



Fédération internationale des ligues des droits de l'Homme
17, Passage de la Main d'Or 75011 Paris - Tel : 33 (0) 1 43 55 25 18 - Fax : 33 (0) 1 43 55 18 80 - Email : fidh@fidh.org - Site internet : www.fidh.org

FIDH & REDRESS REPORT- Fostering a European Approach to Accountability for genocide, crimes against humanity, war crimes and torture- Extraterritorial Jurisdiction and the European Union – April 2007

There is international consensus that perpetrators of the most serious crimes under international law- genocide, crimes against humanity, war crimes, torture and enforced disappearances- must be held accountable. The obligation to investigate and prosecute such crimes has been recognised as an obligation *erga omnes*, meaning a legal interest owed by all States, and is reflected in international treaties and as a matter of customary international law.

At the same time, it has been recognised that the victims of such crimes have an enforceable right to a remedy and adequate and effective reparations.¹ Without redress, feelings of powerlessness and disenfranchisement can hold survivors in a state of perpetual 'victimhood'.² The ability to access effective remedies is therefore a key factor in overcoming the effects of the crime and in the fight to combat impunity.

The courts of the State in which the crime took place (the territorial State) would appear to be the most obvious judicial arena to afford justice to victims. In reality, however, these courts may be inaccessible for a variety of legal and/or practical reasons, including the availability of domestic immunities or amnesties, *de facto* impunity and security risks, particularly where crimes were State sponsored. Again, after protracted periods of inter-State, internal armed conflict or strife, it can be virtually impossible to bring persons accused of such crimes to trial in the State where the atrocities were carried out,

¹ United Nations General Assembly- Basic Principles and Guidelines on the right to a Remedy and Reparations for victims of gross violations of human rights and serious violations of international humanitarian law, 16 December 2005, also known as the 'Van Boven/ Bassiouni Principles.

² See, Yael Danieli, *Preliminary Reflections from a Psychological Perspective*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES: GENERAL CONSIDERATIONS (Neil Kritz, ed., United States Institute for Peace Press, Washington DC, 1995) (discussing the "conspiracy of silence") and Roger Gurr and José Quiroga, *Approaches to Torture Rehabilitation: A Desk Study covering Effects, Cost-effectiveness, participation and sustainability*, in 11(1) *Torture, Quarterly journal on rehabilitation of torture victims and prevention of torture*, 3-35 (2000).

because the entire State structure may have been so disrupted or even destroyed in the course of the conflict, or there may be such deep ethnic or political divisions that to hold a fair trial is simply not feasible.

The movement to ensure that impunity does not prevail for the crimes in question is not new or novel. At Nuremberg, the principle that certain crimes should not escape punishment was clearly expressed and the obligation on Contracting States to seek out and prosecute those said to be responsible for grave breaches of international humanitarian law is a key aspect of the Geneva Conventions, 1949, and Additional Protocol 1 of 1977. Treaties such as the United Nations Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment and the new Convention on the Protection of all Persons from Enforced Disappearances include the obligation to prosecute or extradite accused persons found on the territory of parties to the Convention, irrespective of where the crimes were committed.

International prosecutions for serious crimes under international law have gained ground with the establishment of the ad hoc tribunals for the former Yugoslavia (ICTY) in 1994 and for Rwanda (ICTR) in 1995, and later with the establishment of 'internationalised' courts such as the Special Court for Sierra Leone, and specialised courts or chambers in countries as diverse as East Timor, Kosovo and Cambodia. Efforts to ensure global accountability for serious human rights violations culminated in the establishment of the International Criminal Court (ICC) whose statute came into force on 1st July 2002. The European Union has contributed substantially to the negotiation and coming into force of the ICC Statute and continues to promote its universal ratification and implementation into domestic law in the context of its Common Foreign and Security Policy (CFSP).

The movement to end impunity for the most serious crimes under international law is also evidenced by the growing recourse to foreign courts through universal and other forms of extraterritorial proceedings. The exercise of universal or other forms of extraterritorial jurisdiction is a necessary complement to territorial proceedings and cases before international or internationalised courts, both of which leave significant gaps in their coverage of which alleged perpetrators have had advantage. As a general rule, jurisdiction over crime is primarily territorial: it is the State within whose borders a crime has been committed which has the legal authority and duty to deal with it in accordance with that State's domestic law. However, foreign States may exercise jurisdiction in a number of instances, for example if their nationals were impacted by the crimes or the crime was directed at the foreign State, or where the accused is a national of the foreign State.

States may also exercise jurisdiction on the basis of universal jurisdiction, a principle which permits, and at times requires, States to prosecute certain crimes under international law, regardless of where they were committed, regardless of the nationality or location of the author or the victims and irrespective of any specific connection to the prosecuting State, on the basis that the crimes offend the international community as a whole and all have an inherent interest and responsibility to ensure that perpetrators of such crimes do not evade justice.

The growth of universal and other forms of extraterritorial jurisdiction proceedings is due in part to the increased presence of alleged perpetrators in the territories of States seeking to exercise jurisdiction. It also results in part from the work of the ad hoc and specialised international criminal tribunals which has to a certain extent motivated States to end safe havens for alleged perpetrators from the situations covered by those tribunals, particularly Rwanda and the former Yugoslavia. It is also a practical outcome of the limited mandates and jurisdiction of international tribunals, which could not possibly investigate or prosecute all alleged perpetrators. Further, the arrest of former Chilean Dictator Augusto Pinochet in October 1998 in London inspired victims to initiate criminal proceedings in a number of countries, particularly in European countries.³

The United Nations *Basic Principles and Guidelines on the right to a Remedy and Reparations for victims of gross violations of human rights and serious violations of international humanitarian law* call on States to take the necessary steps to ensure that they are capable of exercising universal jurisdiction or extraditing or surrendering suspects of international crimes to other States or international tribunals:

"5... States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction...."

With an increase in victims as well as perpetrators seeking refuge in European countries, especially following the conflict in the former Yugoslavia and the genocide in Rwanda in 1994, several Member States of the European Union and other European countries such as Norway and Switzerland,⁴ took steps to exercise extraterritorial and in particular, universal jurisdiction. However, the actions taken by such

³ Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity, by Professor Diane Orentlicher, E/Cn.4/2004/88 Of 27 February 2004, Paras. 49-53. The proceedings against Pinochet in Europe also triggered proceedings in Chile, initiated by victims who had previously kept silent and were not considered by the Chilean Justice and Truth Commission until the filing of the complaint in Europe.

States differed significantly owing to the different procedural rules and legal cultures. As only a small number of countries have exercised universal or other forms of extraterritorial jurisdiction, safe havens for perpetrators of the worst crimes continue to exist in the territories of Member States of the European Union.

Within the European Union, the fight against impunity was primarily considered to be a matter falling within its Common Foreign and Security Policy (CFSP), in other words, as outward-focused, emphasising demarches and cooperation with States, primarily in relation to the ICC. There was much less emphasis on the internal practices or policies of EU Member States and the extent to which they implemented their obligations to end safe havens within their borders.

This was the situation in 2003, at the outset of the joint project of the International Federation of Human Rights (FIDH) and REDRESS on 'Fostering an EU approach to Extraterritorial Jurisdiction'.⁵ The objectives at the time are still valid today: to end safe havens for those accused of perpetrating the most serious crimes under international law and to ensure that the victims of these crimes have access to effective and enforceable remedies within the European Union.

However, the circumstances and the environment in which the debate on the exercise of universal and other forms of extraterritorial jurisdiction and the role of the EU in advancing the fight against impunity takes place today, has improved considerably when compared to the initial phase of the Project. Notwithstanding the pessimistic predictions of universal jurisdiction's early demise following the repeal of Belgium's universal jurisdiction law, numerous investigations and trials based on universal jurisdiction have taken place in the territories of Member States since 2003 with several further ongoing investigations and prosecutions. Within the European Union, the support for the ICC has increased and been complemented by support for international humanitarian law. A key development is that the EU's stalwart external support under the CFSP is now complemented by initiatives within the EU's Justice and Home Affairs policy. Legislative instruments specifically aimed at increasing cooperation amongst European Member States in the investigation and

⁴ For the purposes of this Report, Member States of the EU and affiliated countries such as Norway and Switzerland will be referred to as 'European countries'.

⁵ See REDRESS and FIDH: Legal Remedies for Victims of International Crimes: Fostering an EU Approach to Extraterritorial Jurisdiction (March 2004), available online at: <http://www.redress.org/publications/LegalRemediesFinal.pdf> (English) and <http://www.fidh.org/IMG/pdf/LegalRemedies-Final-french.pdf> (French) (last accessed March 2007).

prosecution of serious crimes under international law, have been progressively implemented in the past three years.

The challenges for the competent authorities within EU Member States to progress complex extraterritorial investigations in respect of genocide, crimes against humanity, war crimes and torture are elaborated upon in this Report. Equally, best practice solutions on how best to overcome such challenges are explained. The experience of the EU in its establishment of a common approach to the fight against transnational crime, as illustrated for instance in the fight against terrorism, are explored with a view to applying such approaches to serious crimes under international law.

The practical developments in recent years have managed to shift the debate on universal jurisdiction from **whether** it should be exercised and *whether* the EU has competencies in the context of its Justice and Home Affairs Policy to ensure a common approach to **how best to implement** obligations in practice, **how to overcome** remaining obstacles and **how to achieve** a unified European Framework.

The purpose of this Report is to illustrate the advances made in recent years in the implementation of international criminal law in practice, to highlight the remaining challenges and the further beneficial roles EU institutions may play, together with national governments, to overcome these. Combined with its commitment to international criminal justice on an external level, the EU and its Member States can play a leading role in advancing the fight against impunity for genocide, crimes against humanity, war crimes and torture.

This Report follows a Conference that was organised by REDRESS and FIDH in collaboration with the Civil Liberties, Justice and Home Affairs Committee (LIBE) and the Sub-Committee on Human Rights (DROI) of the European Parliament. The Conference took place on 20-21 November 2006 in the European Parliament in Brussels and brought together government representatives from more than 20 European countries, policy makers and civil servants from European institutions, police investigators, prosecutors and judges, academics and civil society experts. The Report is based in large part on the presentations and discussions which arose during the Conference.

Findings and Recommendations of the Report

The past two decades have seen an unparalleled progress in ensuring accountability and justice on the basis of international law. International justice mechanisms have begun to put into practice what

was agreed upon by the international community more than 50 years ago in the form of international treaties and conventions.

At the same time, 50 years after the Treaty of Rome, the European Union has gained considerable competencies and influence that today allows it to be a key supporter of international justice. European countries are at the forefront in ensuring that perpetrators of genocide, crimes against humanity, war crimes and torture are held accountable and that victims can access justice. The numerous investigations and prosecutions demonstrate that, with sufficient political will, challenges can be overcome and an essential contribution to the fight against impunity can be rendered on a national level.

The practice also shows that not all countries have implemented their international law obligations into domestic law or in practice. While 'new' Member States might be confronted with a considerable body of legislation to implement domestically, assistance should be sought from and rendered by those States that have already done so. New Member States, as well as the majority of 'older' Member States that have not yet done so, should also make sure to benefit from the experiences and expertise of the few Member States that have made progress in the investigation and prosecution of serious international crimes.

The fight against impunity for serious international crimes is of concern to all Member States, as a matter of their international law obligations but also as they will remain attractive 'ports of call' for victims and perpetrators escaping war, armed conflicts and dictatorships.

The European Union should adopt a more coherent internal policy in the fight against impunity to mirror its external commitment to international justice. Lessons learned from the fight against terrorism and organised crime illustrate that the EU can render a crucial contribution to ensure a consistent practice of Member States in the fight against cross-border crimes. The Network of Contact Points indicates the important support the EU is able to provide to Member States in the fight against impunity for serious international crimes and should be viewed as the starting point for collective action.

The first steps towards an EU approach to accountability for genocide, crimes against humanity, war crimes and torture have been taken. That such an approach is warranted and, given its competencies, legitimate within the current legal framework, appears to be beyond debate. The EU is in an excellent position to create a 'seamless web of justice' that takes into account the present legal framework of

international law and that ensures that perpetrators do not benefit from the procedural gaps of Member States.

Recommendations

To European Union Member States, affiliated and applicant States

National implementation of international law obligations

- ❑ Include the broadest possible definitions of crimes under customary and conventional international law. National implementing legislation should abolish statutes of limitation for serious international crimes and include the concept of command and superior responsibility and joint criminal enterprise.
- ❑ Exclude the application of immunities to persons who do not enjoy immunity under international law; exclude the availability of State Immunity for serious international crimes.
- ❑ Include the right of victims to participation and reparation and provide for adequate procedures for obtaining reparation; ensure that the right of victims to initiate proceedings or private prosecutions is not removed where it already exists under domestic law.
- ❑ Provide for civil and criminal universal jurisdiction over genocide, crimes against humanity, war crimes, torture and enforced disappearances, without any requirement that a suspect be present in the forum state at the time of filing the complaint.
- ❑ Consider introducing the requirement of anticipatory presence into domestic legislation where this does already form part of the law or established practice.

Universal / extraterritorial jurisdiction

- ❑ Increase the investigation and prosecution of serious international crimes and share the challenge of ending safe havens within Europe equally among European countries to the extent possible.
- ❑ Ensure that immigration services screen asylum and visa applicants for potential involvement in serious international crimes; provide for cooperation between immigration authorities,

investigation and prosecution services to ensure that persons identified through immigration checks will be investigated and prosecuted, instead of deported.

- Determine clear and transparent criteria and guidelines for the exercise of prosecutorial discretion. Provide victims and complainants with a possibility to judicially review the decision of the competent authorities not to investigate (or prosecute) their complaint.
- Ensure that the principle of 'subsidiarity' does not lead to impunity and that it is subject to judicial scrutiny rather than prosecutorial discretion.
- Interpret the principle of 'subsidiarity' narrowly to provide priority to the first State to assert jurisdiction (on whatever basis of jurisdiction) unless the territorial State can demonstrate that it is able and willing to exercise jurisdiction in a fair and prompt manner.

Investigation and Prosecution of Serious International Crimes

- Establish specific practical arrangements for the investigation of serious international crimes such as specialised units within immigration, police and prosecution authorities that will ensure that serious international crimes are investigated on a consistent basis and enable practitioners to develop experience and expertise in the investigation and prosecution of these crimes.
- Consider setting up a fund for defense counsel to remedy an imbalance in funds available to the prosecution and defense and to pay for investigations of the defense abroad.

Network of Contact Points

- Ensure that a contact point in charge of international crimes is appointed for the Network of Contact Points and attends all Network meetings; ensure that follow up from Network Meetings is discussed in the appropriate Ministries.
- Ensure that – in the absence of a small secretariat for the Network- regular meetings of the Network are convened by the country holding the Presidency or, if necessary, several countries in collaboration with the Council Secretariat of the European Union.

To the Council of the European Union

- Consider the adoption of JHA Council Conclusions that request the Commission to submit a proposal of a Framework Decision on serious international crimes.
- Cooperate with the European Commission to adopt an Action Plan on serious international crimes, setting out an EU strategy on the fight against impunity.
- Ensure cooperation between the COJUR and Article 36 (CATS) working groups and provide for a regular exchange on the fight against impunity between the General Affairs and External Relations (GAER) and the Justice and Home Affairs (JHA) Council.
- Follow up on conclusions adopted by the Network of Contact Points and include the conclusions in GAER as well as JHA Council discussions.
- Strengthen the Network of Contact Points and provide it with sufficient resources and an independent structure to ensure regular meetings of the Network; consider to appoint a Network Coordinator and to establish a small secretariat within Eurojust to foster the development of a consistent practice within Member States; ensure that necessary changes to Eurojust's legal framework are incorporated into current discussions on Eurojust's mandate.
- Continue to support the International Criminal Court and international criminal justice in negotiations with third countries.
- Cooperate closely with the Council of Europe working group on Public International Law (CAHDI).

To the European Commission

- As participant in Council working group meetings, ensure that the fight against impunity for serious international crimes forms part of the agenda of Council working group meetings; encourage the Justice and Home Affairs Council to adopt conclusions outlining a European Union strategy for the fight against impunity for serious international crimes.

- ❑ Cooperate with the Justice and Home Affairs Council towards the draft of a Framework Decision on serious international crimes.
- ❑ Cooperate with the Justice and Home Affairs Council to draft an Action Plan on combating serious international crimes, setting out an EU strategy for the fight against impunity.
- ❑ Ensure the inclusion of serious international crimes in the follow up to the Hague Programme.
- ❑ Provide practical assistance to national authorities investigating serious international crimes abroad, including the use of premises and translation facilities.
- ❑ Consider to make funds available for the setting up of a European defense counsel fund, which could pay for investigations carried out by the defense abroad.
- ❑ Continue to support the International Criminal Court and international criminal justice in negotiations with third countries.

To the European Parliament

- ❑ Consider adopting a resolution on the fight against impunity for genocide, crimes against humanity, war crimes and torture that touches upon the International Criminal Court and the international obligations of EU Member States.
- ❑ Include the fight against impunity on the agenda of the relevant committees, in particular the Sub Committee for Human Rights (DROI), Civil Liberties, Justice and Home Affairs (LIBE) and the Foreign Affairs (AFET) Committee.
- ❑ Continue to scrutinise Council and Commission activities in respect of serious international crimes and request to be informed about the progress made by the Council and Commission in that respect, in particular about the Network of Contact Points.

To the Network of Contact Points

- Ensure that regular meetings are organised by the country holding the Presidency or, if necessary, by several countries in collaboration with the Council Secretariat of the EU; a provisional date for follow up meetings should be arranged at every Network meeting.
- To determine the agenda of Network Meetings, consult with contact points, experts from the ICC and other international courts and tribunals, civil society and policy makers of the European Union institutions to ensure that the agenda covers the most urgent issues relevant to investigators, prosecutors and policy makers alike.
- Consider how the Network of Contact Points could provide organisational support and practical information to countries that have not yet set up a specialised unit.
- Ensure close cooperation with Interpol and in particular its working group on war crimes, crimes against humanity and genocide, and with Europol and Eurojust.
- Make use of the existing financial programmes within the European Commission to receive training for practitioners through the European Police College, the European Judicial Training Network or the International Institute for Criminal Investigations.



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