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International Federation for Human Rights

EU Update on International Crimes

Inside this issue:

Plans for the Permanent Secretariat of the EU Network of Contact Points Begin to Take Shape

By Åsa Rydberg van der Sluis, Universal Jurisdiction Project Coordinator, REDRESS/FIDH

In the last issue of this Newsletter, we reported that it had been decided that the ***European Network of Contact Points in respect of Persons Responsible for Genocide, Crimes against Humanity and War Crimes*** ("the Network") would set up a permanent Secretariat at Eurojust in The Hague.[1] Since then, another Network meeting has taken place which put some flesh on the bones of the decision on the future role of the Network Secretariat.

On 7 December 2009, the Swedish EU Presidency organised the 7th meeting of the Network. This was the first time that the Network met twice in a year and the main purpose of the meeting was to discuss the establishment and functioning of the Network Secretariat. Prior to the meeting, the Contact Points had been invited to submit their suggestions in this regard. Ten delegations replied to this request, as well as Norway and Canada. In addition, a joint letter with recommendations from Amnesty International, CICC, FIDH, Human Rights Watch and REDRESS was submitted.

The Network meeting began with an explanation of Eurojust's budget, which allows for the Network Secretariat to be established in 2011. With regard to the role of the Secretariat, it was underscored that it should ensure the continuity of the work of the Network and facilitate the exchange of information between the Contact Points. It was decided that "the Secretariat should support the Presidency in arranging regular meetings for the network to exchange information on all matters relating to investigation of serious international crimes."[2] In other words, the initiative to organise a meeting will remain with the country holding the EU Presidency rather than coming from the new Secretariat.

(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 seven times.

Permanent Secretariat for the EU Network (con't from Pg. 1)

The Secretariat should also gather "relevant information", possibly with the assistance of relevant NGOs. Further, it should develop a website or database for the compilation of such information, including court decisions on genocide and extradition and open source material on relevant issues, such as universal jurisdiction. On the other hand, it was decided not to set up a database with information on cases at the investigative stage, since this was not considered useful and it was also found questionable from a data protection point of view. The proposal for an advisory role for the Secretariat was also rejected. Instead, should the need arise, advice should be sought from the European Justice Network or Eurojust, which were said to already have "some relevant experience in relation to EU countries as well as third states." [3]

In terms of future meetings, it was deemed helpful if the EU Presidency trio would develop a coordinated programme for the Network meetings in the coming 18 months. Regular meetings - which are required to discuss common challenges - will be held bi-annually, unless this would be considered unnecessary. The participation by NGOs in the Network meetings was also discussed. The contributions by NGOs were acknowledged as useful in providing relevant information for the activities of the Contact Points. Thus, "[i]nvitations to NGOs for attendance of the Network meetings should be made in view of the information that they could make available to the process." [4]

In conclusion, the Network should benefit greatly from a permanent Secretariat that can ensure the continuity of the Network and facilitate the exchange of information between the Contact Points. Given the fact that it will not initiate Network meetings nor provide advice, it seems as if it will have a supporting rather than leading role within the Network. Consequently, the success of the Network will continue to be determined by the importance given to it by the EU Member States and their Contact Points. ♦

[1] Council Decision 2009/426/JHA of 16 December 2008 on the Strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime. See Article 25a(2). The Council Decision entered into force on 4 June 2009.
[2] Report of the 7th Meeting of the European Union Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes, The Hague 7th December 2009, annexed in a Note from the Presidency to the Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS), 17239/09, 11 December 2009.
[3] Ibid.
[3] Ibid.

The Scope and Application of the Principle of Universal Jurisdiction at the UN General Assembly

At the request of the United Republic of Tanzania, on behalf of the African States, an item was added to the agenda of the 64th Session of the United Nations General Assembly ("GA"), namely the scope and application of the principle of universal jurisdiction. This issue was considered by the Sixth Committee (Legal) and its recommendations were adopted by the GA. Consequently, the UN Secretary-General should invite UN member states to submit to the GA, before 30 April 2010, "information and observations on the scope and application of the principle of universal jurisdiction, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice" and to prepare and submit a report on this to the GA at its 65th Session.

Moreover, the GA decided that the Sixth Committee should continue to consider the matter and that it should be included in the provisional agenda of the 65th Session.

According to the provisional programme, the scope and application of the principle of universal jurisdiction will be considered on 12 – 13 October 2010.♦

United Kingdom: The Ability for Victims to Apply for Arrest Warrants May Soon Require Attorney General Consent

Kevin Laue, REDRESS

In December 2009, a London magistrate issued an arrest warrant for former **Israeli foreign minister Tzipi Livni** over war crimes Israel allegedly committed in Gaza earlier in the year. It had been based on an alleged grave breach of the Fourth Geneva Convention, which is a criminal offence under the UK's Geneva Conventions Act 1957.

The warrant request had been made by lawyers acting for some of the Palestinian victims of the fighting. Livni was a member of the war cabinet during Operation 'Cast Lead' in late 2008/early 2009, and had been due to address a meeting in London. The arrest warrant was subsequently withdrawn after she apparently cancelled her visit.

The UK Government has come under Israeli pressure to block such warrants being issued. As a result the UK Government has indicated its intention to make the issuing of private arrest warrants, which was the procedure used, subject to the Attorney-General's consent in the future. Human rights NGOs are strongly opposed to such a change and have issued an urgent briefing paper to Members of Parliament to resist the move.[1]

Under existing UK law[2] a magistrate may issue an arrest warrant if s/he considers that: there are reasonable grounds to believe that a specific offence has been committed by the named suspect; admissible evidence has been presented which (if uncontradicted) establishes the elements of the offence alleged; s/he has jurisdiction to issue the warrant and has ruled out any immunity of the suspect. In practice, the most senior district judges at Westminster Magistrates' Court hear these applications and determine whether the high threshold of evidence, liability and jurisdiction are met and that no immunity applies.

Although the Attorney General has to be involved in any subsequent decision to prosecute a serious international crime, NGOs argue that to give the Attorney General power to tell a senior judge whether s/he can issue an arrest warrant in an individual case is regressive. There is already a serious risk that prosecutions for such heinous and universally condemned crimes as war crimes, torture, crimes against humanity and genocide can be vetoed for political reasons in the hands of the Attorney General. The prospect of the Attorney General now being given the power to interfere in a criminal case at an even earlier stage and in circumstances of urgency which arise with the issuing of such warrants is almost certain to make it even more difficult to bring suspects to account. NGOs have called the proposal "contrary to the rule of law and constitutionally unsustainable."[3]♦

[1] Briefing to Parliamentarians by the UK Universal Jurisdiction group 27 January 2010 Reasons to oppose the Attorney General interfering with the arrest warrant procedure in cases of suspected serious international crimes: www.redress.org/reports/UJ_Parliamentary_briefing_27_01_2010.pdf

[2] s 25(2) of the Prosecution of Offences Act 1985

[3] Briefing to Parliamentarians, loc cit, page 5

The UK has a duty … to seek out in order to extradite or to prosecute within our own jurisdiction people who are suspected of the grave crimes in question under those conventions. It is very important to make it totally clear that we as a Government are determined to do our duty in fulfilling our obligations under that law, as we did, for instance, in the case of the Afghan warlord, Zardad, who was successfully prosecuted for torture offences here in the UK in 2005. We are absolutely committed to upholding these conventions and to upholding the principles of universal jurisdiction. There can be no impunity for these most grievous of crimes.

There can be a potential impact on our international relations if attempts are made by a private person to arrest one of a foreign state's senior politicians during a visit to the UK. … we need to engage with those who have been, and are, involved in a conflict if we are to be able to try to bring such a conflict to an end or to ease it. It would not be helpful if the use of such a power of application by a private citizen for a warrant for arrest made a person reluctant to visit the UK, notwithstanding that they may have a leadership role within their country and that we need to talk to them about such a matter.

The Solicitor-General (Vera Baird) UK Arrest Warrants Alleged War Crimes) 28 January 2010 4.39 pm

Spain: Changes to Universal Jurisdiction Legislation Uncovered : FIDH interviews Manuel Ollé Sesé, Spanish lawyer, President of APDHE (Asociación Pro Derechos Humanos de España)

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

Q: What changes to the existing legislation on universal jurisdiction in Spain were introduced by the reform of November 2009?

Organic Act 1/2009 of 3 November 2009 introduces amendments to sections 4 and 5 of article 23 of the Organic Law of the Judiciary (LOPJ - Ley Organica del Poder Judicial). Section four (4) limits the exercise of universal jurisdiction in Spain.

Basically, four amendments are introduced:

i) crimes against humanity are added to the list of crimes that fall within the scope of universal jurisdiction; and currency counterfeiting is removed from that same list;
ii) alternative [additional] requirements are added to the exercise of universal jurisdiction : "without prejudice to the provisions of international treaties and conventions", the alleged perpetrators of the crime must be on Spanish soil or the victims must be of Spanish nationality or the existence of some substantial link with Spain;
iii) criminal proceedings in Spain are now, "in all cases", subject to the condition "that no other country has jurisdiction, or international tribunal, have already started proceedings such as an investigation or, if appropriate, effective prosecution the crimes; and
iv) "criminal proceedings before Spanish courts will be temporarily stayed once it has been established that proceedings are underway for the reported crimes" in another country having jurisdiction or before an international tribunal.

The reform aims to demolish the absolute or pure nature of universal jurisdiction. The exercise of universal jurisdiction would be subject to the existence of any of the following circumstances establishing a link with our country: presence of the alleged perpetrators on Spanish soil; victims who are Spanish citizens; or the existence of a substantial connection with Spain.

I would like to provide some clarification relating to the link or connection to Spain. Firstly, given the literal wording of the reform, it will not be necessary to establish a connection with Spain in cases where the crime in question is covered by a treaty to which Spain is a signatory ("without prejudice") which provides otherwise. The wording, though ambiguous, confirms the flexibility of interpretation left up to judicial discretion, as there are various treaties, such as the Geneva Conventions, which are specifically referred to, that do not require any such connection. The second requirement, the fact that victims must be Spanish citizens becomes a sort of passive personality principle jurisdiction which does not exist in Spanish law. And as for the third requirement, the existence of "a substantial connection to Spain" is a catchall that reveals indecisiveness, which is something that can create a significant dysfunction in the application of the law. Consequently, the nature of the crime is the only connecting factor which determines the use of universal jurisdiction.

Three resolutions which apply the recent law have been passed since its coming into force.

The decision dated 26 November 2009 handed down by the Central Investigating Court No. 4 (Juzgado Central de Instrucción) of the Audiencia Nacional, in relation to Iraq. Despite agreeing to the rogatory commission before deciding on the admissibility of the case, it points out to the inexistence of the links to Spain required by the Act, thus properly interpreting the literal contents of the Act ("without prejudice" to the provisions of treaties and conventions). It declares that "the Fourth Geneva Convention, in its article 146, establishes… the obligation of the contracting States to investigate, prosecute and sanction persons who commit grave breaches of the Convention". However, the Central Investigating Court No. 1 in its decision dated 23 November 2009, declared that the case for war crimes, crimes against humanity and genocide committed in Iraq was not admissible because "the alleged perpetrators were not on Spanish soil, and there were neither Spanish victims, nor any substantial link with Spain". The Central Investigating Court No. 3 also decided that the Burma case was not admissible.

Similarly, and against all the principles established by the Constitutional Tribunal of Spain, the reform introduces the principle of subsidiarity for universal jurisdiction to the detriment of concurrent jurisdiction. Once a link with Spain is established, the only condition under which universal jurisdiction can now be applied in Spain is if there are no effective proceedings underway for the same crime in "another country having jurisdiction" or before an "international tribunal".

The Act concludes by ordering Spanish judges to temporarily dismiss proceedings when "it has been established that proceedings have been initiated for the same acts" before a national or international tribunal. This also allows for numerous criticisms. According to this recent amendment, the simple filing of a complaint in the country where the crimes were committed would suffice to suspend the proceedings in Spain for an undetermined period of time, during which it will have to be determined if the legal proceedings initiated by this complaint are fake or effective.

The only thing that is acceptable about the reform is that it specifically introduces crimes against humanity in the list of crimes that fall within the scope of universal jurisdiction.

Q: What are the consequences of this reform on the ongoing Universal Jurisdiction cases currently before the Audiencia Nacional?

The answer – regardless of the fact that in almost all cases one of the conditions relating to a link to Spain apply and that there are no provisions for temporary measures in the Act – is simple: the rules of criminal procedure apply the principle of tempus regit actum and as such are not retroactive. The contrary would imply a ruling on the inadmissibility of a case after the commencement of proceedings that were initially considered admissible.

That is why all proceedings, based on universal jurisdiction, that were initiated before the entry into force of the new Act, are still admissible and ongoing.♦

Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial

Artículo 23.

1. En el orden penal corresponderá la jurisdicción española el conocimiento de las causas por delitos y faltas cometidos en territorio español o cometidos a bordo de buques o aeronaves españoles, sin perjuicio de lo previsto en los tratados internacionales en que España sea parte.

2. Asimismo conocerá de los hechos previstos en las Leyes penales españolas como delitos, aunque hayan sido cometidos fuera del territorio nacional, siempre que los criminalmente responsables fueren españoles o extranjeros que hubieren adquirido la nacionalidad española con posterioridad a la comisión del hecho y concurrieren los siguientes requisitos:

- Que el hecho sea punible en el lugar de ejecución, salvo que, en virtud de un Tratado internacional o de un acto normativo de una Organización internacional de la que España sea parte, no resulte necesario dicho requisito.
- Que el agraviado o el Ministerio Fiscal denuncien o interpongan querella ante los tribunales españoles.
- Que el delincuente no haya sido absuelto, indultado o penado en el extranjero, o, en este ultimo caso, no haya cumplido la condena. Si solo la hubiere cumplido en parte, se le tendrá en cuenta para rebajarle proporcionalmente la que le corresponda.

3. Conocerá la jurisdicción española de los hechos cometidos por españoles o extranjeros fuera del territorio nacional cuando sean susceptibles de tipificarse, según la Ley penal española, como alguno de los siguientes delitos:

- De traición y contra la paz o la independencia del Estado.
- Contra el titular de la Corona, su Consorte, su Sucesor o el Regente.
- Rebelión y sedición.
- Falsificación de la Firma o Estampilla reales, del sello del Estado, de las firmas de los Ministros y de los sellos públicos u oficiales.
- Falsificación de moneda española y su expedición.
- Cualquier otra falsificación que perjudique directamente al crédito o intereses del Estado, e introducción o expedición de lo falsificado.
- Atentado contra autoridades o funcionarios públicos españoles.
- Los perpetrados en el ejercicio de sus funciones por funcionarios públicos españoles residentes en el extranjero y los delitos contra la Administración Pública española.
- Los relativos al control de cambios.

4. (**) Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la Ley española, como alguno de los siguientes delitos:

- Genocidio y lesa humanidad.
- Terrorismo.
- Piratería y apoderamiento ilícito de aeronaves. Delitos relativos a la prostitución y corrupción de menores e incapaces.
- Tráfico ilegal de drogas psicotrópicas, tóxicas y estupefacientes.
- Tráfico ilegal o inmigración clandestina de personas, sean o no trabajadores.
- Los relativos a la mutilación genital femenina, siempre que los responsables se encuentren en España.
- Cualquier otro que, según los tratados y convenios internacionales, en particular los Convenios de derecho internacional humanitario y de protección de los derechos humanos, deba ser perseguido en España.

Sin perjuicio de lo que pudieran disponer los tratados y convenios internacionales suscritos por España, para que puedan conocer los Tribunales españoles de los anteriores delitos deberá quedar acreditado que sus presuntos responsables se encuentran en España o que existen víctimas de nacionalidad española, o constatarse algún vínculo de conexión relevante con España y, en todo caso, que en otro país competente o en el seno de un Tribunal internacional no se ha iniciado procedimiento que suponga una investigación y una persecución efectiva, en su caso, de tales hechos punibles.

El proceso penal iniciado ante la jurisdicción española se sobreseerá provisionalmente cuando quede constancia del comienzo de otro proceso sobre los hechos denunciados en el país o por el Tribunal a los que se refiere el párrafo anterior.

*5. **(**)** Si se tramitara causa penal en España por los supuestos regulados en los anteriores apartados 3 y 4, será en todo caso de aplicación lo dispuesto en la letra c del apartado 2 del presente artículo.*

Interview with Wolfgang Kaleck, General Secretary of ECCHR

During the FIDH/REDRESS conference on Universal Jurisdiction Trial Strategies in November 2009, we took the opportunity to interview one of the speakers, Mr. Wolfgang Kaleck.

As General Secretary and Co-founder of the European Centre for Constitutional and Human Rights (ECCHR), you have devoted your work to promoting universal justice. What aims do you seek to accomplish and how?

My overall aim is to change situations in which gross human rights violations are committed and to achieve criminal justice. Criminal justice is one tool we have to address past human rights violations and consequently prevent future violations from occurring. Most societies are not really ready for dealing with past human rights abuses. But in some cases organizations like ECCHR can come in as a transnational actor to bring a case and to trigger some kind of process for the perpetrators in the state. However, universal jurisdiction is just one tool in the toolbox. Other tools include the use of the European Court and UN mechanisms. You must have all legal and social tools in mind when you develop strategies.

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Which of the cases that you have worked on do you think has contributed the most to the battle for international justice?

The most interesting case was that of Argentine dictator Jorge Rafaél Videla and Emilio Eduardo Massera, which I have been involved in since 1998 in Germany. It shows that extra-territorial jurisdiction can have a very strong and severe impact on the state where the crimes were committed, but that it takes time. Through a successful strategy of NGOs, European states collected evidence and worked together which created a kind of pressure on Argentina. This resulted in a strong motivation to abolish the amnesty law for the former perpetrators and to reopen trials in Argentina. The first accused in Argentina have now been sentenced and a series of huge trials are ongoing.

You mentioned during the Conference in Brussels that many universal jurisdiction complaints that are submitted are 'rubbish'. How do you distinguish such complaints from the valid ones?

"Rubbish" is to collect some newspaper articles, label it with 'war crime' or 'genocide', submit it to the authorities and then to get upset when the case is thrown out by the prosecutors and judges. We should not aim at getting ***any*** universal jurisdiction case accepted – in order to succeed with some selected cases there must be a solid evaluation of the admissibility requirements as well as a good legal analysis of the facts.

by Melissa Messchaert

You have stated that Austria's failure to arrest Chechen President Kadyrov on charges of torture while he was visiting Austria is "unacceptable for a constitutional state". How and why do countries fail to comply with their international legal obligations under the UN Convention Against Torture?

A universal jurisdiction case such as the Kadyrov case presents a big problem for states. Pursuant to the Convention Against Torture, they are obliged to investigate and prosecute if a suspect is in the country. Of course, in certain situations states want to avoid this obligation. There is a series of cases where suspects were present in European countries and they were unable to prosecute them. For instance, in the Almatov case, Germany excused its inaction by stating that the foreign minister might have known that the alleged perpetrator was in the country, but that the prosecutor's office did not know! In my view, some EU states are willing to chase mostly alleged low-rank perpetrators from conflicts in African States. They do deserve to be prosecuted, but you cannot exclude other alleged perpetrators who are citizens of friendly or powerful states. In other words, you cannot use double standards. Instead, European States must act as role models and enforce the rule of law. They must overrule other interests to promote justice.

What does the future for universal jurisdiction hold?

I am not a prophet, but I would say that it is not as bad as it may look at times. The future is about persons who are courageous enough to push for universal justice. We must develop a policy of small steps, but we should insist that history sometimes *can* develop in big steps – we should not give up hope for big cases to arise like the Pinochet case.

What I personally learnt in my first set of Argentinean cases is to constantly put new things on table, to put pressure on the prosecutor's office. After 5 years they came out with arrest warrant, and thereafter an extradition demand. Every small step is part of a much broader process. It is also important to keep in mind that the international criminal justice system is a relatively new process.♦

Belgium: Ephrem Nkezabera is convicted of genocide and rape as a war crime on 1st December 2009

Nkezabera, a former banker said to have been a member of the national committee of the 'Interahamwe', was initially arrested pursuant to a request from the International Criminal Tribunal for Rwanda, but the case was thereafter transferred to Belgium.

Nkezabera had admitted, during pre-trial questioning, that he had financed and armed Hutu extremists involved in the genocide and bankrolled an extremist radio station, earning him the tag 'genocide banker'. In contrast, he contested the rape charges that were also brought against him.

The 12 jurors found him guilty of all charges that had been brought against him.

Due to serious illness, Nkezabera did not attend his trial nor was he present in court for the sentencing.

He was sentenced to 30 years imprisonment. ♦

REDRESS/ FIDH
Rue de la Linière 15
1060 Brussels
Belgium

tel. +32 2 609 44 25
fax:+32 2 609 44 33

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:

Åsa Rydberg van der Sluis
Project Coordinator 'Universal Jurisdiction'
REDRESS/ FIDH
www.redress.org / www.fidh.org
email: asa@redress.org

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