

EU Update on International Crimes

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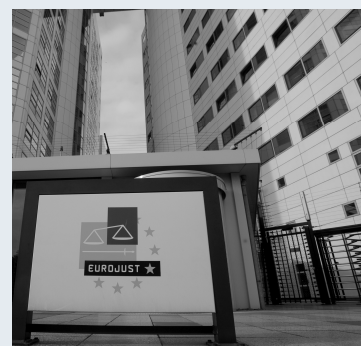
Update on the European Network

By Åsa Rydberg van der Sluis, Project Coordinator 'Universal Jurisdiction'

Since our last edition of the **EU Update on International Crimes** was issued, some interesting institutional developments have taken place with regard to the **Euro-pean Network of Contact Points in respect Persons Responsible for Genocide, Crimes against Humanity and War Crimes** ("the Network"). In a Council Decision of 18 December 2008, it was decided that the Network should have a permanent Secretariat at Eurojust. The Network Secretariat will consequently be based in the Eurojust building in The Hague. Although the Network Secretariat may

draw on the administrative resources of Eurojust, it is important to note that the Network Secretariat shall function as a separate unit. The Council Decision entered into force on 4th of June 2009 and the Secretariat will now have to be set up.

On 23 and 24 April 2009, the 6th meeting of the Network took place. It was organised by the Czech EU Presidency and it was attended by delegations from 19 EU Member States, Norway, USA and Canada. In addition, representatives of the International Criminal Court, the *ad hoc* Tribu-



Eurojust offices in The Hague
Credit © European Communities, 2009

nals, the Prosecutor's office in Bosnia and Herzegovina, Interpol and non-governmental organisations were present. The members of the Network welcomed the Council Decision providing for the establishment of the Network Secretariat.

They also recalled the duty of each country to fight against impunity and noted that investigators, prosecutors and judges in charge of investigations or trials involving genocide, crimes against humanity and war crimes often face challenges abroad.

(con't pg. 2)

Facts about the EU Network of Contact Points

- Established by an EU Council Framework Decision of 13 June 2002
- Created to facilitate and increase cooperation among member states in the investigation and prosecution of grave international crimes at the national levels
- So far, the Network has met five times.

What Next for EU Network? (con't from Pg. 1)

To that end, they should be provided with specialised training that takes into account the geographical, historical and cultural situation of the relevant countries, as well as training on the applicable rules of international law and practical expertise on the taking of evidence in a foreign country. The issue of efficient identification and calling of witnesses was also discussed. In particular, the importance of taking adequate measures to protect witnesses and victims was stressed by the members of the Network.

Further, the meeting focused on how to exchange information and knowledge about ongoing cases. Thus, it was decided that the creation of a comprehensive *fiche* containing information about ongoing investigations - and which authorities are in charge of them - should be considered at the next Network meeting.

Finally, the Network recognised the importance of regular contacts among the contact points as well as regular meetings at least twice a year to share the experiences in the investigation and prosecution of crimes of genocide, crimes against humanity and war crimes. Moreover, whenever necessary, additional meetings on specific topics could be convened on an *ad hoc* basis.

Given the conclusions of the 6th Network meeting about the importance of regular contacts and bi-annual meetings, a Network meeting during the autumn of 2009 is desirable. At the time of writing, Sweden is considering whether it will organise the 7th Network Meeting during the Swedish Presidency. More news to follow in other words...♦



Widows and mothers of political victims demonstrating in N'Djamena, the capital of Chad, to demand that former President Hissène Habré be tried.

In September 2005, Belgium issued an international arrest warrant against Hissène Habré, the former President of Chad, for crimes against humanity, war crimes and torture, and formally requested Senegal - where Habré resides, to

Habré before the ICJ – what's next?

extradite him to Belgium, where an investigation had already been launched. Debates about where would be the best place for the trial led, in 2006, to the African Union calling on Senegal to prosecute Hissène Habré "on behalf of Africa."

Despite some preparations in Senegal to permit the prosecution to proceed, not much occurred, apparently as a result of lack of funds to proceed with the trial. On 19 February 2009 Belgium instituted proceedings at the International Court of Justice (ICJ) against Senegal, on the

grounds that a dispute exists between Belgium and Senegal regarding Senegal's compliance with its obligation to prosecute the former President of Chad, Hissène Habré, or to extradite him to Belgium for the purposes of criminal proceedings.

Belgium also submitted a request for the indication of provisional measures, in order to protect its rights pending the Court's Judgment on the merits and in particular to order Senegal not to allow Habré to leave Senegal pending the

court's judgment on the merits.

In an Order of 28 May 2009, the Court found that circumstances did not require it to order provisional measures. However, the Court will continue to consider the admissibility and merits of the case.

On 17 July 2009, the ICJ fixed time-limits for the filing of the initial pleadings in the case. Belgium has until 9 July 2010 to file its Memorial and Senegal has until 11 July 2011 to file its Counter-Memorial. ♦

Release of Rwandan Suspects Prompts UK Law Reform

Anna MacDonald, Senior Policy/Campaigns Officer, The Aegis Trust

In July, the UK government announced its decision to expand the jurisdiction of our courts to prosecute genocide, war crimes and crimes against humanity.

This followed amendments to the Coroners and Justice Bill tabled by Lord Carlile QC, Baroness D'Souza and Lord Falconer QC. It was also a response to a decision by the High Court back in April, which ruled that four Rwandans, currently living in the UK and suspected of genocide in 1994 could not be extradited to face trial in Rwanda. This caused a real upset because, while they could not be extradited for fair trial reasons, neither could they be prosecuted in the United Kingdom. Genocide, war crimes and crimes against humanity can only be prosecuted in this country if they were committed after 2001.

This is the loophole that the government's announcement sought to close. **The planned changes would give UK courts jurisdiction for crimes of this nature committed since 1991.** When it comes to ending impunity for mass atrocities, this bold move by the government is as significant as the War

Crimes Act 1991 and the International Criminal Court Act 2001. In practice it means that the four Rwandans suspects, currently in legal limbo, could now face trial in the UK.

But even after the reform, there remain serious loopholes in our laws on atrocity crimes. As things stand, you can only be prosecuted for genocide, war crimes and crimes against humanity if you are a UK national or resident. If you are on a tourist visa, business visa or student visa, you are immune.

A simple 'presence' test for prosecution, as called for by an esteemed cross-party section of Lords as well as the Joint Committee on Human Rights, would solve this problem. It would bring us into line with other common law countries, including Canada, New Zealand, South Africa and the United States. It would also bring our laws on genocide, war crimes and crimes against humanity into line with our laws on torture, hostage taking and grave breaches of the Geneva Conventions. For these latter three crimes, the UK courts do not apply a residency test for prosecution.

In June, The Aegis Trust published a report that brought together, for the first time, details of people entering the UK who are suspected of international crimes.

The report examines 18 cases, including those of suspected genocidaires from Rwanda, alleged torturers from Zimbabwe, Iraq, Liberia and the Congo, and alleged war criminals from Afghanistan, Sudan, Sierra Leone and Sri Lanka. Under current law, and even with the Government's proposed changes, many of these people would still be immune from prosecution in the United Kingdom.

During the last stages of the passage of the Coroners and Justice Bill this autumn, the government has the opportunity to finally break down all barriers to prosecution of these terrible crimes. It should make it clear that it will respond to every credible allegation of the presence in the United Kingdom of any individual who may have committed these crimes. If these suspects cannot be extradited or deported, they must be prosecuted here. ♦



UK House of Lords

To date, the UK has had only one successful extraterritorial prosecution aside from WW2 cases. This is in part due to the limitations of the legislation.

If the reforms go ahead, they will only produce results if the resources of police and prosecution services are increased. This is what REDRESS and others have been calling for.

We are pleased that recently, the UK Crown Prosecution Service has agreed to create a special Panel to seek input from civil society. We welcome this.

Kevin Lave, Legal Advisor, REDRESS

International Law Commission's Report on 'Prosecute or Extradite'

Hugo Relva, Legal Advisor, International Justice Project, Amnesty International

"it has been decided by the International Law Commission that the topic of the "Obligation to extradite or prosecute (*aut dedere aut judicare*)" has achieved a sufficient substantial maturity for its codification, with a possibility of including some elements of progressive development."

[Mr. Zdzislaw Galicki, Preliminary report on the obligation to extradite or prosecute ("*aut dedere aut judicare*"), 7 June 06, para. 57.]

In 2004 the International Law Commission (ILC) decided to start, as part of its long-term programme of work, a study on the obligation to extradite or prosecute (*aut dedere aut judicare*).

Basically, under this obligation states must submit the cases of persons found in territories subject to their jurisdiction who are alleged to be responsible for certain crimes to their prosecuting authorities for the purpose of prosecution, regardless of their nationality, unless such persons are extradited to another state or surrender to an international criminal court.

The crimes covered include crimes under national law of international concern (such as hostage taking, hijacking, theft of nuclear material and piracy) and crimes under international law (genocide, crimes against humanity, war crimes, torture, enforced disappearances and extralegal executions).

Obviously, this study – whose Special Rapporteur is the Polish professor Zdzislaw Galicki – is closely related to universal jurisdiction, since the obligation to extradite or prosecute may sometimes include the exercise of this form of jurisdiction.

In 2006 the UN General Assembly in-

vited states to provide information to the ILC on a wide variety of questions regarding the topic under study.

Twenty-eight states so far have replied to the ILC, but most reports are partial or mistaken. For example, while some states have reported a number of conventions providing for the *aut dedere aut judicare* obligation, some others have excluded the same instruments, presumably as not containing such a provision (e.g., Japan, Thailand and United States of America did not include the Torture Convention as providing for the obligation to extradite or prosecute).

At the same time some reports are often contradictory among themselves: while some states

have asserted that the obligation to extradite or prosecute does not exist at all outside international treaties, some others have stated that a rule of customary international law in respect of crimes under international law should not be *a priori* ruled out and some others have suggested that a customary international law rule may be emerging regarding genocide, crimes against humanity and war crimes.♦

International Law Commission
UN Photo/Patrick Bertschmann



Concerns about possible limitations to the exercise of universal jurisdiction in Spain

Delphine Carlens, Programme Officer of the International Justice Desk, FIDH

Eleven years after Spanish judge Garzón ordered the arrest of former Chilean dictator Augusto Pinochet, following a complaint against Augusto Pinochet lodged in Spain, today the possibility of having new similar cases is under threat. The Spanish authorities are about to adopt, under political and diplomatic pressure, restrictive conditions to the exercise of universal jurisdiction, while Spain has been a pioneering country and a reference in the development and the enforcement of the principle of universal jurisdiction.

On 19 May 2009, the Spanish Congress adopted a resolution aiming at limiting the existing legal framework for universal jurisdiction to cases where the victims are Spanish or where the suspect is present on Spanish territory. It has now to be adopted by the Spanish Senate to be definitive. NGOs expect the resolution to be examined by the Senate by the end of September.

Since 1985, a Spanish regulation enables foreign victims to file complaints before Spanish courts against foreign alleged perpetrators of international crimes committed abroad. It is on this basis that Adolfo Scilingo,

a former Argentinean army officer, was condemned in April 2005 for crimes against humanity and torture committed during the Argentinean military dictatorship between 1976 and 1983.

Only several months after this milestone decision, in June 2005, the Argentinean Supreme Court declared unconstitutional the « final point » and « due obedience » amnesty laws, paving the way for domestic and international investigations and prosecutions against officials during this period.

The current Spanish regulation has enabled the investigation and prosecution of alleged perpetrators of the most serious crimes of international law, in particular in cases where their effective prosecution in the country where the alleged crimes were committed is inexistent or not undertaken in an independent and fair manner.

Today, around 10 cases are being investigated by Spanish judges under the universal jurisdiction principle. Recently, investigations were opened into international crimes allegedly committed by Chinese officials against Tibetan citizens during the riots of March 2008;

by Israeli high ranking officials during bombings in the Gaza strip in 2002, as well as by US officials for human rights abuses committed in particular against Guantanamo detainees. These latest judicial developments led to diplomatic pressure on the Spanish authorities exercised by the governments targeted by the complaints, contributing to the ongoing law reform.

Spanish authorities argue that this reform is not a setback in the application of international criminal justice in Spain, but rather a way to overcome the technicalities of universal jurisdiction cases, to enable Spanish courts to assume such a burden of work without detriment to national cases, and to avoid « abusive » complaints.

However, human rights NGOs have been campaigning against this reform for several months, calling out to the Spanish authorities¹ not to limit their meaningful contribution to the fight against impunity and the defence of victims' rights to truth, justice and reparation by introducing restrictions to the effective use of universal jurisdiction.♦



The Spanish Parliament



“Spanish courts have developed significant and complex case law related to universal jurisdiction practice. With its expansive legislation and independent judiciary, Spain has perhaps become the most welcoming forum for those seeking accountability for international crimes.”

W. Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008', *Michigan Journal of International Law* [Vol. 30:927] at 954. See: <http://students.law.umich.edu/mjil/article-pdfs/v30n3-Kaleck.pdf>

¹ See in particular the « Manifesto on the Law Reform introducing Limitations to the Exercise of Universal Justice » signed by numerous national and international human rights NGOs, June 2009, www.fidh.org/MANIFESTO-ON-THE-LAW-REFORM

AU - EU Report on Universal Jurisdiction

In July 2008, at the African Union summit in Sharm el Sheik, the AU issued a decision on 'the abuse of universal jurisdiction' in which it noted:

- i) The abuse of the Principle of Universal Jurisdiction is a development that could endanger international law, order and security;
- ii) The political nature and abuse of universal jurisdiction by judges from some non-African States against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States;
- iii) The abuse and misuse of indictments against African leaders have a destabilizing effect that will negatively impact on the political, social and economic development of States and their ability to conduct international relations;
- iv) Those warrants shall not be executed in African Union Member States;
- v) There is need for establishment of an international regulatory body with competence to review and/or handle complaints or appeals arising out of the principle of universal jurisdiction by individual states.

In its February 2009 progress report on this issue, the African Union reiterated its commitment to fighting impunity, though 'expressed its regret that in spite of its previous Summit decision calling for a moratorium and whilst the African Union (AU) and the European Union (EU) were already in discussion to find a durable solution to this issue, a warrant of arrest was executed against Mrs Rose Kabuye, Chief of Protocol to the President of the Republic of Rwanda, thereby creating tension between the AU and the EU'. It appealed again to UN and in particular EU member states to suspend the execution of warrants by individual European States until all the legal and political issues have been exhaustively discussed.

The decision also requested that the Chairperson of the African Union table the matter with the UN, and this has now been done. The issue should come up at the next meeting of the General Assembly in end September 2009.

Following the issuance of the first AU decision in 2008, at an AU/EU Troika Meeting it was decided to establish a technical ad hoc expert group to clarify the respective understanding on the African and EU side on the principle of universal jurisdiction and to issue recommendations for '*fostering a better mutual understanding between the AU and the EU of the purpose and the practice of universal jurisdiction*'. The AU- EU Expert Report on the Principle of Universal Jurisdiction was released on 16 April 2009.

REDRESS and FIDH wrote a letter to the Representatives of the Council Africa Working Group commenting on this Report, and the comments which follow below are a summary of some of our comments from this letter.

[see: www.redress.org/reports/FIDH_REDRESS_Letter_on_Universal_Jurisdiction_22_April_2009.pdf for our full comments].

The AU EU Expert Report is available here:

http://africa-eu-partnership.org/alfresco/d/d/workspace/SpacesStore/4e7bb5fb-3403-11de-be1d-8350e4e9a7f0/Rapport%20expert%20UA-UE%20sur%20comp%C3%A9tence%20universelle_EN.pdf?quest=true

Summary of REDRESS / FIDH Comments

As we indicated, the Report is very important, in that it recognizes that **universal jurisdiction is a 'vital element in the fight against impunity'**. However, there are a number of areas in which the Report does less well.


Paragraph 41 of the Report recognises the importance of the independence of the judiciary. However, some of the Report's recommendations go against the spirit of this independence.

Comments from REDRESS and FIDH

In particular those that request States to '*bear in mind the need to avoid impairing friendly international relations*' when exercising universal jurisdiction, and those that request national criminal justice authorities to refrain from issuing arrest warrants against suspects against whom such authorities have '*collected compelling evidence of serious crimes of international concern*' where these suspects are foreign state officials. This will require judicial authorities to take into account political rather than legal reasons in the judicial decision making process and provides considerable room for political interference with the judiciary.

Also, the essence of the principle of universal jurisdiction defies territorial borders. Presence on the territory of the investigating State is therefore not per se a precondition for the exercise of such jurisdiction under international law. Yet, the Report provides in paragraph 9 that States only have an obligation to exercise universal jurisdiction where they ratified the relevant treaty and where the suspect is '*subsequently present in the territory of the forum state*'. It then goes on to mention 'treaty crimes of particular significance', which include grave breaches of the 1949 Geneva Conventions. This at least appears contrary to the text of the relevant articles of the Geneva Conventions, which oblige States "**to seek out and prosecute**" those said to be responsible for grave breaches.

Further the Report reminds national criminal justice authorities considering to exercise universal jurisdiction that they are '*legally bound to take into account all the immunities to which foreign state officials may be entitled under international law*'. It does not clarify the extent of such immunities under international law. Recommendations 7 and 10 further seek to shield 'foreign state officials exercising a representative function on behalf of his or her state' from certain judicial measures, such as an arrest warrant. While States' practice as far as immunities are concerned differs, the International Court of Justice (ICJ) in the "**Arrest Warrant**" case was very limited in its findings. The ICJ did not decide on anything other than current foreign ministers. Furthermore, the basis for determining that there was immunity for a limited range of sitting state officials related to the nature of their functions. Consequently, immunity should not be extended beyond the limited range of state officials referred to in the ICJ's judgment, nor to persons who are no longer in post. The Report's recommendations 7, 8 and 10 therefore provide considerable room to go beyond the limited findings of the ICJ, bearing a risk of impunity in cases where immunities are granted contrary to international law. ♦



COUNCIL OF
THE EUROPEAN UNION

Brussels, 16 April 2009

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RELEX	331
COPS	208
JUSTPEN	7
JUST	4

REPORT

From : Council Secretariat

To: Delegations

Subject : The AU-EU Expert Report on the Principle of Universal Jurisdiction

1. The 10th and 11th meetings of the AU-EU Ministerial Troika¹ addressed the issue of universal jurisdiction in the context of the relationship between the AU and the EU.
2. In the Joint Communiqué² issued at the close of the 11th AU-EU Ministerial Troika meeting, "Ministers agreed to continue discussions on the issue and to set up a technical ad hoc expert group to clarify the respective understanding on the African and EU side on the principle of universal jurisdiction, and to report to the next Ministerial Troika meeting (...)"

¹ The meetings were held on 16 September 2008 (Brussels) and 20-21 November 2008 (Addis Ababa) respectively.

² Doc. 1698/08

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To view the latest legislative development and jurisprudence related to extraterritorial jurisdiction within the EU and to receive future updates on cases based on universal jurisdiction, send a blank email to:
uj-info-subscribe@yahoogroups.com

Our 'EU Update on International Crimes' Newsletter outlines the main developments in the field of international criminal justice with a focus on European countries. At the same time it highlights the activities and competencies of the European Union .

For further information or additional input or comments, please, contact:

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REDRESS

Seeking Reparation for Torture Survivors

fidh

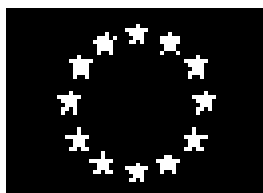
International Federation for Human Rights

****Conference Notice:**

REDRESS and FIDH will be hosting a conference on universal jurisdiction in Brussels, Belgium on 9-11 November 2009.

The Conference will consider, in particular, the practice of universal jurisdiction trials in EU Member States, including issues relating to the involvement and protection of victims and witnesses.

For further information, please contact: asa@redress.org



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