read out<sup>925</sup> and providing anonymity during the proceedings<sup>926</sup> and also at the

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<sup>914</sup> CCP, Article 168. The questionnaire response relied on does not specify what circumstances these might be.

<sup>915</sup> Provided for under the CCP - questionnaire response.

<sup>916</sup> Criminal Code, Article 95, which covers crimes listed under Article 99-106 and 110-112 respectively.

<sup>917</sup> Members of the Seimas, President of the Republic, members of the government, judges of the constitutional courts and other courts, persons on diplomatic missions, among others.

<sup>918</sup> CCP, Article 3(1)(i).

<sup>919</sup> CCP, Articles 407-409.

<sup>920</sup> Crimes enumerated under the CCP, Articles 139(1), 140, 148, 152, 154, 155, 165, 168(1) and (3), 187, 188 and 313.

<sup>921</sup> Crimes under the Criminal Code, Article 7, which include under (1) crimes against humanity and war crimes.

<sup>922</sup> CCP, Article 109.

<sup>923</sup> CCP, Article 112(4).

<sup>924</sup> CCP, Article 28(2).

<sup>925</sup> CCP, Article 81.

pre-trial stage.<sup>927</sup> More particular protection is provided for victims and witnesses under the age of eighteen in court, but also at the pre-trial stage, for example preventing them from being questioned more than once during the pre-trial investigation.<sup>928</sup> Anonymity is generally provided for victims for whom there is a danger to life, health, liberty or property, as well as for their family members or close relatives, where their testimony plays a material role in the proceedings.<sup>929</sup>

There is also more specific legislation designed to protect victims and witnesses.<sup>930</sup> Protective measures include physical protection of persons and property, temporary relocation, identity change including plastic surgery.<sup>931</sup> Lithuania is also a party to a number of international treaties which provide protection from criminal acts.<sup>932</sup>

**Specialised War Crimes Unit:** The Division of Special Investigations of the Prosecutor General's Office (PGO) is responsible for the conduct of pre-trial investigations, including investigations into crimes against humanity, genocide and war crimes. The Division is headed by the senior prosecutor, who is directly accountable to the Assistant Prosecutor General, and employs four prosecutors, the assistant senior prosecutor and a senior specialist.

**Participation in EU Genocide Network:** The senior prosecutor from the Division of Special Investigations is a member of the network of European Union contact persons responsible for coordination of investigations of genocide, crimes against humanity and war crimes. He also attends meetings of the international network of experts in investigating crimes against humanity and war crimes established at the initiative of the Secretary General of Interpol, as well as conferences on these issues in Lithuania and abroad. Prosecutors from the Division of Special Investigations constantly participate in the work of the Review Commission.

## Cases

The authors are not aware of any cases of prosecution of crimes under international law in Lithuania.

## Relevant Legislation

### JURISDICTION

Criminal Code<sup>933</sup>

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<sup>926</sup> CCP, Article 282.

<sup>927</sup> CCP, Article 203.

<sup>928</sup> CCP, Article 186(2).

<sup>929</sup> CCP, Article 199.

<sup>930</sup> Law on Protection of Participants of Criminal Proceedings and Tactical Operations, Officers of Law Enforcement and Justice against Criminal Acts of the Republic of Lithuania.

<sup>931</sup> Ibid., Article 7.

<sup>932</sup> Trilateral Treaty of the Government of the Republic of Lithuania, the Government of the Republic of Estonia and the Government of the Republic of Latvia on Cooperation in Implementing Witness and Victim Protection (ratified 24-05-2001); Agreement of the Government of the Republic of Lithuania and the Cabinet of the Ukraine on Cooperation in Fighting Crime and International Terrorism (in force since 12-02-2008); Treaty of the Government of the Republic of Lithuania and the Government of the Republic of Slovakia Disclosing, Investigating and Preventing Crime (in force since 14-03-2009); Agreement between the Police Department under the Ministry of the Interior of the Republic of Lithuania and Chief Police Superintendent of the Republic of Poland on Cooperation on Issues of Witness Protection (signed 18-05-2004).

<sup>933</sup> Translation from [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=366707](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=366707) (last accessed December 2010).

**Article 5 - Criminal Liability of Citizens of the Republic of Lithuania and Other Permanent Residents of Lithuania for the Crimes Committed Abroad**

Citizens of the Republic of Lithuania and other permanent residents of Lithuania shall be held liable for the crimes committed abroad under this Code.

**Article 6 - Criminal Liability of Aliens for the Crimes Committed Abroad against the State of Lithuania** The aliens who do not have a permanent residence in the Republic of Lithuania shall be liable under a criminal law where they commit crimes abroad against the State of Lithuania as provided for in Articles 114-128 of this Code.

**Article 7 - Criminal liability for the crimes provided for in Treaties**

Persons shall be liable under this Code regardless of their citizenship and place of residence, also of the place of commission of a crime and whether the act committed is subject to punishment under laws of the place of commission of the crime where they commit the following crimes subject to liability under treaties:

- 1) crimes against humanity and war crimes (Articles 99-113);
- 2) trafficking in human beings (Article 147);
- 3) purchase or sale of a child (Article 157);
- 4) production, storage or handling of counterfeit currency or securities (Article 213);
- 5) money or property laundering (Article 216);
- 6) act of terrorism (Article 250);
- 7) hijacking of an aircraft, ship or fixed platform on a continental shelf (Article 251);
- 8) hostage taking (Article 252);
- 9) unlawful handling of nuclear or radioactive materials or other sources of ionising radiation (Articles 256, 256<sup>(1)</sup> and 257);
- 10) the crimes related to possession of narcotic or psychotropic, toxic or highly active substances (Articles 259-269);
- 11) crimes against the environment (Articles 270, 270<sup>(1)</sup>, 271, 272, 274).

**Article 8 - Criminal liability for the crimes committed abroad**

1) A person who has committed abroad the crimes provided for in Articles 5 and 6 of this Code shall be held criminally liable only where the committed act is recognised as a crime and is punishable under the criminal code of the state of the place of commission of the crime and the Criminal Code of the Republic of Lithuania. Where a person who has committed a crime abroad is prosecuted in the Republic of Lithuania, but a different penalty is provided for this crime in each country, the person shall be subject to a penalty according to laws of the Republic of Lithuania, however it may not exceed the maximum limit of penalty specified in the criminal laws of the state of the place of commission of the crime.

2) A person who has committed the crimes provided for in Articles 5, 6, and 7 of the Criminal Code of the Republic of Lithuania shall not be held liable under this Code where he:

1. Has served the sentence imposed by a foreign court;
2. Has been released from serving the entire or a part of the sentence imposed by a foreign court;
3. Has been acquitted or released from criminal liability or punishment by a foreign court's judgement, or no penalty has been imposed by reason of the statute of limitation or on other legal grounds provided for in that state.

**CRIMES UNDER INTERNATIONAL LAW**

**Crimes against humanity and war crimes**

**Article 99 - Genocide**

A person who, seeking to physically destroy, in whole or in part, the persons belonging to any national, ethnic, racial, religious, social or political group, organises, is in charge of or participates in their killing, torturing, causing bodily harm to them, hindering their mental development, their deportation or otherwise inflicting on them the conditions of life bringing about the death of all or a part of them, restricts the birth of the persons belonging to those groups or forcibly transfers their children to other groups shall be punished by imprisonment for a term of five up to twenty years or by life imprisonment.

**Article 100 - Treatment of Persons Prohibited under International Law**

A person who intentionally, by carrying out or supporting the policy of the State or an organisation, attacks civilians on a large scale or in a systematic way and commits their killing or causes serious impairment to their health; inflicts on them such conditions of life as bring about their death; engages in trafficking in human beings; commits deportation of the population; tortures, rapes, involves in sexual slavery, forces to engage in prostitution, forcibly inseminates or sterilises; persecutes any group or community of persons for political, racial, national, ethnic, cultural, religious, sexual or other reasons prohibited under international law; detains, arrests or otherwise deprives them of liberty, where such a deprivation of liberty is not recognised, or fails to report the fate or whereabouts of the persons; carries out the policy of apartheid shall be punished by imprisonment for a term of five up to twenty years or by life

imprisonment.

**Article 101 - Killing of Persons Protected under International Law**

Any person who, in violation of norms of international humanitarian law in time of war or during an international armed conflict, occupation or annexation, orders to kill or kills: the persons who had surrendered by laying down their arms or not having any means of resistance; the wounded, the sick or seamen of a sinking war ship; prisoners of war; the civilians present in an occupied, annexed or captured territory or in the territory of hostilities or other persons under international protection in time of war shall be punished by imprisonment for a period of ten up to twenty years or by life imprisonment.

**Article 102 - Deportation of Civilians of an Occupied State or Transfer of the Civilian Population of an Occupying State**

A person who, in time of war or during an international armed conflict or under the conditions of occupation or annexation, orders to deport or carries out deportation of the civilian population from an occupied or annexed territory to the territory of an occupying or annexing country or of a third country; orders to transfer or transfers the civilian population of the occupying state to the territory of the occupied country shall be punished by imprisonment for a term of three up to fifteen years.

**Article 103 - Causing Bodily Harm to, Torture or Other Inhuman Treatment of Persons Protected under International Humanitarian Law**

A person who, in time of war or during an armed international conflict or under the conditions of occupation or annexation and in violation of norms of international humanitarian law, inflicts a serious bodily harm to or an illness upon or tortures the wounded, the sick, seamen of a sinking warship, prisoners of war, civilians or other persons protected under international humanitarian law, conducts a biological or medical experiment with them, unlawfully takes their organ or tissue for transplanting purposes, unlawfully takes their blood or subjects them to other inhuman treatment, imposes upon them criminal penalties without a judgement of an independent and impartial court or without guarantees of defence in court or commits an outrage on the remains of the fallen; shall be punished by imprisonment for a term of three up to twelve years.

**Article 104 - Violation of Norms of International Humanitarian Law Concerning Protection of Civilians and Their Property in Time of War**

A person who, in time of war or during an armed international conflict or under the conditions of occupation or annexation and in violation of norms of international humanitarian law, drives out the civilian population from their homes or resettles them or forces them to change their religion; rapes women, involves them in sexual slavery or forces them to engage in prostitution; forcibly sterilises or inseminates them; utilises means of intimidation or terror; takes hostages; applies collective punishment; confines in a concentration camp; separates children from their parents or guardians; threatens death by starvation; imposes criminal penalties without a judgement of an independent and impartial court or without guarantees of defence in court; confiscates their property or conducts mass expropriation thereof for purposes other than military necessity; imposes unjustifiably large contributions and requisitions shall be punished by imprisonment for a term of three up to fifteen years.

**Article 105 - Forcible Use of Civilians or Prisoners of War in the Armed Forces of the Enemy**

1) A person who, in time of war, during an armed international conflict, occupation or annexation and in violation of international humanitarian law, forces civilians or prisoners of war to serve in the armed forces of their enemy, uses them as a human shield in a military operation, conscripts or recruits children under the age of 18 years into the armed forces or uses them in a military operation shall be punished by imprisonment for a term of three up to ten years.

2) A person who conscripts or recruits children under the age of 18 years into military service in the military groups not belonging to the armed forces of the State or uses them in a military operation shall be punished by imprisonment for a term of three up to twelve years.

**Article 106 - Destruction of Protected Objects or Plunder of National Valuable Properties**

A person who issues an order not justifiable by military necessity to destroy or destroys the historic monuments, objects of culture, art, education, upbringing, science or religion protected by treaties or national legal acts, plundered national valuable properties in an occupied or annexed territory and causes extensive damage shall be punished by imprisonment for a term of three up to twelve years.

**Article 107 - Delay in Repatriation of Prisoners of War**

A person who, after the signing of a peace treaty or cessation of hostilities, unjustifiably delays the release or repatriation of prisoners of war shall be punished by imprisonment for a term of up to three years or a fine.

**Article 108 - Delay in Release of Interned Civilians or Impeding Repatriation of Other Civilians**

A person who, after cessation of hostilities, unjustifiably delays the release of interned civilians or does not permit other civilians to repatriate to their Homeland from the territory of an armed conflict, where they so wish shall be punished by imprisonment for a term of up to three years or a fine.

**Article 109 - Unlawful Use of the Emblem of the Red Cross, Red Crescent, Red Crystal and the United Nations Organization or Another Universally Recognised Emblem (Sign) or Designation**

A person who unlawfully uses the emblem of the Red Cross, Red Crescent, Red Crystal, the United Nations Organization or another universally recognised emblem (sign) or designation during an international or other than international armed conflict shall be punished by imprisonment for a term of up to three years or a fine.

**Article 110 - Aggression**

Any person who causes an aggression against another state or is in command thereof shall be punished by imprisonment for a period of ten up to twenty years or by life imprisonment.

#### Article 111 - Prohibited Military Attack

1) A person who orders to carry out or carries out a military attack prohibited under international humanitarian law against civilians, medical or civil defence personnel, a military or civilian hospital, a first-aid post, a vehicle carrying wounded or sick persons, the personnel of the International Red Cross Committee or a National Red Cross or Red Crescent Society, a military attack against an undefended settlement or a demilitarised zone, a military attack without selecting a specific target and being aware that it could result in civilian casualties or destruction of a civilian object, or a military attack against the combatants who had clearly withdrawn from the battle and had given up resistance shall be punished by imprisonment for a term of three up to fifteen years.

2) A person who orders to carry out or carries out a military attack contravening international humanitarian law against a target posing a considerable danger to the environment and people, such as a nuclear plant, a dam, a facility for the storage of toxic substances or another object, while being aware that it could cause grave consequences, or a military attack using weapons of mass destruction shall be punished by imprisonment for a period of ten up to twenty years or by life imprisonment.

#### Article 112 - Use of Prohibited Means of Warfare

A person who, in violation of treaties to which the Republic of Lithuania is party or universally accepted international practices regarding means of warfare or methods of warfare, orders the use of or uses in hostilities prohibited means of warfare or methods of warfare shall be punished by imprisonment for a term of three up to ten years.

#### Article 113 - Marauding

A person who orders the plundering of or plunders property on the battlefield from the fallen or the wounded shall be punished by imprisonment for a term of up to five years.

## Luxembourg

### Overview

Luxembourg law criminalises genocide,<sup>934</sup> war crimes<sup>935</sup> and torture<sup>936</sup> generally, but also more specifically war crimes, genocide and crimes against humanity in the context of certain conflicts in the former Yugoslavia and in Rwanda and neighbouring countries.<sup>937</sup> There are no provisions relating to crimes against humanity or enforced disappearance generally. These are thus treated as ordinary crimes.

Article 5 of the Code of Criminal Procedure<sup>938</sup> allows for active personality jurisdiction for crimes committed by a Luxembourg national outside Luxembourg. Where the said national has been acquitted or pardoned in another country, no action will be taken unless the crimes are committed in times of war. This provision also provides a type of universal jurisdiction: foreign nationals who are joint offenders or accomplices of a crime committed outside Luxembourg may be prosecuted in Luxembourg jointly with the accused Luxembourg national. In general, proceedings can only be initiated at the request of the public prosecutor and must be preceded by a complaint from the injured party or his family, or by an official complaint to the Luxembourg authorities by the authority of the country where the offence was committed.<sup>939</sup> With some exceptions<sup>940</sup> the accused must be located either in Luxembourg or in an enemy country, or where the Government has obtained his or her extradition.

Article 5-1 provides for universal jurisdiction in relation to any Luxembourg or foreign national who is present in Luxembourg and who has committed certain crimes<sup>941</sup> abroad, whether or not such crimes are punishable in the place where they were committed.

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<sup>934</sup> Law of 8 August 1985 Concerning the Repression of Genocide (8 août 1985 - *Loi portant répression du génocide*), Article 6.

<sup>935</sup> Including certain offences committed in war time that are not justified by the laws and customs of war under the Law of 2 August 1947 Concerning the Repression of War Crimes (*Loi du 2 août 1947 sur la répression des crimes de guerre*) (*Mém. 1947. 755 - Pas. 1947. 500*), Article 1. This provides jurisdiction to War Crimes Courts (*Cour[s] de crimes de guerre*); also grave breaches of the 1949 Conventions under the Law of 9 January 1985 Concerning the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949 (*Loi du 9 janvier 1985 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949*) (*Mém. A N° 2 du 25 janvier 1985, p. 24*), Article 10.

<sup>936</sup> CCP, Article 7-3, in conjunction with CC, Articles 260-1 to 260-4.

<sup>937</sup> Law of 18 May 1999 Introducing Certain Measures for Facilitating Cooperation with: 1) the International Tribunal created by the United Nations Security Council in its Resolution 827 of 25 May 1993 for the judgment of persons presumed responsible for serious violations of international humanitarian law committed on the territory of the former Socialist Federal Republic of Yugoslavia since 1991 2) the International Tribunal created by the United Nations Security Council in its Resolution 955 of 8 November 1994 for the judgment of persons presumed responsible for acts of genocide or other serious violations of international humanitarian law committed on the territory of Rwanda and Rwandan citizens presumed responsible for such acts or violations committed on the territory of neighbouring States, between 1 January and 31 December 1994 (*Loi du 18 mai 1999 introduisant certaines mesures visant à faciliter la coopération avec: 1) le Tribunal international créé par le Conseil de Sécurité des Nations Unies dans sa Résolution 827 du 25 mai 1993 pour le jugement des personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ancienne République fédérative socialiste de Yougoslavie depuis 1991 2) le Tribunal international créé par le Conseil de Sécurité des Nations Unies dans sa Résolution 955 du 8 novembre 1994 pour le jugement des personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commises sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins, entre le 1er janvier et le 31 décembre 1994*), Article 2.

<sup>938</sup> The translation of relevant Luxembourg criminal law provisions are taken from the questionnaire response.

<sup>939</sup> CCP, Article 5.

<sup>940</sup> CCP, Article 5 in conjunction with Article 7.

<sup>941</sup> Namely those under Articles 163, 169, 170, 177, 178, 185, 187-1, 192-1, 192-2, 198, 199, 199b and 368 to 382-2 of the Criminal Code - these include such crimes of forgery and counterfeiting, which are crimes against Luxembourg state interests.



Article 7 provides for protective and passive personality jurisdiction in relation to certain crimes committed in wartime.<sup>942</sup>

Universal jurisdiction in relation to:

- war crimes is provided for in the Law of 9 January 1985;<sup>943</sup>
- genocide is provided for in the Law of 8 August 1985;<sup>944</sup>
- torture<sup>945</sup> is provided for under Article 7(4) of the Code of Criminal Procedure; where an extradition request has been made but where it has not been possible to extradite.

## Issues

**Nexus requirements (including presence or residence):** The 9 January 1985 law that provides for universal jurisdiction over grave breaches of the Geneva Conventions specifies that presence is not required.<sup>946</sup>

To prosecute someone in Luxembourg for war crimes, crimes against humanity or genocide that fall within the jurisdictions of the International Criminal Tribunals for Rwanda or the former Yugoslavia, however, the alleged perpetrator needs to be present in Luxembourg.<sup>947</sup>

Prosecutions for other acts of genocide or for certain offences committed in wartime that are not justified by the laws and customs of war, require that the suspect be either found in Luxembourg territory, found in an “*enemy country*” (*pays ennemi*), or extradited to Luxembourg.<sup>948</sup>

Prosecutions for torture can proceed as long as one of two possible criteria are satisfied, both of which imply the perpetrator’s presence at some stage: either 1) the victim is resident in Luxembourg;<sup>949</sup> or 2) extradition of the alleged perpetrator must have been requested but not granted.<sup>950</sup> Aside from presence, certain residence requirements apply to civil claims when brought as part of criminal proceedings.<sup>951</sup> With respect to civil claims brought separately, generally the tribunal where the defendant is resident has competence to hear the case.

**Subsidiarity:** There are no provisions regarding subsidiarity.

**Double criminality:** This is only required for active personality jurisdiction, where the person has been found guilty of the crime in the state of commission.

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<sup>942</sup> Including abduction of minors, indecent exposure, rape, prostitution or the corruption of minors, or homicide or voluntary bodily injury, or attacks against personal freedom.

<sup>943</sup> Relating to the Repression of severe abuses according to the International Conventions of 12 August 1949, Article 10.

<sup>944</sup> Law of 8 August 1985 on the suppression of genocide, Article 6.

<sup>945</sup> And other crimes including terrorism and people trafficking.

<sup>946</sup> Law of 9 January 1985 Concerning the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949, Article 10. (Translation found in Amnesty International, “Universal Jurisdiction - the duty of states to enact and enforce legislation,” AI Index: IOR 53/002/2001, 1 September 2001.) It states: “Every individual, who has committed, outside the territory of the Grand Duchy, a violation covered by the present law, can be prosecuted in the Grand Duchy even if he is not found here.”

<sup>947</sup> Law of 18 May 1999 Introducing Certain Measures for Facilitating Cooperation with the international tribunals for Rwanda and the former Yugoslavia, *supra*, Article 2.

<sup>948</sup> Law of 8 August 1985 Concerning the Repression of Genocide, Article 6; and Law of 2 August 1947 Concerning the Repression of War Crimes, Article 1.

<sup>949</sup> CCP, Article 7-3. The wording of this provision appears to imply residence of the victim at the time of the commission of the offence.

<sup>950</sup> CCP, Article 7-4.

<sup>951</sup> CCP, Article 60.

**Prosecutorial and Executive discretion:** The Code of Criminal Procedure grants the public prosecutor wide discretion,<sup>952</sup> subject to the rights of the victim. The prosecutor may decide not to prosecute if he or she deems that the crime is not sufficiently serious in terms of harm to the victim or to society in general, and will also make the decision bearing in mind whether the guilty party acted for excusable reasons.

**Statutes of limitation:** There is no statute of limitation for war crimes.<sup>953</sup> For other crimes under international law, the statute of limitations applicable to ordinary crimes applies.<sup>954</sup>

**Immunities:** The Luxembourg Constitution provides for certain cases of immunity, for example the Grand Duke.<sup>955</sup> Deputies may be prosecuted for criminal matters,<sup>956</sup> however all arrests are subject to the Chamber's authorisation, unless the deputy in question is caught in the act of committing a serious offence.

**Victims' role in proceedings:** A victim can bring an action in two ways. First, as a civil party before the investigating magistrate, following which the investigating magistrate will be obliged to carry out an investigation from which a prosecution will ensue.

Second, in accordance with Article 3 of the Code for Criminal Procedure, civil actions can be pursued simultaneously<sup>957</sup> and before the same judges as those hearing the prosecution case. They can also be heard separately, however, and in this case the action will be halted until after the final verdict relating to the public prosecution, which may have started before or after the civil action.

Furthermore, the victim can appeal for interlocutory proceedings to grant a provision, on condition that the existence of the obligation cannot be seriously disputed.<sup>958</sup> The court rendering the sentence, notwithstanding any acquittal based on the provisions of Article 71, Paragraph 1 of the Penal Code, remains competent to hear the civil action that had previously been brought before it.<sup>959</sup> If the investigating authorities order a dismissal based on the provisions of Article 71, Paragraph 1 of the Penal Code, the civil action must be pursued before the civil courts.<sup>960</sup>

Article 3 of the Code for Criminal Procedure provides only that any national association with legal personality and approved by the Ministry of Justice is entitled to exercise the rights of the civil party with regard to certain crimes,<sup>961</sup> and will only exercise these as regards an individual when the individual declares in writing they are not opposed to taking such action.

**Victim and witness protection:** The Code of Criminal Procedure provides for in-court and out-of-court protective measures for victims and witnesses. These include, for example,

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<sup>952</sup> CCP, Article 23(1).

<sup>953</sup> Law of 24 December 1974, Articles 1 and 2: War crimes as defined by Articles 1 and 2 of the Law of 2 August 1947 on the repression of war crimes, and the articles contained in Chapters II and III of Title I of Book II, in Chapter I of Title VI of Book II and in Chapters I and IV of Title VIII of Book II of the Penal Code, which concerns crimes committed between 9 May 1940 and 8 May 1945.

<sup>954</sup> Criminal Code, Article 635, and Code of Criminal Investigation, Article 637, which deal with crimes against minors.

<sup>955</sup> Luxembourg Constitution, Article 4.

<sup>956</sup> Luxembourg Constitution, Article 69.

<sup>957</sup> Law of 10 November 1966.

<sup>958</sup> Law of 6 October 2009.

<sup>959</sup> Law of 8 August 2000.

<sup>960</sup> Law of 8 August 2000.

<sup>961</sup> Namely those under Articles 375, 382-1, 382-2, 401b, 409, 444 (2), 453, 454, 455, 456, 457, 457-1, 457-2, 457-3 and 457-4 of the Criminal Code.

hearings via telephone or audiovisual link.<sup>962</sup> Victims and witnesses may also benefit from physical protection.<sup>963</sup>

**Participation in EU Genocide Network:** Luxembourg has designated a contact point for the EU Genocide Network.

## Cases

In 1998, Chilean refugees in Luxembourg filed a complaint against former Chilean President Augusto Pinochet following his arrest in London. The investigating judge ruled that Luxembourg law at the time did not provide for jurisdiction over the alleged acts.<sup>964</sup>

## Relevant Legislation

### JURISDICTION

Code of Criminal Procedure<sup>965</sup>

Article 5

(Grand Duchy Decree, 25 May 1944) Any Luxembourg national who has committed a crime outside the Grand Duchy of Luxembourg punishable by Luxembourg law can be prosecuted and tried in the Grand Duchy.

(L 31 May 1999) Any Luxembourg national found guilty outside the Grand Duchy of an action considered as a crime by Luxembourg law can be prosecuted and tried in the Grand Duchy of Luxembourg, if the action is punishable by the laws in the country where the action was committed.

However, with the exception of crimes and offences committed during times of war, irrespective if a crime or an offence is concerned, no action will be taken when the offender has been acquitted in a foreign country for the same offence.

This also applies if, after having been found guilty, the sentence has been served or the person pardoned.

Any time spent in a foreign prison for an offence that is also punishable in the Grand Duchy, will be taken into consideration for sentences that give rise to the loss of liberty.

For crimes committed against a Luxembourg or foreign national, proceedings can only be initiated at the request of the public prosecutor; it must be preceded by a complaint from the injured party or his family, or by an official complaint to the Luxembourg authorities by the authority of the country where the offence was committed, or, if the foreign offence was committed in wartime against a national from a country allied to Luxembourg, according to the meaning of Article 117, Paragraph 2 of the Penal Code (Grand Ducal Decree of 14 July 1943), by the authority of the country where the injured foreigner is a national.

(Grand Ducal Decree of 25 May 1944) Foreign nationals who are joint offenders or who are accomplices of a crime committed outside the territory of the Grand Duchy of Luxembourg may be pursued in the Grand Duchy, jointly with the accused Luxembourg national or after the latter has been sentenced.

(Grand Ducal Decree of 25 May 1944) With the exception of the cases set out in Article 7 below and crimes or offences committed in wartime, in a foreign country, by a Luxembourg national against a Luxembourg national or a national from an allied country, the offences set out in this article shall only be pursued if the accused is located either in the Grand Duchy of Luxembourg or in an enemy country, or if the Government has obtained his extradition.

Article 5-1:

(L. 13 January 2002) Any Luxembourg or foreign national present in the Grand Duchy of Luxembourg who has committed one of the offences set out in Articles 163, 169, 170, 177, 178, 185, 187-1, 192-1, 192-2, 198, 199, 199b and 368 to 382-2 of the Penal Code may be prosecuted and tried in the Grand Duchy of Luxembourg, even though the offence is not punishable by the laws in the country where the act was committed and the Luxembourg authorities have not received a complaint from the injured party, or a complaint from the country where the offence was

<sup>962</sup> CCP, Article 48-1, in particular relating to minors.

<sup>963</sup> Questionnaire response.

<sup>964</sup> Réquisitoire du 19 novembre 1998 du parquet du tribunal d'arrondissement de Luxembourg dans l'affaire de la plainte contre Augusto Pinochet, n° 18077/98/CD, reprinted in Annales du Droit Luxembourgeois 393 (1999).

<sup>965</sup> Translation of relevant Luxembourg criminal law provisions have been taken from the questionnaire response.

committed. (L. 13 March 2009)

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Article 7:

(L. 13 January 2002) Any foreign national who, outside the territory of the Grand Duchy, is found guilty, as an offender or an accomplice:

(1) Of a crime against the security of the State or against public safety; or of one of the offences set out in Articles 198, 199 and 199b of the Penal Code

(2) Of a crime or an offence against public trust, as provided for in Chapters I, II and III of Title III of Book II of the Penal Code, if the crime or offence relates to coins or monetary signs in the form of notes that are legal tender in the Grand Duchy, or concern objects, instruments, computer programmes or processes whose purpose is to produce, counterfeit, alter or forge the said

(3) Of a crime or an offence against public trust, as provided for in Chapters I, II and III of Title III of Book II of the Penal Code, if the crime or offence relates to coins or monetary signs in the form of notes that are legal tender in a foreign country, or whose issuance is or was authorised by a foreign state or by virtue of a provision having the effect of a law, or concern objects, instruments, computer programmes or processes whose purpose is to produce, counterfeit, alter or forge the said, or concern one of the offences set out in Article 192-1 and 192-2 of the Penal Code

(4) In wartime, any offence concerning the abduction of minors, indecent exposure, rape, prostitution or the corruption of minors, or homicide or voluntary bodily injury, or attacks against personal freedom committed against a Luxembourg national or a national from an allied country, may be pursued and judged according to the provisions set out in Luxembourg laws, if the offender is either in the Grand Duchy of Luxembourg or is in a foreign country, or if the Government obtains the extradition of the said offender.

...

Article 7-4

Any person found guilty in a foreign country of one of the offences set out in Articles 135-1 to 135-6 and 260-1 to 260-4, 382-1 and 382-2 of the Penal Code, can be prosecuted and tried in the Grand Duchy of Luxembourg when an extradition request is made and the interested party has not been extradited.

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Law of 9 January 1985 relating to the Repression of severe abuses according to the International Conventions of 12 August 1949

Article 10

Any person who has committed outside the territory of the Grand Duchy an offence covered by this law, can be prosecuted in the Grand Duchy even if not yet present therein.

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Law of 8 August 1985 on the suppression of genocide

Article 6

Any foreign national outside the territory of the Grand Duchy who commits, either as the offender or an accomplice, one of the offences set forth in Articles 1, 2, 3 and 4 of this law, may be prosecuted and tried according to the provisions of Luxembourg laws, if the said national is present either in the Grand Duchy, or in an enemy country, or if the Government has obtained his extradition.

CRIMES UNDER INTERNATIONAL LAW

Law of 9 January 1985 relating to the Repression of severe abuses according to the International Conventions of 12 August 1949

Article 1

Are considered crimes according to international law and prosecuted according to the provisions of the said law, the serious offences listed below that injure, by action or omission, persons or property protected by the Conventions signed in Geneva on 12 August 1949 and approved by the Law of 25 May 1953.

- 1) Intentional homicide
- 2) Torture or inhuman treatment, including biological experiments
- 3) Actions that intentionally cause severe suffering or serious physical injury or damage to health
- 4) Obliging a person protected by the Convention in terms of the treatment of prisoners of war or protected by a Convention relating to the protection of civilians in wartime, to serve in the armed forces of the enemy power
- 5) Depriving a person protected by the Convention in terms of the treatment of prisoners of war or protected by a Convention relating to the protection of civilians in wartime, of the right to be regularly and impartially tried according to the prescriptions of these Conventions
- 6) Deporting any person protected by the Convention relating to the protection of civilian in wartime

- 7) Transferring or detaining any person protected by the said Convention, when such actions are prohibited therein
- 8) Taking hostages
- 9) Destroying or appropriating property in a manner unjustified by military needs and executed on a wide scale basis.

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#### Law of 8 August 1985 on the suppression of genocide

##### Article 1

Will be found guilty of genocide, any person intending to destroy, wholly or partly, a national, ethnic, racial or religious group, as such, and committing one of the following acts:

- a) Murdering the members of the group
- b) Severely injuring the physical or mental integrity of the members of the group
- c) Intentionally submitting the group or the members of the group to such conditions likely to result in their total or partial physical destruction
- d) Applying measures likely to prevent the birth of children within the group
- e) The forced transfer of children from the group to another group

And any persons found guilty will be condemned to life imprisonment.

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#### Criminal Code

##### Article 260-1

Any person, such as custodian or a public agent or invested with public authority, any person responsible for public services or any person acting on the instigation or with the express or tacit approval of such persons, who has intentionally inflicted torture upon a person according to the meaning of the United Nations Convention on torture and other cruel, inhuman or degrading treatment or punishment, causing pain or suffering, whether physical or mental, for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, will be punished by a five to 10-year prison term.

## Malta

### Overview

Malta has enacted provisions in its Criminal Code incorporating the Rome Statute definitions of genocide, crimes against humanity and war crimes into its national law.<sup>966</sup>

Torture is also specifically criminalised under the Criminal Code,<sup>967</sup> but the crime of enforced disappearance (outside the context of a crime against humanity) is not.

Maltese law provides for active personality jurisdiction over the Rome Statute crimes and torture as defined in the Criminal Code.<sup>968</sup> Universal jurisdiction is also available for those crimes, although this is limited to permanent residents of Malta.<sup>969</sup>

Universal jurisdiction may also be taken over any person present in Malta who committed an act abroad which, if committed in Malta would constitute an offence, and the act involved the use of a bomb, grenade, rocket, automatic firearm, letter bomb or parcel bomb which endangered persons.<sup>970</sup> It may also be exercised over a person who cannot be extradited following a request (because they are a national or may be subject to the death penalty) even if there is no particular provision in Maltese law dealing with the crime.<sup>971</sup>

Passive personality jurisdiction exists over all crimes where the perpetrator is a national or permanent resident of Malta.<sup>972</sup>

### Issues

**Nexus requirements (including presence or residence):** Unless a person's extradition has been requested and denied,<sup>973</sup> permanent residence is generally required for the exercise of universal jurisdiction in relation to crimes under international law.<sup>974</sup> However, if the act involved the use of a bomb, grenade, rocket, automatic firearm, letter bomb or parcel bomb which endangered persons, presence in Malta is enough.<sup>975</sup>

**Subsidiarity:** If a victim appeals a decision not to prosecute a crime, and the Attorney General declares that agreement has been reached with the competent authorities of another country that the courts of that country will exercise jurisdiction over the crime, the declaration is to be considered conclusive and the appeal must be dismissed.<sup>976</sup>

**Double criminality:** Double criminality is not a requirement to exercise extraterritorial jurisdiction.

**Prosecutorial and Executive discretion:** Any person may make a report of a crime to the police. For more serious crimes, the police will gather evidence and bring it, as soon as

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<sup>966</sup> CC, Book I, Part II, Title I. See in particular Articles 54A-54D.

<sup>967</sup> CC, Article 139A.

<sup>968</sup> CC, Article 5(1)(d).

<sup>969</sup> CC, Article 5(1)(d).

<sup>970</sup> CC, Article 5(1)(e)(ii).

<sup>971</sup> CC, Article 5(1)(h).

<sup>972</sup> CC, Article 5(1)(d).

<sup>973</sup> CC, Article 5(1)(h).

<sup>974</sup> CC, Article 5(1)(d).

<sup>975</sup> CC, Article 5(1)(e)(ii).

<sup>976</sup> CC, Article 541(1).

possible, before the Magistrate's court.<sup>977</sup> Magistrate's courts then act as courts of criminal enquiry,<sup>978</sup> and decide whether there are sufficient grounds for committing the accused for trial on indictment.<sup>979</sup>

The case is then sent to the Attorney General, who may file the indictment in the Criminal Court or order the discharge of the accused, if he or she is of the opinion that there are not sufficient grounds for the filing of an indictment.<sup>980</sup> The Attorney General may also overturn a decision of the Magistrate's court to discharge the accused.<sup>981</sup>

If the Magistrate's Court discharges an accused for want of evidence, the police have a duty to continue to make further and fuller investigations into the case.<sup>982</sup>

For genocide, crimes against humanity and war crimes, the consent of the Attorney General is required before proceedings can be instituted.<sup>983</sup>

**Ability to review decisions of the prosecutor or other governmental body:** If the police receive a complaint and refuse to institute proceedings the person who made the report or complaint may make an application to the Magistrate's Court for an order to the police to institute proceedings.<sup>984</sup> If the court is satisfied that the report or complaint is prima facie justified, it will make such an order.

**Statutes of limitation:** The generally applicable rules as to prescription of offences are found in Article 688 of the Criminal Code. However, the operation of these prescription periods is specifically excluded in relation genocide, crimes against humanity and war crimes.<sup>985</sup>

The prescription period for the crime of torture under Article 139A is fifteen years.<sup>986</sup>

**Victims' role in proceedings:** Under the Maltese Criminal Code, criminal actions and civil actions are separate.<sup>987</sup>

A criminal action is prosecuted ex officio in all cases where the complaint of the private party is not required to set the action in motion<sup>988</sup> or where the law does not expressly leave the prosecution of the action to a private party.<sup>989</sup> The criminal action is defined in the Criminal Code as "*essentially a public action ... vested in the State and ... prosecuted in the name of the Republic of Malta, through the Executive Police or the Attorney General, as the case may be, according to law*".<sup>990</sup>

However, the complainant is allowed to be present at the court of enquiry proceedings and to engage an advocate or a legal procurator to assist him. Where the proceedings were instituted on the complaint of the victim, the victim may examine or cross-examine

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<sup>977</sup> CC, Article 356(1).

<sup>978</sup> CC, Article 389.

<sup>979</sup> CC, Article 401(2).

<sup>980</sup> CC, Article 433(1).

<sup>981</sup> CC, Article 433(3).

<sup>982</sup> CC, Article 404.

<sup>983</sup> CC, Article 541(2).

<sup>984</sup> CC, Article 541(1).

<sup>985</sup> CC, Art 541(5).

<sup>986</sup> CC, Article 688(b).

<sup>987</sup> CC, Articles 3(2) and (3) and 6.

<sup>988</sup> A complaint is not required in relation to crimes under international law: CC, Article 544.

<sup>989</sup> CC, Article 4(2).

<sup>990</sup> CC, Article 4(1).

witnesses and produce further evidence;<sup>991</sup> where the proceedings were instituted ex officio, the complainant's legal representative may examine or cross-examine witnesses, produce evidence or make submissions.<sup>992</sup>

A complaint may be made on behalf of a victim by close family members or heirs or by any person on behalf of another person under his or her tutorship or care.<sup>993</sup>

The civil action is heard before the courts of civil jurisdiction, through which victims may seek compensation for the damage caused by the offence.<sup>994</sup>

**Victim and witness protection:** Article 54H of the Criminal Code extends the provisions of any laws for the protection of victims and witnesses of certain offences to any victim or witness of genocide, crimes against humanity and war crimes (as defined in the chapter implementing the Rome Statute).

At the investigation stage, in exceptional circumstances and to provide for the safety of the witness, the court of enquiry may omit all personal details of a witness other than their name and surname and the language in which they deposed from their deposition.<sup>995</sup>

At trial, the general rule is that witnesses are to be examined orally in court,<sup>996</sup> however a person's deposition may be relied on without such examination where the witness has died, cannot be found or is outside of Malta.<sup>997</sup> There are also special provisions for minors.<sup>998</sup>

### Cases

There have been no cases where universal jurisdiction has been exercised in judicial practice in Malta.<sup>999</sup>

### Relevant Legislation

#### JURISDICTION

##### Criminal Code

5. (1) Saving any other special provision of this Code or of any other law conferring jurisdiction upon the courts in Malta to try offences, a criminal action may be prosecuted in Malta -

(a) against any person who commits an offence in Malta, or on the sea in any place within the territorial jurisdiction of Malta;

(b) against any person who commits an offence on the sea beyond such limits on board any ship or vessel belonging to Malta;

(c) against any person who commits an offence on board any aircraft while it is within the air space of Malta or on board any aircraft belonging to Malta wherever it may be;

For the purposes of this paragraph the expression "air space" means the air space above the land areas and territorial waters of Malta;

<sup>991</sup> CC, Article 410(1).

<sup>992</sup> CC, Article 410(2).

<sup>993</sup> CC, Article 542.

<sup>994</sup> CC, Article 3(3).

<sup>995</sup> CC, Article 391.

<sup>996</sup> CC, Article 646(1).

<sup>997</sup> CC, Article 646(2).

<sup>998</sup> CC, Article 646(2).

<sup>999</sup> Permanent Mission of Malta to the United Nations, Observations on the scope and application of the principle of universal jurisdiction in response to General Assembly Resolution 64/117 of 16 December 2009, 29 April 2010, p. 3; available at [http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri\\_StatesComments/Malta.pdf](http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Malta.pdf) (last accessed December 2010).



(d) without prejudice to the preceding paragraphs of this subarticle, against any citizen of Malta or permanent resident in Malta who in any place or on board any ship or vessel or on board any aircraft wherever it may be shall have become guilty of the offences mentioned in article 54A or of an offence against the safety of the Government or of the offences mentioned in articles 133, 139A, or of the offences mentioned in articles 311 to 318 and in article 320 when these are committed or are directed against or on a state or government facility, an infrastructure facility, a public place or a place accessible to the public, a public transportation system, or of forgery of any of the Government debentures referred to in article 166 or of any of the documents referred to in article 167, or of the offence mentioned in article 196, or of any other offence against the person of a citizen of Malta or of any permanent resident in Malta;

For the purposes of this paragraph:

"permanent resident" means a person in favour of whom a permit of residence has been issued in accordance with the provisions contained in article 7 of the of the Immigration Act;

"offence against the person" includes the offences mentioned in articles 86 to 90 and in articles 211 to 205;

the expressions "state or government facility", "infrastructure facility" and "public transportation system" shall have the same meaning assigned to them respectively by article 314A(4);

(e) against any person who being in Malta -

(i) shall have become guilty of any offence under article 87(2) or articles 198, 199, 211, 214 to 218, 220, 249 to 251, 311, 312, 314A, 314B, 316 or 317 when committed or directed on or against the person of a protected person or to the prejudice or injury of such person or likely to endanger the life or to cause serious injury to the property, life or health of such a person, or in connection with an attack on any relevant premises or on any vehicle ordinarily used by a protected person or when a protected person is on or in the premises or vehicle; or

(ii) shall have committed any act which if committed in Malta would constitute an offence and such act involved the use of a bomb, grenade, rocket, automatic firearm, letter bomb or parcel bomb which endangered persons, although the offences referred to in this paragraph shall have been committed outside Malta:

Provided that for the purposes of sub-paragraph (i) of this paragraph it shall be immaterial whether the offender knew that the person was a protected person;

(f) against any person who -

(i) commits any offence in premises or in a building outside Malta having diplomatic immunity due to the fact that it is being used as an embassy, a residence or for such other purpose connected with the diplomatic service of Malta; or

(ii) commits an offence in a place outside Malta when such person enjoys diplomatic immunity by virtue of such service;

(g) against any person who being in Malta, shall be a principal or an accomplice in any of the crimes referred to in article 87(2), or in articles 139A, 198, 199, 211, 214 to 218, 220, 249 to 251, 298, or in articles 311 to 318 or in article 320 when these are committed in the circumstances mentioned in paragraph (d) or (e) of this subarticle, or in a crime which is committed by any act as is mentioned in paragraph (e)(ii) of this subarticle, or conspires with one or more persons for the purpose of committing any of the said crimes, although the crimes shall have been committed outside Malta;

(h) against any person in respect of whom an authority to proceed, or an order for his return, following a request by a country for his extradition from Malta, is not issued or made by the Minister responsible for justice on the ground that the said person is a Maltese citizen or that the offence for which his return was requested is subject to the death penalty in the country which made the request, even if there is no provision according to the laws of Malta other than the present provision in virtue of which the criminal action may be prosecuted in Malta against that person;

(i) against any person who commits an offence which, by express provision of law, constitutes an offence even when committed outside Malta:

Provided that no criminal action shall be prosecuted against the President of Malta in respect of acts done in the exercise of the functions of his office.

(2) For the purposes of subarticle (1)(b) and (c), a ship or vessel or an aircraft shall be deemed to belong to Malta if it is registered in Malta or, if it is not registered anywhere, is owned wholly by persons habitually resident in Malta or by bodies corporate established under and subject to the laws of Malta and having their principal place of business in Malta.

(3) For the purposes of subarticle (1)(e):

"a protected person" means, in relation to an alleged offence, any of the following:

(a) a person who at the time of the alleged offence is a Head of State, a member of a body which performs the functions of Head of State under the constitution of the State, a Head of Government or a Minister for Foreign Affairs and is outside the territory of the State in which he holds office;

(b) a person who at the time of the alleged offence is a representative or an official of a State or an official or agent of an international organisation of an intergovernmental character, is entitled under international law to special protection from attack on his person, freedom or dignity and does not fall within the preceding paragraph;

(c) a person who at the time of the alleged offence is a member of the family of another person mentioned in either of the preceding paragraphs and -

(i) if the other person is mentioned in paragraph (a) above, is accompanying him,

(ii) if the other person is mentioned in paragraph (b) above, is a member of his household;

"relevant premises" means premises at which a protected person resides or is staying or which a protected person uses for the purpose of carrying out his functions as such a person; and

"vehicle" includes any means of conveyance;

and if in any proceedings a question arises as to whether a person is or was a protected person, a certificate issued by or under the authority of the Minister responsible for foreign affairs and stating any fact relating to the question shall be conclusive evidence of that fact.

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See also Section 54D set out below.

## CRIMES UNDER INTERNATIONAL LAW

### Genocide, crimes against humanity and war crimes

Criminal Code

#### PART II - OF CRIMES AND PUNISHMENTS

##### Title I - OF GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES

General.

54A. (1) It is a crime for a person to commit genocide, a crime against humanity or a war crime.

(2) In this Title -

"the ICC Treaty" means the Statute of the International Criminal Court, done at Rome on 17th July, 1988;

"the ICC" means the International Criminal Court established by the ICC Treaty;

"genocide" means an act of genocide as defined in article 54B;

"crime against humanity" means a crime against humanity as defined in article 54C;

"war crime" means a war crime as defined in article 54D;

"Minister" means the Minister responsible for Justice.

(3) In interpreting and applying the provisions of this Title the court shall take into account the original text of the ICC Treaty and of any treaty and convention referred to in the ICC Treaty.

(4) In interpreting and applying the provisions of articles 54B, 54C and 54D, hereinafter, in this Title, referred to as "the relevant articles", the court shall take into account -

(a) any relevant Elements of Crimes adopted in accordance with article 9 of the ICC Treaty, and

(b) until such time as Elements of Crimes are adopted under that article, any relevant Elements of Crimes contained in the report of the Preparatory Commission for the International Criminal Court adopted on 30<sup>th</sup> June, 2000.

(5) The Minister may set out in regulations the text of the Elements of Crimes referred to in subarticle (2), as amended from time to time.

(6) The relevant articles shall for the purposes of this Title be construed subject to and in accordance with any relevant reservation or declaration made by Malta when ratifying any treaty or agreement relevant to the interpretation of those articles.

(7) The Minister may by regulations set out the terms of any reservation or declaration referred to in subarticle (5) and where any such reservation or declaration is withdrawn in whole or in part may revoke or amend any regulations as aforesaid which contain the terms of that reservation or declaration.

(8) In interpreting and applying the provisions of the relevant articles the court shall take into account any relevant judgment or decision of the ICC and may also take into account any other relevant international jurisprudence.

Genocide.

54B. (1) Genocide is committed where any of the following acts is committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such -

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

(2) Whosoever directly and publicly incites others to commit genocide shall be guilty of a crime.

Crimes against humanity.

54C. (1) A crime against humanity is committed where any of the following acts is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture;
- (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in subarticle (3), or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this sub-article or any crime under article 54A;
- (i) enforced disappearance of persons;
- (j) the crime of apartheid;
- (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

(2) For the purpose of subarticle (1) -

(a) "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in subarticle (1) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "the crime of apartheid" means inhumane acts of a character similar to those referred to in subarticle (1), committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

(3) For the purpose of this Title, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

War crimes.

54D. A war crime is committed where any of the following acts is committed:

(a) grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) wilful killing;
- (ii) torture or inhuman treatment, including biological experiments;
- (iii) wilfully causing great suffering, or serious injury to body or health;
- (iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) unlawful deportation or transfer or unlawful confinement;

(viii) taking of hostages;

(b) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) declaring that no quarter will be given;

(xiii) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) pillaging a town or place, even when taken by assault;

(xvii) employing poison or poisoned weapons;

(xviii) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

..... *omissis* .....

(xxi) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 54C(2)(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities;

(c) in the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

(i) violence to life and person, in particular murder of all kind, mutilation, cruel treatment and torture;

(ii) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) taking of hostages;

(iv) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable;

(d) paragraph (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature;

(e) other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) pillaging a town or place, even when taken by assault;

(vi) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 54C(2)(f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) killing or wounding treacherously a combatant adversary;

(x) declaring that no quarter will be given;

(xi) subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) paragraph (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

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#### Torture

##### Criminal Code

139A. Any public officer or servant or any other person acting in an official capacity who intentionally inflicts on a person severe pain or suffering, whether physical or mental -

(a) for the purpose of obtaining from him or a third person information or a confession; or

(b) for the purpose of punishing him for an act he or a third person has committed or is suspected of having committed; or

(c) for the purpose of intimidating him or a third person or of coercing him or a third person to do, or to omit to do, any act; or

(d) for any reason based on discrimination of any kind,

shall, on conviction, be liable to imprisonment for a term from five to nine years:

Provided that no offence is committed where pain or suffering arises only from, or is inherent in or incidental to, lawful sanctions or measures:

Provided further that nothing in this article shall affect the applicability of other provisions of this Code or of any other law providing for a higher punishment.

## The Netherlands

### Overview

The Dutch International Crimes Act entered into force in October 2003 to replace the pre-existing fragmented legislation on genocide, war crimes and torture and to criminalise crimes against humanity. Each of these crimes is now defined and criminalised under the Act.

Without prejudice to the Criminal Code and the Code of Military Law, according to Section 2 of the Act, Dutch courts have universal, passive or active personality jurisdiction over the following persons:<sup>1000</sup>

- anyone who commits any of the crimes defined in the International Crimes Act, outside the Netherlands, if he is present on Dutch territory,
- anyone who commits any of the defined crimes outside the Netherlands, if the crime is committed against a Dutch national,
- a Dutch national who commits any of the defined crimes outside Dutch territory.

In addition, the Dutch Penal Code (*Wetboek*) establishes universal jurisdiction over piracy and counterfeiting,<sup>1001</sup> hijacking and other attacks against aircraft and maritime navigation where the perpetrator is present in the Netherlands.<sup>1002</sup>

The International Crimes Act cannot be applied retrospectively to crimes committed before its entry into force on 1 October 2003. Following the dismissal of a high profile case concerning the Rwandan genocide on this basis,<sup>1003</sup> a bill was tabled in 2009 to amend the Act to extend temporal jurisdiction to the time of ratification of the Genocide Convention, however this has not yet been passed.

### Issues

**Nexus requirements:** The presence of the accused is a pre-condition for prosecution in most circumstances. According to Section 2 Paragraph 1(a) of the International Crimes Act, the suspect has to be present in the Netherlands to exercise universal jurisdiction. Regarding other crimes, while presence during trial is the norm in the Dutch legal system, trial *in absentia* is permitted in certain circumstances.<sup>1004</sup>

**Dual criminality:** The provisions outlined above providing for universal jurisdiction do not require dual criminality.

**Prosecutorial and executive discretion:** The Public Prosecutor, who has the sole authority to initiate criminal proceedings, is empowered with a significant degree of discretion. Under the so called *expediency principle*, the Prosecutor can determine whether or not to bring a prosecution based on public interest. Criteria for this decision may include technical issues, such as sufficiency of evidence, or policy, concerning, for example, the severity of the alleged offence, the offender's personal circumstances or otherwise.<sup>1005</sup> The Explanatory Memorandum for the International Crimes Act has noted

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<sup>1000</sup> Response of the Permanent Mission of the Kingdom of the Netherlands to the United Nations, 1 July 2010.

<sup>1001</sup> Penal Code, Sections. 4 (3) and (5), in conjunction with 381-385 and 208-215. Available in Dutch at <http://www.ecocarib.org/legislation-and-drafts/data-resources/70-dutch-penal-code>. (last accessed Dec. 2010).

<sup>1002</sup> Penal Code, Sections 4 (7) and (8), in conjunction with 166, 168, 350, 352, 354, and 385a to 385c.

<sup>1003</sup> The Joseph Mpambara case.

<sup>1004</sup> Criminal Procedure Code (*Wetboek van Strafvordering*) available in Dutch at [http://wetten.overheid.nl/BWBR0001903/geldigheidsdatum\\_16-12-2010](http://wetten.overheid.nl/BWBR0001903/geldigheidsdatum_16-12-2010) (last accessed dec. 2010) , Sections 278 to 280.

<sup>1005</sup> Criminal Procedure Code, Sections. 67 and 242; and M.E.I.Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the*

that the Prosecutor's decision may be based on factors such as whether the suspect would be entitled to immunity under international law, whether prima facie evidence is sufficient, and whether a conviction is reasonably possible, considering for example the prospect for obtaining cooperation from other states essential for the gathering of evidence.<sup>1006</sup>

**Ability to review decisions of the prosecutor:** A decision of the Public Prosecutor not to institute proceedings can be challenged by an "*interested party*" in an appeals court.<sup>1007</sup>

**Statutes of limitation:** Although Sections 70 to 76a of the Criminal Code establish statutes of limitation for crimes under Dutch law, they do not apply to genocide, torture, crimes against humanity and most war crimes committed after the enactment of the International Crimes Act.<sup>1008</sup> The Netherlands is one of the few countries that has ratified the European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes.<sup>1009</sup>

**Immunities in criminal cases:** The Penal Code states that the jurisdiction provided therein shall be subject to limitations recognised by international law.<sup>1010</sup> More specific rules have also emerged. In particular, sitting "*foreign heads of state, heads of government and ministers of foreign affairs [...], and other persons in so far as their immunity is recognised under customary international law*" or under a Convention applicable in the Netherlands, are immune from prosecution for genocide, war crimes, crimes against humanity and torture as defined under the ICC implementing legislation.<sup>1011</sup>

**Victims' role in proceedings:** Victims of crimes under international law or third parties acting on their behalf can file a complaint directly with the police authorities. There is a central intake desk for complaints with regard to international crimes or the complaints can be filed with the local police authorities.<sup>1012</sup>

Civil claims for compensation can be brought either within criminal proceedings or through separate civil proceedings under tort law.<sup>1013</sup> Each carries significant limitations, however.<sup>1014</sup>

In the course of a criminal trial, victims can obtain compensation in two ways. First, they can join proceedings as a civil party and make a claim. Alternatively, where the defendant is convicted, the court may order him/her to compensate the victims. In the former scenario, only a simple process is permitted; the victim cannot bring witnesses or experts to support the claim and if the damage cannot easily be determined, the criminal court will not be able to consider the claim.<sup>1015</sup> In the latter, the victim has no control over whether or not compensation is considered.<sup>1016</sup>

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Victim in the Framework of Criminal Law and Procedure, Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)), Chapter 17, Section 7.1.

<sup>1006</sup> As outlined in H. Bevers, J. Roording and O. Swaak-Goldman, "The Dutch International Crimes Act (Bill)," in Mathias Neuner, ed., *National Legislation Incorporating International Crimes* (BWV, Berlin, 2003).

<sup>1007</sup> Criminal Procedure Code, Sections 12 to 13a.

<sup>1008</sup> See Section 13 of the International Crimes Act. Section 21(2) extends the application of Section 13 to acts of torture punishable under the Torture Convention Implementation Act and specifies that it applies retrospectively.

<sup>1009</sup> FIDH/REDRESS Report: "Legal Remedies for Victims of 'International Crimes'." March 2004, p. 63.

<sup>1010</sup> See Section 8 of the Penal Code.

<sup>1011</sup> See Section 16 of the International Crimes Act.

<sup>1012</sup> FIDH/REDRESS Comparative Research Report 2010, Police/Investigations Questionnaire.

<sup>1013</sup> See Section 36(f) of the Penal Code and Section 51a (1) of the Civil Procedure Code.

<sup>1014</sup> FIDH/REDRESS Report: "Legal Remedies for Victims of 'International Crimes'." March 2004, p. 61.

<sup>1015</sup> See Sections 334(1), 361(3) of the Civil Procedure Code.

<sup>1016</sup> FIDH/REDRESS Report: "Legal Remedies for Victims of 'International Crimes'." March 2004, p. 61.



Victims from the EU who have not managed to obtain compensation through these procedures or from an insurance company or elsewhere can apply to the Criminal Injuries Compensation Fund.<sup>1017</sup>

**Victim and witness protection:** During the proceedings, witnesses can be granted judicial protective measures such as the possibility of giving anonymous testimony outside of the courtroom in front of an examining judge.<sup>1018</sup>

There is a national witness protection programme in place in the Netherlands, which does provide for protective measures outside the proceedings. In cases where witnesses or other people involved in the investigation face security issues, the national witness protection team will conduct a threat and risk assessment to determine the appropriate measures. Relocation is one of the possible strategies. The possibilities to protect victims or witnesses abroad are dependent upon their location and the threat. The Dutch witness protection team cooperates with a large number of mostly European countries. Whether it cooperates with foreign police authorities will depend upon the nature of the security issues faced by the person in need of protection and the relations between the Dutch and foreign authorities.<sup>1019</sup>

**Specialised War Crimes Unit:** The Dutch International Crimes Unit (“*Team Internationale Misdrijven*”, TIM) within the Dutch National Crimes Squad includes 30 experienced investigators. The unit also employs an expert of African Studies, a jurist and two experts of international relations and public administration respectively. Further experts are employed on a case by case basis in relation to specific countries, such as Afghanistan, Rwanda and Iraq.<sup>1020</sup> The Unit is complemented by a team of prosecutors located within the National Public Prosecutor’s office in Rotterdam, where four prosecutors are in charge of all criminal investigations and prosecutions of serious international crimes.<sup>1021</sup> Trials of serious international crimes are centralised in The Hague District and Appeals court, where a specialised investigative judge is leading probes into serious international crimes.

**Participation in EU Genocide Network:** Two members of the War Crimes Team have attended the 8<sup>th</sup> Genocide Network Meeting in Madrid.<sup>1022</sup>

## Cases

No person has yet been tried and convicted under the International Crimes Act. However, several cases based on universal jurisdiction were brought under the international crimes legislation applicable prior to its entry into force.<sup>1023</sup> Prosecutions were usually undertaken under the War Time Offences Act, the Torture Convention Implementation Act and the Genocide Convention Implementation Act.<sup>1024</sup>

In 1997, a case was brought against Darko Knežević for grave breaches and violations of Common Article 3 of the Geneva Conventions of 1949 committed in the former Yugoslavia.

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<sup>1017</sup> Ibid.

<sup>1018</sup> FIDH/REDRESS Police/Investigations Questionnaire.

<sup>1019</sup> Ibid.

<sup>1020</sup> E-mail correspondence with Dutch official, 8 December 2010.

<sup>1021</sup> Dutch National Crimes Squad, response to FIDH and REDRESS questionnaire, on file with the authors.

<sup>1022</sup> FIDH/REDRESS Police/Investigations Questionnaire.

<sup>1023</sup> Response of the Permanent Mission of the Kingdom of the Netherlands to the United Nations, 1 July 2010.

<sup>1024</sup> Van Der Borcht, Erwin, “Prosecution of International crimes in the Netherlands”, supra., pp. 113-14.

It was the first time that Dutch military courts were declared competent even though the Netherlands were not involved in the conflict.<sup>1025</sup>

In 2004, Sebastien Nzapali, a former army officer from Zaire was convicted of torture committed in 1990 and 1995 in the DRC. One year later, the Afghan nationals Heshamuddin Hesham and Habibullah Jalazoy were convicted for war crimes and torture due to their involvement in the KhAD in Kabul between 1979 and 1989 to nine and twelve years in prison.<sup>1026</sup> Another Afghani, Abdullah Faqirzada, was prosecuted for torture and war crimes. In June 2007, he was acquitted, since his implication with the proven crimes by the KhAD was uncertain. On 16 July 2009, this acquittal was upheld. On 23 March 2009, the Rwandan national Joseph Mpambara was found guilty of torture, committed in 1994, and sentenced to 20 years' imprisonment by the Hague District Court in first instance.<sup>1027</sup>

### **Relevant Legislation:**

#### **JURISDICTION**

##### **International Crimes Act 2003**

Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act)

##### **Section 2**

1. Without prejudice to the relevant provisions of the Criminal Code and the Code of Military Law, Dutch criminal law shall apply to:

- (a) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the suspect is present in the Netherlands;
- (b) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the crime is committed against a Dutch national;
- (c) a Dutch national who commits any of the crimes defined in this Act outside the Netherlands.

2. The expression 'any of the crimes defined in this Act' as referred to in subsection 1 shall be equated with the crimes defined in Articles 131-134, 140, 189, 416-417bis and 420bis-420quater of the Criminal Code, if the offence or crime referred to in such articles is a crime defined in this Act.

3. Prosecution on the basis of subsection 1 (c) may also take place if the suspect becomes a Dutch national only after committing the crime.

#### **CRIMES UNDER INTERNATIONAL LAW**

##### **International Crimes Act 2003**

##### **§ 2 Crimes**

##### **Section 3**

1. Anyone who, with intent to wholly or partly destroy, any national, ethnic or religious group or a group belonging to a particular race, as such:

- (a) kills members of the group;
  - (b) causes serious bodily or mental harm to members of the group;
  - (c) deliberately inflicts upon the group conditions of life calculated to bring about the physical destruction of the group, in whole or in part;
  - (d) imposes measures intended to prevent births within the group; or
  - (e) forcibly transfers children of the group to another group,
- shall be guilty of genocide and liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine.

<sup>1025</sup> The Netherlands Supreme Court, 11 November 1997.

<sup>1026</sup> Rikhof, Joseph, "Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity", 20 *Criminal Law Forum*, vol. 20, no. 1, 2008; these sentences were upheld by the appeals court in January 2007. Cf.: Case Numbers LJN AZ7147 and LJN AZ9365. Cases can be found in Dutch at <http://zoeken.rechtspraak.nl/>. (last accessed Oct. 2010).

<sup>1027</sup> The Hague Justice Portal, <http://www.haguejusticeportal.net/eCache/DEF/8/604.html>. (last accessed Sept. 2010); Cf.: LJN BI2444. can be found in Dutch at <http://zoeken.rechtspraak.nl/>. (last accessed Oct. 2010).

2. Conspiracy and incitement to commit genocide which occurs in public, either orally or in writing or by means of images, shall carry the same penalties as prescribed for attempted genocide.

#### Section 4

1. Anyone who commits one of the following acts shall be guilty of a crime against humanity and liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine, if such acts are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) intentional killing;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture (as defined in section 1(1) (d));
- (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;
- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this subsection or any other crime as referred to in this Act;
- (i) enforced disappearance of persons;
- (j) the crime of apartheid;
- (k) other inhumane acts of a similar character which intentionally cause great suffering or serious injury to body or to mental or physical health.

2. For the purposes of this section:

- (a) 'attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in subsection 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;
- (b) 'enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person, including the exercise of such power in the course of trafficking in persons, in particular women and children;
- (c) 'persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (d) 'enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this section, 'extermination' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.

#### Section 5

1. Anyone who commits, in the case of an international armed conflict, one of the grave breaches of the Geneva Conventions, namely the following acts if committed against persons protected by the said Conventions:

- (a) intentional killing;
  - (b) torture (as defined in section 1 (1)(d)) or inhuman treatment, including biological experiments;
  - (c) intentionally causing great suffering or serious injury to body or health;
  - (d) extensive intentional and unlawful destruction and appropriation of goods without military necessity;
  - (e) compelling a prisoner of war or other protected person to serve in the armed forces of a hostile power;
  - (f) intentionally depriving a prisoner of war or other protected person of the right to a fair and regular trial;
  - (g) unlawful deportation or transfer or unlawful confinement; or
  - (h) the taking of hostages;
- shall be liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine.

2. Anyone who commits, in the case of an international armed conflict, one of the grave breaches of the Additional Protocol (I), concluded in Bern on 12 December 1977, to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts (Netherlands Treaty Series 1980, 87), namely:

- (a) the acts referred to in subsection 1, if committed against a person protected by the Additional Protocol (I);
- (b) any intentional act or omission which jeopardises the health of anyone who is in the power of a party other than the party to which he or she belongs, and which:
  - (i) entails any medical treatment which is not necessary as a consequence of the state of health of the person concerned and is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party responsible for the acts and who are in no way deprived of their liberty;
  - (ii) entails the carrying out on the person concerned, even with his consent, of physical mutilations;
  - (iii) entails the carrying out on the person concerned, even with his consent, of medical or scientific experiments; or
  - (iv) entails removing from the person concerned, even with his consent, tissue or organs for transplantation;
- (c) the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health:
  - (i) making the civilian population or individual citizens the object of attack;
  - (ii) launching an indiscriminate attack affecting the civilian population or civilian objects, in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
  - (iii) launching an attack against works or installations containing dangerous forces, in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
  - (iv) making non-defended localities or demilitarised zones the object of attack;

(v) making a person the object of attack in the knowledge that he is *hors de combat*; or  
 (vi) the perfidious use, in violation of article 37 of Additional Protocol (I), of the distinctive emblem of the red cross or red crescent or of other protective emblems recognised by the Geneva Conventions or Additional Protocol (I); or  
 (d) the following acts if committed intentionally and in violation of the Geneva Conventions and Additional Protocol (I):  
 (i) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies or the transfer of all or part of the population of the occupied territory within or outside this territory in violation of article 49 of the Fourth Geneva Convention;  
 (ii) unjustifiable delay in the repatriation of prisoners of war or civilians;  
 (iii) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;  
 (iv) making clearly recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example within the framework of a competent international organisation, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), of Additional Protocol (I) and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives; or  
 (v) depriving a person protected by the Geneva Conventions or Article 85, paragraph 2, of Additional Protocol (I) of the right to a fair and regular trial shall be liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine.

3. Anyone who commits, in the case of an international armed conflict, one of the following acts:

(a) rape, sexual slavery, enforced prostitution, enforced sterilisation or any other form of sexual violence which can be deemed to be of a gravity comparable to a grave breach of the Geneva Conventions;  
 (b) forced pregnancy;  
 (c) subjecting persons who are in the power of an adverse party to the conflict to physical mutilation or medical or scientific experiments of any kind, which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such persons or persons;  
 (d) treacherously killing or wounding individuals belonging to the hostile nation or army.  
 (e) killing or wounding a combatant who is in the power of the adverse party, who has clearly indicated he wishes to surrender, or who is unconscious or otherwise *hors de combat* as a result of wounds or sickness and is therefore unable to defend himself, provided that he refrains in all these cases from any hostile act and does not attempt to escape; or  
 (f) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury, shall be liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine.

4. Anyone who, in the case of an international armed conflict, intentionally and unlawfully commits one of the following acts shall be liable to a term of imprisonment not exceeding fifteen years or a fifth category fine:

(a) making the object of attack cultural property that is under enhanced protection as referred to in articles 10 and 11 of the Second Protocol, concluded in The Hague on 26 March 1999, to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (Netherlands Treaty Series 1999, 107);  
 (b) using cultural property that is under enhanced protection as referred to in (a) or the immediate vicinity of such property in support of military action;  
 (c) destroying or appropriating on a large scale cultural property that is under the protection of the Convention, concluded in The Hague on 14 May 1954, for the Protection of Cultural Property in the Event of Armed Conflict (Netherlands Treaty Series 1955, 47) or the Second Protocol thereto;  
 (d) making cultural property that is under protection as referred to in (c) the object of attack; or  
 (e) theft, pillaging or appropriation of - or acts of vandalism directed against - cultural property under the protection of the Convention referred to in (c).

5. Anyone who, in the case of an international armed conflict, commits one of the following acts:

(a) intentionally directing attacks against civilian objects, that is, objects that are not military objectives;  
 (b) intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;  
 (c) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;  
 (d) the transfer, directly or indirectly, by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or part of the population of the occupied territory within or outside this territory;  
 (e) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;  
 (f) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;  
 (g) employing poison or poisoned weapons;  
 (h) employing asphyxiating, poisonous or other gases and all analogous liquids, materials or devices;  
 (i) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;  
 (j) committing outrages upon personal dignity, in particular humiliating and degrading treatment;  
 (k) utilising the presence of a civilian or other protected person to render certain points, areas, or military forces immune from military operations;  
 (l) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;  
 (m) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

- (n) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (o) intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance or peace missions in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; generally accepted medical standards and supervisory measures intended to protect the interests of both donor and recipient.

#### Section 6

1. Anyone who, in the case of an armed conflict not of an international character, commits a violation of article 3 common to all of the Geneva Conventions, namely the commission against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those who are placed *hors de combat* by sickness, wounds, detention, or any other cause, of one of the following acts:

(a) violence to life and person, in particular killing of all kinds, mutilation, cruel treatment and torture (as defined in section 1 (1) (d));

(b) the taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

or

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognised as indispensable;

shall be liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine.

2. Anyone who, in the case of an armed conflict not of an international character, commits one of the following acts:

(a) rape, sexual slavery, enforced prostitution, enforced sterilisation or any other form of sexual violence which can be deemed to be of any gravity comparable to a grave breach of the Geneva Conventions;

(b) forced pregnancy;

(c) subjecting persons in the power of another party to the conflict to physical mutilation or medical or scientific experiments of any nature whatever, which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest and which cause death to or can seriously endanger the health of such persons or persons; or

(d) treacherously killing or wounding individuals belonging to the hostile nation or army; shall be liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine.

3. Anyone who, in the case of an armed conflict not of an international character, commits one of the following acts:

(a) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(c) intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance or peace missions in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(d) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(e) pillaging a town or place, even when taken by assault;

(f) conscripting or enlisting children under the age of fifteen years into the national armed forces or armed groups or using them to participate actively in hostilities;

(g) declaring that no quarter will be given; or

(h) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the circumstances of the conflict; or

(i) giving instructions for the transfer of the civilian population for reasons connected with the conflict, other than on account of the safety of the citizens or where imperatively demanded by the circumstances of the conflict;

shall be liable to a term of imprisonment not exceeding fifteen years or a fifth category fine.

4. Section 5, subsection 6, shall apply *mutatis mutandis* to an act as referred to in subsection

3.

#### Section 7

1. Anyone who, in the case of an international or non-international armed conflict, commits a violation of the laws and customs of war other than as referred to in sections 5 or 6 shall be liable to a term of imprisonment not exceeding ten years or a fifth category fine 2. A term of imprisonment not exceeding fifteen years or a fifth category fine shall be imposed:

(a) if an act as referred to in subsection 1 is likely to result in the death of or serious bodily injury to another person;

(b) if an act as referred to in subsection 1 involves one or more outrages committed upon personal dignity, in particular humiliating and degrading treatment;

(c) if an act as referred to in subsection 1 involves compelling another person to do, refrain from doing or permit something, or

(d) if an act as referred to in subsection 1 involves pillaging a city or place, even when taken by assault.

3. Section 5, subsection 6, shall apply *mutatis mutandis* to an act as referred to in subsection 1.

#### Section 8

1. Torture committed by a public servant or other person working in the service of the authorities in the course of his duties shall carry a sentence of life imprisonment or a term of imprisonment not exceeding twenty years or a fifth category fine.

2. The following shall be liable to similar sentences:

(a) a public servant or other person working in the service of the authorities who, in the course of his duties and by one of the means referred to in Article 47, paragraph 1 (ii), of the Criminal Code, solicits the commission of torture or intentionally permits another person to commit torture;

(b) a person who commits torture, if this has been solicited or intentionally permitted by a public servant or another person working in the service of the authorities, in the course of his duties and by one of the means referred to in Article 47, paragraph 1 (ii), of the Criminal Code.

## Norway

### Overview

The Norwegian General Civil Penal Code of 1902 (Criminal Code) provides for universal jurisdiction over a wide range of offences, including ‘domestic’ crimes such as assault including threats, violence with personal injury, rape and felonies against another person’s life, body and health, as well as international crimes such as hostage tacking and hijacking.<sup>1028</sup>

The crimes of genocide, crimes against humanity and war crimes are covered in the New General Civil Penal Code of 2005 (2005 Code), chapter 16, which entered into force in 2008, and only in relation to the crimes of genocide, crimes against humanity and war crimes, while for all other crimes, the 1902 Criminal Code still applies.<sup>1029</sup> Section 5 of the 2005 Code provides for limited universal jurisdiction over genocide, war crimes and crimes against humanity,<sup>1030</sup> while Section 6 provides for absolute universal jurisdiction over acts that Norway has a right or an obligation to prosecute under international law or under agreements with foreign States.<sup>1031</sup>

The law also allows for retrospective universal jurisdiction, to cover crimes committed before the coming into force of the 2005 Code, though the Supreme Court on 3 December 2010 ruled that these provisions violated the Norwegian constitution.<sup>1032</sup>

Norwegian law explicitly provides for active personality jurisdiction.<sup>1033</sup> Passive personality jurisdiction is provided for in the 2005 Code.<sup>1034</sup>

### Issues

**Nexus requirements (including presence or residence):** Universal jurisdiction over “*domestic crimes*” is subject to the crime being committed by a person “*domiciled in Norway*”.<sup>1035</sup> The Supreme Court of Norway has considered a person to be domiciled in Norway if he/she has actually been residing in Norway for a period of time and also had the intention to reside in Norway.<sup>1036</sup>

Universal Jurisdiction over genocide, crimes against humanity and war crimes is subject to the residence of the suspect in Norway, including suspects who have become residents since committing the act.<sup>1037</sup> However, where the maximum penalty for the crime committed is more than one year, it is sufficient if the suspect is “*staying*” in Norway.<sup>1038</sup>

Absolute universal jurisdiction can be exercised over crimes committed abroad and that Norway has an obligation or a right to prosecute. The only requirement is that it must be

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<sup>1028</sup> Criminal Code, Section 12 (4).

<sup>1029</sup> Chapter 16 of the New General Civil Penal Code 2005 No.28.

<sup>1030</sup> Ibid, Section 5.

<sup>1031</sup> Ibid, Section 6.

<sup>1032</sup> See further below, p. 4.

<sup>1033</sup> Criminal Code, Section 12 (3).

<sup>1034</sup> 2005 Code, Section 5 (5).

<sup>1035</sup> Criminal Code, Section 12 (3); 2005 Code, Section 5 (1).

<sup>1036</sup> Ministry of Justice, Response to FIDH/REDRESS questionnaire.

<sup>1037</sup> 2005 Code, Section 5 (1) 2; (2) .

<sup>1038</sup> 2005 Code, Section 5 (3).

in the “*public interest*” to do so. The provision will be particularly relevant if the suspect is not a Norwegian national, and is not staying in Norway when a prosecution is instituted.

**Subsidiarity:** In considering whether a prosecution of a crime under international law on the basis of universal jurisdiction would be in the public interest, the competent prosecuting authority must also assess the extent to which another country has jurisdiction and a “*properly functioning legal system*”.<sup>1039</sup>

**Double criminality:** The prosecution of a felony committed abroad on the basis of universal jurisdiction can only proceed if it is also punishable according to the law of the country in which it is committed (and provided that the suspect is resident in Norway or staying in Norway).<sup>1040</sup>

**Prosecutorial and Executive discretion:** At the time of writing, an indictment for crimes committed abroad had to be issued by the King.<sup>1041</sup> Amendments to the Criminal Procedural Code that will confer that responsibility to the Director General of Public Prosecutions have yet to be adopted.<sup>1042</sup> Furthermore, a prosecution of crimes against humanity, war crimes or genocide or other crimes that Norway is obliged to prosecute and that have been committed outside Norway will only be initiated if it is in the public interest.<sup>1043</sup> This will allow for considerable discretion on behalf of the prosecution authorities.<sup>1044</sup>

**Statutes of limitation:** Statutes of limitation will not apply for crimes against humanity, war crimes or genocide if the acts are punishable by a term of imprisonment for 15 years or more.<sup>1045</sup>

**Immunities:** Neither the 1902 Criminal Code nor the 2005 one mention immunity. Only the King of Norway is afforded with immunity according to the Constitution, and diplomatic personnel protected by the Vienna Convention.<sup>1046</sup>

**Victims’ role in proceedings:** The CCP provides victims with the possibility to file a private prosecution if the case is not prosecuted by the public authorities. However, this does not apply to cases where the prosecution authorities decided that it is not in the public interest to prosecute.<sup>1047</sup>

Victims also have the right to raise civil claims against an accused, provided that the claim arises from the same act that the case is concerned with.<sup>1048</sup> The prosecutor may on application pursue also civil legal claims in public cases. Applications from victims to bring civil claims can only be denied if their claim is “*obviously unjustified*” or if it would cause “*disproportionate inconvenience for the hearing of the criminal case if the civil claim was pursued in combination*”.<sup>1049</sup>

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<sup>1039</sup> See Submission by the Permanent Mission of Norway to the United Nations on the issue of Universal Jurisdiction, p.5, 7 May 2009.

<sup>1040</sup> CC, Section 12 (4) b).

<sup>1041</sup> CC, Section 13; see also Submission by the Permanent Mission of Norway to the United Nations on the issue of Universal Jurisdiction, p.5, 7 May 2009.

<sup>1042</sup> Criminal Procedure Act 1981, Section 65, item 4.

<sup>1043</sup> 2005 Code, Section 5 (7).

<sup>1044</sup> See Submission by the Permanent Mission of Norway to the United Nations on the issue of Universal Jurisdiction, p.5, 7 May 2009.

<sup>1045</sup> CC, Section 91.

<sup>1046</sup> Ministry of Justice, Response to FIDH/REDRESS questionnaire.

<sup>1047</sup> CCP, Chapter 28, Section 402 (14).

<sup>1048</sup> CCP, Chapter 29, Section 3.

<sup>1049</sup> CCP, Chapter 28, Section 427.



The CCP provides for victims' right to counsel, though crimes under international law are not referred to in the list of crimes that provide victims a right to legal counsel.<sup>1050</sup>

**Victim and witness protection:** Witnesses in Norwegian criminal proceedings are, as a general rule, obliged to testify orally in court. Under certain circumstances, witnesses may also be heard via telephone or videoconference,<sup>1051</sup> though main witnesses are expected to be heard directly and orally in court. The court may “*exempt a witness who has more than 800 kilometres to travel by regular transport service or 125 kilometres by any other means*” if such attendance would entail disproportionate inconvenience or costs in relation to the significance of the witness.<sup>1052</sup>

The court may decide to hear the evidence of an anonymous witness if there is a risk that the testimony will put the witness at risk, and only if strictly necessary and if it does not entail substantial disadvantages for the defence of the accused charged.<sup>1053</sup> Anonymous testimony may mean that (1) the witness's name is not revealed, (2) that no other information is given which may lead to the witness's identity becoming known, or (3) that physical or technical measures are applied to keep the witness's identity secret.<sup>1054</sup>

A national witness protection programme is in place and managed by the National Criminal Investigation Service (NCIS). Norwegian authorities have also relied on NGOs in the past to provide witnesses with protection such as shelter.<sup>1055</sup>

**Specialised War Crimes Unit:** A Special International Crimes (SIF) office has been created in 2005, located within the National Criminal Investigation Service (NCIS). It is in charge of investigating war crimes, genocide and crimes against humanity committed abroad by persons who are currently in Norway. The unit may also investigate acts of torture and acts of terror. Approximately 16 persons work on crimes under international law within SIF. It is complemented by a special office within the National Authority for Prosecution of Organised and other Serious Crime (NAST).

Most of the investigators and prosecutors within SIF and NAST have received special training in the investigation and prosecution of crimes under international law by the Institute for International Criminal Investigations or by Interpol.<sup>1056</sup>

## Cases

At the time of writing, there were ongoing investigations into crimes under international law committed in Rwanda, Sri Lanka, the Balkans and Afghanistan. In all cases, the suspects are residing or domiciled in Norway.<sup>1057</sup>

The Norwegian Supreme Court on 3 December 2010 dismissed the conviction of a Croatian national for war crimes and crimes against humanity allegedly committed in 1992 in the former Yugoslavia. The Supreme Court held that the provisions of the 2005 Code, which only entered into force in 2008 and provided for retrospective universal jurisdiction over crimes under international law, violated the Norwegian Constitution, which prohibits

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<sup>1050</sup> CCP, Chapter 9a, Section 107a.

<sup>1051</sup> CCP, Chapter 10, Section 109a.

<sup>1052</sup> CCP, Chapter 10, Section 109.

<sup>1053</sup> CCP, Chapter 10, Section 130a.

<sup>1054</sup> *Idem*.

<sup>1055</sup> Ministry of Justice Response to FIDH/REDRESS questionnaire.

<sup>1056</sup> *Idem*.

<sup>1057</sup> *Idem*.

retrospective legislation. The Court held that the case should instead proceed on the basis of the law in force at the time the offences were allegedly committed.<sup>1058</sup>

## Relevant Legislation

### JURISDICTION

#### **War Crimes, Genocide, Crimes Against Humanity (2005 Code)**

Section 5. Applicability of the criminal legislation to acts committed abroad

Outside the scope and extent pursuant to Section 4, the criminal legislation applies to acts committed

- a) by a Norwegian national,
- b) by a person resident in Norway, or
- c) on behalf of an enterprise registered in Norway,

where the acts:

- 1. are also punishable under the law of the country in which they are committed,
- 2. are regarded as a war crime, genocide or a crime against humanity,
- 3. are regarded as a breach of the international law of armed conflict,
- 4. ....

2 The first paragraph applies correspondingly to acts committed

- a) by a person who since committing the act has become a Norwegian national or has been granted residence in Norway,
- b) by a person who is or who since the act has become a national of or is resident in another Nordic country, and who is staying in Norway, or
- c) on behalf of a foreign enterprise which, since the act was committed has transferred all its operations to an enterprise registered in Norway.

3 The first paragraph, items 1,2,3,6,7 apply correspondingly to acts committed by persons other than those who fall within the scope of the first and second paragraphs, when the person is staying in Norway, and the maximum penalty for the act is imprisonment for a term exceeding one year.

4 In the case of acts mentioned in the first paragraph, item 2, the second and third paragraphs apply only if the act is regarded as genocide, a crime against humanity or a war crime under international law.

5 The criminal legislation also applies to acts committed abroad by persons other than those who fall within the scope of the first to fourth paragraph if the maximum penalty is imprisonment for a term exceeding six years and the act is directed against a person who is a Norwegian national or is resident in Norway.

6 In a prosecution under this section, the penalty may not exceed the highest statutory penalty for a corresponding act in the country in which it was committed.

7 A prosecution under this section is only instituted when required in the public interest.

*Other crimes under international law*

*Section 6. Special grounds for prosecution under international law*

<sup>1058</sup> Public Prosecutor v. Misrad Repak, Oslo, Supreme Court, 3 December 2010.

1 Outside the scope and extent of sections 4 and 5 the criminal legislation also applies to acts that Norway has a right or an obligation to prosecute under agreements with foreign States or under international law generally.

2 Section 5, seventh paragraph, applies correspondingly.

### CRIMES UNDER INTERNATIONAL LAW

#### **(New General Civil Penal Code of 2005, Chapter 16)**

##### **(i) War Crimes**

Section 103. War crimes against persons

Any person is liable to punishment for a war crime who in connection with an armed conflict

- (a) kills a protected person,
- (b) inflicts on a protected person great suffering or serious injury to body or health, particularly by torture or other cruel or inhuman treatment,
- (c) enslaves a protected person,
- (d) subjects a protected person to rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity,
- (e) takes a protected person hostage,
- (f) conscripts or enlists children under 18 years of age into armed forces or uses them to participate actively in hostilities,
- (g) subjects a protected person to a medical or scientific experiment that is not carried out in the interest of the person concerned and that seriously endangers the life or health of such person,
- (h) in violation of international law deports or forcibly transfers a protected person from an area in which the person is lawfully present or unlawfully confines a protected person,
- (i) imposes or implements a penalty in respect of a protected person without that person first being given a fair trial in accordance with international law,
- (j) grossly violates the dignity of a protected person by subjecting that person to humiliating or degrading treatment/commits outrages upon the dignity of a protected person, in particular humiliating or degrading treatment, or
- (k) wounds a combatant who has surrendered or has been placed hors de combat,

In the case of an international armed conflict, any person is also liable to punishment who

- (a) transfers part of its own civilian population into an occupied territory,
- (b) compels a national of the hostile party to take part in the operations of war directed against his own country, or
- (c) compels a protected person to serve in the armed forces of a hostile power.

A protected person is a person who does not take, or who no longer takes, active part in hostilities, or who is otherwise protected under international law.

The penalty for a war crime against a person is imprisonment for a term not exceeding 15 years, but for a term not exceeding 30 years in such cases as are mentioned in the first paragraph (a) to (e) or otherwise if the crime is serious. In deciding whether the crime is serious, importance shall be attached to its potential for causing harm and its harmful effects, and to whether it was committed as part of a plan or policy for or as part of a large-scale commission of such crimes.

Section 104. War crimes against property and civil rights

Any person is liable to punishment for a war crime who in connection with an armed conflict

- (a) pillages,

(b) destroys, seizes or confiscates property on a large scale, unless this is strictly necessary for the purpose of waging war/imperatively demanded by the necessities of war\*, or

(c) declares abolished, suspended or inadmissible in a court of law the civil rights of the nationals of the hostile party.

A war crime against property or civil rights is punishable by imprisonment for a term not exceeding 10 years, but for a term not exceeding 30 years when the offence is serious, cf. section 103 , fourth paragraph, second sentence.

#### Section 105. War crimes against humanitarian missions or distinctive emblems

Any person is liable to punishment for a war crime who in connection with an armed conflict

a) directs an attack against personnel, installations, material, medical units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or property/civilian objects\* under international law,

(b) directs an attack against personnel, buildings, material, medical units or transport which are entitled under international law to use one of the specially protected distinctive emblems of the Geneva Conventions and Additional Protocols or any other means of identification indicating that they are protected under the Geneva Conventions, or

(c) makes improper use of a flag of truce, the flag of the enemy or of the United Nations, military insignia or uniforms or makes improper use of the specially protected distinctive emblems mentioned in (b), resulting in death or serious personal injury.

is liable to punishment for a war crime.

The penalty for a war crime against humanitarian missions or distinctive emblems is imprisonment for a term not exceeding 10 years, but for a term not exceeding 30 years in the cases mentioned in (c) and otherwise when the crime is serious, cf. section 103 , fourth paragraph, second sentence.

#### Section 106. War crimes consisting in the use of prohibited methods of warfare

Any person is liable to punishment for a war crime who in connection with an armed conflict

(a) directs an attack against the civilian population as such or against individual civilians not taking direct part in hostilities,

(b) uses starvation of civilians as a method of warfare by depriving them of, withholding from them or denying them access to food or objects indispensable to their survival, or impeding relief supplies in violation of international law,

(c) launches an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or damage to the natural environment which would be excessive in relation to the concrete and direct overall military advantage anticipated,

(d) utilises the presence of a protected person to render certain points, areas or military forces immune from military operations,

(e) directs an attack against towns, villages, dwellings or buildings which are undefended and which are not military objectives, or against demilitarised zones,

(f) directs an attack against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, cultural monuments, hospitals and places where the sick and wounded are collected, or against any other civil object, provided they are not military objectives,

(g) leading any person to believe that he is entitled to protection or is obliged to provide protection in accordance with international law and with the intention of betraying this trust, kills or wounds any person belonging to the nationals or armed forces of the hostile party, or

(h) declares or threatens that no quarter will be given.

The penalty for a war crime consisting in the use of prohibited methods of warfare is imprisonment for a term not exceeding 15 years, but for a term not exceeding 30 years when the crime includes the wilful murder of a civilian and any other protected person or otherwise if the crime is serious, cf. section 103 , fourth paragraph, second sentence.

#### Section 107. War crimes consisting in the use of prohibited means of warfare

Any person is liable to punishment for a war crime who in connection with an armed conflict

- (a) employs poison or poisoned weapons,
- b) employs biological or chemical weapons,
- c) employs bullets which expand or flatten easily in the human body, or
- d) employs another means of warfare that is in violation of international law

The penalty for a war crime consisting in the use of prohibited means of warfare is imprisonment for a term not exceeding 15 years, but for a term not exceeding 30 years when the crime includes the wilful murder of a civilian or any other protected person or otherwise if the crime is serious, cf. section 103 , fourth paragraph, second sentence.

Section 108. Conspiracy and incitement to commit genocide, crimes against humanity and war crimes

Any person who conspires with another person to commit a criminal offence mentioned in sections 101 to 107 is liable to imprisonment for a term not exceeding 10 years. The same applies to any person who directly and publicly incites another person to commit such an offence.

Section 109. Responsibility of superiors

A military or civilian commander or person effectively acting as such is liable to punishment for breach of superior responsibility if persons under his authority and control commit a crime mentioned in sections 101 to 107, when the crime is a result of the commander or person's failure to exercise control properly over them, and the commander or person

- a) knew or should have known that the subordinates were committing or were about to commit such a crime, and
- b) failed to take necessary and reasonable measures within his power to prevent or stop the crime, or to report the matter to a competent authority for prosecution,

The penalty is imprisonment for a term not exceeding 10 years, but not exceeding 30 years if the crime is serious. When assessing whether the crime is serious, importance shall be attached to the degree of seriousness and scope of the crimes the subordinates have committed and the degree to which the superior is to be blamed.

**(ii) Crimes Against Humanity**

Section 102. Crimes against humanity.

Any person is liable to punishment for a crime against humanity who, as part of a widespread or systematic attack directed against any civilian population,

- (a) kills a person,
- (b) exterminates a population in whole or in part, including by inflicting on it or parts of it conditions of life calculated to bring about the destruction of the population in whole or in part,
- (c) enslaves a person,
- (d) deports or forcibly transfers a population in violation of international law/without grounds permitted under international law,
- (e) imprisons or otherwise severely deprives a person of physical liberty in violation of fundamental rules of international law,
- (f) tortures a person in his custody or under his control by inflicting on the person severe mental or physical pain or suffering,
- (g) subjects a person to rape, sexual slavery or enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity,
- (h) subjects an identifiable group to persecution by depriving one or more members of the group of fundamental human rights on political, racial, national, ethnic, cultural, religious, gender-related or other grounds contrary to international law,
- (i) on behalf of, or with the consent, support or authorisation/authorisation, support or acquiescence\* of a State or a political organisation contributes to the enforced disappearance of a person, with the intention of removing that person from the protection of the law for a prolonged period of time,

(j) in the context of an institutionalised regime of systematic oppression and domination by one racial group over one or more other racial groups/any other racial group or groups\* commits a crime of apartheid by carrying out inhumane acts of a character like or similar to that of acts falling within the scope of this section with the intention of maintaining that regime, or

(k) commits another inhumane act of a similar character that causes great suffering or severe injury to body or health.

The penalty for a crime against humanity is imprisonment for a term not exceeding 30 years.

**(iii) Genocide**

Section 101. Genocide

Any person is liable to punishment for genocide who with intent to destroy, in whole or in part, a national, ethnical, racial or religious group

(a) kills one or more members of the group,

(b) causes serious injury to body or to mental or physical health to one or more members of the group,

(c) deliberately inflicts on one or more members of the group conditions of life calculated to bring about the physical destruction of the group, in whole or in part,

(d) imposes measures on one or more members of the group intended to prevent births within the group, or

(e) forcibly transfers one or more children from the group to another group.

To render a person liable to punishment for aiding and abetting, it suffices that he intends to share the principal's genocidal intent. The penalty for genocide is imprisonment for a term not exceeding 30 years.

**(iv) Torture**

Section 117 a Criminal Code 1902.

Any person who commits torture shall be liable to imprisonment for a term not exceeding 15 years. In the case of aggravated and severe torture resulting in death, a sentence of imprisonment for a term not exceeding 21 years may be imposed. Any person who aids and abets such an offence shall be liable to the same penalty.

Torture here means that a public official inflicts on another person harm or severe physical or mental pain,

a) with the intention of obtaining information or a confession,

b) with the intention of punishing, threatening or compelling someone, or

c) because of the person's creed, race, skin colour, sex, homosexual inclination, lifestyle or orientation or national or ethnic origin.

In this provision public official means anyone who

a) exercises public authority on behalf of a state or municipality, or

b) performs a service or work that a state or municipality shall pursuant to a statute or regulation appoint someone to perform or wholly or partly pay for.

Torture also includes any acts referred to in the second paragraph committed by a person who acts at the instigation of or with the express or implied consent of a public official.

## Poland

### Overview

Poland's Criminal Code criminalises genocide and some war crimes.<sup>1059</sup> The Constitution also stipulates that "*No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment*"<sup>1060</sup> and the Torture Convention can be applied directly in Polish law.<sup>1061</sup>

Polish criminal law provides for both active and passive personality jurisdiction.<sup>1062</sup>

Article 109 of the Polish Criminal Code provides for active personality jurisdiction for any crime committed by Polish citizens abroad. Article 110(1) provides for passive personality jurisdiction over non-Poles who have committed offences abroad against the interests of the Republic of Poland, a Polish legal person or organization which does not have the status of a legal person, where the offence is also punishable in the place where it was committed.<sup>1063</sup>

The Polish Criminal Code also provides for universal jurisdiction under Article 110(2), which stipulates that Polish criminal law will apply to non-Poles for offences abroad provided that such crimes are subject to a penalty exceeding two years' imprisonment under Polish law, that they are also regarded as crimes in the place they were committed, that the perpetrator remains within the territory of the Republic of Poland and no decision on his or her extradition has been made. This would cover war crimes and genocide as set out in the Criminal Code.<sup>1064</sup>

Article 113 provides further for universal jurisdiction over crimes which Poland is obliged to prosecute under international agreements; these are punishable under Polish law irrespective of the law in the place where they are committed, provided no decision on extradition has been taken.

### Issues

**Nexus requirements (including presence or residence):** Presence is required for the exercise of passive personality jurisdiction under Article 110(1) and universal jurisdiction under Article 110(2). Procedurally, as a general rule, presence at the hearing is mandatory, *unless otherwise provided by law*.<sup>1065</sup> Exceptions exist where the accused's presence is not deemed indispensable, in which case the hearing may be conducted *in absentia*.<sup>1066</sup>

**Subsidiarity:** There do not appear to be any provisions governing subsidiarity in the Polish criminal law.

**Double criminality:** Double criminality exists under the Criminal Code, Articles 110(2) and 111(1) for ordinary crimes; where there is a difference between Polish criminal law and the laws of the place where the crime was committed, the court may apply this difference in favour in the perpetrator. Article 113 states, however, that where crimes committed

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<sup>1059</sup> CC, Articles 117-126.

<sup>1060</sup> Article 40.

<sup>1061</sup> Government of Poland, *Third periodic reports of States parties due in 1998: Poland*, 18 March 1999, CAT/C/44/Add.5.

<sup>1062</sup> The translation of relevant Polish criminal law provisions are taken from the questionnaire response. These are based on the 1997 Criminal Code and the 1997 Criminal Procedure Code, but include the amendments made to both in 2009.

<sup>1063</sup> CC, Article 111(1).

<sup>1064</sup> Under Articles 113-126

<sup>1065</sup> CCP, Articles 374(1), 376(1), 377(3), 382.

<sup>1066</sup> CCP, Articles 376(1) and 377(3).

are obliged to be prosecuted under international agreements to which Poland is party, these will be prosecuted under the Polish criminal law irrespective of whether they are punishable in the place in which were committed.

**Prosecutorial and Executive discretion:** Under the Criminal Procedure Code, prosecutions are initiated by the prosecutor, or any other person entitled to prosecute,<sup>1067</sup> although the court is not bound by the prosecutor's withdrawal of prosecution.<sup>1068</sup>

**Statutes of limitation:** The rules on statutes of limitations do not apply to crimes against peace, crimes against humanity or war crimes,<sup>1069</sup> nor to homicide or torture perpetrated by any public official in the performance of his official duties.<sup>1070</sup>

**Immunities:** The Polish Code of Criminal Procedure provides immunity to diplomatic staff and their families, including related administrative and technical staff,<sup>1071</sup> as well as to persons who are granted immunity under international treaties or customary law.<sup>1072</sup> Immunity is also provided to consular officials and other persons accorded similar status in international treaties or customary law for acts carried out in the context of their official duties.<sup>1073</sup> Finally, a witness or expert who is a non-Polish citizen and is summoned and appears voluntarily at court cannot be prosecuted or arrested or put under preliminary detention. No sentence may be executed on him or her in connection with an offence relevant to the criminal proceedings, or any other offence committed by him before crossing the Polish border, until seven days after the court declares that his presence at court is no longer necessary.<sup>1074</sup>

There do not appear to be any regulations dealing with international crimes specifically.

**Victims' role in proceedings:** The Criminal Procedure Code states that the victim may act as subsidiary prosecutor<sup>1075</sup> and the withdrawal of any charges does not prevent him or her from pressing charges.<sup>1076</sup> If the public prosecutor does not find sufficient grounds to bring an indictment and therefore refuses to prosecute or decides to discontinue proceedings, the victim may file an indictment at court within one month of notification of the public prosecutor's decision.<sup>1077</sup>

A victim may also make a claim for property damages/loss resulting from the offence within the criminal proceedings.<sup>1078</sup> If the court refuses the claim, he or she may litigate the claim as a civil litigant in civil proceedings.<sup>1079</sup>

**Victim and witness protection:** The Code of Criminal Procedure provides for in-court and out-of-court protective measures for witnesses where there is a real threat to the life, health, freedom or property of the witness or next of kin. Such measures include the protection of identity and personal details of the witness,<sup>1080</sup> and examination in closed

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<sup>1067</sup> CCP, Article 14(1).

<sup>1068</sup> CCP, Article 14(2).

<sup>1069</sup> CC, Article 105(1).

<sup>1070</sup> CC, Article 105(2).

<sup>1071</sup> CCP, Article 578(1)-(4).

<sup>1072</sup> CCP, Articles 578(5) and 579(1)1-2.

<sup>1073</sup> CCP, Article 579(1)1-2.

<sup>1074</sup> CCP, Article 589(1).

<sup>1075</sup> CCP, Article 53.

<sup>1076</sup> CCP, Article 54(2).

<sup>1077</sup> CCP, Articles 330(2) and 55(1).

<sup>1078</sup> CCP, Article 62.

<sup>1079</sup> CCP, Article 67(1).

<sup>1080</sup> CCP, Article 184.



session hearings.<sup>1081</sup> A national witness protection system also exists, although there are no legislative provisions on this.<sup>1082</sup>

## Cases

So far there have been no prosecutions based on universal jurisdiction in Poland that the authors are aware of. However, in November 2007, the Polish Military Prosecutor's Office launched an investigation into the case of Polish soldiers who were alleged to have attacked civilians and civilian targets in Afghanistan, which was brought before the District Court Martial in Warsaw. Although this particular case was based on active personality jurisdiction, it opens up possibilities regarding the application of the war crimes clauses of the Polish Criminal Code.

## Relevant Legislation

### JURISDICTION

#### Criminal Code<sup>1083</sup>

Liability for offences committed abroad

#### Article 109

The Polish penal law shall be applied to Polish citizens who have committed an offence abroad.

#### Article 110

1) The Polish penal law shall be applied to aliens who have committed abroad an offence against the interests of the Republic of Poland, a Polish citizen, a Polish legal person or a Polish organisational unit not having the status of a legal person.

2) The Polish penal law shall be applied to aliens in the case of the commission abroad of an offence other than listed in § 1, if, under the Polish penal law, such an offence is subject to a penalty exceeding 2 years of deprivation of liberty, and the perpetrator remains within the territory of the Republic of Poland and where no decision on his extradition has been taken.

#### Article 111

1) The liability for an act committed abroad is, however, subject to the condition that the liability for such an act is likewise recognised as an offence, by a law in force in the place of its commission.

2) If there are differences between the Polish penal law and the law in force in the place of commission, the court may take these differences into account in favour of the perpetrator.

#### Article 113

Notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements.

### CRIMES UNDER INTERNATIONAL LAW

#### Criminal Code

Chapter XVI. Offences against peace, and humanity, and war crimes

#### Article 117

1) Whoever initiates or wages a war of aggression shall be subject to the penalty of the deprivation of liberty for a

<sup>1081</sup> CCP, Article 183(2).

<sup>1082</sup> It is worth noting the Witness Protection Act or the Law on Crown Witnesses which was implemented in 1998 for a trial period until 2006. This made provision for a witness protection programme which provided physical protection, relocation and a change of identity for victims of *serious crimes* - information found at: <http://www.unhcr.org/refworld/category,COI,IRBC,,POL,3f7d4dfc11,0.html> (last accessed December 2010).

<sup>1083</sup> Translation of relevant Polish criminal law provisions have been taken from the questionnaire response.

minimum term of 12 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.

2) Whoever makes preparation to commit the offence specified under (1) shall be subject to the penalty of the deprivation of liberty for a minimum term of 3 years.

3) Whoever publicly incites to initiate a war of aggression shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years.

#### Article 118

1) Whoever, acting with an intent to destroy in full or in part, any ethnic, racial, political or religious group, or a group with a different perspective on life, commits homicide or causes a serious detriment to the health of a person belonging to such a group, shall be subject to the penalty of the deprivation of liberty for a minimum term of 12 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.

2) Whoever, with the intent specified under (1), creates, for persons belonging to such a group, living conditions threatening its biological destruction, applies means aimed at preventing births within this group, or forcibly removes children from the persons constituting it, shall be subject to the penalty of the deprivation of liberty for a minimum term of 5 years or the penalty of deprivation of liberty for 25 years.

3) Whoever makes preparation to commit the offence specified under (1) or (2) shall be subject to the penalty of the deprivation of liberty for a minimum term of 3 years.

#### Article 119

1) Whoever uses violence or makes unlawful threat towards a group of person or a particular individual because of their national, ethnic, political or religious affiliation, or because of their lack of religious beliefs, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years.

2) The same punishment shall be imposed on anyone, who incites commission of the offence specified under (1).

#### Article 120

Whoever uses a means of mass extermination prohibited by international law, shall be subject to the penalty of the deprivation of liberty for a minimum term of 10 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.

#### Article 121

1) Whoever, violating the prohibition contained in international law or in internal law, manufactures, amasses, purchases, trades, stores, carries or dispatches the means of mass extermination or means of warfare, or undertakes research aimed at the manufacture or usage of such means, shall be subject to the penalty of the deprivation of liberty for a term of between 1 and 10 years.

2) The same punishment shall be imposed on anyone, who allows the commission of the act specified under (1).

#### Article 122

1) Whoever, in the course of warfare, attack an undefended locality or a facility, hospital zone or uses any other means of warfare prohibited by international law, shall be subject to the penalty of the deprivation of liberty for a minimum term of 5 years, or the penalty of deprivation of liberty for 25 years.

2) The same punishment shall be imposed on anyone, who, in the course of warfare, uses a means of warfare prohibited by international law.

#### Article 123

1) Whoever, in violation of international law, commits the homicide of

- 1) persons who surrendered, laid down their arms or lacked any means of defence,
- 2) the wounded, sick, shipwrecked persons, medical personnel or clergy,
- 3) prisoners of war,
- 4) civilians in an occupied area, annexed or under warfare, or other persons who are protected by international law during warfare,

shall be subject to the penalty of the deprivation of liberty for a minimum term of 12 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.

2) Whoever, in violation of international law, causes the persons specified under (1) to suffer serious detriment to health, subjects such persons to torture, cruel or inhumane treatment, makes them even with their consent the objects of cognitive experiments, , uses their presence to protect a certain area or facility, or armed units from warfare, or keeps such persons as hostages shall be subject to the penalty of the deprivation of liberty for a minimum term of 5 years or the penalty of deprivation of liberty for 25 years

#### Article 124

Whoever, in violation of international law, forces the persons specified under Article 123(1) to serve in enemy armed forces, resettles them, uses corporal punishment, deprives them of liberty or of the right to independent and impartial judicial proceedings, or restricts their right to defence in criminal proceedings, shall be subject to the penalty of the deprivation of liberty for a minimum term of 3 years.

#### Article 125

1) Whoever, in an area occupied, taken over or under warfare, in violation of international law, destroys, damages or removes items of cultural heritage shall be subject to the penalty of the deprivation of liberty for a term of between 1 and 10 years.

2) If the act pertains to an item of particular importance to cultural heritage, the perpetrator shall be

subject to the penalty of the deprivation of liberty for a minimum term of 3 years.

Article 126

1) Whoever, in the course of warfare, illegally uses the emblem of the Red Cross or Red Crescent, shall be subject to the penalty of the deprivation of liberty for a minimum term of 3 years.

2) The same punishment shall be imposed on anyone, who, in the course of warfare, illegally uses protective emblems for items of cultural heritage or other emblems protected under international law, or uses a national flag or the military markings of the enemy, neutral country or an international organisation or commission.

## Portugal

### Overview

Portugal has incorporated the Rome Statute crimes - genocide, war crimes and crimes against humanity - into domestic legislation,<sup>1084</sup> and has a provision in its Criminal Code outlawing torture.<sup>1085</sup>

Article 5 of the Portuguese Criminal Code applies to criminal acts committed outside Portuguese territory, unless provided otherwise in an international treaty or convention.<sup>1086</sup> This Article provides for passive personality jurisdiction,<sup>1087</sup> stating that certain crimes are punishable when committed against Portuguese nationals either by other Portuguese customarily resident in Portugal at the time of the crime and subsequently found in Portugal.<sup>1088</sup> It also provides for active personality jurisdiction, where the accused cannot be extradited and the crime also exists in the state where the act took place.<sup>1089</sup>

The Article also provides for universal jurisdiction on a number of bases: (i) for certain crimes and/or (ii) where the perpetrator is discovered in Portugal, it is a crime permitting extradition, but it is not possible to extradite the suspect;<sup>1090</sup> or (iii) in respect of international treaties or conventions to which Portugal is party giving rise to an obligation to prosecute.<sup>1091</sup>

Law no. 31/2004 incorporates the Rome Statute into Portuguese legislation so that war crimes, crimes against humanity and genocide are punishable under Article 5, as long as the suspect is discovered in Portugal and cannot be extradited or delivered to the International Criminal Court.

### Issues

**Nexus requirements (including presence or residence):** Presence is required to exercise universal jurisdiction under Article 5 (including for Rome Statute Crimes), except in relation to certain enumerated crimes.<sup>1092</sup>

Procedurally, the general rule is that the accused must be present at trial.<sup>1093</sup> However, there are exceptions, where his or her presence is not deemed indispensable or where circumstances make it impossible, for example old age, ill health or even residence abroad, and in such cases it is possible to conduct the trial *in absentia*.<sup>1094</sup>

**Subsidiarity:** Article 5 does not specifically deal with subsidiarity except insofar as it states that jurisdiction is allowed over crimes under international law where extradition or the execution of a European warrant of arrest, or other instrument of international cooperation binding on Portugal, is not possible. In addition, Article 7 of the Portuguese

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<sup>1084</sup> Law no. 31/2004.

<sup>1085</sup> CC, Article 243.

<sup>1086</sup> CC, Article 5(1).

<sup>1087</sup> Translation of relevant Portuguese Criminal Law provided in questionnaire response.

<sup>1088</sup> CC, Article 5(1)(b) and (e).

<sup>1089</sup> CC, Article 5(1)(e).

<sup>1090</sup> CC, Article 5(1)(a),(c),(d) and (f).

<sup>1091</sup> CC, Article 5(2).

<sup>1092</sup> CC, Article 5(1)(a).

<sup>1093</sup> CC, Article 332.

<sup>1094</sup> CC, Article 333 and 334.

Constitution provides that Portugal may accept the jurisdiction of the International Criminal Court in relation to complementarity.

International cooperation in criminal matters generally is ruled by law no. 144/99, which foresees the existence of joint investigation teams that may be set up by mutual agreement between the Portuguese State and a foreign State.<sup>1095</sup>

**Double criminality:** Double criminality must exist to exercise active or passive personality jurisdiction under Article 5(1)(e).

**Prosecutorial and Executive discretion:** The public prosecutor is legally obliged to investigate all crimes brought to his or her attention<sup>1096</sup> and generally to prosecute where there is sufficient evidence, where the perpetrator can be identified and charged and public action is permitted.<sup>1097</sup> The public prosecutor could, however, suspend proceedings conditionally for offences that are subject to less than five years of imprisonment, as long as s/he has the consent of the examining magistrate, the auxiliary prosecutor and the accused.<sup>1098</sup>

**Ability to review decisions of the prosecutor or other governmental body:** The victim has the right to challenge decisions not to prosecute,<sup>1099</sup> but not decisions to suspend proceedings.<sup>1100</sup>

**Statutes of limitation:** There is no statute of limitation for the crimes which fall under the Rome Statute, by virtue of law no. 31/2004.

**Immunities:** There are no immunities for serious crimes. Article 196 of the Portuguese Constitution lifts immunity for crimes where punishment exceeds 3 years. It should be noted that all crimes which are covered by the aforementioned law 31/2004, which incorporates the Rome Statute into Portuguese law, are subject to penalties exceeding 3 years. In addition, Article 7 of the Constitution accepts the jurisdiction of the International Criminal Court, thereby discarding immunity for serious crimes.

**Victims' role in proceedings:** Article 68 of the Portuguese Criminal Procedure Code provides for '*assistentes*'. These are civil parties, usually the victims, who may intervene in the proceedings. The '*assistente*' participates in the judicial inquiry and thereafter, but in addition to offering evidence, he or she may act as a prosecutor independent from the public prosecutor or in cases where the prosecutor does not choose to prosecute. Any victim who has suffered from crimes against peace and humanity may participate as '*assistente*'.<sup>1101</sup>

Victims may make a claim for damages in the respective criminal proceedings, and in some circumstances make a separate one before a civil court.<sup>1102</sup>

**Victim and witness protection:** There is specific legislation which affords in-court and out-of-court protection to victims and witnesses.<sup>1103</sup> This would include measures such as conducting trials via video-conferencing facilities, safe transportation to the court, police

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<sup>1095</sup> Questionnaire response.

<sup>1096</sup> CCP, Article 262.

<sup>1097</sup> CCP, Article 277 and 283.

<sup>1098</sup> CCP, Article 281.

<sup>1099</sup> CCP, Articles 277, 278 and 287-2b.

<sup>1100</sup> CCP, Article 281-5.

<sup>1101</sup> CCP, Article 68.

<sup>1102</sup> CCP, Article 71 and 74.

<sup>1103</sup> The Witness Protection Law (Law no. 94/99).

protection and police surveillance. In addition special witness protection programs are available enabling relocation and identity change, including physiognomic change.<sup>1104</sup>

**Specialised War Crimes Unit:** The Central Department for Investigation and Criminal Action (DCIAP) is a special unit for the investigation of serious crimes, headed by the Prosecutor General. In addition, the National Counter-Terrorism Unit of the *Polícia Judiciária*, which mainly deals with terrorism, has the competence to prevent, detect, investigate and support the judicial authorities in dealing with crimes which fall under the Criminal Law on the Violation of International Humanitarian Law.<sup>1105</sup>

**Participation in EU Genocide Network:** Portugal has implemented the EU Council Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, and has designated a particular EU Contact Point. This contact point has participated in network meetings.

## Cases

The authors are not aware of any cases of prosecution of crimes under international law in Portugal using universal jurisdiction.

## Relevant Legislation

### JURISDICTION

Criminal Code<sup>1106</sup>

Article 5 - Acts committed outside the Portuguese territory

1 - Unless provided otherwise in an international treaty or convention, the Portuguese criminal law is also applicable to acts committed outside the national territory:

- a) When constituting the crimes foreseen in articles 221, 262 to 271, 308 to 321 and 325 to 345;
- b) Against Portuguese, by Portuguese customarily residents in Portugal at the time of their commission and found therein;
- c) When constituting the crimes foreseen in articles 159 to 161, 171, 172, 175, 176 and 278 to 280, provided that the agent is found in Portugal and cannot be extradited or handed over as a result of the execution of an European arrest warrant or other instrument of international cooperation which bounds the Portuguese State;
- d) When constituting the crimes foreseen in articles 144, 163 and 164, when the victim is a minor, provided that the agent is found in Portugal and cannot be extradited or handed over as a result of the execution of an European arrest warrant or other instrument of international cooperation which bounds the Portuguese State;
- e) By Portuguese, or by foreigners against Portuguese, whenever:
  - i) The agents are found in Portugal;
  - ii) Such acts are also punishable by the law of the place where they have been committed, unless the place of the act is not subject to any punitive power; and
  - iii) Such acts constitute a crime permitting extradition and such extradition cannot be granted or it is decided not to hand over the agent in execution of an European arrest warrant or other instrument of international cooperation which bounds the Portuguese State;
- f) By foreigners found in Portugal and whose extradition has been requested, when constituting crimes permitting extradition and such extradition cannot be granted or it is decided not to hand over the agent in execution of an European arrest warrant or other instrument of international cooperation which bounds the Portuguese State;
- g) By a legal person or against a legal person having its registered office in the Portuguese territory.

2 - The Portuguese criminal law is also applicable to acts committed outside the national territory to which the Portuguese State has, by international treaty or convention, bound itself to decide.

### CRIMES UNDER INTERNATIONAL LAW

Law no. 31/2004 incorporates the Rome Statute into Portuguese legislation. In addition, torture is defined in the Criminal Code as a crime against peace and humanity, and defined in a way which is close

<sup>1104</sup> Witness Protection Law, Article 22.

<sup>1105</sup> Law no. 42/2009, Article 7.

<sup>1106</sup> Translation obtained from questionnaire response from Portugal and verified at: <http://www.verbojuridico.com/download/portuguese-penalcode.pdf> (unofficial translation).

to that defined in the Convention, as follows:

Article 243

1. Any person who, in the performance of duties of preventing, prosecuting, investigating or trying criminal or disciplinary offences, enforcing related penalties or protecting, guarding or supervising a detained person or prisoner, subjects that person to torture or to cruel, inhuman or degrading treatment for the purpose of:

- (a) Obtaining a confession, statement, declaration or information from that or any other person;
- (b) Punishing that person for an act which he committed, of which he was suspected or which was committed by any other person; or
- (c) Intimidating that or any other person shall be liable to one to five years' imprisonment, unless a harsher penalty is applicable under another legal provision.

2. Any person who, on his own initiative or following orders from a superior, usurps the functions described in the preceding paragraph to commit any of the acts referred to therein shall be liable to the same penalty.

3. Any act which involves inflicting intense physical or psychological suffering or using chemical substances, medicaments, drugs or other natural or artificial means in order to impair the victim's ability to take decisions or freely express his will shall be regarded as torture or cruel, inhuman or degrading treatment or punishment.

4. The provisions of the preceding paragraph do not include pain or suffering inherent in or arising from the enforcement of the penalties provided for in paragraph 1 or any lawful measures depriving a person of his liberty or restricting his freedom.

Article 244

1. Any person who, under the terms and conditions provided for in the preceding article:

- (a) Causes serious harm to another person's physical integrity;
  - (b) Uses particularly harsh means or methods of torture, such as beatings, electric shocks, mock executions or hallucinogens; or
  - (c) Habitually commits any of the acts referred to in the preceding article;
- shall be liable to 3 to 12 years' imprisonment.

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2. When the acts referred to in this or the preceding article lead to the suicide or death of the victim, the perpetrator shall be liable to 8 to 16 years' imprisonment".

6. According to article 245, failure to report the commission of an act of torture is also punishable:

"A hierarchical superior who is aware that a subordinate has committed an act referred to in articles 243 and 244 and who fails to report him within no more than three days of learning of the commission of the act shall be liable to six months' to three years' imprisonment".

7. In accordance with article 246 of the Penal Code, the commission of the crimes referred to in the Penal Code as crimes against peace and against humanity may lead to deprivation of the right to vote and to be elected to political office for a period of 2 to 10 years.

## Romania

### Overview

Romania adopted a new Criminal Code in 2009, however this new Code is not yet in force. This overview will therefore consider the position under the current Criminal Code (the “1969 Criminal Code”) and under the Code passed in 2009 (the “2009 Criminal Code” or the “new Code”).

The relevant provisions of each Code are set out at the end of this country entry. The 1969 Criminal Code criminalises torture,<sup>1107</sup> war crimes, some crimes against humanity, and genocide.<sup>1108</sup> The new Code introduces definitions of war crimes,<sup>1109</sup> crimes against humanity<sup>1110</sup> and genocide<sup>1111</sup> broadly in line with those under the Rome Statute.

Under the 1969 Criminal Code, the authorities have jurisdiction over all crimes perpetrated by citizens and residents of Romania. This therefore provides for active personality jurisdiction, and universal jurisdiction (limited by residence) for all crimes.<sup>1112</sup> The Code also allows for the exercise of passive personality jurisdiction under Article 5, and this also extends to all crimes. These provisions are restricted in the new Code: active nationality jurisdiction applies automatically only in relation to crimes with a punishment of more than 10 years; in other cases a double criminality requirement is imposed.<sup>1113</sup> Jurisdiction based solely on residence is removed.

Under the current Code, universal jurisdiction is available in relation to all crimes where the accused is present in Romania and the double criminality requirement is fulfilled.<sup>1114</sup> However, if, “*in accordance with the law of the country where the offender committed the offence, there is any cause preventing initiation of penal pursuit or continuation of the criminal trial or penalty enforcement, or when the penalty was executed or considered as having been executed*” these provisions do not apply.<sup>1115</sup> It is not clear whether it would need to be shown that there is a ‘genuine’ reason under that law; but at the very least an official document would need to be provided to show cause.<sup>1116</sup> This type of jurisdiction has also been significantly restricted under the new Code: it will apply only to those crimes which Romania is bound by treaty to prosecute.<sup>1117</sup>

Overarching the rules in both Codes are obligations imposed by international conventions; in the case of conflict between the two the international convention will apply.<sup>1118</sup>

### Issues

**Nexus requirements (including presence or residence):** Presence is required for the exercise of universal jurisdiction in Romania, for all crimes. Under the current Code, if

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<sup>1107</sup> CC 1969, Article 267.

<sup>1108</sup> CC 1969, Articles 356-360.

<sup>1109</sup> CC 2009, Articles 440-444.

<sup>1110</sup> CC 2009, Articles 439.

<sup>1111</sup> CC 2009, Articles 438.

<sup>1112</sup> CC 1969, Article 4.

<sup>1113</sup> CC 2009, Article 9.

<sup>1114</sup> CC 1969, Article 6(1).

<sup>1115</sup> CC 1969, Article 6(3).

<sup>1116</sup> Meeting with Romanian officials, 11 June 2010.

<sup>1117</sup> CC 2009, Article 11.

<sup>1118</sup> CC 1969, Article 7; CC 2009, Article 12.



the double criminality requirement is not fulfilled, the stricter requirement of residence is imposed.<sup>1119</sup>

**‘Subsidiarity’:** Under the current Code, if the jurisdictional conditions are met, the authorities in Romania may proceed with an investigation or prosecution. This would not be affected by the fact that another state also had jurisdiction,<sup>1120</sup> although that could conceivably amount to a reason under the law of the territorial state preventing continuation of the criminal trial where jurisdiction is taken under Article 6(3). Under the new Code, an explicit subsidiarity principle is imposed in respect of passive personality jurisdiction (Article 10) and for universal jurisdiction (Article 11) the extradition of the accused must have been requested and refused.

**Double criminality:** Double criminality is required to exercise universal jurisdiction over alleged perpetrators where jurisdiction is based solely on presence under the current Code.<sup>1121</sup> Under the new Code double criminality is required to exercise active personality jurisdiction over crimes punishable by 10 years imprisonment or less.<sup>1122</sup>

**Prosecutorial and Executive discretion:** Criminal procedure is based on the legality principle (rather than the opportunity principle) which means that if a crime is brought to the attention of the competent national authority, it must proceed accordingly and initiate an investigation.<sup>1123</sup> Prosecutions for crimes committed abroad by a foreign citizen brought on the basis of passive personality jurisdiction (under either Code) or active personality jurisdiction (under the new Code) must be authorised by the general prosecutor.<sup>1124</sup> In other cases the prosecution may be initiated by an ordinary prosecutor.<sup>1125</sup>

**Ability to review decisions of the prosecutor or other governmental body:** If the prosecutor decides not to investigate or prosecute a case, the interested party can make a complaint to a court, which will decide if the case should be taken up or not.<sup>1126</sup>

**Statutes of limitation:** Certain crimes under international law are not subject to limitation periods in Romanian law. The 1969 Criminal Code excludes the international crimes referred to above (in Articles 356-359) from the operation of limitation periods.<sup>1127</sup> The new Criminal Code similarly provides that prescription does not remove criminal responsibility in cases of genocide, war crimes and crimes against humanity.<sup>1128</sup>

**Immunities:** The 1969 Criminal Code provides that the criminal law does not apply to offences committed by diplomats of foreign countries or by other persons who, in compliance with international conventions, are not subject to Romanian state criminal jurisdiction.<sup>1129</sup> National law immunities are also provided for deputies and senators in certain circumstances.<sup>1130</sup> There are no specific provisions addressing the relationship between immunities and prosecutions of crimes under international law.

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<sup>1119</sup> CC 1969, Articles 5 and 6.

<sup>1120</sup> Meeting with Romanian officials, 11 June 2010.

<sup>1121</sup> CC 1969, Article 6(1).

<sup>1122</sup> CC 2009, Article 9.

<sup>1123</sup> Response to MoJ/MFA Questionnaire.

<sup>1124</sup> CC 1969, Article 5; CC 2009, Articles 9 and 10.

<sup>1125</sup> Meeting with Romanian officials, 11 June 2010.

<sup>1126</sup> Ibid.

<sup>1127</sup> CC 1969, Article 121(2).

<sup>1128</sup> CC 2009, Article 153(2).

<sup>1129</sup> CC 1969, Article 8.

<sup>1130</sup> Response to MoJ/MFA Questionnaire.

**Victims' role in proceedings:** Victims or third parties acting on their behalf may raise civil claims for damages within a criminal prosecution<sup>1131</sup> or within civil proceedings. The criminal investigation body or the court will ask the victim's representative to submit a report on the size of the damage and the acts by which the damage was done. Civil claims on behalf of the victim may also be raised ex officio by the court, when the victim lacks or has limited capacity.<sup>1132</sup>

**Victim and witness protection:** If there are real fears about the safety of a witness, he or she may be granted anonymity and given a fictitious name for the purposes of the trial and neither the accused nor his or her defender will know the identity of the witness. In such cases the witness will be heard through closed circuit television, with the image and voice distorted so as not to be recognised, and the statement will be rendered entirely in written form.<sup>1133</sup> Information about the real identity of the witness must be recorded in an official report kept in a sealed envelope at the prosecutor's office or at the court. The statements of anonymous witnesses may be relied on to determine the truth only to the extent to which they are corroborated with facts and circumstances resulting from all the evidence in the case.<sup>1134</sup>

A prosecutor or court may also request police to provide personal protection to a witness.<sup>1135</sup>

Romania has a Witness Protection Unit, established under Law 682/2002 regarding protection of witnesses. Chapter 2 of the law provides for protective measures including relocation.<sup>1136</sup> The Witness Protection Unit has also cooperated with agencies from other states to relocate witnesses from abroad.<sup>1137</sup>

**Participation in EU Genocide Network:** Romania has designated four contact points in respect of persons responsible for genocide, crimes against humanity and war crimes. Two of these contact points are in the Ministry of Justice and two are in the Prosecution Office of the High Court of Cassation and Justice. Romania has participated in the Network meetings.

## Cases

The researchers are not aware of investigations or prosecutions of crimes under international law on the basis of universal jurisdiction carried out in Romania. Romania did however arrest and extradite a Lebanese and Spanish citizen<sup>1138</sup> to the United States for crimes committed outside the United States.<sup>1139</sup>

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<sup>1131</sup> CCP, Article 15.

<sup>1132</sup> CCP, Article 17.

<sup>1133</sup> CCP, Article 86.2(3).

<sup>1134</sup> CCP, Article 86.1.

<sup>1135</sup> CCP, Article 86.5.

<sup>1136</sup> Article 12.2(f).

<sup>1137</sup> Meeting with Romanian officials, 11 June 2010.

<sup>1138</sup> Tareg Mousa Al Ghazi and Luis Felipe Moreno Godoy.

<sup>1139</sup> They were convicted of the following offences: (1) conspiracy to murder U.S. officers; (2) conspiracy to acquire and export anti-aircraft missiles; (3) conspiracy to provide material support and resources to the Fuerzas Armadas Revolucionarias de Colombia (the "FARC"), a designated foreign terrorist organization; and (4) money laundering. Godoy was also found guilty of conspiracy to murder U.S. nationals. See United States Attorney Southern District of New York, 'International arms trafficker Monzer Al Kassar and associate sentenced on terrorism charges', 24 February 2009; available at <http://www.justice.gov/usao/nys/pressreleases/February09/kassarsentencingpr.pdf>, and United States Attorney Southern District of New York, 'Associate of international arms dealer Monzer Al Kassar found guilty of terrorism offences', 18 March 2009; available at <http://www.justice.gov/usao/nys/pressreleases/March09/algaziverdictpr.pdf>.

## Relevant Legislation

### Jurisdiction

#### CURRENT CODE (1969)

Article 4. - Criminal law applies to offences committed outside Romania, if the perpetrator is a Romanian citizen or if, possessing no citizenship, the perpetrator has residence in Romania.

Article 5. - (1) Criminal law applies to offences committed outside Romania, which act against the Romanian state security or against a Romanian citizen's life, or which seriously damaged physical integrity or health of a Romanian citizen and which are committed by a foreign citizen or by a person without citizenship and who is not residing in Romania.

(2) The initiation of a criminal pursuit for the offences provided in the previous paragraph must be preliminarily authorized by the general prosecutor.

Article 6. - (1) Criminal law also applies to other offences than those provided in art. 5, paragraph 1, namely to offences committed outside Romania by a foreign citizen or by a person without citizenship and who is not residing in Romania, if:

- a) the respective action is considered a offence as well by the criminal law of the country where the action was committed;
- b) the perpetrator is in the country.

(2) For offences against the Romanian state interests or against a Romanian citizen, the offender can be tried also in case his extradition has been obtained.

(3) The provisions in the preceding paragraphs do not apply if, in accordance with the law of the country where the offender committed the offence, there is any cause preventing initiation of penal pursuit or continuation of the criminal trial or penalty enforcement, or when the penalty was executed or considered as having been executed. When the penalty was not executed at all or only part of it was executed, the next procedure will be in accordance with legal provisions on compliance with foreign sentences.

Article 7. - The provisions of art. 5 and 6 will be applied only if there is no different disposition imposed by an international convention.

#### FUTURE CODE (2009) (NOT YET IN FORCE)

##### Article 9 - Personality of criminal law

Romanian criminal law applies to offences committed outside de state's territory by a Romanian citizen or a Romanian legal person if the punishment imposed by Romanian law is life imprisonment or imprisonment of more than 10 years. In all other cases Romanian law is applied to offences committed outside the state's territory by a Romanian citizen or a Romanian legal person if the act is also enshrined as an offence by the criminal law of the state where the offence was committed or if it was committed in a place which is not under the jurisdiction of any other state. The initiation of such criminal proceedings can only be undertaken with the prior approval of the general prosecutor from the prosecutor's office of the Court of Appeal on the territory of which is located the prosecutor's office firstly announced or of the general prosecutor of the prosecutor's office by the High court of Cassation and Justice.

##### Article 10 - Reality of criminal law

Romanian criminal law applies to offences committed outside the territory of the state by a foreign citizen or a person without citizenship against the Romanian state, a Romanian citizen or a Romanian legal person. The initiation of such criminal proceedings can only be undertaken with the prior approval of the general prosecutor of the prosecutor's office of the High Court of Cassation and Justice and only if the deed is not the object of a judicial procedure on the territory of the state where it was committed.

##### Article 11 - Universality of criminal law

(1) Romanian criminal law applies also to other offences than those mentioned in Article 10 committed outside the country's territory by a foreign citizen or a person without citizenship who is located by his or her own will on the territory of Romania in the following cases:

- (a) the offence committed is one in respect of which the Romanian state has assumed the obligation to repress on the basis of an international treaty regardless of whether the act is criminal under the law of the state where it was committed;
- (b) the extradition or the surrender of the offender was requested and this was refused.

(2) The provisions of paragraph (1)(b) will not apply when, according to the laws of the state where the offence was committed, there is a cause which impedes the initiation of criminal proceedings or the continuation of the criminal trial or the execution of the punishment, or when the punishment was executed or considered as executed.

(3) When the punishment has not been executed or has been only partially executed, the procedure referring to the recognition of foreign judgments is to be followed.

##### Article 12

The provisions of Articles 8-11 will be applied only if there is no different disposition imposed by an international convention.

### Crimes under international law

#### CURRENT CODE (1969)

Article 267. - (1) Pain or physical or psychic strong sufferance intentionally caused to a person, especially in order to obtain from this person or from a third person information or confessions, to punish her for an act that she or a third person committed or is suspected to have committed, to intimidate or to exert pressure on her or on a third person, or for any other reason based on a form of discrimination, whatever this is, when such pain or sufferance are caused by a public authority agent or by any other person who acts under an official title, instigated by or with the express or tacit consent of such persons, shall be punished by 2-7 years jail.

(2) If the deed mentioned in paragraph 1 had one of the consequences shown in art. 181 or 182, the punishment is imprisonment between 3 and 10 years.

(3) The torture that resulted in death of the victim shall be punished by jail for life or for 15- 25 years.

(4) The attempt shall be punished.

(5) No exceptional circumstance, whatever that is, be it war or threats of war, internal political instability or any other exceptional situation, can be invoked as justification for torture; the order of the superior or of a public authority cannot be invoked either.

(6) The deeds stipulated in paragraph 1 are not considered torture if the pain or sufferance result exclusively from legal sanctions and are inherent to these sanctions or caused by them.

## TITLE XI

### OFFENCES AGAINST PEACE AND MANKIND

Article 356.- Propaganda for war, circulation of tendentious or invented news, or any other manifestations favoring the start of a war, done verbally, in writing, at the radio, TV, cinema or by other such means, shall be punished by 5-15 years jail and interdiction of certain rights.

Article 357. - (1) Perpetration, with the purpose of destroying, wholly or in part, a community or a national, ethnic, racial or religious group, of one of the following deeds:

a) killing the members of the community or group;

b) seriously harming the physical or mental integrity of the members of the community or group;

c) subjecting the community or group to life conditions or treatment meant to lead to physical destruction;

d) taking measures in order to impede births within the community or group;

e) forced transfer of children belonging to the community or group into another community or group, shall be punished by jail for life or 15-25 years jail and interdiction of certain rights.

(2) If the deed is committed during war, the punishment shall be jail for life.

(3) Prior understanding in order to commit the offence of genocide shall be punished by 5-20 years jail and interdiction of certain rights.

Article 358. - (1) Inhuman treatment of wounded or sick, of the members of the civil sanitary staff, of the Red Cross or the organizations assimilated to it, of the shipwrecked, the war prisoners and, generally, of any person whose power is inferior to that of his enemy, or subjecting them to medical or scientific experiments that are not justified by a medical cure in their interest, shall be punished by 5-20 years jail and interdiction of certain rights.

(2) The same punishment is enforced for the perpetration against the persons mentioned in the previous paragraphs of one of the following deeds:

a) constraint to serve in the army forces of the enemy;

b) taking prisoners;

c) deportation;

d) dislocation or privation of freedom without a legal reason;

e) conviction or execution without a prior trial performed by a legally constituted tribunal, which would have tried in accordance with the fundamental judicial guarantees stipulated by the law.

(3) Torture, mutilation or extermination of those listed in paragraph 1 shall be punished by jail for life or 15-25 years jail and interdiction of certain rights.

(4) If the deeds stipulated in the present article are committed during wartime, the punishment shall be jail for life.

Article 359 - (1) Whole or partial destruction of:

a) the buildings, any other constructions or ships that serve as hospitals;

b) any means of transport belonging to a sanitary or Red Cross service, or to the organizations assimilated to it, serving to transport the wounded, the sick, the sanitary, Red Cross or other assimilated organizations' materials;

c) the sanitary materials stores,

if all these bear the appropriate distinctive signs, shall be punished by 5-20 years jail and interdiction of certain rights.

(2) The same punishment shall be enforced for appropriation, in any way, unless justified by a military necessity and committed on a big scale, of the means or materials destined to help or care of the wounded or sick under the power of the enemy.

(3) The same punishment shall be enforced for whole or partial destruction, or appropriation in any way, unless justified by a military necessity, and committed on a big scale, of any other goods.

Article 360. - (1) Any form of destruction, unless dictated by military necessity, of monuments or constructions of artistic, historic or archaeological value, of museums, big libraries, archives of historic or scientific value, works of art, manuscripts, valuable books, scientific collections or important book collections, archives, or reproductions of the above mentioned things and, in general, of any cultural values of the peoples, shall be punished by 5-20 years jail and interdiction of certain rights.

(2) The same punishment is enforced for robbing or appropriation in any way of one of the cultural values listed in the present chapter, on the territories under military occupation.

Article 361 - (1) The attempt to the offences mentioned in the present title shall be punished.

- (2) Hiding or favoring the offences mentioned in this title shall be punished by 3-10 years jail.
- (3) Hiding or favoring by the spouse or a close relative of the offences mentioned in art. 357 and 358 paragraph (3) and (4) shall be punished. The limits of the punishment stipulated in paragraph (2) shall be reduced by half, and, for the other offences, hiding and favoring shall be punished.

#### FUTURE CODE (2009) (NOT YET IN FORCE)

##### Genocide and Crimes Against Humanity

###### Article 438 - Genocide

(1) Committing, in order to destroy, in whole or in part, a national, ethnical, racial or religious, of one of the following facts:

- a) Killing members of the group;
- b) physical or mental harm to members of the group;
- c) subjecting the group to conditions of life that leads to physical destruction in whole or part thereof;
- d) imposing measures intended to prevent births within the group;
- e) forcibly transferring children belonging to a group to another group, it is punishable by life imprisonment or imprisonment for 15 to 25 years and prohibiting the exercise of some rights.

(2) If the facts referred to in para. (1) is committed in wartime, the punishment is life imprisonment.

(3) Agreement in committing the crime of genocide shall be punished with imprisonment from 5-10 years and prohibiting the exercise of some rights.

(4) Incitement to commit the crime of genocide, committed directly, in public, shall be punishable by imprisonment for 2-7 years and prohibiting the exercise of some rights.

###### Article 439 - Crimes against humanity

(1) Committing in a widespread or systematic attack launched against a civilian population, of one of the following facts:

- a) killing people;
- b) subjecting a population or part thereof, in order to destroy it in whole or in part, to the living conditions designed to cause physical destruction in whole or part of it;
- c) slavery or human trafficking, especially of women and children;
- d) deportation or forced transfer, contrary to general rules of international law, of persons which live lawfully on the territory of a state, by expelling them to another state or another territory or using other coercive measures;
- e) torturing a person under guard of the offender or on which it exercises control in any other way, causing her physical or mental damages, or suffering serious consequences physical or mental, which exceed the sanctions allowed by international law;
- f) rape or sexual assault, coercion into prostitution, forced sterilization or illegal detention of women having a forced pregnancy in order to alter the ethnic composition of a population;
- g) physical or mental injury to persons;
- h) causing a forced disappearance of persons, in order to take it out from protection of the law for a long period, by abduction, arrest or detention, at the order of a state or a political organization or with their authorization, support or consent, followed by refusing to admit that this person is deprived of liberty or to provide real information on the fate which is reserved or location as soon as this information was requested;
- i) imprisonment or other severe form of deprivation of liberty contrary to general rules of international law;
- j) the persecution of a group or a community by the denial of fundamental human rights or serious restriction on the exercise of these rights, based on political, racial, national, ethnic, cultural, religious, sexual or based on other criteria recognized as inadmissible under international law;
- k) such other inhumane acts causing great suffering or injury to the physical or mental, shall be punishable by life imprisonment or imprisonment for 15 to 25 years and prohibiting the exercise of some rights.

(2) The same punishment applies to the facts set out in para. (1), committed in an institutionalized regime of systematic oppression and domination of a racial group over another, with the intention of maintaining that system.

##### War crimes

###### Article 440 - War crimes against persons

(1) Committing, in an armed conflict, international or non, over one or more persons protected by international humanitarian law, one of the following facts:

- a) murder;
- b) taking of hostages;
- c) the application of cruel or inhuman treatment, causing her physical or mental injury or serious physical or mental suffering, especially by torture or mutilation;
- d) rape or sexual assault, coercion into prostitution, forced sterilization or illegal detention of women having a forced pregnancy in order to alter the ethnic composition of a population;
- e) the deportation or forced transfer, contrary to general rules of international law, of persons which live lawfully on the territory of a state, by expelling them to another state or another territory or using other coercive measures;
- f) the application or enforcement of a severe punishment, particularly the death penalty or a custodial sentence against a person who wasn't judged within an impartial and legal proceedings, that provide guarantees required by international law;
- g) a person exposed to danger of death or serious harm to health by:
  1. carrying on over that person experiences on which she has not consented voluntarily, expressly and previously or it is not necessary for her health or not performed in its interest;
  2. removal of tissue or organs for transplantation from this, except the removal of blood or skin for therapeutic purposes conducted in accordance with generally accepted medical principles and consented voluntarily, expressly and previously by the person;
  3. submission to unrecognized methods of medical treatment without being necessary for the health of the person and

although she had not consented voluntarily, expressly and previously;

h) a person subjected to degrading treatment, shall be punishable by life imprisonment or imprisonment for 15 to 25 years and prohibiting the exercise of some rights.

(2) The same punishment applies to the recruitment or incorporation of children who have not reached the age of 15, in armed forces or armed groups and their determination by any means, to participate actively in hostilities.

(3) Injury, in an armed conflict, international or no, of a member from enemy armed forces or an enemy combatant party after he surrendered without conditions or was knocked out in any way, shall be punished with imprisonment from 5-12 years and prohibiting the exercise of some rights.

(4) Committing, in an armed conflict with international nature, one of the following facts:

a) maintaining unlawful detention or unreasonable delay of the return of one or more persons from among those referred to in paragraph (5) letter a)

b) transferring, directly or indirectly, by an agent of the occupying power, part of the civilian population which it belongs, in the occupied territory;

c) compelling, by force or threat of one or more persons from among those referred to in paragraph (5) letter a) to serve in the armed forces of the enemy;

d) compelling of enemy to take part in operations of war directed against their country, shall be punishable by imprisonment for 3-10 years and prohibiting the exercise of some rights.

(5) persons protected by international humanitarian law are:

a) in an international armed conflict: protected persons within the meaning of the Geneva Conventions of 12 August 1949 and Additional Protocol I of 8 June 1977, especially the wounded, sick, shipwreck, prisoners of war and civilians;

b) in a non-international armed conflict: the wounded, sick, shipwreck and persons who not participating directly in hostilities and who are in the power of the enemy party;

c) in an armed conflict with international or non-international nature: armed forces and part of enemy combatants, who have surrendered or from any other cause can no longer defend themselves and which are not under the power of the enemy party.

Article 441 - War crimes against property and other rights

(1) The act of the person, within the armed conflict, with or without international nature, robbing or in violation of international law and without this being justified by military necessity, destroys, appropriates or requisition the property of the enemy party, being under power of the party of which the offender belongs, shall be punished with imprisonment from 3-10 years and prohibiting the exercise of some rights.

(2) Declaration, in international armed conflict, as off, suspended or inadmissible in court all third party rights and actions or a substantial part thereof shall be punished with imprisonment from 3-10 years and interdiction to exercise some rights.

Article 442 - War crimes against humanitarian operations and emblems

(1) The act of the person, in an armed conflict, with or without international nature:

a) initiate an attack against personnel, installations, material, units or vehicles involved in a humanitarian mission or a peacekeeping mission under the UN Charter, which enjoys protection under international humanitarian law that guarantees safety to civilians or civilian property;

b) triggers an attack against personnel, buildings, hospitals or medical vehicles, which use the distinctive signs provided by the Geneva Conventions, in accordance with international humanitarian law, shall be punishable by imprisonment for 7-15 years and interdiction to exercise some rights.

(2) the deed of the person, in an armed conflict, with or without international nature, who uses without right the distinctive marks under the Geneva Conventions, parliamentary flag, flags, military insignia or uniform of the United Nations or of the enemy, causing death or injury of one or more persons, shall be punished with imprisonment for 7-15 years and prohibiting the exercise of some rights.

Article 443 -Use of prohibited methods in combat operations

(1) The act of the person, in an armed conflict, with or without international nature:

a) starts an attack by military means against the civilian population or civilians that are not directly participating in hostilities;

b) starts an attack by military means against civilian property, protected as such by international humanitarian law, especially buildings dedicated to religious worship, education, art, science, philanthropic, historical monuments, hospitals, places where the sick or wounded are gathered and against cities, villages, dwellings or buildings or demilitarized zones, facilities or equipment containing hazardous substances, insofar as they are not used as a military objective;

c) carry out an attack by military means, knowing that it will cause casualties among the civilian population, civil personal injury, property damage of a civil nature, which is manifestly disproportionate to the concrete and direct overall military advantage expected ;

d) uses a person protected by provisions of international humanitarian law to avoid certain points, areas or military forces to become the target of military operations of the enemy party;

e) uses as a method of conduct of the war, the deliberate starvation of civilians, depriving them of essential goods for survival or impeding, in breach of international humanitarian law, receiving aid to them;

f) declares or orders that will be no mercy for losers;

g) kills or injures through cunning, a member of the enemy armed forces or an enemy combatant, shall be punished with imprisonment from 7-15 years and prohibiting the exercise of some rights.

(2) Conduct an attack by military means in an armed conflict with international nature, knowing that it will cause extensive environmental damage, long-term and severe, which is manifestly disproportionate to the concrete and direct overall military advantage expected, shall be punished with imprisonment from 3-10 years and prohibiting the exercise of some rights.

Article 444 - Use of prohibited means in combat operations

The act of the person, in an armed conflict, with or without international nature:

a) use poison or weapons with poisonous substances;

b) using asphyxiating gas, toxic or similar or any liquids, materials or similar processes;

c) use weapons causing unnecessary suffering to individuals shall be punished with imprisonment from 7-15 years and

prohibiting the exercise of some rights.

Article 445 - Attempt  
Attempt of the offenses under this title shall be punishable.

## Slovakia

### Overview

The Slovak Constitution provides that international treaties on human rights and fundamental freedoms and for whose exercise a law is not necessary have precedence over domestic laws.<sup>1140</sup> It also provides that human rights treaties ratified by the Slovak Republic are a part of its legal order and have precedence over domestic laws if they provide a greater scope of constitutional rights and freedoms.<sup>1141</sup>

Slovakia enacted a new criminal code in January 2010.<sup>1142</sup> Under the Slovak Criminal Code, genocide,<sup>1143</sup> war crimes,<sup>1144</sup> crimes against humanity<sup>1145</sup> and torture<sup>1146</sup> are criminalised.<sup>1147</sup>

Section 5a provides specifically for universal jurisdiction for enumerated crimes which include crimes against humanity, genocide and war crimes “*even if such act was committed outside of the territory of the Slovak Republic by an alien who has not his/her permanent residence on the territory of the Slovak Republic*”.

Section 5a does not separately deal with active personality jurisdiction, except that it is implied in the wording, which indicates that the provisions shall be applied ‘even if’ the crime was committed by a foreign person. Passive personality jurisdiction is also not explicitly dealt with, although crimes against Slovak interests, such as espionage and plotting against the Slovak Republic, are included among the crimes listed in this section.

### Issues

**Nexus requirements (including presence or residence):** Section 5a of the Criminal Code does not impose additional nexus requirements for the exercise of universal jurisdiction.

**Double criminality:** Double criminality is not required for the exercise of universal jurisdiction under Section 5a of the Criminal Code.

**Immunities:** The Criminal Code of Procedure provides that persons who have immunity under either national or international law will be exempted from the competence of law enforcement agencies and the court. Consent from the National Council of the Slovak Republic is required for the criminal prosecution of a member of that Council, and likewise the consent of the Constitutional Court for a judge or the Prosecutor General of the Constitutional Court. The Ministry of Justice is the appropriate authority in the case of any doubt as to whether exemption applies,<sup>1148</sup> although in the case of foreign nationals it will give such a decision having first received the position of the Ministry of Foreign Affairs.<sup>1149</sup>

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<sup>1140</sup> Constitution, Article 7(5).

<sup>1141</sup> Constitution, Article 154c.

<sup>1142</sup>The translation of relevant Slovak criminal law provisions are taken from the questionnaire response. These are based on the Criminal Code which entered into force in Slovakia on 1 January 2010.

<sup>1143</sup> CC, Section 218.

<sup>1144</sup> CC, Sections 414, 426, 427, 428, 431, 432, and 433.

<sup>1145</sup> CC, Section 425.

<sup>1146</sup> CC, Section 420.

<sup>1147</sup> The Slovak Constitution also stipulates that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment: Constitution, Article 16(2).

<sup>1148</sup>The decision of the Ministry of Justice is not binding, although it would usually be followed - response from representative of the MoJ.

<sup>1149</sup> CCP, Section 8(3).



**Victim and witness protection:** The Criminal Code of Procedure provides in-court and out-of-court protective measures, including closed sessions and the protecting of witnesses' identities,<sup>1150</sup> as well as examination using technical means.<sup>1151</sup>

**Specialised War Crimes Unit:** The Slovak Organised Crime Bureau only deals with international crimes such as terrorism, the trafficking of drugs, weapons and people, and financial crimes. There is no special unit within Slovakia which deals with crimes under international law such as genocide, war crimes, crimes against humanity or torture.<sup>1152</sup>

**Participation in EU Genocide Network:** Slovakia has a designated contact point for the EU Network.<sup>1153</sup>

## Cases

The authors are not aware of any prosecutions based on universal jurisdiction in Slovakia to date.

## Relevant Legislation

### JURISDICTION

Slovak Criminal Code (law no. 300/2005 coll. as amended)<sup>1154</sup>

#### Section 5a

This Act shall be applied to determine the criminal liability for the criminal offence of illicit manufacturing and possession of narcotics or psychotropic substances, poisons or precursors, and trafficking in them (Section 171 and 172) forgery, fraudulent alteration and illicit manufacturing of money and securities (Section 270), uttering counterfeit, fraudulently altered and illicitly manufactured money and securities (Section 271), manufacturing and possession of instruments for counterfeiting and forgery (Section 272), forgery, fraudulent alteration and illicit manufacturing of duty stamps, postage stamps, stickers and postmarks (Section 274), forgery and fraudulent alteration of control technical measures for labelling goods (Section 275), establishing, masterminding and supporting a terrorist group or its member (Section 297), illicit manufacturing and possession of nuclear materials, radioactive substances, hazardous chemicals and hazardous biological agents and toxins (Section 298 and 299), plotting against the Slovak Republic (Section 312), terror (Section 313 and 314), destructive actions (Section 315 and 316), sabotage (Section 317), espionage (Section 318), assaulting a public authority (Section 321), assaulting a public official (Section 323), counterfeiting and altering a public instrument, official seal, official seal-off, official emblem and official mark (Section 352), jeopardising the safety of confidential and restricted information (Section 353), smuggling of migrants (Section 355), endangering peace (Section 417), genocide (Section 418), terrorism and some forms of participation on terrorism (section 419), brutality (Section 425), using prohibited weapons and unlawful warfare (Section 426), plundering in the war area (Section 427), misuse of internationally recognized and national symbols (Section 428), war atrocities (Section 431), persecution of civilians (Section 432), lawlessness in the wartime (Section 433), even if such act was committed outside of the territory of the Slovak Republic by an alien who has not his/her permanent residence on the territory of the Slovak Republic.

### CRIMES UNDER INTERNATIONAL LAW

Slovak Criminal Code (law no. 300/2005 coll. as amended)

#### Section 414

Desertion of Weapons and Other Means of War

(1) Any person who drops, abandons or renders unusable a weapon or other means of war in a combat situation shall be

<sup>1150</sup> CCP, Section 101(3), (4) and (5).

<sup>1151</sup> CCP, 101b.

<sup>1152</sup> Questionnaire response from the Slovak Police.

<sup>1153</sup> Ibid.

<sup>1154</sup> Translation of relevant Slovak criminal law provisions have been taken from the questionnaire response.

liable to a term of imprisonment of two to eight years.

(2) The offender shall be liable to a term of imprisonment of five to fifteen years if he causes a particularly serious consequence through the commission of the offence referred to in paragraph 1.

#### Section 418

##### Genocide

(1) Any person who, with the intention to destroy, in whole or in part, any national, ethnic, racial or religious group,

- a) causes grievous bodily harm or death to a member of such group,
  - b) imposes a measure intended to prevent births within the group,
  - c) forcibly transfers children of the group to another group, or
  - d) deliberately inflicts on the group conditions of life calculated to bring about its physical destruction in whole or in part,
- shall be liable to a term of imprisonment of fifteen to twenty years.

(2) The offender shall be liable to a term of imprisonment of twenty to twenty-five years or to life imprisonment if he commits the offence referred to in paragraph 1 in the wartime or during an armed conflict.

(3) The offender shall be liable to life imprisonment if, through the commission of the offence referred to in paragraph 1, he causes death to several persons.

#### Section 420

##### Torture and other inhuman or cruel treatment

(1) Any person, who in relation with the exercise of public authority causes bodily or mental harm to another person by ill-treatment, torture or inhuman treatment, shall be liable to a term of imprisonment of two to six years.

(2) An offender shall be liable to a term of imprisonment of three to ten years when committing an act referred to in paragraph 1 (a) with at least two other persons (b) a more serious manner, (c) against a protected person, (d) out of a special motif or (e) against a person whose freedom was restricted in compliance with the law.

(3) An offender shall be liable to a term of imprisonment of seven to twelve years when committing a crime referred to in paragraph 1(a) and causes the person serious bodily harm or death, (b) to frustrate or make difficult the exercise of fundamental human rights and freedoms of this persons harder or as a member of a dangerous group.

(4) An offender shall be liable to a term of imprisonment of twelve to twenty years when committing a crime referred to in paragraph 1(a) and causes several persons serious bodily harm or death, (b) in a crisis situation”.

#### Section 425

##### Brutality

(1) Any person who commits an act against civilian population that is deemed to be a crime against humanity under Article 7 of the Rome Statute of the International Criminal Court shall be liable to a term of imprisonment of twelve to twenty-five or to life imprisonment.

(2) The offender shall be liable to life imprisonment if he commits the offence referred to in paragraph 1,

- a) and causes grievous bodily harm or death to several persons or other particularly serious consequence through its commission, or
- b) in retaliation

#### Section 426

##### Using Prohibited Weapons and Unlawful Warfare

(1) Any person who in the wartime orders

- a) the use of prohibited means of warfare or of similar material or uses such means or material, or who
  - b) that prohibited practices be used in the combat or uses such combat practices himself,
- shall be liable to a term of imprisonment of four to ten years.

(2) The same sentence as referred to in paragraph 1 shall be imposed on a commander who, in contravention of the provisions of international law concerning the means and methods of warfare, wilfully

- a) causes harm to civilian population or to the lives, limbs or property of civilians by a military operation, or wages an attack against them as a reprisal, wages an attack against an undefended site or demilitarised zone,
- b) destroys or damages a water dam, nuclear power plant or a similar installation containing dangerous forces, or
- c) destroys or damages a facility designated for humanitarian purposes or an internationally recognised cultural or natural monument.

(3) The offender shall be liable to a term of imprisonment of ten to twenty years if, through the commission of the offence referred to in paragraphs 1 or 2, he causes

- a) grievous bodily harm or death to several persons,
- b) large-scale damage, or
- c) other particularly serious consequence.

#### Section 427

##### Plundering in the War Area

(1) Any person who, in the war operations area, in the battlefield, in the areas affected by military operations, or on the occupied territory,  
a) takes possession of a thing belonging to another, misusing that person's distress,  
b) wilfully destroys property belonging to another or takes possession of such property under the pretext of war necessity, or  
c) robs the killed or wounded persons,  
shall be liable to a term of imprisonment of four to ten years.

(2) The offender shall be liable to a term of imprisonment of seven to twelve years if he commits the offence referred to in paragraph 1  
a) using violence, the threat of violence or other serious harm, or  
b) against persons or things enjoying special protection under the law or international legal instruments.

(3) The same sentence as referred to in paragraph 2 shall be imposed on the offender if, through the commission of the offence referred to in paragraph 1, he causes  
a) grievous bodily harm, or  
c) substantial damage.

(4) The offender shall be liable to a term of imprisonment of ten to twenty years if, through the commission of the offence referred to in paragraph 1, he causes  
a) death, or  
b) large-scale damage.

#### Section 428 Misuse of Internationally Recognised and National Symbols

(1) Any person who, in the wartime, misuses the designation of the Red Cross or other identification symbols or colours recognised by international law for designating medical facilities, vehicles, persons providing medical assistance or securing evacuation, shall be liable to a term of imprisonment of three to ten years.

(2) The same sentence as referred to in paragraph 1 shall be imposed on any person who, in the wartime, misuses the emblem of the United Nations, national flag, national emblem military emblem, insignias or uniform of a neutral or other state which is not a party to the conflict.

(3) The offender shall be liable to a term of imprisonment of twelve to twenty-five years or to life imprisonment if, through the commission of the offence referred to in paragraphs 1 or 2 that constitutes a means of military deception, he causes  
a) death to several persons,  
b) large-scale damage, or  
c) other particularly serious consequence.

#### Section 431 War Atrocities

(1) Any person who, in the wartime, violates the rules of international law by cruel treatment of helpless civilian population, refugees, wounded persons, members of the armed forces who have laid down their arms or prisoners of war shall be liable to a term of imprisonment of four to ten years.

(2) The same sentence as referred to in paragraph 1 shall be imposed on any person who, in the wartime, violates the rules of international law by  
a) failing to take effective measures for the protection of persons who are in need of such help, in particular children, women and wounded or elderly persons, or who prevents such measures from being taken, or  
b) impedes or blocks civil protection organisations of the enemy, of a neutral or other state in the fulfilment of their humanitarian tasks.

(3) The offender shall be liable to a term of imprisonment of ten to twenty-five years or to life imprisonment if, through the commission of the offence referred to in paragraphs 1 or 2, he causes grievous bodily harm or death or other particularly serious consequence.

#### Section 432 Persecution of Civilians

(1) Any person who, in the wartime, performs inhuman acts on the grounds of national, racial or ethnic discrimination, or who terrorises helpless civilian population by violence or the threat of its use, shall be liable to a term of imprisonment of four to ten years.

(2) The same sentence as referred to in paragraph 1 shall be imposed on any person, who, at the time referred to in paragraph 1,  
a) destroys or seriously damages the source of elementary necessities of life of the civilian population in an occupied territory or buffer zone, or who wilfully refuses to provide the population with the assistance they need for their survival,  
b) delays, without justifiable reasons, the return of the civilian population or prisoners of war,  
c) resettles, without justifiable reasons, civilian population of the occupied territory,  
d) settles the occupied territory with the population of his own country, or

e) wilfully denies the civilian population or prisoners of war the right to have their criminal offences decided by impartial courts.

(3) The offender shall be liable to a term of imprisonment of ten to twenty-five years or to life imprisonment if, through the commission of the offence referred to in paragraphs 1 or 2, he causes grievous bodily harm or death or other particularly serious consequence.

#### Section 433

##### Lawlessness in the Wartime

(1) Any person who commits an act that is deemed to be a war crime under Article 8 of the Rome Statute of the International Criminal Court shall be liable to a term of imprisonment of twelve to twenty-five or to life imprisonment.

(2) The offender shall be liable to life imprisonment if he commits the offence referred to in paragraph 1,  
a) and causes grievous bodily harm or death to several persons or other particularly serious consequence through its commission, or  
b) in retaliation.

## Slovenia

### Overview

Slovenia enacted a new Criminal Code in 2008, which came into force on 1 November 2008.<sup>1155</sup>

Under the Code, genocide,<sup>1156</sup> crimes against humanity,<sup>1157</sup> war crimes<sup>1158</sup> and torture<sup>1159</sup> are all criminalised. The crime of enforced disappearance is not specifically criminalised, but is dealt with in the context of crimes against humanity.<sup>1160</sup>

Active personality jurisdiction is provided for under Article 12 of the Criminal Code. This applies to any citizen of the Republic of Slovenia who commits any criminal offence abroad.

Passive personality jurisdiction is provided for under Article 13(1) of the Criminal Code. This applies the Slovenian Criminal Code to any foreign citizen who has, in a foreign country, committed a criminal offence against Slovenia or against Slovenian citizens and has been apprehended in Slovenia and is not extradited to the foreign country.

The Republic of Slovenia has universal jurisdiction over crimes which include the crimes under international law listed above. Article 11 of the Criminal Code enumerates specific crimes for which universal jurisdiction is available, including “*any other criminal offence, which according to international agreement has to be prosecuted in all signatory states, irrespective of the location where it was committed*”. Article 13(2) states that it will apply to any foreign citizen who has, in a foreign country, committed a criminal offence against a third country or any of its citizens, where he has been apprehended in the Republic of Slovenia but was not extradited to the foreign country.

### Issues

**Nexus requirements (including presence or residence):** The Slovene Constitution states in Article 29 that persons charged with criminal offences have the right to be present at trial,<sup>1161</sup> which would imply that presence is required for any trial. The 2007 Criminal Procedure Act also requires a defendant to be present for the hearing.<sup>1162</sup> Finally, Article 13(2) of the Criminal Code applies to any foreign citizen who has committed a criminal offence abroad where he has been apprehended in Slovenia but was not extradited.

There is no residence requirement.<sup>1163</sup>

**Subsidiarity:** There does not appear to be any provision which covers subsidiarity specifically, although this may be implied by Article 13 of the Criminal Code, which provides that the Code will apply to persons apprehended in the territory of Slovenia who have not been extradited. In addition, where several countries request extradition of the

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<sup>1155</sup> See unofficial translation at: [http://www.oapi.wipo.net/wipolex/en/text.jsp?file\\_id=180880](http://www.oapi.wipo.net/wipolex/en/text.jsp?file_id=180880) (last accessed December 2010).

<sup>1156</sup> CC, Article 100.

<sup>1157</sup> CC, Article 101.

<sup>1158</sup> CC, Article 102.

<sup>1159</sup> CC, Article 265.

<sup>1160</sup> CC, Article 101.

<sup>1161</sup> Translation of the text of the Slovene Constitution is available at: <http://www.dz-rs.si/index.php?id=351&docid=25&showdoc=1> (last accessed December 2010).

<sup>1162</sup> Articles 307 and 201 - questionnaire response. Under the Criminal Procedure Act, a defendant may be tried *in absentia*, but only where he or she has already been heard and if his presence is not deemed indispensable.

<sup>1163</sup> CCP, Article 27(3).

same person for the *same criminal offence*, priority shall be given to the country whose citizen that person happens to be. If his *country of origin* does not request extradition, priority shall be given to the *country in whose territory the criminal offence was committed*.<sup>1164</sup>

**Double criminality:** There is no double criminality requirement for the exercise of extraterritorial jurisdiction.

**Prosecutorial and Executive discretion:** Prosecutorial discretion is provided for under the Criminal Procedure Act.<sup>1165</sup> The public prosecutor is bound to institute prosecution if there is reasonable suspicion that a criminal offence liable for prosecution *ex officio* has been committed.

In some circumstances, where the offence is not an offence in the country in which it was committed, the permission of the Minister of Justice is required for prosecution.<sup>1166</sup>

**Ability to review decisions of the prosecutor or other governmental body:** This is provided for in Article 170 of the Criminal Procedure Code.

**Statutes of limitation:** Article 95 of the Criminal Code provides that there is no limitation for the prosecution of serious crimes such as genocide, war crimes, crimes against humanity and torture.

**Immunities:** Certain immunities are provided for in relation to international crime.<sup>1167</sup> The penal law does not apply to the acts of certain persons who are excluded under the provisions of the Constitution or international law regulations. These persons are not defined, although the Criminal Procedure Code specifies that in the event of doubt as to who is immune, the court should refer to the Ministry of Foreign affairs.

**Victims' role in proceedings:** The injured party may assume prosecution where the public prosecutor finds no grounds to institute or to continue criminal proceedings.<sup>1168</sup>

**Victim and witness protection:** The Criminal Procedure Act provides for witness protection.<sup>1169</sup> Special measures are provided for witnesses at risk of harm, as well as for their close relatives.<sup>1170</sup> Such measures include protecting his or her, or their, identity, ensuring adequate measures within the courtroom to shield witnesses from the accused, for example by video conferencing. There is also more specific legislation enacted to protect witnesses.<sup>1171</sup> This also deals with in-court protective measures,<sup>1172</sup> as well as the possibility of measures out of court including relocation, change of identity, physical protection and economic and social support.<sup>1173</sup>

**Participation in EU Genocide Network:** Slovenia has designated an EU Network contact point.<sup>1174</sup>

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<sup>1164</sup> CCP, 523(1).

<sup>1165</sup> Articles 19 and 168.

<sup>1166</sup> CC, Article 14(4) and 14(5).

<sup>1167</sup> CC, Article 6, "Exclusion of personal application"; also CCP, Article 141.

<sup>1168</sup> CCP, Article 19.

<sup>1169</sup> CCP, Article 240a.

<sup>1170</sup> CCP, Article 136(1)-(3).

<sup>1171</sup> Witness Protection Act.

<sup>1172</sup> Witness Protection Act, Article 19.

<sup>1173</sup> Witness Protection Act, Articles 19 and 20.

<sup>1174</sup> Act on International Co-operation in Criminal Matters between the Member States of the European Union, Article 65.

## Cases

The authors are not aware of any cases of prosecution of crimes under international law in Slovenia using either expansive or limited universal jurisdiction.

## Relevant Legislation

### JURISDICTION

Criminal Code (Official Gazette No. 55/2008, corrected No. 66/2008) <sup>1175</sup>

#### Article 11

The Penal Code of the Republic of Slovenia shall apply to any person who, in a foreign country, commits

- a criminal offence under Article 243<sup>1176</sup> of this Penal Code or any other criminal offence, which according to international agreement has to be prosecuted in all signatory states, irrespective of the location where it was committed, and
- criminal offences under Article 108<sup>1177</sup> and Articles 348-360<sup>1178</sup> of this Penal Code.

Application of the Penal Code of the Republic of Slovenia to Citizens of the Republic of Slovenia who committed a criminal offence abroad:

#### Article 12

The Criminal Code of the Republic of Slovenia shall be applicable to any citizen of the Republic of Slovenia who commits any criminal offence abroad other than those specified in the preceding article.

#### Article 13

1) The Criminal Code of the Republic of Slovenia shall apply to any foreign citizen who has, in a foreign country, committed a criminal offence against the Republic of Slovenia or any of its citizens even though the offences in question are not covered by Article 11 of the present Code.

2) The Penal Code of the Republic of Slovenia shall also be applicable to any foreign citizen who has, in a foreign country, committed a criminal offence against a third country or any of its citizens if he has been apprehended in the Republic of Slovenia, but was not extradited to the foreign country. In such cases, the court shall not impose a sentence on the perpetrator heavier than the sentence prescribed by the law of the country in which the offence was committed.

### CRIMES UNDER INTERNATIONAL LAW

#### Criminal Code

#### Chapter 14 - Offences against Humanity

#### Article 100 - Genocide

1) Whoever with the intention of destroying in whole or in part a national, ethnic, racial or religious group or gives the order:

- to kill members of the group;
- to cause serious bodily or mental harm to members of the group;
- to intentionally inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- to impose measures to prevent births within the group; or
- to forcibly transfer children of the group to another group

Shall be sentenced to imprisonment for not less than fifteen years.

2) The same punishment shall be imposed on whoever commits any of the acts under the previous paragraph against any group because of the reasons referred to in indent 8 or Article 101.

#### Article 101 - Crimes against Humanity

<sup>1175</sup> Uofficial translation - see: [www.oapi.wipo.net/wipolex/en/text.jsp?file\\_id=180880](http://www.oapi.wipo.net/wipolex/en/text.jsp?file_id=180880) (last accessed December 2010).

<sup>1176</sup> These crimes relate to counterfeiting money.

<sup>1177</sup> These crimes mainly relate to terrorism, hostage-taking, hijacking, and research, development, purchasing, supplying and using weapons or explosions, including nuclear, biological or chemical weapons.

<sup>1178</sup> Criminal Offences Against the Sovereignty of the Republic of Slovenia and its Democratic Constitutional Order.

Whoever orders or carries out the following acts, which are part of a larger systematic attack against the civilian population and of which the perpetrators is aware:

- murder;
- extermination, which means creating such living conditions, inter alia deprivation of access to food and medical supplies, that would lead to partial destruction of population;
- enslavement, which means performing of a particular or all justifications arising from the property right over a person and also include carrying out such justification in trafficking in human beings, especially women and children;
- deportation or forcible transfer of population, which means forcible removal of people by deportation or other forcible acts from the area, in which they have been legally residing, without any reasons allowed according to international law;
- imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- torture, which means intentional infliction of severe pain, physical or mental suffering on a person whom the perpetrator detained, whereby the torture does not include pain or suffering which is exclusively the result of implementation of legal sanction or is connected thereto;
- rape, sexual slavery, enforced prostitution, forced pregnancy which means illegal detention of a woman who got pregnant by duress with the intention to affect ethnical structure of any population or to perform other severe violence of comparable gravity;
- persecution, which represents intentional or severe encroachment or fundamental rights contrary to the international law, against any identifiable group or community on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law in connection with any criminal offence referred to in this Article and in Articles 100, 102 and 103;
- forced disappearance of persons, which means capture, detention or kidnapping of a person carried out by the agents of the State or political organisation, or under its authorisation, support or consent, which then will not admit to this kind of capture or will not provide information on the fate of these persons or their location, which the purpose to deny these persons legal protection for a long period of time;
- the crime of apartheid, which means in humane acts of character similar to those mentioned in this Article, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Shall be sentenced to imprisonment for not less than fifteen years.

#### Article 102 - War Crimes

Whoever orders or commits war crimes, especially if they are committed as part of an integral plan or policy, or as part of an extensive implementation of such crimes, namely the following:

1) grave breaches of Geneva Conventions on 12 August 1949 (Act on notification of succession concerning the Council of Europe conventions, the Geneva Conventions and additional protocols regarding the protection of victims of war and international agreements in the field of arms control, the depositors of which are the three main nuclear forces (Official Gazette of the Republic of Slovenia, No 14/1992)), namely any mentioned act against persons or property, which are protected by appropriate Geneva Conventions:

- wilful killing;
- torture or inhumane treatment, as well as biological experiments;
- intentional causing of great suffering or serious injury to body or health;
- extensive unlawful wanton destruction or appropriation of property;
- forcing a prisoner of war or other protected person to serve in the forces of a hostile power;
- depriving a prisoner of war or other protected person of a fair trial;
- unlawful deportation or confinement;
- taking hostages;

2) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;



- intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
  - attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
  - killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
  - making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, or insignia or the flag of the Red Cross, or insignia that conform to them, as well as of the distinctive emblems of the Geneva Conventions or markings of cultural property according to the Hague Convention (The Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict with the Rules for its implementation (Official Gazette of FPRY - International agreements, No 4/56) and the Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (Official Gazette of the Republic of Slovenia, No 22/2003)), resulting in death or serious personal injury;
  - the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
  - intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
  - subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
  - killing or wounding treacherously individuals belonging to the hostile nation or army;
  - illegal taking of objects from the dead or wounded in the battlefield;
  - declaring that no quarter will be given;
  - destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
  - declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
  - compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
  - pillaging a town or place, even when taken by assault;
  - employing poison or poisoned weapons;
  - employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
  - employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
  - employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are fully prohibited;
  - committing outrages upon personal dignity, in particular humiliating and degrading treatment;
  - committing rape, sexual slavery, enforced prostitution, forced pregnancy which means illegal detention of a woman who got pregnant by duress with the intention to affect ethnical structure of any population or to perform other grave breaches of international law, enforced sterilization, or any other form of sexual violence, also constituting a grave breach of the Geneva Conventions;
  - utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
  - use of cultural property under extended protection or their immediate surroundings to support military actions;
  - intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions;
  - intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
  - conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities;
- 3) in the case of an armed conflict not of an international character, which, however, does not constitute internal disturbance and tensions like riots, individual and occasional acts of violence and other similar acts, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- taking hostages;
- the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable;

4) other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations (Act on notification of succession concerning the Council of Europe conventions, for which the USA government is the depositary, the Hague Conventions, and the intellectual property conventions (Official Gazette of the Republic of Slovenia, No 24/1992)), as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- pillaging a town or place, even when taken by assault;
- committing rape, sexual slavery, enforced prostitution, forced pregnancy which means illegal detention of a woman who got pregnant by duress with the intention to affect ethnical structure of any population, enforced sterilization, or any other form of sexual violence, also constituting a grave breach of Article 3, common to the four Geneva Conventions;
- conscripting or enlisting children under the age of fifteen years into the armed forces or groups, or using them to participate actively in hostilities;
- ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- killing or wounding treacherously a combatant adversary;
- declaring that no quarter will be given;
- subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

shall be sentenced to imprisonment for not less than fifteen years.

Article 103 - Aggression

Any person who commits the act of aggression, defined in accordance with the international law, shall be sentenced to imprisonment for not less than fifteen years.

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Article 265 - Torture

1) Whoever intentionally causes severe pain or suffering to another person, either physical or mental, in order to obtain information or a confession from him or a third person, punish him for an act committed by himself or a third person, or which is suspected as having been committed by him or a third person with a view of intimidating him or putting him under pressure, or to intimidate a third person or put such person under pressure or for whichever reason which is based on any form of violating equality, shall be sentenced to imprisonment for not less than one and not more than ten years.

2) If the pain and suffering referred to in the preceding paragraph is caused or committed by an official or any other person who possesses official status or on his initiative or upon his expressed consent or tacitly, he shall be sentenced to imprisonment for not less than three and not more than twelve years.

## Spain

### Overview

Genocide, crimes against humanity, war crimes and torture are criminalised under the Spanish criminal Code.

Section 4 of Article 23 of the Fundamental Law of the Judiciary (*Ley Orgánica del Poder Judicial*) provides for the principle of universal jurisdiction under Spanish legislation. On this basis, Spain can prosecute certain offences to which it may have no connection at all. This is the case where a binding international treaty includes the obligation of exercising universal jurisdiction,<sup>1179</sup> such as, for example, Article 146 of the 4<sup>th</sup> Geneva Convention.<sup>1180</sup> Torture may also be prosecuted under this Article where the accused is present in Spain.<sup>1181</sup> Such jurisdiction is also specifically provided for in relation to genocide and crimes against humanity.<sup>1182</sup>

In addition, Spanish courts are capable of exercising jurisdiction over all crimes in Spanish criminal legislation under the active personality principle, provided that a number of conditions are met.<sup>1183</sup> The passive personality principle can be invoked as the necessary point of connection for crimes enlisted in Article 23(4) of the Fundamental Law of the Judiciary.<sup>1184</sup>

### Issues

**Nexus requirements:** Until recently, no point of connection was required for the application of the universality principle under Spanish legislation, provided that the act in question could be classified as a crime enlisted in the old Article 23(4) of the Fundamental Law of the Judiciary.<sup>1185</sup> This became most evident in the Pinochet case of 1998 in which the *Audiencia Nacional* declared Spanish courts competent, even though the former Chilean head of state was in the United Kingdom at the time.<sup>1186</sup>

However, in a 2009 amendment to sections 4 and 5 of Article 23,<sup>1187</sup> nexus requirements were introduced.<sup>1188</sup> Without detriment to the provisions of the international treaties and conventions signed by Spain, Spanish Courts can only exercise universal jurisdiction if it is proved that the person alleged to be responsible is in Spain, that there are victims of

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<sup>1179</sup> Fundamental Law of the Judiciary, Article 23(4)(h).

<sup>1180</sup> See: *Iraq Case*, Central Court No. 2, Decision of 26 November 2009.

<sup>1181</sup> Spain's report to the Committee Against Torture, 'Consideration of reports submitted by States Parties under Article 19 of the Convention: Fifth periodic reports of States parties due in 2004: Spain', 18 February 2009, CAT/C/ESP/5, paragraph 96; available at: <http://www.unhcr.org/refworld/publisher,CAT,STATEPARTIESREP,ESP,49f043552,0.html> (last accessed December 2010).

<sup>1182</sup> Fundamental Law of the Judiciary, Article 23(4)(a).

<sup>1183</sup> Fundamental Law of the Judiciary, Article 23(2).

<sup>1184</sup> Fundamental Law of the Judiciary, Article 23(4).

<sup>1185</sup> Amnesty International 2008, España: « La lucha contra la impunidad a través de la jurisdicción universal », p. 7. However, see the Supreme Court's ruling in the Rios Montt case in which some kind of nexus requirement was implied, even if it had no legislative basis. In September 2005, the Supreme Court's ruling was eventually overturned by the Constitutional Tribunal. See, Bernabeu, Almudena, "The Guatemala Genocide Case and the Jesuits Case before the Spanish National Court in Spain", REDRESS/FIDH, *EU Update on International Crimes*, November 2010, at: <http://www.redress.org/smartweb/newsletters/eu-update-international-crimes> (last accessed December 2010).

<sup>1186</sup> See: Pinochet Case, Judgment of the *Audiencia Nacional*, 5 November 1998.

<sup>1187</sup> By means of the Fundamental Law 1/2009 of 3 November (in effect since 5 November 2009).

<sup>1188</sup> Manuel Ollé Sesé, 'Summary of the universal jurisdiction reforms in Spain', in the November 2010 edition of the REDRESS and FIDH *EU Update on International Crimes* at pp 5-10; available at: [http://www.fidh.org/IMG/pdf/EU\\_Newsletter\\_Nov\\_2010.pdf](http://www.fidh.org/IMG/pdf/EU_Newsletter_Nov_2010.pdf) (last accessed December 2010), p. 2.

Spanish nationality, or that there is another link of outstanding importance with Spain.<sup>1189</sup>

If such points of connection cannot be found, legal controversies are likely to arise regarding the interpretation of international treaties or agreements and the question of whether they make it mandatory or not to try the respective crimes under the universality principle.<sup>1190</sup>

**Subsidiarity:** In any case of jurisdiction under Article 23(4) of the Fundamental Law of the Judiciary, “*it has to be proved that no proceedings have been initiated in another competent country or an International Court leading to an investigation and effective prosecution of the offences*”.<sup>1191</sup>

Likewise, the criminal proceedings initiated under the Spanish jurisdiction “*will be provisionally dismissed when there is evidence of the starting of other proceedings on the reported actions in the country or in the Court abovementioned.*”<sup>1192</sup>

**Dual criminality:** There is no dual criminality requirement for the application of universal jurisdiction. However, in cases where jurisdiction is exercised under the active personality principle, the act in question has to be punishable under the law of the territorial state.<sup>1193</sup>

**Prosecutorial and executive discretion:** There is no prosecutorial or executive discretion in Spanish legislation. According to Article 124(1) of the Spanish constitution, the Office of Public Prosecutor has the task of promoting the operation of justice in the defence of the rule of law, of citizens' rights and of the public interest as safeguarded by the law, whether ex officio or at the request of interested parties, as well as that of protecting the independence of the courts and securing before them the satisfaction of social interest.

Except for proceedings brought through a popular action (see below), the national prosecution office decides whether to prosecute on the basis of the evidence collected by the investigative judge in the preliminary investigation, and reports to the Attorney General, who is appointed by the national government. The position of the national prosecution office concerning universal jurisdiction cases generally reflects the position of the national government.<sup>1194</sup>

**Statues of limitation:** Most of the crimes under Spanish criminal law are subject to statues of limitation.<sup>1195</sup> However, according to Article 131(4) of the Criminal Code,<sup>1196</sup> as amended in June 2010, crimes against humanity, genocide and crimes against protected persons and property during armed conflict are exempt from limitation periods, as well as acts of terrorism, if they have caused the death of at least one person.<sup>1197</sup>

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<sup>1189</sup> Fundamental Law of the Judiciary, Article 23 (4).

<sup>1190</sup> Manuel Ollé Sesé, Summary of the universal jurisdiction reform in Spain, p. 2.

<sup>1191</sup> Fundamental Law of the Judiciary, Article 23(4)(2).

<sup>1192</sup> Ibid.

<sup>1193</sup> Id., Article 23(2)(a).

<sup>1194</sup> Amnesty International 2008, ‘España: “La lucha contra la impunidad a través de la jurisdicción universal”’, p. 36; Human Rights Watch, ‘Universal Jurisdiction in Europe: Spain’, June 2006; available at <http://www.hrw.org/en/node/11297/Article/14> (last accessed December 2010).

<sup>1195</sup> CC, Article 131.

<sup>1196</sup> The Code is available in Spanish in an unamended version at [http://noticias.juridicas.com/base\\_datos/ Penal/lo10-1995.html](http://noticias.juridicas.com/base_datos/ Penal/lo10-1995.html) (last accessed December 2010).

<sup>1197</sup> See Boletín Oficial del Estado, Número 152, 23 June 2010, p. 54837. Available at [http://www.unifr.ch/ddp1/derechopenal/legislacion/L\\_20100713\\_01.pdf](http://www.unifr.ch/ddp1/derechopenal/legislacion/L_20100713_01.pdf) (last accessed December 2010).

**Immunities in criminal cases:** Spanish procedural legislation accepts the general rules of public international law on immunities.<sup>1198</sup>

In 2008, the National High Court refused to try the current president of Rwanda, Paul Kagame, for his involvement in acts of genocide, crimes against humanity, war crimes and terrorism since it was assumed that he benefited from head of state immunity.<sup>1199</sup>

**Victims' role in criminal proceedings:** Article 125 recognises the right of every citizen to engage in popular action (*actio popularis*) in defence of legitimate collective interests.<sup>1200</sup> Provided that third parties can convince the investigative judge that a valid case exists, the investigation may proceed.<sup>1201</sup> This has been the avenue by which most prosecutions for crimes under international law using universal jurisdiction in Spain have been brought.

Spanish law provides that any criminal complaint filed by a victim is also a civil claim except if the claimant expressly renounces it.<sup>1202</sup> In addition, it is possible to file a separate civil action after the criminal responsibility has been proven in a process based on universal jurisdiction.<sup>1203</sup>

**Victim protection:** A number of Spanish legal provisions exist aiming to maintain the anonymity of witnesses.<sup>1204</sup>

Victims can participate in criminal proceedings through different methods of testifying, including testimonies via video-link, written statements and personal oral statements.<sup>1205</sup>

**Participation in EU Genocide Network:** Representatives of Spain participated in the 8<sup>th</sup> Meeting of the Network on 27-28 May 2010 in Madrid.<sup>1206</sup>

### Cases:

A large number of complaints have been filed on the basis of universal jurisdiction in Spain, including the cases against former Chilean president Augusto Pinochet, former Chilean general Herman Brady, former Argentinean Military official Ricardo Miguel Cavallo, former Guatemalan head of state Efraín Ríos Montt, and several other officials, among others. All these criminal proceedings have included civil actions. The first case that led to a conviction was the trial against the Lieutenant Commander Adolfo Francisco Scilingo, who was tried and condemned for the crimes of murder and illegal detention “*which constitute crimes against humanity according to international law.*”<sup>1207</sup>

Currently there are a considerable number of ongoing cases being investigated and prosecuted in Spanish courts.<sup>1208</sup> These cases include:<sup>1209</sup>

- cases concerning Guatemala and El Salvador Jesuits;

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<sup>1198</sup> Fundamental Law of the Judiciary, Article 21(2).

<sup>1199</sup> Amnesty International 2008, ‘España: “La lucha contra la impunidad a través de la jurisdicción universal”’, p. 29.

<sup>1200</sup> *Ibid.*, p. 35.

<sup>1201</sup> Human Rights Watch, ‘Universal Jurisdiction in Europe: Spain’, June 2006.

<sup>1202</sup> CC, Articles 109, and 112.

<sup>1203</sup> Amnesty International, ‘España: “La lucha contra la impunidad a través de la jurisdicción universal”’, p. 20.

<sup>1204</sup> Human Rights Watch, ‘Universal Jurisdiction in Europe: Spain’, June 2006.

<sup>1205</sup> *Ibid.*

<sup>1206</sup> Response to Genocide Network Questionnaire on Extraterritorial Jurisdiction: Spain.

<sup>1207</sup> Criminal Division of the National High Court, 19 April 2005.

<sup>1208</sup> Manuel Ollé Sesé, ‘Summary of the universal jurisdiction reforms in Spain’.

<sup>1209</sup> *Ibid.* Further cases are referred to in the newsletter summary.

- The Pinochet case concerning various defendants for crimes committed in Chile, although many of these defendants are being tried in Chile;
- A case concerning the death in Baghdad in April 2003 of the Spanish reporter Jose Manuel Couso Permuy caused by a member of the United States army; on 16 July 2010 the Supreme Court revoked the dismissal of the case and ordered that it be reopened for investigation into war crimes;
- Cases in relation to alleged genocide in Tibet: one of these continues and one has been dismissed<sup>1210</sup> on the basis that none of the required points of connection exist and prosecution is not mandated by treaty, appeal pending);
- A case in relation to persecution of Falun Gong members in China;
- A case concerning alleged torture connected to rendition of suspects by the United States Central Intelligence Agency;
- The trial of 40 members of the Rwandan Patriotic Front and the Government of Rwanda for genocide, crimes against humanity, terrorism and war crimes. Some of the victims were Spanish nationals; and
- Cases in relation to alleged torture at the US Guantánamo Detention Camp.

**Relevant Legislation:**

<p><b>JURISDICTION</b></p> <p>Fundamental Law of the Judiciary: (Unofficial translation)</p> <p>Article 23(2)</p> <p>Spanish jurisdiction exists over acts described in the Spanish penal laws as crimes, although they have been committed outside national territory, provided that the criminals responsible were Spanish or foreigners who have acquired Spanish nationality after the commission of the act and that the following conditions are met:</p> <p>a) That the act is punishable at the place of commission, unless, under an international treaty or a legal act of an international organization of which Spain is a party, no such requirement is necessary.</p> <p>b) The victim or prosecutor brings a report or complaint before Spanish courts.</p> <p>c) That the offender has not been acquitted, pardoned or punished abroad, or, in the latter case, has not completed the sentence. If only part of the sentence has been served this will be taken into account for a proportional reduction in the sentence.</p> <p>...</p> <p>Article 23(4)</p> <p>Spanish jurisdiction will be likewise competent to know the actions committed by Spanish or foreign people out of national territory which can be categorized, according to Spanish law, as any of the following crimes:</p> <p>a) Genocide and crimes against humanity</p> <p>b) Terrorism</p> <p>c) Piracy and illegal aircraft seizure</p> <p>d) Crimes regarding prostitution and corruption of children and incapable people</p> <p>e) Illegal trafficking in narcotic drugs, psychotropic and toxic substances</p> <p>f) Illegal immigration or trafficking of human beings, regardless they are workers or not</p> <p>g) Crimes regarding female ablation, when the people responsible are in Spain</p> <p>h) Any other crime that, according to international treaties and conventions, especially the Conventions on humanitarian international law and protection of human rights, a person must be prosecuted for in Spain</p>
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<sup>1210</sup> Decision of 26 February 2010.

Without detriment to the provisions of the international treaties and conventions signed by Spain, Spanish Courts can have knowledge of previous crimes if it has been proved that the alleged responsible are in Spain or that there are victims of Spanish nationality, or that there is a link of outstanding importance with Spain. In any case, it has to be proved that no proceedings have been initiated in another competent country or an International Court leading to an investigation and effective prosecution of the offences.

The criminal proceedings initiated under the Spanish jurisdiction will be provisionally dismissed when there is evidence of the starting of other proceedings on the reported actions in the country or in the Court abovementioned.

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## CRIMES UNDER INTERNATIONAL LAW

### Criminal Code

#### TITLE XXIV - Offences against the International Community

#### CHAPTER II - Offences of genocide

##### Article 607

1. Those who carry out any of the following acts with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group shall be sentenced as follows:

1st. To fifteen to twenty years' imprisonment, if they kill any of the members of the group.

If two or more aggravating circumstances exist the sentence shall be increased by one degree ('la pena superior en grado').

2nd. To fifteen to twenty years' imprisonment if they abuse sexually any of the members of the group, or cause any of the injuries contained in Article 149.

3rd. To eight to fifteen years' imprisonment if they subject the group or any of its members to living conditions that endanger their life or damage gravely their health, or when they produce any of the injuries contained in Article 150.

4th. To eight to fifteen years' imprisonment if they carry out forcible transfers of the group or its members, adopt any measure that tends to impede their way of life or reproduction, or transfer forcibly individuals from one group to another.

5th. To four to eight years' imprisonment in the event of any injury other than those referred to in the 1st and 3rd paragraphs of this Article.

2. The diffusion by any means of ideas or doctrines that deny or justify the offences defined in the previous paragraph of this Article, or whose objective is to rehabilitate regimes or institutions that support practices that cause such offences shall be punishable with a term of imprisonment of one to two years.

#### CHAPTER II BIS - Crimes against humanity

##### Article 607 bis

1. Those who commit the offences set out below as part of a generalized or systematic attack against the whole or part of the civilian population shall be guilty of crimes against humanity.

In any event, the commission of such offences shall be considered to be crimes against humanity:

1st. Where they take place because of membership of any identifiable group or collectivity on political, racial national, ethnic, cultural, religious, gender or other grounds universally recognized as impermissible under international law.

2nd. In the context of institutionalised oppression and systematic domination of one racial group over one or more racial groups and where it is intended to maintain this situation.

2. Those convicted of crimes against humanity shall be sentenced:

1st. To fifteen to twenty years' imprisonment for the death of any person.

The sentence shall be increased by one degree if any of the circumstances referred to in Article 139 exist.

2nd. To twelve to fifteen years' imprisonment for the offence of rape, and four to six years' imprisonment for any other sexual assault.

3rd. To twelve to fifteen years' imprisonment as regards any of the injuries contained in Article 149, and to eight to twelve years' imprisonment if people are subjected to living conditions where their lives are endangered or if any of the injuries contained in Article 150 are caused. The sentence shall be four to eight years' imprisonment for causing any of the injuries contained in Article 147.

4th. To eight to twelve years' imprisonment for forcible deportation or transfer which is unauthorised under international law of one or more persons to another State or place, by way of expulsion or other coercive acts.

5th. To six to eight years' imprisonment for the forced pregnancy of any woman with the intent of affecting the ethnic composition of the population, which shall be in addition to any sentence imposed for other offences.

6th. To twelve to fifteen years' imprisonment for detaining any person and subsequently refusing to recognise such deprivation of physical liberty or give information on the fate or whereabouts of the detained person.

7th. To eight to twelve years' imprisonment for detaining another, depriving him of his physical liberty, in violation of the rules of international law. The sentence shall be reduced by one degree ('la pena inferior en grado') when the detainment lasts for less than fifteen days.

8th. To four to eight years' imprisonment for grave torture of persons that were in their custody or control, and to two to six years' imprisonment for less serious cases.

For the purposes of this Article, torture shall mean subjecting people to physical or mental suffering.

Any sentence imposed for torture shall be in addition to any sentence imposed, where appropriate, for violation of the victim's other rights.

9th. To four to eight years' imprisonment for any offence relating to prostitution contained in Article 187.1, or six to eight years' imprisonment as regards those cases provided for in Article 188.1.

A sentence of six to eight years' imprisonment shall be imposed on those who transfer people from one place to another, for the purpose of their sexual exploitation, using violence, intimidation or deceit, or by abusing a situation of superiority, or the need or vulnerability of the victim.

When the offences referred to in the previous paragraph and Article 188.1 are committed against minors or the disabled, the sentence shall be increased by one degree.

10th. To four to eight years' imprisonment the offence of subjecting or maintaining anyone in a state of slavery. This sentence shall apply in addition to any sentences imposed for specific violations of an individual's human rights. Slavery shall mean where one person exercises over another, including in a de facto manner, some or all property rights, such as buying, selling, lending, or bartering.

#### CHAPTER III - Offences against Protected Persons and Property in the Event of Armed Conflict

##### Article 608

For the purposes of this Chapter, 'protected persons' shall have the following meaning:

- 1st. The wounded, the sick, the shipwrecked, and health and religious personnel, protected under the I and II Geneva Conventions dated 12 August 1949 or by Additional Protocol to the Geneva Conventions (Protocol I) dated 8 June 1977.
- 2nd. The prisoners of war protected by the III Geneva Convention dated 12 August 1949 or by Additional Protocol to the Geneva Conventions (Protocol I) dated 8 June 1977.
- 3rd. The civilian population and the civilian personnel protected by the IV Geneva Convention dated 12 August 1949 or by Additional Protocol to the Geneva Conventions (Protocol I) dated 8 June 1977.
- 4th. Non-combatants and personnel of the Protecting Power and its substitute protected by the Geneva Conventions dated 12 August 1949 or by Additional Protocol to the Geneva Conventions (Protocol I) dated 8 June 1977.
- 5th. Members of parliament and those accompanying them, protected by the II Convention of The Hague dated 29 July 1899.
- 6th. Personnel of the United Nations and associated personnel protected by the Convention on the Safety of United Nations and Associated Personnel of 9 November 1994.
- 7th. Any other person with that condition by virtue of Additional Protocol II dated 8 June 1977 or any other of the international Treaties of which Spain is a signatory.

##### Article 609

Anyone who, in the event of an armed conflict, mistreats or seriously endangers the life, health or integrity of any protected person, subjects him or her to torture or inhuman treatment, including biological experiments, wilfully causes him or her great suffering, or subjects him or her to any medical treatment that is inappropriate given the state of health of that person or is not in accordance with generally recognised medical principles that the Party responsible for the treatment would apply, in similar medical circumstances, to his own free national citizens, shall be sentenced to four to eight years' imprisonment, which shall be in addition to any sentence imposed for the resulting injuries.

##### Article 610

In the event of an armed conflict, anyone who uses or orders the use of methods or means of warfare that are prohibited, or whose objective purpose is to cause unnecessary suffering or additional harm, as well as those that are intended to cause, or can be reasonably expected to cause, widespread, long-lasting, and grave damage to the natural environment, affecting the health or survival of the population, or orders there to be no quarter, shall be sentenced to ten to fifteen years' imprisonment, which shall be in addition to any sentence imposed for the damage caused.

##### Article 611

In the event of an armed conflict, a sentence of ten to fifteen years' imprisonment, which shall be in addition to any sentence imposed for the damage or injury caused, shall be imposed on anyone who does any of the following:

- 1st. Carries out or orders the carrying out of indiscriminate or excessive attacks or makes the civilian population the target of attacks, retaliation or acts or threats of violence whose principal aim is to terrorise them.
- 2nd. Destroys or damages, violating the rules of international law applicable to armed conflicts, non-military ships or aircraft of an adversary or a neutral party unnecessarily and without warning and without taking the necessary measures to protect the security of personnel and the conservation of documentation on board.
- 3rd. Obliges a prisoner of war or civilian to serve in the forces of a hostile Power, or deprives him or her of the right to a fair and regular trial.
- 4th. Deports, transfers forcibly, takes hostage, or detains or confines illegally any protected person, or uses such person to render certain points, areas or military forces immune from military operations.
- 5th. Transfers and settles, directly or indirectly, into occupied territory the civilian population of the Occupying Power so that it resides there permanently.
- 6th. With regard to any protected person, carries out, orders the carrying out or maintains racial segregation policies and other inhuman and degrading practices based on other differences of an unfavourable nature that amount to an outrage upon human dignity.
- 7th. Unjustifiably prevents or delays the freeing or repatriation of prisoners of war or civilians.

##### Article 612

In the event of an armed conflict, a sentence of three to seven years' imprisonment, which shall be in addition to any sentence imposed for the damage or injury caused, shall be imposed on anyone who does any of the following:

- 1st. Knowingly violates the protected status of hospitals, health installations, material, units and means of transport, prison camps, health and safety zones and areas, neutralized zones, places for imprisoning civilians, undefended areas and demilitarised areas, which are identifiable by the appropriate signs or emblems.
- 2nd. Uses violence on health or religious personnel or those that make up medical missions, or rescue workers, or against personnel with the right to use the signs or emblems of the Geneva Conventions, in accordance with international law.
- 3rd. Seriously injures, deprives of or fails to procure the necessary food or medical assistance for any protected person, or subjects him or her to degrading or humiliating treatment, fails to inform him or her, without justifiable delay and in a comprehensible manner, of his or her situation, imposes collective punishment for individual acts or violates the rules concerning the housing of women and families or concerning the special protection of women and children laid down in international treaties of which Spain is a signatory.
- 4th. Makes improper or treacherous use of distinctive or protective signs, emblems, or signs established and recognised in the international treaties of which Spain is a signatory, especially the emblems of the Red Cross and the Red Crescent.
- 5th. Makes improper or treacherous use of the distinctive flag, uniform, insignia, or emblem of neutral States, United Nations or other States that are not parties in the conflict or adversaries, during attacks or so as to cover, favour, protect, or obstruct military operations, except as regards the exceptions expressly laid down in the international treaties of which



Spain is a signatory.

6th. Makes improper or treacherous use of the parliamentary flag or flag of surrender, attacks the inviolability or retains improperly any member of parliament or any person accompanying him or her, any personnel of the Protecting Power or its substitute, or any members of the International Fact-Finding Commission.

7th. Dispossesses the dead, the wounded, the sick, the shipwrecked, prisoners of war or imprisoned civilians, of their personal effects.

#### Article 613

1. In the event of an armed conflict, a sentence of four to six years' imprisonment shall be imposed on anyone who does, or orders to be done, any of the following:

a) Attacks, or makes the object of retaliation or acts of hostility, clearly recognisable cultural property or places of worship that form part of the cultural or spiritual heritage of the population, and those that have been given protected status under special agreements, or cultural property under reinforced protection, causing widespread destruction, provided that such property is not situated in the immediate vicinity of military targets or is not being used to support the military effort of the adversary.

b) Attacks, or makes the object of retaliation, civil property of the adversary, causing its destruction, provided that in the circumstances of the case such property does not provide a definite military advantage or that such property does not contribute effectively to the military action of the adversary.

c) Attacks, destroys, steals or renders unusable property that is indispensable for the survival of the civilian population, except where the adversary uses such property in direct support of military action or exclusively as a means of subsistence for members of its armed forces.

d) Attacks, or makes the object of retaliation, places or installations that contain dangerous substances, where such attacks may lead to the escape of such substances and cause significant losses among the civilian population, except where such places or installations are used in regular, significant and direct support of military operations and such attacks are the only means of ending such support.

e) Destroys, damages or takes possession of, without any military need, objects that do not belong to him or her, obliges another to give up such objects or carries out any other act of pillage.

2. In the event that the offences concern cultural property under special protection or in particularly serious cases, the sentence may be increased by one degree.

#### Article 614

In the event of an armed conflict, anyone who carries out or orders the carrying out of any other violations or acts in breach of the international treaties of which Spain is a signatory, concerning the means of conducting hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners of war, the protection of civilians and the protection of cultural property in the event of armed conflict, shall be sentenced to six months to two years' imprisonment.

#### Article 614 bis

When any of the conduct referred to in this Chapter forms part of a plan or a policy or is committed on a large scale, the sentences imposed shall be in the upper half of the applicable range of sentence.

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#### Article 174: Torture

(a) A public authority or official commits torture if, by abuse of his office and for the purpose of obtaining a confession or information from any person or of punishing him for any act he has committed or is suspected of having committed, or for any reason based on discrimination of any kind, he subjects that person to conditions or procedures which by their nature, duration or other circumstances cause him physical or mental suffering, entail the suppression or diminution of his faculties of conscience, discernment or decision-making, or in any other way infringe his moral integrity. The person guilty of torture shall be liable to a term of two to six years' imprisonment if the infringement was a serious one, and a term of one to three years' imprisonment if it was not. In addition to the penalties mentioned, the penalty of general disqualification for 8 to 12 years shall be imposed in all cases;

(b) The same penalties shall be incurred, respectively, by authorities or staff of prisons or centres for the protection or correction of minors who commit any of the acts referred to in the above paragraph against detainees, inmates or prisoners.

## Sweden

### Overview

The Swedish rules on jurisdiction are found in Chapter 2 of the Swedish Criminal Code<sup>1211</sup> (*Brottsbalken*). The Code expressly provides for universal jurisdiction over certain ordinary crimes, such as murder, manslaughter, kidnapping and gross rape, as well as a broad range of crimes of international concern. Among crimes under international law, Swedish courts may exercise universal jurisdiction over genocide and certain war crimes, which correspond to “crimes against international law” in Swedish legislation<sup>1212, 1213</sup>.

The universal jurisdiction provisions relating to ordinary crimes in Chapter 2 of the Criminal Code fall into three groups: The first group applies to domiciliaries, residents, citizens of other Nordic countries and other foreigners present in Sweden.<sup>1214</sup> The second group covers a limited number of cases involving foreign public servants<sup>1215</sup> and the third one<sup>1216</sup> includes any crime committed where the minimum penalty in the Criminal Code is four years’ imprisonment.<sup>1217</sup>

In addition, there are two different bases for the exercise of universal jurisdiction over crimes under national law of international concern: either they are expressly listed as falling under universal jurisdiction in Chapter 2, Section 3 (6) of the Criminal Code, including hijacking, unlawful dealings with chemical weapons/mines, false or careless statement before an international court etc, or they can be prosecuted as ordinary crimes for which universal jurisdiction can be exercised.<sup>1218</sup>

Apart from genocide and certain war crimes Swedish courts cannot exercise universal jurisdiction over other crimes under international law, like crimes against humanity, torture and enforced disappearances.<sup>1219</sup> This is because definitions of these crimes are either missing in the Swedish Criminal Code or are inconsistent with international law.<sup>1220</sup>

However, they may exercise universal jurisdiction over much (but far from all) of the conduct amounting to such crimes - but again, only as ordinary crimes and subject to all the restrictions on the exercise of such jurisdiction, including statutes of limitation and prohibitions of retroactive criminal law.<sup>1221</sup>

In addition, the Criminal Code provides for active personality jurisdiction according to Chapter 2 Section 2 when the crime has been committed by a Swedish citizen.<sup>1222</sup>

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<sup>1211</sup> Swedish Criminal Code. English translation available at <http://www.regeringen.se/content/1/c6/02/77/77/cb79a8a3.pdf> (last accessed December 2010).

<sup>1212</sup> See Chapter 22 Section 6 of the Criminal Code.

<sup>1213</sup> Amnesty International, *Sweden: End Impunity through Universal Jurisdiction*, No Safe Haven Series No. 1, AI Index: EUR 42/001/2009 2009, p. 15. Available at <http://www.amnesty.org/en/library/asset/EUR42/001/2009/en/35c14013-eec8-11dd-b1bd-6368f1b61c3f/eur420012009en.pdf> (last accessed December 2010).

<sup>1214</sup> See Section 2 (1) to (3) of the Criminal Code.

<sup>1215</sup> Section 3 (2-3a) of the Criminal Code.

<sup>1216</sup> Section 3 (7) of the Criminal Code.

<sup>1217</sup> Amnesty International, *Sweden: End Impunity through Universal Jurisdiction*, p. 15.

<sup>1218</sup> FIDH/REDRESS, MoJ/MFA Questionnaire. Answers provided by Karolina Wieslander, Legal Advisor, Ministry of Justice; Amnesty International, *Sweden: End Impunity through Universal Jurisdiction*, p. 19.

<sup>1219</sup> Amnesty International, *Sweden: End Impunity through Universal Jurisdiction*, p. 31.

<sup>1220</sup> *Ibid.*, p. 43.

<sup>1221</sup> *Id.*, p. 31.

<sup>1222</sup> See Chapter 2 section 2 of the Criminal Code.

The legislation does not, as a main rule, provide for passive personality jurisdiction. There is however an exception stipulating that when a crime is committed in an area not belonging to any state outside the Realm it shall be adjudged according to Swedish law and by a Swedish court if the crime was directed against a Swedish citizen, a Swedish association or private institution, or against an alien domiciled in Sweden.<sup>1223</sup>

### **Issues**

**Nexus requirements:** There is no formal residence or presence requirement in order to open an investigation under Swedish legislation.<sup>1224</sup> The alien must however be present in the territory of Sweden *at the latest* when the indictment is brought against him or her.<sup>1225</sup>

**Subsidiarity:** The ability or willingness of the state where the alleged crimes were committed to investigate and prosecute the crimes is taken into account in the practical handling of a case.<sup>1226</sup>

**Double Criminality:** The double criminality requirement does apply when jurisdiction is based on the active personality principle<sup>1227</sup> or the principle of universal jurisdiction under group one (Section 2 (1) to (3) of the Criminal Code, jurisdiction is based on the residence or presence of the perpetrator in Sweden). However, this is not the case if an additional basis for Swedish jurisdiction is applicable, for example if the crime has a minimum punishment of four years or is expressly listed as a crime of international concern.<sup>1228</sup>

**Prosecutorial and executive discretion:** According to Chapter 2, Section 5 of the Criminal Code, prosecution for a crime under universal jurisdiction may be instituted only with the authorisation of the Government or a person designated by the Government. This is usually a Senior Public Prosecutor serving at one of the International Public Prosecution Offices located in Stockholm, Malmö and Goteborg, which deal with cases of crimes under international law.

The prosecutor in charge handles the case independently and no other prosecutor, senior or not, can instruct him or her how to decide. However, a more senior prosecutor can take over the investigation if he or she decides there is a mistake made by the first prosecutor. Furthermore the Prosecutor-General has a general authority to take over and lead any criminal investigation including those handled at the International Public Prosecution Offices. However, this is more a theoretical possibility, seldom or never used in practise.

The Ministry of Justice or the Minister of Justice have no authority to interfere with the investigation of an individual case.

According to Swedish law there is an absolute duty to prosecute if the prosecutor on objective grounds can foresee a conviction.

**Ability to review decisions of the prosecutor:** A prosecutors' decision not to prosecute can be appealed within the Prosecution Authority to a more senior prosecutor with the Prosecutor-General being the final instance. This procedure is not regulated by law. In general, the decision to prosecute is very seldom or never under scrutiny by a more senior

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<sup>1223</sup> See Chapter 2, Section 3 Subparagraph 5 of the Criminal Code.

<sup>1224</sup> Amnesty International, *Sweden: End Impunity through Universal Jurisdiction*, p. 57.

<sup>1225</sup> FIDH/REDRESS, MoJ/MFA Questionnaire. Answers provided by Karolina Wieslander, Legal Advisor, Ministry of Justice.

<sup>1226</sup> Ibid.

<sup>1227</sup> See Chapter 2, Section 2 (1) of the Criminal Code.

<sup>1228</sup> Amnesty International, *Sweden: End Impunity through Universal Jurisdiction*, p. 61.

prosecutor. Instead it is for the court to decide the case in the regular criminal court proceedings.<sup>1229</sup>

**Statutes of limitation:** On 1 July 2010 the Swedish Parliament enacted a governmental proposal abolishing statutes of limitation applicable for *inter alia* gross crime against international law (corresponding to war crimes), and the crime of genocide.<sup>1230</sup>

As mentioned above, there is no specific provision concerning other crimes against international law and general statutes of limitation<sup>1231</sup> are applicable. Such acts can however constitute a crime under the Criminal Code that can lead to life imprisonment. For this group of crime, statutes of limitation have been abolished as well.<sup>1232</sup>

There are no special statutes of limitation under Swedish law expressly applicable to crimes under international law. Normal prescription periods would therefore apply to all crimes under international law when they are prosecuted as ordinary crimes under Swedish law. Sweden is neither a party to the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, nor to the analogous Council of Europe treaty.

**Immunities in criminal cases:** According to Chapter 2, Section 7 of the Criminal Code immunities are regulated by reference to international law.

**Victims' role in proceedings:** Victims have a number of rights with respect to participation in criminal proceedings: They are allowed to participate in the proceedings and they may examine the defendant and witnesses.<sup>1233</sup> Moreover, they have a right to a legal representative in all cases where the alleged act may lead to imprisonment.<sup>1234</sup>

In general, Sweden permits a private prosecution by a victim, provided the victim has reported the offence to a prosecutor and the prosecutor has declined to act.<sup>1235</sup> However, as mentioned further above, prosecution for a crime committed outside of Sweden may be instituted only on the authority of the Government or a person designated by the Government.<sup>1236</sup>

In the context of criminal proceedings, the prosecutor is obligated to pursue any civil claims requested by the victim, provided that this can be done without considerable inconvenience and if the claim is not manifestly unfounded. However, where this is not possible, the court can order that the claim be brought instead through civil action. The conviction of the defendant is not a necessarily condition for an award for damages to the victim.<sup>1237</sup> In addition, a person may, under some conditions, be entitled to legal aid for a civil party prosecution.<sup>1238</sup>

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<sup>1229</sup> FIDH/REDRESS, MoJ/MFA Questionnaire. Answers provided by Karolina Wieslander, Legal Advisor, Ministry of Justice.

<sup>1230</sup> Ibid.

<sup>1231</sup> See Chapter 35 of the Criminal Code.

<sup>1232</sup> See Chapter 35 Section 2 of the Criminal Code; FIDH/REDRESS, MoJ/MFA Questionnaire. Answers provided by Karolina Wieslander, Legal Advisor, Ministry of Justice.

<sup>1233</sup> See Chapter 37 Section 1, Chapter 22 Section 6 Code of Judicial Procedure.

<sup>1234</sup> See the Law on Legal Representation for Victims. (*Lag om Målsägandebiträde*)

<sup>1235</sup> Chapter 20, Section 8 of the Code of Judicial Procedure. English translation available at <http://www.sweden.gov.se/content/1/c6/02/77/78/30607300.pdf> (last accessed December 2010).

<sup>1236</sup> See Chapter 2, Section 5 of the Criminal Code.

<sup>1237</sup> See Chapter 22, Sections 1, 2, 5 and 7 of the Code of Judicial Procedure.

<sup>1238</sup> FIDH/REDRESS, MoJ/MFA Questionnaire. Answers provided by Karolina Wieslander, Legal Advisor, Ministry of Justice.

**Victim protection:** There is a national witness protection programme in place but the details are kept strictly confidential. The same applies to other protective measures that are available to victims and witnesses outside court.<sup>1239</sup>

Under Swedish procedural law victims may, under some conditions, testify by video-link;<sup>1240</sup> written statements are normally not admitted.<sup>1241</sup>

**Specialised War Crimes Unit:** A war crimes unit with eight police investigators, one analyst and one administrator was established in March 2008. It is complemented by four prosecutors within the International Public Prosecution Office in Stockholm.<sup>1242</sup> Both units have nationwide jurisdiction and their activities and performance will be reviewed in March 2011.<sup>1243</sup>

**Participation in EU Genocide Network:** Swedish Police officers have participated in meetings of the Network.<sup>1244</sup>

## Cases

In 2002, a complaint was filed with the Swedish police against Ariel Sharon based on his alleged role in the Sabra and Shatila killings in Lebanon and the prosecutor found that Swedish Courts would have jurisdiction over the alleged crimes. However, the prosecutor decided to discontinue investigations as he believed that there would be severe difficulties to obtain evidence without the support of Israeli authorities and that there was no prospect of Sweden succeeding in having Sharon extradited to its national territory if the investigations were to have led to a trial. An appeal to the superior prosecutor was not successful.<sup>1245</sup>

In October 2005, Abdi Qeybdiid, a Somali police chief in Mogadishu, stayed in Sweden for a few days and was recognised by a Somali refugee, who filed a police complaint claiming that he had led a militia during the civil war. As a consequence, the international prosecutor's office initiated a preliminary investigation into the matter and requested that the Gothenburg District Court detain Qeybdiid on the grounds that there was probable cause to suspect him of genocide. However, the request was turned down by the court, since the suspicions did not reach the level of "probable cause".<sup>1246</sup>

In January 2006, Russian Lieutenant-General Vjatjeslav Sucharev participated in the international defence exercise "Snowflake", in Sweden. During this exercise, a report was filed against him with the police, claiming that he and his military unit were responsible for war crimes and crimes against humanity in Chechnya. After informal contacts between the Prosecutor-General and the government, the International Prosecutor's office dropped the case and decided not to open an investigation. The grounds for the decision were that the prosecutor found strong reasons to presume that Sucharev held immunity on the basis of principles of international law.<sup>1247</sup>

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<sup>1239</sup> Ibid.

<sup>1240</sup> Chapter 5, Section 10 of the Code of Judicial Procedure.

<sup>1241</sup> Chapter 35, Section 14 of the Code of Judicial Procedure.

<sup>1242</sup> Email correspondence with Swedish official, 14 December 2010.

<sup>1243</sup> FIDH & REDRESS interview with Ingemar Isaksson, Detective Superintendent of the Swedish National Criminal Police War Crimes Unit, in "EU Update on Serious International Crimes", Issue 4, Summer 2008.

<sup>1244</sup> FIDH/REDRESS Police/Investigations Questionnaire, answers provided by Karolina Wieslander, Legal advisor, Ministry of Justice.

<sup>1245</sup> Amnesty International, *Sweden: End Impunity through Universal Jurisdiction*, p. 84.

<sup>1246</sup> Ibid., p. 86.

<sup>1247</sup> Id.

A Rwandan genocide suspect wanted in Rwanda, Sylvere Ahorugeze, has been detained in Sweden without trial since July 2008. Ahorugeze is suspected of having been one of the leaders of the Hutu extremists involved in genocide and stands accused of murdering 28 Tutsis in a suburb of Kigali on 7 April 1994. He was arrested in Stockholm in July 2008 after visiting the Rwandan embassy in Sweden to obtain a passport for his wife. A Swedish court subsequently ordered him to remain in custody pending a request for extradition by Rwanda on charges of genocide and crimes against humanity. A year later, the Swedish Supreme Court noted that the judicial system in Rwanda had made clear improvements during the last couple of years (although much remained to be done) and concluded that the circumstances of the case did not give sufficient reason to conclude that there was a general legal impediment to the extradition of the applicant to Rwanda to stand trial on charges of genocide and crimes against humanity.<sup>1248</sup> Following this, on 7 July 2009 the Swedish Government decided to extradite Ahorugeze to Rwanda. Ahorugeze has taken his case to the European Court of Human Rights, which requested the Swedish Government to suspend the extradition.

On 13 October 2010 Sweden's first war crimes trial was opened in Stockholm District Court. Ahmet Makitan, a naturalised Swedish citizen originally from the FY is accused of torturing Serb inmates while working as a guard at a Bosnian prison in 1992, as well as of participation in genocide. The trial is expected to last at least five months.<sup>1249</sup>

## Relevant Legislation

### JURISDICTION

Swedish Criminal Code (unofficial translation)

Chapter 2, Section 1

Crimes committed in this Realm shall be adjudged in accordance with Swedish law and by a Swedish court. The same applies when it is uncertain where the crime was committed but grounds exist for assuming that it was committed within the Realm.

Chapter 2, Section 2

Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court where the crime has been committed:

1. by a Swedish citizen or an alien domiciled in Sweden,
2. by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm or who is a Danish, Finnish, Icelandic, or Norwegian citizen and is present in the Realm, or
3. by any other alien, who is present in the Realm, and the crime under Swedish Law can result in imprisonment for more than six months.

The first, paragraph shall not apply if the act is not subject to criminal responsibility under the law of the place where it was committed or if it was committed within an area not belonging to any state and, under Swedish law, the punishment for the act cannot be more severe than a fine.

In cases mentioned in this Section, a sanction may not be imposed which is more severe than the severest punishment provided for the crime under the law in the place where it was committed.

The limitations mentioned in paragraph two and three in this Section are not applicable in relation to crimes in accordance with Chapter 6 Section 1-6, Section 8 paragraph 3 or Section 12 or attempts to commit such crimes, if the crime is committed against a person under the age of eighteen.

Neither are the limitations applicable in relation to crimes in accordance with Chapter 4 Section 1 a or Chapter 16 Section 10 a paragraph 1 subparagraph 1 and paragraph 5 or attempt to commit such crimes.

Chapter 2, Section 3

Even in cases other than those listed in Section 2, crimes committed outside the Realm shall be adjudged according to Swedish law and by Swedish court,

<sup>1248</sup> <http://www.hogstadamstolen.se/Domstolar/hogstadamstolen/Avgoranden/2009/2009-05-26%20%20%201082-09%20beslut.pdf> (in Swedish, last accessed December 2010).

<sup>1249</sup> The Local, Sweden's News in English, "Sweden's First War Crimes Trial Underway." 13 October 2010.

1. if the crime was committed on board a Swedish vessel or aircraft or was committed in the course of duty by the officer in charge or a member of its crew,
2. if the crime was committed by a member of the armed forces in area in which a detachment of the armed forces was present, or if it was committed by some other person in such an area and the detachment was present for a purpose other than an exercise,
3. if the crime was committed in the course of duty outside the Realm by a person employed in the foreign contingent of the Swedish armed forces or in the foreign contingent of the Swedish Police Force,
- 3a. if the crime was committed in the course of duty outside the Realm by a police man, a customs officer, an officer at the Coast Guard, fulfilling transnational tasks according to an international agreement that has been ratified by Sweden,
4. if the crime committed was a crime against the Swedish nation, a Swedish municipal authority or other assembly, or against a Swedish public institution,
5. if the crime was committed in an area not belonging to any state and was directed against a Swedish citizen, a Swedish association or private institution, or against an alien domiciled in Sweden,
6. if the crime is hijacking, maritime or aircraft sabotage, airport sabotage, counterfeiting currency, an attempt to commit such crimes, crimes against international law, unlawful dealings with chemical weapons, unlawful dealings with mines, false or careless statement before an international court, terrorist crime according to the law on terrorist crimes (2003:148) or an attempt to commit such a crime or if the crime is committed against the International Criminal Court, or
7. if the least severe punishment prescribed for the crime in Swedish law is imprisonment for four years or more.

#### Chapter 2, Section 5

Prosecution for a crime committed within the Realm on a foreign vessel or aircraft by an alien, who was the officer in charge or member of its crew or otherwise travelled in it, against another alien or a foreign interest shall not be instituted without the authority of the Government or a person designated by the Government.

Prosecution for a crime committed outside the Realm may be instituted only following the authorisation referred to in the first paragraph. However, prosecution may be instituted without such an order if the crime consists of a false or careless statement before an international court or if the crime was committed:

1. on a Swedish vessel or aircraft or by the officer in charge or some member of its crew in the course of duty,
2. by a member of the armed forces in an area in which a detachment of the armed forces was present,
3. in the course of duty outside the Realm by a person employed by a foreign contingent of the Swedish armed forces,
4. in Denmark, Finland, Iceland or Norway or on a vessel or aircraft in regular commerce between places situated in Sweden or one of the said states, or
5. by a Swedish, Danish, Finnish, Icelandic or Norwegian citizen against a Swedish interest. (Law 1993:350)

#### Chapter 2, Section 7

In addition to the provisions of this Chapter on the applicability of Swedish law and the jurisdiction of Swedish courts, limitations resulting from generally recognised fundamental principles of public international law or from special provisions in agreements with foreign powers, shall be observed.

### CRIMES UNDER INTERNATIONAL LAW

#### Criminal Code

#### Chapter 22, Section 6

A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian Law concerning armed conflicts shall be sentenced for *crime against international Law* to imprisonment for at most four years. Serious violations shall be understood to include:

1. use of any weapon prohibited by international law,
2. misuse of the insignia of the United Nations or of insignia referred to in the Act on the Protection of Certain International Medical Insignia (Law 1953:771), parliamentary flags or of the internationally recognised insignia, or the killing or injuring of an opponent by means of some other form of treacherous behaviour,
3. attacks on civilians or on persons who are injured or disabled,
4. initiating an indiscriminate attack knowing that such attack will cause exceptionally heavy losses or damage to civilians or to civilian property,
5. initiating an attack against establishments or installations which enjoy special protection under international law,
6. occasioning severe suffering to persons enjoying special protection under international law; coercing prisoners of war or civilians to serve in the armed forces of their enemy or depriving civilians of their liberty in contravention of international law; and
7. arbitrarily and extensively damaging or appropriating property which enjoys special protection under international law in cases other than those described in points 1-6 above. If the crime is gross, imprisonment for at most ten years, or for life shall be imposed. In assessing whether the crime is gross, special consideration shall be given to whether it comprised a

large number of individual acts or whether a large number of persons were killed or injured, or whether the crime occasioned extensive loss of property.

If a crime against the international law has been committed by a member of the armed forces, his lawful superior shall also be sentenced in so far as he was able to foresee the crime but failed to perform his duty to prevent it. (Law 1994:1721)



## Switzerland

### Overview

The Swiss Criminal Code provides for limited universal jurisdiction over specific crimes, including human trafficking; sexual assault; rape; violation or promotion of prostitution if the victim is less than 18 years old; sexual acts with children if the victim is less than 14 years of age; qualified pornography if the objects or presentations include sexual activities with children.<sup>1250</sup>

Article 6 (1) of the Criminal Code further provides limited universal jurisdiction over crimes Switzerland is obligated to investigate and prosecute under international law.<sup>1251</sup>

The Criminal Code was amended after Switzerland ratified the Convention against Genocide in 2000 and Article 264 (2) provides for limited universal jurisdiction over genocide.<sup>1252</sup> Further amendments to the Swiss Criminal Code designed to ensure the implementation of the Rome Statute into Swiss law will come into force on 1 January 2011.<sup>1253</sup> The Code will then contain definitions of crimes against humanity<sup>1254</sup> and war crimes<sup>1255</sup> in addition to the definition of genocide already in the Criminal Code, whereas torture and enforced disappearances are not defined as separate crimes. Similarly, the Swiss Military Criminal Code will be amended to reflect the crimes of the Rome Statute and as from 1 January 2011 include revised definitions of war crimes<sup>1256</sup> as well as definitions of genocide<sup>1257</sup> and crimes against humanity.<sup>1258</sup>

The revised Codes will provide for limited universal jurisdiction over genocide, crimes against humanity and war crimes.<sup>1259</sup> The amendments also clarify the competence of civil and military courts over crimes under international law. Accordingly, the Federal Prosecution Service will be in charge of prosecuting genocide, crimes against humanity and war crimes<sup>1260</sup> unless the suspect or victim is a member of the Swiss army, which will then trigger the competence of the Military Prosecution authorities.<sup>1261</sup> The jurisdiction of the Federal Prosecution Service to prosecute will be, however, limited to crimes committed after the coming into force of the amendments on 1 January 2011 in relation to crimes against humanity and war crimes as defined by the amendments, and to 15

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<sup>1250</sup> Criminal Code (CC) of 21 December 1937 (as of 1 December 2010), Article 5 (1).

<sup>1251</sup> Ibid, Article 6 (1); the Swiss government has asserted that this provision operates to confer jurisdiction over torture committed abroad in its Initial Report to the UN Committee against Torture, CPT / Inf (2002) 4, 25 March 2002.

<sup>1252</sup> Ibid, Article 264 (2).

<sup>1253</sup> Draft Federal Law on the change of Federal laws to implement the Rome Statute of the ICC ("Bundesgesetz über die Änderung von Bundesgesetzen zur Umsetzung des Römer Statuts des Internationalen Strafgerichtshofs"), 18 June 2010; see also Ministry of Justice, "La Suisse se donne les moyens de poursuivre les crimes les plus graves Les modifications de loi entreront en vigueur le 1er janvier 2011", 2 November 2010, at : [http://www.bj.admin.ch/content/bj/fr/home/dokumentation/medieninformationen/2010/ref\\_2010-11-02.html](http://www.bj.admin.ch/content/bj/fr/home/dokumentation/medieninformationen/2010/ref_2010-11-02.html) (last accessed December 2010).

<sup>1254</sup> Amended CC, Title Twelve bis, 264a.

<sup>1255</sup> Ibid, Title Twelve ter, Article 264b-j.

<sup>1256</sup> Amended Military Criminal Code (MCC), Articles 110-114.

<sup>1257</sup> Ibid, Article 108.

<sup>1258</sup> Ibid, Article 109.

<sup>1259</sup> Amended CC, Title Twelve quarter, Article 264m.

<sup>1260</sup> Amended Article 23 (1) (g) of the Criminal Procedural Code (CCP).

<sup>1261</sup> Military Criminal Code of 13 June 1927, as amended by the Draft Federal Law on the change of Federal laws to implement the Rome Statute of the ICC ("Bundesgesetz über die Änderung von Bundesgesetzen zur Umsetzung des Römer Statuts des Internationalen Strafgerichtshofs"), 18 June 2010, Article 220.

December 2000 in relation to genocide.<sup>1262</sup> The Military Prosecution Service may exercise universal jurisdiction to prosecute certain war crimes as defined prior to the amendments and committed on or after 1 January 1968.<sup>1263</sup>

Swiss legislation further provides for active and passive personality jurisdiction over crimes committed abroad.<sup>1264</sup>

### **Issues:**

**Nexus requirements (including presence or residence):** Swiss authorities may exercise universal jurisdiction over war crimes, crimes against humanity and genocide as enshrined in the amended version of the Criminal Code provided that the suspect is present in Switzerland and is not facing extradition.<sup>1265</sup> An investigation and/or prosecution on the basis of universal jurisdiction can be dismissed where a suspect has left Switzerland, and where the suspect's return to Switzerland is not expected.<sup>1266</sup> Presence of the suspect is also required to trigger universal jurisdiction under Article 6(1).

**Subsidiarity:** An investigation and/or prosecution against a suspect of crimes under international law can be dismissed where an authority of another country or an international tribunal whose competence is recognised by Switzerland is investigating and/or prosecuting the alleged crime(s) and where the suspect can be extradited to such authority or surrendered to the international tribunal.<sup>1267</sup>

**Double criminality:** Where Switzerland is obligated to prosecute a crime by international treaty law, such as for instance the crime of torture, Swiss authorities may exercise universal jurisdiction provided that the crime is also punishable in the territorial state or no criminal law jurisdiction applies at the place of commission and provided that the suspect remains in Switzerland and is not extradited to the foreign country.<sup>1268</sup>

**Prosecutorial and Executive discretion:** While the legality principle requires Swiss authorities to initiate an investigation into alleged crimes where an initial suspicion exists, a limited principle of legality will be introduced with the amendments coming into force on 1 January 2011. However, according to the Office of the Prosecutor General, it is unlikely that the limited principle will be applied in the context of "*macro crimes*" such as genocide.<sup>1269</sup>

**Statutes of limitation:** The amended Criminal Code explicitly provides that genocide, crimes against humanity and specific war crimes (referred to in Article 264c (1-3), 264d (1-2), 264e (1-2), 264f, 264g (1-2) and 264h) are excluded from limitation periods.<sup>1270</sup> Statutes of limitation may apply in the context of torture and specific war crimes not listed in Article 264.<sup>1271</sup>

**Immunities:** According to the Office of the Prosecutor General, immunities for foreign officials apply as provided for by international law.<sup>1272</sup> Wide ranging immunities from

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<sup>1262</sup> CC, Article 2 (1).

<sup>1263</sup> Military Criminal Code, Section 10 (1bis).

<sup>1264</sup> CC Article 7 (2).

<sup>1265</sup> Amended CC, Article 264m (1).

<sup>1266</sup> Amended CC, Article 264m (2) (b).

<sup>1267</sup> Ibid, Article 264m (2) (a).

<sup>1268</sup> Criminal Code, Article 6 (1) (1-b).

<sup>1269</sup> Office of the Prosecutor General, Response to FIDH/REDRESS questionnaire.

<sup>1270</sup> Amended CC, Article 101 (1 and 3).

<sup>1271</sup> CC Article 97.

<sup>1272</sup> Office of the Prosecutor General, Response to FIDH/REDRESS questionnaire.

jurisdiction appear to apply, however, to members of personnel of permanent missions and international servants in the context of ‘headquarter agreements’ concluded between the Federal Council of Switzerland and international organisations based in Switzerland, especially in Geneva.<sup>1273</sup> A complaint brought by a torture survivor against the former minister of Interior of Tunisia, Mr Abdallah Kallel was dismissed by the Court of first instance on immunity grounds.<sup>1274</sup>

**Victims’ role in proceedings:** With the introduction of a new code of criminal procedure, private party prosecution will be introduced for all crimes under Swiss law.<sup>1275</sup> Victims can also raise civil claims in cases initiated by a prosecutor<sup>1276</sup> and are entitled to legal aid for private prosecutions provided that the victim does not have the necessary financial means and subject to a likelihood of the prosecution to succeed<sup>1277</sup>, as well as civil claims<sup>1278</sup>, provided that the victim is present in Switzerland and files the law suit in Switzerland.

**Victim and witness protection:** Switzerland does not have a specific witness protection programme and each case is decided individually.<sup>1279</sup> Victims in Switzerland have a number of rights including right to protection, to be accompanied by a person of their trust and where requested, prosecution services will avoid an encounter between the victim and the accused.<sup>1280</sup> Specific measures can be ordered in cases involving sexual crimes, including interviewing of the victim by a person of the same sex.<sup>1281</sup> Courts can decide to order specific protection measures for witnesses where there are reasons to believe that a “*witness, an informant, an accused, an expert or a translator*” could be at risk as a result of their participation in the proceedings. These measures can include anonymity, closed court hearings, voice distortion or change of appearance and protection from the public.<sup>1282</sup>

**Specialised War Crimes Unit:** There is no specific budget available for the investigation and prosecution of crimes under international law. However, the Federal Criminal Police located in Berne has one specialised officer working on such crimes, and the Federal Prosecutor in Berne has a unit of prosecutors working on crimes against humanity.<sup>1283</sup> Swiss investigators and prosecutors have participated in special training in relation to the investigation and prosecution of crimes under international law, in particular trainings conducted by Interpol and the Institute for International Criminal Investigations.<sup>1284</sup>

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<sup>1273</sup> See Website of the Swiss Foreign Office, “Immunity of a person”, at <http://www.eda.admin.ch/eda/en/home/topics/intorg/un/unge/gepri/manimm/manim2.html>.

<sup>1274</sup> See TRIAL, “Will the European Court of Human Rights voice its opinion on the immunity of a minister-torturer?”, 15 December 2010, at [http://www.trial-ch.org/en/about-trial/trial-acts/details/article/tunisie-la-cour-europeenne-des-droits-de-lhomme-se-prononcera-t-elle-sur-limmunit-e-dun-ministre.html?tx\\_ttnews%5BbackPid%5D=1188&cHash=16cdc3f198](http://www.trial-ch.org/en/about-trial/trial-acts/details/article/tunisie-la-cour-europeenne-des-droits-de-lhomme-se-prononcera-t-elle-sur-limmunit-e-dun-ministre.html?tx_ttnews%5BbackPid%5D=1188&cHash=16cdc3f198) (last accessed December 2010).

<sup>1275</sup> Office of the Prosecutor General, Response to FIDH/REDRESS questionnaire; see also Article 81 (1) (b) (5), Criminal Procedural Code, as amended by the Draft Law on the organisation of Criminal Courts, 19 March 2010, at <http://www.admin.ch/ch/f/ff/2008/7431.pdf> (in French).

<sup>1276</sup> Office of the Prosecutor General, Response to FIDH/REDRESS questionnaire; Articles 116, 120 CCP.

<sup>1277</sup> Article 134 CCP.

<sup>1278</sup> Article 125 CCP.

<sup>1279</sup> Office of the Prosecutor General Response to FIDH and REDRESS questionnaire.

<sup>1280</sup> Article 115 of the CCP lists a number of rights of victims.

<sup>1281</sup> Article 150 CCP.

<sup>1282</sup> Articles 146, 147, 149 CCP.

<sup>1283</sup> Office of the Prosecutor General, Response to FIDH and REDRESS questionnaire.

<sup>1284</sup> Idem.

**Participation in EU Genocide Network:** Switzerland has an observer Status with the EU Network, and since 2004, representatives of the Federal Prosecutor or military justice regularly attend meetings of the Network.<sup>1285</sup>

### Cases

The Federal Police conducted several investigations into allegations of war crimes upon request of the military justice.<sup>1286</sup> In 2001, the Tribunale militare de Cassation upheld the conviction of Fulgence Niyonteze for war crimes. Other counts, such as genocide and crimes against humanity, were dropped as Swiss Criminal Law at the time did not legally recognize those crimes. He was sentenced to 14 years imprisonment and to 15 years of exclusion from Switzerland.<sup>1287</sup>

On 13 February 2001, Mr. Abennacer Nait- Liman, who had allegedly been tortured in the facilities of the Ministry of Interior in Tunisia in 1992, filed a complaint against the then Tunisian Minister of Interior, Abdallah Kallel. The Geneva prosecutor opened a preliminary inquiry, stating that the Convention against Torture contained an obligation to prosecute every person, including foreigners, suspected of the crime of torture and that the facts alleged in the complaint appeared to be well- founded. Abdallah Kallel could leave Switzerland before the police could act. The case has since been rejected by the court of first instance, the Appeals court and the Supreme Court, on the grounds of immunity and a missing link to Switzerland respectively. The complainant applied to the European Court alleging a violation of Article 6 of the European Convention on Human Rights. On 15 December, the European Court communicated the case to the Swiss government.<sup>1288</sup>

### Relevant Legislation

#### JURISDICTION

##### Criminal Code

##### Art. 6

1 Any person who commits a felony or misdemeanour abroad that Switzerland is obliged to prosecute in terms of an international convention is subject to this Code provided:

- a. the act is also liable to prosecution at the place of commission or no criminal law jurisdiction applies at the place of commission; and
- b. the person concerned remains in Switzerland and is not extradited to the foreign country.

##### Amendment to Criminal Code Art. 264m

2 Lorsque l'auteur n'est pas de nationalité suisse et que l'acte commis à l'étranger n'était pas dirigé contre un ressortissant suisse, les autorités peuvent suspendre la poursuite pénale ou y renoncer, sous réserve de la conservation des preuves, dans les cas suivants:

<sup>1285</sup> Idem.

<sup>1286</sup> Federal Criminal Police, Response to FIDH and REDRESS questionnaire.

<sup>1287</sup> Niyonteze Fulgence, Tribunal militaire de cassation: arrêt, 27-4-2001, at <http://www.haguejusticeportal.net/eCache/DEF/6/910.html>.

<sup>1288</sup> See TRIAL, "Will the European Court of Human Rights voice its opinion on the immunity of a minister-torturer?", 15 December 2010, at [http://www.trial-ch.org/en/about-trial/trial-acts/details/article/tunisie-la-cour-europeenne-des-droits-de-lhomme-se-proncera-t-elle-sur-limmunité-dun-ministre.html?tx\\_ttnews%5BbackPid%5D=1188&cHash=16cdc3f198](http://www.trial-ch.org/en/about-trial/trial-acts/details/article/tunisie-la-cour-europeenne-des-droits-de-lhomme-se-proncera-t-elle-sur-limmunité-dun-ministre.html?tx_ttnews%5BbackPid%5D=1188&cHash=16cdc3f198) (last accessed December 2010).

- a. une autorité étrangère ou un tribunal pénal international dont la compétence est reconnue par la Suisse poursuit l'infraction et l'auteur est extradé ou remis à ce tribunal;
- b. l'auteur ne se trouve plus en Suisse et n'y reviendra probablement pas.

#### CRIMES UNDER INTERNATIONAL LAW

#### (v) War Crimes (amended Criminal Code)

##### Titre 12ter Crimes de guerre

##### Art. 264b

Les art. 264d à 264j sont applicables dans le contexte d'un conflit armé international, y compris en situation d'occupation, et, si la nature de l'infraction ne l'exclut pas, dans le contexte d'un conflit armé non international.

##### Art. 264c

1 Est puni d'une peine privative de liberté de cinq ans au moins quiconque commet, dans le contexte d'un conflit armé international, une infraction grave aux conventions de Genève du 12 août 1949, à

savoir l'un des actes ci-après visant des personnes ou des biens protégés par une de ces conventions:

- a. meurtre;
- b. prise d'otages;
- c. infliction à une personne de grandes souffrances ou d'une atteinte grave à son intégrité corporelle ou à sa santé physique ou psychique, notamment par la torture, un traitement inhumain ou des expériences biologiques;
- d. destruction ou appropriation de biens non justifiée par des nécessités militaires et exécutée à grande échelle;
- e. contrainte faite à une personne de servir dans les forces armées d'une puissance ennemie;
- f. déportation, transfert ou détention illégaux de personnes;
- g. déni d'un jugement régulier et impartial avant l'infliction ou l'exécution d'une peine lourde.

Les actes visés à l'al. 1 qui sont commis dans le contexte d'un conflit armé non international sont assimilés à des infractions graves au droit international humanitaire s'ils sont dirigés contre une personne ou un bien protégé par ce droit.

3 Si l'acte est particulièrement grave, notamment s'il touche un grand nombre de personnes ou que son auteur agit avec cruauté, le juge peut prononcer une peine privative de liberté à vie.

4 Dans les cas de moindre gravité relevant de l'al. 1, let. c à g, le juge peut prononcer une peine privative de liberté d'un an au moins.

##### Art. 264d

1 Est puni d'une peine privative de liberté de trois ans au moins quiconque, dans le contexte d'un conflit armé, dirige une attaque contre:

- a. la population civile en tant que telle ou des civils qui ne participant pas directement aux hostilités;
- b. des personnes, des installations, du matériel ou des véhicules employés dans le cadre d'une mission d'aide humanitaire ou de maintien de la paix conforme à la Charte des Nations Unies du 26 juin 1945, lorsqu'ils sont protégés par le droit international humanitaire;
- c. des biens de caractère civil, des zones d'habitation et des bâtiments non défendus ou des zones démilitarisées qui ne constituent pas des objectifs militaires;
- d. des unités sanitaires, des bâtiments, du matériel ou des véhicules munis d'un signe distinctif prévu par le droit international humanitaire ou dont le caractère protégé est reconnaissable malgré l'absence de signe distinctif, des hôpitaux ou des lieux où des malades et des blessés sont rassemblés;

e. des biens culturels, les personnes chargées de les protéger ou les véhicules affectés à leur transport ou encore des bâtiments consacrés à la religion, à l'art, à l'enseignement, à la science ou à l'action caritative, lorsqu'ils sont protégés par le droit international humanitaire.

2 Dans les cas particulièrement graves d'attaques contre des personnes, le juge peut prononcer une peine privative de liberté à vie.

3 Dans les cas de moindre gravité, le juge peut prononcer une peine privative de liberté d'un an au moins.

#### Art. 264e

1 Est puni d'une peine privative de liberté de trois ans au moins quiconque, dans le contexte d'un conflit armé:

a. porte gravement atteinte à l'intégrité corporelle ou à la santé physique ou psychique d'une personne protégée par le droit international humanitaire ou met cette personne gravement en danger en la soumettant à une procédure médicale qui n'est pas motivée par son état de santé et n'est pas conforme aux principes de la médecine généralement reconnus;

b. viole une personne de sexe féminin protégée par le droit international humanitaire, la détient alors qu'elle a été mise enceinte contre sa volonté dans l'intention de modifier la composition ethnique d'une population, contraint une personne protégée par le droit international humanitaire à subir un acte sexuel d'une gravité comparable, la contraint à se prostituer ou la stérilise de force;

c. porte gravement atteinte à la dignité d'une personne protégée par le droit international humanitaire en la traitant d'une manière humiliante ou dégradante.

2 Si l'acte est particulièrement grave, notamment s'il touche un grand nombre de personnes ou que son auteur agit avec cruauté, le juge peut prononcer une peine privative de liberté à vie.

3 Dans les cas de moindre gravité, le juge peut prononcer une peine privative de liberté d'un an au moins.

#### Art. 264f

1 Quiconque procède à la conscription ou à l'enrôlement d'enfants de moins de quinze ans dans les forces armées ou dans des groupes armés ou les fait participer à un conflit armé est puni d'une peine privative de liberté de trois ans au moins.

2 Si l'acte est particulièrement grave, notamment s'il touche un grand nombre d'enfants ou que son auteur agit avec cruauté, le juge peut prononcer une peine privative de liberté à vie.

3 Dans les cas de moindre gravité, le juge peut prononcer une peine privative de liberté d'un an au moins.

#### Art. 264g

1 Est puni d'une peine privative de liberté de trois ans au moins quiconque, dans le contexte d'un conflit armé:

a. lance une attaque dont il sait ou doit présumer qu'elle va causer, de manière disproportionnée par rapport à l'avantage militaire concret et direct attendu, des pertes en vies humaines dans la population civile, des blessures aux civils, des dommages aux biens de caractère civil ou des dommages étendus, durables et graves à l'environnement;

b. utilise une personne protégée par le droit international humanitaire comme bouclier pour influencer des opérations de combat;

c. à titre de méthode de guerre, se livre au pillage, s'approprie illicitement des biens de toute autre manière, détruit ou confisque sans nécessité des biens appartenant à l'ennemi, prive des civils de biens indispensables à leur survie ou empêche l'envoi de secours;

d. tue ou blesse un combattant adverse par trahison ou alors qu'il est hors de combat;

e. mutilé le cadavre d'un combattant adverse;

f. ordonne, en vertu de son pouvoir de commandement, qu'il ne soit pas fait de quartier ou en menace l'ennemi;

g. abuse du pavillon parlementaire, du drapeau, de l'uniforme, des insignes militaires de l'ennemi ou de l'Organisation des Nations Unies, ou des signes distinctifs prévus par le droit international humanitaire;

h. en tant que membre d'une puissance occupante, transfère une partie de sa population civile dans la zone occupée ou transfère tout ou partie de la population de la zone occupée à l'intérieur ou à l'extérieur de celle-ci.

2 Si l'acte est particulièrement grave, notamment s'il touche un grand nombre de personnes ou que son auteur agit avec cruauté, le juge peut prononcer une peine privative de liberté à vie.

3 Dans les cas de moindre gravité, le juge peut prononcer une peine privative de liberté d'un an au moins.

Art. 264h

1 Est puni d'une peine privative de liberté de trois ans au moins quiconque, dans le contexte d'un conflit armé:

- a. utilise du poison ou des armes empoisonnées;
- b. utilise des armes biologiques ou chimiques, y compris des gaz, matières ou liquides toxiques ou asphyxiants;
- c. utilise des balles qui s'épanouissent ou s'aplatissent facilement dans le corps humain ou des balles qui explosent dans le corps humain;
- d. utilise des armes dont l'effet principal est de blesser par des éclats qui ne sont pas localisables par rayons X dans le corps humain;
- e. utilise des armes à laser dont l'effet principal est de provoquer la cécité permanente.

2 Si l'acte est particulièrement grave, le juge peut prononcer une peine privative de liberté à vie.

Art. 264i

Est puni d'une peine privative de liberté de trois ans au plus ou d'une peine pécuniaire quiconque:

- a. continue les hostilités après avoir eu officiellement connaissance de la conclusion d'un armistice ou de la paix ou enfreint les conditions d'un armistice de toute autre manière;
- b. maltraite, injurie ou retient indûment un parlementaire ennemi ou une personne qui l'accompagne;
- c. retarde d'une manière injustifiée le rapatriement de prisonniers de guerre après la fin des hostilités.

Art. 264j

Quiconque, dans le contexte d'un conflit armé, enfreint, d'une manière qui n'est pas réprimée par les art. 264c à 264i, une norme du droit international humanitaire dont la violation est punissable en vertu du droit international coutumier ou d'une convention internationale reconnue comme contraignante par la Suisse est puni d'une peine privative de liberté de trois ans au plus ou d'une peine pécuniaire.

**(vi) Crimes Against Humanity**

Art. 264a

1 Est puni d'une peine privative de liberté de cinq ans au moins quiconque, dans le cadre d'une attaque généralisée ou systématique lancée contre la population civile:

- a. tue intentionnellement une personne;
- b. tue avec préméditation de nombreuses personnes ou impose à la population des conditions de vie propres à entraîner sa destruction, dans le dessein de la détruire en tout ou en partie;
- c. dispose d'une personne en s'arrogeant sur elle un droit de propriété, notamment dans le contexte de la traite d'êtres humains, de l'exploitation sexuelle ou du travail forcé;
- d. inflige à une personne une grave privation de liberté en infraction aux règles fondamentales du droit international;
- e. dans l'intention de soustraire une personne à la protection de la loi pendant une période prolongée:

1. la prive de liberté sur mandat ou avec l'assentiment d'un Etat ou d'une organisation politique, toute indication sur le sort qui lui est réservé ou sur l'endroit où elle se trouve étant ensuite refusée,

2. refuse toute indication sur le sort qui lui est réservé ou l'endroit où elle se trouve, sur mandat d'un Etat ou d'une organisation politique ou en enfreignant une obligation légale;

f. inflige à une personne se trouvant sous sa garde ou sous son contrôle de grandes souffrances ou porte gravement atteinte à son intégrité corporelle ou à sa santé physique ou psychique;

g. viole une personne de sexe féminin, la détient alors qu'elle a été mise enceinte contre sa volonté dans l'intention de modifier la composition ethnique d'une population, contraint une personne à subir un acte sexuel d'une gravité comparable, la contraint à se prostituer ou la stérilise de force;

h. déporte des personnes de la région où elles se trouvent légalement ou les transfère de force;

i. porte gravement atteinte aux droits fondamentaux des membres d'un groupe de personnes en les privant ou en les dépouillant de ces droits pour des motifs politiques, raciaux, ethniques, religieux ou sociaux ou pour tout autre motif contraire au droit international, en relation avec un des actes visés aux titres 12bis et 12ter ou dans le but d'opprimer ou de dominer systématiquement un groupe racial;

j. commet tout autre acte d'une gravité comparable à celle des crimes visés par le présent alinéa et inflige ainsi à une personne de grandes souffrances ou porte gravement atteinte à son intégrité corporelle ou à sa santé physique ou psychique.

2 Si l'acte est particulièrement grave, notamment s'il touche un grand nombre de personnes ou que son auteur agit avec cruauté, le juge peut prononcer une peine privative de liberté à vie.

3 Dans les cas de moindre gravité relevant de l'al. 1, let. c à j, le juge peut prononcer une peine privative de liberté d'un an au moins.

**(vii) Genocide**

**Art. 264**

1 Any person who with the intent to destroy, in whole or in part, a group of persons characterised by their nationality, race, religion or ethnic affiliation:

a. kills members of such a group, or seriously harms them physically or mentally;

b. inflicts living conditions on members of such a group that are calculated to bring about its total or partial destruction;

c. orders or takes measures that are directed towards preventing births within such a group; or

d. forcibly transfers children in such a group to another group or arranges for such children to be forcibly transferred to another group shall be liable to a custodial sentence of life or a custodial sentence of not less than ten years.

2 If the offence has been committed abroad, the offender shall nevertheless be liable to the foregoing penalties if he is resident in Switzerland and cannot be extradited. Article 6bis no. 2196 applies.

3 The regulations on authorisation to bring a prosecution in terms of Article 366 paragraph 2 letter b197, Articles 14 and 15 of the Government Liability Act of 14 March 1958198, and Articles 1 and 4 of the

Guarantees Act of 26 March 1934199 do not apply to the offence of genocide.



## ***United Kingdom of Great Britain and Northern Ireland***

### **Overview**

United Kingdom law explicitly provides for universal jurisdiction over the crimes of torture,<sup>1289</sup> hostage taking,<sup>1290</sup> participating in the slave trade,<sup>1291</sup> offences against United Nations personnel,<sup>1292</sup> piracy<sup>1293</sup> and certain war crimes, including grave breaches of the 1949 Geneva Conventions and their first additional Protocol.<sup>1294</sup> The International Criminal Court Act (ICCA) of 2001 provides for a more restrictive form of universal jurisdiction over genocide, crimes against humanity and war crimes.<sup>1295</sup> Initially, the ICCA's jurisdiction only covered crimes committed after its coming into force on 1 September 2001. The Coroners and Justice Act of 2009 however amended the ICCA, providing for retrospective application of the ICCA's jurisdiction over genocide, crimes against humanity and war crimes committed on or after 1 January 1991,<sup>1296</sup> as "*these crimes have existed at international law since that date*".<sup>1297</sup>

The UK War Crimes Act 1991, introduced to address the presence of suspects of WW II crimes on British territory, provides for extraterritorial jurisdiction over certain crimes (murder, manslaughter or culpable homicide constituting a violation of the laws and customs of war) committed between 1939 and 1945 in Germany or in places under German occupation by a person who subsequently became a UK citizen or resident.<sup>1298</sup> The Royal Warrant of 14 June 1945 provides British military courts sitting outside the UK with jurisdiction over war crimes committed by civilian or members of armed forces during a conflict in which the UK is/was involved.<sup>1299</sup>

The ICCA also provides for active personality jurisdiction over the Rome Statute Crimes.<sup>1300</sup>

### **Issues**

Nexus requirements (including presence or residence): Which nexus requirements apply for universal jurisdiction to be exercised depends on the relevant crime under international law. The suspect's presence or "*the reasonable prospect*" of the suspect's presence in the UK is sufficient for the police to initiate an investigation of the crime of torture and hostage taking.<sup>1301</sup>

The cases of Israeli General Almog and former Israeli Foreign Minister Tzipi Livni suggest that the suspect's anticipated presence in the UK is sufficient for an arrest warrant to be

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<sup>1289</sup> Criminal Justice Act 1988, Section 134 (1).

<sup>1290</sup> Taking of Hostages Act 1982, Section 1.

<sup>1291</sup> Slave Trade Act 1873, Section 26, as amended by Statute Law (Repeals) Act 1998.

<sup>1292</sup> United Nations Personnel Act 1997, Sections 1, 2, 3 and 5 (3).

<sup>1293</sup> R v. Keyn (1876) 2 Ex D 63, 2 bilc 701, CCR; R v. Anderson (1868).

<sup>1294</sup> Geneva Conventions Act, Section 1 (1); and Geneva Conventions (Amendment) Act 1995, Section 1.

<sup>1295</sup> International Criminal Court Act 2001 Sections 51, 52, 58 and 59; International Criminal Court (Scotland) Act 2001, Sections 1 and 2.

<sup>1296</sup> International Criminal Court Act 2001, Section 65A, as amended by Coroners and Justice Act 2009, Section 70 (3).

<sup>1297</sup> Crown Prosecution Service, Response to FIDH/REDRESS questionnaire.

<sup>1298</sup> War Crimes Act 1991, Section 1.

<sup>1299</sup> Royal Warrant of 14 June 1945, promulgated on 18 June 1945 in Army Order 81/1945. The text of the Royal Warrant is in the United Kingdom's *Manual of Military Law*,

<sup>1300</sup> International Criminal Court Act 2001, Section 51(b).

<sup>1301</sup> Crown Prosecution Service, "War Crimes/ Crimes against Humanity Referral Guidelines", p.3, 29 April 2010, at [http://www.cps.gov.uk/publications/agencies/war\\_crimes.html](http://www.cps.gov.uk/publications/agencies/war_crimes.html).

issued relating to the commission of war crimes. In both cases, a British magistrate issued an arrest warrant over war crimes allegedly committed in Gaza in 2002 and 2009 respectively and both suspects were expected to arrive in the UK prior to the issuance of the arrest warrants. In the case of General Almog, the arrest warrant was withdrawn on 15 September 2005 after he had left the country,<sup>1302</sup> while in the case of Tzipi Livni, the court withdrew the arrest warrant after it became apparent that she had cancelled her attendance at a meeting in London and therefore was no longer due to arrive in the UK.<sup>1303</sup>

For crimes under the ICCA, universal jurisdiction is limited to UK nationals or foreigners who are either resident at the time of offence or who become resident after the crime and still reside in the UK when the proceedings are brought. If they are not present in the UK, any investigation “*will be suspended until there is a reasonable prospect of the suspect returning to the UK voluntarily*”.<sup>1304</sup>

The Coroner’s and Justice Act 2009, Section 70, inserts a new Section 67 A into the ICCA 2001 that provides a list of individuals who are to be treated as resident in the United Kingdom:

- an individual who has indefinite leave to remain in the UK;
- any other individual who has made an application for such leave (whether or not it has been determined) and who is in the UK;
- an individual who has leave to enter or remain in the UK for the purposes of work or study and who is in the UK;
- an individual who has made an asylum claim, or a human rights claim which has been granted;
- an individual who has made an asylum claim, or a human rights claim (whether or not the claim has been determined) and who is in the UK;
- an individual named in an application for indefinite leave to remain, an asylum claim, or a human rights claim as a dependant of the individual making the application of the claim if
  - o the application or claim has been granted or
  - o the named individual is in the UK claim (whether or not the application or claim has been determined)
- an individual who would be liable to removal or deportation from the UK but cannot be removed or deported because of Section 6 of the Human Rights Act 1998;
- an individual
  - o against whom a decision to make a deportation order has been made;
  - o who has not appealed against that decision; and
  - o who is in the UK;
- an individual who is an illegal immigrant within the meaning of Section 33 (1) Immigration Act 1971 or who is liable to removal under Section 10 Immigration and Asylum Act 1999; and

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<sup>1302</sup> BBC, “Police feared ‘airport stand-off’”, 19 February 2008, at <http://news.bbc.co.uk/1/hi/uk/7251954.stm>.

<sup>1303</sup> The Guardian, “British court issued Gaza arrest warrant for former Israeli minister Tzipi Livni”, 14 December 2009, at <http://www.guardian.co.uk/world/2009/dec/14/tzipi-livni-israel-gaza-arrest>.

<sup>1304</sup> Crown Prosecution Service, “War Crimes/ Crimes against Humanity Referral Guidelines”, p.2, 29 April 2010, at [http://www.cps.gov.uk/publications/agencies/war\\_crimes.html](http://www.cps.gov.uk/publications/agencies/war_crimes.html).

- an individual who is detained in lawful custody in UK.<sup>1305</sup>

When applying Section 67A, authorities need to take into account the following considerations:

- the periods during which the individual has been or intends to be in the UK;
- the purpose for which the individual is, has been or intends to be in the UK;
- whether the individual has family or other connections to the UK and the nature of those connections, and
- whether the individual has an interest in residential property located in the UK.<sup>1306</sup>

**Subsidiarity:** According to the CPS, prosecutors make decisions as to whether to prosecute in accordance with the Code for Crown Prosecutors and the Director of Public Prosecutor's Guidance on Charging.<sup>1307</sup> The principle of subsidiarity is not enshrined in any of the UK laws referring to crimes under international law, yet past practice in relation to for instance cases of Rwandan genocide suspects indicate that there is a clear preference within the CPS for prosecutions in the territorial state. Accordingly, the CPS seeks to ensure the extradition to Rwanda of genocide suspects currently residing in the UK, despite jurisdiction over the genocide and despite serious concerns that British courts may refuse to extradite suspects to Rwanda, as the High Court has already decided in April 2009.<sup>1308</sup>

**Double criminality:** There is no 'double criminality requirement' for the exercise of extraterritorial jurisdiction under UK law.

**Prosecutorial and Executive discretion:** The Metropolitan Police Terrorism Command (SO15) within the Metropolitan Police Services is responsible for the "*investigation of all allegations of war crimes, crimes against humanity, genocide and torture*". The "War Crimes/Crimes against Humanity Referral Guidelines" set out criteria for the SO15 to decide whether to initiate an investigation against a specific suspect, taking into account the nationality and location of the suspect, availability of evidence, including victims and witnesses, as well as the advice of the Crown Prosecution Service (CPS) in relation to legal issues such as immunity and jurisdiction.<sup>1309</sup>

Where a decision to investigate is made, the complainant will be informed accordingly, and it will be up to the SO15 to decide whether or not to arrest a specific suspect. Should the SO15 decide not to investigate, it will inform the complainant or his/ her solicitor.<sup>1310</sup>

On completion of any investigation, SO15 will submit the file of evidence against the suspect to the Counter Terrorism Department (CTD) of the CPS. The CTD will review the evidence file "*in accordance with the Code for Crown Prosecutors*" and consider whether a prosecution would be in the public interest. The more serious the offence, the more likely it is that a prosecution will be required in the public interest.<sup>1311</sup>

<sup>1305</sup> International Criminal Court Act 2001, Section 67A (1), as amended by Coroners and Justice Act 2009, Section 70 (4).

<sup>1306</sup> International Criminal Court Act 2001, Section 67A (2), as amended by Coroners and Justice Act 2009, Section 70 (4).

<sup>1307</sup> Crown Prosecution Service, Response to FIDH/REDRESS questionnaire.

<sup>1308</sup> Correspondence on file with REDRESS.

<sup>1309</sup> Crown Prosecution Service, "War Crimes/ Crimes against Humanity Referral Guidelines", p.3, 29 April 2010, at [http://www.cps.gov.uk/publications/agencies/war\\_crimes.html](http://www.cps.gov.uk/publications/agencies/war_crimes.html).

<sup>1310</sup> Ibid, paras.10/11.

<sup>1311</sup> Code of Crown Prosecution Service, paragraph 4.13.

The Attorney General's consent would then be necessary for a prosecution of crimes under international law to proceed.<sup>1312</sup> As a government appointed official and chief legal advisor to the government, the Attorney General has absolute discretion over prosecutions of crimes under international law. In relation to the crime of torture, the Attorney General in 1993 stated that he will consent to a proposed prosecution under Sections 134 and 135 of the Criminal Justice Act 1988 if there is "*sufficient admissible and reliable evidence to afford a realistic prospect of conviction*" and where the circumstances are such "*that it would be in the public interest for there to be a prosecution*".<sup>1313</sup>

In response to private applications to a magistrate for the issuance of arrest warrants against Israeli nationals for war crimes, legislative proposals are currently under way to restrict access to a magistrate and to make the decision of the Magistrate subject to the consent of the Director of Public Prosecutions.<sup>1314</sup>

**Ability to review decisions of the prosecutor or other governmental body:** A complainant can seek judicial review of a decision by SO15 not to investigate. Similarly, a decision by the CPS not to prosecute may be judicially reviewed. If an application for judicial review is successful, the court will direct the CPS to reconsider its position. The final decision will be, however, for the CPS.<sup>1315</sup>

**Statutes of limitation:** No statutes of limitation apply to the prosecution of genocide, crimes against humanity or war crimes under the ICCA 2001.<sup>1316</sup> In *R v Anthony Sawoniuk*, the Court of Appeal refused the claimant's application that his conviction for war crimes under the War Crimes Act 1991 should have been stayed on account of the time delay between the offence (1942) and the date on which the prosecution was brought (1999).

**Immunities:** The House of Lords confirmed in the case of Augusto Pinochet that acting heads of state have a right to immunity from individual criminal prosecution for any crime regardless of whether those acts are official functions carried out in the exercise of duties or acts performed in private capacity. This immunity is also reflected in Section 14 (1) of the State Immunity Act 1978. However, it appears to also be applied to other acting ministers of foreign governments. A London Magistrate based the rejection of issuing an arrest warrant against Israeli Defense Ministers Shaul Mofaz in 2004 and Ehud Barak in 2009 on immunity grounds, while in November 2005 an arrest warrant was not issued against Bo Xilai, Chinese Minister for Trade, also for immunity reasons.<sup>1317</sup> Indeed, it appears that contrary to international law, immunities from prosecution are applied to a range of officials, including visiting armed forces from certain countries, ambassadors, high commissioners and their diplomatic staff.<sup>1318</sup>

Former heads of state are not granted absolute immunity afforded to an acting head of state, but rather immunity *rationae materiae*, that is, only for acts carried out in an

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<sup>1312</sup> Section 135 Criminal Justice Act 1988; section 53(3) of the ICC Act 2001; section 1(3) of the War Crimes Act 1991; section 1A of the Geneva Conventions Act 1957 as amended by section 70 of the ICC Act 2001; section 2 (1) of the Taking of Hostages Act 1982; section 5(1) of the United Nations Personnel Act 1997.

<sup>1313</sup> House of Commons Hansard Debates for 19 July 1993, Written Answers to Questions, at <http://www.publications.parliament.uk/pa/cm199293/cmhansrd/1993-07-19/Writtens-3.html>.

<sup>1314</sup> Ministry of Justice, "New Rules on Universal Jurisdiction", 21 July 2010, at <http://www.justice.gov.uk/news/newsrelease220710b.htm>.

<sup>1315</sup> Crown Prosecution Service, Response to FIDH/REDRESS questionnaire; see Crown Prosecution Service, "Appeals Judicial Review of Prosecution Decisions: Legal Guidance: The Crown Prosecution Service, including case law of Decisions not to prosecute, at [http://www.cps.gov.uk/legal/a\\_to\\_c/appeals\\_judicial\\_review\\_of\\_prosecution\\_decisions/index.html](http://www.cps.gov.uk/legal/a_to_c/appeals_judicial_review_of_prosecution_decisions/index.html).

<sup>1316</sup> Crown Prosecution Service, Response to FIDH/REDRESS questionnaire.

<sup>1317</sup> See Louise Arimatsu, "Universal Jurisdiction for International Crimes: Africa's Hope for Justice?", April 2010, IL BP 2010/01, at [http://www.chathamhouse.org.uk/files/16379\\_bp0410arimatsu.pdf](http://www.chathamhouse.org.uk/files/16379_bp0410arimatsu.pdf); see also The Guardian, "Israeli minister Ehud Barak faces war crimes arrest threat during UK visit", at <http://www.guardian.co.uk/world/2009/sep/29/ehud-barak-war-crimes-israel>.

<sup>1318</sup> Crown Prosecution Service, Response to FIDH/REDRESS questionnaire.

official capacity or in the exercise of the duty of a head of state. In the Pinochet case, the majority of the House of Lords found that Pinochet was not entitled to immunity for acts of torture.

English courts have taken a more expansive view of applicable immunities in extraterritorial civil proceedings and state immunity rules as contained in the State Immunity Act 1978 have prevented for instance torture survivors from claiming compensation before the courts of England and Wales.<sup>1319</sup> In *Jones v Interior Ministry of Saudi Arabia*, the Appellate Committee of the House of Lords in 2006 unanimously decided that the terms of the State Immunity Act 1978 meant that UK courts had no jurisdiction to hear a civil claim against a foreign government in respect of torture committed outside territory under UK control.<sup>1320</sup>

**Victims' role in proceedings:** Section 6 (1) of the Prosecution of Offences Act 1985 provides private individuals the possibility to bring a private prosecution by applying to a magistrate.<sup>1321</sup> The right to bring a private prosecution applies to all offences including crimes under international law. Normally, the application to the magistrate would be for a summons to the defendant to attend court, yet there is also an alternative of issuing an arrest warrant if the offence is serious, or if the suspect is unlikely to answer to a summons.<sup>1322</sup>

A magistrate may issue an arrest warrant with a view to bringing a suspect before a magistrates' court on the basis of information presented to the magistrate. The magistrate will need to examine the information presented to confirm that "*a person has, or is suspected of having, committed an offence,*"<sup>1323</sup> and to ascertain "*at the very least (i) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (ii) that the offence alleged is not 'out of time'; (iii) that the court has jurisdiction; (iv) whether the informant has the necessary authority to prosecute*".<sup>1324</sup>

By virtue of Section 25 (2) of the Prosecution of Offences Act 1985, a warrant for arrest can be issued without the consent of the Attorney General, including for crimes under international law.<sup>1325</sup> The rationale behind Section 25 (2) is to cover instances where action "*needs to be taken to apprehend the offender and detain him if there is not time to obtain permission*".<sup>1326</sup> Consent of the Attorney General will need to be sought subsequently before the prosecution can proceed further.

The ability of victims to directly apply to a magistrate to issue an arrest warrant on the basis of prima facie evidence has triggered some controversy in the context of arrest

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<sup>1319</sup> Section 1(1) of the State Immunity Act 1978 provides that "[A] state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of the Act." The Act then provides for a number of exceptions from the State Immunity rule, including "commercial transactions entered into by the foreign state; actions relating to a contract of employment with a UK resident; and any interest in movable or immovable property." Torture and other human rights violations do not feature among these exceptions; see also REDRESS, "Torture (Damages) Bill 2007-08- A Private Member's Bill to Provide a Remedy for Torture Survivors in the United Kingdom, at [http://www.redress.org/downloads/publications/Evidence%20publication%20-%20FINAL%203%20\\_A4\\_%20saved.pdf](http://www.redress.org/downloads/publications/Evidence%20publication%20-%20FINAL%203%20_A4_%20saved.pdf).

<sup>1320</sup> House of Lords, Judgments, *Jones v. Ministry of Interior Al Mamlaka Al Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others* [2006] UKHL 26, 14 June 2006.

<sup>1321</sup> Prosecution of Offences Act 1985, Section 6 (1).

<sup>1322</sup> Ministry of Justice, Arrest Warrants- Universal Jurisdiction, 6 March 2010, at <http://www.parliament.uk/documents/documents/upload/arrest-warrant-universal-jurisdiction.pdf>; see also Crown Prosecution Service, "Private Prosecutions", 23 June 2009, at [http://www.cps.gov.uk/legal/p\\_to\\_r/private\\_prosecutions/](http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/).

<sup>1323</sup> Magistrates' Court Act 1980, Section 1 (1).

<sup>1324</sup> *R v Brentford Justices, ex part Catlin* [1975] QB 455, at 464.

<sup>1325</sup> Prosecution of Offences Act, section 25 (2).

<sup>1326</sup> *R v Lambert* [2009] EWCA Crim 700.

warrants issued in respect of Israeli nationals. The UK government stated in response to one of these arrest warrants that “*Israel is a strategic partner and a close friend of the UK. We are determined to protect and develop these ties*”...and that the Government is looking urgently at ways in which the UK system might be changed in order to avoid this sort of situation arising again.<sup>1327</sup> Accordingly, the government seeks to restrict victims’ access to a magistrate to issue an arrest warrant specifically to crimes under international law, and to require the “*consent of the Director of Public Prosecutions before an arrest warrant can be issued to a private prosecutor in respect of an offence of universal jurisdiction*”.<sup>1328</sup>

Victims cannot participate as private parties to criminal proceedings under UK law.

**Victim and witness protection:** Specific measures can be adopted under the Youth Justice and Criminal Evidence Act (YJCEA) 1999 in relation to witness who are “*vulnerable due to their age, mental or physical capacity*”<sup>1329</sup>, as well as “*intimidated witnesses*”<sup>1330</sup> where the court considers that the quality of evidence given by these witnesses is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.<sup>1331</sup> The court will take into account a range of factors, including the alleged circumstances of the offence, the age and social background of the witness and any behaviour towards the witness on the part of the accused, likely accused or associates of the accused. Complainants in respect of sexual offences are statutorily deemed eligible under this section.<sup>1332</sup> While the Coroners and Justice Act 2009 amended the special measures regime and specifically referred to “*witnesses in gun and knife crime offences*”, no direct reference to crimes under international law is made in relation to special measures.

However, where a witness is, in principle eligible for a special measure, the court must satisfy itself that the special measure would improve the quality of the witness’s testimony, including whether such measure would prevent a party to the proceedings from testing the evidence. Special measures include screening the witness from the accused, evidence by live TV link, enabling the witness to give testimony during the trial from outside the courtroom, testifying in private, video recorded evidence in chief, and, where that has been permitted, video recorded cross- examination or re- examination and examination of a witness through an intermediary (especially in cases of vulnerable witnesses).<sup>1333</sup>

In cases where witnesses are fearful that their testimony will put them or those closest to them at risk, as for instance in organised crime or gang crime cases, witnesses may be able to provide testimony anonymously.<sup>1334</sup>

**Specialised War Crimes Unit:** A specialised war crimes team was established within the Immigration and Naturalisation Department (IND) of the UK Border Agency in 2004.<sup>1335</sup> The

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<sup>1327</sup> Foreign & Commonwealth Office, “Response to UK arrest warrant for Tzipi Livni, 15 December 2009, at <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=21448373> (last accessed December 2010).

<sup>1328</sup> Ministry of Justice news release, “New rules on Universal Jurisdiction”, 22 July 2010, <http://www.justice.gov.uk/news/newsrelease220710b.htm>.

<sup>1329</sup> Youth Justice and Criminal Evidence Act 1999, Section 16.

<sup>1330</sup> Ibid, Section 17.

<sup>1331</sup> Crown Prosecution Service, Response to FIDH/REDRESS questionnaire.

<sup>1332</sup> Ibid.

<sup>1333</sup> Youth Justice and Criminal Evidence Act 1999, Sections 23-30.

<sup>1334</sup> Crown Prosecution Service, response to FIDH/REDRESS questionnaire; see also sections 86 to 98 of the Coroners and Justice Act 2009; Guidance on Witness Anonymity by Director of Public Prosecutions, December 2009; Attorney General’s Guidelines to Prosecutors; for further guidance see R v. Mayers; Glasgow; Costelloe and Bahmanzadeh; R v, P, V and R [2008] EWCA Crim 1418.

team may take one of several actions in respect of people who may have committed or been complicit in crimes under international law. These include refusing leave to enter, excluding from refugee status and depriving citizenship as well as revoking refugee status where applicable.<sup>1336</sup> The team may also refer cases to the Metropolitan Police Service but does not automatically do so. The team is composed of 14 analysts with specific country expertise and who are in charge of 21,000 asylum seekers and visa applicants. They work closely with staff from other departments to ensure that cases where there is reason to believe that the applicant may have been involved in the commission of an international crime are referred to and handled by the war crimes team.<sup>1337</sup>

No equivalent exists within the Metropolitan Police or the Crown Prosecution Service, where officers are assigned to cases involving crimes under international law, yet also work on other cases such as terrorism and organized crime, rather than exclusively on crimes under international law.<sup>1338</sup> While no budget is made available specifically for the prosecution of crimes under international law, additional resources would be provided from departmental reserves if necessary.<sup>1339</sup>

**Participation in EU Genocide Network:** Practitioners from the Crown Prosecution Service, and the Metropolitan Police, participate in meetings of the EU Genocide Network.

### Cases:

The Metropolitan Police referred 39 cases of crimes under international law to the CPS since 1992. The alleged offences have taken place in Afghanistan, Chechnya, China, Eritrea, Gaza, Iraq, Nepal, Pakistan, Somali State of Puntland, Sri Lanka, Rwanda, Soviet Union, UK, Western Ukraine and Zimbabwe. The relevant crimes were allegedly committed by individuals, government departments and international companies and span from 1941 to 2006.<sup>1340</sup>

Of these 39 referrals, three resulted in a prosecution for crimes under international law: On 1 April 1999, the High Court found Anthony Swoniuk guilty of 2 counts of murder contrary to common law, committed during WWII, and he was sentenced to life imprisonment. In 2004, the CTD charged Williams, a British soldier, with murder as a result of a shooting of an Iraqi citizen in Iraq in August 2003. Following the trial judge's observations in February 2005, the evidence was further reviewed and, as the CTD did no longer see a realistic prospect of conviction, the case was dismissed.<sup>1341</sup>

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<sup>1335</sup> Report of the Home Office, "Secure Borders, Safe Haven- Integration with Diversity in Modern Britain", February 2002, p.103, at [www.archive2.official-documents.co.uk/document/cm53/5387/cm5387.pdf](http://www.archive2.official-documents.co.uk/document/cm53/5387/cm5387.pdf) (last accessed December 2010). The team is now called "Research and Information Team" (RAIT).

<sup>1336</sup> UK Border Agency, "Identifying, handling and considering asylum claims made by suspected war criminals and perpetrators of crimes against humanity, including genocide", at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/suspectedwarcriminals.pdf?view=Binary>.

<sup>1337</sup> Presentation by Susan Wale, then Head of War Crimes Team, UKBA, at FIDH / REDRESS conference, November 2008; see also UKBA, "Exceptional leave to remain: suspected war criminals and perpetrators of crimes against humanity and genocide", at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apunotices/elrwarcrimes.pdf?view=Binary>.

<sup>1338</sup> For further information on arrangements in place in the UK to identify, investigate and prosecute crimes under international law, see REDRESS and FIDH, "Strategies for the effective investigation and prosecution of serious international crimes: The practice of Specialized War Crimes Units", December 2010, at [http://www.redress.org/downloads/publications/The\\_Practice\\_of\\_Specialised\\_War\\_Crimes\\_Units\\_Dec\\_2010.pdf](http://www.redress.org/downloads/publications/The_Practice_of_Specialised_War_Crimes_Units_Dec_2010.pdf).

<sup>1339</sup> Crown Prosecution Service, Response to FIDH/REDRESS questionnaire.

<sup>1340</sup> Ibid.

<sup>1341</sup> Crown Prosecution Service, R v. Williams, 7 April 2005, at [http://www.cps.gov.uk/news/press\\_releases/120\\_05/](http://www.cps.gov.uk/news/press_releases/120_05/).

The prosecution of Afghan warlord Faryadi Zardad was the first domestic prosecution of a foreign national for acts of torture committed outside the UK. Zardad was convicted of acts of torture and hostage taking committed in Afghanistan in the 1990s. He was sentenced to twenty years of imprisonment.<sup>1342</sup>

In 2009, the High Court's rejection of an extradition request by the government of Rwanda made against four Rwandan genocide suspects residing in the UK (and leading to the suspects' release without charge or conditions despite the court's consideration that on the basis of the evidence presented, they had a 'case to answer') highlighted serious shortcomings in UK domestic legislation, which did not provide for universal jurisdiction over the genocide committed in 1994. As a result, the ICCA was amended by Section 70 of the Coroners and Justice Act, though to date, no criminal charges have been brought against the individuals.

Sri Lankan Colonel Amman Karuna was arrested by UK authorities on 2 November 2007 for possession of a false diplomatic passport and firearms. The Metropolitan Police initiated an investigation into allegations of Karuna's involvement into the conscription of child soldiers in Sri Lanka, based on evidence presented primarily by human rights NGOs. However, due to severe witness protection concerns, the Metropolitan Police was unable to collect sufficient evidence. The Crown Prosecution Service concluded that "*there was no realistic prospect of a conviction against Col Karuna based on the evidence that has been submitted to the CPS*".<sup>1343</sup>

## Relevant Legislation

### JURISDICTION

#### **Torture: Criminal Justice Act, Section 134 (1):**

"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."

#### **Hostage Taking: Taking of Hostages Act 1982, Section 1:**

"(1) A person whatever his nationality, who, in the United Kingdom or elsewhere, -

(a) detains any other person ("the hostage"), and

(b) in order to compel a State, international governmental organisation or person to do or abstain from doing any act, threatens to kill, injure or continue to detain the hostage, commits an offence."

#### **Participating in the Slave Trade: The Slave Trade Act 1873, Section 26:**

"Any offence against this Act or the said enactments with which this Act is to be construed as one, or otherwise in connexion with the slave trade, shall for all purposes of and incidental to the trial and punishment of a person guilty of such offence, and all proceedings and matters preliminary and incidental to and consequential on such trial and punishment, and for all purposes of and incidental to the jurisdiction of any court, constable, and officer with reference to such offence, be deemed to have been committed either in the place in which the offence was committed, . . .<sup>E1</sup> or in any place in which the person guilty of the offence may for the time being be <sup>E2</sup>. . .; and the offence may be described in any indictment or other document relating thereto as having been committed at the place where it was wholly or partly committed, or as having been committed on the high seas or out of Her Majesty's dominions, and the venue or local description in the margin may be that of the place in which the trial is held.

Where any such offence is commenced at one place and completed at another, the place at which such offence is to be deemed to have been committed shall be either the place where the offence was commenced or the place where the offence was completed.

<sup>1342</sup> Crown Prosecution Service, "CPS secures Historic Torture Conviction", 18 July 2005, at [http://www.cps.gov.uk/news/press\\_releases/135\\_05/](http://www.cps.gov.uk/news/press_releases/135_05/).

<sup>1343</sup> The Guardian, "Sri Lanka: Tamil Tigers leader quits UK after war crimes inquiry is dropped, 5 July 2008, at <http://www.guardian.co.uk/world/2008/jul/05/srilanka.warcrimes>.



Where a person being in one place is accessory to or aids or abets in any such offence committed in another place, the place at which such offence is to be deemed to have been committed shall be either the place in which the offence was actually committed or the place where the offender was at the time of his being so accessory, aiding, or abetting.”

**Offences against United Nations Personnel: Offences against United Nations Personnel Act 1997, Section 1 (similar provision in sections 2,3 and 5 (3)):**

“If a person does outside the United Kingdom any act to or in relation to a UN worker which, if he had done it in any part of the United Kingdom, would have made him guilty of any of the offences mentioned in subsection (2), he shall in that part of the United Kingdom be guilty of that offence.”

**Certain war crimes and breaches of first additional Protocol: Geneva Conventions Act 1957**

Section 1(1):

“Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the scheduled conventions or the first protocol shall be guilty of an offence.”

**Genocide; war crimes; crimes against humanity: International Criminal Court Act 2001, Sections 51 and 52 (similar provisions in Sections 58 and 59 in relation to Northern Ireland; similar provisions in Sections 1 and 2 of International Criminal Court (Scotland) Act 2001):**

“ (1) It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime.

(2) This section applies to acts committed—

(a) in England or Wales, or

(b) outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction.

**Retrospective jurisdiction over genocide, crimes against humanity and war crimes under the ICCA 2001 as amended by Coroners and Justice Act, Section 70 (3):**

“Retrospective application of certain offences

(1) Sections 51 and 58 apply to acts committed on or after 1 January 1991.

(2) But those sections do not apply to a crime against humanity, or a war crime within article 8.2(b) or (e), committed by a person before 1 September 2001 unless, at the time the act constituting that crime was committed, the act amounted in the circumstances to a criminal offence under international law.

(3) Section 52 applies to conduct in which a person engaged on or after 1 January 1991, and in subsections (2) and (3) of that section references to an offence include an act or conduct which would not constitute an offence under the law of England and Wales but for this section.

(4) Section 59 applies to conduct in which a person engaged on or after 1 January 1991, and in subsections (2) and (3) of that section references to an offence include an act or conduct which would not constitute an offence under the law of Northern Ireland but for this section.

(5) Any enactment or rule of law relating to an offence ancillary to a relevant Part 5 offence—

(a) applies to conduct in which a person engaged on or after 1 January 1991, and

(b) applies even if the act or conduct constituting the relevant Part 5 offence would not constitute such an offence but for this section.

(6) But sections 52 and 59, and any enactment or rule of law relating to an offence ancillary to a relevant Part 5 offence, do not apply to—

(a) conduct in which the person engaged before 1 September 2001, or

(b) conduct in which the person engaged on or after that date which was ancillary to an act or conduct which—

(i) was committed or engaged in before that date, and

(ii) would not constitute a relevant Part 5 offence, or fall within section 52(2) or 59(2), but for this section, unless, at the time the person engaged in the conduct, it amounted in the circumstances to a criminal offence under international law.

(7) Section 65, so far as it has effect in relation to relevant Part 5 offences—

(a) applies to failures to exercise control of the kind mentioned in section 65(2) or (3) which occurred on or after 1 January 1991, and

(b) applies even if the act or conduct constituting the relevant Part 5 offence would not constitute such an offence but for this section.

(8) But section 65, so far as it has effect in relation to relevant Part 5 offences, does not apply to a failure to exercise control of the kind mentioned in section 65(2) or (3) which occurred before 1 September 2001 unless, at the time the failure occurred, it amounted in the circumstances to a criminal offence under international law.

(9) In this section “relevant Part 5 offence” means an offence under section 51, 52, 58 or 59 or an offence ancillary to such an offence.

**UK War Crimes Act 1991**

Section 1:

“Subject to the provisions of this section, proceedings for murder, manslaughter or culpable homicide may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence—

- (a) was committed during the period beginning with 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation; and
- (b) constituted a violation of the laws and customs of war.”

## CRIMES UNDER INTERNATIONAL LAW

### **War Crimes/Genocide/ Crimes against Humanity, International Criminal Court Act, Section 1 and Section 50**

#### 1 The ICC and the ICC Statute

(1) In this Act—

“the ICC” means the International Criminal Court established by the Statute of the International Criminal Court, done at Rome on 17<sup>th</sup> July 1998;

“the ICC Statute” means that Statute; and

“ICC crime” means a crime (other than the crime of aggression) over which the ICC has jurisdiction in accordance with the ICC Statute.

(2) References in this Act to articles are, unless otherwise indicated, to articles of the ICC Statute.

(3) Schedule 1 to this Act contains supplementary provisions relating to the ICC.

#### 50 Meaning of “genocide”, “crime against humanity” and “war crime”

(1) In this Part—

“genocide” means an act of genocide as defined in article 6,

“crimes against humanity” means a crime against humanity as defined in article 7, and

“war crime” means a war crime as defined in article 8.2

(2) In interpreting and applying the provisions of those articles the court shall take into account—

(a) any relevant Elements of Crimes adopted in accordance with article 9, and

(b) until such time as Elements of Crimes are adopted under that article, any relevant Elements of Crimes contained in the report of the Preparatory Commission for the International Criminal Court adopted on 30th June 2000.

(3) The Secretary of State shall set out in regulations the text of the Elements of Crimes referred to in subsection (2), as amended from time to time.

The regulations shall be made by statutory instrument which shall be laid before Parliament after being made.

(4) The articles referred to in subsection (1) shall for the purposes of this Part be construed subject to and in accordance with any relevant reservation or declaration made by the United Kingdom when ratifying any treaty or agreement relevant to the interpretation of those articles.

Her Majesty may by Order in Council—

(a) certify that such a reservation or declaration has been made and the terms in which it was made;

(b) if any such reservation or declaration is withdrawn (in whole or part), certify that fact and revoke or amend any Order in Council containing the terms of that reservation or declaration.

(5) In interpreting and applying the provisions of the articles referred to in subsection (1) the court shall take into account any relevant judgment or decision of the ICC.

Account may also be taken of any other relevant international jurisprudence.

(6) The relevant provisions of the articles of the ICC Statute referred to in this section are set out in Schedule 8 to this Act.

No account shall be taken for the purposes of this Part of any provision of those articles omitted from the text set out in that Schedule.

#### *Grave Breaches of the Geneva Conventions and First Additional Protocol*, Geneva Conventions Act 1957, Section 1A:

1A) For the purposes of subsection (1) of this section—

(a) a grave breach of a scheduled convention is anything referred to as a grave breach of the convention in the relevant Article, that is to say—

(i) in the case of the convention set out in the First Schedule to this Act, Article 50;

(ii) in the case of the convention set out in the Second Schedule to this Act, Article 51;

(iii) in the case of the convention set out in the Third Schedule to this Act, Article 130;

(iv) in the case of the convention set out in the Fourth Schedule to this Act, Article 147; and

(b)

a grave breach of the first protocol is anything referred to as a grave breach of the protocol in paragraph 4 of Article 11, or paragraph 2, 3 or 4 of Article 85, of the protocol.]

#### **Torture, Criminal Justice Act 1988, Section 134:**

Torture.

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.

(2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if—

(a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence—

(i) of a public official; or

(ii) of a person acting in an official capacity; and

(b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.

(3) It is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission.

(4) It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct.

(5) For the purposes of this section “lawful authority, justification or excuse” means—

(a) in relation to pain or suffering inflicted in the United Kingdom, lawful authority, justification or excuse under the law of the part of the United Kingdom where it was inflicted;

(b) in relation to pain or suffering inflicted outside the United Kingdom—

(i) if it was inflicted by a United Kingdom official acting under the law of the United Kingdom or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law;

(ii) if it was inflicted by a United Kingdom official acting under the law of any part of the United Kingdom or by a person acting in an official capacity under such law, lawful authority, justification or excuse under the law of the part of the United Kingdom under whose law he was acting; and

(iii) in any other case, lawful authority, justification or excuse under the law of the place where it was inflicted.

(6) A person who commits the offence of torture shall be liable on conviction on indictment to imprisonment for life.