

Universal Jurisdiction in Europe The State of the Art

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I. Introduction

“Universal jurisdiction” is an idea that is as much acclaimed as denounced.¹ Much debated as a principle, the legal concept has attracted global attention since the dramatic 1998 arrest in London of former Chilean dictator Augusto Pinochet on charges of torture. But the Pinochet case itself developed in a significantly changed international legal environment. The last two decades have seen a revolution in forms of accountability for grave human rights violations, with the international community demonstrating a considerable interest in ensuring that certain international crimes are prosecuted.²

Yet despite the creation of ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone and the International Criminal Court (ICC), vast gaps persist in the ability to bring to justice persons accused of the gravest international crimes: genocide, crimes against humanity, war crimes and torture. With finite resources, international courts and mixed “internationalized” tribunals can try only a relatively small number of perpetrators, and the courts’ mandates are generally limited to crimes committed in specific territories and conflicts. Even with the advent of a permanent International Criminal Court, it is expected that there will remain an “impunity gap unless national authorities, the international community and the [ICC] work together to ensure that all appropriate means for bringing other perpetrators to justice are used.”³ In combating impunity for grave human rights violations, a critical role thus remains for national courts and tribunals through the exercise of universal jurisdiction.

“Universal jurisdiction” refers to the competence of a national court to try a person suspected of a serious international crime—such as genocide, war crimes, crimes against humanity or torture—even if neither the suspect nor the victim are nationals of the country where the court is located (“the forum state”), and the crime took place outside that country.⁴ The exercise of universal jurisdiction is commonly authorized, or even

¹ See for example Henry Kissinger, “The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny,” *Foreign Affairs*, July/August 2001, and reply by Kenneth Roth, “The Case for Universal Jurisdiction,” *Foreign Affairs*, September/October 2001. See also George Fletcher, “Against Universal Jurisdiction,” *Journal of International Criminal Justice*, vol. 1 (2003), p. 580, and Georges Abi-Saab, “The Proper Role of Universal Jurisdiction,” *Journal of International Criminal Justice*, vol. 1 (2003), p. 596.

² In this report, “international crimes” will be used to refer to genocide, war crimes, crimes against humanity, and torture.

³ Paper on Some Policy Issues Before the Office of the Prosecutor, ICC, 2003, p. 3, [online] http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf.

⁴ Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford, 2003),

required, by an international convention to which the state is a party. For example, the Convention against Torture⁵ and the Grave Breaches provisions of the Geneva Conventions both mandate the exercise of universal jurisdiction.

On paper, a great many countries around the world appear to recognize that they can and should exercise universal jurisdiction over international crimes such as torture and war crimes, by passing laws that permit the prosecution of such crimes.⁶ But practice has generally lagged far behind laws on the books. At the same time, concerns about the politicization of universal jurisdiction laws—and the risk that cases implicating foreign government officials could be inconvenient or embarrassing to the country where the court is located—have been a constant theme in debates about universal jurisdiction, and have led at least one country so far, Belgium, to significantly revise its laws.⁷ Issues of insufficient political will may be compounded by fear that universal jurisdiction cases, which concern events occurring in a foreign country and where suspects, witnesses and victims are likely to be foreign nationals, will be time- and resource-intensive to investigate and prosecute.

In the aftermath of Belgium's 2003 decision to significantly narrow its universal jurisdiction laws (in part due to direct pressure from foreign governments including the United States, which threatened to have the NATO Headquarters moved from Brussels⁸), there was a widespread perception that universal jurisdiction was “on its last legs, if not already in its death throes.”⁹ But rumors of universal jurisdiction's death would appear to have been greatly exaggerated. Despite setbacks such as Belgium's law

p. 3; Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia, 2005), pp. 25-26. The country in which the crimes occurred is referred to in this report as the “territorial state.”

⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [Annex, 39 U.N. GAOR Supp., No. 51, p. 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987, arts. 4-5; 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 October 21, 1950, art. 49; 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, art. 49; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force October 21, 1950, art. 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force October 21, 1950, art. 146.

⁶ See Amnesty International's survey of domestic laws, *Universal Jurisdiction - The Duty of States to Enact and Enforce Legislation* (AI Index: IOR 53/002/2001), September 2001, [online] http://web.amnesty.org/pages/legal_memorandum (retrieved May 2006).

⁷ See this report, Country Case Study: Belgium.

⁸ The threat arose because the head of the U.S. Central Command, and sitting U.S., British and Israeli political leaders, had been the subject of complaints filed under Belgium's universal jurisdiction law. See Luc Reydam, “Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law,” *Journal of International Criminal Justice*, vol. 1 (2003), p. 679.

⁹ Antonio Cassese, “Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction,” *Journal of International Criminal Justice*, vol. 1 (2003), p. 589.

reforms, there has since 2000 been a steady rise in the number of cases prosecuted under universal jurisdiction laws in Western Europe, evidencing a heightened willingness among certain European states to utilize universal jurisdiction. At the level of European Union (EU) policy, the Council of the European Union on Justice and Home Affairs (the Council) has adopted a decision recognizing that EU member states are “confronted on a regular basis” with persons implicated in genocide, crimes against humanity and war crimes, and who are trying to enter and reside in the EU. In its decision, the Council declared that these crimes “must not go unpunished and that their effective prosecution must be ensured by taking measures at national level and by enhancing international cooperation.”¹⁰ An earlier Council decision created an “EU Network” of national contact points intended to enhance the exchange of information concerning the investigation of international crimes.¹¹ Momentum has also been generated by the widespread ratification of the Rome Statute of the International Criminal Court among EU and non-EU states. The Rome Statute requires states parties to complement the efforts of the court, and its preamble calls on national courts to exercise criminal jurisdiction over those responsible for international crimes.¹²

The successful prosecution of international crimes in 2005 by courts in Spain, France, Belgium, the United Kingdom and the Netherlands—with more trials scheduled for 2006—indicates that universal jurisdiction is now a practical reality that is gradually being assimilated into the functioning of criminal law systems in parts of Western Europe. But relatively little is known about the *practice* of universal jurisdiction in various national legal systems, and the circumstances under which cases are actually investigated, prosecuted and tried. In this report Human Rights Watch examines the practice of universal jurisdiction in several European states since 2001.¹³ Based on interviews with prosecutors, investigating judges, immigration officials, police personnel and defense and victims’ lawyers in eight different countries, the report examines the real challenges encountered when trying to exercise universal jurisdiction in domestic courts, and—more significantly—the variety of innovative and creative responses which have been developed in some countries to overcome many of these challenges.

¹⁰ Council Decision 2003/335/JHA of 8 May 2003, Official Journal L 118, 14/052003 P.0012-0014, [online] http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_118/l_11820030514en00120014.pdf, preambular paras. 1, 6.

¹¹ Decision 2002/494/JHA of 13 June 2002, Official Journal L 167, 26/06/2002 P.0001-0002, [online] http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_167/l_16720020626en00010002.pdf (retrieved January 2006).

¹² See preambular para. 4, Rome Statute of the ICC, [online] http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf (retrieved April 2006).

¹³ Universal jurisdiction practice occurring before 2001 has been covered by REDRESS in *Universal Jurisdiction in Europe*, June 1999, [online] <http://www.redress.org/publications/UJEurope.pdf> (retrieved May 2006).

The experiences examined in this report suggest that the fair and effective exercise of universal jurisdiction is far from easy. The cases are more complex and resource-intensive than most ordinary criminal cases, and frequently raise novel legal questions for domestic courts. Problems of a lack of political will to pursue prosecutions remain pervasive. These challenges must be taken into account when setting expectations—particularly the expectations of victims—about what is possible through universal jurisdiction cases. Fundamentally, however, the national experiences examined in this report show that the fair and effective exercise of universal jurisdiction is achievable where there is the right combination of appropriate laws, adequate resources, institutional commitments, and political will.

The experiences examined in this report are exclusively European. This is in part because, as noted above, a handful of EU member states have been at the center of developments in the exercise of universal jurisdiction. It is also because the EU as an institution has, through its decisions, actively encouraged these developments and has the potential to do much more to enhance cooperation and the exchange of information.¹⁴ By assuming a leading role, both Western European states and the EU as a whole are uniquely situated to serve as examples to the wider international community of how universal jurisdiction can be strengthened as an effective, practical and realistic means of combating impunity for the worst international crimes.

¹⁴ Of the eight countries surveyed for this report, seven are EU members. The eighth country surveyed, Norway, is not in the EU.

II. Challenges and Responses—Making Universal Jurisdiction a Reality

From the initial complaint to the conclusion of the trial and any appeal, cases involving universal jurisdiction present special demands on police, prosecutors, defense counsel and courts. Because the acts in question will have occurred in a foreign country, and often many years earlier, cases rarely arise in the manner to which local authorities are accustomed—such as through a victim simply reporting to a police station.

Investigators and prosecutors may lack familiarity with both the historical and political context of the alleged crime, and the applicable international law. Witnesses may be dispersed across several countries, or the state in which the crime was committed may decline to cooperate with investigative requests. For similar reasons, a defendant may also face considerable problems gaining access to witnesses or evidence that exculpates him or her.

Despite these and other difficulties, cases have been opened and have proceeded to trial and conviction. These developments have generally occurred where law enforcement and judicial authorities in the relevant countries have made an organizational and institutional commitment to take potential universal jurisdiction cases seriously. This section reviews some of the key hurdles that have arisen in the exercise of universal jurisdiction by national authorities, and considers the strategies adopted by some national authorities to overcome them.

A. Notification and Complaint Mechanisms

1. Immigration Authorities

In its decision of May 8, 2003, the EU Council observed that “Member States are being confronted on a regular basis with persons who were involved in such crimes and who are trying to enter and reside in the European Union.”¹⁵ The preponderance of cases that have proceeded to trial under universal jurisdiction laws in Belgium, the Netherlands, Denmark and the United Kingdom have involved perpetrators who entered as asylum applicants, in the aftermath of a change of government or civil conflict in the territory where the crime was committed. Asylum seekers who are victims of an international crime may well be seeking refugee status alongside individuals whom they recognize as perpetrators. In some cases, suspected perpetrators may unwittingly disclose information which suggests a basis for further investigation into whether they

¹⁵ Council Decision 2003/335/JHA of 8 May 2003, preambular para. 6.

have been involved in a serious crime—for example, the individual might disclose that he was an army officer or militia member, as part of his refugee application.

Immigration authorities thus play a potentially vital role in alerting national police and judicial authorities to the presence of suspected perpetrators of international crimes. In the case of some countries examined in this report, immigration authorities have embraced this potential by adopting policies and procedures for reviewing visa and asylum applications in order to identify information suggesting involvement in international crimes, and for referring these cases to police and prosecutorial authorities. In Denmark, the Netherlands and Norway, the immigration authorities have taken the initiative of creating a specialized department that reviews asylum and visa applicants whose applications contain information suggesting involvement in international crimes. These departments maintain a list of suspects according to certain criteria, including previous employment, and after cross-checking the information with a list of suspects issued by international tribunals.¹⁶ This approach has been a key trigger for the exercise of universal jurisdiction in these three countries, and prosecutorial authorities there have so far received the majority of their cases through referral by immigration authorities.¹⁷

In the Netherlands, for example, asylum seekers are screened by the Immigration and Naturalization Service (IND), which has a special unit dealing exclusively with suspected “1F” cases.¹⁸ When an asylum seeker’s claim is rejected on the grounds of alleged involvement in an international crime, the file is then sent to the prosecution authorities. One criterion that can place an asylum seeker on the list of 1F files is his or her former profession: in an October 2005 case that saw two Afghan nationals convicted of war crimes,¹⁹ the accused were placed on the list because of their former rank as generals in the Afghan army. In Denmark, immigration authorities and the Danish Red Cross work in conjunction to distribute pamphlets among asylum seekers explaining to them in six languages other than Danish (Albanian, Arabic, Dari, French, English and Bosnian-Croatian-Serbian) where and with whom they can file a complaint if they are the victim of

¹⁶ Human Rights Watch telephone interview with Danish official, December 6, 2005; Human Rights Watch interview with Dutch official, October 6, 2005.

¹⁷ Human Rights Watch interview with Dutch official, October 6, 2005; Human Rights Watch telephone interview with Norwegian official, September 14, 2005. The website of the Danish Special International Crimes Office (SICO) refers to receiving 50 percent of its cases from the immigration authorities, with higher numbers in previous years, see <http://www.sico.ankl.dk/page34.aspx>.

¹⁸ Article 1F of the Refugee Convention renders an asylum seeker ineligible for refugee status if he or she has committed a “crime against peace, a war crime, or a crime against humanity,” or a “serious non-political crime.” See Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954, art. 1F.

¹⁹ Hesham and Jalalzoy, The Hague District Court, October 14, 2005, AV 1489 and AV 1163, *Rechtbank-Gravenhage*, 09/751005-04; official English translation of the judgments of both cases available at http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp?searchtype=ljn&ljn=AV1163&u_ljn=AV1163 and http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp?searchtype=ljn&ljn=AV1489&u_ljn=AV1489 (retrieved March 2006).

an international crime or have knowledge of a perpetrator in Denmark. The United Kingdom has recently established a special office within the Home Office's Immigration and Naturalization Department (UK IND) dealing exclusively with allegations of international crimes committed by British visa applicants and asylum seekers. Approximately twelve cases have already been referred to the UK police,²⁰ and this number is expected to increase once screening guidelines are created for the UK IND as a whole.

The picture is different in the other four countries surveyed for this report. Although Belgium has prosecuted several asylum applicants from Rwanda for their role in the Rwandan genocide, it has not instituted formal arrangements for notification and cooperation between immigration authorities and prosecutorial authorities. Spain, France and Germany have similarly not taken steps that might ensure cooperation and notification.

Countries face the risk that they may become a safe haven for suspected perpetrators of international crimes unless they give consideration to formalizing and strengthening mechanisms of cooperation and information exchange between immigration authorities and prosecutorial authorities, in respect of suspected perpetrators of international crimes who apply for visas or refugee status. The practice of the Netherlands, Norway, Denmark and the United Kingdom strongly suggests specialized departmental units can be highly effective in both screening applicants and deepening awareness among frontline immigration officers about what kinds of information could alert them to an applicant's possible involvement in an international crime. Regularized procedures for referring suspected cases to prosecutorial authorities ensure that the necessary legal expertise is engaged at an early stage, reducing the risk that possible perpetrators can enter a country undetected.

2. Private Complaints

Landmark universal jurisdiction cases, such as the opening of a prosecution against Augusto Pinochet in Spain and the request for his extradition from the United Kingdom, and a Belgian court's indictment and extradition request for former Chadian dictator Hissène Habré, have been initiated through complaints lodged by private parties. These cases have arisen in civil law jurisdictions, many of which have a legal tradition of expressly permitting privately-initiated criminal prosecutions. Under these

²⁰ Human Rights Watch telephone interviews with official of the UK Metropolitan Police anti-terrorist department, November 16, 2005, and with an official of the UK Home Office Immigration and Nationality Directorate, November 28, 2005.

legal systems, private petitioners—usually victims and nongovernmental organizations (NGOs)—file criminal complaints against an alleged perpetrator by submitting them directly to an investigating judge or prosecutor. Victims and NGOs are frequently the principal sources of evidence or of witnesses that could establish responsibility for the crime alleged. Those countries in which private petitioners have been instrumental in bringing about prosecutions under universal jurisdiction laws also tend to be countries where immigration authorities are relatively inactive in notifying police authorities about potential suspects.

Private petitions have been the driving force behind universal jurisdiction-based cases in Spain, usually in the face of opposition by the prosecutorial authorities themselves.²¹ In the Spanish system, petitioners lodge an *acción popular* directly with an investigative judge. This judge, once seized of the matter, determines whether there is sufficient evidence to open an investigation, and is empowered to order necessary steps (such as the deposing of witnesses) to enable the investigation to proceed. Generally, in such a system, the investigative judge will rule whether there is sufficient evidence, once the investigation is completed, for the case to proceed to trial.²² The *acción popular* procedure was the basis for the international arrest warrant in the Pinochet case; the indictment, prosecution and conviction in Spain of former Argentine military officer Adolfo Scilingo; and the successful extradition from Mexico of former Argentine military officer Manuel Cavallo.²³ The latter were both charged, inter alia, with crimes against humanity.

In France and Belgium, private petitioners have initiated almost all complaints. Belgium's two major criminal trials involving universal jurisdiction—both concerning participants in the Rwandan genocide—were the result of complaints lodged with prosecutors by *parties civiles*. Similar to the Spanish *acción popular*, a *constitution de parties civiles* seizes an investigative judge of the case irrespective of the wishes of the prosecutor. All cases lodged thus far under French universal jurisdiction laws have been brought by *parties civiles*.

Revisions to Belgium's universal jurisdiction laws in 2003 curtailed the right of *parties civiles* to complain directly to an investigative judge, and placed the decision to open a prosecution in the hands of federal prosecution authorities.²⁴ The revisions were spurred by concerns that private petitioners were misusing the procedure to make

²¹ Human Rights Watch telephone interview with Spanish official, September 14, 2005.

²² See this report, Country Case Study: Spain.

²³ Ibid.

²⁴ The prosecution can be directed to open an investigation by the minister of justice, and a Belgian court has held that judicial authorities may review a prosecutor's refusal to open an investigation under certain circumstances. See this report, Country Case Study: Belgium.

political claims.²⁵ The proposed French law implementing the ICC Statute would remove the right of *parties civiles* to file complaints concerning international crimes directly with a *juge d'instruction*, leaving the decision to initiate a prosecution entirely with prosecutorial authorities.²⁶

Somewhat unusually for a common law country, UK law permits private individuals to request an arrest warrant directly from a magistrate (district judge) in instances where the police fail to investigate an allegation that a crime has been committed.²⁷ On September 10, 2005, based on evidence presented by a UK law firm acting on behalf of a Palestinian human rights NGO, Senior District Judge Timothy Workman issued the first ever warrant under the UK's Geneva Conventions Act 1957 against retired Israeli General Doron Almog. The warrant sought Almog's arrest for his alleged participation in grave breaches of the Geneva Conventions in Israeli-occupied Gaza, where he had been a commander. Almog arrived at Heathrow Airport the following day, but did not disembark from his flight after he was informed of the existence of the warrant. He returned to Israel before the Metropolitan Police could execute the warrant. Both the UK Prime Minister and Foreign Secretary apologized to their Israeli counterparts concerning the incident, and consideration is now being given to amending the Prosecution of Offences Act 1985 to preclude private parties from applying for arrest warrants in relation to international crimes.²⁸

Private party-initiated complaints are indispensable in bringing suspected perpetrators to the attention of judicial authorities where police and prosecutorial authorities may lack the political will to pursue certain cases because of concern about coming into conflict with the foreign policy positions of the executive. The complicated reality of cases involving universal jurisdiction is that legitimate complaints may sometimes implicate nationals of countries with which the state whose universal jurisdiction laws are invoked has close relations. But the rule of law requires the consistent and principled application of the relevant legal rules, never more so than in respect of laws concerning the gravest crimes known to international law. States should not engage in law reform to prevent the instigation of prosecutions simply because such cases might be politically

²⁵ Daniel Vandermeersch, "Prosecuting International Crimes in Belgium," *Journal of International Criminal Justice*, vol. 3 (2005), pp. 402, 410.

²⁶ See *Avant-projet de loi portant adaptation de la législation française au Statut de la Cour pénale internationale et modifiant certaines dispositions du code pénale, du code de justice militaire, de la loi du 29 juillet 1881 sur la liberté de la presse et du code de procédure pénale*, June 2003.

²⁷ UK, Prosecution of Offences Act 1985, s 25(2). See this report, Country Case Study: United Kingdom.

²⁸ Israeli politicians met twice with Home Office officials to discuss changes to the law providing private parties with the opportunity to file complaints directly with a magistrate. Changes to the legislation are currently being considered. See Vikram Dodd, "UK Considers Curbing Citizens' Right to Arrest Alleged War Criminals," *The Guardian*, February 3, 2006.

inconvenient. Bona fide concerns about the vexatious or frivolous use of private party-initiated cases may be well-founded, but could be managed through adequate judicial supervision, or the requirement that a certain level of reasonable suspicion be met before an investigation can proceed or an arrest warrant can be issued. Curtailing private party-initiated complaints seriously endangers the fragile, recent progress in the exercise of universal jurisdiction in Europe.

B. Developing Expertise in Prosecuting International Crimes

1. Specialized Units

One obstacle to the successful investigation and prosecution of international crimes is the relative lack of familiarity with investigating and prosecuting such cases among domestic law enforcement agencies whose work principally involves domestic offenses. Prosecutions under universal jurisdiction may seem daunting and resource-intensive for a variety of reasons: they involve not only criminal offenses with which domestic prosecutors have little experience, but also the prospects of extraterritorial investigations, language barriers, the need to understand the historical and political context in which the alleged crimes occurred, and the gathering of evidence to prove elements of crimes that may be of a type never adjudicated in a country's domestic courts.

Some of the countries examined in this report have responded to these challenges by creating units within police and prosecutorial authorities that specialize in the investigation and prosecution of transnational crimes, including universal jurisdiction cases. According to interviews with law enforcement officials and prosecutors from countries that have created specialized units, such units allow the concentration of experience and information about investigating and prosecuting international crimes.²⁹ This, in turn, enhances the efficiency and proficiency of investigations, and allows the continuous accumulation of expertise concerning universal jurisdiction prosecutions.

Denmark, the Netherlands, Norway, and to a lesser extent the UK, have created specialized units within the police and prosecution services to handle international crimes cases.³⁰ Prosecutors and investigators with experience either in complex crime cases or international criminal law form part of these units, and some training in international criminal law is also being undertaken.³¹ Denmark has set up a unit

²⁹ Human Rights Watch interview with Dutch officials, October 6, 2005; Human Rights Watch telephone interview with Danish official, October 29, 2005.

³⁰ See the respective country case studies for further details on the different units.

³¹ For instance by the Dutch war crimes unit. Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.

composed of both prosecutors and investigators, thereby combining legal expertise and practical investigative expertise. According to Danish officials, the combination of these two forms of expertise improves their ability to quickly decide whether to investigate a complaint. Specialized units in the countries mentioned above include not only investigators and prosecutors, but also translators, military analysts, historians and anthropologists, on an as-needed basis.³² In Belgium, a special police unit was created in 1998 to deal exclusively with international crimes, following an increase in complaints based on universal jurisdiction. While a specialized team of investigative judges has not been formally created in Belgium, in practice universal jurisdiction cases are transferred to a handful of judges who have accumulated considerable experience in the relevant issues.³³

The creation of specialized units in these jurisdictions suggests an institutional commitment to taking potential universal jurisdiction cases seriously. Such units are also mandated as an initiative by the EU Council decision “on the investigation and prosecution of genocide, crimes against humanity and war crimes,”³⁴ which urges EU member states to “consider the need to set up or designate specialist units... with particular responsibility for investigating and... prosecuting the crimes in question.” The efficacy of such units seems borne out in the recent experience of investigation and prosecution: with the exception of two cases where private parties played the leading role (Scilingo in Spain, and Ely Ould Dah in France),³⁵ all convictions in universal jurisdiction cases since 2001 have been in cases handled by specialized units.

The absence of such units in Spain and France³⁶ is particularly striking, because both countries’ courts have been active in trying universal jurisdiction cases brought by private petitioners. As noted above, the private petition mechanism has been integral to the exercise of universal jurisdiction in Europe. Private parties are frequently the primary source of information and evidence in universal jurisdiction cases brought in Spanish courts. At the same time, private petitioners cannot be relied upon as the sole means by which universal jurisdiction laws are invoked: private petitioners do not have

³² Experts included historians (Netherlands, Norway, Belgium), psychologists (Belgium), and anthropologists and military experts (Netherlands).

³³ Human Rights Watch interview with Belgian investigative judge, Brussels, October 24, 2005.

³⁴ Council Decision 2003/335/JHA, art. 4.

³⁵ On April 19, 2005, the Spanish National Court convicted Alfredo Scilingo to 640 years of imprisonment for crimes against humanity. See “‘Dirty war’ officer found guilty,” BBC News, April 19, 2005, [online] <http://news.bbc.co.uk/2/hi/europe/4460871.stm> (retrieved January 2006). On July 1, 2005, a French criminal court in Nîmes convicted Mauritanian officer Ely Ould Dah in absentia to ten years of imprisonment for torture. See “Ely Ould Dah convicted after six years of proceedings,” FIDH, July 2, 2005, [online] http://www.fidh.org/article.php3?id_article=1809 (retrieved January 2006).

³⁶ Human Rights Watch telephone interview with Spanish official, September 14, 2005; Human Rights Watch interview with French lawyer, September 19, 2005.

the investigative resources and expertise of police authorities or the ability to seek official cooperation from third states. Exercising universal jurisdiction *only* where private parties are active and well-organized means that allegations concerning international crimes will not be consistently investigated, and the relevant expertise cannot become assimilated into the “institutional memory” of police and prosecutorial authorities. In short, relying solely of private parties to investigate and pursue universal jurisdiction guarantees that universal jurisdiction will be exercised in an ad hoc and intermittent manner.

French officials involved in the investigation of universal jurisdiction cases noted that “special units” have been created within the Paris judicial district in order to prosecute terrorism, organized crime, crimes against children and public health-related crimes. These units have four investigating judges each, three dedicated administrative assistants, and a number of experts. No such unit has been created in relation to international crimes, even though all cases concerning the Rwanda genocide have been allocated to the Paris district by a decision of the *Cour de Cassation* in 2001.³⁷ Individual investigative judges in the Paris district are left to manage such cases on their own, without either expert assistance or additional administrative support.³⁸ The lack of resources significantly slows the progress of universal jurisdiction cases and makes extraterritorial investigations impossible at the present time.³⁹ When a universal jurisdiction case involving, for example, alleged participation in the Rwandan genocide is one of “one hundred ongoing cases” on a judge’s docket, French officials told us that “[the cases] can’t move ahead.”⁴⁰ Officials involved in these investigations attribute the lack of resources, and the failure to create a dedicated task force for universal jurisdiction cases, to the absence of political will on the part of French authorities to take these cases seriously.

Where neither a specialized unit *nor* a private petition mechanism exist, the prospects for the effective exercise of universal jurisdiction laws are likely to be quite poor. This is presently the case in Germany which, despite exemplary universal jurisdiction legislation, has not devoted adequate resources to investigating and prosecuting international crimes.⁴¹ Currently, Germany has one investigator within the Federal Police Force who

³⁷ Human Rights Watch interview with French officials, Paris, May 10, 2006.

³⁸ Human Rights Watch interview with French officials, Paris, May 10, 2006.

³⁹ The officials also noted that cooperation from the territorial state has been very difficult to obtain.

⁴⁰ Human Rights Watch interview with French officials, Paris, May 10, 2006.

⁴¹ At the time of writing, no cases have been investigated by German authorities under the Code of Crimes against International Law (CCAIL—see this report, Country Case Study: Germany), which came into force on June 30, 2002, despite the latter’s wide scope.

is working on international crimes on a day-to-day basis.⁴² The problem of a lack of resources is both a cause and effect of the federal prosecutor's restrictive approach to investigating international crimes, which has meant that no investigations have been opened since the adoption of the new law in 2002 and thus no demand has been generated for an increase in resources. As detailed below, the prosecutor has adopted an unusually wide definition of immunity when considering a complaint against a former head of state,⁴³ and particularly narrow approaches to the notions of "subsidiarity"⁴⁴ and of whether an investigation was possible.⁴⁵

Consistent with the EU Council's decision, Human Rights Watch urges those countries that have not created a specialized unit to consider doing so, in order to institutionalize their legal commitment to prosecuting international crimes.

2. Investigations

a. Domestic investigations

The challenges posed by investigating an international crime that occurred outside the state where the prosecution occurs are myriad. However, interviews with police officers and lawyers who have successfully prosecuted such cases indicate that those challenges are far from insurmountable. Initial information about a suspect or alleged criminal act can be gleaned from open sources, including human rights NGO reports and intergovernmental organizations.⁴⁶ When victims and diaspora communities are present in the country where officials are conducting the investigation, potential witnesses may also be located without extraterritorial investigations, or located with the assistance of private petitioners.⁴⁷ Indeed, if the suspect is present on the forum state's territory (as a

⁴² Human Rights Watch interview with German officials, Meckenheim, November 22, 2005. This is surprising in light of the experiences of German authorities in the 1990s concerning investigations of international crimes committed in the former Yugoslavia and the resulting convictions. A special unit consisting of several investigators did exist in the 1990s for the investigation of crimes committed in the former Yugoslavia. Furthermore, it is difficult to reconcile with the commitment shown by German authorities to the international criminal tribunals and to the ICC.

⁴³ See below, section III.B.

⁴⁴ Subsidiarity refers to the idea that universal jurisdiction should be exercised only if the state with the closest links to the crime (the state where the crime occurred, or the state of nationality of the alleged perpetrator and or the victims), or an international tribunal, is unable or unwilling to try the case. See discussion of the German federal prosecutor's approach below, section III.E.

⁴⁵ See below, section III.C.

⁴⁶ The Dutch and Danish units confirmed in interviews with Human Rights Watch that a substantial amount of preliminary information is found in reports of NGOs and intergovernmental organizations.

⁴⁷ In the Rwanda cases, Belgian investigators questioned witnesses in Rwandan emigré communities in Brussels. Human Rights Watch interview with Belgian officials, Brussels, October 24, 2005. In the recent case against two Afghan nationals, the Dutch unit enquired about potential witnesses in the Afghan emigré community in Amsterdam and questioned witnesses from Germany and France. Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.

refugee or visa holder), conventional methods of surveillance, interrogation and search and seizure of evidence can be employed.⁴⁸ Members of the diplomatic corps who have been posted in the country where the crimes allegedly occurred have also been interviewed as a source of background and historical information.⁴⁹

b. Extraterritorial investigations

The practice of specialized units that have taken universal jurisdiction cases to trial shows that extraterritorial investigations are feasible, and have been undertaken in order to obtain evidence necessary to secure a conviction. The factors that affect a unit's ability to investigate in a foreign state include the number of complaints concerning that state⁵⁰ and, most significantly, whether cooperation can be expected from the foreign state and whether the security of the investigators and potential witnesses can be assured.⁵¹ In a majority of cases resulting in the prosecution and conviction of an international crime, members of specialized units have undertaken investigations in the state where the crime occurred. For example, all six convictions in the two trials of participants in the Rwandan genocide were built on investigations carried out in Rwanda by the special Belgian police unit that deals exclusively with international crimes. The Belgian unit's investigators also undertook missions to Chad, Ghana and Togo to investigate universal jurisdiction cases. In the case of Faryadi Zardad, an Afghan militia leader ultimately convicted of acts of torture and hostage-taking that had taken place in Afghanistan in the 1990s, British investigators traveled to Afghanistan on nine occasions to locate and interview witnesses. Prosecutors also accompanied the British investigators on some missions, in order to ensure that the information needed by the prosecution was collected and to assess the challenges that may be faced by witnesses and victims in Afghanistan if they testified in the case.⁵² According to Dutch investigators, the majority of evidence used in the two successful universal jurisdiction prosecutions in the Netherlands was collected abroad.⁵³

⁴⁸ The Dutch special unit in the case against two Afghan nationals tapped the phones of the suspects. Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.

⁴⁹ Daniel Vandermeersch, "Prosecuting International Crimes in Belgium," p. 412.

⁵⁰ For example, Danish and Belgian units try to combine the investigation of several complaints from one country when undertaking investigative missions.

⁵¹ The issue of cooperation with the territorial state is often taken into account at the outset of the investigation, and for Dutch officials this forms part of the decision whether to investigate a complaint in the first place. Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005. See also below, section III.C and III.D.

⁵² Human Rights Watch interview with British official, November 30, 2005.

⁵³ Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.

Extraterritorial investigations are undoubtedly resource-intensive,⁵⁴ and pose particular challenges in terms of security, logistics and cooperation. The exercise of investigative and judicial authority on the territory of a foreign state is commonly achieved through a mutual legal assistance treaty, and letters rogatory. In order to be effective, these mechanisms require extensive cooperation both *within* the government agencies of the forum state, and *between* the forum state and the territorial state. Securing this cooperation can be time consuming and legally complex, as each party to a mutual legal assistance treaty has its own domestic procedures for requesting and affording the cooperation promised under the treaty. For example, a police authority's request to undertake investigations in a foreign state may first have to be referred to the Foreign Ministry and Ministry of Justice of the forum state,⁵⁵ which will determine whether the mutual assistance arrangements with the territorial state should be invoked. According to investigators who have used mutual assistance arrangements, each ministry that vets the request applies its own (legal and political) criteria for determining whether the request should be transmitted to the territorial state.⁵⁶ Once a decision to transmit the request is made, investigators must then await a reply from the territorial state. In one instance, the Dutch war crimes unit had to wait a year to receive a reply to their letter rogatory from a country they asked for assistance.⁵⁷ Because a letter rogatory sent by Belgian authorities to their counterparts in Guatemala was not sufficiently precise with regard to questions to be asked to witnesses, the Belgian authorities had to wait one-and-a-half years and send several letters rogatory before they could start investigating in Guatemala.⁵⁸

Mutual legal assistance arrangements are complex and can result in lengthy delays in the investigative process. Nevertheless, investigators interviewed by Human Rights Watch indicated that, once the formalities had been completed, local authorities in the territorial state did afford the necessary cooperation to enable the investigation to proceed in most cases. Investigators have sometimes reduced the delays involved in an extraterritorial investigation by making extensive use of the consular or embassy staff of their home country in the country where the crime was committed. For example, Dutch

⁵⁴ The costs involved in the recent Zardad trial amounted to over £3 million (U.S.\$ 5.2 million). See "Huge Challenge' of Afghan Torture Case," BBC News, July 18, 2005, [online] <http://news.bbc.co.uk/1/hi/uk/4693787.stm> (retrieved February 2006).

⁵⁵ German and Dutch Ministries of Justice have special contact points in charge of mutual legal assistance in criminal matters, dealing with requests from other countries while also forwarding requests on behalf of their own authorities. Belgian authorities relied on a judicial liaison officer placed in the Ministry of Justice of Venezuela to establish cooperation with authorities in Guatemala and Costa Rica. French investigative officials noted that the absence of a "liaison magistrate" in Rwanda made it very difficult for them to obtain cooperation from the territorial state.

⁵⁶ For instance the Dutch Ministry of Justice contact point for mutual legal assistance must take into account legal as well as safety issues arising in an investigation abroad.

⁵⁷ Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.

⁵⁸ Human Rights Watch interview with Belgian officials, Brussels, October 24, 2005.

investigators used the offices of embassy staff in several countries to contact local officials and potential witnesses, and explore possible investigative leads.⁵⁹ During the investigation in the Zardad case, British investigators obtained cooperation with Afghan authorities through the British embassy in Kabul, and the assistance of embassy staff was engaged to find and approach witnesses.⁶⁰ The British embassy also liaised with the United States military and secured their assistance when investigators needed to travel to parts of Afghanistan that were under U.S. military control.⁶¹

In order to locate witnesses during extraterritorial investigations, Belgian, British, Dutch and Danish investigators interviewed by Human Rights Watch stated that they generally began by getting leads from members of diaspora communities in the forum state. In other instances, the complainants themselves proved to be the first point of reference for finding witnesses. British investigators aired television and radio spots in Afghanistan, explaining their inquiry and encouraging witnesses to come forward,⁶² while Belgian authorities cooperated closely with local authorities in locating witnesses in Rwanda.⁶³

Investigators from several countries noted that documentary and physical evidence concerning the crime was difficult or even impossible to secure,⁶⁴ making witness evidence the principal basis upon which a case was built. The credibility of witnesses thus became a paramount concern for some investigators, and several practitioners with experience in extraterritorial investigations noted that translation problems hampered their ability to assess the reliability of a potential witness's statement. Belgian investigators who traveled to Rwanda relied on local authorities to question witnesses in the local language, Kinyarwanda, and commented that it was often difficult to determine

⁵⁹ Human Rights Watch interview with officials of the Dutch war crimes unit, Driebergen, October 6, 2005. Belgian investigators working in Rwanda and Danish investigators in the Democratic Republic of Congo each used their embassy in those countries in a similar way. Human Rights Watch interview with Belgian officials, Brussels, October 24, 2005, and Human Rights Watch telephone interview with Danish officials, October 31, 2005.

⁶⁰ Human Rights Watch telephone interview with British official, September 7, 2005, and Human Rights Watch interview with British official, Crown Prosecution Service, November 30, 2005.

⁶¹ Human Rights Watch telephone interview with British official, Crown Prosecution Service, November 30, 2005.

⁶² Human Rights Watch telephone interview with British official, October 16, 2005.

⁶³ Observation by Human Rights Watch representative attending the Rwanda "Two Brothers" trial (see Country Case Study: Belgium), Brussels, 2005.

⁶⁴ Human Rights Watch interview with Danish official, August 8, 2005; Human Rights Watch telephone interview with British official, October 16, 2005; Human Rights Watch interviews with Dutch officials, October 6, 2005, and January 29, 2006. British investigators in the case of Afghan defendant Zardad could not obtain health records in Afghanistan as the victims of torture either did not seek medical treatment or hospitals had been destroyed during the war. Police records were also unusable as the suspect himself had controlled the police in the region at the time of committing the crimes. Human Rights Watch telephone interview with British official, October 16, 2005.

whether a question was being accurately put to the witness.⁶⁵ When on one occasion British investigators hired a translator in Afghanistan, they discovered upon returning to the UK that the translations were inaccurate, forcing them to make another trip to Afghanistan with a professional translator in order to re-take the statements.⁶⁶

c. Extraterritorial investigations and the accused's right to a fair trial

Extraterritorial investigations pose a particular set of challenges for an accused person's ability to mount an effective defense. Minimum fair trial guarantees that must be respected in any trial in EU member states include "equality of arms,"⁶⁷ and the right to confront and examine witnesses.⁶⁸ "Equality of arms" refers to the principle that every party to a case must be afforded a reasonable opportunity to present his or her case under conditions that do not place the party at a substantial disadvantage vis-à-vis the opponent.⁶⁹ This includes not only equality in presenting arguments, but also equality in being able to present evidence. The defendant's right to confront and examine witnesses against him or her is a fundamental fair trial guarantee applicable to both common law and civil law systems. It is essential to test the credibility of witnesses and their evidence. The right requires that an accused should be given "adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at some later stage in the proceedings."⁷⁰ Ensuring these fair trial guarantees in the context of a universal jurisdiction case, where most witnesses and evidence for and against the defendant may be outside the country, may require additional efforts on the part of judicial authorities.

In adversarial systems, such as the UK, the defendant is largely responsible for the collection of exculpatory evidence (although prosecutors are usually obliged to disclose such evidence if they come across it). Hence, the practical ability of a defense lawyer to travel to the forum state and investigate on behalf of the accused is crucial. In *Zardad*, the defendant was assisted by legal aid, and legal aid did extend to enabling his defense lawyer on three occasions to accompany the prosecution to Afghanistan to supervise identification parades and conduct investigations.⁷¹ In civil law systems, at the pre-trial

⁶⁵ Human Rights Watch interview with Belgian officials, Brussels, October 24, 2005.

⁶⁶ Human Rights Watch telephone interview with British official, September 7, 2005.

⁶⁷ European Convention on Human Rights (ECHR), (ETS 5), 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos. 3, 5, and 8 which entered into force on September 21, 1970, December 20, 1971, and January 1, 1990, respectively, art. 6(3)(b), and International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 14(3)(e).

⁶⁸ *Ibid.*

⁶⁹ *Kaufman v. Belgium* (1986) 50 DR 98, 115; *Foucher v. France* (1998) 25 EHRR 234, p. 34.

⁷⁰ *Delta v. France*, (1990) 16 EHRR 574, para. 36.

⁷¹ Human Rights Watch interview with British official, Crown Prosecution Service, November 30, 2005.

stage an investigative judge usually assumes principal responsibility for gathering both inculpatory and exculpatory evidence.⁷² Thus the costs of enabling defense lawyers to be present during extraterritorial investigations were not borne by judicial authorities or legal aid in most of the cases examined by Human Rights Watch.⁷³ According to practitioners interviewed by Human Rights Watch, defense lawyers can instead review the statements taken by the investigative judge and apply to the court for further investigative acts to be undertaken by the judge on behalf of the defendant. Where a defense lawyer has questions that he or she wishes to pose to a witness, he or she may be able to request the investigative judge to return to the forum state to ask the questions or interview other witnesses nominated by the defense.⁷⁴ The pre-trial stage is a critical one in some civil law systems, because the dossier of evidence prepared by the investigative judge is the principal basis for the trial court's evaluation of the facts; in some national systems, not all witnesses examined by an investigative judge at the pre-trial stage need be examined at the trial stage.

The civil law system's investigative judge does play a critical role in preserving the rights of the accused. However, the inability of defense lawyers to attend at the examination of witnesses located outside the country or conduct extraterritorial investigations raises a risk of violating the fair trial guarantee that an accused be able to confront and examine witnesses against him and compel the attendance of witnesses in his favor, on the same terms as those against him.⁷⁵ Where a witness is examined by an investigative judge in the absence of defense counsel, and that witness is not examined at trial but his or her evidence is relied upon, the accused will have been deprived of his or her right to confront the witness. Allowing defense lawyers to pose written questions given in advance to an investigative judge who travels to the forum state may not be an adequate substitute, particularly as the defense lawyer cannot observe the demeanor of the witness—an essential aspect of testing credibility. Moreover, if defense lawyers do not have the resources to conduct investigations in the territorial state at all, their practical ability to test evidence will be limited.

⁷² Human Rights Watch interview with Dutch official, February 7, 2006; and Human Rights Watch interview with Belgian official, October 24, 2005. In Germany, it is the prosecution rather than an investigative judge that must investigate inculpatory and exculpatory evidence. See Germany, Code of Criminal Procedure, para. 160(II).

⁷³ Exceptions were the Hesham and Jalalzoy cases tried in the Netherlands. There, defense lawyers applied to the court for funds to travel to Afghanistan, enabling the defense to send one private investigator on one trip to Afghanistan. These funds did not extend to cover travel within Afghanistan or the costs of interpretation, and a second trip to accompany the prosecution and investigative judge was not funded: Human Rights Watch telephone interview with Dutch defence lawyer, October 25, 2005.

⁷⁴ See for example Belgium, Code of Criminal Procedure, art. 61 ter.

⁷⁵ ICCPR, art. 14(3)(f); ECHR, art. 6(3)(d).

Even where the defense is able to conduct private investigations or accompany other judicial authorities during extraterritorial investigations, obtaining evidence for the defense may be particularly difficult. Indeed, there were no witnesses for the defense in the Zardad case, and only a very limited number in other universal jurisdiction cases in the Netherlands or the first Rwanda trial in Belgium.⁷⁶ Defense witnesses may fear to come forward on behalf of the defendant, especially if the latter belongs to a group that has fallen from power or now opposes the current government in the territorial state. In the second Rwanda trial in Belgium in May-June 2005, the lawyer for one defendant expressed this dilemma by arguing that it might be difficult for a witness from Rwanda to support the accused because the witness would have to speak a “truth that is different from the truth of the current government in power.”⁷⁷ Witness protection or other protective measures that may be made available to inculpatory witnesses (such as the option of testifying by video-link at the forum state’s embassy or diplomatic compound) should thus also be made available on equal terms to exculpatory witnesses.

Prosecutions for crimes against humanity, genocide and war crimes thus pose a special challenge to basic fair trial guarantees. Given the risks outlined above to an accused’s fair trial rights, judicial authorities need to take all appropriate measures—within the context of the national legal system—to facilitate defense counsel’s ability to effectively prepare a defense.

3. Witness Testimony and Witness Protection

Faced with key witnesses residing outside the country in which the trial will occur, investigators and judicial authorities have adopted a variety of measures to take their testimonies. In the case of a Ugandan national prosecuted in Denmark under universal jurisdiction laws, a prosecutor, defense lawyer and judge traveled to Uganda to take videotaped witness testimony, which was then shown to a Danish court.⁷⁸ In the two Belgian trials concerning the Rwandan genocide, most witnesses were physically transported to Belgium to give evidence in person, and a minority—usually witnesses for the defense—testified via video-link.⁷⁹ British prosecuting authorities used the British embassy in Kabul as the venue for forty witnesses in the Zardad case to give evidence via video-link to a London court. When the first Zardad trial resulted in a hung jury,

⁷⁶ Human Rights Watch telephone interview with Dutch lawyer, October 21, 2005; Human Rights Watch interview with Belgian officials, October 24, 2005.

⁷⁷ Unofficial translation by Human Rights Watch representative attending the second Rwanda trial in Brussels, May 9–June 28, 2005.

⁷⁸ Human Rights Watch telephone interview with Danish official, August 11, 2005.

⁷⁹ Human Rights Watch interview with Belgian officials, Brussels, October 24, 2005. Seventy-six witnesses from Rwanda testified in person during the second Rwanda trial.

prosecutors decided that a small number of key witnesses would be flown to the United Kingdom to give evidence in person.⁸⁰

A commonly cited concern among governmental authorities is that witnesses brought to testify from the territorial state may seek asylum in the forum state. In principle, it is difficult to see why this should be an obstacle to obtaining the witness's testimony: if the witness has a well-founded fear of persecution arising out of their participation in the prosecution, and the witness's evidence is significant for the case, prosecutorial authorities must give due consideration to whether they should facilitate the witness's relocation, by enabling her or him to claim asylum, or through other arrangements. Where the concern is that unfounded or vexatious asylum claims are likely, experience suggests that video-link testimony can be an effective substitute for transporting the witness to the forum state.

In light of the fraught political contexts in which international crimes are often committed—civil wars, coup d'états, ethnic conflicts—witnesses can be expected to face real threats to their and their families' well-being by becoming involved in a prosecution. Investigators interviewed by Human Rights Watch noted 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.⁸¹ In an effort to reduce visibility, 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.⁸² 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.⁸³

Ultimately, however, the prosecutorial and judicial authorities pursuing the case do not have law enforcement powers in the territorial state, and thus their direct capacity to protect witnesses is limited and often wholly dependent on the law enforcement authorities of the territorial state. Prosecutors from various countries interviewed by

⁸⁰ Human Rights Watch telephone interview with British official, Crown Prosecution Service, November 30, 2005.

⁸¹ Human Rights Watch interview with Belgian lawyer, August 25, 2005.

⁸² Human Rights Watch telephone interview with British official, November 16, 2005; Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.

⁸³ Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.

Human Rights Watch generally noted the limits they faced in the ability to directly protect witnesses after the case was over, but none had received reports of subsequent threats to witnesses. Nevertheless, it seems crucial that judicial authorities have the practical capacity to monitor the welfare of at-risk witnesses and respond to threats, particularly if there are reasons to believe that local witness protection capacity is limited or non-existent. Maintaining links established during the investigation with local contacts and NGOs in the territorial state allows for a continuing flow of information about potential threats. This vigilance must be applied equally to both prosecution and defense witnesses. Governmental authorities of the forum state must ensure the capacity to relocate gravely threatened witnesses, either to the forum state or to a safe third state, with the latter's agreement.

4. International Cooperation and Information Exchange

With sufficient international coordination and cooperation, universal jurisdiction prosecutions can be an essential part of a safety net against impunity, denying safe havens to perpetrators of international crimes. While several treaty provisions⁸⁴ oblige states parties to cooperate in the investigation of international crimes—such as article 88 of the First Additional Protocol⁸⁵ to the Geneva Conventions and article 9 of the Convention against Torture⁸⁶—practical mechanisms for information and exchange have been largely absent.

The EU Council's decision to create a "Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes" ("the Network")⁸⁷ in 2002 marked a first step in increasing cooperation in the investigation and prosecution of international crimes. The Network was intended to increase effective cooperation and the exchange of information between national practitioners prosecuting international crimes. Another Council decision, from 2003, provides for regular

⁸⁴ In addition to treaty obligations, various UN General Assembly (GA) resolutions have called upon all states to cooperate with each other in the "detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity," including UN GA Resolution 3074 (XXVIII) of December 3, 1973, providing a list of principles on international cooperation, which is available online at http://www.unhchr.ch/html/menu3/b/p_extrad.htm (retrieved January 2006).

⁸⁵ Article 88 of the First Additional Protocol reads: "1. The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol." See 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 December 7, 1978.

⁸⁶ Article 9 of the Convention against Torture reads: "1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings."

⁸⁷ Council Decision 2002/494/JHA of June 13, 2002, Official Journal L 167, 26/06/2002 P.0001-0002, [online] http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_167/l_16720020626en00010002.pdf (retrieved January 2006).

meetings of the Network to exchange information about experiences, practices and methods.⁸⁸ Although the first meeting of the Network was not held until November 2004, the Network has met three times to date, and according to investigators and prosecutors interviewed by Human Rights Watch it has become an important tool for the cooperation of investigators and judicial officials alike, with the potential to render the investigation and prosecution of international crimes more effective.⁸⁹ The meetings have enabled investigators to make important bilateral contacts and to exchange information regarding national legislation and its practical enforcement. British and Danish investigators relied on information from contact points before conducting extraterritorial investigations, and Norwegian officials met with investigators from the Dutch, Danish and British unit when setting up the Norwegian specialized unit.⁹⁰

Officials from countries examined in this report noted that the Network was a useful forum to discuss sensitive issues in a confidential setting, and could advance police and judicial cooperation among specialized units created by some EU member states. The fact that mutual legal assistance among the twenty-five member states is constantly being streamlined makes the EU a natural forum for this kind of cooperation. The Network could also concentrate information and experience on lessons learned with regard to cooperation requests, witness protection and obtaining evidence. In interviews with Human Rights Watch, practitioners have emphasized that the Network should focus on the lessons learned by different national authorities. Human Rights Watch urges EU member states to organize meetings of the Network regularly and under each Presidency.⁹¹ In the long term, the EU member states need to ensure that the Network has the necessary resources, including a coordinator to organize meetings, and who could serve as a focal point for countries involved in the investigation or prosecution of international crimes.

An increase in universal jurisdiction prosecutions prompted Interpol in 2004 to organize Expert Meetings on international crimes, bringing together delegates from over ninety countries to improve coordination and information sharing. The meetings, two of

⁸⁸ Council Decision 2003/335/JHA of May 8, 2003, art. 5, Official Journal L 118, 14/052003 P.0012-0014, [online] http://europa.eu.int/eurlex/pri/en/oj/dat/2003/l_118/l_11820030514en00120014.pdf (retrieved January 2006).

⁸⁹ Human Rights Watch telephone interview with Danish official, October 31, 2005; Human Rights Watch telephone interview with British official, September 7, 2005; Human Rights Watch telephone interview with Norwegian official, September 14, 2005.

⁹⁰ Ibid.

⁹¹ This was proposed by the Network's conclusions of its meetings to date. Regular meetings are also referred to in art. 5 of Council Decision 2003/335/JHA of May 8, 2003, Official Journal L 118, 14/052003 P.0012-0014, available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_118/l_11820030514en00120014.pdf (retrieved January 2006).

which have taken place to date, are supplemented by a Working Group that addresses, in a smaller setting, the objective discussed at the Expert meetings.⁹² The Interpol initiative, which has the potential to reach Interpol's 184 member states, is an important cooperation mechanism that fulfills functions similar to the Network, but with an emphasis on investigative aspects. Interpol is in the process of setting up a database containing information on past and ongoing investigations of international crimes in different countries, thereby enabling practitioners to know which countries have experience in the investigation of a particular crime committed in a particular country. An effective database will avoid duplicating investigative efforts and further streamline the investigation process. If countries make information available to the database, it could significantly assist the investigation of international crimes. Human Rights Watch encourages Interpol member countries to contribute relevant expertise and information to the database on a continuous basis.

⁹² See Interpol resolution on the support for the investigation and prosecution of genocide, war crimes and crimes against humanity, [online] <http://www.interpol.int/Public/ICPO/GeneralAssembly/AGN73/resolutions/AGN73RES17.asp> (retrieved January 2006).

III. Continuing Obstacles to Universal Jurisdiction

Despite the numerous positive developments in national practice detailed so far, significant limitations remain which hinder the exercise of universal jurisdiction in the countries examined. These limitations are not necessarily inherent in universal jurisdiction cases, and could be overcome with sufficient political will. They include the continuing absence of implementing legislation in some states, restrictive threshold requirements for opening investigations, overly broad conferrals of immunity, and a lack of transparency in the exercise of universal jurisdiction.

A. Absence of Implementing Legislation

Several countries considered in this report have not introduced definitions of international crimes into domestic law. Norway and Denmark have taken the step of creating specialized units to investigate universal jurisdiction cases, but the work of these units has been hampered by the absence of laws which incorporate international crimes into Norwegian and Danish law.⁹³ Prosecutors have no choice but to frame international crimes, such as war crimes, in terms of domestic equivalents such as murder or assault. In one case tried in Denmark, a Ugandan national accused of what were, in effect, war crimes, was successfully prosecuted for armed robbery and abduction. Using domestic criminal law offenses in this way is thus possible, but fails to fully capture the nature of the offense: torture is a form of assault, but its gravity is not adequately conceptualized as simply assault. More significantly, utilizing domestic law criminal charges means that the crimes will be subject to statutes of limitation under national law. Danish investigators have been unable to pursue several cases of international crimes because they are subject to the ten-year limitations period for criminal offenses in Denmark.⁹⁴ Under international law, however, international crimes such as crimes against humanity and war crimes are not subject to statutes of limitations.⁹⁵

Human Rights Watch urges states to take the necessary measures to incorporate international crimes into their criminal laws, and to ensure that international crimes are not subject to statutes of limitations.

⁹³ Both Norway and Denmark have ratified the four Geneva Conventions, the Genocide Convention, the Convention against Torture and the Rome Statute of the ICC.

⁹⁴ Danish Penal Code, sections 93-97.

⁹⁵ See Convention against the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, GA resolution 2391 (XXIII), November 1968, entered into force November 1970, [online] http://www.unhcr.ch/html/menu3/b/p_limit.htm. See also Rome Statute of the ICC, art. 29.

B. Amnesties and Immunities

International practice strongly suggests that genocide, crimes against humanity, torture and war crimes cannot be amnestied.⁹⁶ States prosecuting these offenses under universal jurisdiction laws are not bound by domestic amnesties issued in the territorial state, as acts of a foreign legislature do not bind another sovereign state. The practice of national courts in Europe concerning amnesties in the territorial state is uneven, and information on prosecutorial authorities' attitude to the issue is scant. Spanish courts have indicated that not only will a domestic amnesty in the territorial state not bind them, but also that such laws provide a reason for Spanish courts to exercise jurisdiction because amnesties mean that courts in the territorial state cannot prosecute the crimes.⁹⁷ Spanish law prevents a prosecution only where the individual has been acquitted, pardoned or punished abroad;⁹⁸ an amnesty does not amount to a pardon, because the latter implies that the individual was prosecuted and convicted before having the punishment annulled. Similarly, the French Supreme Court held that a foreign amnesty law has effect only in the territory of the state concerned, and that recognizing the applicability of a foreign amnesty law in France would be tantamount to a violation by the French national authorities of their international obligations, and to a negation of the principle and purpose of universal jurisdiction.⁹⁹

Danish prosecutors indicated to Human Rights Watch that they do take into account relevant amnesty provisions in the territorial state when deciding whether to prosecute an individual for a universal jurisdiction crime. Three cases involving international crimes were not investigated due to amnesties that had been enacted in the country where the crime was committed.¹⁰⁰ Thus far the Danish Special International Crimes Office (SICO) has never disqualified an amnesty, as the amnesties in question have been general, referring not only to regime officials, but to both parties of a conflict.¹⁰¹ The rationale advanced for treating these amnesties as a bar to prosecution was that

⁹⁶ Naomi Roht Arriaza and Lauren Gibson, "The Developing Jurisprudence on Amnesty," *Human Rights Quarterly*, vol. 20 (1998), p. 843; United Nations Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, 23 August 2004, S/2004/616, paras. 10, 64(c); *Prosecutor v. Furundzija*, ICTY, 10 December 1998, para. 155.

⁹⁷ Spain, Audiencia Nacional, Third Chamber, Sentencia Num. 16/2005, 19 April 2005, Part III, section 6, available online at <http://www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html#I.%20ANTECEDENTES> (retrieved May 2006).

⁹⁸ Spain, Organic Law of the Judicial Power, art. 23.2c.

⁹⁹ Cour de Cassation, decision N° de pourvoi : 02-85379, October 23, 2002, in the case against Mauritanian national Ely Ould Dah, available online at <http://www.legifrance.gouv.fr/> (retrieved May 2006).

¹⁰⁰ Human Rights Watch telephone interview with Danish official, October 31, 2005. All of these cases concerned the Lebanon Amnesty Law of 1991, which grants a general amnesty for crimes committed before March 28, 1991, during the Lebanese civil war.

¹⁰¹ Human Rights Watch telephone interview with Danish official, October 31, 2005.

Denmark, as a matter of comity, should respect the sovereignty of another state's official acts.

Article 6(5) of the Second Additional Protocol to the Geneva Conventions¹⁰² urges authorities to grant the “broadest possible amnesty to persons who have participated” in an internal armed conflict or those deprived of their liberty due to the conflict. This article envisages amnesties for individuals who may have been susceptible to prosecution because they took up arms during a non-international armed conflict. As clarified by the International Committee of the Red Cross—and consistent with international practice—it should not be read as permitting or mandating amnesties for war crimes, torture, crimes against humanity or genocide.¹⁰³ Principles of comity may require that a state respect the sovereign acts of another state in many circumstances. However, where the state has ratified treaties which oblige it to extradite or prosecute alleged perpetrators of international crimes if the territorial state is unwilling or unable to do so (such as the Convention against Torture and the ICC Statute), it is difficult to see how comity would require a state to defy its treaty obligations.¹⁰⁴

Human Rights Watch urges states exercising universal jurisdiction over war crimes, crimes against humanity, torture or genocide, not to apply domestic amnesties passed in the territorial state which purport to annul criminal liability for these crimes. International practice now firmly rejects general amnesties for the gravest international crimes, and states should not regard such amnesties as a reason not to pursue a prosecution.

Official position is not a defense and cannot be a basis to negate the criminal responsibility of a person who would otherwise be guilty of an international crime, even if the crime was committed in the course of his or her official duties.¹⁰⁵ However, the International Court of Justice (ICJ) has held in the “Arrest Warrant” case that certain officials of foreign governments, such as accredited diplomats, current heads of state (or heads of government such as prime ministers) and current foreign ministers, are entitled to a temporary procedural immunity from the criminal jurisdiction of foreign states,

¹⁰² 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 June 8, 1977, entered into force 7 December 1978.

¹⁰³ Letter to Margaret Popkin from Toni Pfanner, Head of Legal Division, ICRC Headquarters, Geneva, April 15, 1997, cited in Margaret Popkin and Nehal Bhuta, “Latin American Amnesties in Comparative Perspective: Can the Past be Buried?”, *Ethics and International Affairs*, vol. 13 (1999), p. 103.

¹⁰⁴ See the reasoning of Lords Steyn and Nichols in *R v. Bow Street Magistrates Court; ex parte Pinochet (No. 1)*, (November 25, 1998), 4 All ER 897 at 938 (Lord Nicholls) and 946-7 (Lord Steyn).

¹⁰⁵ *Case Concerning the Arrest Warrant Case of 11 April 2000*, ICJ Reps, February 14, 2002, paras. 60-61.

which lasts for as long as the person holds the post.¹⁰⁶ Once an individual ceases to hold the position of head of state/government or foreign minister, he or she loses immunity from the criminal jurisdiction of foreign states.

Human Rights Watch's research indicates national authorities in the countries examined in this report have relied on the decision in the "Arrest Warrant" case to decline to investigate allegations of international crimes against a visiting official, and that in some cases that reliance went beyond what *Arrest Warrant* supports. British authorities in 2005 declined to investigate visiting Chinese Trade Minister Bo Xilai for his alleged involvement in torture and genocide of members of the Falungong spiritual group, on the grounds that he had immunity as a visiting minister and member of an official delegation.¹⁰⁷ In 2005, German authorities argued that *former* Chinese President Jiang Zemin was entitled to immunity from German criminal jurisdiction.¹⁰⁸ However, as noted above, the immunity from national criminal jurisdiction afforded by international law to certain kinds of state officials does not apply to former officials,¹⁰⁹ and thus the German prosecutorial authorities' decision appears to be a significant widening of immunity which finds no support in the "Arrest Warrant" case. The ICJ decision is clear in its implication that the jurisdictional immunity of heads of state/government and foreign ministers derives from the nature of the functions their duties entail. The immunity should not be extended to persons who no longer have such duties, or whose duties as a sitting minister are not closely analogous to those of a head of state/government or foreign minister.

In 2003, a French court rejected an application for an arrest warrant against Robert Mugabe for torture because he enjoyed immunity from prosecution as the current head of state of Zimbabwe.¹¹⁰ Interviews with French officials revealed that French judicial authorities refer cases with potential immunity issues to a special unit of the Foreign Affairs Ministry, which decides on the matters.¹¹¹ This raises the concern that political, rather than legal, standards may be applied when determining whether a suspect is entitled to immunity from French jurisdiction.

¹⁰⁶ Ibid, paras. 53-55.

¹⁰⁷ See this report, Country Case Study: United Kingdom.

¹⁰⁸ A copy of the decision of the federal prosecutor is available (in German) online at <http://www.diefirma.net/download.php?8651010ea2af5be8f76722e7f35c79de&hashID=44b8c6eba6a3530e554210fa10d99b3a> (retrieved May 2006).

¹⁰⁹ Arrest Warrant case, para. 61.

¹¹⁰ See Redress, Universal Jurisdiction Update, April 2003, [online] <http://www.redress.org/publications/UJ%20Update%20-%20Apr03%20-%20final.pdf> (retrieved May 2006).

¹¹¹ Human Rights Watch interview with French officials, Paris, May 10, 2006.

C. Presence Requirement and the Possibility of Investigation

Most countries examined in this report require that a suspect be physically present or likely to be present in the territory of the state before a prosecution is initiated.¹¹² In some countries, presence or anticipated presence is the precondition for an investigation to be opened by police authorities.¹¹³ The principle of universality in international law does not *require* that states pursue investigations and prosecutions where a suspect is not within their territory and not susceptible to their law enforcement authorities; at the same time, neither does international law preclude a state from seeking the extradition of a non-national who is outside its territory, in order to try that person for international crimes.¹¹⁴ This is an issue broadly within the discretion of states and will vary as a matter of law and policy from one state to another. Nevertheless, rigid presence requirements in law or prosecutorial policy will greatly diminish the effectiveness of universal jurisdiction laws as an “important reserve tool in the international community’s struggle against impunity.”¹¹⁵ For example, in October 2005, Danish authorities received a complaint concerning a Chinese official who was scheduled to attend a conference in Copenhagen. The complaint was received in advance of the suspect’s entry into Denmark, but the strict presence requirement in Danish legislation meant that Danish authorities could not legally open an investigation into the complaint before the suspect arrived. In effect, Danish investigators had only five days—the duration of the conference—to investigate the complaint and apply for an arrest warrant. When the Chinese official left Denmark after five days, the investigation had to be discontinued.¹¹⁶

A legal threshold of “likely presence” or “anticipated presence” as the precondition for opening an investigation may be one way of avoiding the difficulties confronted by Danish authorities in the case above. This threshold is incorporated in a new provision of the German Criminal Procedure Code,¹¹⁷ which makes obligatory an investigation into a suspected perpetrator of international crimes where the suspect is present in

¹¹² Presence in the prosecuting state is a requirement triggering the discretion of national authorities in Denmark, France and the Netherlands. In the United Kingdom, an arrest warrant cannot be issued unless a suspect is present or likely to be present in the territory. Norway requires that a suspect be present before he or she can be charged. Spain does not require presence to open an investigation or charge a suspect.

¹¹³ The Netherlands, for example, requires that a suspect be present before an investigation can commence: Netherlands, International Crimes Act, section 2(1). The Danish Special International Crimes Office requires a suspect to be present before an investigation is opened, and if a suspect flees while the investigation is ongoing, then an investigation will be closed. German law does not require the presence of the suspect, but gives a prosecutor discretion to refuse to open an investigation if the suspect’s presence cannot be anticipated (see further, Country Case Studies).

¹¹⁴ In 2003, Spanish courts successfully secured the extradition of Miguel Cavallo, an Argentinian military officer, to face trial in Spanish courts. See this report, Country Case Study: Spain.

¹¹⁵ UN Secretary-General, “Rule of Law and Transitional Justice,” para. 48.

¹¹⁶ Human Rights Watch telephone interview with Danish official, October 31, 2005.

¹¹⁷ Germany, Code of Criminal Procedure, para. 153f.

Germany or the suspect's presence is anticipated.¹¹⁸ German authorities, however, have yet to open an investigation under these laws.¹¹⁹

Where a suspect is not present in Germany, the prosecutor has the discretion to decline to open an investigation, and Human Rights Watch interviews with German lawyers indicated that, when exercising this discretion, the federal prosecutor will take into account the practical ability of German investigators to investigate the complaint in the absence of the suspect. According to officials interviewed by Human Rights Watch, the possibility of questioning witnesses in other European countries is disregarded even where the presence and identity of such witnesses in neighboring countries is specified by the complainants.¹²⁰

This approach was evident in the German federal prosecutor's refusal to open an investigation into former Uzbekistan Interior Minister Zokirjon Almatov, who is alleged to have had command responsibility for systematic torture and the massacre of hundreds of individuals in Andijan in May 2005.¹²¹ A complaint against Almatov was filed with the prosecutor by victims¹²² when he traveled to Hannover for medical treatment, but Almatov had left Germany before the prosecutor made a decision concerning the complaint. In that decision, in which he declined to open an investigation, one of the reasons given by the prosecutor was that the expectation of non-cooperation from Uzbekistan made an investigation practically impossible. By ignoring the possibility of conducting investigations outside the territorial state—such as by interviewing witnesses and victims present in other states and identified by the complainants¹²³—the federal prosecutor has *de facto* made the physical presence of the suspect a strict precondition for opening an investigation into an international crime. This seems to unduly narrow the scope of Germany's universal jurisdiction laws and contradicts the spirit of the legislation, which expressly leaves open the possibility of opening an investigation

¹¹⁸ Germany, Code of Criminal Procedure, para. 153f(2). The obligation to open an investigation is subject to the rules of subsidiarity (see below, section III.E).

¹¹⁹ Since the coming into force of the Code of Crimes against International Law on June 30, 2002, the federal prosecutor has received forty-two complaints. In a number of these, the CCAIL was not applicable as the crimes complained of were committed before June 30, 2002. However, the federal prosecutor relied on paragraph 153f of the Code of Criminal Procedure in fourteen cases to reject a complaint. See this report, Country Case Study: Germany. See also Ursula Ruessmann, "Rumsfeld und Jiang Zemin blieben unbehelligt," *Frankfurter Rundschau*, May 6, 2006, [online] http://www.fr-aktuell.de/in_und_ausland/politik/aktuell/?em_cnt=876283&sid=e7bd7ebf3787d43f4d99651540462d6f

¹²⁰ Human Rights Watch interview with German officials, Meckenheim, December 12, 2006.

¹²¹ See Human Rights Watch, "Bullets were Falling Like Rain: The Andijan Massacre, May 13, 2005," *A Human Rights Watch Report*, vol. 17, No. 5 (D), June 2005, [online] <http://hrw.org/reports/2005/uzbekistan0605/>.

¹²² Human Rights Watch assisted the complainants in filing the complaint.

¹²³ According to information obtained by Human Rights Watch and made available to the federal prosecutor, approximately 400 victims of the Andijan massacre were living in EU Member States at the time the complaint was filed.

despite the absence of the suspect. While recognizing that, depending on the case, investigations in the territorial state may be indispensable,¹²⁴ due notice should be taken of the experience of other European states considered in section II.B, above, which suggests that investigations and prosecutions can be successful without the cooperation of the territorial state where well-organized private petitioners identify witnesses and sources of evidence.¹²⁵

D. Prosecutorial Discretion

In most of the countries examined in this report, prosecutorial discretion is pivotal to whether an investigation into and prosecution of an alleged perpetrator of an international crime will proceed. The discretion is exercised by different authorities in each country, such as by the police and Crown Prosecution Service (CPS) in the United Kingdom,¹²⁶ or solely by the prosecutor as in Belgium, the Netherlands, Norway, Denmark and Germany. Prosecutors thus frequently play the role of “gatekeepers” to the use of universal jurisdiction laws, with the notable exceptions of Spain and France,¹²⁷ where an investigative judge may pursue a case brought by private petitioners in spite of opposition by the public prosecutor.¹²⁸ Each prosecutorial authority takes a different approach to exercising this discretion, and employs different criteria, as might be expected across diverse national legal systems. Nevertheless, prosecutorial discretion can be particularly non-transparent if the criteria are difficult to ascertain. Indeed, the principles governing the exercise of prosecutorial discretion are commonly found only in internal guidelines,¹²⁹ or articulated on a case-by-case basis.¹³⁰ Without a degree of

¹²⁴ Since the strategic overhaul of the Dutch arrangements in 2002, the Dutch Prosecution Service will not start an investigation where an investigation in the territorial state is or will be impossible. Human Rights Watch telephone interview with Dutch official, February 3, 2006.

¹²⁵ In particular, Spain and France.

¹²⁶ In ordinary criminal cases, the UK’s Metropolitan Police decides whether to investigate a complaint without the CPS’s involvement. In cases of international crimes, however, the investigators consult the CPS for legal advice at the outset of the investigation and enquire about issues such as immunity and jurisdiction. Human Rights Watch telephone interviews with official of the UK Metropolitan Police anti-terrorist department, September 7, 2005, and with official of the UK Home Office Immigration and Nationality Directorate, November 28, 2005.

¹²⁷ A French prosecutor’s decision not to investigate a complaint is not reviewable, but the *parties civiles* mechanism mitigates this by allowing victims to lodge a complaint directly with a *juge d’instruction*. However, as noted above, the French legislature is considering removing the rights of *parties civiles* in its legislation implementing the Rome Statute. No judicial review is possible against the decision of the French prosecutor not to investigate a complaint. This lack of judicial review was mitigated by the possibility of private parties being able to file a complaint directly with an investigative judge. If *parties civiles*’ rights are removed, the legislature should consider introducing some mechanism for the judicial review of prosecutorial discretion.

¹²⁸ See this report, Country Case Studies: Spain and France.

¹²⁹ The guidelines applied by the Crown Prosecution Service of the UK are public. See Code for Crown Prosecutors, [online] http://www.cps.gov.uk/victims_witnesses/prosecution.html#01.

¹³⁰ The Dutch Prosecution Service, in addition to a list of criteria provided by the war crimes unit with regard to evidence, will consider additional criteria, depending on the case. Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005, and Human Rights Watch telephone interview with Dutch official,

transparency and publicity concerning how prosecutorial discretion will be exercised, it is difficult for complainants and victims to know with any certainty when a complaint will be investigated, or the reasons behind a decision not to open an investigation. A lack of transparency also makes it easier for non-legal reasons—such as concerns that a prosecution will be embarrassing to the foreign relations of the forum state—to be parsed as legal ones.

Once an investigation is opened, opportunity for the exercise of discretion arises again when deciding whether to pursue a prosecution based on the evidence yielded by the investigation. The main factors governing this decision tend to be whether there is a reasonable prospect of achieving a conviction of the suspect, and whether it is in the public interest to prosecute.¹³¹ The notion of “public interest” is a broad one, and can encompass many factors. Human Rights Watch urges that, in the context of crimes such as genocide, crimes against humanity and war crimes, the gravity of such crimes, their universal condemnation and the international community’s commitment to repressing them should be considered when evaluating the “public interest” in pursuing such a prosecution. Similarly, the forum state’s interest in not becoming a “safe haven” for perpetrators of such crimes could reasonably form part of the overall “public interest” in prosecuting such crimes.

The possibility of judicial or administrative review of the exercise of prosecutorial discretion greatly increases its transparency,¹³² and may be a way of promoting consistency in decisions about whether to prosecute international crimes. UK law permits complainants to seek judicial review of a prosecutorial decision to close a case.¹³³ A Belgian appeals court held in May 2005 that, under Belgian laws, a decision of the prosecutor not to investigate a certain complaint can be subject to judicial review, but at present only the prosecutor is permitted to bring forward reasons for his decisions and complainants do not have a right to address the judge.¹³⁴ A complainant in the Netherlands may also seek judicial review of a prosecutor’s decision not to prosecute.¹³⁵

February 6, 2006. The federal prosecutor of Germany, as outlined above, also applies criteria not contained in paragraph 153f of the Code of Criminal Procedure.

¹³¹ See for instance the British Crown Prosecution Service’s code for prosecutors, available online at <http://www.cps.gov.uk/publications/docs/code2004english.pdf> (retrieved February 2006).

¹³² Antoinette Perrodet, “The Public Prosecutor” in M Delmas-Marty and JR Spencer, *European Criminal Procedure* (Cambridge University Press, 2005), p. 445.

¹³³ *Ibid.*, p. 444. See also C. Hilson, “Decision to Prosecute and Judicial Review,” *Criminal Law Review* (1993), p. 739; M. Burton, “Reviewing Crown Prosecution Service Decisions not to Prosecute,” *Criminal Law Review*, (2001), p. 374.

¹³⁴ Cour d’Arbitrage, Judgment Nr 62, 23 March 2005, available online at <http://www.arbitrage.be/> (retrieved April 2006). Decisions concerning subsidiarity are within the competence of the prosecutor and are not reviewable.

¹³⁵ Netherlands, Code of Criminal Procedure 1994, arts. 12-13.

In Norway, Denmark and Germany, only administrative review is available. The review is generally undertaken by the Director of Prosecutions (Norway, Denmark) or by an officer of the Ministry of Justice (Germany). Administrative review processes do not provide the same measure of transparency and accountability as judicial review and in light of the political sensitivity of universal jurisdiction prosecutions, judicial mechanisms may be more desirable in ensuring that bona fide legal reasons underlie a decision not to prosecute.

E. Subsidiarity

It is widely accepted that universal jurisdiction is a “reserve tool” in the fight against impunity, to be applied where “the justice system of the country that was home to the violations is unable or unwilling to do so.”¹³⁶ This principle, known as “subsidiarity,” implies that courts in the territorial state that are able and willing to prosecute individuals for international crimes should have priority in exercising jurisdiction over the crimes. However, an overly restrictive approach to subsidiarity runs the risk of ignoring or widening an impunity gap that may exist in the state where the crimes occurred. For example, in a 2000 decision, the Spanish National Court held that Spanish courts could not exercise jurisdiction over crimes against humanity allegedly committed in Guatemala because there was a chance that Guatemalan courts would investigate the complaint in the future. Yet the crimes alleged in the complaint were committed in the early 1980s, and no judicial process had been initiated in Guatemala since that time. In 2005, Spain’s Constitutional Court reversed this ruling, holding that Spanish courts could exercise universal jurisdiction if the complainant could submit reasonable evidence of legal inactivity by authorities in the territorial state, attributable to a lack of ability or will to effectively investigate and prosecute the crimes alleged.¹³⁷

In his decision in a complaint brought against U.S. Defense Secretary Donald Rumsfeld, the German federal prosecutor determined that the principle of “subsidiarity”¹³⁸ meant that German courts could not exercise jurisdiction over allegations that Rumsfeld bore command responsibility for torture committed by the U.S. military, because torture

¹³⁶ UN Secretary-General, “Rule of Law and Transitional Justice,” para. 48.

¹³⁷ The decision of the Spanish Constitutional Court in the Guatemala case was discussed in detail in National Court, 4th Section of the Criminal Chamber, Roll of Appeal No 196/05, Preliminary Proceedings on 10 January 2006, concerning a further universal jurisdiction case, the Tibetan Genocide case (proceedings available online, in Spanish at http://www.elpais.es/elpaismedia/ultimahora/media/200601/10/espana/20060110elpepunac_1_Pes_DOC.doc, retrieved April 2006). The National Court allowed the appeal, taking into account, inter alia, that the complainants could adduce some evidence as to the failure of Chinese authorities to investigate the crimes and that the events complained of are outside the jurisdiction of the ICC. See this report, Country Case Study: Spain.

¹³⁸ Enshrined in Germany, Code of Criminal Procedure, para. 153f(2)(4).

allegations against low-ranking soldiers were already under investigation in the United States. In the prosecutor's view, the fact that the investigations did not address the responsibility of Rumsfeld or other commanders was not relevant to the assessment, provided U.S. authorities were investigating the "complex" as a whole:

In what order and with what means the state with [primary] jurisdiction carries out an investigation of individuals in the framework of a whole complex, must be left up to this state according to the principle of subsidiarity. An alternative only obtains if the investigation is being carried out only for the sake of appearances or without a serious intent to prosecute.¹³⁹

This approach leaves a very wide margin of discretion to authorities in the territorial state, and may mean that the *specific* crime alleged against a *specific suspect* by a complainant or victim could remain uninvestigated in the territorial state, but no prosecution could be brought under Germany's universal jurisdiction laws. A better approach would be to assess whether the specific crime and specific suspect about which the victim complains have been effectively investigated and prosecuted in the state where the alleged crime took place.

¹³⁹ Unofficial translation of prosecutor's decision, p. 4, [online] http://www.ccr-ny.org/v2/legal/september_11th/docs/german_appeal_english_tran.pdf (retrieved February 2006).

IV. Conclusion

Universal jurisdiction is an essential piece of the emerging international fabric of justice and accountability for the gravest crimes recognized by the international community. The experiences reviewed in this report show that, while exercising universal jurisdiction can pose challenges to domestic legal systems, these challenges can be overcome—provided there is an institutional and policy commitment to prosecuting international crimes. On paper, many countries have made this commitment, by signing treaties that mandate the exercise of universal jurisdiction. This report suggests that the yawning gap between principle and practice is slowly closing in some countries in Western Europe, in part because of a real concern that these states not become safe havens for alleged perpetrators of international crimes. The EU has played a leading role in encouraging states to institutionalize their commitment to fight impunity for international crimes, by urging the creation of “specialized units” and establishing the EU Network.

Despite the progress made in the exercise of universal jurisdiction in recent years, it remains a fragile mechanism. States continue to be nervous about the political consequences of using universal jurisdiction laws, and the possibility of alienating nations with which they have political and economic ties. There is still a real risk that states will try to roll back the exercise of universal jurisdiction through, for example, introducing new limits on victims’ ability to bring private prosecutions.

The states considered in this report, which have strong investigative capacities and highly developed legal systems, are well-placed to lead the way in the exercise of universal jurisdiction. They have the potential to serve as valuable sources of experience and information concerning the practical exercise of universal jurisdiction, and it is vital that countries cooperate with each other in sharing this knowledge. Most importantly, they must maintain their commitment to ensuring that universal jurisdiction lives up to its promise as an effective tool in the fight against impunity for international crimes.

V. Recommendations

To the EU Council and EU Presidency

- Continue to promote member states' cooperation in criminal matters, and extend the mandate of existing cooperation mechanisms such as Europol to include international crimes.
- Ensure that the EU Network meets regularly and has sufficient resources to function as a forum for law enforcement professionals to exchange information and experiences about ongoing cases. Consider nominating a Network coordinator responsible for strategic planning and the organization of Network meetings.
- Strengthen cooperation between the EU Network and other EU institutions and bodies (for example, EC delegations in third countries, EU police missions, rule of law missions and peace building missions) in order to facilitate extraterritorial investigations into international crimes.

To EU Member States and other National Governments

- Ensure domestic implementation of international crimes, as defined in treaties to which the state is a party, and ensure that statutes of limitations do not apply to international crimes.
- Consider the creation of adequately resourced and staffed "specialized units" within police and prosecutorial authorities, with principal responsibility for investigating and prosecuting universal jurisdiction cases.
- Promote cooperation between immigration authorities and police and prosecutorial authorities in order to ensure that suspected perpetrators of international crimes who are visa or refugee applicants are referred to the appropriate law enforcement authority.
- Commit to appointing contact points in charge of international crimes in accordance with article 1 of the Council Decision establishing the EU Network. Ensure that the meetings of the EU Network are attended by contact points and that information is shared with relevant institutions involved in the investigation and prosecution of international crimes.
- Cooperate with Interpol in the creation of a database on past and current investigations of international crimes in different countries.
- Ensure adequate measures for the protection of witnesses, both foreign and national, in universal jurisdiction cases. Protection should include, where

appropriate, the possibility of relocating (within the country of nationality or another country) seriously at-risk witnesses.

- Do not extend immunities to persons who no longer have official duties entitling them to immunity, or whose duties are not closely analogous to those of a head of state/government or foreign minister.
- Do not remove the right of victims to pursue private prosecutions, where such a right already exists in domestic law. Concerns about vexatious prosecutions can be addressed through less drastic measures, such as strengthening judicial control of the process.
- Enhance transparency in prosecutorial decision-making concerning international crimes through publication of applicable guidelines and judicial review.
- Do not apply amnesties for genocide, war crimes, crimes against humanity or torture.

Country Case Studies

VI. Belgium

Belgium's universal jurisdiction legislation, the "Act concerning Punishment for Grave Breaches of International Humanitarian Law," came into force in 1993 and was amended in 1999 to include universal jurisdiction over crimes against humanity and genocide in addition to war crimes. The Code of Criminal Procedure¹⁴⁰ further granted victims the right to initiate a criminal investigation on the basis of universal jurisdiction. Following a wave of complaints against high-ranking officials of various foreign states,¹⁴¹ political pressure led to an amendment of the act in April 2003, removing the right of victims to initiate a universal jurisdiction prosecution, and introducing immunity provisions "in accordance with international law."¹⁴² Further pressure led to the act being repealed altogether in August 2003.¹⁴³ The act's provisions concerning international crimes were incorporated into the Belgian Criminal Code,¹⁴⁴ and there is no longer a specific law in force in Belgium covering international crimes.

In conjunction with amendments to the Code of Criminal Procedure, Belgian courts currently exercise an extended form of active and passive personality jurisdiction over war crimes, crimes against humanity and genocide.¹⁴⁵ Article 12 bis of the Preliminary Title of the Criminal Procedural Code gives Belgian courts jurisdiction over any offense

¹⁴⁰ Code of Criminal Procedure of 1878, art. 7.

¹⁴¹ Complaints were filed, inter alia, against then Israeli Prime Minister Ariel Sharon and others for their role in the Sabra and Shatila massacre; against former Chinese President Jiang Zemin for international crimes allegedly committed against Falungong practitioners; and against former U.S. President George H.W. Bush, then Secretary of Defense (and current U.S. Vice President) Dick Cheney, Gen. (now retired) Norman Schwarzkopf, and Chairman of the Joint Chiefs of Staff Colin Powell for war crimes allegedly committed in the 1991 Gulf War. U.S. Gen. Tommy Franks was also the subject of a complaint for war crimes allegedly committed under his command during the 2003 Iraq war. All of these complaints were dismissed after the change to the legislation in August 2003.

¹⁴² For these amendments see the unofficial translation available in *International Legal Materials*, 42 (2003), p. 749.

¹⁴³ Loi relative aux violations graves du droit international humanitaire, 5 August 2003, Moniteur Belge (Law Gazette), No. 286, August 7, 2003; unofficial English translation available online in *International Legal Materials*, vol. 42 (2003), p. 1248. For an overview of the changes see Luc Reydam, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law," *Journal of International Criminal Justice*, vol. 1 (2003), p. 679.

¹⁴⁴ Criminal Code of 1867 (Code Penal), arts. 136 bis – 136 octies, available online at http://www.juridat.be/cgi_loi/legislation.pl (retrieved April 2006).

¹⁴⁵ Preliminary Title of the Code of Criminal Procedure (Titre préliminaire du Code de procédure pénale), Chapter II, arts. 6 (1), 7(1) and 10 (5).

committed outside Belgium that Belgium is under a treaty obligation to prosecute.¹⁴⁶ International crimes are tried in Belgium by the *Court d'Assises*, composed of a judge and a twelve-person jury.¹⁴⁷

Prosecutions based on universal jurisdiction and leading to a conviction since 2001 include the “Butare Four” case,¹⁴⁸ and the case of Rwandan businessmen Etienne Nzabonimana and Samuel Ndashyikirwa (“The Two Brothers” case),¹⁴⁹ both cases concerning crimes committed in Rwanda during the 1994 genocide. Ongoing cases include the case against former Chadian dictator Hissène Habré.¹⁵⁰ The law concerning universal jurisdiction was changed in August 2003, requiring cases against U.S. Gen. Tommy Franks, former Israeli Prime Minister Ariel Sharon and petroleum company TotalFinaElf to be dropped.

A. Jurisdictional Challenges

1. Presence

As of August 2003, Belgian authorities can exercise jurisdiction over alleged perpetrators of genocide, crimes against humanity and war crimes who are either Belgian nationals or Belgian residents, including perpetrators who became residents or citizens after the crime was committed.¹⁵¹ Courts can also exercise jurisdiction over international crimes if the victims are Belgian nationals or had lived in Belgium for at least three years at the time the crime was committed.¹⁵² Courts therefore exercise a form of passive or active nationality jurisdiction, unless Belgium has an obligation to prosecute under treaty law.

¹⁴⁶ Preliminary Title of the Code of Criminal Procedure, art. 12 bis; Belgium ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on June 25, 1999. Torture as a criminal offense has been incorporated in article 417 bis of the Criminal Code.

¹⁴⁷ Belgian Constitution, as of February 17, 1994, art. 150.

¹⁴⁸ La Cour d'Assises de L'arrondissement Administratif de Bruxelles-Capitale, verdict of June 8, 2001. Documentation of the whole trial is available online at http://www.asf.be/AssisesRwanda2/fr/fr_ICI_procesassises.htm (retrieved April 2006).

¹⁴⁹ La Cour d'Assises de L'arrondissement Administratif de Bruxelles-Capitale, verdict of June 29, 2005. See also “Rwandans sentenced over genocide,” BBC News, June 29, 2005, [online] <http://news.bbc.co.uk/2/hi/africa/4635637.stm> (retrieved April 2006).

¹⁵⁰ For details concerning the Habré case, see [online] <http://www.hrw.org/justice/habre/>.

¹⁵¹ Preliminary Title of the Code of Criminal Procedure (Titre préliminaire du Code de procédure pénale), Chapter II, art. 7 (1), introduced in 1964, provides for active personality jurisdiction, with article 6(1) bis providing courts with jurisdiction over international crimes committed abroad by “any person who has his principle residence on [Belgian] territory” (“...toute personne ayant sa résidence principale sur le territoire du Royaume”). According to the government's explanatory memorandum, this includes those who became residents after the commission of the crime, see <http://www.ulb.ac.be/droit/cdi/fichiers/chbre-51-0103-01.pdf>, p. 5.

¹⁵² Article 10 (5), introduced in 1984, provides for general passive personality jurisdiction.

2. Immunities

In the case against former Israeli Prime Minister Ariel Sharon, the *Cour de Cassation* held the complaints inadmissible,¹⁵³ underlining the verdict of the International Court of Justice, in the “Arrest Warrant” case,¹⁵⁴ that a sitting prime minister enjoyed a functional immunity from jurisdiction in a foreign court, no matter what crimes were involved. To bring Belgian legislation into line with the judgment of the ICJ, the Law relating to Grave Breaches of International Law was modified in April 2003, and now Belgian law recognizes immunities within the limits established by international law.¹⁵⁵

3. Limitation

Crimes against humanity, war crimes and genocide are not subject to a period of limitation.¹⁵⁶

4. Subsidiarity

The principle of subsidiarity was introduced by the changes to the legislation in April 2003. The prosecutor may refrain from referring the complaint to the investigative judge if, taking into consideration the interests of justice and Belgium’s international obligations, the particular complaint should be brought before an international tribunal or before a court in the territorial state or the state of nationality of the alleged perpetrator. If the prosecutor determines that the ICC is the appropriate forum, the minister of justice may, after consultations with the Council of Ministers, refer the case to the ICC. If the ICC decides not to exercise its competence over the matter, Belgian courts will have jurisdiction. It is then once again up to the federal prosecutor to decide how to proceed with the complaint.¹⁵⁷

¹⁵³ La Cour de Cassation, decision of September 24, 2003.

¹⁵⁴ Case Concerning the Arrest Warrant of April 11, 2000 (The Democratic Republic of Congo v. Belgium), judgment of April 14, 2002, available online at http://www.icj-cij.org/icjwww/idocket/ICOB/ICOBjudgment/ICOB_jjudgment_20020214.PDF (retrieved March 2006).

¹⁵⁵ See *Moniteur Belge*, May 7, 2003, unofficial English translation available in ILM, vol. 42 (2003) p.204.

¹⁵⁶ Code of Criminal Procedure, art. 21.

¹⁵⁷ Article 7 of the Law amending the law of June 16, 1993, concerning the prohibition of grave breaches of international humanitarian law and article 144 ter of the Judicial Code.

B. Practical Arrangements for the Exercise of Universal Jurisdiction in Belgium

1. Special departments in charge of the investigation and prosecution of international crimes

a. Police

A unit was set up in 1998 to deal exclusively with international crimes following an increase in complaints based on universal jurisdiction, particularly concerning alleged perpetrators from Rwanda. The unit is part of the crime section of the judicial police of the *arrondissement judiciaire Bruxelles*. So far the unit has investigated international crimes committed in a number of countries, including Rwanda, Chad, Guatemala and Burma. It was created to bring together all the relevant expertise within one unit and now includes six experienced investigators.¹⁵⁸

b. Prosecution

The *Parquet Federal* has had exclusive competence over international crimes since 2003.¹⁵⁹ It decides whether to open an investigation, and can order an investigative judge to start an investigation. While the judge is completely independent once an investigation begins, the *Parquet Federal* is under the direct authority of the Ministry of Justice, which can command the prosecution to prosecute a case but cannot order it to refrain from doing so.

c. Investigative judge

Theoretically, the investigation of international crimes by an investigative judge depends on the whereabouts of the suspect or the location at which the complaint is filed. In practice, however, it has so far been possible to transfer all cases involving international crimes to just a very limited number of investigative judges, who have thus accumulated valuable experience. At present they also deal with the investigation of terrorism cases (among other, ordinary crimes).¹⁶⁰ The budget available to the investigative judge is provided by the Ministry of Justice, and the resources allocated have been considered adequate,¹⁶¹ although there is no specific budget for the investigation of war crimes, crimes against humanity and genocide.¹⁶²

¹⁵⁸ Human Rights Watch interview with Belgian officials, October 24, 2005.

¹⁵⁹ Human Rights Watch interview with Belgian prosecutor, April 22, 2004.

¹⁶⁰ Human Rights Watch interview with Belgian investigative judge, October 24, 2005.

¹⁶¹ Human Rights Watch interview with Belgian investigative judge, October 24, 2005; Human Rights Watch interview with Belgian officials, October 24, 2005.

¹⁶² Human Rights Watch interview with Belgian prosecutor, April 22, 2004.

d. Notification

Both cases that led to conviction, *Butare Four* and *The Two Brothers*, were brought to the attention of the *Parquet* by *parties civiles*. The “*constitution de parties civiles*” is the equivalent of a private petition and *oblige*s the investigative judge to start the investigation. At present there is no cooperation with immigration authorities, which is striking in light of the fact that the perpetrators in the Rwanda cases had all claimed asylum in Belgium.¹⁶³ This has become even more pressing because of the changes to the legislation in April 2003 that prevent the investigative judge from acting solely on a complaint initiated by *parties civiles*, and because public prosecutors have rarely been the driving force behind complaints based on universal jurisdiction.

2. Decision to investigate and prosecute

Since the modification of the universal jurisdiction legislation in August 2003,¹⁶⁴ the prosecutor’s discretion has widened. The prosecutor can decide not to investigate a complaint if the complaint is obviously unfounded, the crimes referred to in the complaint do not qualify as serious violations of international humanitarian law, or if an admissible public action cannot result from the complaint. The prosecutor can further reject a complaint if facts of the case indicate that the case should be heard by the courts of the state where the crimes were committed or by an international court.¹⁶⁵

The decision about whether to investigate a complaint now lies solely at the prosecutor’s discretion, and public prosecutors play an increasingly important role in the exercise of universal jurisdiction in Belgium. The police and the investigative judge are only consulted by the prosecution. In exceptional cases, the minister of justice can order the federal prosecutor to initiate an investigation (*droit d’injonction positive*).¹⁶⁶ The investigation is carried out by the special police department in charge of the investigation of international crimes under the supervision of the investigative judge, who acts as a judicial official and police investigator.

In a complaint brought against the modified universal jurisdiction law, the *Cour d’Arbitrage* decided on March 23, 2005, that judicial review of a prosecutor’s decision not to open an

¹⁶³ Human Rights Watch interview with Belgian officials, October 24, 2005.

¹⁶⁴ Amendment to the “*Loi relative aux violations graves du droit international humanitaire*” and to article 144 ter of the Judicial Code, April 23, 2003. See *Moniteur Belge*, May 7, 2003.

¹⁶⁵ Code of Criminal Procedure, arts. 10 (5) and 12 bis; *Cour d’Arbitrage*, Judgment Nr. 62, March 23, 2005, available online at <http://www.arbitrage.be/> (retrieved April 2006).

¹⁶⁶ Belgian Constitution, as of February 17, 1994, arts. 151. In February 1995, the Belgian minister of justice asked the prosecutor general in Brussels to initiate proceedings against alleged perpetrators of crimes committed in Rwanda in 1994.

investigation was permissible to some extent.¹⁶⁷ If the prosecutor decides not to further proceed with a case, the Indicting Chamber (*Chambres des mises en accusation*) will take the decision whether to continue with a case. However, at no stage of the review are private parties filing the complaint allowed to intervene to present their case, and the chamber will base its decision on the reasons set out by the prosecutor only.

No such judicial review is possible 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.¹⁶⁸

3. Investigation

a. Investigation in Belgium

The police and the investigative judge consult experts and check Internet resources as well as related academic and NGO material. Other crucial sources of evidence in past cases were provided by *parties civiles* who supplied names of witnesses and material related to crimes. In the Rwanda cases, emigré communities proved to be a useful starting point for seeking witnesses and additional contacts in the territorial state.¹⁶⁹ Once the investigation in Belgium is complete and all available evidence has been collected, the judge decides whether an investigation abroad is necessary.

b. Extraterritorial investigation

At the date of writing, Belgian investigators have carried out five rogatory missions—three to Rwanda, one to Guatemala and one to Chad. Prior to the rogatory mission to Rwanda, one preparatory commission of investigators went to Rwanda. The rogatory letter is executed by the local authorities in the presence of the Belgian team. In Rwanda, for instance, it was a Rwandan representative of the judiciary who conducted the interviews. The team investigating in the context of a rogatory mission abroad includes one investigative judge, a prosecutor and investigators, and often a registrar and a translator.¹⁷⁰

¹⁶⁷ *Cour d'Arbitrage*, Judgment Nr 62, March 23, 2005, available online at <http://www.arbitrage.be/> (retrieved April 2006).

¹⁶⁸ *Ibid.*

¹⁶⁹ Human Rights Watch interview with Belgian officials, October 24, 2005.

¹⁷⁰ Human Rights Watch interview with Belgian investigative judge, October 24, 2005.

C. Cooperation

1. National cooperation

There is no systematic cooperation with immigration authorities. There is extensive cooperation between the *Parquet federal*, investigative judges and the relevant police unit.

2. International cooperation

For the investigation in Guatemala from 1980 onwards, the foreign ministries of Guatemala and Costa Rica cooperated with the Belgian authorities, through the assistance of a Belgian liaison magistrate based in Venezuela. Although Spain is also investigating the events that occurred in Guatemala, there has been no official cooperation between Spain and Belgium. While the Belgian authorities considered it essential to investigate abroad, the Spanish authorities relied on documents and other evidence available without investigating in the territorial state. In the Rwanda cases there was cooperation with Switzerland and Canada.¹⁷¹

Before going abroad the investigating team compiles a list of questions, documents and witnesses in which they are interested for local authorities to review and approve (letter rogatory). The Belgian embassy in the territorial state is usually contacted to establish a first contact with local authorities. Where no embassy exists, the Belgian Ministry of Justice has liaison officers in various ministries of justice around the world who help to establish early contacts. In the Guatemala case, a Belgian liaison officer affiliated with the Ministry of Justice of Venezuela contacted all relevant authorities in Guatemala and Costa Rica. For every piece of evidence the Belgian investigation team wanted to seize, the Public Ministry of the territorial state had to be contacted.¹⁷² During the investigation in Rwanda the team of investigators always had a team of local police traveling with them, for their protection.¹⁷³ In Guatemala, the team was accompanied by two officers charged with their protection.¹⁷⁴

Neither the EU Network nor the Interpol working group seem to have played an important role in past investigations, as the majority of investigations carried out by Belgian authorities abroad have taken place before the operation of either cooperation mechanism. However, Belgian officials attend both EU and Interpol meetings,¹⁷⁵

¹⁷¹ Human Rights Watch interview with Belgian officials, October 24, 2005; Human Rights Watch interview with Belgian investigative judge, October 24, 2005.

¹⁷² Human Rights Watch interview with Belgian investigative judge, October 24, 2005.

¹⁷³ Human Rights Watch interview with Belgian officials, October 24, 2005.

¹⁷⁴ Human Rights Watch interview with Belgian investigative judge, October 24, 2005.

¹⁷⁵ Past Network meetings as well as Interpol meetings were attended by Belgian officials.

enabling authorities of other countries to benefit from the experience of Belgian authorities in the investigation and prosecution of international crimes and vice versa.

D. Role and Rights of Victims and Witnesses

1. Victims—Compensation and legal representation

Victims may file a civil action for damages in the criminal proceedings.¹⁷⁶ In addition to those who are directly affected by the crime, family members may bring a claim for compensation as long as they can prove a family link to the victim. In the second Rwanda trial a number of victims succeeded in their claims for compensation against the two convicted perpetrators.¹⁷⁷

Although victims are entitled to legal representation where they cannot afford to pay for it themselves, this does not include costs incurred during the pre-trial phase. During trial, lawyers for victims and for the defense receive €500 per day in court.

2. Witnesses

As the emphasis in Belgium is placed on oral proceedings, the number of witnesses testifying in person during trial is quite large. In the second Rwanda trial, for instance, seventy-six witnesses testified in person.¹⁷⁸ The identity of witnesses cannot be concealed under Belgian law, but investigators indicated that even had they been available, mechanisms to protect anonymity would have been ineffective in the cases tried so far. This was because persons in the territorial state were already aware who testified in the trial, due to media attention, and the fact that a witness travels from Rwanda to Belgium.¹⁷⁹ Post-trial protection in the territorial state does not appear to be extensive. Indeed, according to a Belgian victims' lawyer, the Belgian authorities need to improve their efforts with regard to witness protection and to rely less on local authorities in this respect.¹⁸⁰ This view was supported by an investigative judge, who observed that protection measures for witnesses and victims provided by local police in the territorial state were limited.

Accommodating a large number of witnesses in the same location can have the advantage of providing a system of mutual support for witnesses who are all far away from home,

¹⁷⁶ Code of Criminal Procedure, arts. 66, 67.

¹⁷⁷ Human Rights Watch interview with Belgian lawyer, August 25, 2005.

¹⁷⁸ Human Rights Watch interview with Belgian officials, October 24, 2005.

¹⁷⁹ Human Rights Watch interview with Belgian officials, October 24, 2005.

¹⁸⁰ Human Rights Watch interview with Belgian lawyer, August 25, 2005.

but it has the obvious disadvantage of accommodating prosecution and defense witnesses together.¹⁸¹ The majority of witnesses in the second Rwanda trial remained in Belgium for one week and left before the following witnesses arrived. Throughout their stay, they were all entitled to receive psychological help from a witness and victims unit. Twelve witnesses went into hiding once they had testified, and a number of witnesses claimed asylum, especially the defense witnesses who argued that their testimonies in favor of the accused would endanger them on their return to Rwanda.¹⁸²

It is not possible under Belgian law to film a witness testimony in the territorial state, as this method does not allow both parties to challenge statements. Preparing a witness is not allowed under Belgian law and is viewed as a contamination of the original statement given in front of the jury. Witnesses are, however, given the chance to read through copies of their statements before they testify at trial. This reminds them of their original statement, often given years before the trial.¹⁸³

E. Fair Investigation and Trial

With regard to the Rwanda trial in 2005, the team investigating abroad did not encounter difficulties in meeting with and finding witnesses for the defense.¹⁸⁴ The investigative judge is under an obligation to investigate evidence incriminating and exculpating the accused. While the defense lawyer is not entitled to have a private investigator appointed, the lawyer has the right to ask the investigating judge to go back to the territorial state and to take more statements from a list of potential defense witnesses.¹⁸⁵ Since investigations abroad form part of the pre-trial phase, they are not covered by legal aid.

¹⁸¹ Witnesses in the Rwanda trials were accommodated in former army barracks, where it was possible to observe them and to keep the costs of accommodation down.

¹⁸² Human Rights Watch interview with Belgian officials, October 24, 2005.

¹⁸³ Human Rights Watch interview with Belgian officials, October 24, 2005.

¹⁸⁴ Human Rights Watch interview with Belgian officials, October 24, 2005.

¹⁸⁵ Code of Criminal Procedure, art. 61 ter.

VII. Denmark

Section 8 (5) of the Danish Penal Code¹⁸⁶ provides for universal jurisdiction over crimes that Denmark has an obligation to prosecute under an international convention. This includes torture under the Convention against Torture¹⁸⁷ and grave breaches of the Geneva Conventions.¹⁸⁸ In addition, section 8 (6) provides Danish courts with universal jurisdiction over any crime with a sentence of more than one year's imprisonment, where the crime is also a crime in the territorial state and the suspect cannot be extradited to the territorial state.¹⁸⁹ Due to a lack of implementing legislation, all complaints are investigated, prosecuted and eventually punished on the basis of crimes as defined in the Danish Penal Code. Several complaints have been investigated on this basis since 2001, with three cases leading to a prosecution. One, involving a Ugandan national, led to a conviction for armed robbery and abduction in 2004.¹⁹⁰ Other prosecutions did not lead to trial because of the death or escape of the accused. All other investigations have so far been discontinued for reasons further outlined below.

A. Jurisdictional Challenges

1. Presence

Although not required by section 8 (5), the suspect has to be voluntarily present for Danish authorities to exercise jurisdiction over the crimes that international treaty law commits them to prosecute, and presence is a prerequisite for a police investigation.¹⁹¹ Should the suspect leave Denmark during an investigation, the investigation will be discontinued. Extradition can only be requested where a suspect has already been charged

¹⁸⁶ Penal Code (*Straffeloven*) 1930, section 8 (5).

¹⁸⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

¹⁸⁸ 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 October 21, 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 October 21, 1950.

¹⁸⁹ Penal Code, section 8 (6).

¹⁹⁰ Human Rights Watch telephone interview with staff of the Special International Crimes Office (SICO), August 11, 2005; for more information see the SICO website, at <http://www.sico.ankl.dk/page34.aspx> (retrieved April 2006).

¹⁹¹ Human Rights Watch telephone interview with Danish official, August 11, 2005; Human Rights Watch interview with Danish official, August 24, 2005. With regard to torture offenses see *Lee Urzua et al v. Pinochet*, Opinion of the Director of Public Prosecution, December 3, 1998, Case No. 555/98, reported in *Yearbook of International Humanitarian Law*, vol. 3 (2003), p. 469.

and has subsequently fled Denmark.¹⁹² To avoid a suspect's departure, the investigative authorities have to apply for a court order for preliminary detention. Such an order will only be granted where there is substantial reason to believe that a crime was committed by the suspect and where he or she seeks to leave Denmark, tamper with evidence, or commit a crime.¹⁹³ Due to the substantial level of evidence required to implicate a suspect, it has only been possible for the investigative authorities to obtain the order in two cases. The first case involved the Ugandan national who was convicted, and the second a former Iraqi general who escaped before the order could be enforced.¹⁹⁴

The strict adherence to the presence requirement stopped the investigation of a recent complaint filed by a practitioner of Falungong against a Chinese prosecutor who attended a conference in Copenhagen in August 2005. The investigators had five days to establish a link between the crimes in question and the alleged perpetrator.¹⁹⁵ However, it was not possible to collect sufficient evidence to successfully apply to the courts for an arrest warrant within this timeframe. The Chinese prosecutor left Denmark once the conference was over, and the investigation had to be discontinued.

2. Immunities

Danish authorities can exercise universal jurisdiction as provided for in article 8 (5) if such an exercise is in accordance with international law.¹⁹⁶ Accordingly, immunities as recognized by international law will prevent an investigation by Danish authorities, as illustrated in the case against the former ambassador of Israel to Denmark, Carmi Gillon, where the Ministry of Foreign Affairs and the Ministry of Justice in July 2001 decided not to open an investigation against him.¹⁹⁷

Three cases involving international crimes could not be investigated due to amnesties which have been enacted in the country where the crime had been committed.¹⁹⁸ A list of criteria is applied, as a matter of policy, to each amnesty in order to determine

¹⁹² Human Rights Watch telephone interview with staff of the SICO, October 31, 2005; Danish authorities issued an international arrest warrant against former Iraqi General Nizar al-Khazraji, who escaped from Denmark on March 17, 2003, before a Danish arrest warrant could be enforced.

¹⁹³ Human Rights Watch telephone interview with Danish official, October 31, 2005; see further the SICO website, at <http://www.sico.ankl.dk/page34.aspx> (retrieved May 2006).

¹⁹⁴ Human Rights Watch telephone interview with staff of the SICO, October 31, 2005.

¹⁹⁵ *Ibid.*

¹⁹⁶ Penal Code, section 12.

¹⁹⁷ On the case against Carmi Gillon see letter by Human Rights Watch to the Danish Ministry of Foreign Affairs, available online at <http://hrw.org/english/docs/2001/07/19/denmar311.htm>.

¹⁹⁸ Human Rights Watch telephone interview with staff of the SICO, October 31, 2005. All of these cases concerned the Lebanon Amnesty Law of 1991, which grants a general amnesty for crimes committed before March 28, 1991.

whether it will be a bar to prosecution in Denmark. Thus far the Special International Crimes Office (SICO) has never disqualified an amnesty, as the amnesties in question have been general, referring not only to regime officials, but to both parties of the conflict.¹⁹⁹ It appears that amnesties are respected, even if they apply to crimes such as crimes against humanity, torture or war crimes. It is unclear why Danish authorities regards themselves as bound by amnesties issued in the territorial state.

3. *Limitation*

Because Denmark has not legislated international crimes directly into domestic law and prosecutes the domestic law equivalents of international crimes, statutes of limitation apply to the prosecutions. This has stopped the investigation of three complaints involving allegations of torture, as this is classified as a crime against the person and is therefore subject to a statute of limitation of ten years.²⁰⁰

4. *Subsidiarity*

The issue of subsidiarity is not regulated under Danish law, and practitioners indicated that it has not arisen in any case so far. It would be dealt with on a case by case basis, taking into account extradition requests and whether the territorial state would apply the death penalty. In the case of the Ugandan national who escaped to Denmark where he was convicted for armed robbery and abduction in 2004, three Ugandan nationals were prosecuted and convicted by a Ugandan court for being involved in the same crimes. While Uganda did not ask for the escaped accused's extradition, authorities indicated that they would have only considered extradition if Uganda could have ensured that the death penalty would not be applied.²⁰¹

B. Practical Arrangements for the Exercise of Universal Jurisdiction in Denmark

1. Special departments in charge of the investigation and prosecution of international crimes

The Special International Crimes Office (SICO) was established in 2002 and is in charge of the investigation and prosecution of serious crimes²⁰² committed abroad by persons present in Denmark. SICO currently has a staff of seventeen: six prosecutors, nine investigators and two translators. The investigators and prosecutors work in teams,

¹⁹⁹ Human Rights Watch telephone interview with staff of the SICO, October 31, 2005.

²⁰⁰ Penal Code, sections 93-97.

²⁰¹ Human Rights Watch interview with Danish official, May 22, 2006.

²⁰² Serious crimes are all crimes that carry a minimum sentence of six years of imprisonment.

divided by geographical region. The composition of prosecutors and investigators in the same unit has proven advantageous as both are able to profit from one another's expertise in the complex legal and investigative aspects of the investigation of international crimes. The office's focus is on serious crimes committed abroad, covering anything from murder and rape to genocide. Approximately 20 percent of their work deals exclusively with international crimes.²⁰³ As one of three national police units, its budget is part of the overall police budget and is determined by the Ministry of Justice. According to the officials interviewed, there is neither a lack of financial resources nor of personnel available to SICO.²⁰⁴

2. Notification

SICO receives about 60 percent of all cases from the immigration authorities. All asylum seekers are screened and interviewed three times in order to enable immigration authorities to verify their stories. SICO has a special contact person within the immigration authority who screens all cases before referring them to the unit.²⁰⁵ The majority of cases referred to SICO by immigration authorities are determined to lack sufficient credibility to warrant a prosecution.²⁰⁶ This is established by contacting the country in question or researching background information on the alleged victim.

The Danish immigration authorities and the Danish Red Cross work in conjunction to distribute pamphlets among asylum seekers explaining to them in six languages other than Danish (Albanian, Arabic, Dari, French, English and Bosnian-Croatian-Serbian) where and with whom they can file a complaint. Together with a form on SICO's website,²⁰⁷ it provides victims and witnesses with the opportunity to directly address the relevant authorities in charge of such complaints. Out of sixty-three complaints received before May 31, 2004, forty-four cases were reported to SICO by the immigration authorities, fifteen by private/anonymous complainants, and four were based on individual initiatives.²⁰⁸ However, according to the 2005 annual report of SICO, the numbers referred to by the immigration authorities were decreasing, while a rising number of complaints have been referred to SICO by victims or witnesses or started on SICO's own initiative.²⁰⁹

²⁰³ Human Rights Watch interview with Danish official, August 24, 2005.

²⁰⁴ Human Rights Watch telephone interview with staff of the SICO, October 31, 2005; Human Rights Watch interview with Danish official, August 24, 2005.

²⁰⁵ Human Rights Watch telephone interview with staff of the SICO, November 25, 2005.

²⁰⁶ Human Rights Watch telephone interview with staff of the SICO, August 11, 2005.

²⁰⁷ See <http://www.sico.ankl.dk/page33.aspx> (retrieved April 2006).

²⁰⁸ See http://www.sico.ankl.dk/media/beretning_sais_010602-3105.pdf (retrieved April 2006).

²⁰⁹ See http://www.sico.ankl.dk/media/sico_summary_2005_annual_report.pdf (retrieved April 2006).

3. *Decision to investigate and prosecute*

In cases involving “ordinary crimes,” that is crimes committed in Denmark, the police decide whether to investigate a complaint and the prosecution does not get involved in the investigations. However, in all cases referred to SICO, the prosecution has sole authority in deciding whether to initiate an investigation. In practice, this decision is taken jointly with the investigators and the investigation itself is then carried out jointly by the police and SICO. This is one of the advantages of having the expertise of both parties combined in one unit.²¹⁰ The decision is taken according to the “investigation strategy” outlined below.

The prosecution is subject to the authority of the minister of justice, who, pursuant to section 98 (1) of the Administration of Justice Act, superintends their work and pursuant to section 98 (2) may issue guidelines concerning the discharge of their duties.²¹¹ The authority to prosecute under section 8 (4-6) lies with the minister of justice.²¹² Practitioners interviewed by Human Rights Watch indicated that so far the minister of justice did not interfere with their work, and they believed that it was unlikely that this would happen in the future.²¹³ Accordingly, the decision to prosecute international crimes is taken by the director of SICO and is based on the evidence available, which must be sufficient to give rise to a reasonable expectation of a successful conviction.²¹⁴ On two occasions, the prosecutor decided to discontinue proceedings on the basis that the cost of further investigations required would have been disproportionate to the gravity of the alleged crime. Similarly, investigators would not carry out extensive enquiries abroad for a minor crime.²¹⁵

SICO investigators apply a three-stage test to each complaint that they are requested to investigate. They ask: (i) Is the crime within the jurisdiction of Denmark? (ii) Is the suspect present in Denmark? and (iii) Is the limitation period still running? If the answer to all three questions is yes, SICO begins an investigation.

Where the prosecutor decides not to investigate or prosecute, the complainant—provided he or she has some link to the crime in question—can appeal to the director of

²¹⁰ Human Rights Watch telephone interview with staff of the SICO, August 11, 2005.

²¹¹ Administration of Justice Act (*Retsplejeloven*) 1916, section 98.

²¹² Circular letter of the Director of Public Prosecution 3/2002 (*Rigsadvokatens Meddelelse 3/2002*).

²¹³ Human Rights Watch interview with Danish official, August 24, 2005; Human Rights Watch telephone interview with staff of the SICO, November 15, 2005.

²¹⁴ Administration of Justice Act, section 7(2).

²¹⁵ Human Rights Watch telephone interviews with staff of the SICO, November 15 and 25, 2005. An example given was theft.

public prosecution who is the first and last official to whom the complainant can turn.²¹⁶ The director will take into account the reasons given by the prosecutor not to prosecute and the overall handling of the case. No courts are involved in the appeal as it is a purely administrative procedure. Appeals have been lodged in two instances with the director of public prosecution upholding the decision of SICO not to prosecute, due to insufficient evidence in one case, and the review decision still pending in the other.²¹⁷

4. Investigation

a. Investigation in Denmark

When a case is opened, a team of one prosecutor and two investigators searches for evidence through open sources such as NGO reports, newspapers and the Internet. After this preliminary investigation (lasting a maximum of four weeks) the team calls a meeting with the director and the chief detective of SICO and presents a plan of action highlighting areas where further investigation is necessary. Where preliminary evidence does not reveal a need for further investigation, a closing letter is sent to the complainant, setting out the reasons why the investigation has been discontinued.²¹⁸

b. Extraterritorial investigation

Before SICO investigates abroad, they ensure that the incident actually occurred and that the territorial state is willing to cooperate. Other countries with experience of investigation in the territorial states concerned are contacted for advice. Following this, a team of one prosecutor, two investigators and possibly a translator is sent abroad as quickly as possible.²¹⁹ As a time-saving measure, the number of complaints from this country is taken into account so that the team can attempt to combine the investigation of all complaints in a particular state.²²⁰ The team works closely with local authorities where possible. In the Ugandan case, Danish investigators traveled to foreign states at least three times, on two occasions together with a judge, prosecutor and a defense lawyer when testimonies were taken.²²¹

²¹⁶ Administration of Justice Act, section 724 (1).

²¹⁷ Human Rights Watch telephone interview with staff of the SICO, November 25, 2005.

²¹⁸ Human Rights Watch interview with Danish official, August 24, 2005.

²¹⁹ Human Rights Watch telephone interview with staff of the SICO, October 31, 2005.

²²⁰ Human Rights Watch interview with Danish official, August 24, 2005.

²²¹ Human Rights Watch telephone interview with staff of the SICO, November 25, 2005

C. Cooperation

1. International cooperation

a. EU Network

The network of contact points was utilized to exchange information with practitioners from other countries.²²² The potential of the EU Network in assisting national authorities in the investigation of international crimes is valued highly by Danish practitioners, and exchange of experiences made by other countries is considered crucial for a successful investigation.²²³

b. Interpol

An initiative by Denmark created the Interpol working group on international crimes in 2004. As a much larger meeting forum, Interpol provides a possibility to meet people from outside Europe. In particular, SICO describes Interpol's database specializing in international crimes as a fundamentally important development in order to avoid duplicating the efforts of different countries working on international crimes.²²⁴

c. Cooperation with the territorial state

Cooperation with the territorial state is crucial in the event that sufficient evidence to charge a suspect is not available elsewhere. To date, only one investigation could not be continued due to a non-cooperative territorial state, while in all other relevant cases the territorial state has provided assistance to SICO.²²⁵ In the Ugandan case, the first contact was established via the Danish embassy, which forwarded a rogatory letter to the relevant local authorities—the police and prosecution services. The rogatory letter contained specific crime-related questions regarding the identification of witnesses, and whether the state's personnel would be present when statements were taken or whether the Danish authorities could take statements themselves.²²⁶ The letter rogatory was executed together with the local authorities and in the case of Uganda was relatively informal, as it did not have to be renewed for every piece of evidence or new witnesses not included in the original letter. However, other countries require a more detailed letter rogatory.²²⁷

²²² Human Rights Watch telephone interview with staff of the SICO, October 31, 2005.

²²³ Ibid.

²²⁴ Human Rights Watch telephone interview with staff of the SICO, August 11, 2005.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Human Rights Watch telephone interview with staff of the SICO, October 25, 2005.

D. Role and Rights of Victims and Witnesses

1. Victims—Compensation and legal representation

A victim is considered a person who is directly affected by a crime. Relatives do not fall under the definition of victim, even if they are indirectly affected by the crime.²²⁸ Victims cannot initiate an investigation or bring a private prosecution under Danish law for serious crimes, but may have the right to state-funded legal representation.²²⁹

In addition to the victim's right to claim compensation in civil proceedings, the prosecution is obliged to pursue civil claims lodged by the victim if the civil aspects involved are not too complex for a criminal court to decide.²³⁰ Although the victim has no right to participate in the penal aspects of criminal proceedings, a victim can be legally represented as far as compensation is concerned. This representation is covered by legal aid for the trial and possible appeals. In the Uganda trial, victims did not receive any compensation as there were no claims regarding the charges on which the accused was convicted. The other claim-related charges had to be dropped. The victims lived in Uganda and did not travel to Denmark for the trial.²³¹

2. Witnesses

Although eyewitness testimonies are given much weight, no witnesses have yet traveled to Denmark to testify at trial. Instead, a witness gave testimony in a Ugandan court in the presence of a Danish prosecutor and defense lawyer.²³² This testimony was filmed and later presented in the Danish court. It seems that possibilities such as videotaping a testimony given in court are considered to be preferable for several reasons: a witness can testify in familiar surroundings; the possibility of witnesses claiming asylum in Denmark is avoided; and the costs of travel for a potentially large number of witnesses are also reduced.²³³

²²⁸ There is no legal definition of the term "victim"/injured party (*forurettede*), but according to commentary, the term is commonly assumed to be interpreted narrowly, and only those whom the penal provisions specifically seek to protect are considered an injured party, see MEI Brien and EH 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*, Wolf Legal Productions (2000), [online] <http://www.victimology.nl/onlpub/Brienenhoegen/bh-ch6denmark.pdf> (retrieved June 2006), p. 235.

²²⁹ Administration of Justice Act, section 275-1, in conjunction with relevant provisions of the Penal Code. A lawyer may be appointed by the court depending on the seriousness of the crime. Administration of Justice Act, section 741a-2, in conjunction with relevant sections of the Penal Code.

²³⁰ Administration of Justice Act, sections 991–996a.

²³¹ Human Rights Watch telephone interview with staff of the SICO, October 31, 2005.

²³² Human Rights Watch telephone interview with staff of the SICO, August 11, 2005.

²³³ Human Rights Watch telephone interview with staff of the SICO, November 25, 2005.

Witness protection has not been an issue in Danish investigations. However, where the witnesses feel afraid in the territorial state, Danish authorities will inform local authorities and try to negotiate a protection agreement.²³⁴ Reliance is thus placed on local mechanisms and the national criminal procedure of the territorial state.

E. Fair Investigation and Trial

It is inherent in the Danish system that the police look for both inculpatory and exculpatory evidence. Therefore, so long as no testimonies are taken, investigators do not specifically ask for a defense counsel to be present in the investigation. The defense can ask the investigators to look for evidence required by the defense. The defense can apply to the court to order the investigators to look for further evidence after the investigation has concluded.²³⁵

Although there is no “legal aid” available for criminal cases in Denmark, the defense and all related costs are paid for by public funds. The legal costs are settled before the trial, and it is only in the case of a person’s conviction that he or she might be ordered by the court to pay for those costs.²³⁶

²³⁴ Human Rights Watch telephone interview with staff of the SICO, October 31, 2005.

²³⁵ Ibid.

²³⁶ Ibid.

VIII. France

Article 689 of the French Code of Criminal Procedure²³⁷ provides for universal jurisdiction over offenses committed outside of France when an international convention gives jurisdiction to French courts to deal with this offense.²³⁸ Article 689.1 sets out the conditions for an exercise of universal jurisdiction of French courts, and subsequent paragraphs (689.2-689.9) list the international conventions that provide French courts with universal jurisdiction. As far as international crimes are concerned, the only convention referred to is the Convention against Torture, in article 689.2. No provisions exist for grave breaches of the Geneva Conventions²³⁹ or other war crimes, and French courts have held that the Conventions were not directly applicable in national law. Accordingly grave breaches or war crimes are not subject to universal jurisdiction under French law.²⁴⁰ French courts can therefore only exercise universal jurisdiction over torture.²⁴¹

By virtue of Law No. 95-1 of January 2, 1995,²⁴² and Law No. 96-432 of May 22, 1996,²⁴³ which implemented Security Council Resolutions 827 and 955 setting up the ad-hoc tribunals for the former Yugoslavia and Rwanda, French courts can exercise ad hoc universal jurisdiction over war crimes, genocide and crimes against humanity, if

²³⁷ Code of Criminal Procedure (*Code de procédure pénale*) 1957, as amended by the Act of December 1992, official translation available on the website of the French government at http://www.legifrance.gouv.fr/html/codes_traduits/cpptextA.htm (retrieved May 2006).

²³⁸ France ratified the four Geneva Conventions on June 28, 1951, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment on February 18, 1986.

²³⁹ 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 October 21, 1950, art. 49; 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, art. 49; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force October 21, 1950, art. 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force October 21, 1950, art. 146.

²⁴⁰ The Court of Appeal (Chambre d'accusation) on November 24, 1994 (DOSSIER N A 94/02071, available online at <http://www.trial-ch.org/twdoc/JAVOR1994.pdf>), confirmed by the Supreme Court (Cour de Cassation) on March 26, 1996 (N° de pourvoi : 95-81527, available online at <http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXRXAX1996X03X06X00132X000>).

²⁴¹ Article 222-1 of the Criminal Code (*Code Pénal*) of 1994 reads as follows: "The subjection of a person to torture or to acts of barbarity is punished by fifteen years' criminal imprisonment." The code is available online at http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm (retrieved May 2006).

²⁴² Available online at http://www.oup.com/uk/orc/bin/0199259119/resources/cases/ch19/1995_france_icty.pdf (retrieved May 2006).

²⁴³ Available online at <http://www.legifrance.gouv.fr/WAspad/Visu?cid=493837&indice=1&table=JORF&ligneDeb=1> (retrieved May 2006).

committed in the former Yugoslavia, Rwanda or by Rwandan citizens in neighbouring countries.²⁴⁴

Since 2001, one person has been convicted by a French court on the basis of universal jurisdiction. On July 1, 2005, Ely Ould Dah, a Mauritanian officer was sentenced *in absentia* to ten years in prison for torturing black African members of the military in 1990 and 1991.²⁴⁵ Other investigations have been discontinued for reasons outlined further below, while some are still ongoing, including that of Rwandan priest Wenceslas Munyeshyaka, the “Disappeared of the Beach” in Congo Brazzaville, and Callixte Mbarushimana for his alleged participation in the 1994 Rwandan genocide.

A. Jurisdictional Challenges

1. Presence

With respect to crimes that may be prosecuted under article 689 of the Criminal Procedure Code and to crimes committed in the former Yugoslavia and Rwanda, presence of the suspect on French territory must be established before a criminal investigation can be launched.²⁴⁶ Where a complaint has been filed directly with the investigative judge, the private party filing the complaint has to include some indication that the alleged perpetrator is present in France. In the case of Wenceslas Munyeshyaka, for instance, victims included in their complaint an article published in a local French newspaper that mentioned his name in connection with a local event.²⁴⁷ The judicial authorities can order an investigation to corroborate the allegations that the person is present on French territory.

Presence is only required for an investigation to commence, and can proceed even if the suspect leaves the territory in the course of the investigation. Trials *in absentia* in universal jurisdiction cases are possible, as in the Ely Ould Dah case, already mentioned.²⁴⁸ In 1999, while Ely Ould Dah was staying in France, two French organizations filed a complaint on behalf of two victims against him on charges of

²⁴⁴ The Criminal Code in articles 211-1 to 212-3 refers to crimes against humanity and genocide. Neither is subject to universal jurisdiction, except as provided for by Laws No. 95-1 of January 2, 1995, and 96-432 of May 22, 1996.

²⁴⁵ For an overview of the issues involved see documentation by the FIDH available online at <http://www.fidh.org/IMG/pdf/ely2005f.pdf> (retrieved May 2006).

²⁴⁶ Code of Criminal Procedure, art. 689.1; Law No. 95-1 of January 2, 1995, art. 2; and Law No. 96-432 of May 22, 1996, art. 2. For further information on presence see FIDH, “Implementing the principle of universal jurisdiction in France,” March 2006, [online] http://www.fidh.org/IMG/pdf/universal_juris.pdf (retrieved May 2006).

²⁴⁷ Human Rights Watch interview with French officials, May 10, 2006.

²⁴⁸ Code of Criminal Procedure, art. 410 in combination with art. 412.

torture. The lieutenant was first imprisoned and later placed under judicial supervision. In 2000 he managed to escape to Mauritania. The investigating judge continued with the proceedings and ordered a trial before the *Cour d'Assises*. Both the Court of Appeal and the *Cour de Cassation* confirmed the decision of the investigating judge to proceed with the case, even though the accused remained in Mauritania.

2. Immunities

Where an investigative judge receives a case involving potential immunity issues, the case is usually referred to the Ministry of Foreign Affairs, which has a special unit dealing with such issues. The case is then referred back to the investigative judge in charge of the case with a determination to proceed or not proceed.²⁴⁹ In the *Disappeared of the Beach* case, a complaint filed by an NGO against Jean-François Ndengue, chief of the National Police of the Republic of Congo (Brazzaville) for crimes against humanity, enforced disappearances and torture led to the indictment and preliminary arrest of Ndengue on April 1, 2004 while on a private visit to France. The public prosecutor appealed against this decision to the Court of Appeal, which held that Ndengue was entitled to immunity. He was released and left France immediately. The public prosecutor denounced the decision of the investigative judge placing Ndengue in detention as arbitrary, and the French Foreign Ministry justified the decision to release him by the fact that Ndengue was holding a valid diplomatic passport and that he was on an official visit to France.²⁵⁰

A warrant for the arrest of Zimbabwean President Robert Mugabe, accused of torture, was issued by a Paris magistrate on February 17, 2003, when Mugabe was visiting Paris for a Franco-African summit. A French court ruled, however, that Mugabe holds immunity from prosecution as a sitting head of state.²⁵¹ In the Nezzar case, a complaint was filed against a former Algerian defense minister and member of the High Committee of State, Khaled Nezzar, for torture in Algeria. In response to a press inquiry, the French Ministry of Foreign Affairs said that General Nezzar was on an official mission in France (although he reportedly had no meetings planned with French officials) and the Algerian embassy stated that he was carrying a diplomatic passport. The prosecutor promptly opened a preliminary investigation the same afternoon, but the suspect left a few hours later on a private aircraft.

²⁴⁹ Human Rights Watch interview with French officials, May 10, 2006.

²⁵⁰ See www.fidh.org/afriq/dossiers/sassou/sassou.htm for summary of facts and procedure (French only). (retrieved January 5, 2006).

²⁵¹ See Redress, "Universal Jurisdiction Update," April 2003, available online at <http://www.redress.org/publications/UJ%20Update%20-%20Apr03%20-%20final.pdf> (retrieved May 2006).

In the case against Tunisian vice-consul Khaled Ben Said, accused of torture by a Tunisian national in 2001, the suspect attempted to invoke immunity in connection with his diplomatic status after being identified and located by the French police at the Tunisian Consulate in Strasbourg.²⁵² However, a French prosecutor did not recognize this claim for immunity and, after a preliminary investigation into the alleged acts, issued proceedings against Ben Said. When the accused fled France, the examining judge issued an international arrest warrant on February 15, 2002.²⁵³

With respect to allegations that the complaints in the *Ould Dab* case fell under a Mauritanian amnesty law, the judge took the view that “whatever the legitimacy of an amnesty in the context of a local policy of reconciliation, this law has effect only in the territory of the State concerned and is not opposable to third countries in the context of the application of international law”.²⁵⁴ The court stated that recognizing the applicability of a foreign amnesty law in France would be tantamount to a violation by the French national authorities of their international obligations and to negating the very principle and purpose of universal jurisdiction. The magistrate therefore ruled that jurisdiction applied, and issued an indictment against the accused.²⁵⁵

3. Limitation

Felonies, including the crime of torture, are subject to a limitation period of ten years, starting from the day of the commission of the crime, if during this period no investigative step was taken.²⁵⁶ Although not yet subject to universal jurisdiction, it is worth mentioning that crimes against humanity and genocide—as contained in the Criminal Code since 1994—are not subject to statutes of limitation.²⁵⁷

4. Subsidiarity

While the ICTR and ICTY would enjoy primary jurisdiction if they requested it, French courts can exercise jurisdiction concurrently with other jurisdictions. Authorities proceed on the basis that if the other jurisdiction succeeds with a prosecution, they will stop their own investigation, in accordance with the principle of *no bis in idem*. According to

²⁵² Human Rights Watch telephone interview with French official, November 22, 2005.

²⁵³ For more information on this case see FIDH at <http://www.fidh.org/communiq/2002/tn0403a.htm> (retrieved May 2006).

²⁵⁴ Unofficial translation.

²⁵⁵ Cour de Cassation, decision N° de pourvoi: 02-85379, October 23, 2002, available online at <http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXRXAX2002X10X06X00195X000> (retrieved May 2006).

²⁵⁶ Code of Criminal Procedural, art. 7. When committed against minors, the limitation period is twenty years, and it does not start running until the minor has “come to age.” Art. 7 in combination with art. 706-47.

²⁵⁷ Criminal Code, art. 213-5.

French officials, this has the advantage of keeping their own proceedings ongoing in case the proceedings in the territorial state do not lead anywhere.²⁵⁸

B. Practical Arrangements for the Exercise of Universal Jurisdiction in France

1. Special departments in charge of the investigation and prosecution of international crimes

There is no special police unit that deals exclusively with international crimes in France. The investigative judge or prosecutor in the judicial district where the alleged perpetrator is found or where the complaint is brought has competence to prosecute international crimes cases (territorial competence). In Paris, a number of “special units” have been created to investigate and prosecute terrorism, organized crime, crimes against children and public health-related crimes, among others. International crimes are dealt with by the investigative judges in the “general unit,” however, along with ordinary crimes. As no such unit has been created in relation to international crimes, individual investigative judges are seized randomly within their judicial district and are left to manage such cases on their own, without either expert assistance or additional administrative support. As this prevents investigative judges from accumulating experience and expertise, the *Cour de Cassation* in 2001 decided that it was in the interests of the administration of justice to group all cases concerning crimes committed in Rwanda within the jurisdiction of the Paris judicial authorities.²⁵⁹ However, even within the Paris jurisdiction, no specific competence for these crimes exists and complaints are distributed among the investigative judges of the general unit.²⁶⁰

2. Notification

Universal jurisdiction cases that were investigated and/or prosecuted were all initiated by private parties relying on the *parties civiles* provisions of the French Criminal Procedure Code.²⁶¹ All complainants in these cases were assisted by NGOs.²⁶² No special department within the immigration authorities exists to refer cases of alleged perpetrators of international crimes to investigative judges.²⁶³

²⁵⁸ Human Rights Watch interview with French officials, May 10, 2006.

²⁵⁹ Cour de Cassation, September 26, 2001. For an overview of Rwandan case in France see http://www.fidh.org/article.php3?id_article=857 (retrieved May 2006).

²⁶⁰ Human Rights Watch interview with French officials, May 10, 2006.

²⁶¹ Code of Criminal Procedure, art. 1.

²⁶² This assistance is based on the Code of Criminal Procedure, art. 2-1, which provides for associations that are committed to assist victims of, inter alia, torture, to exercise the same rights as a private party.

²⁶³ Human Rights Watch interview with French officials, May 10, 2006.

3. *Decision to investigate and prosecute*

The investigating judge is in charge of the investigation and can require the assistance of the “judicial police.”²⁶⁴ The investigative judge can be seized of a case by the prosecutor, who has a degree of discretion as to whether to refer a complaint to the investigative judge.²⁶⁵ Should a victim or another third party relying on the *parties civiles* provision decide to file a complaint directly with the investigative judge, an investigation must be initiated taking into account the submissions of the district prosecutor.²⁶⁶ The complaint is sent to the district prosecutor for the latter’s submissions. An investigation can only be refused when the investigative judge is convinced by a submission of the prosecution “that the facts of the case cannot lead to a lawful prosecution for reasons relating to the right to prosecute.”²⁶⁷ If the investigative judge does not investigate a complaint due to the submission of the prosecution, the complainants can appeal that decision to the Chamber of the *Cour d’Assises*, while the prosecutor has the same right should the investigative judge disregard his submission against opening an investigation.²⁶⁸ Victims thus have direct access to justice, and the first conviction based on universal jurisdiction in France was based on the initiative of the *parties civiles* in the Ely Ould Dah case. An appeal directly against a prosecutor’s decision not to investigate is not possible.

The current draft of the legislation implementing the Rome Statute of the International Criminal Court proposes to abrogate the right of private parties to lodge complaints regarding crimes against humanity and war crimes with the investigative judge, and grants this right exclusively to the prosecution. The decision to prosecute is based on a recommendation of the investigative judge, who, once the investigation is complete, takes into account the evidence at his or her disposal. The chamber of the *Cour d’Assises* then decides on the recommendation of the investigative judge.²⁶⁹

4. *Investigation*

Once the investigative judge is seized with a case and the prosecutor’s submissions have been received, evidence from open sources and available in France is sought by the investigative judge and the judicial police. This proved to be sufficient in the Ely Ould Dah case, where the conviction in absentia was secured on the basis of witnesses and

²⁶⁴ Code of Criminal Procedure, art. 51.

²⁶⁵ Code of Criminal Procedure, art. 40.

²⁶⁶ Code of Criminal Procedure, art. 1 and art. 85.

²⁶⁷ Code of Criminal Procedure, art. 86.

²⁶⁸ Code of Criminal Procedure, art. 177- 2.

²⁶⁹ Cases involving serious crimes such as torture are usually dealt with by the Cour d’Assises. Code of Criminal Procedure, arts. 231 to 380.

other evidence available in France.²⁷⁰ To date, no investigation based on universal jurisdiction has been carried out by French officials in another country. This is due to a variety of factors depending on the cases, including lack of cooperation by the authorities of the territorial state, or lack of resources available to the judicial police.²⁷¹

C. Cooperation

1. International cooperation

No use has yet been made of the EU Network or the Interpol working group on International Crimes to exchange experiences gained by other national authorities when investigating abroad. When French officials sent a letter rogatory to their counterparts in Rwanda to obtain permission to investigate as well as assistance from local authorities, it took three years to receive a reply, which was negative. Consequently, no investigation could be carried out and the case is still under investigation. The procedure to establish cooperation is complex and requires follow-up from those in charge of transmitting the request for cooperation. While a contact point for international cooperation in criminal matters exists within the Ministry of Justice, there are no standard procedures in place on how to handle such requests.

D. Role and Rights of Victims and Witnesses

1. Victims—Compensation and legal representation

Civil claims can be brought as part of criminal prosecutions, including those based on universal jurisdiction. Article 3 of the Criminal Procedure Code provides that “the civil action may be exercised at the same time as the public prosecution and before the same court. It is admissible for any cause of damage, whether material, bodily or moral, which ensues from the actions prosecuted.” According to article 2, civil litigation can be pursued by anyone for damages suffered as a result of crimes under French law. Victims can claim compensation from the alleged perpetrator of the crimes, or, in another procedure, from the “State Compensation Scheme,” which is in place for, inter alia, serious crimes.²⁷² Victims (bearing French nationality or not) wishing to exercise their right as *parties civiles* and/or as civil claimants are entitled to legal representation, the costs of which are covered by legal aid where they cannot provide for it themselves.²⁷³

²⁷⁰ For an overview of the issues involved see documentation by the FIDH at <http://www.fidh.org/IMG/pdf/ely2005f.pdf> (retrieved May 2006).

²⁷¹ Human Rights Watch interview with French officials, May 10, 2006.

²⁷² Code of Criminal Procedure, art. 475-1. For further information on victims' rights in French criminal proceedings see MEI Brien and E.H. Hoegen (2000) *Victims of Crime in 22 European Criminal Justice Systems*, [online] <http://www.victimology.nl/onlpub/Brienenhoegen/bh-ch8france.pdf> (retrieved May 2006).

²⁷³ Code of Criminal Procedure, art. 53-1.

2. Witnesses

While the investigative judge can take written statements from witnesses, French court proceedings are conducted on the principle of orality. Therefore, the key witnesses will be heard by the trial judge during the trial. It is not permitted under French procedural law to videotape witness statements and to rely on these during trial. Instead, witnesses could testify via video-link.²⁷⁴ Certain specific provisions exist in French law concerning the protection of witnesses in cases of grave crimes and where there is a serious risk to the witnesses' safety providing, for instance, witnesses with the possibility to give testimony anonymously.²⁷⁵ Further, the intimidation or threatening of witnesses is considered an aggravating circumstance and will lead to a more severe punishment of the offender.²⁷⁶

E. Fair Investigation and Trial

Investigative judges are obliged to investigate inculpatory and exculpatory evidence.²⁷⁷ Representation of the defendant is guaranteed by providing legal aid where the accused is not able to pay for it.²⁷⁸ The defense lawyer must be able to challenge all evidence relied upon by the prosecution during trial, as the trial judge must only reach a decision based on the evidence which has been laid before the judge during trial ("principle of contradiction"). Anyone convicted in absentia can file an application with the court to have the enforcement of the judgment set aside.²⁷⁹

²⁷⁴ Code of Criminal Procedure, art. 706-61.

²⁷⁵ Code of Criminal Procedure, art. 706-58.

²⁷⁶ Criminal Code, arts. 222 and 322.

²⁷⁷ Code of Criminal Procedure, art. 81.

²⁷⁸ Legal Aid Act (Law No. 91-647 of July 10, 1991), art. 2, reads as follows: "Natural persons with insufficient means to enable them to assert their rights in the courts shall be eligible for legal aid. Such aid may be full or partial."

²⁷⁹ Code of Criminal Procedure, arts. 489-493.

IX. Germany

The German Code of Crimes against International Law (CCAIL),²⁸⁰ which came into force on June 30, 2002, provides for universal jurisdiction over genocide, crimes against humanity and war crimes. International crimes committed before this date have to be considered under paragraph 6 number 1 of the German Criminal Code, providing for universal jurisdiction over genocide, and paragraph 6 number 9, which provides for universal jurisdiction over international crimes that Germany has a treaty obligation to prosecute.²⁸¹ Except for the crime of genocide,²⁸² there was no implementing legislation prior to June 30, 2002, and all complaints regarding international crimes thus had to be investigated and prosecuted on the basis of crimes defined in the German Criminal Code.²⁸³ Several international crimes committed in the former Yugoslavia were investigated and prosecuted by German authorities in the 1990s, but no complaints have been investigated since the new Code came into force. A new provision in the Criminal Procedure Code provides the federal prosecutor with considerable prosecutorial discretion.²⁸⁴ Cases against U.S. Defense Secretary Donald Rumsfeld, former Chinese President Jiang Zemin and former Uzbek Minister of Interior Zokirjon Almatov, have not been investigated as the federal prosecutor relied on the discretion provided for in the Criminal Procedure Code.

A. Jurisdictional Challenges

1. Presence

Before 2002 German courts held with regard to crimes committed in the former Yugoslavia that German authorities could only exercise universal jurisdiction where the suspect was present in Germany, or some other “legitimizing link” existed between the

²⁸⁰ Act introducing the Code of Crimes Against International Law (*Gesetz zur Einführung des Völkerstrafgesetzbuchs*), BGBl.2002 I, P 2254 (Federal Law Gazette of the Federal Republic of Germany), June 26, 2002, official English translation available online at <http://www.iuscrim.mpg.de/forsch/legaltext/vstgbleng.pdf> (retrieved March 2006). For comments see *Bundestag Drucksache* 14/8524, March 13, 2002, available in German at <http://www.iuscrim.mpg.de/forsch/straf/docs/BT-Drucks.%20148524%20VStGB.pdf> (retrieved March 2006).

²⁸¹ German Criminal Code (*Strafgesetzbuch*), unofficial English translation available online at <http://www.iuscomp.org/gla/statutes/StGB.htm> (retrieved March 2006).

²⁸² Previously art. 220a, repealed by the CCAIL.

²⁸³ For instance, grave breaches of the Geneva Conventions as murder pursuant to paragraph 211 of the Criminal Code or unlawful deprivation of personal liberty pursuant to paragraph 239 of the Criminal Code. In *Public Prosecutor v. Djajic*, the Bavarian High Court (*Bayerisches Oberstes Landesgericht*) in its judgment of May 23, 1997, convicted Novislav Djajic, a member of the Bosnian Serb forces, for aiding and abetting manslaughter, instead of the war crime of willful killing.

²⁸⁴ Code of Criminal Procedure (*Strafprozessordnung*), art.153f, introduced with the coming into force of the CCAIL, available (in German) at <http://www.gesetze-im-internet.de/bundesrecht/stpo/gesamt.pdf> (retrieved March 2006).

crime and Germany.²⁸⁵ This requirement was thought to have been overcome by the entry into force of the CCAIL, which does not make the exercise of universal jurisdiction by German authorities dependent on the presence of the suspect or any other link to Germany.²⁸⁶ However, paragraph 153f of the Criminal Procedural Code, introduced in conjunction with the CCAIL, provides the federal prosecutor with discretion to refrain from starting an investigation where the suspect's presence cannot be anticipated.²⁸⁷ Although not required to start an investigation, practitioners indicated to Human Rights Watch that an investigation is far more likely to start in cases where the suspect is present in Germany, since this would increase the likelihood of a successful investigation.²⁸⁸ The suspect's presence or anticipated presence makes an investigation obligatory, provided that no other jurisdiction is carrying out a genuine investigation of the crimes.²⁸⁹ This follows from the principle of not providing a safe haven to perpetrators of international crimes.

2. Immunities

While the CCAIL is silent on the issue of immunity, Germany's Judiciary Act (*Gerichtsverfassungsgesetz*) does recognize two forms of immunity: article 20 (1) confers immunity on representatives of other states and their delegations and those present in Germany by invitation of Germany. Article 20 (2) recognizes general rules of public international law concerning sovereign immunity.²⁹⁰ Relying on this latter provision, the federal prosecutor in 2003 accepted immunity for the former Chinese President Jiang Zemin. The prosecutor adopted an expansive reading of the ruling of the International Court of Justice in the case of the Democratic Republic of the Congo v. Belgium ("Arrest Warrant" case)²⁹¹ as conferring immunity on former as well as current heads of state/government and foreign ministers.²⁹²

²⁸⁵ The Federal Supreme Court in the case of Nicola Jorgic, April 30, 1999.

²⁸⁶ Section 1 of the CCAIL provides for absolute universal jurisdiction: "This Act shall apply to all criminal offenses against international law designated under this Act, to serious criminal offenses designated therein even when the offense was committed abroad and bears no relation to Germany."

²⁸⁷ Code of Criminal Procedure, para. 153f, (2), No 2. For a commentary in German to paragraph 153f see *Bundestag Drucksache* 14/8542, March 13, 2002, pp. 37-38.

²⁸⁸ Human Rights Watch interview with German officials, December 12, 2005.

²⁸⁹ Code of Criminal Procedure, para. 153f, (2).

²⁹⁰ A German version of the *Gerichtsverfassungsgesetz* is available online at <http://bundesrecht.juris.de/gvg/>.

²⁹¹ *Case concerning the Arrest Warrant of 11 April 2000* (The Democratic Republic of Congo v. Belgium), Judgment of April 14, 2002, available online at http://www.icj-cij.org/iccjwww/idocket/icobe/icobejudgment/icobe_jjudgment_20020214.PDF (retrieved March 2006).

²⁹² A copy of the decision of the federal prosecutor is online available (in German) at <http://www.diefirma.net/download.php?8651010ea2af5be8f76722e7f35c79de&hashID=44b8c6eba6a3530e554210fa10d99b3a> (retrieved May 2006).

3. Limitation

Under the CCAIL, none of the crimes referred to are subject to statutes of limitation.²⁹³ As no implementing legislation existed prior to 2002 except in cases of genocide, other international crimes committed before the enforcement of the CCAIL, such as torture and grave breaches of the Geneva Conventions, have to be investigated and prosecuted on the basis of the German Criminal Code and consequently are subject to a statute of limitations.²⁹⁴

4. Subsidiarity

The German federal prosecutor will only exercise universal jurisdiction if the competent authorities of the territorial state, or of the state of nationality of the suspect or victim, refrain from carrying out a genuine investigation and where the International Criminal Court or another competent international tribunal does not investigate the case.²⁹⁵ These limiting considerations stopped the investigation of a complaint filed by Iraqi torture victims against Donald Rumsfeld and others with the federal prosecutor. Referring explicitly to paragraph 153f, the prosecutor argued that the crimes referred to in the complaint (war crimes against persons and grievous bodily harm), were already under investigation by U.S. authorities and therefore the principle of subsidiarity would not permit German authorities to investigate the complaint. According to the prosecutor's argument, the principle of subsidiarity does not permit national authorities to take into account whether national authorities are investigating the individual referred to in the complaint but rather whether the U.S. authorities were investigating the *complex* as a whole.²⁹⁶ As the federal prosecutor answered this question in the affirmative, he did not consider it possible or necessary for German authorities to start an investigation.

²⁹³ Section 5 of the CCAIL: "The prosecution of serious criminal offenses pursuant to this Act and the execution of sentences imposed on their account shall not be subject to any statute of limitation."

²⁹⁴ Serious Bodily Harm as torture would be subject to a limitation period of twenty years. See Criminal Code, para. 78 (3) 2 in combination with para. 224.

²⁹⁵ Human Rights Watch interview with German officials, December 12, 2005. See also commentary to the CCAIL, *Bundestag Drucksache* 14/8542, March 13, 2002, pp. 37-38.

²⁹⁶ The German federal prosecutor referred to investigations and prosecutions carried out by U.S. authorities against low-level soldiers as constituting a genuine investigation; the prosecutor interpreted the principle of complementarity of the Rome Statute to mean that the national authorities are required to consider the concept of prosecution on the basis of the whole complex and not in relation to an individual alleged criminal and his special part in the deed. For an English translation of the prosecutor's decision see http://www.ccr-ny.org/v2/legal/september_11th/docs/german_appeal_english_tran.pdf (retrieved February 2006).

B. Practical Arrangements for the Exercise of Universal Jurisdiction in Germany

1. Special departments in charge of the investigation and prosecution of international crimes

The crimes committed during the wars in the former Yugoslavia led to a wave of refugees arriving in Germany, among them a number of suspected perpetrators of international crimes. A total of 128 investigations into the crimes committed during the wars have been conducted since 1993, and led to the establishment of a specialized unit within the Federal Criminal Police Office (*Bundeskriminalamt*, or BKA) for the investigation of war crimes committed in the former Yugoslavia.²⁹⁷ German authorities recognized the need to concentrate the competence of experienced practitioners within one unit in order to deal with the challenges of investigating international crimes while also acting as a contact point for both national and international police investigators.²⁹⁸

Since 2001, however, the number of BKA staff working on international crimes has been gradually reduced, such that now only one investigator works on international crimes on a daily basis. The investigator is in charge of international crimes and serves as a contact point between the BKA and the federal prosecutor.

The federal prosecutor is in charge of the investigation and prosecution of international crimes. It deals with all cases of international crimes under the CCAIL and with most complaints regarding crimes committed before 2002.²⁹⁹ Where the federal prosecutor decides that an investigation is necessary, it will usually refer the complaint to the BKA and supervise the investigation.

2. Notification

No special department within the immigration authorities exists, and most complaints to date filed under the CCAIL have been filed by private parties. The German federal prosecutor so far has not considered an investigation on the basis of newspaper reports,

²⁹⁷ Claudia Ilgner, investigator of the Federal National Police, "*Besonderheiten und Problemstellungen bei Strafverfolgungsmassnahmen und kriminalpolizeilichen Ermittlungen wegen Völkermordes, Verbrechen gegen die Menschlichkeit und Kriegsverbrechen*," presentation given during the conference "*Der Internationale Strafgerichtshof - fünf Jahre nach Rom*," Berlin, 2003, documentation available at http://files.institut-fuer-menschenrechte.de/488/d30_v1_file_40e162450cb01_Theissen_Nagler_2004_IStGH_Dokumentation.pdf (retrieved March 2006).

²⁹⁸ Ibid

²⁹⁹ The competence over international crimes as in the CCAIL lies exclusively with the federal prosecutor, according to paragraph 142 in combination with paragraph 120 I No. 8 of the Judiciary Act ("*Gerichtsverfahrensgesetz*").

as these are deemed insufficient information for a successful investigation.³⁰⁰ Only a small number of complaints concerning international crimes have been received so far, a fact that is invoked to justify the low number of people working exclusively on international crimes.³⁰¹

3. Decision to investigate and prosecute

The decision to investigate and prosecute a complaint of the CCAIL is taken exclusively by the federal prosecutor. As noted above, a new provision in the Code of Criminal Procedure gives the prosecutor the discretion to decline to open an investigation where the suspect is not on (or anticipated to be on) German territory or where the territorial state or an international tribunal is exercising jurisdiction over the matter.³⁰² Where the suspect is present or likely to be present, the prosecution is obliged to investigate unless a country with priority jurisdiction is already carrying out a genuine investigation.

The case against Jiang Zemin illustrated that where the suspect is not present in Germany, the prosecution will take into account other aspects such as the practical ability of German investigators to investigate the complaint with a view to prosecuting the individual.

Practitioners indicated to Human Rights Watch that the overall context is considered, and that the possibility of questioning witnesses in other European countries is disregarded even where the presence and identity of such witnesses in neighboring countries is specified by the complainants. A decisive element in the exercise of prosecutorial discretion is therefore the suspect's presence, in combination with the principle of subsidiarity and the ease with which German authorities are able to investigate the crimes.³⁰³ The federal prosecutor's decision not to open an investigation against former Uzbek Minister of Interior Zokirjon Almatov illustrates the approach towards international crimes favored by the federal prosecutor: The prosecution argued that the likelihood of a successful investigation was non-existent and that therefore no investigation would be opened.³⁰⁴

When the complainants in the case against Donald Rumsfeld and others tried to appeal against the decision of the federal prosecutor not to initiate an investigation, the Higher

³⁰⁰ Human Rights Watch interview with German officials, December 12, 2005.

³⁰¹ Ibid.

³⁰² Code of Criminal Procedure, para. 153f, (2), No. 2.

³⁰³ Human Rights Watch interview with German officials, Meckenheim, December 12, 2005.

³⁰⁴ See press statement issued by the federal prosecutor (*Generalbundesanwalt*) on March 30, 2006, [online] <http://www.generalbundesanwalt.de/news/index.php?Artikel=191&Thema=7&Start=0> (retrieved April 2006).

Regional Court dismissed the appeal as inadmissible.³⁰⁵ Accordingly, complainants do not have the opportunity to appeal to the courts against the decision of the federal prosecutor not to investigate according to 153f Code of Criminal Procedure.³⁰⁶ Instead complainants must direct their complaint to the Ministry of Justice in a purely administrative procedure.

4. Investigation

The BKA will usually be ordered by the federal prosecutor to investigate complaints filed under the CCAIL.³⁰⁷ However, as mentioned above, there have been no such referrals as yet. 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. In light of the considerable experience German practitioners obtained in the investigation of international crimes, and the fact that a specialized unit has existed in this capacity, the current commitment does not seem to correspond to that once shown on a practical level by German authorities.

C. Cooperation

Each complaint is considered first and foremost on the basis of its possible investigation within Germany and therefore cooperation is only considered once it has been decided that an investigation will take place.

1. EU Network

A contact point within the Ministry of Justice deals with all requests for cooperation in international criminal law. As such the contact point has dealt with requests from other countries, but due to a lack of investigations carried out by German authorities he has not yet had to transfer requests regarding international crimes on behalf of German authorities to another country.³⁰⁸

³⁰⁵ For an English translation of the decision see http://www.ccr-ny.org/v2/legal/september_11th/docs/German_HigherRegionalCourt_decision.pdf (retrieved February 2006).

³⁰⁶ Code of Criminal Procedure, para. 172 (2).

³⁰⁷ Human Rights Watch interview with German officials, December 12, 2005.

³⁰⁸ Human Rights Watch telephone interview with German official, November 7, 2005.

2. Interpol

Interpol is considered a useful platform for sharing information and expertise, but in the absence of active cases it is not used in the investigation of international crimes.

D. Role and Rights of Victims

1. Victims - Compensation and legal representation

Victims can participate in criminal proceedings as joint plaintiffs and theoretically claim compensation from the accused in criminal proceedings, provided that their claim will not require separate evidence and is not too complex.³⁰⁹ Otherwise, compensation must be pursued in civil proceedings. Victims who cannot pay for their legal representation are entitled to legal aid, the amount of which has to be decided by the relevant court.³¹⁰

Victims are primarily witnesses in German proceedings and as such, their access to justice is limited to the possibility of filing a complaint with the federal prosecutor. The detailed evidence necessary for a complaint that will convince the federal prosecutor to initiate an investigation of the complaints will generally require legal assistance or representation.³¹¹ A complaint filed by a victim or an NGO must contain a selection of evidence, witnesses and some persuasive indications that the accused is in Germany. It must also take account of any political dimensions to the complaint.³¹²

E. Fair Investigation and Trial

Any investigation of international crimes under the CCAIL is carried out under the supervision of the federal prosecutor. It is the responsibility of the prosecution to investigate inculpatory and exculpatory evidence.³¹³ During the investigation, the defense is entitled to be present when statements are taken by the court from the accused or any other witness, and to obtain access to any expert opinion.³¹⁴ Once the investigation has been completed, the entire dossier of evidence that the prosecution will rely upon before the court must be made available to the defense.³¹⁵ The defense can request the police to carry out further investigation and where the prosecution does not comply, the defense can apply for a court order for further investigation.³¹⁶ The court therefore has a

³⁰⁹ Code of Criminal Procedure, para. 406 (1).

³¹⁰ Code of Criminal Procedure, para. 404 (5).

³¹¹ Human Rights Watch telephone interview with German lawyer, September 21, 2005.

³¹² Human Rights Watch interview with German officials, December 12, 2005.

³¹³ Code of Criminal Procedure, para. 160 (2).

³¹⁴ Code of Criminal Procedure, para. 168c (2), (3).

³¹⁵ Code of Criminal Procedure, para. 147.

³¹⁶ Code of Criminal Procedure, para. 201.

supervisory role from the moment the prosecution decides to indict the accused. The accused is entitled to legal aid where he or she cannot afford to pay for it.³¹⁷

³¹⁷ Code of Criminal Procedure, paras.140-150.

X. Netherlands

Under the International Crimes Act of June 19, 2003 (ICA),³¹⁸ Dutch courts can exercise universal jurisdiction over genocide, war crimes, crimes against humanity and torture provided that the perpetrator is present in the Netherlands and that the crimes were committed after the entry into force of the act on October 1, 2003.³¹⁹ International crimes committed before that date have to be dealt with under previous law, the Wartime Offenses Act of July 10, 1952, the Genocide Convention Implementation Act of 1964 and the Act implementing the Convention against Torture of 1988.³²⁰

Since 2001 prosecutions based on universal jurisdiction and leading to a conviction include the case of Sebastien Nzapali, a Congolese national who was sentenced to two-and-a-half years of imprisonment on April 7, 2004, for leading death squads in Kinshasa between 1990 and 1995.³²¹ In October 2005, two perpetrators from Afghanistan were condemned to twelve and nine years of imprisonment respectively for their involvement in war crimes and torture in Afghanistan.³²² Proceedings are currently suspended in a case against former Suriname President Desi Bouterse, accused of playing a key role in the murder of fifteen opposition political party members in Suriname. In 2001 the Dutch Supreme Court found that the accused could not be tried in absentia, and that the Act Implementing the Torture Convention could not be applied retroactively.³²³

³¹⁸ Act of June 19, 2003, containing rules concerning serious violations of international humanitarian law, official English translation available online at http://www.minbuza.nl/default.asp?CMS_ITEM=48969E53AB41497BB614E6E9EAABF9E0X3X35905X73 (retrieved March 2006).

³¹⁹ International Crimes Act, sections 2 (1) (a), (c), 2 (3), in conjunction with sections 3 to 8 and section 10 defining the crimes. The introduction to the act emphasizes that the provisions of the act cannot be applied ex post facto. See http://www.minbuza.nl/default.asp?CMS_ITEM=MBZ459385 (retrieved March 2006).

³²⁰ The Wartime Offenses Act (*Wet Oorlogsstrafrecht*) has been modified by the ICA, while both the Genocide Convention Implementation Act (*Uitvoeringswet genocideverdrag*) and the Torture Convention Implementation Act (*Uitvoeringswet folteringverdrag*) have been repealed by articles 19 and 20 of the ICA respectively. Article 21 (1) provides for prosecutions for genocide or torture that had been initiated before the entry into force of the ICA to continue under the previous legislation. Article 21 (2) refers to torture offenses committed before October 1, 2003, to be punishable according to provisions of the Torture Convention Implementation Act.

³²¹ Rotterdam District Court, April 7, 2004, A0 7287, Rotterdam, 000050-30; official English translation available online at http://www.coeicl.de/dokumente/NL_Nzapali_Judgement.pdf (retrieved March 2006).

³²² The Hague District Court, October 14, 2005, AV 1489 and AV 1163, Gravenhage, 09/751005-04; official English translation of the judgments of both cases are available online at http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp?searchtype=ijn&ijn=AV1163&u_ijn=AV1163 and http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp?searchtype=ijn&ijn=AV1489&u_ijn=AV1489 (retrieved March 2006).

³²³ On December 18, 2001, the Supreme Court reversed a decision of the Amsterdam Appeal Court that ordered the public prosecutor to open an investigation into Bouterse's alleged involvement. See http://www.iccninbuzanl.econom-i.com/default.asp?CMS_ITEM=5813F8A1C1D44C3EB9120730BFD9318DX3X55889X32&CMS_NOCOOKIES=YES (retrieved March 2006).

A. Jurisdictional Challenges

1. Presence

The ICA expressly requires the suspect's presence in the Netherlands for Dutch authorities to carry out an investigation based on universal jurisdiction.³²⁴ The legislation does not specify at which stage of a case the suspect has to be present for an investigation to start, but practitioners indicated to Human Rights Watch that an investigation will only be opened in cases where the suspect is present in the Netherlands.³²⁵ It is often challenging for individual victims to prove this presence, particularly for those who are not represented by a lawyer or who do not have the support of an NGO. Furthermore, the presence must be voluntary and Dutch courts will not issue an extradition request to secure a suspect's presence in the Netherlands. In *Bouterse*, the Supreme Court found that the accused, who was no longer a Dutch national following Suriname's independence from the Netherlands in 1975, could not be prosecuted in the Netherlands unless he appeared voluntarily on Dutch territory.³²⁶

2. Immunities

The ICA recognises immunity in accordance with international law for foreign heads of state and government and ministers of foreign affairs. This immunity is expressly limited to the time they are in office. Other persons enjoy immunity from the prosecution of these crimes in so far as it is recognized under customary international law or under any convention applicable within the Netherlands.³²⁷

3. Limitations

Statutes of limitations as contained in articles 70 and 76 of the Criminal Code do not apply to the crimes referred to in the ICA, with the exception of some war crimes referred to in section 7(1) of the ICA.³²⁸

4. Subsidiarity

Dutch authorities will only exercise universal jurisdiction if neither the territorial courts nor the ICC is exercising jurisdiction.

³²⁴ International Crimes Act, section 2 (1) (a).

³²⁵ Human Rights Watch interview with Dutch officials, Special Unit, October 6, 2005; Human Rights Watch interview with Dutch officials, Rotterdam, October 4, 2005.

³²⁶ A brief summary of the case is available in English online at http://www.iccnmbuzanl.econom-i.com/default.asp?CMS_ITEM=5813F8A1C1D44C3EB9120730BFD9318DX3X55889X32&CMS_NOCOOKIES=YES (retrieved March 2006).

³²⁷ International Crimes Act, section 16.

³²⁸ International Crimes Act, section 13.

B. Practical Arrangements for the Exercise of Universal Jurisdiction in the Netherlands

1. Special departments in charge of the investigation and prosecution of international crimes

a. Police

In 1998, a specialized war crimes team, NOVO,³²⁹ was set up by the Dutch government following an influx of alleged perpetrators seeking refuge in the Netherlands. After a negative evaluation of the NOVO team's performance in 2002,³³⁰ the war crimes unit now forms part of the Dutch national crime squad and was integrated into the *Landelijke Parket* (Prosecution Services). The capacities of the war crimes unit were doubled, and currently thirty-two people are working in the unit on a day-to-day basis on international crimes, ranging from administrative staff to criminal intelligence officers and investigators. The unit has a pool of experts at its disposal, including chemical weapons experts, criminal scientists, historians and anthropologists. Rather than employing these experts on a permanent basis, the unit recruits them as needed.³³¹ Since the evaluation in 2002, the strategy of investigating international crimes has changed and the emphasis is now on investigating abroad wherever this is feasible.³³² Cooperation with the immigration authorities, ministries and in particular the Prosecution Service has improved.³³³ Following these changes, three perpetrators of international crimes have been brought to justice on the basis of universal jurisdiction, resulting in a positive evaluation of the team's performance in February 2006.³³⁴

b. Prosecution

Several prosecutors form a department in the *Landelijke Parket*, working in close cooperation with the war crimes unit. The department became operational in 2003 following a decision taken by the Ministry of Justice to extend the mandate of the National Prosecutor's Office in Rotterdam to international crimes.³³⁵ Six staff in the

³²⁹ Nationaal Opsporingsteam Voor Oorlogsmisdrijven.

³³⁰ The evaluation was carried out by the University of Utrecht on behalf of the Ministry of Justice. A summary of the evaluation is available in English online at http://www.wodc.nl/images/ewb02nat_Summary_tcm11-25485.pdf (retrieved March 2006).

³³¹ Human Rights Watch interview with Dutch officials, October 6, 2005.

³³² Human Rights Watch interview with Dutch officials, October 6, 2005.

³³³ Evaluation carried out over the period 2002-2006, summary in English available online at http://www.justitie.nl/english/press/press_releases/archive/archive_2006/60313Improvement_in_war_crimes_in_vestigation.asp (retrieved March 2006).

³³⁴ Summary in English available online at http://www.justitie.nl/english/press/press_releases/archive/archive_2006/60313Improvement_in_war_crimes_in_vestigation.asp (retrieved March 2006).

³³⁵ Human Rights Watch email communication with staff of the *Landelijke Parket* in Rotterdam, January 27, 2006.

department work on international crimes: two prosecutors, two legal assistants (one of whom is an expert in international criminal law), and two administrative assistants.³³⁶

2. Notification

The two primary modes of notification of international crimes are the immigration services and the media.³³⁷ Persons seeking asylum in the Netherlands are screened by the Immigration and Naturalization Service (IND) for possible involvement in international crimes. The screening forms part of the application of the definition of “refugee” in the 1951 Refugee Convention.³³⁸ The Dutch IND has a special unit dealing exclusively with suspected “1F” cases. Where there is a suspicion of involvement in international crimes after two screening interviews, a third interview focusing exclusively on 1F issues will follow. If an asylum seeker’s claim is rejected on the grounds of alleged involvement in an international crime, the file is then sent to the prosecution authorities. One criterion that can place an asylum seeker on the list of 1F files is his or her former profession: in the 2005 Afghan war crimes case, the two accused were placed on the list because of their former rank as generals in the Afghan army.

In 2003, seventy 1F cases were referred to the prosecution services, 82 percent of which were not investigated after applying certain criteria,³³⁹ while the remaining 18 percent are still being considered. In the case of Nzapali, the immigration authorities refused to grant him refugee status on the basis of his possible involvement in international crimes. The police commenced investigations after some of his former victims recognized Nzapali and denounced him to the police.³⁴⁰

3. Decision to investigate and to prosecute

Although the war crimes unit and prosecution authorities discuss cases together, each has their own role: while the prosecution authorities look at a case from the judicial point of view, the police assess the evidence and the chances of a successful investigation. A list of criteria drawn up by the unit for every case involving international crimes is available to the prosecution to enable it to reach a decision about whether to

³³⁶ Ibid.

³³⁷ Human Rights Watch interview with Dutch officials, October 6, 2005.

³³⁸ Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954, art 1. Article 1F of the Refugee Convention renders an asylum seeker ineligible for refugee status if he or she has committed a “crime against peace, a war crime, or a crime against humanity” or a “serious non-political crime.”

³³⁹ Human Rights Watch interview with Dutch official, October 6, 2005.

³⁴⁰ See Human Rights Watch, “Netherlands: Congolese Torturer convicted,” *A Human Rights Watch Press Release*, April 7, 2004, [online] <http://hrw.org/english/docs/2004/04/07/congo8406.htm>.

investigate a complaint.³⁴¹ Where legal problems or a lack of evidence do not pose barriers, the prosecution considers a complaint on the basis of its mission statement: that the Netherlands should not become a safe haven for perpetrators of international crimes and should not permit its own nationals to go unpunished for international crimes committed abroad.³⁴²

Where the prosecution decides not to investigate, the complainant is informed and can appeal to the Appeals Court, which will consider the complaint and, where it considers it appropriate, order the prosecution to start an investigation.³⁴³

4. *Investigation*

The war crimes unit is proactive in the field—in addition to conducting national research in open sources at the outset of the investigation, the unit travels to the scene of the crimes and investigates on site. In past cases, 80-90 percent of the evidence was gathered abroad.³⁴⁴ Whenever the unit considers an investigation of international crimes, staff take into account the possibility of going abroad and any associated risks and problems. Before going abroad they look for evidence in the Netherlands, establish contact with exile communities and review NGO reports. When they go abroad, they make several trips: first, an informal trip is organized to establish contacts with the relevant authorities in countries with which no mutual legal assistance agreement exists or with countries where the security of everyone involved cannot be guaranteed. In difficult cases the unit sends two criminal intelligence officers who look for evidence and establish contacts with potential witnesses. Once the investigation by the unit is complete, they present their findings to an investigative judge. Then the prosecution service, an investigative judge and, where possible, the defense lawyer, travel to the territorial state to take statements of the witnesses found by the war crimes unit and carry out further investigations.³⁴⁵ In the case of Nzapali, Dutch officials spent several months pursuing an investigation in the Democratic Republic of Congo, in collaboration with Congolese authorities and NGOs.³⁴⁶

³⁴¹ Matters to consider with respect to every complaint include: possibility of investigation, presence of the suspect, possibility of proving that the suspect bears responsibility for the alleged crimes, severity of the crime, level of involvement of the suspect, prospects of the territorial state cooperating with Dutch authorities, and prospects of completing the case.

³⁴² Human Rights Watch interview with staff of the *Landelijk Parket*, October 4, 2005.

³⁴³ Code of Criminal Procedure 1994, arts. 12–13.

³⁴⁴ Human Rights Watch interview with Dutch official, October 6, 2005.

³⁴⁵ Human Rights Watch interview with Dutch official, October 6, 2005.

³⁴⁶ See Human Rights Watch, “Netherlands: Congolese Torturer convicted.”

C. Cooperation

1. National cooperation

There is cooperation between the immigration authorities, the war crimes unit and the prosecution services in the investigation and prosecution of universal jurisdiction cases. Complexity arises due to the need for coordination between the Prosecution Services and the Ministries of Justice and Foreign Affairs in the execution of requests for legal assistance in foreign countries. Each ministry evaluates requests for cooperation in light of its own mandate and priorities. The Ministry of Justice has a special department responsible for mutual legal assistance in criminal matters, and a policy and legal advisor dealing exclusively with requests from the war crimes unit and units from other countries. The department looks at the legal, policy and ethical implications of requests for legal assistance.³⁴⁷

EU mechanisms have streamlined requests for legal cooperation among EU member states, because they permit such requests to be made directly to the relevant judicial authorities. However, where corresponding authorities do not exist in the territorial state, where there is no mutual assistance treaty or where the safety of investigators, witnesses and victims cannot be guaranteed, an alternative approach may be used.³⁴⁸ The approach favored by Dutch investigators in the past has been to present their case and related requests to the Dutch embassy or consulate in the relevant territorial state, which then attempts to facilitate contacts with local authorities or witnesses. In establishing contact for an extraterritorial investigation the emphasis was placed on ensuring compliance with the principles of international law and respecting the sovereignty of the territorial state.

2. International cooperation

a. EU Network and Interpol

The EU Network is utilized as a mechanism for sharing information and experiences, and to discuss challenges faced in relation to legal assistance.³⁴⁹ Interpol is engaged as a source of practical guidance in relation to investigations.

b. Cooperation with the territorial state

Investigations have taken place in various countries including Afghanistan, Iraq, the Democratic Republic of Congo, Liberia, and Sierra Leone. Because investigations often

³⁴⁷ Human Rights Watch interview with Dutch official, October 4, 2005.

³⁴⁸ Human Rights Watch interview with Dutch official, October 4, 2005.

³⁴⁹ Human Rights Watch interview with Dutch official, October 4, 2005.

involve more than one country, it has proved impossible for the war crimes unit to contact the relevant Ministry of Justice or Ministry of Foreign Affairs for every piece of evidence they require from foreign states. In one case they received a reply from an authority of another country more than a year after their original request for assistance.³⁵⁰ Instead, investigators travel directly to the relevant country and present their case to the Dutch embassy and use embassy staff to establish contact with relevant people. Investigators also use their time in the territorial state to explain why they are pursuing the crime, and to encourage witnesses to come forward. They take translators from the Netherlands after screening them carefully for any potential involvement in the case or relationship to witnesses.

D. Role and Rights of Victims and Witnesses

1. Victims—Compensation and legal representation

Victims of international crimes can bring a claim for compensation in criminal proceedings, provided that their claim is not too complex and can be determined by the court during criminal proceedings.³⁵¹ (The majority of victims in the Afghan case lived in the territorial state and none lived in the Netherlands. In the Nzapali case, victims who lived in the Netherlands denounced Sebastien Nzapali to the Dutch police. The issue of compensation did not arise in either case, and the investigators do not raise the issue of compensation with victims.³⁵²)

Once the prosecution has been informed or receives a name of a victim, they will contact the victim and explain the proceedings, the rights of the victim and suggest an informal meeting. This includes information on the possibility of appeal should the prosecution decide not to investigate. The decision concerning whether to investigate can take months. The lawyer can assist the victim in lodging a complaint and an appeal if necessary. Legal representation can also push the prosecution to open an investigation, especially where the investigation is politically sensitive.³⁵³

³⁵⁰ Human Rights Watch interview with Dutch officials, October 6, 2005.

³⁵¹ Code of Criminal Procedure, section 51ff. The position of victims has been strengthened by the introduction of the Victim Act Terwee (the act is commonly known under the name Terwee, after the chair of the Act's preparatory committee, Mrs. Terwee-van Hilten), which was incorporated into the Code of Criminal Procedure, see: MEI Brien and EH Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, available online at <http://www.victimology.nl/onlpub/Brienenhoegen/bh-ch17netherlands.pdf> (retrieved June 2006).

³⁵² Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.

³⁵³ Human Rights Watch telephone interview with Dutch lawyer, October 25, 2005.

2. Witnesses

The war crimes unit investigates in the Netherlands within the relevant emigré community and tries to establish contacts there first. Once one witness is identified, this witness is relied on to identify other witnesses in the Netherlands, the territorial state, or elsewhere. The investigators have to find witnesses for both parties, but first look for incriminating witnesses, and only search for defense witnesses at the end of the investigation. This is in order to prevent defense witnesses from warning the suspect that he or she is being investigated against, and thus risking the suspect's escape.

Dutch investigators interview witnesses in Dutch embassies or diplomatic missions in the territorial state (in one case, an interview took place at the headquarters of the UN peacekeeping mission in a state). In order to reduce witnesses' exposure to publicity and help preserve confidentiality, witnesses are sometimes provided with pretexts to visit the place of the interview, and investigators avoid being seen in public with witnesses.³⁵⁴ Other means of protection have included providing witnesses with mobile phones, relocating witnesses, or providing them with financial means to hide for a certain period. Investigators warn witnesses of potential threats, and explain the limited ability of Dutch investigators to protect the witness in the territorial state.

It is common for Dutch courts to have witness testimonies read out during trial. In the recent Afghan war crimes trial, only one witness from overseas testified in person, while testimonies from other Afghan witnesses were read out in court. According to the prosecution, there are several reasons why witnesses are not heard in person in court, including a lack of funds available to provide for travel and accommodation, and the fact that witnesses often do not have a passport and therefore cannot travel to the Netherlands. In past cases it has been more convenient for Dutch officials to travel to the territorial state to take testimonies on site. No witnesses from Congo testified in person in the Nzapali trial. Witness testimonies were taken by a Dutch magistrate and the lawyer for the accused, who went to Congo to facilitate the questioning of witnesses. The testimonies were subsequently read out at the trial in the Rotterdam district court.

E. Fair Investigation and Trial

The accused is entitled to legal aid where he or she cannot afford to pay for legal representation. Witnesses for the defense are often provided by the defendants themselves, but if defense counsel wishes to conduct his or her own investigations in the territorial state, an application must be made to the court for additional funds. In the

³⁵⁴ Human Rights Watch interview with Dutch officials, Special Unit, Driebergen, October 6, 2005.

Afghan (Hesham and Jalalzoy) case,³⁵⁵ defense counsel asked the court for funds to pay for a private investigator. Travel costs to Afghanistan were awarded, but not the costs of hiring an investigator or traveling within the country.³⁵⁶ Additionally, funds for insurance were not sufficient and the lawyer could not accompany the prosecution and investigating judge on a second trip.

Defense counsel for Hesham raised several issues which she contended negatively affected the fairness of the trial. Although the investigative judge is required to investigate inculpatory and exculpatory evidence, defense counsel contended that the defense did not have adequate time and resources to prepare the defense case, and was thus unable to conduct in-country research, obtain the translation of documents or even attend depositions taken by the investigative judge in Afghanistan. The defense also complained that the prosecution was granted unfair access to the defendants' immigration files in violation of their right to privacy. Testimonies of a number of witnesses were taken without the opportunity for defense counsel to be present and question them.³⁵⁷ The prosecution emphasized, however, that the defense had had the opportunity to question witnesses via video conference but had not made use of this.³⁵⁸

³⁵⁵ In the Hesham and Jalalzoy cases, two former members of the Afghan military were tried and convicted of war crimes and torture committed in Afghanistan in the 1980s.

³⁵⁶ Human Rights Watch telephone interview with Dutch lawyer, October 25, 2005.

³⁵⁷ Human Rights Watch telephone interview with Dutch lawyer, October 25, 2005.

³⁵⁸ Human Rights Watch telephone interview with Dutch official, January 27, 2006.

XI. Norway

Norway has not introduced definitions of international crimes into its domestic law.³⁵⁹ However, article 12.4 of the Norwegian General Civil Penal Code (Criminal Code) enables the prosecution of non-nationals for crimes committed overseas—including international crimes—provided the criminal acts amount to a crime under Norwegian criminal law. Article 12.4 provides that Norwegian criminal law shall be applicable to acts committed abroad by a foreigner when the act either constitutes murder, assault and certain other crimes under Norwegian law, or “is a felony also punishable according to the law of the country in which it is committed, and the offender is resident in the realm or is staying therein.”³⁶⁰

Although no trials based on universal jurisdiction have yet taken place in Norway, the country has identified numerous suspects on its territory. Around forty alleged war criminals who sought asylum in Norway remain at liberty. Seventy cases have been examined so far and divided into regional folders. Cases concern suspects from Iraq, Afghanistan, Africa (particularly Rwanda) and the Balkans. As of September 2005, a new unit for international crimes had been set up within Norway’s National Criminal Investigation Service (NCIS). The unit, together with a special prosecutor in charge of international crimes, is creating a detailed list of all cases in order to establish guidelines for the selection and prioritizing of cases.³⁶¹

In February 2006, there was an unprecedented request by the prosecution at the International Criminal Tribunal for Rwanda (ICTR) for the transfer of a case from the ICTR to Norway. The request was preceded by negotiations with the Norwegian authorities, who were willing to try Michel Bagaragaza, accused of “conspiracy to commit genocide, genocide or complicity in genocide” under Norway’s domestic legislation. However, the ICTR rejected the transfer of the case in May 2006. Without explicitly referring to the lack of implementing legislation, the ICTR concluded that “Norway does not have jurisdiction over the crimes in the indictment against Bagaragaza.”³⁶²

³⁵⁹ Norway has been a party to the four Geneva Conventions since August 3, 1951, and ratified the Convention against Torture and Other, Cruel, Inhuman or Degrading Treatment on June 9, 1986.

³⁶⁰ Criminal Code 1982, art. 12.4.

³⁶¹ Human Rights Watch telephone interview with Norwegian official, September 14, 2005.

³⁶² “UN genocide court rejects transfer of suspect’s case to Norway,” Agence France-Press, May 19, 2006.

A. Jurisdictional Challenges

1. Presence

The suspect does not have to be present on Norwegian territory for an investigation to be opened, but he or she needs to be present for the indictment. The problem of whether the presence of an accused can be secured by way of extradition is neither dealt with by the Norwegian Criminal Procedure Act³⁶³ nor by rulings of the Supreme Court. So far, out of the seventy cases that the newly created unit within the NCIS has examined, nineteen suspects have fled the country. Although Norway no longer retains jurisdiction over these persons, the unit has decided to continue examining their files prior to closure in order to assess whether to forward the files to the country where the relevant suspect is believed to be.³⁶⁴

2. Immunities

The Norwegian Criminal Code is silent on the issue of immunity, but the code is to be applied within the limitations of international law.³⁶⁵ So far, the issue of immunity has not arisen in any case of international crimes nor has the issue of amnesties, which is not regulated in Norwegian law. Practitioners interviewed by Human Rights Watch indicated that there is no obligation under Norwegian law to respect an amnesty and that this would be considered on a case to case basis.³⁶⁶

3. Limitation

Because international crimes can be prosecuted only as analogous domestic crimes such as murder, international crimes may be subject to statutes of limitations. Possible revisions to this situation are being considered by a committee, but any decision regarding this matter has yet to be taken.³⁶⁷

³⁶³ Act of 22 May 1981 No. 25 relating to Legal Procedure in Criminal Cases (The Criminal Procedure Act), with subsequent amendments, most recently by Act of 17 July 1998 No. 56, available online at <http://www.ub.uio.no/ujur/ulovdata/lov-19810522-025-eng.doc> (retrieved June 2006).

³⁶⁴ Human Rights Watch telephone interview with Norwegian official, November 16, 2005.

³⁶⁵ Criminal Code, art. 4.

³⁶⁶ Human Rights Watch telephone interview with Norwegian official, September 14, 2005.

³⁶⁷ Human Rights Watch telephone interview with Norwegian official, September 14, 2005.

B. Practical Arrangements for the Exercise of Universal Jurisdiction in Norway

1. Special departments in charge of the investigation and prosecution of international crimes

As mentioned above, a new unit within Norway's National Criminal Investigation Service (NCIS) is responsible for investigating international crimes. One of the reasons why the issue of prosecuting international crimes attracted attention in Norway is related to the creation of the war crimes unit in Denmark (see Country Case Study: Denmark, above). Following the establishment of this unit, suspected perpetrators of international crimes left Denmark for Norway. Norwegian authorities soon realized the problems posed by this development and called for a study to determine the best arrangements for a new unit.

The unit is currently composed of four investigators and one lawyer. One investigator has been trained in The Hague in the investigation of international crimes, and this training will be extended to other investigators and lawyers joining the unit. The unit will be comprised of ten people in total, with two police lawyers who are prosecutors, one historian in charge of explaining and researching the context of the crimes, and seven investigators. The aim is to have teams (as in Denmark) which are in charge of cases concerning specific countries. At present two investigators are working on crimes that occurred in Rwanda.³⁶⁸ A national chief prosecutor has been nominated to work on international crimes, but does not form part of the special unit (her work also includes issues such as organized crime, child pornography and computer crimes); she is assisted on a case-by-case basis by local prosecutors.³⁶⁹ It is envisaged that at least three prosecutors will work on international crimes in the future.³⁷⁰

2. Notification

Most cases are referred to the police by immigration authorities who are notified about crimes either by witnesses and victims or by the perpetrators themselves.³⁷¹ Most alleged perpetrators are already living in Norway, but many cases remain uninvestigated because domestic cases are given priority. The unit has also received notifications from other countries, including the Rwandan government and Denmark, when suspects fled the latter country to hide in Norway.

³⁶⁸ Human Rights Watch telephone interview with Norwegian official, November 16, 2005.

³⁶⁹ Human Rights Watch telephone interview with Norwegian official, November 16, 2005.

³⁷⁰ Human Rights Watch telephone interview with Norwegian official, September 14, 2005.

³⁷¹ According to officials interviewed by Human Rights Watch, perpetrators sometimes admit or even fabricate involvement in international crimes, thinking that it may assist an asylum claim in Norway.

3. *Decision to investigate and prosecute*

The decision of whether to open an investigation lies with the chief prosecutor of the national prosecution office and an investigation has to be carried out where there are “reasonable grounds” to believe that a crime has been committed.³⁷² The police commissioner can also order a local investigation by way of a written investigation order. Where the police decide not to investigate, the complainant can appeal to the regional prosecutor and subsequently to the national prosecution office up to the director general of prosecution. No appeal is possible against a decision of the latter.³⁷³ The current chief prosecutor has asked that all decisions not to investigate complaints regarding international crimes are passed to her, enabling her to scrutinize the decisions and to establish a set of guidelines for the investigation of future complaints.

The chief prosecutor will give orders to prosecute based on criteria established by the attorney general, including considerations such as whether the evidence is sufficient to go to court and whether the prosecutor is convinced of the suspect’s culpability and likely conviction.

4. *Investigation*

Before the police can start an investigation, a written investigation order must be issued and signed by either the chief prosecutor or a police commissioner. The special unit of the NCIS will then investigate the case in open sources and try to establish the whereabouts of the alleged perpetrator. As there is a backlog of cases, the unit for the moment is focusing on the files referred to it by immigration authorities and seeks to identify cases where the perpetrator is still present in Norway. All cases concerning international crimes will be reviewed by the national chief prosecutor.³⁷⁴

C. *Cooperation*

1. *International cooperation*

a. *EU Network*

The NCIS regards the EU Network as a source of information and a venue for sharing experiences in prosecuting international crimes through face to face meetings.³⁷⁵

³⁷² Act of Criminal Procedure 1981 (*Straffeprosessloven*), para. 224. The unofficial translation by the Norwegian Ministry of Justice reads as follows: “a criminal investigation shall be carried out when as a result of a report or other circumstances there are reasonable grounds to inquire whether any criminal matter requiring prosecution by the public authorities subsists.”

³⁷³ Act of Criminal Procedure 1981, para. 59a.

³⁷⁴ Human Rights Watch telephone interview with Norwegian official, September 14, 2005.

³⁷⁵ Human Rights Watch telephone interview with Norwegian official, September 14, 2005.

b. Interpol

The Interpol meetings fulfil a similar role to the EU Network, but on a larger scale.

c. Cooperation with other states

The unit cooperated with Denmark, the UK, the Netherlands and Canada to exchange information and knowledge about best practices.

D. Role and Rights of Victims and Witnesses

1. Victims—Compensation and legal representation

Victims can only claim compensation in civil suits. In criminal cases, the prosecutor will claim compensation on behalf of the victims. The compensation is normally paid by the convicted perpetrator or, if this is not possible, out of a victims' fund provided by the government. This fund is already operational.³⁷⁶

2. Witnesses

During a trial witnesses do not have to be physically present in Norway. It is possible to arrange testimonies via video conference or to record testimonies given in the presence of a judge, prosecutor and defense lawyers or to read out statements in court.³⁷⁷

However, the chief prosecutor has emphasized the importance of at least the main witnesses giving testimony in person at trial, and states that the possibility of witnesses claiming asylum should not constitute a reason to prevent witnesses from testifying in person.³⁷⁸

E. Fair Investigation and Trial

No matter where an investigation takes place, the police must look for evidence on behalf of both the accused and the complainant. The accused is entitled to receive legal aid where he or she lacks the means to pay for his or her representation. This only covers representation in court and is not extended to investigations carried out by the defense itself. Should the defense have carried out its own investigations, it can present a

³⁷⁶ Human Rights Watch telephone interview with Norwegian official, November 16, 2005.

³⁷⁷ Act of Criminal Procedure, para. 298: "where it is in the interest of the witness to do so."

³⁷⁸ Human Rights Watch telephone interview with official in the office of the chief prosecutor, November 16, 2005.

salary bill to the court at the end of the trial and the court will decide whether to reimburse the costs of investigation.³⁷⁹

³⁷⁹ Act of Criminal Procedure, para. 107.

XII. Spain

Article 23.4 of the Organic Law 6/1985,³⁸⁰ confers on Spanish courts universal jurisdiction over genocide and any offense that Spain is obliged to prosecute under international treaties, including the Convention against Torture³⁸¹ and the Geneva Conventions and their first additional protocol.³⁸² Crimes against humanity have been criminalized under the Spanish Criminal Code³⁸³ since 2004.³⁸⁴ Cases initiated in Spain based on universal jurisdiction include the case of former Chilean dictator Augusto Pinochet, which started when a Spanish investigative judge opened an investigation into Pinochet under Spain's universal jurisdiction laws and subsequently asked for Pinochet's arrest and extradition from the United Kingdom in 1998.³⁸⁵ Although Pinochet was not extradited, the case was a starting point for subsequent universal jurisdiction cases in Spain.³⁸⁶ Since Pinochet, completed cases include that against former Peruvian President Alberto Fujimori, and the case of Argentine military officer Adolfo Scilingo, who was convicted and sentenced by the Spanish National Court to 640 years of imprisonment for attempted genocide and other crimes committed during Argentina's "dirty war" in the 1970s.³⁸⁷ Ongoing cases concern events in Tibet, Rwanda, Guatemala, and the case

³⁸⁰ Organic Law 6/1985, of 1 July, of the Judicial Power (*Ley Organica 6/1985, de 1 de julio, del Poder Judicial*), as amended by Organic Law 11/1999, art. 23.4 (a) and (g). For a Spanish version of the relevant article see [online] http://www.juridicas.com/base_datos/Admin/lo6-1985.11t1.html (retrieved April 2006).

³⁸¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987, ratified by Spain on October 21, 1987.

³⁸² 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 October 21, 1950; Geneva Convention for the Amelioration of the Condition of the 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 October 21, 1950. Spain ratified the four Geneva Conventions on August 4, 1952. 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 December 7, 1978, ratified by Spain on June 8, 1977, April 21, 1989.

³⁸³ Spanish Penal Code 1995 (*Código Penal*), art. 607 bis. The Code is available, in Spanish, online at http://www.juridicas.com/base_datos/Penal/lo10-1995.html (retrieved May 2006).

³⁸⁴ The High Court (Audencia Nacional) held in the case of Adolfo Scilingo that crimes against humanity may be prosecuted even if they were committed before the amendment of the Criminal Code: see Giulia Pinazauti, "An Instance of Reasonable Universality: The Scilingo Case," *Journal of International Criminal Justice*, 3 (2003), p. 1092.

³⁸⁵ For an English version of the writ of acceptance see [online] <http://www.derechos.org/nizkor/chile/juicio/jurie.html> (retrieved April 2006).

³⁸⁶ As this report confines itself to cases after 2001, the Pinochet case will only be referred to where related proceedings occurred after 2001. For more detailed information see: Human Rights Watch, "The Pinochet Prosecution" (1998), [online] <http://www.hrw.org/campaigns/chile98/index.htm>, and Amnesty International, "Universal Jurisdiction Cases," [online] <http://web.amnesty.org/pages/uj-cases-eng> (retrieved April 2006).

³⁸⁷ National Court, Criminal Chamber, April 19, 2005, judgment available, in Spanish, online at <http://www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html> (retrieved April 2006).

against Ricardo Miguel Cavallo, an Argentine military officer whose trial is scheduled to start later in 2006.³⁸⁸

A. Jurisdictional Challenges

1. Presence

Article 23.4 of the Organic Law 6/1985 does not require the suspect's presence for the purpose of opening an investigation or for charging the perpetrator. Presence is required for the trial phase as trials in absentia are generally not permitted, but presence for trial can be achieved through extradition.³⁸⁹ The ruling of the Constitutional Court in the "Guatemala" case (see below) on the scope of article 23.4 held that the physical presence of the suspect is not required to initiate an investigation based on universal jurisdiction.³⁹⁰

2. Immunities

Spanish law recognizes immunity in accordance with the provisions of public international law.³⁹¹ Spanish courts have also held that amnesties passed in the territorial state will not be binding on Spanish courts exercising universal jurisdiction.³⁹²

3. Limitation

Article 131.4 of the Spanish Criminal Code expressly excludes crimes against humanity, genocide, and war crimes from statutes of limitations. For other serious crimes, the statute of limitations varies from three to twenty years according to the sentence the crime carries.³⁹³

³⁸⁸ See, "Prosecutors charge former Argentine officer with genocide," *El Pais* (English edition), January 12, 2006.

³⁸⁹ Order (*auto*) of November 5, 1998 (no. 1998/22605) of the High Court (*Audiencia Nacional*) in the proceedings against Augusto Pinochet. Spanish courts successfully secured a suspect's extradition from Mexico to ensure his presence at trial in the case of Argentine national Miguel Cavallo. The decision of the Mexican Supreme Court to extradite Cavallo is available, in Spanish, online at <http://www.derechos.org/nizkor/arg/espana/cortemex.html> (retrieved April 2006). See also "Argentine faces Spanish justice," BBC News, June 29, 2003, [online] <http://news.bbc.co.uk/1/hi/world/americas/3029156.stm> (retrieved April 2006).

³⁹⁰ Constitutional Court, Second Chamber, STC 237/2005, September 26, 2005, available, in Spanish, online at <http://www.tribunalconstitucional.es/Stc2005/STC2005-237.htm> (retrieved April 2006).

³⁹¹ Organic Law 6/1985 of 1 July, of the Judicial Power, art. 21 (2).

³⁹² Spain, Audiencia Nacional, Third Chamber, Sentencia Num. 16/2005, 19 April 2005, Part III, section 6, available online at <http://www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html#I.%20ANTECEDENTES> (retrieved May 2006).

³⁹³ Criminal Code, art. 131.

4. *Subsidiarity*

The Constitutional Court in *Guatemala* concluded that territorial courts and an international court have priority over Spanish courts exercising universal jurisdiction. However, it also held that universal jurisdiction could be exercised by Spanish courts where a party to the case submits evidence demonstrating that courts in the territorial state are unwilling or unable to effectively investigate and prosecute the crimes referred to in the complaint.³⁹⁴ The National Court in the “Tibetan Genocide” case emphasized that Spain could exercise universal jurisdiction over genocide committed in Tibet in the absence of a “national connection” with Spain and ordered the investigative judge to open an investigation.³⁹⁵ Hence, it is not necessary for a complainant or prosecutor to show a link between the prosecution of a universal jurisdiction crime and Spain’s national interest.

B. Practical Arrangements for the Exercise of Universal Jurisdiction in Spain

1. Special departments in charge of the investigation and prosecution of international crimes:

There is no special unit that deals exclusively with international crimes in Spain. Crimes are investigated by the judicial police under the supervision of an investigative judge. The role of police units in universal jurisdiction cases has been marginal, since most of the evidence and witnesses have been provided by NGOs or in public documents.³⁹⁶ There have been no investigations abroad, and it has not been considered necessary for the police or investigative judge to collect evidence abroad.

2. Notification

All cases have thus far been raised through filings by victims or NGOs. Article 125 of the Spanish Constitution, the Organic Law of the Judiciary and the Criminal Procedural

³⁹⁴ The decision of the Constitutional Court in the Guatemala case of September 26, 2005, was discussed in detail in National Court, 4th Section of the Criminal Chamber, Roll of Appeal No 196/05, Preliminary Proceedings on January 10, 2006, concerning a further universal jurisdiction case, the Tibetan Genocide case, (proceedings available online, in Spanish, at http://www.elpais.es/elpaismedia/ultimahora/media/200601/10/espana/20060110elpepunac_1_Pes_DOC.doc, retrieved April 2006). The National Court allowed the appeal, taking into account, inter alia, that the complainants could adduce some evidence as to the failure of Chinese authorities to investigate the crimes and that the events complained of are outside the jurisdiction of the International Criminal Court.

³⁹⁵ National Court, 4th Section of the Criminal Chamber, Roll of Appeal No 196/05, Preliminary Proceedings, January 10, 2006.

³⁹⁶ Human Rights Watch telephone interview with Spanish official, September 14, 2005.

Code all provide expressly for the *acción popular*,³⁹⁷ enabling Spanish citizens with an interest in a particular case or acting on behalf of a victim to bring private prosecutions. The permissibility of the *acción popular* has been crucial in notifying authorities about international crimes, and has enabled the filing of cases which ultimately resulted in conviction.³⁹⁸

Immigration authorities screen asylum seekers for their potential involvement in criminal activities, but have not referred cases to judicial authorities.

3. *Decision to investigate and prosecute*

An investigative judge is seized of a case either through a referral by the prosecution, or by an *acción popular*.³⁹⁹ In the past, where the investigative judge was seized of a case by third parties exercising the *acción popular*, the national prosecution office often opposed the investigation and appealed to the High Court (*Audencia Nacional*).⁴⁰⁰ However, provided that the third parties can convince the investigative judge that a valid case exists, the investigation may proceed.⁴⁰¹

Subject to proceedings brought through an *acción popular*, the national prosecution office decides, on the basis of the evidence collected by the investigative judge in the preliminary investigation,⁴⁰² whether to prosecute 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. According to a Spanish official, the former government was particularly opposed to prosecution of crimes committed in Latin America as it had traditionally strong (economic) links to the countries affected by the investigations.⁴⁰³ Following the 2005 decision of the Constitutional Court in the *Guatemala* case, the

³⁹⁷ Constitution of Spain, art. 125, Organic Law 6/1985, art. 20.3, Code of Criminal Procedure, sections 101 and 270.

³⁹⁸ Human Rights Watch telephone interview with Spanish official, January 17, 2006.

³⁹⁹ Spanish Constitution of 1987, art. 124–127.

⁴⁰⁰ In all cases concerning Argentina and Chile, the prosecution submitted several appeals against judicial decisions affirming jurisdiction. Human Rights Watch telephone interview with Spanish official, September 14, 2005.

⁴⁰¹ The National Court in the Tibetan Genocide case emphasized the right of third parties with an interest in the case to rely on *acción popular* in respect of universal jurisdiction proceedings, taking into account that one issue to decide in each case would be whether the party in question is abusing the law in approaching Spanish courts. The court held that in the present case, the applicants (the Committee to Support Tibet) did not abuse the provision of the *acción popular*, and ordered the investigative judge to investigate the crimes.

⁴⁰² Code of Criminal Procedure of 1882 (*Ley de Enjuiciamiento Criminal*), section 229.

⁴⁰³ Human Rights Watch telephone interview with Spanish official, September 14, 2005.

attorney general is currently working on establishing guidelines on the exercise of universal jurisdiction by the prosecution.⁴⁰⁴

4. Investigation

The investigative judge is in charge of the investigation and is assisted, where necessary, by the “judicial police.” Once the complaint is filed, the investigating judge takes the necessary steps to process the complaint, including giving specific orders to the police, hearing witnesses, requesting documents or sending rogatory letters, the latter being particularly important in cases concerning crimes committed in Chile and Argentina.⁴⁰⁵

C. Cooperation

1. International cooperation mechanisms

Use is made of the EU network and Interpol and both are considered to be necessary for the exchange of information. However, cases have not yet required Spanish investigators or judges to conduct investigations in the territorial state, as all necessary evidence was considered to be available elsewhere. In the case against Cavallo, Spanish and Mexican authorities successfully cooperated to obtain the extradition of Cavallo from Mexico to Spain⁴⁰⁶ and, in the case of Scilingo, authorities relied on the “Treaty on Extradition and Judicial Assistance in Criminal Matters”⁴⁰⁷ signed by Spain and Argentina in 1987 as well as article 9 of the Convention against Torture.⁴⁰⁸ This allowed the Spanish court to examine witnesses in Buenos Aires via video link from Madrid.⁴⁰⁹

⁴⁰⁴ Human Rights Watch telephone interview with Spanish official, January 17, 2006.

⁴⁰⁵ For some of the issues involved see Equipo Nizkor, “Witnesses located in Buenos Aires began to give their testimony by video-conference in the trial of Lieutenant Commander Scilingo,” [online] <http://www.derechos.org/nizkor/espana/juicioral/doc/witnesses.html> (retrieved May 2006).

⁴⁰⁶ On June 11, 2003, the Mexican Supreme Court ruled that Cavallo could be extradited on charges of genocide and terrorism, but not on charges of torture as the crimes of torture allegedly committed by Cavallo were subject to a statute of limitation under Mexican law. The trial against Cavallo is scheduled to start in 2006. The decision of the Mexican Supreme Court is available, in Spanish, online at <http://www.derechos.org/nizkor/arg/espana/cortemex.html> (retrieved April 2006). For an introductory comment see http://www.law.nyu.edu/kingsburyb/fall03/intl_law/PROTECTED/unit5/rtf/MexicoSup.rtf (retrieved April 2006). Authorities of both countries relied on the Treaty Concerning Extradition and Mutual assistance in Criminal Matters 1978, Reg./10/18/1980.

⁴⁰⁷ Treaty on Extradition and Judicial Assistance in Criminal Matters 1987.

⁴⁰⁸ Article 9 states that “States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of [torture] including the supply of all evidence at their disposal necessary for the proceedings.”

⁴⁰⁹ For a detailed account of the challenges involved in requesting legal assistance see: www.derechos.org/nizkor/espana/juicioral/doc/witnesses.html.

D. Role and Rights of Victims and Witnesses

1. Victims—Compensation and legal representation

There is no limit on compensation, but punitive damages are not permitted. The convicted perpetrator is also responsible for compensation and where he or she is unable to pay, the state will intervene (although it has only done so in cases involving terrorism). NGOs generally act as the contact points and sources of support for victims. All victims so far have been represented by NGOs, as legal aid is not available for *acciones populares*.⁴¹⁰

In February 2005, parties involved in the prosecution of Pinochet secured an \$8 million pension fund for his victims. Previously, in rulings of October 19 and December 10, 1998, the Central Investigative Court No. 5 had ordered the freezing of Pinochet's funds around the world, so as to enable victims to receive compensation in the event of his conviction. On February 25, 2005, the plaintiffs and the Riggs Bank, and two of the latter's board members, settled. While criminal and civil actions against Riggs Bank were terminated, proceedings against Pinochet for concealment of assets continue.⁴¹¹

As detailed above, victims can participate in proceedings either as civil claimants or by bringing a private prosecution.

2. Witnesses

Different methods of testifying, including testimonies via video-link, written statements and personal oral statements are permitted under Spanish law. In the trial of Scilingo, witnesses testified in person during trial as well as via video-link.⁴¹² In any case, the defendant lawyer must be permitted to cross examine witnesses and other evidence.⁴¹³

Legal provisions such as those maintaining the anonymity of witnesses have been widely used, mainly in cases concerning terrorism, organized crime and gender violence.⁴¹⁴ So far, protection has not posed a problem during investigations as no threats have been reported and no investigations have been carried out abroad by Spanish investigators. NGOs provide care and support for witnesses during all stages of the investigation and the trial as this is unavailable elsewhere.

⁴¹⁰ Human Rights Watch telephone interview with Spanish official, September 14, 2005.

⁴¹¹ Terence O'Hara, "Allbrittons, Riggs to pay victims of Pinochet," *Washington Post*, February 26, 2005, [online] <http://www.washingtonpost.com/wp-dyn/articles/A53805-2005Feb25.html> (retrieved April 2006).

⁴¹² For an overview of the issues involved in the testimonies given via video-link see www.derechos.org/nizkor/espana/juicioral/doc/witnesses.html

⁴¹³ Human Rights Watch telephone interview with Spanish official, September 14, 2005.

⁴¹⁴ Human Rights Watch telephone interview with Spanish official, September 14, 2005.

E. Fair Investigation and Trial

Equality of arms is guaranteed as both parties can submit evidence, both parties must be represented, and the court must always give reasons for its decisions concerning the acceptance or the refusal of proposed evidence. Further, the investigative judge is required to investigate inculpatory and exculpatory evidence. The defense lawyer must be able to challenge all evidence presented by the prosecution.⁴¹⁵ Representation of the defendant is guaranteed by providing legal aid when the accused is not able to pay for it.⁴¹⁶

⁴¹⁵ Ley Orgánica del Tribunal del Jurado, May 22, 1995, art. 31.

⁴¹⁶ Spanish Constitution, article 24-2, refers to the defendant's right to a fair trial. Legal aid is provided by the Legal Aid Law 1996 (Ley 1/1996, de 10 de enero 1996 de Asistencia Jurídica Gratuita).

XIII. United Kingdom (England and Wales)

Section 134 of the Criminal Justice Act 1988⁴¹⁷ implements the Convention against Torture⁴¹⁸ and authorizes courts in England and Wales to exercise universal jurisdiction over torture. Jurisdiction over certain war crimes, including grave breaches of the four Geneva Conventions⁴¹⁹ and their first additional protocol,⁴²⁰ can be exercised under the Geneva Conventions Act 1957.⁴²¹ Jurisdiction can only be exercised over crimes against humanity and genocide if they were committed after the coming into force of the International Criminal Court Act 2001.⁴²²

On October 16, 1998, British police, acting on a Spanish arrest warrant, arrested former Chilean dictator Augusto Pinochet in London. The Pinochet case, although not the first case to be based on universal jurisdiction in Europe, became a landmark case for universal jurisdiction.⁴²³ The first successful prosecution under universal jurisdiction laws in the UK occurred more than five years after Pinochet in July 2005, when Afghan militia leader Faryadi Zardad was convicted of acts of torture and hostage-taking that had taken place in Afghanistan in the 1990s.⁴²⁴ Zardad was sentenced to twenty years of imprisonment. Several other complaints have been filed under the UK's universal jurisdiction laws but none have yet proceeded to trial.

⁴¹⁷ Criminal Justice Act 1988, section 134, available online at

http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880033_en_1.htm (retrieved April 2006).

⁴¹⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

⁴¹⁹ 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 October 21, 1950, art. 49; 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, art. 49; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force October 21, 1950, art. 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force October 21, 1950, art. 146.

⁴²⁰ 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 December 7, 1978.

⁴²¹ Geneva Conventions Act 1957, section 1, 1A.

⁴²² International Criminal Court Act 2001, section 50, available online at

<http://www.opsi.gov.uk/ACTS/acts2001/20010017.htm> (retrieved April 2006).

⁴²³ As this report confines itself to cases after 2001, for an overview of the Pinochet case see Human Rights Watch, "The Pinochet Prosecution" (1998), [online] <http://www.hrw.org/campaigns/chile98/index.htm>; and Amnesty International, "Universal Jurisdiction Cases," [online] <http://web.amnesty.org/pages/uj-cases-eng> (retrieved April 2006).

⁴²⁴ *R v. Zardad*, High Court judgment of 19 July 2005, available online at <http://www.redress.org/news/zardad%207%20apr%202004.pdf> (retrieved April 2006).

A. Jurisdictional Challenges

1. Presence

Police may open an investigation regardless of the whereabouts of the accused. However, for an arrest warrant to be issued and for the suspect to be charged, the accused must either be present or his or her presence anticipated.⁴²⁵ A trial in absentia is possible under UK law under certain circumstances at the trial judge's discretion.⁴²⁶ Charges of crimes against humanity and genocide can be prosecuted only where a suspect was a UK resident at the time at which the crime was committed.⁴²⁷

2. Immunities

Sitting heads of state enjoy immunity from prosecution under section 14(1) of the State Immunity Act of 1978.⁴²⁸ Hence, complaints filed under UK universal jurisdiction laws against U.S. President George W. Bush and Zimbabwean President Robert Mugabe have not been investigated.⁴²⁹ However, immunity also seems to be extended to every sitting minister of foreign governments. In February 2004 a London court rejected an application for an arrest warrant to be issued against Israeli Defense Minister Shaul Mofaz,⁴³⁰ for immunity reasons, and in November 2005 a magistrate refused to issue an arrest warrant against Chinese Trade Minister Bo Xilai, arguing that as part of an official delegation to the United Kingdom, Bo Xilai would enjoy immunity.⁴³¹

An amnesty passed in the state where the crime was committed has been held not to bind UK courts, which have the discretion not to apply the amnesty law to crimes that, through treaties (such as the Convention against Torture), the UK government has committed itself to prosecuting.⁴³²

⁴²⁵ Application for Arrest Warrant Against General Doron Almog (Bow St. Mag. Ct. Sept. 10.05) (per Workman, Sr Dist.J.).

⁴²⁶ *R v. Jones*, 20 February 2002, (2002) UKHL 5.

⁴²⁷ International Criminal Court Act 2001, section 51 (2) (b).

⁴²⁸ United Kingdom State Immunity Act of 1978, available online at <http://www.law.berkeley.edu/faculty/ddcaron/Documents/RPID%20Documents/rp04038.html> (retrieved April 2006).

⁴²⁹ Application for Arrest Warrant Against Robert Mugabe (Bow St. Mag. Ct. Jan. 14, 2004) (per Workman, Sr. Dist. J.).

⁴³⁰ Application for Arrest Warrant Against General Shaul Mofaz (Bow St. Mag. Ct. Feb. 12, 2004) (per Pratt, Dist. J.).

⁴³¹ Application for Arrest Warrant Against Bo Xilai (Bow St. Mag. Ct. Nov. 08, 2005) (per Workman, Sr Dist.J.).

⁴³² See the reasoning of Lords Steyn and Nichols in *R v. Bow Street Magistrates Court; ex parte Pinochet (No 1)*, (25 Nov. 1998), [1998] 4 All ER 897 at 938 (Lord Nicholls) and 946-7 (Lord Steyn).

B. Practical Arrangements for the Exercise of Universal Jurisdiction in the England and Wales

1. Special departments in charge of the investigation and prosecution of international crimes

The investigation of universal jurisdiction crimes is the responsibility of two investigators within the Anti-Terrorist Branch of the Metropolitan Police. The branch has a total staff of three hundred. The two investigators who lead universal jurisdiction criminal investigations also investigate terrorism-related crimes due to the relative lack of universal jurisdiction investigations.⁴³³ When an investigation into a universal jurisdiction crime is opened, a team of investigators is selected from the Anti-Terrorist Branch and the investigation is then coordinated by the two investigators in charge.⁴³⁴ For example, in the Zardad case, two investigators coordinated the investigation from London while sending delegates from the Anti-Terrorist Branch to Afghanistan.

The prosecution of universal jurisdiction crimes is the responsibility of the Crown Prosecution Service (CPS), which has two prosecutors in its Counter-Terrorism Department working permanently on such cases.⁴³⁵ Due to a lack of case volume these prosecutors also work on terrorism and other transnational crimes. This level of resourcing was considered sufficient by the investigators and prosecutors involved in the Zardad case.⁴³⁶

2. Notification

The Metropolitan Police and courts have generally been notified of the presence or anticipated presence of alleged perpetrators of international crimes by the media, victims' lawyers or NGOs.⁴³⁷ For example, Zardad came to the attention of authorities through a BBC documentary,⁴³⁸ while the case of Israeli General Doron Almog was brought before a magistrates' court through lawyers acting on behalf of a Palestinian human rights NGO.⁴³⁹

⁴³³ Human Rights Watch telephone interview with British official, Metropolitan Police anti-terrorist branch, September 7, 2005.

⁴³⁴ Human Rights Watch telephone interview with British official, Metropolitan Police anti-terrorist branch, November 16, 2005.

⁴³⁵ See http://www.cps.gov.uk/legal/section1/chapter_c.html#02 (retrieved April 2006).

⁴³⁶ Human Rights Watch telephone interviews with British official, Crown Prosecution Service, November 2, 2005, and with British official, Metropolitan Police anti-terrorist branch, September 7, 2005.

⁴³⁷ Human Rights Watch telephone interview with British official, Crown Prosecution Service, November 3, 2005.

⁴³⁸ John Simpson, "How Newsnight found Zardad," BBC News, July 18, 2005, [online] <http://news.bbc.co.uk/1/hi/programmes/newsnight/4693783.stm> (retrieved April 2006).

⁴³⁹ For documentation of the case against Almog see <http://www.hickmanandrose.co.uk/news05.html> (retrieved November 30, 2005).

In principle the Home Office's Immigration and Nationalization Department (IND) can also refer cases that arise through its review of asylum and immigration applications, and a special department has been established within the IND dealing exclusively with allegations of international crimes committed by applicants for UK visas and asylum seekers. Where the department receives a complaint from caseworkers within the IND, the suspect is screened and additional evidence is sought from open sources, before the department considers whether to refer the matter to the police. Since the department's creation, twelve cases have been referred to the police,⁴⁴⁰ and this number is likely to increase once the special unit within the IND has established guidelines and screening criteria for the IND as a whole.⁴⁴¹ Prior to the establishment of the special department, it was easier for alleged perpetrators of international crimes to gain access to the UK undetected and an unknown number of those may currently reside in the UK. The IND special department is, as far as possible, also reviewing past cases.⁴⁴² In January 2006, a British newspaper discovered the presence in England of a Rwandan accused of participating in the 1994 genocide. The suspect had been living in a small town since being granted leave to remain by the Home Office in 2002, after seeking asylum in 1999.⁴⁴³

3. Decision to investigate and prosecute

The police usually decide whether to investigate a complaint without the CPS's involvement. In cases of international crimes, however, the investigators consult the CPS for legal advice at the outset of the investigation and enquire about issues such as immunity and jurisdiction.⁴⁴⁴ The investigation itself is the responsibility of the police, and the CPS only become involved on request. Where no legal obstacles arise, the investigators consider a complaint taking into account the evidence available and the likelihood of successfully prosecuting. The guiding policy in deciding whether to investigate is to ensure that the UK does not act as a safe haven for perpetrators of international crimes.⁴⁴⁵ It would appear, however, that this is not always applied

⁴⁴⁰ Human Rights Watch telephone interviews with British official, Metropolitan Police anti-terrorist branch, November 16, 2005, and with an official of the UK Home Office Immigration and Nationality Directorate, November 28, 2005.

⁴⁴¹ Human Rights Watch telephone interview with an official of the UK Home Office Immigration and Nationality Directorate, November 28, 2005.

⁴⁴² Human Rights Watch telephone interview with an official of the UK Home Office Immigration and Nationality Directorate, November 28, 2005.

⁴⁴³ Jon Swan, "Focus: Rwandan genocide suspect in Britain," *The Sunday Times* (London), January 29, 2006, [online] <http://www.timesonline.co.uk/article/0,,2087-2014429,00.html> (retrieved February 2006). Further suspects were discovered by the media in May 2006. See Sandra Laville, "Wanted for Genocide in Kigali. Living Comfortably in Bedford," *The Guardian*, May 13, 2006.

⁴⁴⁴ Human Rights Watch telephone interviews with British official, Metropolitan Police anti-terrorist branch, September 7, 2005, and with an official of the UK Home Office Immigration and Nationality Directorate, November 28, 2005.

⁴⁴⁵ Human Rights Watch telephone interview with British official, November 16, 2005.

consistently. In the case concerning former Israeli General Almog, the police did not make a decision concerning the arrest of the suspect prior to his arrival in the UK, despite evidence presented by lawyers acting for victims that convinced a senior district judge to issue an arrest warrant for Almog.

The decision of whether to prosecute is largely at the CPS's discretion. Based on the "Code for Crown Prosecutors," the CPS takes into account the issue of jurisdiction, the amount of reliable and admissible evidence available and whether it is in the public interest to prosecute.⁴⁴⁶ Should the CPS decide to prosecute international crimes on this basis, the consent of the attorney general is required.⁴⁴⁷ The attorney general is a government-appointed official, who acts as the chief legal advisor to the government and superintends the director of public prosecutions, who is head of the CPS. The attorney general has absolute discretion over prosecutions of international crimes.⁴⁴⁸

Third parties, including those not involved in a particular crime, can file a complaint and, where the police refuse to investigate, initiate a private investigation and prosecution.⁴⁴⁹ This includes the right to apply for an arrest warrant to be issued against an alleged perpetrator whose presence can either be established or anticipated, even without the consent of the CPS or the attorney general.⁴⁵⁰ However, private prosecutions can be subrogated by the CPS, which may then choose to discontinue the prosecution. In addition, the attorney general's consent is needed to prosecute any international crimes, and hence a private party cannot maintain a prosecution in the face of opposition by the CPS.

A complainant can seek judicial review of a police decision not to investigate, or the decision of the CPS not to prosecute.⁴⁵¹ The High Court will consider whether the decision of the relevant authority has been reasonable and in the public interest.

⁴⁴⁶ See http://www.cps.gov.uk/victims_witnesses/prosecution.html#01 The evidence available must be such as to establish a realistic prospect of conviction.

⁴⁴⁷ Criminal Justice Act 1988, section 135; Geneva Conventions Act 1957, section 1A (3) (a); International Criminal Court Act 2001, section 53 (3).

⁴⁴⁸ Human Rights Watch telephone interview with British official, Crown Prosecution Service, November 3, 2005. The attorney general has confirmed to Parliament that he will apply the same criteria as the CPS for any other criminal offense: first, the amount of sufficient admissible and reliable evidence establishing a realistic prospect of conviction; second, it must be in the public interest to prosecute. Written answer by the attorney general to Mr. Boateng, Parliamentary question 19 July 1993, Hansard, available online at <http://www.publications.parliament.uk/pa/cm199293/cmhansrd/1993-07-19/Writtens-3.html> (retrieved April 2006). Case law suggests that the decision of the attorney general is not subject to judicial review, see *R v. Solicitor-General, ex p Taylor*, *The Times*, August 14, 1995, case no: CO 2117-94.

⁴⁴⁹ Prosecution of Offences Act 1985, section 6 (1).

⁴⁵⁰ Prosecution of Offences Act 1985, section 25 (2).

⁴⁵¹ *R v. Director of Public Prosecutions, ex parte C* (1995) 1 Cr.App.R 136. The court sets out three criteria for judicial review: (i) the decision was the result of some unlawful policy, (ii) the decision was made because the

4. Investigation

a. Investigation in the UK

The police assess the evidence available, check open sources and conduct research on the complainant, the country in question and on the suspect. Once the investigation is under way, the CPS is approached where legal cooperation from other countries is required.⁴⁵²

b. Extraterritorial investigation

In the Zardad case, British officials went to Afghanistan on nine occasions.⁴⁵³ The prosecution went to Afghanistan together with the police on three occasions to ensure that statements taken from witnesses were sufficiently detailed. The prosecution also traveled with investigators to gain an understanding of the living circumstances of the witnesses and victims in Afghanistan, in order to assess the challenges witnesses might face in court.⁴⁵⁴ In order to overcome logistical and security challenges in locating witnesses, television and radio broadcasts were used to encourage witnesses to come forward.⁴⁵⁵

C. Cooperation

1. National cooperation

Cooperation between the police, CPS and the Home Office was necessary to facilitate the bringing of witnesses to testify in the Zardad case. Field investigations in the territorial state rely on cooperation and assistance provided through the Foreign and Commonwealth Office's embassies and consular offices. The Foreign and Commonwealth Office referred the investigators' initial request for assistance to relevant authorities in the Afghan government, which subsequently contacted the British embassy in Kabul. From that time, all further requests for assistance were dealt with by the British embassy directly.⁴⁵⁶

DPP had failed to act in accordance with the code issues pursuant to section 10 of the POA 1985, (iii) the decision was perverse. See http://www.cps.gov.uk/legal/section19/chapter_c.html#_Toc2672291 for the judicial review procedure against a decision of the CPS not to prosecute (retrieved May 2006).

⁴⁵² Human Rights Watch telephone interview with British official, Metropolitan Police anti-terrorist branch, September 7, 2005.

⁴⁵³ Human Rights Watch telephone interview with British official, Metropolitan Police anti-terrorist branch, November 16, 2005.

⁴⁵⁴ Human Rights Watch telephone interview with counsel for the prosecution in the Zardad case, November 30, 2005.

⁴⁵⁵ Human Rights Watch telephone interview with British official, Metropolitan Police anti-terrorist branch, November 16, 2005.

⁴⁵⁶ Human Rights Watch telephone interview with British official, Metropolitan Police anti-terrorist branch, September 7, 2005.

2. International cooperation

a. With other countries

In *Zardad* British authorities cooperated with U.S. military and diplomatic personnel because of the need to conduct investigations in an area of Afghanistan under the effective control of U.S. military forces. Prior to the investigation, the permission of the armed forces was obtained, and during the investigation in these areas protection was provided by U.S. military personnel.⁴⁵⁷

b. The EU Network

While the prosecution in *Zardad* did not make use of the Network or of Interpol, the police relied on Interpol contact points from the Netherlands and Denmark as both had experience of investigation of international crimes committed in Afghanistan. The EU Network was cited as a useful source of information and experiences.⁴⁵⁸

D. Role and Rights of Victims and Witnesses

1. Victims—Compensation and legal representation

The victim has no *locus standi* in UK criminal proceedings, except for the possibility of bringing a private prosecution. However, this possibility is limited as it is expensive and not covered by legal aid, and prosecutions may be subrogated by the CPS. A substantial amount of work in the fields of universal jurisdiction is accordingly dependent on lawyers working on a pro bono basis.⁴⁵⁹ The court may make a compensation order for the victim in criminal proceedings and the victim does not have to submit an application. The court must give reasons should it not make a compensation order.⁴⁶⁰

2. Witnesses

Witnesses are permitted to testify via video-link⁴⁶¹ which proved to be extremely useful in the recent *Zardad* case. Witnesses' testimony was shown via video-link from the British embassy in Kabul to the court room in London. Logistical challenges such as travel and accommodation arrangements as well as visa and potential asylum requests were thus avoided. However, the outcome of the first trial (the jury was unable to reach a verdict) suggests that a lack of key witnesses testifying in person may cause difficulties.

⁴⁵⁷ Human Rights Watch telephone interview with British official, Metropolitan Police anti-terrorist branch, September 7, 2005.

⁴⁵⁸ Human Rights Watch telephone interview with British official, Crown Prosecution Service, November 3, 2005.

⁴⁵⁹ Human Rights Watch email communication from a British lawyer, November 7, 2005.

⁴⁶⁰ Criminal Justice Act, section 104.

⁴⁶¹ Criminal Procedure Rules, Rule 30.1, available online at http://www.dca.gov.uk/criminal/procrules_fin/contents/rules/part_30.htm#rule30_1 (retrieved April 2006).

By contrast, the jury in the second trial, which heard the testimony of three eyewitnesses in person, managed to successfully reach a verdict.

In *Zardad*, the protection of witnesses was guaranteed while they gave statements within the embassy and their identities were not publicly disclosed. At the time of writing, three months after the second trial and one year after the first, no reports of threats to witnesses had been received.⁴⁶² British investigators are still in contact with a number of witnesses via local NGOs who provide most of the assistance and care to witnesses due to their access to remote areas and their presence in the country.

E. Fair Investigation and Trial

The UK has an adversarial system of criminal procedure. In this system the defendant is largely responsible for the collection of exculpatory evidence (although prosecutors are usually obliged to disclose such evidence if they come across it). In *Zardad*, the defendant was assisted by legal aid, and legal aid did extend to enabling his defense lawyer to accompany the prosecution to Afghanistan to supervise identification parades and conduct investigations.

⁴⁶² Telephone interview with British official, Metropolitan Police anti-terrorist branch, November 16, 2005.

XIV. Acknowledgments

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