



UNIVERSAL JURISDICTION IN THE EUROPEAN UNION

Country Studies

For further information on this report, please contact THE REDRESS TRUST, at:

3rd Floor, 87 Vauxhall Walk, London SE11 5HJ
Tel: +44 (0)20 7793 1777 Fax: +44 (0)20 7793 1719
Registered Charity Number 1015787, A Limited Company in England Number 2274071
redresstrust@qn.apc.org (general correspondence)

ACKNOWLEDGEMENTS

This report was written by Ariana Pearlroth and edited by Carla Ferstman of REDRESS. We have relied heavily on the following sources in the preparation of the information in the report: the [Universal Jurisdiction Website](http://www.universaljurisdiction.info) (<http://www.universaljurisdiction.info>); Amnesty International's report "[Universal Jurisdiction - the duty of states to enact and enforce legislation](http://web.amnesty.org/web/web.nsf/pages/legal_memorandum)," AI Index: IOR 53/002/2001, 1 September 2001 (http://web.amnesty.org/web/web.nsf/pages/legal_memorandum); M.E.I. Brien and E.H. Hoegen, [Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation \(85\) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure](http://www.victimology.nl/onlpub/Brienhoegen/BH.html), Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)) (<http://www.victimology.nl/onlpub/Brienhoegen/BH.html>); and REDRESS' report, "[Universal Jurisdiction in Europe: Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide](http://www.redress.org/publications/UJEurope.pdf)," 30 June 1999 (<http://www.redress.org/publications/UJEurope.pdf>). The report has also benefited from country-specific information provided by a range of national human rights institutes and organisations, which was collected by REDRESS as part of a feasibility study for the Project on the approximation and/or harmonisation of standards at the EU level.

We also wish to thank those who contributed to individual chapters:

Austria: Louise Sperl, Ludwig Boltzmann Institute of Human Rights, Ngwengeh Jacline Chungong, REDRESS;

Belgium: Soline Nève and Guillaume de Walque, *La Ligue des Droits de l'Homme*; Orlando Fernandez, REDRESS;

Denmark: Rasmussen Holdgaard and Dorit Borggaard, Danish Centre for Human Rights;

Finland: Minna Kimpimäki;

France: Haidee-Laure Giles, REDRESS; Jeanne Sulzer and Sébastien Bourgoin, FIDH;

Germany: Caroline Harvey and Claudia Ludwig, REDRESS; Wolfgang Kaleck, lawyer, President of the Republican Lawyers association, Vice president of the European democratic lawyers (Germany);

Greece: Anna Damaskou and Antonis Xenakis; John-Sotirios Spyropoulos, REDRESS;

Italy: Sylvia Mercogliano; Pietro Sardaro; Stefan Scheer, REDRESS;

Luxembourg: Soline Nève and Guillaume de Walque, *La Ligue des Droits de l'Homme*; Nicholas Thielgen, Decherts;

Portugal: Ngwengeh Jacline Chungong; Sarah Gomes; Maria Joao Vasquez;

Spain: Luis Benavides, REDRESS; Dr. Juan E. Garcés, lawyer (Spain);

Sweden: Rolf Ring, Raoul Wallenberg Institute;

United Kingdom: Rosanna Mesquita, Clare Hamill, and Sarah Richards, REDRESS.

CONTENTS

PREFACE	i
RESOURCES	ii
AUSTRIA	1
BELGIUM	4
DENMARK	7
FINLAND	10
FRANCE	12
GERMANY	16
GREECE	19
IRELAND	21
ITALY	22
LUXEMBOURG	24
THE NETHERLANDS	26
PORTUGAL	29
SPAIN	31
SWEDEN	34
UNITED KINGDOM	36

PREFACE

This report is designed to provide an overview of the status of universal jurisdiction in each of the fifteen Member States of the European Union. It seeks to cover all crimes that can trigger universal jurisdiction under the domestic law and jurisprudence of these countries. Inevitably, given the complexity of the subject matter, information concerning certain crimes or certain developments in legislation and practice will have been difficult to obtain for this writing and therefore this report should not be perceived as exhaustive. We would welcome any comments on the information provided in this report, so that a second, improved edition may be published.

“UNIVERSAL JURISDICTION”

The universality principle stems from the notion that certain crimes are so heinous that every country has an interest in ensuring that perpetrators are brought to justice. The principle provides the basis on which the courts of any country can try cases involving these crimes, regardless of where the crimes were committed or the nationality of the perpetrators or victims.

Universal jurisdiction has been used in numerous European countries to ensure that perpetrators of serious crimes under international law, including war crimes, crimes against humanity, genocide, torture, terrorism, human trafficking and others, do not evade justice. This type of jurisdiction has been put to use outside of Europe as well, such as in the Israeli case against Adolf Eichmann, in Senegalese legal proceedings against former Chadian President Hissène Habré, and in numerous civil suits in the United States against foreign torturers.

Although universal jurisdiction in its strictest interpretation is meant to refer to cases in which no direct connection to the forum state is required, this report uses the term more broadly. In order to show the various types of jurisdiction that Member States of the European Union recognise, beyond jurisdiction linked to their own nationals or their own territories, we have included jurisdiction triggered by the residence of the accused or by the fact that the accused, who was a foreign national at the time the offence was committed, subsequently became a citizen of the state in which the case is being tried.

RESOURCES

Information and documentation concerning the status and practice of universal jurisdiction around the world can be found in several resources developed during the last few years. They include:

- The Universal Jurisdiction Website, www.universaljurisdiction.info
- Amnesty International's "[Universal Jurisdiction: The duty of states to enact and enforce legislation](#)"
- The [national implementation database](#) of the International Committee of the Red Cross
- [Country information and updates](#) by the NGO Coalition for an International Criminal Court
- Prevent Genocide International's [domestic law database](#)
- Equipo Nizkor's website, www.derechos.org/nizkor
- The Council of Europe's [webpage for progress reports on ratification and implementation of the Rome Statute](#)
- Diplomatie Judiciaire's [webpages on cases](#) around the world, include many based on universal jurisdiction
- REDRESS' 1999 report "[Universal Jurisdiction in Europe](#)"
- The World Organization Against Torture's Criminal Accountability for Human Rights Abusers website, www.criminalaccountability.org

Other sources are in the process of being developed:

- The University of Notre Dame's website for its Translational Justice Project
- The TMC Asser Institute's universal jurisdiction database

AUSTRIA

Austrian law establishes universal jurisdiction over “punishable acts which Austria is under an obligation to punish.”¹ This provision could be deemed applicable to several crimes under international law, such as grave breaches of the 1949 Geneva Conventions and torture under the Convention against Torture. The Government has in fact asserted that this provision “is the legal basis for the fulfilment of the obligations established by article 5 of the [Torture] Convention.”² Article 5 imposes an obligation to either try or extradite alleged torturers present in the territory of a State party. The Government also views the Convention against Torture as being directly enforceable under Austrian law.³

Austrian law also provides for universal jurisdiction over the following acts, as long as the suspect cannot be extradited: kidnapping, slavery, human trafficking, counterfeiting of currency or of particularly protected securities, acts involving organised crime, certain drug-related offences⁴ and offences involving hijacking. The provision establishing universal jurisdiction for hijacking specifies that prosecutions can only take place if the suspect is in Austria.⁵

Additionally, Austrian courts are able to exercise universal jurisdiction over crimes under Austrian law, as long as the act is also punishable in the place where it was committed. If the suspect is a foreign national upon the commencement of the criminal procedure, Austrian courts would only have jurisdiction if certain criteria can be satisfied: 1) the suspect must be found on Austrian territory; and 2) s/he cannot be extradited “for reasons other than the type or nature of the act.”⁶ This provision could, and has been, applied to offences such as genocide, which is a crime under Austrian law.⁷ Furthermore, the Constitution provides that, “the generally recognized rules of international law are regarded as integral parts of Federal law.”⁸

With respect to civil action, victims can bring civil claims for compensation either as part of criminal proceedings⁹ or in separate civil litigation, irrespective of the claimant’s nationality.¹⁰ If Austrian courts are unable to establish jurisdiction over a case under the usual rules of Austrian law, the Supreme Court has the authority to order them to assume jurisdiction if Austria is obligated to do so under conventional international law.¹¹

In addition, victims who have permanent residence in Austria and are citizens of a State in the European Economic Area can obtain compensation for personal injury, though not pain and suffering, under the Law concerning Victims of Crimes (*Verbrechensopfergesetz (VOG)*).

¹ Penal Code (*Strafgesetzbuch*), Art. 64(1)(6). (Translation found in Austria’s initial State party report to the Committee against Torture (CAT/C/5/Add.10), para. 23.)

² Austria’s initial State party report to the Committee against Torture (CAT/C/5/Add.10), para. 24.

³ Austria’s initial State party report to the Committee against Torture (CAT/C/5/Add.10), para. 7ff.

⁴ Penal Code, Art. 64(1)(4).

⁵ Penal Code, Art. 64(1)(5)(d).

⁶ Penal Code, Art. 65(1)(2). (Translation found on the website of the International Committee of the Red Cross at <http://www.icrc.org/ihl-nat.nsf/0/e1cb1944e1871a23c1256ab20031fc2c?OpenDocument>.)

⁷ [Penal Code, Art. 321](#). The Supreme Court (*Oberster Gerichtshof*) has recognised Austrian jurisdiction under Art. 65(1)(2) over a genocide case that was based on universal jurisdiction. (Judgment of the Supreme Court, 15Os99/94, 13 July 1994, as found in REDRESS, “[Universal Jurisdiction in Europe: Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide](#),” 30 June 1999, pp. 16-17.)

⁸ [Constitution](#), Art. 9(1).

⁹ Criminal Procedure Code, Art. 47(f).

¹⁰ Civil Procedure Code (*Zivilprozeßordnung*), Art. 3.

¹¹ Jurisdiction Act, (*Jurisdiktionsnorm*) Art. 28.

CASES

One case has been brought before Austrian courts based on universal jurisdiction against Bosnian Serb Dusko Cvjetkovic for genocide, murder and arson allegedly committed in Bosnia and Herzegovina. The Supreme Court declared the case admissible under the Genocide Convention and Art. 65(1)(2) of the Penal Code.¹²

In August 1999, actions were taken against high Iraqi official Issat Ibrahim Khalil (a.k.a. Al Doori), who was in Austria for medical attention. The U.S. government reportedly requested Austrian authorities to undertake his arrest. He was rumoured to have been the military commander in charge of a 1988 poison gas attack on Kurds, among other crimes. A local Austrian official then filed a complaint with the Public Prosecutor alleging his responsibility in the torture of two Iraqi citizens.¹³ The prosecutor reportedly initiated an investigation, but Al Doori left the country a few days later.¹⁴

In another case, an investigation was instituted but not concluded against a Croatian citizen living in Austria. In 1993, a Croatian court convicted him in absentia for war crimes under the Croatian Penal Code and handed down a ten-year prison sentence. The suspect moved from Austria to Hungary, and in September 2001 was extradited to Croatia, where he is currently serving out his prison sentence. The Austrian case has been suspended.¹⁵

ISSUES INVOLVED

PRESENCE REQUIREMENT: As noted above, specific provisions condition the exercise of universal jurisdiction on the presence of the accused in Austrian territory. These concern offences related to hijacking, and offences under Austrian law committed by a foreign national under Penal Code Article 65(1)(2). In contrast, offences that Austria is under an obligation to punish, as provided for in Article 64(1)(6), do not explicitly require presence. However, a particular international obligation to prosecute may be conditioned on the presence of the accused. These provisions do not specify the stage of proceedings at which presence would be required.

Presence during the criminal trial is required except if the alleged offence carries a prison sentence of no more than three years and the defendant was summoned to appear by a court and already underwent a court interrogation. In such circumstances, the trial could proceed even if the defendant fails to appear.¹⁶

Presence during civil proceedings do not require the defendant's presence as long as s/he has been properly summoned by a court. If the defendant's address is not known and a writ cannot be delivered, a *curator absentis* can be nominated in order to represent the defendant and the case will proceed as though the defendant was present.

IMMUNITY: Given that the Constitution provides that, "the generally recognized rules of international law are regarded as integral parts of Federal law",¹⁷ immunities, insofar as they are recognised by the general rules of international law, may apply.

¹² Judgment of the Supreme Court, 150s99/94, 13 July 1994, *supra*. The case eventually failed on the merits, as none of the five prosecution witnesses could identify the defendant. (Republic of Austria v. Cvjetkovic, Landesgericht Salzburg, 31 May 1995, as found in REDRESS, "Universal Jurisdiction in Europe: Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide," 30 June 1999, p. 17.)

¹³ Case report to the Public Prosecutor Vienna concerning Izzat Ibrahim Khalil Al Door, submitted by Peter Pilz, 13 August 1999 (as found in Amnesty International, "[Universal Jurisdiction - the duty of states to enact and enforce legislation](#)," AI Index: IOR 53/002/2001, 1 September 2001.).

¹⁴ As reported in Amnesty International, "Universal Jurisdiction - the duty of states to enact and enforce legislation," *supra*.

¹⁵ Higher Regional Court Vienna, 22dVR4575/01.

¹⁶ Criminal Procedure Code (*Strafprozeßordnung (StPO)*), Art. 427, in conjunction with Penal Code, Art. 17.

¹⁷ [Constitution](#), Art. 9(1).

RELATIONSHIP WITH OTHER JURISDICTIONS: Austrian courts have interpreted the Genocide Convention and Article 65(1)(2) of the Penal Code as setting out the relationship between territorial jurisdiction and Austrian courts with universal jurisdiction in the context of the prosecution of acts of genocide. In the Cvjetkovic case, the Supreme Court held that although the Genocide Convention establishes that alleged perpetrators of genocide should be tried by courts of the territorial state or by an international tribunal,¹⁹ this rule assumes that the territorial state has a functioning legal system. Since this was not so, and there was not at that time an international tribunal able to handle the facts of the case, the Court held that the purpose of the Convention would be undermined if Austrian courts did not exercise jurisdiction. This appears to establish a hierarchical relationship with respect to the crime of genocide in which the territorial state has priority, while Austrian courts would be able to exercise universal jurisdiction should it be necessary. This was reinforced by the Supreme Court's application of Penal Code Article 65(1)(2). This provision conditions the exercise of Austrian jurisdiction in cases based on the universality principle on an inability to extradite the suspect. The Court accepted that the dysfunctional nature of the territorial state's legal and communication systems satisfied this condition.²⁰

STATUTES OF LIMITATION: Article 57 of the Penal Code establishes statutes of limitation of between one and twenty years for the prosecution of all offences under Austrian law except those punishable by life imprisonment. Regarding civil claims for damages and torts, the limitation period is three years, starting from the moment of the damage and/or when the perpetrator is known to the victim. If the claim is based on an intentionally committed crime sanctioned with more than one year of imprisonment, the limitation period extends to thirty years.²¹

¹⁹ Genocide Convention, Art. 6.

²⁰ Supreme Court, Cvjetkovic case, 13 July 1994, *supra*.

²¹ Civil Code, Art. 1489.

BELGIUM

Belgium's well-known universal jurisdiction law was repealed in August 2003 and replaced, in far more restrictive form, with amendments to the Belgian Criminal Code. These amendments, adopted on 1 August 2003, provide Belgian courts with jurisdiction over genocide, crimes against humanity and war crimes,²² as well as ancillary offences, only if the accused is Belgian or has primary residence in Belgian territory,²³ if the victim is Belgian or had lived in Belgium for at least three years at the time the crimes were committed,²⁴ or if Belgium is required by treaty to exercise jurisdiction over the case.²⁵ The previous law (*Loi du 16 juin 1993 relative à la repression des infractions graves aux Conventions Internationales des Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977*), [as amended in 1999](#) and now repealed, had provided for universal jurisdiction over war crimes, crimes against humanity and genocide without any nexus requirements.

Belgian law also provides for jurisdiction over summary and indictable offences under Belgian law that are also offences under the law of the place of commission, as long as the alleged perpetrator has primary residence in Belgian territory, the public prosecutor orders the prosecution, and either the victim or his/her family has filed a complaint or the State where the offence took place has advised Belgian authorities to prosecute.²⁶

Belgian courts are also able to exercise universal jurisdiction over certain crimes against minors, where the person is found in Belgium.²⁷

To claim compensation for damages, victims can bring a civil action as part of criminal proceedings.²⁸ Victims of intentional violent crime can also seek compensation from the Belgian State, under the 1985 Act on state compensation²⁹ so long as they meet certain criteria, such as if they became civil parties during the criminal trial but were not awarded compensation, provided that the claimant had the right to visit or live in Belgium.³⁰

²² Specifically, violations under the Geneva Conventions and both additional protocols, the Rome Statute of the International Criminal Court, and grave breaches as defined in Protocol II to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. (See the Penal Code, as amended by the 5 August 2003 – Law Relating to Grave Breaches of International Humanitarian Law ([5 Août 2003 - Loi relative aux violations graves du droit international humanitaire](#)), Art. 136quater.

²³ 17 April 1878 – Law Containing the First Title of the Criminal Procedure Code (*17 Avril 1878 – Loi contenant le titre préliminaire due Code de procedure pénale*), as amended by the 5 August 2003 – Law Relating to Grave Breaches of International Humanitarian Law, *supra*, Art. 6(1°bis), in conjunction with the amended Penal Code, *supra*, Book II, Title Ibis (Grave Breaches of International Humanitarian Law (*Des violations graves du droit internationale humanitaire*)), which establishes and defines these crimes under Belgian law.

²⁴ Amended Criminal Procedure Code, *supra*, Art. 10(1bis), in conjunction with the amended Penal Code, *supra*, Book II, Title Ibis.

²⁵ Amended Criminal Procedure Code, Art. 12bis.

²⁶ Amended Criminal Procedure Code, *supra*, Art. 7. Note that when the offence is committed during war, this rule differs slightly (See Art. 7(2) of the same Code).

²⁷ Law Containing Provisions Regarding the Repression of Trafficking in Human Beings and of Child Pornography of 13 April 1995 ([Loi du 13 avril 1995 contenant des dispositions en vue de la repression de la traite des êtres humains et de la pornographie enfantine](#)), Art. 8.

²⁸ For the specific rights and conditions, see the amended Criminal Procedure Code, Arts. 4, 66 and 67, among others.

²⁹ 1er Août 1985 - Loi portant des mesures fiscales et autres, as amended, Section II – State aid for victims of intentional violent acts (L'aide de l'Etat aux victimes d'actes intentionnels de violence).

³⁰ See Article 31bis for more detailed criteria.

CASES

Complaints based on universal jurisdiction have been filed against: four Rwandans for genocide; Israeli Prime Minister Ariel Sharon and others for their role in a massacre, carried out by Israeli-allied Christian militia, in the Sabra and Shatila refugee camps; former head of the Palestinian Preventive Security Service Muhammad Dahlan for terrorism and incitement to murder Israelis; former Chadian President Hissène Habré for torture and crimes against humanity during his rule from 1982 to 1990; the oil company TotalFinaElf for its logistical and financial support of the Burmese military, which was responsible for crimes such as forced labour, murder, torture and extrajudicial executions amounting to crimes against humanity in Burma (Myanmar); former Chinese President Jiang Zemin for torture, genocide and crimes against humanity allegedly committed against Falun Gong practitioners; former U.S. President George Bush, Sr., Vice President Dick Cheney, Secretary of State Colin Powell and Gen. Norman Schwarzkopf for war crimes during the first Gulf War; U.S. General Tommy Franks for war crimes under his command during the recent Gulf War; three former Khmer Rouge leaders for genocide and crimes against humanity in Cambodia; as well as against, Congolese Foreign Minister (at the time the case was brought) Yerodia Abdoulaye Ndombasi, former Iranian President Ali Akbar Hachémi-Rafsandjani, former Chilean President Augusto Pinochet, former Moroccan Interior Minister Driss Basri, President of Rwanda Paul Kagame, President of Congo (Brazzaville) Denis Sassou Nguesso, Iraqi leader (at the time the case was brought) Saddam Hussein, Cuban President Fidel Castro, President of the Ivory Coast Laurent Gbagbo, his predecessor Robert Gueï and two ministers, President of the Central African Republic Ange-Felix Patassé, and Mauritanian President Maaouya oul Sid'Amhed Taya, among others. Of these, only the [four Rwandans](#) have been convicted. Many others never even reached admissibility hearings.

Most of these cases can no longer proceed, as a result of the August 2003 legislative changes. The new legislation does, however, include a transitory provision allowing a limited category of advanced cases to continue, including those concerning the Rwandan genocide and the killing of two Belgian priests in Guatemala, as well as the complaints filed against ex-Chadian dictator Hissène Habré, for which a Belgian investigating judge had already gone to Chad in 2002.³¹

ISSUES INVOLVED

PRESENCE REQUIREMENT: Although Belgian law does not specify any presence requirement for the exercise of universal jurisdiction over genocide, war crimes or crimes against humanity, residence is a requirement. In particular, residence of either the alleged perpetrator or the victim in Belgian territory has been established as a condition except where Belgium is required by treaty to exercise jurisdiction over a case.³² Under the previous 1993 law (as amended in 1999), no link to Belgium was required.³³

EXECUTIVE DISCRETION: Unless the accused is Belgian or has his primary residence in Belgium, the decision as to whether to proceed with any complaint, including whether to initiate an investigation concerning genocide, crimes against humanity or war crimes rests entirely with the state prosecutor.³⁴ This considerably reduces victims' ability to obtain direct access to the courts, as compared to procedure in place prior to the 5 August 2003 amendments in which victims could be involved as civil parties (i.e. through "*constitution de partie civile*"). For ordinary crimes under Belgian law, an order from the office of the

³¹ 5 August 2003 – Law Relating to Grave Breaches of International Humanitarian Law, Art. 29, §3.

³² See first paragraph of this chapter for further details.

³³ As confirmed by the Supreme Court (*Cour de Cassation*) in the [case against Ariel Sharon and others](#), 12 February 2003.

³⁴ The amended Criminal Procedure Code, *supra*, Art. 6(1°bis), 10(1°bis) and 12bis. The prosecutor is obligated to proceed with a case unless it is manifestly unfounded, the alleged offences do not fall within the framework of Book II, Title Ibis of the Penal Code, the case could not be found admissible, or, in the interests of justice and in keeping with Belgium's international obligations, the case should instead be brought in another jurisdiction, where the administration of justice is independent and impartial. According to the same article, it is not possible to challenge the prosecutor's decision.

UNIVERSAL JURISDICTION IN THE EUROPEAN UNION

public prosecutor (*ministère public*) is required for prosecutions based on universal jurisdiction to take place, even where the accused has primary residence in Belgium.³⁵

IMMUNITY: The 1993 law expressly excluded immunity for state officials whereas the current legislation provides that, “[i]n accordance with international law, prosecutions are excluded with respect to:

- foreign heads of State, heads of government and ministers of foreign affairs, during the period in which they are in office, as well as other persons for whom immunity is recognised by international law;
- persons who enjoy immunity, total or partial, based on a treaty to which Belgium is a party.”³⁷

This shift appears to have resulted from the decision of the International Court of Justice in the case of the [Democratic Republic of the Congo v. Belgium](#) which determined, *inter alia*, that foreign ministers, and by inference heads of state and government, enjoy immunity while still in office, except if the State they represent waives their immunity.

RELATIONSHIP WITH OTHER JURISDICTIONS: Belgium’s Minister of Justice is required to inform the International Criminal Court (ICC) of cases that the State Prosecutor has decided not to pursue in certain specified circumstances.³⁸ Additionally, the Minister of Justice, by a decision of the Counsel of Ministers, can inform the ICC of acts of genocide, crimes against humanity and war crimes³⁹ that are before the Belgian judiciary. If the ICC decides to address the acts, Belgian competence over the offences must cease. However, if the Court subsequently decides not to proceed, Belgium will again have competence.⁴⁰

STATUTES OF LIMITATION: Prosecution of acts of genocide, crimes against humanity and war crimes⁴¹ are not subject to any statute of limitations.⁴²

³⁵ See paragraph 2 of Article 7.

³⁷ The amended Criminal Procedure Code, *supra*, Art. 1°bis. (Unofficial translation by the Universal Jurisdiction Information Network.)

³⁸ For further details, see Article 10(1°bis) and 12bis of the amended Criminal Procedure Code, *supra*.

³⁹ As defined in the amended Penal Code, *supra*.

⁴⁰ 5 August 2003 – Law Relating to Grave Breaches of International Humanitarian Law, Art. 28.

⁴¹ As defined in Articles 136bis, 136ter and 136quater of the amended Penal Code, *supra*.

⁴² The amended Criminal Procedure Code, *supra*, Art. 21.

DENMARK

Danish law provides for universal jurisdiction over crimes that Denmark is obligated to prosecute under conventional international law.⁴³ This would clearly cover torture under the [Convention against Torture](#)⁴⁴ and grave breaches of the [Geneva Conventions](#),⁴⁵ among other crimes. It is questionable, however, as to whether it would apply to crimes against humanity or genocide. These crimes, or conduct amounting to them, could however be tried under the following, more restrictive provisions:

Section 8(6) of the Penal Code enables Danish courts to exercise universal jurisdiction over any crime under Danish law that carries a prison sentence of more than one year, as long as the act would also be punishable in the territorial state and extradition of the accused for trial in another country has been "rejected". Section 8(6) does not explain the meaning of "rejected," leaving it unclear as to who can reject transfer to another state and whether extradition needs to have been requested and refused as a pre-condition for the exercise of jurisdiction by Danish courts.

Additionally, Section 7 of the Penal Code requires that domestic courts exercise jurisdiction over crimes under Danish law committed abroad by Danish residents, or nationals or residents of Nordic countries who are present in Denmark, where: 1) the crimes were committed in a territory not belonging to any state and are punishable by more than "simple detention"; or 2) the crimes were committed in a foreign state and are also punishable under the law of that state. For crimes under Danish law that are committed in territories not belonging to any state and are punishable by a sentence more severe than simple detention, Danish courts would also have jurisdiction if the victims were residents of Denmark.⁴⁶

The Military Criminal Code also provides for universal jurisdiction over certain crimes committed during armed conflict by members of foreign military services who are interned in Denmark and other specified persons who may not have Danish nationality.⁴⁷

Civil claims for compensation can be brought either within criminal proceedings or in separate civil actions.⁴⁸ In criminal proceedings, the Public Prosecutor is obligated to pursue civil claims lodged by the victim, if this can be done without considerable inconvenience. Where separate civil proceedings are lodged, the victim bears a financial burden, as each party is obligated to pay the expenses of the proceedings. Once a ruling has been made, the losing party is required to reimburse the other side.⁴⁹

Victims can also seek compensation for personal injury from public funds if the victim is a Danish resident or, at the time of the injury, was a civil servant in the Danish foreign service.⁵⁰ If there is a criminal prosecution in Denmark for the alleged crime, the victim must make a compensation claim during trial. It is, however, also possible to seek such compensation from public funds even if the perpetrator is unknown or cannot be found.⁵¹

⁴³ Penal Code (*Straffeloven*), Section 8(5).

⁴⁴ As confirmed by Denmark's first report to the Committee against Torture (CAT/C/5/Add.4): "19. [...] Denmark has, in fulfilment of the requirements as to jurisdiction flowing from article 5 [of the Torture Convention], established jurisdiction on the principle of aut dedere aut iudicare. Accordingly, Danish criminal jurisdiction can, under section 8 (1) (5), be exercised in respect of criminal offences committed outside Danish territory, regardless of the offender's nationality, where the act is recognized by an international convention in pursuance of which Denmark is under obligation to institute legal proceedings. This provision establishes, inter alia, Danish jurisdiction in torture cases regardless of where the act was committed and irrespective of the offender's nationality."

⁴⁵ As demonstrated by the Supreme Court's confirmation of Danish jurisdiction in the Sarić case, 15 August 1995.

⁴⁶ Penal Code, Section 8(3).

⁴⁷ Military Criminal Code, Act No. 2t April 1973, adopted on 26 April 1973, as amended by Act No. 195 of 3 May 1978, Sections 2, 5(2) and 6, in conjunction with Sections 24-25 and 30-36.

⁴⁸ Administration of Justice Act (*Retsplejeloven*), Section 991.

⁴⁹ Administration of Justice Act, Sections 311 and 312.

⁵⁰ Consolidated Act on Compensation from the State to Victims of Crimes (*Voldsofferloven*), Section 1(3).

⁵¹ Consolidated Act on Compensation from the State to Victims of Crimes, Section 6.

CASES

In 1994, Refik Sarić was convicted and sentenced, under Penal Code Art. 8(5), to eight years imprisonment for crimes amounting to grave breaches of the Geneva Conventions committed against Bosnian Muslims.

Former chief of staff of the Iraqi army Nizar al-Khazraji, who had been living in Denmark as an asylum seeker, was charged on 19 November 2002 with grave breaches of the fourth Geneva Convention in relation to crimes allegedly committed against Kurdish civilians during the 1980-1988 Iran-Iraq war. Although he had been placed under house arrest, he managed to escape in March 2003. In response, the Danish authorities issued both a national and international arrest warrant and expressed a willingness to request an extradition in the event that the accused is found abroad.

As of early 2002, an investigation was underway into crimes committed by a Burundian who was seeking asylum in Denmark. The Burundian had told immigration authorities of his crimes, though later denied making such statements. The Director of Public Prosecutions reportedly determined that Denmark could exercise jurisdiction over the matter.

Danish immigration authorities also submitted information to the Director of Public Prosecutions about crimes committed by another asylum seeker – from Sierra Leone – who had admitted his actions during immigration proceedings. However he disappeared before the Director of Public Prosecutions received the information and no investigation had been initiated as of the start of 2002.

The only known case concerning a perpetrator not present in Denmark was against former Chilean President Augusto Pinochet. In 1998, 15 Danish residents of Chilean origin lodged a complaint with the Director of Public Prosecutions (*Rigsadvokaten*) against Pinochet for torture and other ill-treatment committed in Chile between 1973 and 1988. They requested that Denmark open an investigation concerning the alleged acts and seek Pinochet's extradition from the United Kingdom with a view to prosecuting him. After consideration, the Director of Public Prosecutions replied in the negative, determining that Denmark did not have jurisdiction over the alleged offences. The Ministry of Justice later confirmed this decision.⁵²

As of early 2002, the Danish immigration authorities were reportedly looking into several asylum cases in which the asylum seekers may have committed crimes subject to universal jurisdiction.

Under the legislation for state compensation, very few extraterritorial cases have been brought and all have involved persons with close connections to Denmark.

ISSUES INVOLVED

PRESENCE REQUIREMENT: The defendant must be present for the trial phase of proceedings, as trial in absentia is prohibited in Denmark.⁵³ Section 8(5) of the Penal Code does not establish any further presence requirement, and thus prosecutions could theoretically be brought for certain crimes under international treaty law, regardless of the location of the accused prior to trial. This would arguably apply to grave breaches of the Geneva Conventions 1949, as the Conventions have been interpreted as creating an obligation to find and bring to trial or extradite persons responsible for grave breaches, irrespective of the accused's location. Furthermore, jurisprudence confirms that once charges have been laid against a suspect present in Denmark, criminal proceedings for

⁵² Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Fourth periodic reports of States parties due in 2000 (CAT/C/55/Add.2) , [Addendum, Denmark](#), [4 August 2000], paras. 32-34.

⁵³ Administration of Justice Act, Section 847.

grave breaches can continue, at least until the trial phase, even if the accused flees the country (see al-Khazraji case above).

Some obligations to prosecute under international law, however, arise only if the accused is present in the territory of the forum state. This is the case with the Convention against Torture.⁵⁴ Indeed, Danish authorities determined that they did not have jurisdiction over torture allegedly committed by former Chilean President Augusto Pinochet, who was in the United Kingdom when jurisdiction was being considered.

IMMUNITY: As the Penal Code restricts the application of Section 8 in accordance with international law,⁵⁵ it appears that immunities would apply in cases based on universal jurisdiction insofar as they are recognised by international law. This was confirmed in one case against the Israeli ambassador to Denmark Carmi Gillon. He had been accused of bearing responsibility for the torture of prisoners allegedly committed by the Israeli Security Service during his term as head of the Service. However, the Minister of Foreign Affairs stated that his diplomatic immunity precluded any prosecution from proceeding against him under the [Vienna Convention on Diplomatic Relations](#). The Justice Ministry confirmed this interpretation on 25 July 2001 and the police closed the case.

Denmark does not have general legislation on state immunities.

FORUM NON CONVENIENS: Danish courts do not appear to have the discretion to reject competence over a case based on the doctrine of *forum non conveniens*.

STATUTES OF LIMITATION: The Penal Code establishes statutes of limitation of 5 to 15 years for most crimes under Danish law. Crimes such as hijacking and murder however are exempt from prescription periods.⁵⁶ With respect to civil litigation, most claims for compensation must be made within five years of the damage taking place.⁵⁷ Additionally, applications for compensation from public funds cannot be submitted any later than two years from the date of the offence.

⁵⁴ See Article 5(2).

⁵⁵ Section 12.

⁵⁶ Penal Code, Sections 93 - 97.

⁵⁷ Act on Limitations (*Forældelsesloven*), Section 1(5).

FINLAND

Under Finnish law, Finnish courts can exercise universal jurisdiction over a broad range of crimes, often without any nexus requirement. Such crimes include war crimes, genocide, torture, counterfeiting, drug-related offences, hijacking and sabotaging aircraft, attacks against internationally protected persons, hostage taking, unlawful handling of nuclear material, unlawful involvement in chemical weapons, and piracy and other unlawful acts against the safety of maritime navigation, as well as perhaps other crimes under international treaties ratified by Finland that carry an obligation to either extradite or prosecute,⁵⁸ and terrorism.⁵⁹

Jurisdiction over crimes committed abroad can also be triggered by any offence under Finnish law, as long as the act is also criminalised under the law of the place of commission, if within a state,⁶⁰ and the alleged perpetrator either: (1) was at the time of the offence, or is upon the start of trial, permanently resident in Finland, or (2) was apprehended in Finland and at the beginning of trial a citizen or resident of a Nordic country.⁶¹ Finnish courts must also exercise universal jurisdiction over offences under Finnish law, which are also offences in the place of commission, in the context of vicarious administration of justice, where the territorial State has either requested that they do so or requested extradition but extradition was refused.⁶²

A civil claim for damages can be brought through separate civil proceedings, regardless of any link between the case and Finland. Victims who are resident in Finland can also seek compensation from the Finnish State for personal injury committed abroad.⁶³

CASES

On 11 September 2003, a group of Falun Gong practitioners resident in Finland filed a criminal complaint against Luo Gan, a Standing Committee member of the Chinese Communist Party's Politburo. During his visit to Finland in early September, Luo Gan was formally notified of the complaint alleging his responsibility for torture and genocide carried out against Falun Gong practitioners in China. However, he returned to China before any further action was taken by Finnish authorities.

Additionally, one case based on Chapter 1, Section 7 of the [Penal Code](#) is now reportedly underway concerning drug offences committed in the Netherlands. However, the case involved defendants who were Finnish nationals or residents.

ISSUES INVOLVED

PRESENCE REQUIREMENT: Neither presence nor any other nexus to Finland is required to exercise universal jurisdiction under Chapter 1, Section 7 of the Penal Code. However, as noted above, the application of universal jurisdiction under certain other provisions can be conditioned, *inter alia*, on the alleged perpetrator being apprehended in Finland.⁶⁴

⁵⁸ [Finnish Penal Code](#), as amended by 650/2003, Chapter 1, Section 7(1) and (2), in conjunction with the Decree on the application of Chapter 1, Section 7 of the Penal Code (627/1996, as amended by Decrees 353/1997, 118/1999, 537/2000 and 370/2001), entered into force on 1 September 1996 (see Appendix 7 of the Council of Europe [Progress Report by Finland](#), 11 September 2001).

⁵⁹ *Ibid* and Penal Code, Chapter 1, Section 7(3), in conjunction with Chapter 34a.

⁶⁰ Penal Code, Chapter 1, Section 11(1). Some exceptions to this rule apply to certain specified crimes, such as sexual offences against children and corruption by public officials, under Paragraph 2 of the same Section.

⁶¹ Penal Code, Chapter 1, Section 6.

⁶² Penal Code, Chapter 1, Sections 8 and 11, with the exceptions cited above.

⁶³ Victim Compensation Act (1973/935).

⁶⁴ Penal Code, Chapter 1, Section 6(3)(b).

EXECUTIVE DISCRETION: According to Chapter 1, Section 12 of the Penal Code, criminal investigations in universal jurisdiction cases can be carried out only under order of the Prosecutor-General, except in certain limited circumstances, such as where the alleged perpetrator was a permanent resident of Finland at the time of the commission of the offence or upon the start of trial and the victim is a Finnish resident. The Penal Code does not specify criteria for the exercise of this discretion.

IMMUNITY: The Penal Code does not address immunity for foreign officials. However, as Section 15, Chapter 1 of the Penal Code states that international law binding on Finland can restrict the application of Finnish law, it appears that immunities would apply insofar as they are recognised by the general rules of international law.

STATUTES OF LIMITATION: Statutes of limitations apply to many crimes that can trigger the exercise of universal jurisdiction, as specified in Section 1, Chapter 8 of the Penal Code. However, crimes that carry a maximum penalty of life imprisonment, such as genocide, are not subject to prescription.

FRANCE

French law provides for universal jurisdiction over war crimes, genocide and crimes against humanity under limited conditions. In particular, the ability to exercise universal jurisdiction over such crimes appears to remain limited to those specific instances when international conventions/treaties are said to have specific application in France by way of implementing legislation. For example, French courts can exercise their jurisdiction over such crimes when committed either in the former Yugoslavia since 1991 or in Rwanda, or by Rwandan citizens in neighbouring countries, during 1994.⁶⁵ They can assert jurisdiction over specified crimes, that France has a duty to prosecute under international treaties, including torture, terrorism, piracy, hijacking, corruption of European public officials and offences committed by means of nuclear materials.⁶⁶ Military courts can also hear cases based on a limited form of universal jurisdiction in which the alleged offences were committed in breach of the laws and customs of war during an armed conflict to which France was a party in limited circumstances.⁶⁷ Specifically, the offences must have been committed since the start of the armed conflict, by either enemy nationals or those working for the enemy or in the enemy's interests, and in a zone of the war. Such offences also need to have been committed against a French protégé, a soldier serving or having served France, a stateless person or a refugee resident, or against the possessions of such persons.

French courts also have the authority to exercise jurisdiction over any offence punishable under French criminal law committed on or after 1 March 1994 by persons who subsequently became French nationals.⁶⁸

Civil compensation for damages can be obtained in the context of criminal proceedings, as the criminal judge addresses both the criminal sanction and the civil damage.⁶⁹

CASES

Prominent cases brought in France on the basis of universal jurisdiction include those concerning the Rwandan priest, Munyeshyaka, Javor, and the recent case of Ely Ould Dah, a Mauritanian lieutenant. Several other cases involve crimes committed in Rwanda in 1994, including *Dirigeants de la Radio Télévision Libre des Milles-Collines* and *Bucyibaruta* and others.

Other cases, all of which are pending, include: the vice-consul to the Tunisian Consulate in France, Khaled Ben Said, subject of an international warrant since February 2002; the case against the Algerian General, Khaled Nezzar, accused of committing crimes of torture and cruel, inhuman and degrading treatment; the case brought by six Tunisian victims against Tunisian alleged torturers Mohamed Ali Ganzoui, Ali Mansour and Mohamed Ennaceur; and finally the case of "the Disappeared of the Beach," which refers to the massacres allegedly conducted in Brazzaville in 1999 by Denis Sassou Nguesso, President of the Republic of Congo, Pierre Oba, General of the Ministry of the Interior, Public Security and Territorial Administration, Norbert Dabira, Inspector General of the army residing in France, and Blaise Adoua, General, Captain of the Republican guard (a.k.a. the presidential guard). This latter case became the subject of a claim by the Republic of Congo against France at the International Court of Justice.

⁶⁵ [Law no. 95-1 of 2 January 1995](#) and [Law no. 96-432 of 22 May 1996](#).

⁶⁶ [Criminal Procedure Code](#), Article 689 to 689-10.

⁶⁷ [Code of Military Justice](#) (*Code de Justice Militaire*). Art. 70.

⁶⁸ [Penal Code](#), Art. 113-6 § 3.

⁶⁹ [Criminal Procedure Code](#), Art. 3.

ISSUES INVOLVED

PRESENCE REQUIREMENT:

Investigation

With respect to crimes that may be prosecuted under Article 689-1 of the [Criminal Procedure Code](#), such as torture, terrorism, piracy and others, presence must be established before a criminal investigation can be opened.⁷⁰ The same requirement applies to cases launched on the basis of [Law no. 95-1 of 2 January 1995](#) and [Law no. 96-432 of 22 May 1996](#) concerning, respectively, crimes committed in the former Yugoslavia since 1991 and Rwanda or, by Rwandan citizens, in neighbouring countries, in 1994.

Given that Article 689-1 of the Criminal Procedure Code requires that the suspect “be found” in French territory before the launch of any criminal proceeding, the question arises as to whether this requirement prevents the opening of an investigation when the whereabouts of the suspect are unknown – i.e. when an investigation would be required to determine whether the accused is present. The investigating judge in the [Javor case](#) adopted a liberal approach but was not followed by the *Cour de cassation*. In the Javor case, the victims did not bring any evidence that the suspects were on French territory when they filed their complaint. The investigating judge held that Article 1 of the Criminal Procedure Code gives victims, along with prosecutors, the right to initiate prosecutions, and that the presence requirement enshrined in Article 689-1 does not prevent victims from exercising that right even when the suspect’s whereabouts are not known. Therefore, he concluded, victims can not only refer the matter to a judge, but may also initiate any investigative measures in order to identify and search for the authors of the offence.

However, the Indicting Chamber of the Court of Appeal and the *Cour de Cassation* both reaffirmed the condition of presence. The [Cour de Cassation](#) seemed to assert that the burden of establishing the presence of the suspect in French territory rested on the victims and had to be carried out prior to any complaint.

In theory, the victim could launch a complaint *in rem*, i.e against an unnamed person (in French: ‘*plainte contre X*’). This is usually used when the victim does not know who committed the offence. It would allow him/her to automatically shift the burden of finding the offender onto the Public Prosecution.

Even when the suspect has not been found on French territory, it is still possible, with respect to crimes committed in the former Yugoslavia or Rwanda, to ensure that evidence, such as a medical examination in case of rape, is collected in France and would be available if the suspect is later found there.⁷¹ Similarly, pursuant to Article 77-1 of the Criminal Procedure Code, “if the case calls for findings or technical or scientific examinations which may not be postponed”, the district prosecutor can decide to carry them out.

Prosecution

Once the accused has been found on French territory and a prosecution has been launched, the prosecution may continue even if the accused is no longer there. The case of the Mauritanian lieutenant [Ely Ould Dah](#) illustrates this. In June 1999, while he was staying in France, two French organisations, on behalf of two victims, filed a complaint against him on charges of torture. The lieutenant was first imprisoned, and later placed under judicial supervision. In April 2000 he managed to escape to Mauritania. Despite his absence, in May 2001 the investigating judge indicted him and ordered a trial before the *Cour d’Assises*. His lawyers then started a long legal battle to dismiss the case on jurisdictional grounds. Finally, both the Court of Appeal and the *Cour de Cassation* confirmed the

⁷⁰ Criminal Procedure Code, Art. 689-1; *Cour de cassation*, [Javor case](#).

⁷¹ Two circulars, namely [Circular of 10 February 1995](#), Art. 2.2.1. (published in the *Journal Officiel*, 21 February) and [Circular of 22 July 1996](#), Art. 1 (*Journal Officiel*, 31 August), edited after the adoption of Law no. 95-1 of 2 January 1995 and Law no. 96-432 of 22 May 1996, respectively, allow during preliminary investigations the interview and the medical examination of victims who have taken refuge in France, even if the suspect has not yet been found in the territory of the Republic. Such measures are considered as “conservatory measures” (“*mesures conservatoires*”) – i.e. measures taken to preserve a right or a property, in the event of later prosecutions.

UNIVERSAL JURISDICTION IN THE EUROPEAN UNION

decision of the investigating judge to proceed with the case even though the accused remained in Mauritania.

Trial

Trials in absentia (*jugements par contumace*) in universal jurisdiction cases are also possible, subject to the presence of the accused in French territory prior to the beginning of the prosecution.⁷² Again, the Ely Ould Dah case provides a good example of its application. In its [decision of 23 October 2002](#), the *Cour de Cassation* declared French courts competent to exercise universal jurisdiction in the case against Ely Ould Dah in respect of alleged acts of torture and complicity of torture committed in Mauritania in the 1990s, according to Articles 689-1 and 689-2 of the Criminal Procedure Code, and decided to send the case to the *Cour d'Assises du Gard* to be judged. This marked the first time that French courts would try someone who is not present at a trial based on universal jurisdiction.

EXECUTIVE DISCRETION: In criminal matters, the opportunity to bring a prosecution remains the discretion of the Public Prosecutor.⁷³ In France, prosecutors are under the authority of the Ministry of Justice.⁷⁴ Furthermore, Article 36 of the Criminal Procedure Code allows the Ministry of Justice to issue written instructions to prosecute a particular case or refer the matter to the relevant court, although orders not to prosecute are theoretically not permitted.⁷⁵

However, according to Article 1 of the Criminal Procedure Code (French version), victims can institute a civil action. Such a mechanism obliges the Public Prosecutor to open an investigation and designate an investigating judge, thereby allowing victims to have a direct access to justice. A majority of the pending universal jurisdiction cases have been filed using this mechanism. The French draft law incorporating into national law crimes under the jurisdiction of the International Criminal Court would abrogate "*constitution de partie civile*" so that only the prosecution authorities would decide on the opportunity to prosecute. Victims would only be able to become civil parties after this decision is taken.⁷⁶

IMMUNITY: France recognises immunity for foreign heads of state while in office. In a [recent ruling](#) in the case against Libyan President and Colonel Muammar Khadafi, the *Cour de Cassation* stated that customary international law bars prosecutions of sitting foreign heads of state before the criminal courts of a foreign country, when no contrary international provisions bind the involved parties. In addition, in response to an application for the arrest of Zimbabwean President Robert Mugabe, when he was visiting Paris, a French court reportedly ruled that Mugabe holds immunity from prosecution as a sitting head of state.

RELATIONSHIP WITH OTHER JURISDICTIONS (INCLUDING ICC): Chapter II of [Law no. 95-1 of 2 January 1995](#) concerning crimes committed in the former Yugoslavia addresses the relationship between French jurisdiction and that of the International Criminal Tribunal for the former Yugoslavia (ICTY) when each seeks to exercise jurisdiction over the same case. A request by the ICTY for the cessation of French jurisdiction essentially requires automatic implementation by the French judiciary, assuming the proper procedures have been followed and the case falls within the ICTY's jurisdictional mandate. One particular provision in Chapter II – i.e. Article 6 – establishes the

⁷² General rules governing trials in absentia are set down in Article 627-21 (definition) and Articles 628 to 641 of the Criminal Procedure Code.

⁷³ Criminal Procedure Code, Art. 40.

⁷⁴ [Ordonnance n° 58-1270 of 22 December 1958, Art. 5.](#)

⁷⁵ See Rep. Min 4 Sept 1995, JOAN (*Journal Officiel de l'Assemblée Nationale*) Q 1995, p. 3802. For further information on the links between the Public Prosecutor's Office and the Executive see, for example, ELLIOTT Catherine, *French Criminal Law*, Willan Publishing, 2001, Chap. 2, pp. 23-32.

⁷⁶ Avant-projet de loi portant adaptation de la législation française au Statut de la Cour pénale internationale et modifiant certaines dispositions du code pénal, du code de justice militaire, de la loi du 29 juillet 1881 sur la liberté de la presse et du code de procédure pénale, June 2003. See, also Commission Nationale Consultative des Droits de l'Homme, "Avis sur l'avant-projet de loi portant adaptation de la législation française au Statut de la Cour pénale internationale," 15 May 2003.

relationship between a civil action under this law before French courts and a criminal proceeding before the ICTY.

[Law no. 96-432 of 22 May 1996](#), concerning offences committed in Rwanda, or by Rwandans in neighbouring countries, in 1994, incorporates the same provisions.

GERMANY

German law expressly provides for the exercise of universal jurisdiction over genocide, crimes against humanity and war crimes.⁷⁷ Additional crimes that can trigger universal jurisdiction in Germany include serious offences involving nuclear energy, explosives or radiation, assaults against air or sea traffic, trafficking in human beings, unauthorised distribution of narcotics, dissemination of pornographic writings, counterfeiting, subsidy fraud, and acts committed abroad if they are prosecutable on the basis of a binding international agreement.⁷⁸ German courts may also exercise universal jurisdiction over other crimes, including ordinary crimes under national law (e.g. murder, assault), which were carried out by someone who concomitantly committed one of the above acts.⁷⁹ Furthermore, when an act is prosecutable under a binding international agreement but is not defined as a crime in German law, it may be possible to exercise universal jurisdiction over any crime under German law that constitutes the said act (e.g. murder constituting a war crime or genocide).⁸⁰

German law also expressly provides for jurisdiction over all crimes defined under German criminal law either where the perpetrator subsequently acquired German citizenship or, on the basis of the principle of vicarious administration of justice, where the perpetrator was a foreigner apprehended in Germany and could not be extradited for trial.⁸¹

Civil compensation can be sought in several ways: within criminal proceedings, separate civil litigation or victim-offender mediation. Before criminal courts, civil claims can be brought for any of the above crimes at any time during criminal proceedings,⁸² although the court may reject the application for a joint procedure without providing reasons and appeals are not permitted.⁸³ Compensation may only be awarded if the defendant is found guilty or sentenced to a special measure,⁸⁴ such as a provisional stay of proceedings by the court on condition that the alleged perpetrator compensates the victim.⁸⁵ In practice, very few civil claims are brought in this manner, as criminal courts tend to prefer not to rule on civil matters.

Victims can seek compensation through separate civil proceedings, as long as the defendant has either residence⁸⁶ or perhaps assets⁸⁷ in Germany. The ability to base the declaration of competence on the presence of assets alone is unclear; while the German

⁷⁷ Section 1, [Code of Crimes Against International Law \(Völkerstrafgesetzbuch\)](#), passed on 30 June 2002. No prosecutions have yet been initiated under this new legislation, although several universal jurisdiction cases had been lodged and declared admissible under Germany's previous universal jurisdiction legislation – Article 6, [Criminal Code \(Strafgesetzbuch\)](#). This provided for universal jurisdiction over genocide and “acts which, on the basis of international agreement binding on the Federal Republic of Germany, shall also be prosecuted if they are committed abroad”, among other crimes. German courts exercised such jurisdiction in the Djajic and Jorgic cases, among others.

⁷⁸ Section 6, Criminal Code.

⁷⁹ In the [Jorgic case](#), the Federal High Court held that because it had jurisdiction over the crime of genocide it could “annex” jurisdiction over the concomitantly committed crime of murder. (Section 1, Judgment, Jorgic case, Federal High Court, 30 April 1999.) Subsequent to the introduction of the Code of Crimes, it would seem that such annexation remains possible as long as the *actus reus* of the crime being annexed is covered by the principal crime.

⁸⁰ For example, due to the fact that grave breaches did not exist per se as crimes under German domestic law, they were instead prosecuted as crimes under national law such as murder. (See Judgment, Djajic case, High Court of Bavaria, 23 May 1997.)

⁸¹ Article 7(2), Criminal Code. The High Court of Bavaria used this provision to further support its exercise of jurisdiction, *inter alia*, over murder in the [Djajic case](#) (Judgment, Djajic case, High Court of Bavaria, 23 May 1997).

⁸² [Criminal Procedure Code \(Strafprozeßordnung, or StPO\)](#), Sections 403-406c, s. 404-1.

⁸³ Criminal Procedure Code, Sections 404-5.

⁸⁴ See Section 7.2 under guideline D.10 and D.11.

⁸⁵ Criminal Procedure Code, Section 153 a. The prosecutor's office has responsibility for enforcing the compensation order.

⁸⁶ Civil Procedure Code ([Zivilprozeßordnung](#)), Section 1.

⁸⁷ Civil Procedure Code, Section 23.

Code of Civil Procedure recognises the presence of assets as a sufficient nexus to Germany, a court ruled in 1991 that it is not.⁸⁸ Aside from residence, what would suffice as a link to Germany remains unclear.

Compensation through victim-offender mediation was introduced in Germany in 1994.⁸⁹

CASES

Cases brought before German courts on the basis of universal jurisdiction include those against Novislav Djajic, Maksim Sokolovic, Djuradj Kusljic and Nikola Jorgic – all of whom were found guilty – among others. Civil claims did not form part of the criminal proceedings.

ISSUES INVOLVED

STATE SOVEREIGNTY: Before the [Code of Crimes Against International Law](#) was passed (which expressly states that it shall apply to acts which bear no relation to Germany), German courts adhered to the principle of non-intervention ("*Nichteinmischung*") requiring an "inland link" ("*inländische Anknüpfungspunkt*") between the accused and Germany before jurisdiction could be exercised in order to respect the principle of territorial sovereignty.⁹⁰

The minimum requirements for establishing an "inland link" were unclear, as courts have tended to consider the sum of all existing links in the particular case when rendering their decisions rather than specifying any minimum.⁹¹

With the introduction of the Code of Crimes against International Law, this rule has changed with respect to genocide, war crimes and crimes against humanity. Section 1 of the Code expressly states that the Code shall apply even to acts that bear "no relation to Germany", thus clarifying that the inland link requirement no longer applies. However, the requirement may or may not still be applicable to the exercise of universal jurisdiction over crimes that remain outside the scope of the Code.

PRESENCE REQUIREMENT:

Genocide, War Crimes and Crimes against Humanity

Prior to the enactment of the Code of Crimes Against International Law, the ability of German courts to exercise jurisdiction over an extraterritorial crime of genocide, war crimes or crimes against humanity could have hinged on the presence or residence of the accused in Germany when no other link to Germany could satisfy the "inland link" requirement.

With the introduction of the Code of Crimes, there is no requirement that someone suspected of genocide, war crimes or crimes against humanity be present on German territory for an investigation to commence. However, prosecution might not proceed if the suspect is neither in Germany nor likely to be present in Germany, depending on the decision of the prosecutor.⁹²

Serious Offences involving Human Trafficking, Other Acts Prosecutable on the Basis of Binding International Agreement, etc.

⁸⁸ Bundesgerichtshof, Judgment, 2 July 1991, (XI ZR 206/90) = NJW 1991, 3092 (3093 ff.).

⁸⁹ M.E.I.Brienen and E.H. Hoegen, Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure, Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)), Chapter 9, Section 9.

⁹⁰ See, *inter alia*, Judgment, Jorgic case, Duesseldorf Court, and Judgments, Federal High Court, 20 October 1976, 8 April 1987, 13 February 1994, 11 December 1998 and 11 February 1999.

⁹¹ See, for example, Judgment, Jorgic case, Federal High Court, 30 April 1999; Judgment, Tadic case, Federal High Court, 13 February 1994; Judgment, Djajic case, Federal High Court; Judgments, Federal High Court, 20 October 1976, 8 April 1987, 11 December 1998 and 11 February 1999.

⁹² Code of Crimes against International Law, Section 153f, *supra*.

UNIVERSAL JURISDICTION IN THE EUROPEAN UNION

Cases involving offences that fall within the application of Section 6 of the Criminal Code may still need to demonstrate the existence of an “inland link” for German courts to accept jurisdiction. Such a link could be satisfied by the presence or residence of the accused in Germany. However, the absence of any so-called “inland link” requirement in the new Code of Crimes against International Law may signal a shift away from this approach.

EXECUTIVE DISCRETION: The Public Prosecution Service (*Staatsanwaltschaft*) is required to “take action in the case of all criminal offences which may be prosecuted, provided there are sufficient factual indications”.⁹³ However, Section 153 of the [Code of Criminal Procedure](#) identifies the conditions under which the public prosecution office can (though it is not obliged to) dispense with a case. These conditions appear to allow for the possibility of dispensing with a prosecution on political grounds.

IMMUNITY: Germany’s Judiciary Act (*Gerichtsverfassungsgesetz*) recognises the general rules of public international law on sovereign immunity.⁹⁴

FORUM NON CONVENIENS: German law of civil procedure does not recognise the doctrine of *forum non conveniens*.

RELATIONSHIP WITH OTHER JURISDICTIONS: The principle of residual jurisdiction may be applicable in civil suits in cases of negative conflict of jurisdiction – that is, cases where no other State exercises jurisdiction and German statutes do not establish a basis for civil jurisdiction. However, there does not appear to be any case law on the subject.

VICTIMS’ ACCESS TO JUSTICE: On paper, victims hold a strong position in German criminal law and procedure. In principle, victims can participate in a number of ways, such as by joining the proceedings as an auxiliary prosecutor or by bringing a civil claim for damages in adhesion to criminal proceedings.⁹⁵ However, in practice victims face numerous obstacles. Access to information depends on the victim’s role in the proceedings. The procedure of adhering civil claims to criminal proceedings often proves unsuccessful for victims, perhaps due to lack of information and support in preparing the claim, resistance among judges and prosecutors to dealing with civil claims during criminal proceedings, the fact that lawyers can earn more by bringing a claim in a civil court than a criminal one. Enforcement is also usually left to the victim. Victims also rarely obtain compensation through the victim-offender mediation procedure.⁹⁶

⁹³ Section 152(2), Code of Criminal Procedure. (Unofficial translation found on the German Ministry of Justice website, http://www.bmj.bund.de/eng/service/federal_law/10000013/?sid=03664838178c2f6671bc18df34d04914.)

⁹⁴ Section 20(2).

⁹⁵ Criminal Procedure Code, Section 403 ff.

⁹⁶ For further information on victim’s access to justice, see M.E.I. Brien and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)), Chapter 9.

GREECE

Greek law provides for universal jurisdiction over piracy, counterfeiting, slave-trading, human trafficking aimed at “debauchery”, drug trafficking, prostitution, pornography and “any other crime for which specific provisions or international conventions signed and ratified by the Greek state provide for the application of Greek criminal legislation.”⁹⁷ This latter rule, in conjunction with the [Constitution](#) provision establishing that “[t]he generally recognised rules of international law, as well as international conventions [...] shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law [...]”, appears to require the exercise of universal jurisdiction by Greek courts over crimes such as grave breaches of the Geneva Conventions and torture under the Convention against Torture, among others.⁹⁸ Torture has been defined as a crime under domestic law.

Although Greek law does not provide for universal jurisdiction over crimes against humanity per se, certain conduct amounting to crimes against humanity that are both defined under Greek law and over which universal jurisdiction can be exercised, such as torture⁹⁹ and slave-trading,¹⁰⁰ can be prosecuted in Greece. Yet, it does not appear that one could be charged with crimes against humanity itself. The same is true of genocide.

Criminal jurisdiction can also be exercised over any act committed abroad that is defined as a felony or misdemeanor under Greek law as long as the alleged perpetrator was a Greek citizen either upon the commission of the offence or subsequently and the offence is also punishable under the law of the state where the offence was committed.¹⁰¹

Victims can bring civil claims for damages either through separate civil litigation¹⁰² or within criminal proceedings.¹⁰³ Victims can choose to bring all or only part of their claims in criminal proceedings.¹⁰⁴ Additionally, claims that are brought before civil courts can be discontinued and then brought within criminal proceedings against the same defendant.¹⁰⁵ Where a civil claim is brought before a criminal court and a final decision is handed down, civil claims for that crime may no longer be initiated through civil proceedings unless the claimant, during the criminal proceedings, had explicitly retained the right seek further damages through separate civil litigation.¹⁰⁶ The person requesting civil or criminal proceedings is required to pay certain costs of the proceedings. They may be reimbursed depending on the outcome of the trial.

⁹⁷ Penal Code, Article 8 (k). (Translated by Amnesty International in its report, “[Universal Jurisdiction - the duty of states to enact and enforce legislation](#),” AI Index: IOR 53/002/2001, 1 September 2001.)

⁹⁸ Constitution, Art. 28(1). (Translation found on the Ministry of Justice website <http://www.ministryofjustice.gr/>.) Also see, initial report of Greece to the Committee against Torture (CAT/C/7/Add.8), para. 32: “As of the date of publication in the Official Journal of Act No. 1782/88 on the ratification of the Convention against Torture, all persons subject to Greek law as well as law-enforcement agencies are under an obligation to comply with its provisions.” And para. 33: “The Convention cannot be repealed, amended, restricted or changed by any law because, once an international convention has been ratified, it takes precedence over any conflicting legal provision, in accordance with article 28 of the 1975 Greek Constitution”, as quoted by Amnesty International in its report, *supra*. Courts have abided by this provision (see Judgment 1574/1999, Court of Appeal of Athens, and Judgment 286/1999, Court of Appeal of Piraeus, which held that Article 14 (7) of the International Covenant on Civil and Political Rights prevails over contrary provisions in Article 8 of the Penal Code). It should also be noted that the same Article 28 sets reciprocity as a condition for the enforcement of international treaties on foreign nationals.

⁹⁹ Defined in Arts. 137A to D of the Penal Code.

¹⁰⁰ Defined in Art. 323 of the Penal Code.

¹⁰¹ Penal Code, Art. 6. According to the same article, the double criminality rule does not apply if the crime was committed outside the territory of any state.

¹⁰² Criminal Procedure Code, Arts. 914-938.

¹⁰³ Criminal Procedure Code, Arts. 63-70, 82-88, 108, 468, 480 and 488.

¹⁰⁴ For further information, see M.E.I.Brienen and E.H. Hoegen, [Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation \(85\) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure](#), Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)), Chapter 10, Section 7.2.

¹⁰⁵ Criminal Procedure Code, Art. 66.

¹⁰⁶ Criminal Procedure Code, Art. 67.

ISSUES INVOLVED

PRESENCE REQUIREMENT: Presence prior to trial does not appear to be required in universal jurisdiction cases.

EXECUTIVE DISCRETION: The Public Prosecutor has discretion, though based on very strict criteria, in deciding whether or not to initiate proceedings. S/he can decide not to prosecute only if the alleged facts do not constitute a crime, do not satisfy the elements of a crime or are virtually impossible to verify. Any decision not to prosecute is subject to appeal.¹⁰⁷ Once proceedings are underway, the Minister of Justice has the authority to postpone a prosecution where political crimes or international relations are at issue.¹⁰⁸ In the context of civil proceedings, a case might not be able to proceed without the authorisation of the Minister of Justice.¹⁰⁹

IMMUNITY: As Article 28(1) of the Constitution provides that international law prevails over domestic law, it appears that immunities would apply insofar as they are recognised by international law. With respect to state immunity in civil claims, a decision by Greece's Special High Court (*Anotato Eidiko*) in a case against the Federal Republic of Germany demonstrated that states enjoy immunity before Greek courts, even where the damages occurred in Greece.¹¹⁰

STATUTES OF LIMITATION: Foreign statutes of limitation cannot bar prosecutions under Article 8 of the same Code, according to Article 9(2) of the Penal Code. However, it appears that foreign prescription periods would apply to crimes perpetrated by persons who were at the time or subsequently became Greek citizens – i.e. crimes prosecuted under Article 6 of the Penal Code.¹¹¹

¹⁰⁷ See for example Criminal Procedure Code, Arts. 43(1), 47 and 48.

¹⁰⁸ Criminal Procedure Code, Art. 30.

¹⁰⁹ Civil Procedure Code, Art. 923.

¹¹⁰ Special High Court (*Anotato Eidiko*), Germany case, June 2002. The ruling was specific to damage caused by foreign (i.e. German) armed forces operating in Greece, whether during armed conflict or peacetime.

¹¹¹ Penal Code, Art. 9.

IRELAND

Under Irish law, Irish courts can exercise universal jurisdiction over, *inter alia*, grave breaches of the [Geneva Conventions of 1949 and its first additional protocol](#)¹¹² and torture.¹¹³

Victims can also seek civil remedies through criminal proceedings for damages suffered as a result of these crimes, even when the prosecution is based on universal jurisdiction.¹¹⁴ There are two possible procedures for obtaining a compensation order from the court, though both are conditioned on the defendant being convicted: 1) the victim can take the initiative by applying to the court for compensation; or 2) the court can of its own initiative order the defendant to pay compensation. However, if a court chooses not to award compensation, it is under no obligation to explain its reasons.¹¹⁵ A civil claim for damages can also be brought through the civil courts.

Victims can also seek compensation through the Scheme of Compensation for Personal Injuries Criminally Inflicted. This state compensation is provided as a measure of charity; victims do not have a legal right to it.¹¹⁶ There have, however, been reports that the Scheme has become virtually inactive during the past few years.¹¹⁷

ISSUES INVOLVED

EXECUTIVE DISCRETION: While prosecutions for grave breaches of the Geneva Conventions and Protocol I¹¹⁸ do not explicitly require the consent of the executive, the Geneva Conventions Act does specify that the Minister of Foreign Affairs has sole authority to determine whether the Act is applicable to a particular case.¹¹⁹ With respect to torture and ancillary offences, the consent of the Director of Public Prosecutions is required in order to proceed with a prosecution beyond the initial charge and arrest.¹²⁰ The DPP, theoretically independent from the Executive, has the discretion to decide whether to prosecute an indictable offence, and must make this decision on the basis of the sufficiency of the available evidence and the public interest. The DPP is legally prohibited from explaining its reasons for deciding against a prosecution.¹²¹

IMMUNITY: The [Irish Constitution](#) provides that the "State may exercise extra-territorial jurisdiction in accordance with the generally recognised principles of international law."¹²² It would therefore appear that Irish courts could apply immunities insofar as they are recognised under these generally recognised principles.

STATUTES OF LIMITATION: Claims for compensation to the Criminal Injuries Compensation Tribunal should generally be made within three months from when the injury was inflicted. However, there is flexibility for exceptional circumstances.

¹¹² [Geneva Conventions Act, 1962](#), as amended by the [Geneva Conventions \(Amendment\) Act 1998](#), Section 3.

¹¹³ [Criminal Justice \(United Nations Convention Against Torture\) Act, 2000](#), Sections 2 and 3.

¹¹⁴ [Criminal Justice Act, 1993](#), Section 6(1).

¹¹⁵ M.E.I. Brien and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)), Chapter 12: Ireland, Section 5.2.

¹¹⁶ See Brien and Hoegen, *Victims of Crime in 22 European Criminal Justice Systems, supra*, Chapter 12: Ireland, Section 3.7.

¹¹⁷ For further information on the various means of obtaining compensation for victims, see Brien and Hoegen, *Victims of Crime in 22 European Criminal Justice Systems, supra*, Chapter 12: Ireland.

¹¹⁸ Under the amended Geneva Conventions Act, *supra*.

¹¹⁹ Amended Geneva Conventions Act, *supra*, Section 5.

¹²⁰ Criminal Justice (United Nations Convention Against Torture) Act, 2000, Sections 5(2).

¹²¹ [Prosecution of Offences Act](#), 1974, Section 6(1)(a).

¹²² Art. 29(8).

ITALY

Italian courts can exercise universal jurisdiction over torture,¹²³ any crime under Italian law that carries a prison term of at least three years,¹²⁴ and “any other crime for which special legal provisions or international agreements specify that Italian criminal law applies”.¹²⁵ There is debate, however, as to whether this can be applied without the incorporation into Italian law of the relevant jurisdictional provisions.¹²⁶

Limited universal jurisdiction provisions can also be found in military statutes. For example, the 1941 [Wartime Military Criminal Code](#) (*Codice Penale Militare de Guerra*), as [amended in 2002](#), establishes that, “[t]he provisions of Title IV [on offences against war laws and usage], Book Three [on military offences in particular] of this code concerning offences committed against wartime laws and customs, also apply to military personnel and any other member of the enemy armed forces when any of these offences have been committed to the detriment of [...] an allied state or a subject thereof.”¹²⁷ The Code defines certain war crimes, including grave breaches of the [Geneva Conventions](#) among others.

Civil claims for compensation can be brought either in the context of criminal proceedings¹²⁹ or separately before civil courts. The relationship between these two types of proceedings is set out in Article 75 of the Criminal Procedure Code.

ISSUES INVOLVED

PRESENCE REQUIREMENT: In order to exercise universal jurisdiction over torture under [Law No. 498 of 3 November 1988](#), the perpetrator would need to be present in Italian territory and not to be extradited.¹³⁰ Similarly, the ability to exercise universal jurisdiction over any crime under Italian law that carries a prison sentence of at least three years is restricted by a requirement that the alleged perpetrator be present in Italian territory and that no extradition to the territorial or home state has been ordered.¹³¹ In contrast, no presence requirement is stipulated for the prosecution of crimes that Italy is obligated to prosecute under international agreements in accordance with Art. 7(5) of the [Penal Code](#).

EXECUTIVE DISCRETION: Generally, the Public Prosecutor (*Pubblico Ministero*) is obligated to exercise criminal action once a criminal complaint has been lodged and then to submit the case to an investigating judge for prosecution, unless Italian courts would not have jurisdiction over the facts or the allegations are manifestly unfounded.¹³² Decisions

¹²³ Law No. 498 of 3 November 1988 ([Legge 3 novembre 1988, n.498](#)), Art. 3(1)(c); and [Penal Code](#), Art. 10. In its initial report to the Committee against Torture, Italy noted that both of these provisions cover, at least in part, the obligation established in Art. 5(2) of the [Torture Convention](#). Torture is not defined as a crime, however, under Italian law and therefore would need to be prosecuted as ordinary crimes under Italian law that amount to torture, as the Italian Government has explained in its reports to the Committee against Torture. (Italy’s initial state party report (CAT/C/9/Add.9), para. 36; as reiterated in *Third periodic reports of States parties due in 1998: Italy. 15/12/98* (CAT/C/44/Add.2), 15 December 1998, para. 9.)

¹²⁴ Penal Code, Art. 10. Genocide, for example, has been criminalized in Italian law and carries a prison sentence of more than three years ([Law No. 962 of 9 October 1967](#) ([Legge 9 ottobre 1967, n.962](#))).

¹²⁵ Penal Code, Art. 7(5).

¹²⁶ See, for example, Amnesty International, “[Universal Jurisdiction - the duty of states to enact and enforce legislation](#),” AI Index: IOR 53/002/2001, 1 September 2001, Chapter 4, Part B, p. 10.

¹²⁷ Art. 13. (Translation found at http://www.giustiziamilitare.difesa.it/legislazione/cpmg/en/libroprimo_en.shtml).

¹²⁹ Penal Code, Art. 185; and Criminal Procedure Code, Arts. 74, 90, 101, 394, 396.

¹³⁰ Art. 3(1)(c).

¹³¹ Penal Code, Art. 10(1) and (3).

¹³² [Constitution](#), Art. 112 (“The public prosecutor has the duty to initiate criminal proceedings.”).

not to prosecute can be challenged.¹³³ To prosecute someone for torture under Art. 3(1)(c) of Law No. 498 of 3 November 1988, or for ordinary crimes under Penal Code Art. 10, the Minister of Justice must first issue a request for the prosecution to take place.

STATUTES OF LIMITATION: Although statutes of limitation are laid out in Articles 157 to 161 of the [Penal Code](#), they do not appear to be applicable to crimes that can be subject to life imprisonment.

¹³³ Criminal Procedure Code, Arts. 408 to 410.

LUXEMBOURG

Luxembourg law provides for universal jurisdiction over genocide,¹³⁴ grave breaches of the 1949 Geneva Conventions,¹³⁵ certain violations of the laws and customs of war,¹³⁶ torture (either if the victim resides in Luxembourg¹³⁷ or when “an application for extradition has been submitted, but the person concerned has not been extradited”¹³⁸), and offences involving perjury (*faux serment* and *faux témoignage*) and bribery of trial participants.¹³⁹ Furthermore, Luxembourg law provides for universal jurisdiction over certain other war crimes, rape, crimes against public decency (*pudeur*), certain offences against minors, and certain offences involving prostitution, human trafficking, counterfeiting of currency or falsification of official documents.¹⁴⁰

Civil claims for compensation for the above crimes can be sought within criminal proceedings.¹⁴¹

CASES

In 1998, Chilean refugees in Luxembourg filed a complaint against former Chilean President Augusto Pinochet following his arrest in London. The investigating judge ruled that Luxembourg law at the time did not provide for jurisdiction over the alleged facts.¹⁴²

ISSUES INVOLVED

PRESENCE REQUIREMENT: The 9 January 1985 law that provides for universal jurisdiction over grave breaches of the Geneva Conventions specifies that presence is not required: “Every individual, who has committed, outside the territory of the Grand Duchy, a violation covered by the present law, can be prosecuted in the Grand Duchy even if he is not found here.”¹⁴³ To prosecute someone for genocide or for violations of the laws and customs of war, however, he must be either found in Luxembourg territory, found in an “enemy country” (*pays ennemi*), or extradited to Luxembourg.¹⁴⁴ Prosecution for a limited number of war crimes and certain crimes involving the falsification of documents or currency requires simply that the suspect’s whereabouts be known, whether s/he is in

¹³⁴ [Law of 8 August 1985 Concerning the Repression of Genocide](#) (8 août 1985 – *Loi portant répression du génocide*), Art. 6.

¹³⁵ [Law of 9 January 1985 Concerning the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949](#) (*Loi du 9 janvier 1985 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949*) (*Mém. A N° 2 du 25 janvier 1985*, p. 24), Art. 10.

¹³⁶ [Law of 2 August 1947 Concerning the Repression of War Crimes](#) (*Loi du 2 août 1947 sur la répression des crimes de guerre*) (*Mém. 1947. 755 - Pas. 1947. 500*), Art. 1. This provides jurisdiction to War Crimes Courts (*Cour[s] de crimes de guerre*).

¹³⁷ [Code of Criminal Investigation](#), Art. 7-3, in conjunction with [Penal Code](#), Arts. 260-1 to 260-4.

¹³⁸ [Code of Criminal Investigation](#), Art. 7-4, in conjunction with [Penal Code](#), Arts. 260-1 to 260-4. (Translation found in [Third periodic reports of States parties due in 1996: Luxembourg](#) (CAT/C/34/Add.14), 19 February 2001, para. 21.)

¹³⁹ [Code of Criminal Investigation](#), Art. 7-1, in conjunction with [Penal Code](#). Arts. 221bis and 223.

¹⁴⁰ [Code of Criminal Investigation](#), Art. 7(3) and (4) and Art. 5-1, in conjunction with [Penal Code](#), Arts. 163, 169, 170, 177, 178, 187-1, 192-1, 192-2, 198, 199, 199bis, and 368 to 382.

¹⁴¹ [Code of Criminal Investigation](#), Art. 3.

¹⁴² Réquisitoire du 19 novembre 1998 du parquet du tribunal d'arrondissement de Luxembourg dans l'affaire de la plainte contre Augusto Pinochet, n° 18077/98/CD, reprinted in 9 *Annales du Droit Luxembourgeois* 393 (1999), as found in Amnesty International, “[Universal Jurisdiction - the duty of states to enact and enforce legislation](#),” AI Index: IOR 53/002/2001, 1 September 2001.

¹⁴³ [Law of 9 January 1985 Concerning the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949](#), Art. 10. (Translation found in Amnesty International, “[Universal Jurisdiction - the duty of states to enact and enforce legislation](#),” AI Index: IOR 53/002/2001, 1 September 2001.)

¹⁴⁴ [Law of 8 August 1985 Concerning the Repression of Genocide](#), Art. 6; and [Law of 2 August 1947 Concerning the Repression of War Crimes](#), Art. 1.

Luxembourg or abroad.¹⁴⁵ Jurisdiction over crimes such as falsifying documents and counterfeiting currency can also be conditioned on the presence of the alleged perpetrator in Luxembourg territory.¹⁴⁶ Prosecutions for torture can proceed as long as one of two possible criteria are satisfied, both of which imply the perpetrator's presence at some stage: either 1) the victim is resident in Luxembourg;¹⁴⁷ or 2) extradition of the alleged perpetrator must have been requested but not granted.¹⁴⁸

RELATIONSHIP WITH OTHER JURISDICTIONS: Article 12 of the 1985 law concerning grave breaches of the Geneva Conventions provides that Luxembourg courts can cede jurisdiction to foreign courts. However, if the foreign court fails to take action on the case within six months or it renounces its intention to exercise jurisdiction, the Luxembourg courts can re-establish their own jurisdiction over the facts of the case.¹⁴⁹

STATUTES OF LIMITATION: Statutes of limitation for criminal prosecutions are set out in Chapter V of Title VII of Book II of the Code of Criminal Investigation.

¹⁴⁵ Code of Criminal Investigation, Art. 7(3) and (4).

¹⁴⁶ Code of Criminal Investigation, Art. 5-1.

¹⁴⁷ Code of Criminal Investigation, Art. 7-3. The wording of this provision appears to imply residence of the victim at the time of the commission of the offence.

¹⁴⁸ Code of Criminal Investigation, Art. 7-4.

¹⁴⁹ ¹⁴⁹ Law of 9 January 1985 Concerning the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949.

THE NETHERLANDS

Under recently enacted implementing legislation for the International Criminal Court (the [International Crimes Act](#)), Dutch courts have the authority to exercise universal jurisdiction over genocide, war crimes, crimes against humanity and torture, as long as the alleged perpetrator either is present in the territory of the Netherlands or has become a Dutch national subsequent to the commission of the crime.¹⁵⁰ It is not clear as to whether the new International Crimes Act can be applied retrospectively to crimes committed before its entry into force on 1 October 2003. However, section 21(2) of the Act refers to offences committed before the Act's entry into force as punishable under the Torture Convention Implementation Act.¹⁵¹ Additionally, the [Constitution](#) provides that, "No offence shall be punishable unless it was an offence under the law at the time it was committed."¹⁵²

Prior to the introduction of the International Crimes Act, Dutch courts were able to exercise universal jurisdiction over, *inter alia*, violations of the laws and customs of war,¹⁵³ genocide (if the perpetrator subsequently became a Dutch national)¹⁵⁴ and torture.¹⁵⁵

Dutch law also establishes universal jurisdiction over piracy and counterfeiting,¹⁵⁶ hijacking and other attacks against aircraft and maritime navigation where the perpetrator is present in the Netherlands.¹⁵⁷ Some additional provisions establishing universal jurisdiction can be found in Criminal Code Article 4.

Furthermore, Dutch courts can exercise jurisdiction under the representational principle with respect to any crime under Dutch law, as long as the "prosecution has been taken over by the Netherlands from a foreign state on the basis of a treaty from which the competence of the Netherlands follows."¹⁵⁸

Civil claims for compensation can be brought either within criminal proceedings for any of the above crimes¹⁵⁹ or through separate civil proceedings under tort law. Each carries significant limitations, however.

In the course of a criminal trial, victims can obtain compensation in two ways. First, they can join proceedings as a civil party and make a claim. Alternatively, where the defendant is convicted, the court may order him/her to compensate the victims. In the former

¹⁵⁰ [International Crimes Act](#), adopted 19 June 2003, entered into force 1 October 2003, Section 2(1)(a) and (c) and 2(3), in conjunction with Sections 3 to 8 and 10 which define these acts as crimes under Dutch law.

¹⁵¹ The Torture Convention Implementation Act was repealed by Section 20 of the International Crimes Act, *supra*.

¹⁵² Art. 16 [Nulla Poena Sine Lege].

¹⁵³ Wartime Offences Act (*Wet Oorlogsstrafrecht*) (1952), Art. 3(1) and (3). See application of this article in the *Knežević* case. Also, see *n re Rohrig*, Special Criminal Court, Amsterdam, 24 December 1949, 17 Int'l L. Rep. 393. (as cited in Amnesty International, "[Universal Jurisdiction - the duty of states to enact and enforce legislation](#)," AI Index: IOR 53/002/2001, 1 September 2001, Chapter Four, Part B). The ruling provided that "[t]here is a rule of customary international law by which those who violate the rules of war can be punished by those into whose hands they have fallen (the so-called theory of detention). This rule has the same universality as that applied internationally in the rule which treats pirates as enemies of mankind."

¹⁵⁴ Netherlands Act of 2 July 1964 Implementing the Convention on Genocide (*Uitvoeringswet genocideverdrag*) (hereinafter, Genocide Convention Implementation Act), Section 5(2).

¹⁵⁵ Act of 29 September 1988 implementing the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Implementation) Act (*Uitvoeringswet Folteringverdrag*) (hereinafter, Torture Convention Implementation Act), No. 478, Section 5.

¹⁵⁶ Penal Code, Arts. 4 (3) and (5), in conjunction with 381-385 and 208-215.

¹⁵⁷ Penal Code, Arts. 4 (7) and (8), in conjunction with 166, 168, 350, 352, 354, and 385a to 385c.

¹⁵⁸ Penal Code, Art. 4a. Under the representational principle (or the "vicarious administration of justice"), states can exercise jurisdiction on behalf of or when requested to do so by the state in which the crime occurred, or possibly also by another state with jurisdiction.

¹⁵⁹ Penal Code, Art. 36(f); and Civil Procedure Code, Art. 51a(1). The victim can also opt to bring only a part of their claim through criminal proceedings (see Civil Procedure Code, Art. 51a(3)).

scenario, only a simple process is permitted; the victim cannot bring witnesses or experts to support the claim and if the damage cannot easily be determined, the criminal court will not be able to consider the claim.¹⁶⁰ In the latter, the victim has no control over whether or not compensation is considered.

With respect to civil litigation, nexus requirements limit the circumstances in which proceedings can take place. In particular, they can be brought only where either: 1) the claimant resides in the Netherlands;¹⁶¹ or 2) the claimant has requested the freezing or seizure of assets and the defendant has assets in the country.¹⁶²

Victims who have managed to obtain compensation through these procedures or from an insurance company or elsewhere can apply to the Criminal Injuries Compensation Fund.¹⁶³

CASES

Cases based on universal jurisdiction have been brought against, *inter alia*, former Surinamese military leader Desiré Delano Bouterse for torture and murder committed in Surinam; Darko Knežević for grave breaches and violations of Common Article 3 of the Geneva Conventions of 1949 committed in the former Yugoslavia; former Chilean President Augusto Pinochet for torture in Chile and former Argentine Minister of Agriculture Jorge Zorreguieta and other government ministers for torture and crimes against humanity. Dutch military courts were declared competent to try Darko Knežević. Additionally, in April 2002 the Dutch Ministry of Justice announced the creation of a task force mandated in part to investigate the potential involvement of asylum seekers in war crimes in their home countries. This may have led to the arrest and charging of a Congolese (Kinshasa) colonel in September 2003, reportedly for torture, and rape.¹⁶⁴

ISSUES INVOLVED

PRESENCE REQUIREMENT: The presence of the accused is a pre-condition for prosecution in most circumstances, although the stage of proceedings at which such presence is required is not entirely clear. As noted above, to prosecute someone under the new International Crimes Act for genocide, war crimes, crimes against humanity or torture committed outside Dutch territory, where neither the suspect nor the victims of the said crimes are Dutch nationals, the suspect must be present in the territory of the Netherlands. However, the relevant provision of this Act does not offer any clarity as to the stage at which this rule would apply¹⁶⁵ – at trial, at admissibility hearings, to open an investigation, or otherwise. The notes of the Ministry of Foreign Affairs on this provision may shed some light; they indicate that the provision concerns the trial and perhaps admissibility phases only: “The reasons for making this [presence requirement] were the difficulties associated with conducting a trial in *absentia* of an individual with no ties to the Netherlands, as well as the desire to limit jurisdictional conflicts.”¹⁶⁶

With respect to attacks against civil aviation and maritime navigation, prosecution is conditioned on the suspect’s presence in Dutch territory.¹⁶⁷

Regarding other crimes, while presence during trial is the norm in the Dutch legal system, trial in *absentia* is permitted in certain circumstances.¹⁶⁸

¹⁶⁰ Civil Procedure Code, Art. 334(1), 361(3).

¹⁶¹ Civil Procedure Code, Art. 126(3). In such circumstances, it may also be required that the defendant and claimant are of the same nationality.

¹⁶² Civil Procedure Code, Art. 767.

¹⁶³ “Information Supplementary to the Second Dutch Report and a Review of the Report by the Committee against Torture.”

¹⁶⁴ Anthony Deutch, “Dutch Court Charges Congolese Colonel,” *Associated Press*, 30 September 2003.

¹⁶⁵ International Crimes Act, *supra*, Section 2(1).

¹⁶⁶ Netherlands Ministry of Foreign Affairs website, http://www.minbuza.nl/default.asp?CMS_ITEM=MBZ459385.

¹⁶⁷ Penal Code, Arts. 4 (7) and (8), in conjunction with 166, 168, 350, 352, 354, and 385a to 385c.

¹⁶⁸ Criminal Procedure Code (*Wetboek van Strafvordering*), Arts. 278 to 280.

EXECUTIVE DISCRETION: The Public Prosecutor, who has the sole authority to initiate criminal proceedings, is empowered with a significant degree of discretion. Under the expediency principle (*opportuiniteitsbeginsel*), the Prosecutor can determine whether or not to bring a prosecution based on public interest. Criteria for this decision may include technical issues, such as sufficiency of evidence, or policy, concerning, for example, the severity of the alleged offence, the offender's personal circumstances or otherwise.¹⁶⁹ A decision of the Public Prosecutor not to institute proceedings can be challenged by an "interested party" in an appeals court.¹⁷⁰

IMMUNITY: The Penal Code states that the jurisdiction provided therein shall be subject to limitations recognised by international law.¹⁷¹ More specific rules have also emerged. In particular, sitting "foreign heads of state, heads of government and ministers of foreign affairs [...], and other persons in so far as their immunity is recognised under customary international law" or under a Convention applicable in the Netherlands, are immune from prosecution for genocide, war crimes, crimes against humanity and torture as defined under the new ICC implementing legislation.¹⁷²

RELATIONSHIP WITH OTHER JURISDICTIONS: The Netherlands recognises a hierarchy of jurisdictions in which the territorial jurisdiction has priority over the exercise of universal jurisdiction by Dutch courts.

STATUTES OF LIMITATION: Although Sections 70 to 76a of the Criminal Code establish statutes of limitation for crimes under Dutch law, they do not apply to genocide, torture, crimes against humanity and most war crimes committed under the enactment of the International Crimes Act.¹⁷³ The Netherlands has ratified the [European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes](#).

¹⁶⁹ Criminal Procedure Code, Arts. 67 and 242; and M.E.I. Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)), Chapter 17, Section 7.1.

¹⁷⁰ Criminal Procedure Code, *supra*, Arts. 12 to 13a.

¹⁷¹ Penal Code, Art. 8.

¹⁷² International Crimes Act, *supra*, Section 16.

¹⁷³ The International Crimes Act, *supra*, Section 13 exempts these offences from the application of any statutes of limitation. Section 21(2) of the same Act extends the application of Section 13 to acts of torture punishable under the Torture Convention Implementation Act and specifies that it applies retrospectively.

PORTUGAL

Portuguese law expressly provides for universal jurisdiction over genocide, slavery, abduction, human trafficking, sexual abuse of children and certain types of war crimes, where the accused is “found” in Portugal and cannot be extradited.¹⁷⁴ A few of these crimes are classified in the [Penal Code](#) under the heading “crimes against humanity,” but this is not defined as a distinct offence.¹⁷⁵ Portuguese law also provides for universal jurisdiction, regardless of the location of the alleged perpetrator, over terrorism, communication or information fraud, counterfeiting, certain premeditated acts (not concerning serious crimes against the person) and certain crimes against foreign States and international organisations.¹⁷⁶ Additionally, the Penal Code provides for jurisdiction over any act committed abroad: 1) which the state is obligated to prosecute under an international treaty,¹⁷⁷ or 2) for which Portugal is generally able to extradite the perpetrator and the accused is in Portugal but his/her extradition cannot be granted.¹⁷⁸ The former may well obligate Portugal to try or extradite suspected torturers found in its territory, in accordance with the 1984 [Convention against Torture](#), which Portugal has ratified.¹⁷⁹

Under Portuguese law, victims have a right to compensation,¹⁸⁰ even in cases based on universal jurisdiction. Generally, compensation must be addressed in the context of criminal proceedings,¹⁸¹ and victims need to take the initiative by filing civil claims for damages. In very limited circumstances, the criminal court has the authority to award compensation even if the victims have made no such claim, but only where they require special protection.¹⁸² A conviction is not an absolute pre-condition to the awarding of compensation.¹⁸³

Civil claims can also be brought before civil courts, but only in limited circumstances – in particular, when, for instance: 1) the victim was not informed of the opportunity to claim in a criminal court; 2) a prosecution has not taken place up to eight months after the reporting of the crimes; 3) a decision has been taken not to prosecute, to suspend prosecution, to stop proceedings before the sentence is enforced, or to bring the proceedings before a military court or in a summary form; among other criteria.¹⁸⁴

ISSUES INVOLVED

PRESENCE REQUIREMENT: Most provisions that allow for universal jurisdiction in Portugal require that the alleged perpetrator be present in Portugal in order for the courts to try a case. However, Article 5(1)(a) of the Penal Code does not contain this requirement, enabling the courts to hear cases concerning terrorism, crimes against foreign States and international organisations and other offences.¹⁸⁵ Additionally, under Article 5(2) of the Penal Code, Portuguese courts may try crimes that Portugal is obligated to prosecute under conventional international law regardless of the location of the accused. This would arguably include grave breaches of the [Geneva Conventions](#).

¹⁷⁴ [Portuguese Penal Code \(Código Penal Português\)](#), Art. 5(1)(b).

¹⁷⁵ See Capítulo II -Dos crimes contra a humanidade of Título III – Dos crimes contra a paz e a humanidade of the Penal Code.

¹⁷⁶ Penal Code, Art. 5(1)(a).

¹⁷⁷ Penal Code, Art. 5(2).

¹⁷⁸ Article 5(1)(e) Penal Code.

¹⁷⁹ Torture is defined as a crime in Art. 243 and 244 of the Portuguese Penal Code.

¹⁸⁰ Penal Code, Arts. 129 and 130; Civil Code, Art. 483. Much of the information provided on civil claims in this chapter is from M.E.I. Brienens and E.H. Hoegen, [Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation \(85\) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure](#), Dissertation, University of Tilburg (Nijmegen, The Netherlands, 2000: Wolf Legal Productions (WLP)).

¹⁸¹ Criminal Procedure Code, Section 71. Section 72 provides for certain exceptions.

¹⁸² Criminal Procedure Code, Section 82A.

¹⁸³ Criminal Procedure Code, Section 377.

¹⁸⁴ Criminal Procedure Code, Section 72-1, as explained in Brienens and Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, *supra*, footnote 136.

¹⁸⁵ See first paragraph of this chapter for a more comprehensive list of offences.

EXECUTIVE DISCRETION:¹⁸⁶ Portugal does not appear to have made executive discretion part of the judicial process. The public prosecutor is legally obligated to investigate all crimes brought to his/her attention,¹⁸⁷ and, generally, to prosecute when there is sufficient evidence, the perpetrator can be identified and charged and public action is permitted.¹⁸⁸ The public prosecutor could, however, suspend proceedings conditionally for offences that are subject to less than five years of imprisonment, as long as s/he has the consent of the examining magistrate, the auxiliary prosecutor and the accused.¹⁸⁹ The victim has the right to challenge decisions not to prosecute,¹⁹⁰ but not decisions to suspend proceedings.¹⁹¹

STATUTES OF LIMITATION: Persons who wish to claim compensation through criminal proceedings must file a claim within twenty days of being notified that the case will be prosecuted or an indictment issued.¹⁹² Additional rules on prescription periods can be found in Articles 118 to 122 of the Penal Code.

¹⁸⁶ The information on executive discretion in this chapter was found in Brienen and Hoegen, *Victims of Crime in 22 European Criminal Justice Systems, supra*.

¹⁸⁷ Criminal Procedure Code, Section 262.

¹⁸⁸ Criminal Procedure Code, Section 277 and 283.

¹⁸⁹ Criminal Procedure Code, Section 281.

¹⁹⁰ Criminal Procedure Code, Sections 277, 278 and 287-2b.

¹⁹¹ Criminal Procedure Code, Section 281-5.

¹⁹² Criminal Procedure Code, Section 77-2.

SPAIN

A single article of Spanish law provides for universal jurisdiction over the crimes of genocide, terrorism, piracy, hijacking, counterfeiting of foreign currency, offences related to prostitution and corruption of minors and handicapped, drug trafficking and any other crime that Spain has a duty to prosecute under international treaties,¹⁹³ which includes torture and certain violations of international humanitarian law, among others. (For crimes against humanity that do not constitute genocide or torture, the ability of the article to provide a basis for universal jurisdiction remains questionable and has yet to be determined by Spanish courts.) Furthermore, Spanish law provides that any criminal complaint filed by a victim is also a civil claim except if the claimant expressly renounces it.¹⁹⁴

Despite the existence of legislation establishing and supporting the competence of Spanish courts to try cases that have no direct link to Spain, the most recent jurisprudence in 2003 has raised doubt about the ability to exercise universal jurisdiction when there is no such direct connection. In its decision in the [Rios Montt \(Guatemala\) case](#),¹⁹⁵ the Supreme Court (*Tribunal Supremo*), Spain's highest court, determined – by eight votes to seven – that the aforementioned article is too general to "allow criminal proceedings to be instituted"¹⁹⁶ on the basis of universal jurisdiction, and that, due to limitations imposed by the principles of state sovereignty and non-intervention, Spanish courts can only exercise jurisdiction over genocide where there exists a "point of connection"¹⁹⁷ with Spain.

The impact that this decision will have on other cases before Spanish courts is not yet clear. Future rulings are likely to clarify whether the effect of the Rios Montt decision on other cases is to limit jurisdiction over crimes other than genocide. There has been only one subsequent judgment – that of the Supreme Court in the [Fujimori case](#) – where the Court had the opportunity to do so. Here, the Court did not mention any pre-requisite of a link with Spain. Instead, it determined that Spain would have jurisdiction, but ruled not to admit the criminal complaint "for the moment" since the crimes allegedly committed by former President Fujimori are under judicial investigation in Peru and several persons linked to him are in jail there or are fugitives.

CASES

Several complaints have already been filed on the basis of universal jurisdiction, including the cases against former Chilean president Augusto Pinochet, former Chilean general Herman Brady, former Argentinean military official Ricardo Miguel Cavallo, former Guatemalan head of state Efraín Ríos Montt, and several other officials, among others. Argentinean navy officers are currently in Spanish jails awaiting trial for crimes of genocide, terrorism and torture; the trial is expected to take place during 2004. All these criminal proceedings have included civil actions.

ISSUES INVOLVED

STATE SOVEREIGNTY: Until the Supreme Court's Rios Montt ruling in February 2003, Spanish courts had held that the exercise universal jurisdiction by Spain was not contrary to the principle of sovereign equality embodied in Article 2 of the [United Nations](#)

¹⁹³ [Organic Law 6/1985, of 1 July, of the Judicial Power](#) (*Ley Organica 6/1985, de 1 de julio, del Poder Judicial*) , Art. 23.4. Additionally, the "Purpose of the Act" of [Organic Law 6/2000 of 4 October Authorising Ratification by Spain of the Statute of the International Criminal Court](#) does not expressly enable the exercise of universal jurisdiction yet does lend further support to Spain's right to apply the universality principle to genocide and recognises the possibility, if not a duty, to exercise universal jurisdiction for crimes against humanity.

¹⁹⁴ Spanish Criminal Proceedings Law, Art. 112.

¹⁹⁵ Judgment, [Rios Montt case](#), *Tribunal Supremo*, 25 February 2003.

¹⁹⁶ Unofficial translation provided by Amnesty International, on file with the authors.

¹⁹⁷ *Ibid.*

[Charter](#).¹⁹⁸

In the Rios Montt decision, however, the Supreme Court took the view that the principles of state sovereignty and non-intervention can in fact restrict jurisdiction. As such, the Court reasoned that the exercise of extraterritorial jurisdiction by Spanish courts can only be justified where either: a) there exists a direct connection with Spanish national interests, or b) such jurisdiction is "accepted"¹⁹⁹ by agreements between States or by a decision of the United Nations. The Court's examples of national interests that could trigger Spanish competence over a case included the nationality of the alleged perpetrator or the victim (i.e. the active and passive personality principles) or anything that would be covered by the "protection of interests" (or protective) principle. The Court's examples of instances in which jurisdiction would be accepted by agreements between States included ones in which the State is under an international treaty obligation to either extradite or prosecute perpetrators of the crime who are present in its territory. This controversial decision was taken by a slim majority (eight to seven).

In the subsequent Fujimori decision, the Supreme Court did not address the direct connection requirement but did assume that there was a limit to the exercise of jurisdiction: where the territorial state is prosecuting a case in an effective manner, there is no need for a State with universal jurisdiction to intervene. It further explained that a determination that there has been no effective prosecution in the territorial state does not imply any pejorative judgment of that State.

PRESENCE REQUIREMENT: As noted above, the Supreme Court's Rios Montt ruling appears to have introduced a presence requirement with respect to the exercise of universal jurisdiction over certain crimes. The Court does not specify at what stage of a case the perpetrator would need to be present in Spanish territory, but it implies that this would be a precursor to any establishment of competence by a Spanish court. The launch of investigations may still be possible even in the absence of the accused.

Prior to the Rios Montt ruling, it had been possible not only to investigate criminal conduct but also to declare judicial competence regardless of the location of the accused. This was evident in the Pinochet case in which the *Audiencia Nacional* declared Spanish courts competent, even though Pinochet was in the United Kingdom at the time. The ruling of the Supreme Court in the Fujimori case seems to follow the pre-Rios Montt line of reasoning.

However, presence during the merits phase of a trial has always been obligatory however.²⁰⁰

EXECUTIVE DISCRETION: Executive discretion does not exist in Spanish criminal procedure.

IMMUNITY: Spanish law recognises immunities that exist in public international law.²⁰¹ In practice, it appears that Spain does not recognise immunity for former heads of state or "senators for life" in criminal proceedings, including where civil claims are attached. In addition, sovereign immunity might not be applicable when the crime alleged is the crime of genocide. According to the Central Magistrate's Court Number Five, in a decision concerning the request for extradition of Pinochet from the United Kingdom, "sovereign

¹⁹⁸ See, for example, [Judgment, Pinochet case](#), *Audiencia Nacional*, 5 November 1998. The Court stated that, "Article 2(1) of the Charter of the United Nations ("The Organisation is based on the principle of the sovereign equality of all its Members") is not a legal provision which invalidates the proclamation of jurisdiction made in article 23(4) [...]. When the Spanish courts apply the said legal provision, they are not interfering in the sovereignty of the State where the crime was committed, but rather they are exercising Spanish sovereignty with regard to international crimes. Spain has jurisdiction to judge the events by virtue of the principle of universal prosecution for certain crimes - a category of international law - recognized by our internal legislation." (Unofficial translation by Micah Myers, as indicated by Juan Garcés.)

¹⁹⁹ Unofficial translation provided by Amnesty International, on file with the authors.

²⁰⁰ Articles 789(4), 791(4), 793, 834, 835 and 836, [Criminal Procedure Code](#).

²⁰¹ Article 21(2), Organic Law 6/1985, of 1 July, of the Judicial Power, *supra*.

immunity cannot protect someone who has been charged with the crime of genocide, because this would contradict the Genocide Convention of 1948, which is binding on the United Kingdom.²⁰² The Genocide Convention is also binding on Spain.

RELATIONSHIP WITH OTHER JURISDICTIONS: Spanish jurisprudence recognizes a hierarchy of jurisdictions in the context of the crime of genocide, if not other crimes as well. The Supreme Court, in both the Rios Montt and Fujimori rulings, determined that territorial jurisdiction has priority over all other forms of jurisdiction "where there is a real and effective concurrence of active jurisdictions".²⁰³ In the Fujimori decision, the Supreme Court clarified that to commence proceedings based on universal jurisdiction in Spain, "serious and reasonable proof" that the offences "have not been prosecuted effectively to date by the territorial jurisdiction"²⁰⁴ must be provided. The Court explained that there exists a "principle of necessity of jurisdictional intervention",²⁰⁵ derived from the nature and purpose of universal jurisdiction. This establishes the priority of the territorial jurisdiction over a State exercising universal jurisdiction.

There is a significant difference between the two judgments. In the Rios Montt decision, the Court's ruling of inadmissibility was of a permanent character. In the Fujimori ruling, the Court determined that "for the moment"²⁰⁶ there is no need for Spanish courts to exercise jurisdiction. Perhaps this difference can be attributed to the fact that the Fujimori decision did not address a nexus requirement, as had the Rios Montt decision.

STATUTES OF LIMITATION: Limitation periods exist for most crimes, though the crime of genocide is exempt.²⁰⁷

²⁰² Unofficial translation by the Universal Jurisdiction Information Network (UJ Info).

²⁰³ Decision of the Supreme Court in the Rios Montt case. (Unofficial translation provided by Amnesty International, on file with the authors.)

²⁰⁴ Unofficial translation by Amnesty International.

²⁰⁵ Unofficial translation by UJ Info.

²⁰⁶ "[E]n el momento actual". (Unofficial translation by UJ Info.)

²⁰⁷ [Penal Code](#), Art. 131.

SWEDEN

Swedish courts can exercise universal jurisdiction over “crime[s] against international law”, hijacking and sabotaging aircraft/airports, piracy, unlawful involvement in chemical weapons and mines, false or careless statements before international courts,²⁰⁸ and any crime that would result in a prison sentence of a minimum four years.²⁰⁹ In addition, any crime under Swedish law that carries a prison sentence of at least six months can also trigger universal jurisdiction, as long as the accused is present in Sweden.²¹⁰ Furthermore, such jurisdiction can be exercised over all crimes under Swedish law where the alleged perpetrator: 1) was resident in Sweden at the time of the offence or subsequently became resident, 2) became a Swedish citizen subsequent to the commission of the crime, 3) is a citizen of a Nordic country and present in Sweden,²¹¹ or 4) was employed in a foreign contingent of the Swedish military and committed the crime in the course of duty.²¹² Swedish courts can also exercise jurisdiction over crimes under Swedish law committed: 1) by anyone in an area where a detachment of the Swedish military is present for a purpose other than an exercise,²¹³ or 2) against a Swedish resident.²¹⁴ Sweden has criminalized war crimes,²¹⁵ among other offences. Crimes against humanity is not defined as such, though certain conduct amounting to crimes against humanity can be prosecuted before Swedish courts.

Civil claims for compensation can be brought either within criminal proceedings or in separate civil litigation. In criminal proceedings, the prosecutor is obligated to pursue any civil claims requested by the victim, if this can be done without considerable inconvenience and if the claim is not manifestly unfounded. However, where this is not possible, the Court can order that the claim be brought instead through civil action. An award for damages in criminal proceedings is not conditioned on the defendant being convicted.²¹⁶

CASES

One criminal investigation is reported to have been initiated by a Public Prosecutor against Sinisa Jazic, suspected of having murdered Bosnian Muslims. However, the Public Prosecutor decided not to prosecute due to insufficient evidence.²¹⁷

In October 2002, Swedish prosecutors refused to pursue a case against Israeli Prime Minister Ariel Sharon for war crimes committed by the Israeli army in the occupied Palestinian territories since September 2000. According to the prosecutor, it was impossible in practice to conduct a preliminary inquiry into the allegations.

ISSUES INVOLVED

PRESENCE REQUIREMENT: To exercise jurisdiction over a crime committed abroad where there is no connection between Sweden and the accused, such as citizenship or residence, the accused must be present in Sweden.²¹⁸

²⁰⁸ [Swedish Penal Code](#), Chapter 2, Section 3(6).

²⁰⁹ Penal Code, Chapter 2, Section 3(7).

²¹⁰ Penal Code, Chapter 2, Section 2(3).

²¹¹ Penal Code, Chapter 2, Section 2(1) and (2).

²¹² Penal Code, Chapter 2, Section 3(3).

²¹³ Penal Code, Chapter 2, Section 3(2).

²¹⁴ Penal Code, Chapter 2, Section 3(5).

²¹⁵ Penal Code, Chapter 22, Section 6.

²¹⁶ [Code of Judicial Procedure](#), Chapter 22, Sections 1, 2, 5 and 7.

²¹⁷ Amnesty International, “[Universal Jurisdiction - the duty of states to enact and enforce legislation](#),” AI Index: IOR 53/002/2001, 1 September 2001, Chapter Six.

²¹⁸ Penal Code, Chapter 2, Section 2(2) and (3).

IMMUNITY: Foreign officials and representatives of international organisations cannot be prosecuted in Sweden except by Government order.²¹⁹ As the [Penal Code](#) states that limitations resulting from generally recognised fundamental principles of public international law or international agreements binding on Sweden can restrict the application of Swedish law, it appears that immunities would apply insofar as they are recognised by international law.²²⁰ Certain specified persons are also entitled to immunity from civil claims that are brought within criminal proceedings.²²¹

EXECUTIVE DISCRETION: Swedish law does not provide for any executive discretion with respect to the exercise of universal jurisdiction. The initiation of a prosecution is obligatory as long as "there are reasonable grounds to believe that an offence has been committed."²²²

STATUTES OF LIMITATION: All crimes under Swedish law are subject to statutes of limitation, depending on length of prison sentence that they carry.²²³

²¹⁹ Penal Code, Chapter 2, Section 7a.

²²⁰ Penal Code, Chapter 2, Section 7.

²²¹ Code of Judicial Procedure, Chapter 20, Sections 10.

²²² See initial report of Sweden to the Committee against Torture (CAT/C/5/Add.1), para.13.

²²³ Penal Code, Chapter 35.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

United Kingdom law explicitly provides for universal jurisdiction over the crimes of torture,²²⁴ hostage taking,²²⁵ participating in the slave trade,²²⁶ offences against United Nations personnel,²²⁷ piracy²²⁸ and certain war crimes, including grave breaches of the 1949 Geneva Conventions and its first additional Protocol.²²⁹ It also provides for a more limited form of extraterritorial jurisdiction over three of the crimes under the statute of the International Criminal Court – war crimes, crimes against humanity and genocide. To exercise universal jurisdiction over these crimes, they must have been committed by a United Kingdom resident at the time of either the commission of the act or the institution of proceedings²³⁰ or, in England and Wales only, a person subject to United Kingdom service jurisdiction.²³¹ Likewise, the UK [War Crimes Act 1991](#) provides for only limited extraterritorial jurisdiction over certain crimes committed during the Second World War.²³²

Compensation can be sought for the loss or damage suffered by the victim for these crimes through civil proceedings. There is no requirement under English law for a person launching a claim for a civil wrong committed abroad to be resident in the UK or to be a British national. However, in claims where the injury occurred outside the UK, the claimant has to overcome a number of procedural hurdles that may be raised by the defendant such as *forum non conveniens* (see below).

Alternatively, a victim may be awarded compensation for personal injury, loss or damage in a criminal prosecution if the defendant is found guilty.²³³ Courts are required to consider whether the offender should be ordered to pay compensation in every case where the offence has resulted in personal injury, loss or damage.

CASES

In addition to the well-known hearings concerning the extradition of former Chilean President Augusto Pinochet to Spain, cases have been brought in England and Wales against, *inter alia*, Mr. Zardad Sarwar, a mujahadeen military commander in Afghanistan accused of torture. Sarwar was charged by the London Bow Street Magistrate Court on 18 July 2003 with crimes of torture under Section 134 of the [Criminal Justice Act 1988](#) and hostage-taking under the 1982 Taking of Hostages Act. During the last couple of years,

²²⁴ [Criminal Justice Act 1988](#), Section 134(1).

²²⁵ Taking of Hostages Act 1982, Section 1.

²²⁶ [An Act for consolidating with Amendments the Acts for carrying into effect Treaties for the more effectual Suppression of the Slave Trade, and for other purposes connected with the Slave Trade](#) (Slave Trade Act, 1873), Section 26, as amended by the [Statute Law \(Repeals\) Act 1998](#). Exercise of universal jurisdiction is conditioned on the presence of the alleged perpetrator within the jurisdiction.

²²⁷ [United Nations Personnel Act 1997](#), Sections 1, 2, 3 and 5(3).

²²⁸ R v. Keyn (1876) 2 Ex D 63, 2 bilc 701, CCR; R v. Anderson (1868). See also Halsbury's Laws of England.

²²⁹ [Geneva Conventions Act 1957](#), Section 1(1); and the [Geneva Conventions \(Amendment\) Act 1995](#), Section 1.

²³⁰ However, in the latter circumstances, the act would need to have constituted an offence in the particular part of the United Kingdom that is exercising jurisdiction. [International Criminal Court Act 2001](#), Section 68; [International Criminal Court \(Scotland\) Act 2001](#), Section 6.

²³¹ International Criminal Court Act 2001, Sections 51, 52, 58 and 59; International Criminal Court (Scotland) Act 2001, Sections 1 and 2.

²³² [War Crimes Act 1991](#), Section 1 – with respect to war crimes committed in Germany or German-occupied territory between 1939 and 1945. Jurisdiction under the Act is limited to offences of homicide constituting a violation of the laws and customs of war, committed by a person who is now a British citizen or resident in the United Kingdom, or who had such status on or after 8 March 1990.

²³³ Section 35, Powers of the Criminal Courts Act 1973.

various attempts have been made to arrest individuals accused of these crimes. The first was an attempt to have an arrest warrant issued for former U.S. Secretary of State Henry Kissinger for war crimes in Southeast Asia. In 2003, an application was filed for an arrest warrant for Mr. Narendra Modi, the current Chief Minister of State of Gujarat, India, while he was visiting the United Kingdom on personal business. The application, filed on behalf of three victims, accused Modi of responsibility for acts of torture under section 134 of the Criminal Justice Act 1988.

Mohammed Ahmed Mahgoub Ahmed Al Feel, a Sudanese doctor working as a general practitioner in Dundee, Scotland, was charged with torture under Section 134 of the Criminal Justice Act in September 1997. In May 1999, the charges were dropped, apparently for lack of evidence. Additionally, it has been reported that Antoine Gecas, a Lithuanian living in Edinburgh, has been accused of responsibility for the deaths of some 32,000 people during the Second World War, but the authorities have never charged him.²³⁴

There have been a few civil cases brought before the United Kingdom courts, including, for example, the Al-Adsani case in which the claimant brought an action for damages against the State of Kuwait and a named perpetrator as a result of torture he suffered in Kuwait and threats he claimed to have received in the United Kingdom following his revelations about the torture. The case against the Kuwaiti State was dismissed by UK courts on the grounds of state immunity. The European Court of Human Rights found that this dismissal did not breach the claimant's Article 6 rights, despite the Court's clear finding that torture was a peremptory norm with *jus cogens* status under international law. At present, the case brought by Ron Jones against the Interior Ministry of Saudi Arabia and a named individual for torture allegedly committed by Saudi authorities will come before the Court of Appeal in May 2004. This follows Saudi Arabia's successful application before a Master to claim immunity under the State Immunity Act 1978.

ISSUES INVOLVED

PRESENCE REQUIREMENT: In a universal jurisdiction case, the police are able to carry out an investigation regardless of the location of the accused. However, the case can only proceed to trial if the accused is present in the United Kingdom.

EXECUTIVE DISCRETION: Numerous laws containing universal jurisdiction provisions require the consent of an appointee of the executive branch of government, usually the Attorney General. Under the [ICC Act](#), no proceedings may be brought in England and Wales and Northern Ireland except with the approval of the Attorney General.²³⁶ The same is true under the [War Crimes Act 1991](#),²³⁷ the [Geneva Conventions Act 1957](#) as amended by Section 70 of the ICC Act,²³⁸ the Taking of Hostages Act 1982,²³⁹ the [Criminal Justice Act 1988](#)²⁴⁰ and the [United Nations Personnel Act 1997](#) for certain offences.²⁴¹ Variations on these rules may apply for Scotland.

Just recently, in considering the application for an arrest warrant under Section 134 of the Criminal Justice Act, a UK court accepted that the Attorney-General's consent was not needed to issue an arrest warrant but found that consent was required for the issue of a summons.²⁴²

²³⁴ Further information on cases against alleged perpetrators of World War II-era atrocities can be found in a 2001 report by the Simon Wiesenthal Centre (See Gerard Seenan, "[Nazi hunters condemn UK record on prosecutions](#)," *The Guardian*, 20 April 2001).

²³⁶ Section 53(3).

²³⁷ Section 1(3).

²³⁸ Section 1A.

²³⁹ Section 2(1). It reads : "Proceedings for an offence under this Act shall not be instituted – (a) in England and Wales, except by or with the consent of the Attorney –General [...]"

²⁴⁰ Section 135.

²⁴¹ Section 5(1).

²⁴² In the case against Gujarati Chief Minister Narendra Modi.

IMMUNITY: *Heads of state* – As confirmed by the House of Lords in the Pinochet case,²⁴³ acting heads of state have a right to immunity from individual criminal prosecution for any crime regardless of whether those acts are official functions carried out in the exercise of duties or acts performed in private capacity – that is, heads of state are afforded immunity *ratione personae*. Former heads of state are not granted the absolute immunity afforded to an acting head of state but rather immunity *ratione materiae* that is only for acts carried out in an official capacity or in the exercise of the duty of a head of state. In the Pinochet case, the majority of the Law Lords found that Pinochet was not entitled to immunity for acts of torture.

States – States are generally immune from the jurisdiction of the courts of the United Kingdom, with qualified exceptions. For example, in disputes relating to commercial transactions, a State may not be entitled to immunity if the dispute is considered to be a commercial act (*acta jure gestionis*).²⁴⁴ Additionally, although Section 1(1) of the State Immunity Act 1978 affords a state general immunity from the jurisdiction of the UK courts, this is subject to a number of exceptions provided for in the Act. In light of the European Court of Human Rights' decision in the Al-Adsani case, it will be difficult for torture victims and other victims of crimes with universal jurisdiction to overcome the procedural hurdle of immunity granted to a foreign state until the decision is overturned or international law develops a firm exception to the grant of immunity for these types of crimes.²⁴⁵

FORUM NON CONVENIENS: The general principle concerning the application of the doctrine of *forum non conveniens* in the United Kingdom, as stated by Lord Goff in the leading case of *Spiliada Maritime Corporation v Cansulex Ltd* (1987), is that a stay will only be granted on the ground of *forum non conveniens* when the court is satisfied that there is another available forum, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and the aims of justice. The Court applied a two-stage test: firstly the defendant must show that there is another natural forum, which is clearly more appropriate for the hearing of the case. Usually this will be the forum in which the damage occurred. However, the availability and access to evidence and the location where the victims and witnesses are based are also taken into account. Secondly the onus is transferred to the claimant to rebut the defense by satisfying the Court that justice requires the matter to be heard in the prevailing Court by showing that substantial justice will not be done in the appropriate forum. In *Shalk Willem Burger Lubbe et al v Cape plc* (2000), a class action for personal injury and death, the House of Lords found that justice required the matter to be heard in the UK because of the lack of funding for litigation in South Africa, the complications likely to arise from the legal and factual issues in the matter and the absence of developed mechanisms for handling group actions in South Africa.

STATUTES OF LIMITATION: *Criminal* – There are no stated limitation periods for crimes subject to universal jurisdiction under United Kingdom law. In [R v Anthony Sawoniuk](#), the Court of Appeal refused the claimant's application that his conviction for war crimes under the War Crimes Act 1991 should have been stayed on account of the time delay between the offence (1942) and the date on which the prosecution was brought (1999) and the admissibility of evidence. The claimant held that the Prosecutor had discharged the burden of proof (on the balance of probabilities) that the delay between the crime and the criminal proceedings had caused him "serious prejudice ... to the extent that no fair trial could be held".

²⁴³ R v. Bow Street Metropolitan Stipendiary Magistrate & Others, ex parte Pinochet Ugarte [1999] 2 WLR 827 at 91.

²⁴⁴ See *Trendtex Trading Corporation v Central Bank of Nigeria*, 1997 2 WLR 356.

²⁴⁵ The Court recognised that the law was still developing this exception.

Civil – The limitation period for personal injury claims is three years. This may in certain circumstances, with leave of the court, be extended for a further six years.²⁴⁶ This, however, is subject to the court's discretion, which will take into account the length and reason for the delay in bringing the case, the defendant's conduct, any period of disability of the claimant and the claimant's conduct.²⁴⁷

²⁴⁶ See, for example, the Limitation Act 1980, Section 11, and *Stubbings v Webb* 1 [1993] AC 498.

²⁴⁷ Limitation Act 1980, Section 33.