

# A STEP BY STEP APPROACH TO THE USE OF UNIVERSAL (CRIMINAL) JURISDICTION IN WESTERN EUROPEAN STATES

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time, Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, Recognizing that such grave crimes threaten the peace, security and well-being of the world, Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking the national level and by international cooperation,

measures at enhancing



*Cover Picture : In front of the Cour d'assises of Nîmes (South of France) during the trial against the Mauritania captain Ely Ould Dah, sentenced on 1 July 2005, in application of the principle of universal jurisdiction, to 10 years in prison for torturing Mauritians in 1990 and 1991*

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# I. Introduction

This paper focuses on the practice of filing universal jurisdiction complaints, drawing on the experiences made by NGOs and lawyers, who, over the past decade have filed universal jurisdiction complaints, particularly before courts in Western Europe. The experiences are therefore to some extent European yet the lessons learned can be applied in a similar fashion to universal jurisdiction complaints filed elsewhere. The paper highlights how universal jurisdiction can be an instrument in the toolbox of NGOs and others seeking to address human rights violations. As such, universal jurisdiction can effectively contribute to accountability of perpetrators of genocide, crimes against humanity, war crimes, torture and enforced disappearances ('serious international crimes'), provide justice for victims, shed light on human rights abuses and states of impunity, contribute to policy changes and more generally to ending the culture of impunity.

The filing of universal jurisdiction complaints is a challenging endeavour that should not be considered lightly. The complaints can drag on for years, therefore requiring a clear strategy, patience and resources. This paper seeks to address the various challenges and issues that need to be taken into account at the outset of filing a complaint and for the actual submission of that complaint to national authorities. Based on experiences made by FIDH and other organisations in the past with universal jurisdiction cases, potential steps to overcoming challenges and avoiding risks are suggested.

## II. Background to universal jurisdiction

Usually, crimes are prosecuted in the country where they were committed- "territorial jurisdiction"- or by the courts of the nationality of the perpetrator or the victim- "personal jurisdiction". Universal jurisdiction, however, allows the courts of any country anywhere in the world to try perpetrators of serious international crimes regardless of the location of the crimes and irrespective of the nationality of the perpetrator or the victim. It is based on the recognition that certain crimes are so horrific- genocide, crimes against humanity, war crimes, torture and enforced disappearances- that they affect the international community as a whole. Consequently, all states have a duty and at times an obligation to hold perpetrators of such crimes accountable and victims of serious international crimes have a right to justice everywhere in the world.

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. Indeed, 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* oblige States to investigate, prosecute and punish those guilty of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law. The principles further 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....»*

International treaties, such as the Convention on the Protection of all Persons from Enforced Disappearances of 2006, the Convention against Torture of 1984 and the Geneva Conventions of 1949 all oblige States Parties to ensure that suspects of committing the international crimes of enforced disappearance, torture and grave breaches of the Geneva Conventions are brought to justice, either by prosecuting them before their own courts, including on the basis of universal jurisdiction, or by extraditing them to stand trial elsewhere.

It is further widely recognised that international customary law at least permits (rather than obliges) the

### **International Conventions providing for universal jurisdiction over serious international crimes**

#### **(1) Four Geneva Conventions of 1949**

<http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>

*Articles 49/ 50/ 129/ 146:*

*“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”*

#### **(2) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984**

<http://untreaty.un.org/english/treatyevent2001/pdf/07e.pdf>

*Article 5 (2):*

*“Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.”*

#### **(3) Convention on the Protection of all Persons from Enforced Disappearances**

<http://www2.ohchr.org/english/law/disappearance-convention.htm>

*Article 9 (2):*

*“Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.”*

exercise of universal jurisdiction for genocide and crimes against humanity. The “modern” doctrine of universal jurisdiction therefore covers all serious crimes under international law.

Universal jurisdiction is exercised by national courts and as such needs to be distinguished from international tribunals such as the two ad hoc tribunals for the former Yugoslavia and Rwanda or international courts such as the International Criminal Court (ICC). It plays an important role in complementing these international justice mechanisms as these are constrained by a mandate that is limited to a specific territory and conflict or, in the case of the ICC, to crimes committed after 1 July 2002, the date of the entry force of the Statute of the ICC, with a focus on those bearing the greatest responsibility for the crimes. Precisely because of their limited mandate and resources, international courts and tribunals depend on the work carried out by national courts, including national courts exercising universal jurisdiction, to ensure that all perpetrators, low-, mid-, and high level are brought to justice.

Past cases suggest that a variety of legal, practical and political obstacles and challenges need to be overcome for an exercise of universal jurisdiction to succeed. The cases are often politically sensitive and require domestic legislation providing for universal jurisdiction over the specific crimes. Investigations and prosecutions of serious international crimes are more complex and resource intensive than most ordinary crimes. A great degree of political willingness is needed to guarantee that judges, prosecutors and police investigators are independent in their decision making and that they have adequate means available to pursue investigations, prosecutions and trials irrespective of the nationality and the level of the alleged perpetrator. Universal jurisdiction is further often alleged to be a ‘neo- colonial’ tool of the ‘imperialistic west’, despite its roots in widely ratified treaties and conventions and international customary law. However, at the same time it is true that for universal jurisdiction to be truly universal, it needs to be exercised more widely, outside Europe, North America and New Zealand. Promising signals are coming from Senegal, where former Chadian dictator Hissene Habre is awaiting trial, and from Latin America, where universal jurisdiction proceedings in Europe resulted in considerable national judicial activity to bring perpetrators of crimes against humanity, torture and enforced disappearances to justice. The experiences made and lessons learned by judicial authorities in countries such as Argentina, Chile, Peru, Mexico do make an exercise of universal jurisdiction in these countries more likely in the future. Similarly, to be truly universal, it must be exercised not only against low- level perpetrators from poor or developing countries, but senior officials from the West, where they are not held accountable before their own countries’ jurisdiction.

### **III. Rationale for an exercise of universal jurisdiction**

Trials in the country where the crimes were committed (the ‘territorial state’) are preferable to trials abroad as it is usually there where most of the evidence will be located, where the majority of victims are present and a trial of those responsible for committing the crimes will have the greatest impact on victims and society as a whole.

Yet many victims of serious international crimes are unable to obtain justice in their own countries because there is no functioning justice system for instance as a result of an armed conflict as in the aftermath of the war in the former Yugoslavia, the successive wars in Afghanistan or the 1994 genocide in Rwanda. States may not only be unable to render justice, they may also be unwilling to prosecute perpetrators, especially where, as is often the case with international crimes, the crimes were State sponsored. In both scenarios, universal jurisdiction serves as the only means of victims to obtain justice and to ensure accountability of perpetrators.

Apart from accountability and justice, which could be seen as the ‘ultimate objective’ for any complaint brought on the basis of universal jurisdiction, such complaints may also serve to meet other objectives. They can serve as an important catalyst for judicial action in the territorial state, in cases where national authorities have previously been unwilling to investigate and prosecute those involved in serious international crimes. The landmark case of Augusto Pinochet in Spain and the United Kingdom triggered effective proceedings in Chile, and enabled victims who had previously kept silent and were not considered by the Chilean Truth and Reconciliation Commission until the filing of complaints in Europe to trigger new proceedings and to obtain the creation of a Truth Commission on Torture. In Argentina, special legislation such as the ‘full stop’ and ‘due obedience’ laws that were introduced to protect military officials from an investigation and prosecution for atrocities committed during the military dictatorship of 1976-1983 was repealed in June 2005, after several proceedings against Argentinean officials were initiated before Spanish courts on the basis of universal jurisdiction.

Universal jurisdiction complaints can also help to put out in the open States’ human rights violations and as such potentially contribute to a change of policy. The filing of complaints against former US Secretary for Defense, Donald Rumsfeld and other high ranking US officials in Germany and France, stimulated a debate within the US to initiate investigations for torture and war crimes and to address the responsibility of those at the higher end of the chain of command. Additionally, both complaints increased the pressure by the international community on the US to abide by

international law standards imposed for instance by the Convention against Torture and the Geneva Conventions.

All complaints filed before Israeli courts to date for serious international crimes committed in the Occupied Palestinian Territories (OPT) were dismissed, leading victims and NGOs to turn to universal jurisdiction and issuing complaints in the United Kingdom, Spain, the Netherlands, New Zealand and the United States. These complaints can possibly contribute to a change of Israeli judicial authorities' approach to complaints filed for crimes committed in the Gaza strip or the Westbank. At the very least, the complaints help to make the world a smaller place for those accused of the worst crimes, as they often result in the issuing of arrest warrants, and raise awareness of the continuing state of impunity for serious international crimes committed in the OPT.

## **IV. Filing a complaint on the basis of universal jurisdiction**

### **a. Working in a 'network of support'**

Universal jurisdiction cases are very complex due to their international and political nature and the scale of the crimes involved, often resulting in evidence and information being spread over several countries if not continents. They require a tremendous amount of effort on a national and international level, as are linked to national and international law and domestic and international politics. This in turn requires close cooperation among local and international NGOs and lawyers in the territorial and forum state (the state where the complaint is actually filed). An increasing number of NGOs- national as well international- started over the past years to get involved in campaigns designed to strengthen international criminal justice. This includes policy and advocacy activities to strengthen institutions such as the ICC, develop principles such as universal jurisdiction and extended to carrying out investigations with a view to submit criminal complaints to national authorities. NGOs therefore have developed an in- depth experience and can thus be an important source of information at the outset of a complaint. However, due to the sensitive nature of such complaints, it is important to carefully choose partners- locally and internationally. Otherwise, the security of witnesses and victims cannot be guaranteed and suspects may be informed about the possibility or the existence of a complaint, thereby preventing their arrest.

Local NGOs, with direct access to witnesses and victims can collect evidence for the case file and assess the impact of a potential complaint on victims as well as the security situation and the need for protection of witnesses and victims. The complaints brought by FIDH against former Mauritanian army captain Ely Ould Dah in France in 1999, in collaboration with its member leagues in Mauritania and in France, relied heavily on information provided by the local league in Mauritania, in particular as French authorities did not investigate in Mauritania themselves.

It was only thanks to the information collected by the Palestinian Centre for Human Rights (PCHR) and other organisations on the ground that an arrest warrant was issued by a British judge on the basis of universal jurisdiction against former Israeli General Doron Almog in 2005. Their close contact and presence on the ground further allows local NGOs to keep victims informed about the progress made in a specific complaint, which is important in cases that can suffer many setbacks and go on for several years.

International NGOs in past cases have provided financial means to enable witnesses/victims to travel to the forum state in order to meet with authorities as well as for medical treatment for victims with a view to prepare medical reports. Their network further allows international NGOs to support universal jurisdiction complaints politically through media and advocacy strategies designed to raise awareness about the complaint, the relevant human rights violations and to put pressure on national authorities to take a complaint seriously. The support of international NGOs/NGOs outside the territorial state is crucial in cases where victims have to leave the territorial state as a consequence of the filing of the complaint. NGOs in third countries can assist victims in leaving the territorial state and settling in the forum state or elsewhere.

**Step 1:** Prior to filing the actual complaint, a coalition of selected legal experts and local and international NGOs will need to:

- assess the various risks involved in filing a universal jurisdiction complaint (see further below);
- identify realistic objectives of the complaint;
- design strategies on how to overcome legal; practical and political obstacles;
- select the best forum state with the highest potential for the opening of an investigation of the complaint;
- assess what other NGOs are working on with respect to a specific conflict/ crimes committed, to avoid the duplication of efforts and to maximise the impact of the complaint;
- assess whether specialized units and contacts to relevant police/ prosecution/ ministry officials exist in the forum state.

Legal expertise is fundamentally important in universal jurisdiction cases and must cover not only international criminal law issues, but also include an in depth knowledge of the domestic legislation in place in the forum state. Ideally, a universal jurisdiction complaint submitted by a NGO includes a legal analysis of the obligations of the

forum state under international law and puts the crimes committed in a domestic law context (see further below). This process requires lawyers with the relevant expertise. Considering that these cases may take a very long time and may require the filing of submissions and appeals, such legal advice can be costly and lawyers representing victims in such cases can be difficult to find. International NGOs can assist in this respect. FIDH for instance, through a network of lawyers specialized in serious international crimes cases- the Legal Action Group (LAG)- provides legal support to Rwandan genocide survivors who filed universal jurisdiction complaints in France. The LAG supported further victims of torture and filed complaints against Mauritania military official Ely Ould Dah and Tunisian former vice- consul in France, Khaled Ben Said. Both were convicted for torture by French courts in 2005 and 2008 respectively.

Any network of support may, where possible, also include previous contact and cooperation with the relevant national authority handling the complaint. This will help to explain the motivations behind filing a complaint based on universal jurisdiction, rather than territorial or personality jurisdiction. Authorities may be more inclined to take a complaint seriously, where they personally know the complainants and had previous dealings with the e.g. NGO supporting of filing the complaint. Interpol and other international institutions, such as the ad- hoc tribunals, the ICC can also support universal jurisdiction complaint of serious international crimes, due to their network of contacts, insights into certain conflicts and generally long standing experience in fighting cross border crimes.

## **b. Putting together a strong case file**

In universal jurisdiction cases, the crimes have been committed abroad, far away from the forum state and often years, if not decades before the filing of the complaint. Past cases have illustrated that police and prosecution authorities have not always treated serious international crimes cases with the same degree of seriousness as they did domestic crimes or other international crimes such as terrorism, drug trafficking or money laundering. It is therefore not sufficient, as may be the case with ordinary crimes such as a murder or pick pocketing, to simply report to the local police station and NGOs/lawyers will need to carry out some investigative 'groundwork'.

The complaint submitted against Donald Rumsfeld in France and Germany, the case against former Uzbek Internal Affairs Minister Zorijon Almatov in Germany, and various cases filed with authorities in Spain and Belgium have underlined the importance of putting together a strong 'case file' to be submitted as part of the complaint to national authorities. Ideally, this should be prepared in the language of the forum state and include the identification and the whereabouts of the alleged

perpetrator(s) (see further below, ‘presence requirement’), their official position (where applicable), general political/cultural and historical background information on the context of the crimes, and evidence that proves the commission of serious international crimes and that links the alleged perpetrators to these crimes. In the majority of cases, background information will be available in the form of open source reports by NGOs, international organisations such as reports by UN Special Rapporteurs, while most substantial evidence will usually be based on victims and witness statements.

Background information can be important to provide authorities with a context in which the crimes were committed and highlight that for instance torture is committed on a ‘wide scale’ and therefore can constitute a crime against humanity. However, victims and witness statements are crucial to convince law enforcement authorities to open an investigation in a given case. This is particularly so where victims and witnesses managed to escape to the forum state or neighbouring countries and therefore are more easily accessible for an interview with law enforcement authorities. The presence of victims and witnesses in the forum state or neighbouring countries is particularly relevant in cases where law enforcement authorities of the forum state will not be able to rely on cooperation from the territorial state. A Spanish investigative judge for instance, faced with a complaint by Tibet support groups and Tibetan victims alleging human rights abuses by Chinese authorities, heard witnesses and victims in Spain, Belgium and the United Kingdom. A request for rogatory missions to hear further witnesses in India and China is currently pending.

Where the security and protection of victims and witnesses can be guaranteed, and where they have agreed to be interviewed, their whereabouts and identities should be made available on a strictly confidential basis to the judicial authorities of the forum state.

It may be more difficult to have physical or even forensic evidence available, yet medical reports confirming for instance that a victim has been tortured could be prepared in cooperation with relevant NGOs and medical personnel working on the rehabilitation of torture survivors.

**Step 2:** A strong file as part of a universal jurisdiction complaint needs to be prepared in collaboration with the ‘network of support’ and should:

- be written in the relevant language of the forum state;
- identify the suspects and their location;
- state the position of the suspects;
- provide information on general human rights situation in the territorial state;
- include contextual information on the crimes;
- include physical and documentary evidence (where available) and witness/ victim’s testimonies;
- identify potential witnesses/ victims and their whereabouts (where consent has been given and security can be guaranteed to the extent possible);
- set out jurisdiction of territorial state;
- explain reasons for filing complaint abroad;
- analyze the crimes in the context of national and international law;
- establish the link between the crimes and the suspects;
- if necessary to prove a ‘chain of command’, provide a chart specifying the position of the suspect(s) vis-à-vis their superiors/ subordinates;
- where applicable, provide properly authorized death certificates.

The case file will help not only to convince national authorities to open an investigation, but also the NGO itself to assess whether the complaint meets all the relevant criteria and conditions of both, international and national law.

### **c. National framework for the exercise of universal jurisdiction**

While the majority of countries worldwide provide for universal jurisdiction in some form, only few have actual experience and expertise in applying it in practice. Furthermore, most legislation is seriously flawed when it comes to the definition of the crimes and as such might not be suitable for the filing of a complaint. A state's legislation can provide for universal jurisdiction yet prevent NGOs as third parties or even victims from initiating a complaint, leaving that prerogative to the public prosecution services.

When choosing the forum state in which to file a complaint, one therefore has to take into account legal, practical and political aspects. It will be necessary to study potential jurisdictions, in consultation with a group of experts, to determine where the relevant crimes can be tried and to design strategies on how to overcome potential obstacles. Past cases illustrate that European countries are at the forefront when it comes to the exercise of universal jurisdiction, yet these cases also illustrate the different approaches of States in investigating and prosecuting serious international crimes.

**(1) Implementing legislation:** Whereas all European countries have ratified the Geneva Conventions and the Convention against Torture, not all provide for universal jurisdiction over grave breaches and torture (see Annex I). The inadequacy of national legislation varies from country to country, but common problems include the failure to provide specifically for jurisdiction over crimes committed abroad and to provide for definitions of crimes. Some countries, like Germany, the Netherlands and the UK have chosen to adopt special international crimes codes to ensure that their domestic legislation reflects the definitions of crimes of the Rome Statute of the ICC. French legislation provides for universal jurisdiction over torture, but not war crimes, whereas the German Code of Crimes against International Law provides for universal jurisdiction over genocide, crimes against humanity and war crimes, but not over the singular offence of torture, which is dealt with as 'serious bodily harm'. Spain has universal jurisdiction over genocide and crimes against humanity, while British legislation is confined to universal jurisdiction over certain war crimes and torture. National jurisprudence can be equally important as it may refer to legal conditions for the filing of a universal jurisdiction complaint or to universal jurisdiction over international crimes not expressly covered by national legislation (e.g. as in Spain for the crime of torture).

It may take many years from the commission of the crimes to the filing of a universal jurisdiction complaint. Where no implementing legislation exists, like in Denmark, Finland or Sweden and where authorities have to rely on domestic criminal law to bring charges, it often means that crimes will be subject to statutes of limitation under national law, which require filing a complaint in a certain period of time after the commission of the crimes. From past practice it appears that this is particularly the case with torture, which is often not specifically defined and is therefore prosecuted as a crime against the person or serious bodily injury. As such it is for instance subject to a limitation period of 10 years in France, and 20 years in Germany.

**Step 3:** Once the crimes committed by the suspects have been identified, a legal assessment is necessary to see whether a potential forum state:

- has defined the relevant crimes according to international standards or applies national penal law;
- has established universal jurisdiction over these crimes;
- could invoke statutes of limitation in respect of any of the crimes referred to in the complaint;
- sets out specific conditions that need to be met by the complaint for the state to have jurisdiction.

**(2) Method of filing the complaint:** The access of victims to justice through universal jurisdiction depends to a large degree on whether the system allows for victims to participate in proceedings as ‘parties civiles’, which give them the possibility to start the proceedings, or instead reduces the role of victims to submit a complaint to the national authorities, leaving the decision whether to pursue the complaint entirely to the police or prosecution authorities.

In legal systems such as France and Spain, NGOs and victims can initiate proceedings as *parties civiles*, and thereby oblige the national authorities (in both countries the investigative judge) to open an investigation on the basis of their complaint. Though it does not necessarily lead to a prosecution, it puts the NGO/victims in a much better position, providing them with more control and influence in the process. All universal jurisdiction cases in France and Spain so far were initiated by NGOs and victims acting as parties civiles. The UK allows victims and NGOs to file applications for arrest warrants against individuals suspected of serious international crimes directly with a magistrate, provided that the presence of the suspect in the UK can at least be anticipated (see further below).

In the majority of countries, however, it is the prosecution that presides as a ‘gatekeeper’ over universal jurisdiction cases like in Belgium, the Netherlands, Norway, the Czech Republic, Denmark and Germany. In these countries, the role of NGOs and victims is limited to submitting a complaint and it is the prosecutors who have a certain degree of discretion on whether or not to open an investigation. Since each prosecution service applies different criteria in exercising its discretion, and in the absence of clear and transparent guidelines, it can be difficult for NGOs and

victims to ascertain the likelihood of an investigation of their complaint. It also makes it difficult to challenge a prosecutor's decision not to investigate, which is often only possible in an administrative, rather than a judicial procedure. The prominent position of the prosecution in universal jurisdiction cases re-affirms the need for a strong case file with 'incentives' for the prosecution to open an investigation. Although NGOs are entitled to file a complaint, national authorities may not be obliged to keep them informed about the progress of their case. Close contacts to national authorities may help to overcome an initial lack of cooperation. The complaint is in most cases on a stronger footing if it is submitted by or in collaboration with indirect

or direct victims, which may also increase the possibilities to appeal decisions taken by the police/prosecution authorities in the course of proceedings.

**Step 4:** When considering a potential forum state for filing a complaint on the basis of universal jurisdiction, verify:

- the role for victims/ third parties and their admissibility to participate in the proceedings;
- the authority to file the complaint with;
- whether contacts to national authorities and 'specialized war crimes units' exist;
- the criteria for an exercise of 'prosecutorial discretion' (where publicly available/ past cases);
- the possibility to appeal decisions taken by the authorities in response to the complaint;
- whether victims want/ can join the complaint.

**(3) The presence requirement:** Although not expressly required under international law, most states require that the suspect is present in the forum state before a complaint based on universal jurisdiction may be filed. This condition can take various forms, requiring the presence of the suspect at the time of the filing of the complaint and throughout proceedings, like in Denmark, or only at the time of the filing of the complaint, like in France, or at the time of the filing of the complaint and at trial, like in the Netherlands and Canada. Some countries, like Germany,

Spain, the Czech Republic and to a certain extent also Italy and Norway do not require the presence of the suspect for the filing of a complaint, but for trial. The absence of a presence requirement has led to the filing of complaints against a broad range of suspects in Spain and to two complaints against former US Secretary for Defense Donald Rumsfeld in Germany. The UK allows victims to file a petition for an arrest warrant on the basis of universal jurisdiction where the suspect's presence can be anticipated in the immediate future, which led to the issuing of an arrest warrant against former Israeli General Doron Almog in 2005. Italy and France are one of the few countries that allow for trials to take place in absentia, resulting in the conviction of Ely Ould Dah and Khaled Ben Said by French courts for torture committed in Mauritania and Tunisia respectively, in 2005 and 2008, despite the perpetrators' absence during trial, although they were represented by their lawyers before and during the trial.

The presence requirement can prove to be the biggest hurdle to overcome before a universal jurisdiction complaint gets off the ground. Where presence is required,

it can help to monitor a suspect's travel schedule in order to meet the (anticipated) presence requirement and to be able to file a complaint in time. A strong case file, adapted to the relevant countries' legislation and, if possible, in the language of the relevant country, can then be submitted to the relevant national authorities, allowing them to react swiftly and to potentially arrest the suspect before his/her departure. Suspects, in particular mid- to high level suspects travel abroad for conferences, for medical treatment or even just for shopping trips. When it became known for instance that Donald Rumsfeld would be attending a conference in Paris, the FIDH, together with the Centre for Constitutional Rights, FIDH's member organisation in the United States and the European Centre for Human Rights, based in Germany, immediately prepared a complaint based on French universal jurisdiction legislation and submitted it to the French prosecutor upon Rumsfeld's arrival in Paris. He only escaped arrest by hiding in the US Embassy, from where he returned immediately to the United States. Similarly, the plans of Doron Almog to travel to the UK, known to the PCHR, enabled the PCHR in collaboration with a London based law firm to successfully apply for an arrest warrant in advance of his arrival in London. He only escaped arrest by Scotland Yard, which was waiting at the airport, as he was warned by the Israeli embassy not to leave the airplane. He subsequently returned to Israel without ever getting off the plane.

**(4) Immunities:** The International Court of Justice (ICJ) imposed certain restrictions on the exercise of universal jurisdiction, including immunity for incumbent Foreign Ministers and sitting Heads of State and Government (such as a prime minister), who are entitled to a temporary procedural immunity from the criminal jurisdiction of foreign states as long as they are in office. The ICJ argued that such immunity is necessary for these officials to effectively fulfil their function, which would include travel or diplomatic missions on behalf of the State. Accordingly, their immunity ceases to exist once they have left their official position. This is contrary to provisions of the Rome Statute of the ICC, which, in Article 27, excludes immunity for anyone who

**Step 5:** The presence requirement can be decisive factors in selecting the forum state. Where presence is required:

- verify at what stage of the proceedings the suspect needs to be present;
- ascertain the suspect's whereabouts and monitor his/ her travel schedule;
- have a strong case file prepared;
- identify and address potential legal obstacles to the opening of an investigation/ to an arrest on the basis of universal jurisdiction to enable national authorities to react swiftly;
- identify the national authority in charge of your complaint in case a complaint needs to be filed quickly.

**Step 6:** National/ international immunity provisions may prevent the opening of an investigation against a particular suspect. The complaint must therefore specify:

- The current position of suspect;
- The reasons for visit/ presence in forum state (private or official?);

and refer to international law and jurisprudence. A risk assessment of widening the categories of officials to whom immunity may be applicable, thereby creating 'bad precedence', may need to be conducted where the suspect is relatively high level.

is accused of serious international crimes by the ICC, irrespective of their official capacity.

Other immunity issues may arise where the complaint targets a member of an official delegation to the forum state. It further remains controversial whether the ICJ decided that only an incumbent Head of State/Government and Minister for Foreign Affairs enjoy immunity or whether categories of other officials could be

included. A British magistrate in 2004 for instance refused to grant an application for an arrest warrant against General Shaul Mofaz, then Defence Minister of Israel, who was believed to come to a visit to the United Kingdom. In France, the decision to dismiss a complaint against Donald Rumsfeld, was based on the advice of the Ministry of Foreign Affairs, which extended the immunity granted to Heads of State and Government and Ministers of Foreign Affairs to Defense Ministers such as, at the time, Donald Rumsfeld, and even though he was, at the time the complaint was filed, no longer Defence Minister. FIDH denounced this position as this immunity could amount to giving de facto impunity for all former high-level executives responsible for international crimes.

**(5) The principle of subsidiarity:** The principle of subsidiarity is a principle developed by certain courts and which appears in several national laws, though it does not have any legal basis in international law. The principle gives priority jurisdiction to courts of the territorial State or the State of the nationality of the offender and/or international courts or tribunals. Accordingly, universal jurisdiction is only considered as a 'reserve jurisdiction', in cases in which these 'priority jurisdictions' are not able or unwilling to prosecute the suspect in question. The principle is particularly prominent in Belgian and German legislation and has been applied in the past by the Spanish Supreme Court in the case against former dictator of Guatemala Rios Montt. According to the Supreme Court, Spanish courts could exercise universal jurisdiction provided that the complainants could present reasonable evidence demonstrating a lack of judicial activity in the territorial state (Guatemala). In 2005, the German Federal Prosecutor,

**Step 7:** The principle of subsidiarity places additional powers in the hands of the prosecution services, which can interpret judicial efforts undertaken by the territorial state broadly. Any universal jurisdiction complaint should therefore outline the reasons why a complaint needed to be filed abroad, rather than in the territorial state. These can include:

- the lack of a functioning judiciary (e.g. numbers of judges, prosecutors, lawyers in relation to cases; number of convictions; number of people imprisoned without trial)
- proof of self-imposed amnesties in the territorial state that seek to protect alleged perpetrators from prosecution;
- lack of adequate judicial responses to complaints filed in the territorial state;
- the time passed since the commission of the crimes and the filing of the complaint without any judicial activity in the territorial state.

The complaint should also explain why the forum state has an international obligation to investigate, rather than an international court or tribunal. This will require verifying whether a tribunal/ the ICC could have jurisdiction in the specific case. Reference to the level of the suspect (if low to mid level) and the limited mandate and resources of the tribunals/ courts to deal with this specific case may help to convince a national authority why an international court/tribunal should not be responsible for the case.

invoking the principle of subsidiarity, rejected a complaint against Donald Rumsfeld, arguing that the US authorities, though not investigating specifically against Donald Rumsfeld nor the specific crimes referred to in the complaint, were investigating the 'complex' as a whole and therefore German jurisdiction was only secondary and German authorities could not exercise jurisdiction in that case. Moreover, in its decision issued on January 29, 2008, the Spanish Audiencia Nacional accepted to open an investigation on war crimes which had allegedly been committed by seven Israeli officials in Gaza in 2002, only after having established that the Israeli authorities had not investigated on these crimes.

**(6) *Practical and political aspects to consider:*** Meeting all the various legal conditions is a pre-condition for filing a viable universal jurisdiction complaint, yet a number of practical and political challenges remain that could hamper the opening of an investigation on the basis of universal jurisdiction. As a first step, it will be important to file the complaint with the proper authorities in charge, which may differ from the authority in charge of ordinary crimes. For instance, in Germany it is the Federal Prosecutor who is in charge of serious international crimes, whereas complaints of ordinary crimes are to be submitted to the prosecutor in whose jurisdiction the crime was committed. NGOs in the forum state will often have the relevant knowledge and potentially even be in contact with such authorities already. Some countries have established specialized war crimes units within their police and/or prosecution authorities, as for instance The Netherlands, Belgium, Sweden, Norway, Denmark and Canada. These units are designed to specifically investigate and, where there is sufficient evidence, prosecute serious international crimes, guaranteeing that authorities have an expertise in dealing with such cases. This can considerably increase the chances that the complaint is taken seriously and investigated. Specialized units further have more experience in cooperating with NGOs and victims of serious international crimes and therefore might be more open to follow up on a complaint if needed.

Where no such units exist, and where victims cannot initiate prosecutions as parties civiles, as in the majority of countries worldwide, this can indicate a lack of knowledge of universal jurisdiction and international law by the authorities involved. Further, when considering whether to investigate a complaint, prosecution authorities which cannot rely on the resources of a specialized unit, may take into account the lack of resources available for such investigations and competing demands from investigations of ordinary crimes. Combined with a lack of knowledge, this may lead to a quick rejection of the complaint or, at the very minimum, to the slowing down of procedures. It is therefore particularly important to submit a strong case filed, based on solid evidence and domestic and international law, laying out the motivations for filing the complaint on a universal jurisdiction, rather than a territorial or personality jurisdiction basis.

**Step 8:** In addition to the steps outlined above, it is key when choosing a forum state and when deciding on a case strategy:

- to collaborate with NGOs and lawyers to identify the relevant authority in charge of serious international crimes cases;
- to know the national authorities that will handle the complaint to be able to explain the motivations for filing the complaint on the basis of universal, rather than territorial/ personal jurisdiction;
- to assess the chances of a success of an investigation of the complaint, taking into account the resources available in the forum state, the political context of the complaint;
- to assess the impact of the complaint on the legislation of the forum state and the likelihood of negative changes to such legislation;
- to be prepared for the arguments used by officials/ government of the territorial state against the exercise of universal jurisdiction.

Universal jurisdiction cases are often politically sensitive cases as they touch upon the relationship between states, may target officials of a ‘friendly’ state or may otherwise be contrary to the forum states’ geo-political interest in the territorial state. A common argument employed by those targeted by a universal jurisdiction complaint is, that the exercise of such jurisdiction constitutes an infringement of national sovereignty, despite the firm legal basis of the principle of universal jurisdiction in international treaty and customary law. As such there is great potential for political interference in such cases, both, in the territorial and the forum state, despite the separation of powers and an otherwise independent judiciary. The potential for political interference is particularly given where political decision makers, such as the Ministry of Justice or the Attorney General, have a discretion whether or not to investigate or prosecute a particular complaint. In the United Kingdom for instance, it is the Attorney General, a government appointed official and who acts as chief legal advisor to the government, who has absolute discretion over prosecution over international crimes. In Germany, decisions made by the Federal Public Prosecutor not to investigate a universal jurisdiction case cannot be appealed to a court, contrary to decisions

concerning ordinary crimes cases. The decision can only be appealed against in a purley administrative procedure to the Ministry of Justice.

Cases that target relatively high level officials can lead to extensive pressure exercised by government officials on the forum state, to interfere in proceedings or to change the legislation in order to prevent third parties from filing universal jurisdiction complaints. The most prominent example of being target of such pressure is the case of Belgium, where complaints had been filed against high ranking US officials, including Tommy Franks, then commander of the US troops in Iraq. The complaint led then Secretary of Defense, Donald Rumsfeld in June 2003, to threaten to move NATO headquarters from Belgium if it did not change its legislation: “Belgium is a sovereign nation. They can decide what they want to do. It’s perfectly possible to meet elsewhere”. The legislation was repealed in August 2003 and today provides for only limited universal jurisdiction. It no longer allows neither third parties nor victims to act as parties civiles in universal jurisdiction cases.

As a response to universal jurisdiction complaints filed by human rights groups in Spain and the United Kingdom, Israel put considerable pressure on the government

of both countries to change their legislation so as to prevent universal jurisdiction cases against Israeli officials in the future. Similarly, following complaints issued by Spanish and French investigative judges against high level officials of the Rwandan government in 2005 and 2008 respectively, the African Union put the EU and the UN under pressure to discuss the 'abuse of universal jurisdiction', pressuring EU countries to put a moratorium on the arrest warrants.

## **V. Conclusion**

Using universal jurisdiction to address serious human rights violations is relatively new and is not yet very widespread, with a current focus on European countries. The concept is still fragile and a single case can have the potential to considerably change the course of universal jurisdiction in one country, if not more broadly, thereby preventing victims of future atrocities to rely on universal jurisdiction. However, it is starting to become an alternative to more 'traditional' approaches by human rights organisations and past years have seen a considerable increase in NGOs and lawyers resorting to universal jurisdiction, to obtain justice, accountability or even a change of policy. The examples where this has been done successfully are still few, yet their number is increasing and the lessons learned in past cases can contribute to an even more successful application of the principle in the future. The steps above are based on past cases, yet are by no means complete. Each case is different and requires a different strategy. Perhaps the most important 'step' to take by those who are planning to use universal jurisdiction for the first time is to seek the advice of others with experience, to plan carefully and to be prepared for a long time engagement.

# Annex I

<b>Comparative Table on Universal Jurisdiction in Europe</b>					
	<b>Spain</b>	<b>Germany</b>	<b>NL</b>	<b>United Kingdom</b>	<b>Portugal</b>
<b>UJ allowed for crimes of torture</b>	Yes (not within legislation but according to jurisprudence)	Yes (as 'serious bodily harm')	Yes	Yes	Yes
<b>UJ allowed for genocide</b>	Yes	Yes	Yes	No	Yes
<b>UJ allowed for crimes against humanity</b>	Yes (not within legislation but according to jurisprudence)	Yes	Yes	No (yes for slavery)	Yes for certain cases (slavery, traffic in human beings...)
<b>UJ allowed for war crimes</b>	Yes for grave breaches (not within legislation but according to jurisprudence)	Yes	Yes	Yes for certain grave breaches	Yes for certain grave breaches
<b>Presence required for the opening of an investigation/ for the trial</b>	No ; presence required for trial only.	No (not according to law, but prosecution obliged to investigate if suspect is present) ; presence required by law for process	Yes ; Presence required at all stages of the proceedings.	No ; presence required or anticipated for an arrest warrant to be issued and for the suspect to be charged ; trial in absentia possible at discretion of the judge	No
<b>Existence of a special 'war crimes unit'</b>	No	Yes (from April 2009)	Yes	Yes (within immigration authorities only)	No
<b>Examples for sentences using UJ by nationals tribunals</b>	Adolfo Scilingo convicted for crimes against humanity in 2005 (Argentina)	Maksim Sokolovic convicted for war crimes and genocide in 2001.  2 persons convicted for genocide : Djuradj Kusljic in 2001 and Nikola Jorgic in 2007 (former Yugoslavia)	2 convictions for war crimes: Heshamuddin Hesam in 2005 and Habibullah Jalalzoy in 2007 (Afghanistan)  Joseph Mpambara convicted in 2009 for torture committed in Rwanda in 1994.	Faryadi Sarwar Zardad convicted in 2005 for torture (Afghanistan)	

	Sweden	Denmark	Norway	Switzerland	Belgium	France
<b>UJ allowed for crimes of torture</b>	No	Yes (as serious bodily harm)	No	Yes	Yes	Yes
<b>UJ allowed for genocide</b>	Yes	No	Yes	Yes	Yes	Not stipulated by any law project
<b>UJ allowed for crimes against humanity</b>	No	No	Yes	Yes	Yes	Not stipulated by any law project
<b>UJ allowed for war crimes</b>	Yes	Yes for grave breaches	Yes	Yes	Yes	Not stipulated by any law project
<b>Presence required for the opening of an investigation/ for the trial</b>	Yes	Yes	No ; but presence required for indictment	Yes (residence requirement)	Yes (residence requirement)	Yes ; but no presence required for prosecution/ trial.
<b>Existence of a special 'war crimes unit'</b>	Yes	Yes	Yes	In the process of being established (January 2009)	Yes	In the process of being established (January 2009)
<b>Examples for sentences using UJ by nationals tribunals</b>			Refik Saric Bosnian convicted for war crimes in 1995 (former Yugoslavia)	Fulgence Niyonteze convicted in 2000 for war crimes committed in Rwanda in 1994.	7 convictions of Rwandan perpetrators of grave violations of international humanitarian law in 2001, 2005 and 2007 respectively.	Ely Ould Dah, Mauritanien convicted in absence for torture, in 2005, for 10 years of imprisonment  Khaled Ben Said convicted to 8 years imprisonment in 2008 for torture committed in Tunisia.

NOTA: outside of Europe, Canada, Chile, United States, Mexico and Senegal, modified their legislations to give the criminal courts the competence to judge the perpetrators of international crimes committed outside their territory; Canada and the US do have specialized war crimes units.

# Annex II

## FIDH& REDRESS: Contact List- SPECIALIZED 'WAR CRIMES' UNITS

Country	Ministry of Justice	Prosecution/Police/ Immigration	Address	Phone Number/Email
<b>Belgium</b>	Gérard Dive Coordinator, Belgian Task Force ICC- ICT		Boulevard de Waterloo 115, 1000 Brussels	Tel.: 0032 2542 6713 gerard.dive@just.fgov.be
<b>Denmark</b>		Special International Crimes Office (SICO) at: <a href="http://www.sico.ankl.dk/page33.aspx">http://www.sico.ankl.dk/ page33.aspx</a>	Jens Kofods Gade 1 1268 Kobenhavn K Denmark	Tel.: 0045 33 30 72 50 Fax.: 0045 33 30 7270 sico@ankl.dk
<b>Netherlands</b>	Directorate for Administration of Justice and Law Enforcement		Ministry of Justice P.O. Box 20301; 2500 EH, The Hague	Tel.: 0031 70 370 7064/ 0031 70 6134 Email: c.m.joubert@minjus.nl
<b>Netherlands</b>		Prosecution: National Prosecutions Office  Police: Team Internationale Mis- drijven <a href="http://www.warcimes.nl">www.warcimes.nl</a>	Prosecution: P.O. Box 395, 3000 AJ Rotterdam  Police: Postbus 11, 3970 AA Drie- bergen, Netherlands	Tel.: 0031 104966816  Tel.: 0031 653259475 Fax: 0031 343 535426 warcrimesunit@klpd.politie.nl
<b>Netherlands</b>		Immigration: Immigratie- en Naturalisa- tiedienst Unit 1F- zaken	Immigration: Postbus 3100 2130 KC Hoffddorp	Tel.: 0031 20 889 7949 / 0031 6533 19126
<b>Sweden</b>		Police: National Criminal Police, War Crimes Unit, Box SE- 12256 Stockholm		Tel.: 0046 840 13850 Fax: 0046 8650 5260 Email: wcu.rkp@polisen.se
<b>Canada</b>	Joseph Rikhof Senior Counsel; Crimes against Humanity and War Crimes Section Government of Canada		Ministry of Justice: 284 Rue Wellington Street, Ottawa (Ontario), K1A 0H8	Tel.: 001 613 946 0302 Fax: 001 613 952 7370 Email: jrikhof@justice.gc.ca
<b>Canada</b>		Police: Ron Charlebois, Officer in Charge- War Crimes Section	Police: Royal Mounted Police Ottawa, Canada, K1A OR4	Tel.: 001 613 949 9047 Fax.: 001 613 949 2820 Email: ron.charlebois@rcmp-grc. gc.ca
<b>Norway</b>		Prosecution: Siri Frigaard Head of National Autho- rity for the Prosecution of Serious Crime  Police: Kjaersti Helland Head of International Crimes Section	Prosecution: PO Box 80944 Dep 0030 Oslo, Norway  Police: National Criminal Investigation Service Brynsalleen 6, PO Box 8163 Dep, 0034 Oslo, Norway y	Tel.: 0047 23 17 42 01 Fax: 0047 23 17 42 10 Siri.frigaard@statsadvokaten.no  Tel.: 0047 23208000/ 8962 Fax: 0047 2320 8970 kjaersti.helland@politiet.no
<b>Germany</b>		Police: Bundeskriminalamt	Bundeskriminalamt 53338 Meckenheim	Email: info@bka.de (subject: 'war crimes')
<b>Interpol</b>		Fugitive Investigative Sup- port Sub- Directorate	Interpol Secretariat General 200, quai Charles de Gaulle 69006 Lyon France	Fax: 0033 472 44 71 63

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## Establishing the facts

### investigative and trial observation missions

Through activities ranging from sending trial observers to organising international investigative missions, FIDH has developed, rigorous and impartial procedures to establish facts and responsibility. Experts sent to the field give their time to FIDH on a voluntary basis.

FIDH has conducted more than 1 500 missions in over 100 countries in the past 25 years. These activities reinforce FIDH's alert and advocacy campaigns.

## Supporting civil society

### training and exchange

FIDH organises numerous activities in partnership with its member organisations, in the countries in which they are based. The core aim is to strengthen the influence and capacity of human rights activists to boost changes at the local level.

## Mobilising the international community

### permanent lobbying before intergovernmental bodies

FIDH supports its member organisations and local partners in their efforts before intergovernmental organisations. FIDH alerts international bodies to violations of human rights and refers individual cases to them. FIDH also takes part in the development of international legal instruments.

## Informing and reporting

### mobilising public opinion

FIDH informs and mobilises public opinion. Press releases, press conferences, open letters to authorities, mission reports, urgent appeals, petitions, campaigns, website... FIDH makes full use of all means of communication to raise awareness of human rights violations.

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# FIDH represents 155 human rights organisations on 5 continents



Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute

to the prevention of such crimes, (...) Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court (...) with jurisdiction over the most serious crimes of concern to the international community as a whole, Emphasizing that the International Criminal Court (...) shall be complementary to national jurisdictions, Resolved to lasting respect for and the of international justice,

## About FIDH

- FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

- A broad mandate  
FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

- An universal movement  
FIDH was established in 1922, and today unites 155 member organisations in more than 100 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

- An independent organisation  
Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.

*Find information concerning FIDH 155 member organisations on [www.fidh.org](http://www.fidh.org)*