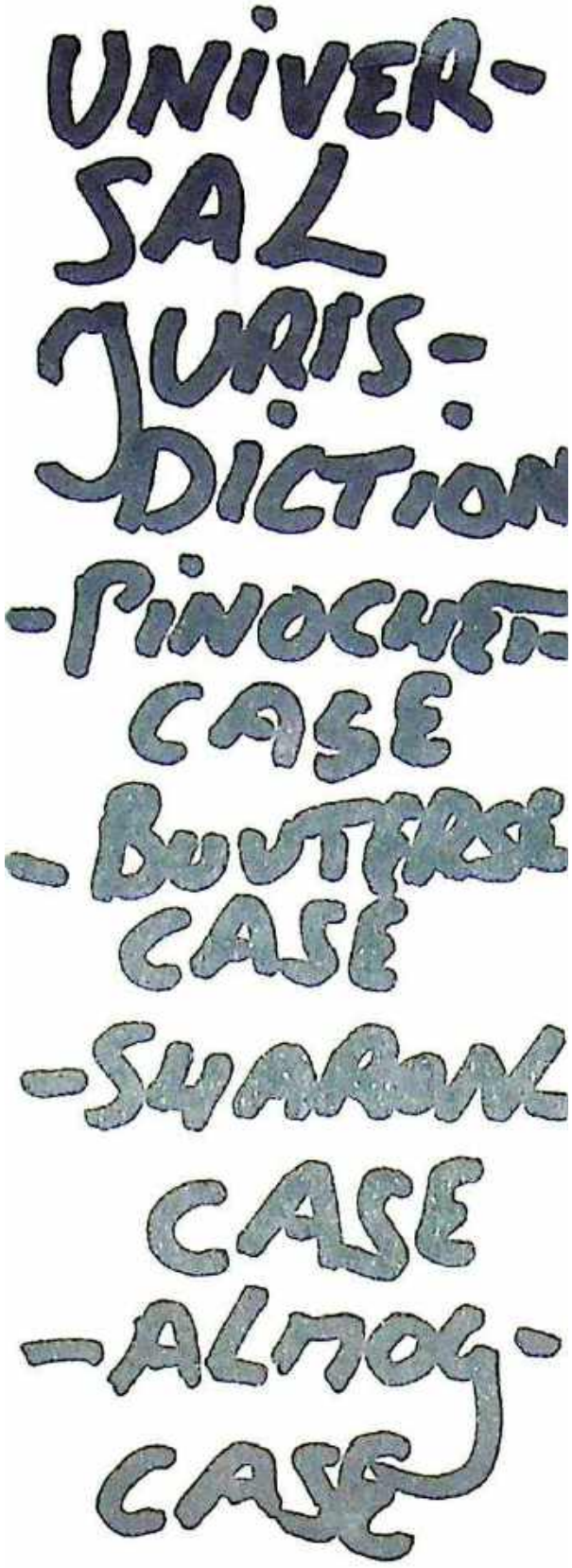

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The State of the Art

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I. Introduction

"Universal jurisdiction" is an idea that is as much acclaimed as denounced.[1] Much debated as a principle, the legal concept has attracted global attention since the dramatic 1998 arrest in London of former Chilean dictator Augusto Pinochet on charges of torture. But the Pinochet case itself developed in a significantly changed international legal environment. The last two decades have seen a revolution in forms of accountability for grave human rights violations, with the international community demonstrating a considerable interest in ensuring that certain international crimes are prosecuted.[2]

Yet despite the creation of ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone and the International Criminal Court (ICC), vast gaps persist in the ability to bring to justice persons accused of the gravest international crimes: genocide, crimes against humanity, war crimes and torture. With finite resources, international courts and mixed "internationalized" tribunals can try only a relatively small number of perpetrators, and the courts' mandates are generally limited to crimes committed in specific territories and conflicts. Even with the advent of a permanent International Criminal Court, it is expected that there will remain an "impunity gap unless national authorities, the international community and the [ICC] work together to ensure that all appropriate means for bringing other perpetrators to justice are used."[3] In combating impunity for grave human rights violations, a critical role thus remains for national courts and tribunals through the exercise of universal jurisdiction.

"Universal jurisdiction" refers to the competence of a national court to try a person suspected of a serious international crime—such as genocide, war crimes, crimes against humanity or torture—even if neither the suspect nor the victim are nationals of the country where the court is located ("the forum state"), and the crime took place outside that country.[4] The exercise of universal jurisdiction is commonly authorized, or even

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[1] See for example Henry Kissinger, "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny," *Foreign Affairs*, July/August 2001, and reply by Kenneth Roth, "The Case for Universal Jurisdiction," *Foreign Affairs*, September/October 2001. See also George Fletcher, "Against Universal Jurisdiction," *Journal of International Criminal Justice*, vol. 1 (2003), p. 580, and Georges Abi-Saab, "The Proper Role of Universal Jurisdiction," *Journal of International Criminal Justice*, vol. 1 (2003), p. 596.

[2] In this report, "international crimes" will be used to refer to genocide, war crimes, crimes against humanity, and torture.

[3] Paper on Some Policy Issues Before the Office of the Prosecutor, ICC, 2003, p. 3, [online] http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf.

[4] Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford, 2003),

required, by an international convention to which the state is a party. For example, the Convention against Torture[5] and the Grave Breaches provisions of the Geneva Conventions both mandate the exercise of universal jurisdiction.

On paper, a great many countries around the world appear to recognize that they can and should exercise universal jurisdiction over international crimes such as torture and war crimes, by passing laws that permit the prosecution of such crimes.[6] But practice has generally lagged far behind laws on the books. At the same time, concerns about the politicization of universal jurisdiction laws—and the risk that cases implicating foreign government officials could be inconvenient or embarrassing to the country where the court is located—have been a constant theme in debates about universal jurisdiction, and have led at least one country so far, Belgium, to significantly revise its laws.[7] Issues of insufficient political will may be compounded by fear that universal jurisdiction cases, which concern events occurring in a foreign country and where suspects, witnesses and victims are likely to be foreign nationals, will be time- and resource-intensive to investigate and prosecute.

In the aftermath of Belgium's 2003 decision to significantly narrow its universal jurisdiction laws (in part due to direct pressure from foreign governments including the United States, which threatened to have the NATO Headquarters moved from Brussels[8]), there was a widespread perception that universal jurisdiction was "on its last legs, if not already in its death throes."[9] But rumors of universal jurisdiction's death would appear to have been greatly exaggerated. Despite setbacks such as Belgium's law

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p. 3; Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia, 2005), pp. 25-26. The country in which the crimes occurred is referred to in this report as the "territorial state."

[5] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [Annex, 39 U.N. GAOR Supp., No. 51, p. 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987, arts. 4-5; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force October 21, 1950, art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force October 21, 1950, art. 49; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force October 21, 1950, art. 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force October 21, 1950, art. 146.

[6] See Amnesty International's survey of domestic laws, *Universal Jurisdiction - The Duty of States to Enact and Enforce Legislation* (AI Index: IOR 53/002/2001), September 2001, [online] http://web.amnesty.org/pages/legal_memorandum (retrieved May 2006).

[7] See this report, Country Case Study: Belgium.

[8] The threat arose because the head of the U.S. Central Command, and sitting U.S., British and Israeli political leaders, had been the subject of complaints filed under Belgium's universal jurisdiction law. See Luc Reydams, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law," *Journal of International Criminal Justice*, vol. 1 (2003), p. 679.

[9] Antonio Cassese, "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction," *Journal of International Criminal Justice*, vol. 1 (2003), p. 589.

reforms, there has since 2000 been a steady rise in the number of cases prosecuted under universal jurisdiction laws in Western Europe, evidencing a heightened willingness among certain European states to utilize universal jurisdiction. At the level of European Union (EU) policy, the Council of the European Union on Justice and Home Affairs (the Council) has adopted a decision recognizing that EU member states are "confronted on a regular basis" with persons implicated in genocide, crimes against humanity and war crimes, and who are trying to enter and reside in the EU. In its decision, the Council declared that these crimes "must not go unpunished and that their effective prosecution must be ensured by taking measures at national level and by enhancing international cooperation."[10] An earlier Council decision created an "EU Network" of national contact points intended to enhance the exchange of information concerning the investigation of international crimes.[11] Momentum has also been generated by the widespread ratification of the Rome Statute of the International Criminal Court among EU and non-EU states. The Rome Statute requires states parties to complement the efforts of the court, and its preamble calls on national courts to exercise criminal jurisdiction over those responsible for international crimes.[12]

The successful prosecution of international crimes in 2005 by courts in Spain, France, Belgium, the United Kingdom and the Netherlands—with more trials scheduled for 2006—indicates that universal jurisdiction is now a practical reality that is gradually being assimilated into the functioning of criminal law systems in parts of Western Europe. But relatively little is known about the *practice* of universal jurisdiction in various national legal systems, and the circumstances under which cases are actually investigated, prosecuted and tried. In this report Human Rights Watch examines the practice of universal jurisdiction in several European states since 2001.[13] Based on interviews with prosecutors, investigating judges, immigration officials, police personnel and defense and victims' lawyers in eight different countries, the report examines the real challenges encountered when trying to exercise universal jurisdiction in domestic courts, and—more significantly—the variety of innovative and creative responses which have been developed in some countries to overcome many of these challenges.

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[10] Council Decision 2003/335/JHA of 8 May 2003, Official Journal L 118, 14/052003 P.0012-0014, [online] http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_118/l_11820030514en00120014.pdf, preambular paras. 1, 6.

[11] Decision 2002/494/JHA of 13 June 2002, Official Journal L 167, 26/06/2002 P.0001-0002, [online] http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_167/l_16720020626en00010002.pdf (retrieved January 2006).

[12] See preambular para. 4, Rome Statute of the ICC, [online] http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf (retrieved April 2006).

[13] Universal jurisdiction practice occurring before 2001 has been covered by REDRESS in *Universal Jurisdiction in Europe*, June 1999, [online] http://www.redress.org/publications/UJEurope.pdf (retrieved May 2006).

The experiences examined in this report suggest that the fair and effective exercise of universal jurisdiction is far from easy. The cases are more complex and resource-intensive than most ordinary criminal cases, and frequently raise novel legal questions for domestic courts. Problems of a lack of political will to pursue prosecutions remain pervasive. These challenges must be taken into account when setting expectations—particularly the expectations of victims—about what is possible through universal jurisdiction cases. Fundamentally, however, the national experiences examined in this report show that the fair and effective exercise of universal jurisdiction is achievable where there is the right combination of appropriate laws, adequate resources, institutional commitments, and political will.

The experiences examined in this report are exclusively European. This is in part because, as noted above, a handful of EU member states have been at the center of developments in the exercise of universal jurisdiction. It is also because the EU as an institution has, through its decisions, actively encouraged these developments and has the potential to do much more to enhance cooperation and the exchange of information.[14] By assuming a leading role, both Western European states and the EU as a whole are uniquely situated to serve as examples to the wider international community of how universal jurisdiction can be strengthened as an effective, practical and realistic means of combating impunity for the worst international crimes.

[14] Of the eight countries surveyed for this report, seven are EU members. The eighth country surveyed, Norway, is not in the EU.

II. Challenges and Responses—Making Universal Jurisdiction a Reality

From the initial complaint to the conclusion of the trial and any appeal, cases involving universal jurisdiction present special demands on police, prosecutors, defense counsel and courts. Because the acts in question will have occurred in a foreign country, and often many years earlier, cases rarely arise in the manner to which local authorities are accustomed—such as through a victim simply reporting to a police station.

Investigators and prosecutors may lack familiarity with both the historical and political context of the alleged crime, and the applicable international law. Witnesses may be dispersed across several countries, or the state in which the crime was committed may decline to cooperate with investigative requests. For similar reasons, a defendant may also face considerable problems gaining access to witnesses or evidence that exculpates him or her.

Despite these and other difficulties, cases have been opened and have proceeded to trial and conviction. These developments have generally occurred where law enforcement and judicial authorities in the relevant countries have made an organizational and institutional commitment to take potential universal jurisdiction cases seriously. This section reviews some of the key hurdles that have arisen in the exercise of universal jurisdiction by national authorities, and considers the strategies adopted by some national authorities to overcome them.

A. Notification and Complaint Mechanisms

1. Immigration Authorities

In its decision of May 8, 2003, the EU Council observed that "Member States are being confronted on a regular basis with persons who were involved in such crimes and who are trying to enter and reside in the European Union."[15] The preponderance of cases that have proceeded to trial under universal jurisdiction laws in Belgium, the Netherlands, Denmark and the United Kingdom have involved perpetrators who entered as asylum applicants, in the aftermath of a change of government or civil conflict in the territory where the crime was committed. Asylum seekers who are victims of an international crime may well be seeking refugee status alongside individuals whom they recognize as perpetrators. In some cases, suspected perpetrators may unwittingly disclose information which suggests a basis for further investigation into whether they

[15] Council Decision 2003/335/JHA of 8 May 2003, preambular para. 6.

have been involved in a serious crime—for example, the individual might disclose that he was an army officer or militia member, as part of his refugee application.

Immigration authorities thus play a potentially vital role in alerting national police and judicial authorities to the presence of suspected perpetrators of international crimes. In the case of some countries examined in this report, immigration authorities have embraced this potential by adopting policies and procedures for reviewing visa and asylum applications in order to identify information suggesting involvement in international crimes, and for referring these cases to police and prosecutorial authorities. In Denmark, the Netherlands and Norway, the immigration authorities have taken the initiative of creating a specialized department that reviews asylum and visa applicants whose applications contain information suggesting involvement in international crimes. These departments maintain a list of suspects according to certain criteria, including previous employment, and after cross-checking the information with a list of suspects issued by international tribunals.[16] This approach has been a key trigger for the exercise of universal jurisdiction in these three countries, and prosecutorial authorities there have so far received the majority of their cases through referral by immigration authorities.[17]

In the Netherlands, for example, asylum seekers are screened by the Immigration and Naturalization Service (IND), which has a special unit dealing exclusively with suspected "1F" cases.[18] When an asylum seeker's claim is rejected on the grounds of alleged involvement in an international crime, the file is then sent to the prosecution authorities. One criterion that can place an asylum seeker on the list of 1F files is his or her former profession: in an October 2005 case that saw two Afghan nationals convicted of war crimes,[19] the accused were placed on the list because of their former rank as generals in the Afghan army. In Denmark, immigration authorities and the Danish Red Cross work in conjunction to distribute pamphlets among asylum seekers explaining to them in six languages other than Danish (Albanian, Arabic, Dari, French, English and Bosnian-Croatian-Serbian) where and with whom they can file a complaint if they are the victim of

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[16] Human Rights Watch telephone interview with Danish official, December 6, 2005; Human Rights Watch interview with Dutch official, October 6, 2005.

[17] Human Rights Watch interview with Dutch official, October 6, 2005; Human Rights Watch telephone interview with Norwegian official, September 14, 2005. The website of the Danish Special International Crimes Office (SICO) refers to receiving 50 percent of its cases from the immigration authorities, with higher numbers in previous years, see http://www.sico.anklag.dk/page34.aspx.

[18] Article 1F of the Refugee Convention renders an asylum seeker ineligible for refugee status if he or she has committed a "crime against peace, a war crime, or a crime against humanity," or a "serious non-political crime." See Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954, art. 1F.

[19] Hesham and Jalalzoy, The Hague District Court, October 14, 2005, AV 1489 and AV 1163, Rechtbank-Gravenhage, 09/751005-04; official English translation of the judgments of both cases available at http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp?searchtype=ljn&ljn=AV1163&u_ljn=AV1163 and http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp?searchtype=ljn&ljn=AV1489&u_ljn=AV1489 (retrieved March 2006).

an international crime or have knowledge of a perpetrator in Denmark. The United Kingdom has recently established a special office within the Home Office's Immigration and Naturalization Department (UK IND) dealing exclusively with allegations of international crimes committed by British visa applicants and asylum seekers. Approximately twelve cases have already been referred to the UK police,[20] and this number is expected to increase once screening guidelines are created for the UK IND as a whole.

The picture is different in the other four countries surveyed for this report. Although Belgium has prosecuted several asylum applicants from Rwanda for their role in the Rwandan genocide, it has not instituted formal arrangements for notification and cooperation between immigration authorities and prosecutorial authorities. Spain, France and Germany have similarly not taken steps that might ensure cooperation and notification.

Countries face the risk that they may become a safe haven for suspected perpetrators of international crimes unless they give consideration to formalizing and strengthening mechanisms of cooperation and information exchange between immigration authorities and prosecutorial authorities, in respect of suspected perpetrators of international crimes who apply for visas or refugee status. The practice of the Netherlands, Norway, Denmark and the United Kingdom strongly suggests specialized departmental units can be highly effective in both screening applicants and deepening awareness among frontline immigration officers about what kinds of information could alert them to an applicant's possible involvement in an international crime. Regularized procedures for referring suspected cases to prosecutorial authorities ensure that the necessary legal expertise is engaged at an early stage, reducing the risk that possible perpetrators can enter a country undetected.

2. *Private Complaints*

Landmark universal jurisdiction cases, such as the opening of a prosecution against Augusto Pinochet in Spain and the request for his extradition from the United Kingdom, and a Belgian court's indictment and extradition request for former Chadian dictator Hissène Habré, have been initiated through complaints lodged by private parties. These cases have arisen in civil law jurisdictions, many of which have a legal tradition of expressly permitting privately-initiated criminal prosecutions. Under these

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[20] Human Rights Watch telephone interviews with official of the UK Metropolitan Police anti-terrorist department, November 16, 2005, and with an official of the UK Home Office Immigration and Nationality Directorate, November 28, 2005.

legal systems, private petitioners—usually victims and nongovernmental organizations (NGOs)—file criminal complaints against an alleged perpetrator by submitting them directly to an investigating judge or prosecutor. Victims and NGOs are frequently the principal sources of evidence or of witnesses that could establish responsibility for the crime alleged. Those countries in which private petitioners have been instrumental in bringing about prosecutions under universal jurisdiction laws also tend to be countries where immigration authorities are relatively inactive in notifying police authorities about potential suspects.

Private petitions have been the driving force behind universal jurisdiction-based cases in Spain, usually in the face of opposition by the prosecutorial authorities themselves.[21] In the Spanish system, petitioners lodge an *acción popular* directly with an investigative judge. This judge, once seized of the matter, determines whether there is sufficient evidence to open an investigation, and is empowered to order necessary steps (such as the deposing of witnesses) to enable the investigation to proceed. Generally, in such a system, the investigative judge will rule whether there is sufficient evidence, once the investigation is completed, for the case to proceed to trial.[22] The *acción popular* procedure was the basis for the international arrest warrant in the Pinochet case; the indictment, prosecution and conviction in Spain of former Argentine military officer Adolfo Scilingo; and the successful extradition from Mexico of former Argentine military officer Manuel Cavallo.[23] The latter were both charged, inter alia, with crimes against humanity.

In France and Belgium, private petitioners have initiated almost all complaints. Belgium's two major criminal trials involving universal jurisdiction—both concerning participants in the Rwandan genocide—were the result of complaints lodged with prosecutors by *parties civiles*. Similar to the Spanish *acción popular*, a *constitution de parties civiles* seizes an investigative judge of the case irrespective of the wishes of the prosecutor. All cases lodged thus far under French universal jurisdiction laws have been brought by *parties civiles*.

Revisions to Belgium's universal jurisdiction laws in 2003 curtailed the right of *parties civiles* to complain directly to an investigative judge, and placed the decision to open a prosecution in the hands of federal prosecution authorities.[24] The revisions were spurred by concerns that private petitioners were misusing the procedure to make

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[21] Human Rights Watch telephone interview with Spanish official, September 14, 2005.
[22] See this report, Country Case Study: Spain.
[23] Ibid.
[24] The prosecution can be directed to open an investigation by the minister of justice, and a Belgian court has held that judicial authorities may review a prosecutor's refusal to open an investigation under certain circumstances. See this report, Country Case Study: Belgium.

political claims.[25] The proposed French law implementing the ICC Statute would remove the right of *parties civiles* to file complaints concerning international crimes directly with a *juge d'instruction*, leaving the decision to initiate a prosecution entirely with prosecutorial authorities.[26]

Somewhat unusually for a common law country, UK law permits private individuals to request an arrest warrant directly from a magistrate (district judge) in instances where the police fail to investigate an allegation that a crime has been committed.[27] On September 10, 2005, based on evidence presented by a UK law firm acting on behalf of a Palestinian human rights NGO, Senior District Judge Timothy Workman issued the first ever warrant under the UK's Geneva Conventions Act 1957 against retired Israeli General Doron Almog. The warrant sought Almog's arrest for his alleged participation in grave breaches of the Geneva Conventions in Israeli-occupied Gaza, where he had been a commander. Almog arrived at Heathrow Airport the following day, but did not disembark from his flight after he was informed of the existence of the warrant. He returned to Israel before the Metropolitan Police could execute the warrant. Both the UK Prime Minister and Foreign Secretary apologized to their Israeli counterparts concerning the incident, and consideration is now being given to amending the Prosecution of Offences Act 1985 to preclude private parties from applying for arrest warrants in relation to international crimes.[28]

Private party-initiated complaints are indispensable in bringing suspected perpetrators to the attention of judicial authorities where police and prosecutorial authorities may lack the political will to pursue certain cases because of concern about coming into conflict with the foreign policy positions of the executive. The complicated reality of cases involving universal jurisdiction is that legitimate complaints may sometimes implicate nationals of countries with which the state whose universal jurisdiction laws are invoked has close relations. But the rule of law requires the consistent and principled application of the relevant legal rules, never more so than in respect of laws concerning the gravest crimes known to international law. States should not engage in law reform to prevent the instigation of prosecutions simply because such cases might be politically

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[25] Daniel Vandermeersch, "Prosecuting International Crimes in Belgium," *Journal of International Criminal Justice*, vol. 3 (2005), pp. 402, 410.

[26] See *Avant-projet de loi portent adaptation de la legislation francaise au Statut de la Cour pénale internationale et modifiant certaines dispositions du code pénale, du code de justice militaire, de la loi du 29 juillet 1881 sur la liberté de la presse et du code de procédure pénale*, June 2003.

[27] UK, Prosecution of Offences Act 1985, s 25(2). See this report, Country Case Study: United Kingdom.

[28] Israeli politicians met twice with Home Office officials to discuss changes to the law providing private parties with the opportunity to file complaints directly with a magistrate. Changes to the legislation are currently being considered. See Vikram Dodd, "UK Considers Curbing Citizens' Right to Arrest Alleged War Criminals," *The Guardian*, February 3, 2006.

inconvenient. Bona fide concerns about the vexatious or frivolous use of private party-initiated cases may be well-founded, but could be managed through adequate judicial supervision, or the requirement that a certain level of reasonable suspicion be met before an investigation can proceed or an arrest warrant can be issued. Curtailing private party-initiated complaints seriously endangers the fragile, recent progress in the exercise of universal jurisdiction in Europe.

B. Developing Expertise in Prosecuting International Crimes

1. Specialized Units

One obstacle to the successful investigation and prosecution of international crimes is the relative lack of familiarity with investigating and prosecuting such cases among domestic law enforcement agencies whose work principally involves domestic offenses. Prosecutions under universal jurisdiction may seem daunting and resource-intensive for a variety of reasons: they involve not only criminal offenses with which domestic prosecutors have little experience, but also the prospects of extraterritorial investigations, language barriers, the need to understand the historical and political context in which the alleged crimes occurred, and the gathering of evidence to prove elements of crimes that may be of a type never adjudicated in a country's domestic courts.

Some of the countries examined in this report have responded to these challenges by creating units within police and prosecutorial authorities that specialize in the investigation and prosecution of transnational crimes, including universal jurisdiction cases. According to interviews with law enforcement officials and prosecutors from countries that have created specialized units, such units allow the concentration of experience and information about investigating and prosecuting international crimes.[29] This, in turn, enhances the efficiency and proficiency of investigations, and allows the continuous accumulation of expertise concerning universal jurisdiction prosecutions.

Denmark, the Netherlands, Norway, and to a lesser extent the UK, have created specialized units within the police and prosecution services to handle international crimes cases.[30] Prosecutors and investigators with experience either in complex crime cases or international criminal law form part of these units, and some training in international criminal law is also being undertaken.[31] Denmark has set up a unit

[29] Human Rights Watch interview with Dutch officials, October 6, 2005; Human Rights Watch telephone interview with Danish official, October 29, 2005.
[30] See the respective country case studies for further details on the different units.
[31] For instance by the Dutch war crimes unit. Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.

composed of both prosecutors and investigators, thereby combining legal expertise and practical investigative expertise. According to Danish officials, the combination of these two forms of expertise improves their ability to quickly decide whether to investigate a complaint. Specialized units in the countries mentioned above include not only investigators and prosecutors, but also translators, military analysts, historians and anthropologists, on an as-needed basis.[32] In Belgium, a special police unit was created in 1998 to deal exclusively with international crimes, following an increase in complaints based on universal jurisdiction. While a specialized team of investigative judges has not been formally created in Belgium, in practice universal jurisdiction cases are transferred to a handful of judges who have accumulated considerable experience in the relevant issues.[33]

The creation of specialized units in these jurisdictions suggests an institutional commitment to taking potential universal jurisdiction cases seriously. Such units are also mandated as an initiative by the EU Council decision "on the investigation and prosecution of genocide, crimes against humanity and war crimes,"[34] which urges EU member states to "consider the need to set up or designate specialist units... with particular responsibility for investigating and... prosecuting the crimes in question." The efficacy of such units seems borne out in the recent experience of investigation and prosecution: with the exception of two cases where private parties played the leading role (Scilingo in Spain, and Ely Ould Dah in France),[35] all convictions in universal jurisdiction cases since 2001 have been in cases handled by specialized units.

The absence of such units in Spain and France[36] is particularly striking, because both countries' courts have been active in trying universal jurisdiction cases brought by private petitioners. As noted above, the private petition mechanism has been integral to the exercise of universal jurisdiction in Europe. Private parties are frequently the primary source of information and evidence in universal jurisdiction cases brought in Spanish courts. At the same time, private petitioners cannot be relied upon as the sole means by which universal jurisdiction laws are invoked: private petitioners do not have

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[32] Experts included historians (Netherlands, Norway, Belgium), psychologists (Belgium), and anthropologists and military experts (Netherlands).
[33] Human Rights Watch interview with Belgian investigative judge, Brussels, October 24, 2005.
[34] Council Decision 2003/335/JHA, art. 4.
[35] On April 19, 2005, the Spanish National Court convicted Alfredo Scilingo to 640 years of imprisonment for crimes against humanity. See "'Dirty war' officer found guilty," BBC News, April 19, 2005, [online] http://news.bbc.co.uk/2/hi/europe/4460871.stm (retrieved January 2006). On July 1, 2005, a French criminal court in Nimes convicted Mauritanian officer Ely Ould Dah in absentia to ten years of imprisonment for torture. See "Ely Ould Dah convicted after six years of proceedings," FIDH, July 2, 2005, [online] http://www.fidh.org/article.php3?id_article=1809 (retrieved January 2006).
[36] Human Rights Watch telephone interview with Spanish official, September 14, 2005; Human Rights Watch interview with French lawyer, September 19, 2005.

the investigative resources and expertise of police authorities or the ability to seek official cooperation from third states. Exercising universal jurisdiction *only* where private parties are active and well-organized means that allegations concerning international crimes will not be consistently investigated, and the relevant expertise cannot become assimilated into the "institutional memory" of police and prosecutorial authorities. In short, relying solely of private parties to investigate and pursue universal jurisdiction guarantees that universal jurisdiction will be exercised in an ad hoc and intermittent manner.

French officials involved in the investigation of universal jurisdiction cases noted that "special units" have been created within the Paris judicial district in order to prosecute terrorism, organized crime, crimes against children and public health-related crimes. These units have four investigating judges each, three dedicated administrative assistants, and a number of experts. No such unit has been created in relation to international crimes, even though all cases concerning the Rwanda genocide have been allocated to the Paris district by a decision of the *Cour de Cassation* in 2001.[37] Individual investigative judges in the Paris district are left to manage such cases on their own, without either expert assistance or additional administrative support.[38] The lack of resources significantly slows the progress of universal jurisdiction cases and makes extraterritorial investigations impossible at the present time.[39] When a universal jurisdiction case involving, for example, alleged participation in the Rwandan genocide is one of "one hundred ongoing cases" on a judge's docket, French officials told us that "[the cases] can't move ahead."[40] Officials involved in these investigations attribute the lack of resources, and the failure to create a dedicated task force for universal jurisdiction cases, to the absence of political will on the part of French authorities to take these cases seriously.

Where neither a specialized unit *nor* a private petition mechanism exist, the prospects for the effective exercise of universal jurisdiction laws are likely to be quite poor. This is presently the case in Germany which, despite exemplary universal jurisdiction legislation, has not devoted adequate resources to investigating and prosecuting international crimes.[41] Currently, Germany has one investigator within the Federal Police Force who

[37] Human Rights Watch interview with French officials, Paris, May 10, 2006.
[38] Human Rights Watch interview with French officials, Paris, May 10, 2006.
[39] The officials also noted that cooperation from the territorial state has been very difficult to obtain.
[40] Human Rights Watch interview with French officials, Paris, May 10, 2006.
[41] At the time of writing, no cases have been investigated by German authorities under the Code of Crimes against International Law (CCAIL—see this report, Country Case Study: Germany), which came into force on June 30, 2002, despite the letter's wide scope.

is working on international crimes on a day-to-day basis.[42] The problem of a lack of resources is both a cause and effect of the federal prosecutor's restrictive approach to investigating international crimes, which has meant that no investigations have been opened since the adoption of the new law in 2002 and thus no demand has been generated for an increase in resources. As detailed below, the prosecutor has adopted an unusually wide definition of immunity when considering a complaint against a former head of state,[43] and particularly narrow approaches to the notions of "subsidiarity"[44] and of whether an investigation was possible.[45]

Consistent with the EU Council's decision, Human Rights Watch urges those countries that have not created a specialized unit to consider doing so, in order to institutionalize their legal commitment to prosecuting international crimes.

2. *Investigations*

a. Domestic investigations

The challenges posed by investigating an international crime that occurred outside the state where the prosecution occurs are myriad. However, interviews with police officers and lawyers who have successfully prosecuted such cases indicate that those challenges are far from insurmountable. Initial information about a suspect or alleged criminal act can be gleaned from open sources, including human rights NGO reports and intergovernmental organizations.[46] When victims and diaspora communities are present in the country where officials are conducting the investigation, potential witnesses may also be located without extraterritorial investigations, or located with the assistance of private petitioners.[47] Indeed, if the suspect is present on the forum state's territory (as a

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[42] Human Rights Watch interview with German officials, Meckenheim, November 22, 2005. This is surprising in light of the experiences of German authorities in the 1990s concerning investigations of international crimes committed in the former Yugoslavia and the resulting convictions. A special unit consisting of several investigators did exist in the 1990s for the investigation of crimes committed in the former Yugoslavia. Furthermore, it is difficult to reconcile with the commitment shown by German authorities to the international criminal tribunals and to the ICC.

[43] See below, section III.B.

[44] Subsidiarity refers to the idea that universal jurisdiction should be exercised only if the state with the closest links to the crime (the state where the crime occurred, or the state of nationality of the alleged perpetrator and or the victims), or an international tribunal, is unable or unwilling to try the case. See discussion of the German federal prosecutor's approach below, section III.E.

[45] See below, section III.C.

[46] The Dutch and Danish units confirmed in interviews with Human Rights Watch that a substantial amount of preliminary information is found in reports of NGOs and intergovernmental organizations.

[47] In the Rwanda cases, Belgian investigators questioned witnesses in Rwandan *emigré* communities in Brussels. Human Rights Watch interview with Belgian officials, Brussels, October 24, 2005. In the recent case against two Afghan nationals, the Dutch unit enquired about potential witnesses in the Afghan emigré community in Amsterdam and questioned witnesses from Germany and France. Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.

refugee or visa holder), conventional methods of surveillance, interrogation and search and seizure of evidence can be employed.[48] Members of the diplomatic corps who have been posted in the country where the crimes allegedly occurred have also been interviewed as a source of background and historical information.[49]

b. Extraterritorial investigations

The practice of specialized units that have taken universal jurisdiction cases to trial shows that extraterritorial investigations are feasible, and have been undertaken in order to obtain evidence necessary to secure a conviction. The factors that affect a unit's ability to investigate in a foreign state include the number of complaints concerning that state[50] and, most significantly, whether cooperation can be expected from the foreign state and whether the security of the investigators and potential witnesses can be assured.[51] In a majority of cases resulting in the prosecution and conviction of an international crime, members of specialized units have undertaken investigations in the state where the crime occurred. For example, all six convictions in the two trials of participants in the Rwandan genocide were built on investigations carried out in Rwanda by the special Belgian police unit that deals exclusively with international crimes. The Belgian unit's investigators also undertook missions to Chad, Ghana and Togo to investigate universal jurisdiction cases. In the case of Faryadi Zardad, an Afghan militia leader ultimately convicted of acts of torture and hostage-taking that had taken place in Afghanistan in the 1990s, British investigators traveled to Afghanistan on nine occasions to locate and interview witnesses. Prosecutors also accompanied the British investigators on some missions, in order to ensure that the information needed by the prosecution was collected and to assess the challenges that may be faced by witnesses and victims in Afghanistan if they testified in the case.[52] According to Dutch investigators, the majority of evidence used in the two successful universal jurisdiction prosecutions in the Netherlands was collected abroad.[53]

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[48] The Dutch special unit in the case against two Afghan nationals tapped the phones of the suspects. Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.
[49] Daniel Vandermeersch, "Prosecuting International Crimes in Belgium," p. 412.
[50] For example, Danish and Belgian units try to combine the investigation of several complaints from one country when undertaking investigative missions.
[51] The issue of cooperation with the territorial state is often taken into account at the outset of the investigation, and for Dutch officials this forms part of the decision whether to investigate a complaint in the first place. Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005. See also below, section III.C and III.D.
[52] Human Rights Watch interview with British official, November 30, 2005.
[53] Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.

Extraterritorial investigations are undoubtedly resource-intensive,[54] and pose particular challenges in terms of security, logistics and cooperation. The exercise of investigative and judicial authority on the territory of a foreign state is commonly achieved through a mutual legal assistance treaty, and letters rogatory. In order to be effective, these mechanisms require extensive cooperation both *within* the government agencies of the forum state, and *between* the forum state and the territorial state. Securing this cooperation can be time consuming and legally complex, as each party to a mutual legal assistance treaty has its own domestic procedures for requesting and affording the cooperation promised under the treaty. For example, a police authority's request to undertake investigations in a foreign state may first have to be referred to the Foreign Ministry and Ministry of Justice of the forum state,[55] which will determine whether the mutual assistance arrangements with the territorial state should be invoked. According to investigators who have used mutual assistance arrangements, each ministry that vets the request applies its own (legal and political) criteria for determining whether the request should be transmitted to the territorial state.[56] Once a decision to transmit the request is made, investigators must then await a reply from the territorial state. In one instance, the Dutch war crimes unit had to wait a year to receive a reply to their letter rogatory from a country they asked for assistance.[57] Because a letter rogatory sent by Belgian authorities to their counterparts in Guatemala was not sufficiently precise with regard to questions to be asked to witnesses, the Belgian authorities had to wait one-and-a-half years and send several letters rogatory before they could start investigating in Guatemala.[58]

Mutual legal assistance arrangements are complex and can result in lengthy delays in the investigative process. Nevertheless, investigators interviewed by Human Rights Watch indicated that, once the formalities had been completed, local authorities in the territorial state did afford the necessary cooperation to enable the investigation to proceed in most cases. Investigators have sometimes reduced the delays involved in an extraterritorial investigation by making extensive use of the consular or embassy staff of their home country in the country where the crime was committed. For example, Dutch

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[54] The costs involved in the recent Zardad trial amounted to over £3 million (U.S.$ 5.2 million). See "'Huge Challenge' of Afghan Torture Case," BBC News, July 18, 2005, [online] http://news.bbc.co.uk/1/hi/uk/4693787.stm (retrieved February 2006).

[55] German and Dutch Ministries of Justice have special contact points in charge of mutual legal assistance in criminal matters, dealing with requests from other countries while also forwarding requests on behalf of their own authorities. Belgian authorities relied on a judicial liaison officer placed in the Ministry of Justice of Venezuela to establish cooperation with authorities in Guatemala and Costa Rica. French investigative officials noted that the absence of a "liaison magistrate" in Rwanda made it very difficult for them to obtain cooperation from the territorial state.

[56] For instance the Dutch Ministry of Justice contact point for mutual legal assistance must take into account legal as well as safety issues arising in an investigation abroad.

[57] Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.

[58] Human Rights Watch interview with Belgian officials, Brussels, October 24, 2005.

investigators used the offices of embassy staff in several countries to contact local officials and potential witnesses, and explore possible investigative leads.[59] During the investigation in the Zardad case, British investigators obtained cooperation with Afghan authorities through the British embassy in Kabul, and the assistance of embassy staff was engaged to find and approach witnesses.[60] The British embassy also liaised with the United States military and secured their assistance when investigators needed to travel to parts of Afghanistan that were under U.S. military control.[61]

In order to locate witnesses during extraterritorial investigations, Belgian, British, Dutch and Danish investigators interviewed by Human Rights Watch stated that they generally began by getting leads from members of diaspora communities in the forum state. In other instances, the complainants themselves proved to be the first point of reference for finding witnesses. British investigators aired television and radio spots in Afghanistan, explaining their inquiry and encouraging witnesses to come forward,[62] while Belgian authorities cooperated closely with local authorities in locating witnesses in Rwanda.[63]

Investigators from several countries noted that documentary and physical evidence concerning the crime was difficult or even impossible to secure,[64] making witness evidence the principal basis upon which a case was built. The credibility of witnesses thus became a paramount concern for some investigators, and several practitioners with experience in extraterritorial investigators noted that translation problems hampered their ability to assess the reliability of a potential witness's statement. Belgian investigators who traveled to Rwanda relied on local authorities to question witnesses in the local language, Kinyarwanda, and commented that it was often difficult to determine

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[59] Human Rights Watch interview with officials of the Dutch war crimes unit, Driebergen, October 6, 2005. Belgian investigators working in Rwanda and Danish investigators in the Democratic Republic of Congo each used their embassy in those countries in a similar way. Human Rights Watch interview with Belgian officials, Brussels, October 24, 2005, and Human Rights Watch telephone interview with Danish officials, October 31, 2005.

[60] Human Rights Watch telephone interview with British official, September 7, 2005, and Human Rights Watch interview with British official, Crown Prosecution Service, November 30, 2005.

[61] Human Rights Watch telephone interview with British official, Crown Prosecution Service, November 30, 2005.

[62] Human Rights Watch telephone interview with British official, October 16, 2005.

[63] Observation by Human Rights Watch representative attending the Rwanda "Two Brothers" trial (see Country Case Study: Belgium), Brussels, 2005.

[64] Human Rights Watch interview with Danish official, August 8, 2005; Human Rights Watch telephone interview with British official, October 16, 2005; Human Rights Watch interviews with Dutch officials, October 6, 2005, and January 29, 2006. British investigators in the case of Afghan defendant Zardad could not obtain health records in Afghanistan as the victims of torture either did not seek medical treatment or hospitals had been destroyed during the war. Police records were also unusable as the suspect himself had controlled the police in the region at the time of committing the crimes. Human Rights Watch telephone interview with British official, October 16, 2005.

whether a question was being accurately put to the witness.[65] When on one occasion British investigators hired a translator in Afghanistan, they discovered upon returning to the UK that the translations were inaccurate, forcing them to make another trip to Afghanistan with a professional translator in order to re-take the statements.[66]

c. Extraterritorial investigations and the accused's right to a fair trial

Extraterritorial investigations pose a particular set of challenges for an accused person's ability to mount an effective defense. Minimum fair trial guarantees that must be respected in any trial in EU member states include "equality of arms,"[67] and the right to confront and examine witnesses.[68] "Equality of arms" refers to the principle that every party to a case must be afforded a reasonable opportunity to present his or her case under conditions that do not place the party at a substantial disadvantage vis-à-vis the opponent.[69] This includes not only equality in presenting arguments, but also equality in being able to present evidence. The defendant's right to confront and examine witnesses against him or her is a fundamental fair trial guarantee applicable to both common law and civil law systems. It is essential to test the credibility of witnesses and their evidence. The right requires that an accused should be given "adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at some later stage in the proceedings."[70] Ensuring these fair trial guarantees in the context of a universal jurisdiction case, where most witnesses and evidence for and against the defendant may be outside the country, may require additional efforts on the part of judicial authorities.

In adversarial systems, such as the UK, the defendant is largely responsible for the collection of exculpatory evidence (although prosecutors are usually obliged to disclose such evidence if they come across it). Hence, the practical ability of a defense lawyer to travel to the forum state and investigate on behalf of the accused is crucial. In *Zardad*, the defendant was assisted by legal aid, and legal aid did extend to enabling his defense lawyer on three occasions to accompany the prosecution to Afghanistan to supervise identification parades and conduct investigations.[71] In civil law systems, at the pre-trial

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[65] Human Rights Watch interview with Belgian officials, Brussels, October 24, 2005.
[66] Human Rights Watch telephone interview with British official, September 7, 2005.
[67] European Convention on Human Rights (ECHR), (ETS 5), 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos. 3, 5, and 8 which entered into force on September 21, 1970, December 20, 1971, and January 1, 1990, respectively, art. 6(3)(b), and International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 14(3)(e).
[68] Ibid.
[69] *Kaufman v. Belgium* (1986) 50 DR 98, 115; *Foucher v. France* (1998) 25 EHRR 234, p. 34.
[70] *Delta v. France*, (1990) 16 EHRR 574, para. 36.
[71] Human Rights Watch interview with British official, Crown Prosecution Service, November 30, 2005.

stage an investigative judge usually assumes principal responsibility for gathering both inculpatory and exculpatory evidence.[72] Thus the costs of enabling defense lawyers to be present during extraterritorial investigations were not borne by judicial authorities or legal aid in most of the cases examined by Human Rights Watch.[73] According to practitioners interviewed by Human Rights Watch, defense lawyers can instead review the statements taken by the investigative judge and apply to the court for further investigative acts to be undertaken by the judge on behalf of the defendant. Where a defense lawyer has questions that he or she wishes to pose to a witness, he or she may be able to request the investigative judge to return to the forum state to ask the questions or interview other witnesses nominated by the defense.[74] The pre-trial stage is a critical one in some civil law systems, because the dossier of evidence prepared by the investigative judge is the principal basis for the trial court's evaluation of the facts; in some national systems, not all witnesses examined by an investigative judge at the pre-trial stage need be examined at the trial stage.

The civil law system's investigative judge does play a critical role in preserving the rights of the accused. However, the inability of defense lawyers to attend at the examination of witnesses located outside the country or conduct extraterritorial investigations raises a risk of violating the fair trial guarantee that an accused be able to confront and examine witnesses against him and compel the attendance of witnesses in his favor, on the same terms as those against him.[75] Where a witness is examined by an investigative judge in the absence of defense counsel, and that witness is not examined at trial but his or her evidence is relied upon, the accused will have been deprived of his or her right to confront the witness. Allowing defense lawyers to pose written questions given in advance to an investigative judge who travels to the forum state may not be an adequate substitute, particularly as the defense lawyer cannot observe the demeanor of the witness—an essential aspect of testing credibility. Moreover, if defense lawyers do not have the resources to conduct investigations in the territorial state at all, their practical ability to test evidence will be limited.

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[72] Human Rights Watch interview with Dutch official, February 7, 2006; and Human Rights Watch interview with Belgian official, October 24, 2005. In Germany, it is the prosecution rather than an investigative judge that must investigate inculpatory and exculpatory evidence. See Germany, Code of Criminal Procedure, para. 160(II).
[73] Exceptions were the Hesham and Jalalzoy cases tried in the Netherlands. There, defense lawyers applied to the court for funds to travel to Afghanistan, enabling the defense to send one private investigator on one trip to Afghanistan. These funds did not extend to cover travel within Afghanistan or the costs of interpretation, and a second trip to accompany the prosecution and investigative judge was not funded: Human Rights Watch telephone interview with Dutch defence lawyer, October 25, 2005.
[74] See for example Belgium, Code of Criminal Procedure, art. 61 ter.
[75] ICCPR, art. 14(3)(f); ECHR, art. 6(3)(d).

Even where the defense is able to conduct private investigations or accompany other judicial authorities during extraterritorial investigations, obtaining evidence for the defense may be particularly difficult. Indeed, there were no witnesses for the defense in the Zardad case, and only a very limited number in other universal jurisdiction cases in the Netherlands or the first Rwanda trial in Belgium.[76] Defense witnesses may fear to come forward on behalf of the defendant, especially if the latter belongs to a group that has fallen from power or now opposes the current government in the territorial state. In the second Rwanda trial in Belgium in May-June 2005, the lawyer for one defendant expressed this dilemma by arguing that it might be difficult for a witness from Rwanda to support the accused because the witness would have to speak a "truth that is different from the truth of the current government in power."[77] Witness protection or other protective measures that may be made available to inculpatory witnesses (such as the option of testifying by video-link at the forum state's embassy or diplomatic compound) should thus also be made available on equal terms to exculpatory witnesses.

Prosecutions for crimes against humanity, genocide and war crimes thus pose a special challenge to basic fair trial guarantees. Given the risks outlined above to an accused's fair trial rights, judicial authorities need to take all appropriate measures—within the context of the national legal system—to facilitate defense counsel's ability to effectively prepare a defense.

3. *Witness Testimony and Witness Protection*

Faced with key witnesses residing outside the country in which the trial will occur, investigators and judicial authorities have adopted a variety of measures to take their testimonies. In the case of a Ugandan national prosecuted in Denmark under universal jurisdiction laws, a prosecutor, defense lawyer and judge traveled to Uganda to take videotaped witness testimony, which was then shown to a Danish court.[78] In the two Belgian trials concerning the Rwandan genocide, most witnesses were physically transported to Belgium to give evidence in person, and a minority—usually witnesses for the defense—testified via video-link.[79] British prosecuting authorities used the British embassy in Kabul as the venue for forty witnesses in the Zardad case to give evidence via video-link to a London court. When the first Zardad trial resulted in a hung jury,

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[76] Human Rights Watch telephone interview with Dutch lawyer, October 21, 2005; Human Rights Watch interview with Belgian officials, October 24, 2005.

[77] Unofficial translation by Human Rights Watch representative attending the second Rwanda trial in Brussels, May 9–June 28, 2005.

[78] Human Rights Watch telephone interview with Danish official, August 11, 2005.

[79] Human Rights Watch interview with Belgian officials, Brussels, October 24, 2005. Seventy-six witnesses from Rwanda testified in person during the second Rwanda trial.

prosecutors decided that a small number of key witnesses would be flown to the United Kingdom to give evidence in person.[80]

A commonly cited concern among governmental authorities is that witnesses brought to testify from the territorial state may seek asylum in the forum state. In principle, it is difficult to see why this should be an obstacle to obtaining the witness's testimony: if the witness has a well-founded fear of persecution arising out of their participation in the prosecution, and the witness's evidence is significant for the case, prosecutorial authorities must give due consideration to whether they should facilitate the witness's relocation, by enabling her or him to claim asylum, or through other arrangements. Where the concern is that unfounded or vexatious asylum claims are likely, experience suggests that video-link testimony can be an effective substitute for transporting the witness to the forum state.

In light of the fraught political contexts in which international crimes are often committed—civil wars, coup d'états, ethnic conflicts—witnesses can be expected to face real threats to their and their families' well-being by becoming involved in a prosecution. Investigators interviewed by Human Rights Watch noted that the very visibility of their investigations in the territorial state might increase the risks to victims and witnesses by attracting unwanted attentions. For example, when Belgian investigators were seen together with a victim in her local community in Rwanda, she was subsequently forced to leave her community due to threats.[81] In an effort to reduce visibility, Dutch and British investigators took statements in secure or neutral places such as embassies and United Nations (UN) compounds and placed emphasis on not being seen together with witnesses in public.[82] In some instances witnesses were given pretexts that might explain their visit to a foreign embassy to anyone who asked. Other precautionary measures used included equipping witnesses with mobile phones while the authorities were investigating in the relevant country, and providing funds for a witness to leave the country for a certain period of time.[83]

Ultimately, however, the prosecutorial and judicial authorities pursuing the case do not have law enforcement powers in the territorial state, and thus their direct capacity to protect witnesses is limited and often wholly dependent on the law enforcement authorities of the territorial state. Prosecutors from various countries interviewed by

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[80] Human Rights Watch telephone interview with British official, Crown Prosecution Service, November 30, 2005.
[81] Human Rights Watch interview with Belgian lawyer, August 25, 2005.
[82] Human Rights Watch telephone interview with British official, November 16, 2005; Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.
[83] Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.

Human Rights Watch generally noted the limits they faced in the ability to directly protect witnesses after the case was over, but none had received reports of subsequent threats to witnesses. Nevertheless, it seems crucial that judicial authorities have the practical capacity to monitor the welfare of at-risk witnesses and respond to threats, particularly if there are reasons to believe that local witness protection capacity is limited or non-existent. Maintaining links established during the investigation with local contacts and NGOs in the territorial state allows for a continuing flow of information about potential threats. This vigilance must be applied equally to both prosecution and defense witnesses. Governmental authorities of the forum state must ensure the capacity to relocate gravely threatened witnesses, either to the forum state or to a safe third state, with the latter's agreement.

4. *International Cooperation and Information Exchange*

With sufficient international coordination and cooperation, universal jurisdiction prosecutions can be an essential part of a safety net against impunity, denying safe havens to perpetrators of international crimes. While several treaty provisions[84] oblige states parties to cooperate in the investigation of international crimes—such as article 88 of the First Additional Protocol[85] to the Geneva Conventions and article 9 of the Convention against Torture[86]—practical mechanisms for information and exchange have been largely absent.

The EU Council's decision to create a "Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes" ("the Network")[87] in 2002 marked a first step in increasing cooperation in the investigation and prosecution of international crimes. The Network was intended to increase effective cooperation and the exchange of information between national practitioners prosecuting international crimes. Another Council decision, from 2003, provides for regular

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[84] In addition to treaty obligations, various UN General Assembly (GA) resolutions have called upon all states to cooperate with each other in the "detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity," including UN GA Resolution 3074 (XXVIII) of December 3, 1973, providing a list of principles on international cooperation, which is available online at http://www.unhchr.ch//html/menu3/b/p_extrad.htm (retrieved January 2006).

[85] Article 88 of the First Additional Protocol reads: "1. The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol." See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force December 7, 1978.

[86] Article 9 of the Convention against Torture reads: "1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings."

[87] Council Decision 2002/494/JHA of June 13, 2002, Official Journal L 167, 26/06/2002 P.0001-0002, [online] http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_167/l_16720020626en00010002.pdf (retrieved January 2006).

meetings of the Network to exchange information about experiences, practices and methods.[88] Although the first meeting of the Network was not held until November 2004, the Network has met three times to date, and according to investigators and prosecutors interviewed by Human Rights Watch it has become an important tool for the cooperation of investigators and judicial officials alike, with the potential to render the investigation and prosecution of international crimes more effective.[89] The meetings have enabled investigators to make important bilateral contacts and to exchange information regarding national legislation and its practical enforcement. British and Danish investigators relied on information from contact points before conducting extraterritorial investigations, and Norwegian officials met with investigators from the Dutch, Danish and British unit when setting up the Norwegian specialized unit.[90]

Officials from countries examined in this report noted that the Network was a useful forum to discuss sensitive issues in a confidential setting, and could advance police and judicial cooperation among specialized units created by some EU member states. The fact that mutual legal assistance among the twenty-five member states is constantly being streamlined makes the EU a natural forum for this kind of cooperation. The Network could also concentrate information and experience on lessons learned with regard to cooperation requests, witness protection and obtaining evidence. In interviews with Human Rights Watch, practitioners have emphasized that the Network should focus on the lessons learned by different national authorities. Human Rights Watch urges EU member states to organize meetings of the Network regularly and under each Presidency.[91] In the long term, the EU member states need to ensure that the Network has the necessary resources, including a coordinator to organize meetings, and who could serve as a focal point for countries involved in the investigation or prosecution of international crimes.

An increase in universal jurisdiction prosecutions prompted Interpol in 2004 to organize Expert Meetings on international crimes, bringing together delegates from over ninety countries to improve coordination and information sharing. The meetings, two of

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[88] Council Decision 2003/335/JHA of May 8,2003, art. 5, Official Journal L 118, 14/052003 P.0012-0014, [online] http://europa.eu.int/eurlex/pri/en/oj/dat/2003/1_118/1_11820030514enen00120014.pdf (retrieved January 2006).

[89] Human Rights Watch telephone interview with Danish official, October 31, 2005; Human Rights Watch telephone interview with British official, September 7, 2005; Human Rights Watch telephone interview with Norwegian official, September 14, 2005.

[90] Ibid.

[91] This was proposed by the Network's conclusions of its meetings to date. Regular meetings are also referred to in art. 5 of Council Decision 2003/335/JHA of May 8, 2003, Official Journal L 118, 14/052003 P.0012-0014, available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_118/l_11820030514en00120014.pdf (retrieved January 2006).

which have taken place to date, are supplemented by a Working Group that addresses, in a smaller setting, the objective discussed at the Expert meetings.[92] The Interpol initiative, which has the potential to reach Interpol's 184 member states, is an important cooperation mechanism that fulfills functions similar to the Network, but with an emphasis on investigative aspects. Interpol is in the process of setting up a database containing information on past and ongoing investigations of international crimes in different countries, thereby enabling practitioners to know which countries have experience in the investigation of a particular crime committed in a particular country. An effective database will avoid duplicating investigative efforts and further streamline the investigation process. If countries make information available to the database, it could significantly assist the investigation of international crimes. Human Rights Watch encourages Interpol member countries to contribute relevant expertise and information to the database on a continuous basis.

[92] See Interpol resolution on the support for the investigation and prosecution of genocide, war crimes and crimes against humanity, [online] http://www.interpol.int/Public/ICPO/GeneralAssembly/AGN73/resolutions/AGN73RES17.asp (retrieved January 2006).

III. Continuing Obstacles to Universal Jurisdiction

Despite the numerous positive developments in national practice detailed so far, significant limitations remain which hinder the exercise of universal jurisdiction in the countries examined. These limitations are not necessarily inherent in universal jurisdiction cases, and could be overcome with sufficient political will. They include the continuing absence of implementing legislation in some states, restrictive threshold requirements for opening investigations, overly broad conferrals of immunity, and a lack of transparency in the exercise of universal jurisdiction.

A. Absence of Implementing Legislation

Several countries considered in this report have not introduced definitions of international crimes into domestic law. Norway and Denmark have taken the step of creating specialized units to investigate universal jurisdiction cases, but the work of these units has been hampered by the absence of laws which incorporate international crimes into Norwegian and Danish law.[93] Prosecutors have no choice but to frame international crimes, such as war crimes, in terms of domestic equivalents such as murder or assault. In one case tried in Denmark, a Ugandan national accused of what were, in effect, war crimes, was successfully prosecuted for armed robbery and abduction. Using domestic criminal law offenses in this way is thus possible, but fails to fully capture the nature of the offense: torture is a form of assault, but its gravity is not adequately conceptualized as simply assault. More significantly, utilizing domestic law criminal charges means that the crimes will be subject to statutes of limitation under national law. Danish investigators have been unable to pursue several cases of international crimes because they are subject to the ten-year limitations period for criminal offenses in Denmark.[94] Under international law, however, international crimes such as crimes against humanity and war crimes are not subject to statutes of limitations.[95]

Human Rights Watch urges states to take the necessary measures to incorporate international crimes into their criminal laws, and to ensure that international crimes are not subject to statutes of limitations.

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[93] Both Norway and Denmark have ratified the four Geneva Conventions, the Genocide Convention, the Convention against Torture and the Rome Statute of the ICC.
[94] Danish Penal Code, sections 93-97.
[95] See Convention against the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, GA resolution 2391 (XXIII), November 1968, entered into force November 1970, [online] http://www.unhchr.ch/html/menu3/b/p_limit.htm. See also Rome Statute of the ICC, art. 29.

B. Amnesties and Immunities

International practice strongly suggests that genocide, crimes against humanity, torture and war crimes cannot be amnestied.[96] States prosecuting these offenses under universal jurisdiction laws are not bound by domestic amnesties issued in the territorial state, as acts of a foreign legislature do not bind another sovereign state. The practice of national courts in Europe concerning amnesties in the territorial state is uneven, and information on prosecutorial authorities' attitude to the issue is scant. Spanish courts have indicated that not only will a domestic amnesty in the territorial state not bind them, but also that such laws provide a reason for Spanish courts to exercise jurisdiction because amnesties mean that courts in the territorial state cannot prosecute the crimes.[97] Spanish law prevents a prosecution only where the individual has been acquitted, pardoned or punished abroad;[98] an amnesty does not amount to a pardon, because the latter implies that the individual was prosecuted and convicted before having the punishment annulled. Similarly, the French Supreme Court held that a foreign amnesty law has effect only in the territory of the state concerned, and that recognizing the applicability of a foreign amnesty law in France would be tantamount to a violation by the French national authorities of their international obligations, and to a negation of the principle and purpose of universal jurisdiction.[99]

Danish prosecutors indicated to Human Rights Watch that they do take into account relevant amnesty provisions in the territorial state when deciding whether to prosecute an individual for a universal jurisdiction crime. Three cases involving international crimes were not investigated due to amnesties that had been enacted in the country where the crime was committed.[100] Thus far the Danish Special International Crimes Office (SICO) has never disqualified an amnesty, as the amnesties in question have been general, referring not only to regime officials, but to both parties of a conflict.[101] The rationale advanced for treating these amnesties as a bar to prosecution was that

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[96] Naomi Roht Arriaza and Lauren Gibson, "The Developing Jurisprudence on Amnesty," *Human Rights Quarterly*, vol. 20 (1998), p. 843; United Nations Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, 23 August 2004, S/2004/616, paras. 10, 64(c); *Prosecutor v. Furundzija*, ICTY, 10 December 1998, para. 155.

[97] Spain, Audencia Nacional, Third Chamber, Sentencia Num. 16/2005, 19 April 2005, Part III, section 6, available online at http://www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html#I.%20ANTECEDENTES (retrieved May 2006).

[98] Spain, Organic Law of the Judicial Power, art. 23.2c.

[99] Cour de Cassation, decision N° de pourvoi : 02-85379, October 23, 2002, in the case against Mauritanian national Ely Ould Dah, available online at http://www.legifrance.gouv.fr/ (retrieved May 2006).

[100] Human Rights Watch telephone interview with Danish official, October 31, 2005. All of these cases concerned the Lebanon Amnesty Law of 1991, which grants a general amnesty for crimes committed before March 28, 1991, during the Lebanese civil war.

[101] Human Rights Watch telephone interview with Danish official, October 31, 2005.

Denmark, as a matter of comity, should respect the sovereignty of another state's official acts.

Article 6(5) of the Second Additional Protocol to the Geneva Conventions[102] urges authorities to grant the "broadest possible amnesty to persons who have participated" in an internal armed conflict or those deprived of their liberty due to the conflict. This article envisages amnesties for individuals who may have been susceptible to prosecution because they took up arms during a non-international armed conflict. As clarified by the International Committee of the Red Cross—and consistent with international practice—it should not be read as permitting or mandating amnesties for war crimes, torture, crimes against humanity or genocide.[103] Principles of comity may require that a state respect the sovereign acts of another state in many circumstances. However, where the state has ratified treaties which oblige it to extradite or prosecute alleged perpetrators of international crimes if the territorial state is unwilling or unable to do so (such as the Convention against Torture and the ICC Statute), it is difficult to see how comity would require a state to defy its treaty obligations.[104]

Human Rights Watch urges states exercising universal jurisdiction over war crimes, crimes against humanity, torture or genocide, not to apply domestic amnesties passed in the territorial state which purport to annul criminal liability for these crimes. International practice now firmly rejects general amnesties for the gravest international crimes, and states should not regard such amnesties as a reason not to pursue a prosecution.

Official position is not a defense and cannot be a basis to negate the criminal responsibility of a person who would otherwise be guilty of an international crime, even if the crime was committed in the course of his or her official duties.[105] However, the International Court of Justice (ICJ) has held in the "Arrest Warrant" case that certain officials of foreign governments, such as accredited diplomats, current heads of state (or heads of government such as prime ministers) and current foreign ministers, are entitled to a temporary procedural immunity from the criminal jurisdiction of foreign states,

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[102] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Adopted on June 8, 1977, entered into force 7 December 1978.

[103] Letter to Margaret Popkin from Toni Pfanner, Head of Legal Division, ICRC Headquarters, Geneva, April 15, 1997, cited in Margaret Popkin and Nehal Bhuta, "Latin American Amnesties in Comparative Perspective: Can the Past be Buried?", *Ethics and International Affairs*, vol. 13 (1999), p. 103.

[104] See the reasoning of Lords Steyn and Nichols in *R v. Bow Street Magistrates Court; ex parte Pinochet (No. 1)*, (November 25, 1998), 4 All ER 897 at 938 (Lord Nicholls) and 946-7 (Lord Steyn).

[105] *Case Concerning the Arrest Warrant Case of 11 April 2000*, ICJ Reps, February 14, 2002, paras. 60-61.

which lasts for as long as the person holds the post.[106] Once an individual ceases to hold the position of head of state/government or foreign minister, he or she loses immunity from the criminal jurisdiction of foreign states.

Human Rights Watch's research indicates national authorities in the countries examined in this report have relied on the decision in the "Arrest Warrant" case to decline to investigate allegations of international crimes against a visiting official, and that in some cases that reliance went beyond what *Arrest Warrant* supports. British authorities in 2005 declined to investigate visiting Chinese Trade Minister Bo Xilai for his alleged involvement in torture and genocide of members of the Falungong spiritual group, on the grounds that he had immunity as a visiting minister and member of an official delegation.[107] In 2005, German authorities argued that *former* Chinese President Jiang Zemin was entitled to immunity from German criminal jurisdiction.[108] However, as noted above, the immunity from national criminal jurisdiction afforded by international law to certain kinds of state officials does not apply to former officials,[109] and thus the German prosecutorial authorities' decision appears to be a significant widening of immunity which finds no support in the "Arrest Warrant" case. The ICJ decision is clear in its implication that the jurisdictional immunity of heads of state/government and foreign ministers derives from the nature of the functions their duties entail. The immunity should not be extended to persons who no longer have such duties, or whose duties as a sitting minister are not closely analogous to those of a head of state/government of foreign minister.

In 2003, a French court rejected an application for an arrest warrant against Robert Mugabe for torture because he enjoyed immunity from prosecution as the current head of state of Zimbabwe.[110] Interviews with French officials revealed that French judicial authorities refer cases with potential immunity issues to a special unit of the Foreign Affairs Ministry, which decides on the matters.[111] This raises the concern that political, rather than legal, standards may be applied when determining whether a suspect is entitled to immunity from French jurisdiction.

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[106] Ibid, paras. 53-55.
[107] See this report, Country Case Study: United Kingdom.
[108] A copy of the decision of the federal prosecutor is available (in German) online at http://www.diefirma.net/download.php?8651010ea2af5be8f76722e7f35c79de&hashID=44b8c6eba6a3530e554210fa10d99b3a (retrieved May 2006).
[109] Arrest Warrant case, para. 61.
[110] See Redress, Universal Jurisdiction Update, April 2003, [online] http://www.redress.org/publications/UJ%20Update%20-%20Apr03%20-%20final.pdf (retrieved May 2006).
[111] Human Rights Watch interview with French officials, Paris, May 10, 2006.

C. Presence Requirement and the Possibility of Investigation

Most countries examined in this report require that a suspect be physically present or likely to be present in the territory of the state before a prosecution is initiated.[112] In some countries, presence or anticipated presence is the precondition for an investigation to be opened by police authorities.[113] The principle of universality in international law does not *require* that states pursue investigations and prosecutions where a suspect is not within their territory and not susceptible to their law enforcement authorities; at the same time, neither does international law preclude a state from seeking the extradition of a non-national who is outside its territory, in order to try that person for international crimes.[114] This is an issue broadly within the discretion of states and will vary as a matter of law and policy from one state to another. Nevertheless, rigid presence requirements in law or prosecutorial policy will greatly diminish the effectiveness of universal jurisdiction laws as an "important reserve tool in the international community's struggle against impunity."[115] For example, in October 2005, Danish authorities received a complaint concerning a Chinese official who was scheduled to attend a conference in Copenhagen. The complaint was received in advance of the suspect's entry into Denmark, but the strict presence requirement in Danish legislation meant that Danish authorities could not legally open an investigation into the complaint before the suspect arrived. In effect, Danish investigators had only five days—the duration of the conference—to investigate the complaint and apply for an arrest warrant. When the Chinese official left Denmark after five days, the investigation had to be discontinued.[116]

A legal threshold of "likely presence" or "anticipated presence" as the precondition for opening an investigation may be one way of avoiding the difficulties confronted by Danish authorities in the case above. This threshold is incorporated in a new provision of the German Criminal Procedure Code,[117] which makes obligatory an investigation into a suspected perpetrator of international crimes where the suspect is present in

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[112] Presence in the prosecuting state is a requirement triggering the discretion of national authorities in Denmark, France and the Netherlands. In the United Kingdom, an arrest warrant cannot be issued unless a suspect is present or likely to be present in the territory. Norway requires that a suspect be present before he or she can be charged. Spain does not require presence to open an investigation or charge a suspect.

[113] The Netherlands, for example, requires that a suspect be present before an investigation can commence: Netherlands, International Crimes Act, section 2(1). The Danish Special International Crimes Office requires a suspect to be present before an investigation is opened, and if a suspect flees while the investigation is ongoing, then an investigation will be closed. German law does not require the presence of the suspect, but gives a prosecutor discretion to refuse to open an investigation if the suspect's presence cannot be anticipated (see further, Country Case Studies).

[114] In 2003, Spanish courts successfully secured the extradition of Miguel Cavallo, an Argentinian military officer, to face trial in Spanish courts. See this report, Country Case Study: Spain.

[115] UN Secretary-General, "Rule of Law and Transitional Justice," para. 48.

[116] Human Rights Watch telephone interview with Danish official, October 31, 2005.

[117] Germany, Code of Criminal Procedure, para. 153f.

Germany or the suspect's presence is anticipated.[118] German authorities, however, have yet to open an investigation under these laws.[119]

Where a suspect is not present in Germany, the prosecutor has the discretion to decline to open an investigation, and Human Rights Watch interviews with German lawyers indicated that, when exercising this discretion, the federal prosecutor will take into account the practical ability of German investigators to investigate the complaint in the absence of the suspect. According to officials interviewed by Human Rights Watch, the possibility of questioning witnesses in other European countries is disregarded even where the presence and identity of such witnesses in neighboring countries is specified by the complainants.[120]

This approach was evident in the German federal prosecutor's refusal to open an investigation into former Uzbekistan Interior Minister Zokirjon Almatov, who is alleged to have had command responsibility for systematic torture and the massacre of hundreds of individuals in Andijan in May 2005.[121] A complaint against Almatov was filed with the prosecutor by victims[122] when he traveled to Hannover for medical treatment, but Almatov had left Germany before the prosecutor made a decision concerning the complaint. In that decision, in which he declined to open an investigation, one of the reasons given by the prosecutor was that the expectation of non-cooperation from Uzbekistan made an investigation practically impossible. By ignoring the possibility of conducting investigations outside the territorial state—such as by interviewing witnesses and victims present in other states and identified by the complainants[123]—the federal prosecutor has *de facto* made the physical presence of the suspect a strict precondition for opening an investigation into an international crime. This seems to unduly narrow the scope of Germany's universal jurisdiction laws and contradicts the spirit of the legislation, which expressly leaves open the possibility of opening an investigation

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[118] Germany, Code of Criminal Procedure, para. 153f(2). The obligation to open an investigation is subject to the rules of subsidiarity (see below, section III.E).

[119] Since the coming into force of the Code of Crimes against International Law on June 30, 2002, the federal prosecutor has received forty-two complaints. In a number of these, the CCAIL was not applicable as the crimes complained of were committed before June 30, 2002. However, the federal prosecutor relied on paragraph 153f of the Code of Criminal Procedure in fourteen cases to reject a complaint. See this report, Country Case Study: Germany. See also Ursula Ruessmann, "Rumsfeld und Jiang Zemin blieben unbehelligt," Frankfurter Rundschau, May 6, 2006, [online] http://www.fr-aktuell.de/in_und_ausland/politik/aktuell/?em_cnt=876283&sid=e7bd7ebf3787d43f4d99651540462d6f

[120] Human Rights Watch interview with German officials, Meckenheim, December 12, 2006.

[121] See Human Rights Watch, "Bullets were Falling Like Rain: The Andijan Massacre, May 13, 2005," *A Human Rights Watch Report*, vol. 17, No. 5 (D), June 2005, [online] http://hrw.org/reports/2005/uzbekistan0605/.

[122] Human Rights Watch assisted the complainants in filing the complaint.

[123] According to information obtained by Human Rights Watch and made available to the federal prosecutor, approximately 400 victims of the Andijan massacre were living in EU Member States at the time the complaint was filed.

despite the absence of the suspect. While recognizing that, depending on the case, investigations in the territorial state may be indispensable,[124] due notice should be taken of the experience of other European states considered in section II.B, above, which suggests that investigations and prosecutions can be successful without the cooperation of the territorial state where well-organized private petitioners identify witnesses and sources of evidence.[125]

D. Prosecutorial Discretion

In most of the countries examined in this report, prosecutorial discretion is pivotal to whether an investigation into and prosecution of an alleged perpetrator of an international crime will proceed. The discretion is exercised by different authorities in each country, such as by the police and Crown Prosecution Service (CPS) in the United Kingdom,[126] or solely by the prosecutor as in Belgium, the Netherlands, Norway, Denmark and Germany. Prosecutors thus frequently play the role of "gatekeepers" to the use of universal jurisdiction laws, with the notable exceptions of Spain and France,[127] where an investigative judge may pursue a case brought by private petitioners in spite of opposition by the public prosecutor.[128] Each prosecutorial authority takes a different approach to exercising this discretion, and employs different criteria, as might be expected across diverse national legal systems. Nevertheless, prosecutorial discretion can be particularly non-transparent if the criteria are difficult to ascertain. Indeed, the principles governing the exercise of prosecutorial discretion are commonly found only in internal guidelines,[129] or articulated on a case-by-case basis.[130] Without a degree of

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[124] Since the strategic overhaul of the Dutch arrangements in 2002, the Dutch Prosecution Service will not start an investigation where an investigation in the territorial state is or will be impossible. Human Rights Watch telephone interview with Dutch official, February 3, 2006.

[125] In particular, Spain and France.

[126] In ordinary criminal cases, the UK's Metropolitan Police decides whether to investigate a complaint without the CPS's involvement. In cases of international crimes, however, the investigators consult the CPS for legal advice at the outset of the investigation and enquire about issues such as immunity and jurisdiction. Human Rights Watch telephone interviews with official of the UK Metropolitan Police anti-terrorist department, September 7, 2005, and with official of the UK Home Office Immigration and Nationality Directorate, November 28, 2005.

[127] A French prosecutor's decision not to investigate a complaint is not reviewable, but the *parties civiles* mechanism mitigates this by allowing victims to lodge a complaint directly with a *juge d'instruction*. However, as noted above, the French legislature is considering removing the rights of *parties civiles* in its legislation implementing the Rome Statute. No judicial review is possible against the decision of the French prosecutor not to investigate a complaint. This lack of judicial review was mitigated by the possibility of private parties being able to file a complaint directly with an investigative judge. If *parties civiles'* rights are removed, the legislature should consider introducing some mechanism for the judicial review of prosecutorial discretion.

[128] See this report, Country Case Studies: Spain and France.

[129] The guidelines applied by the Crown Prosecution Service of the UK are public. See Code for Crown Prosecutors, [online] http://www.cps.gov.uk/victims_witnesses/prosecution.html#01.

[130] The Dutch Prosecution Service, in addition to a list of criteria provided by the war crimes unit with regard to evidence, will consider additional criteria, depending on the case. Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005, and Human Rights Watch telephone interview with Dutch official,

transparency and publicity concerning how prosecutorial discretion will be exercised, it is difficult for complainants and victims to know with any certainty when a complaint will be investigated, or the reasons behind a decision not to open an investigation. A lack of transparency also makes it easier for non-legal reasons—such as concerns that a prosecution will be embarrassing to the foreign relations of the forum state—to be parsed as legal ones.

Once an investigation is opened, opportunity for the exercise of discretion arises again when deciding whether to pursue a prosecution based on the evidence yielded by the investigation. The main factors governing this decision tend to be whether there is a reasonable prospect of achieving a conviction of the suspect, and whether it is in the public interest to prosecute.[131] The notion of "public interest" is a broad one, and can encompass many factors. Human Rights Watch urges that, in the context of crimes such as genocide, crimes against humanity and war crimes, the gravity of such crimes, their universal condemnation and the international community's commitment to repressing them should be considered when evaluating the "public interest" in pursuing such a prosecution. Similarly, the forum state's interest in not becoming a "safe haven" for perpetrators of such crimes could reasonably form part of the overall "public interest" in prosecuting such crimes.

The possibility of judicial or administrative review of the exercise of prosecutorial discretion greatly increases its transparency,[132] and may be a way of promoting consistency in decisions about whether to prosecute international crimes. UK law permits complainants to seek judicial review of a prosecutorial decision to close a case.[133] A Belgian appeals court held in May 2005 that, under Belgian laws, a decision of the prosecutor not to investigate a certain complaint can be subject to judicial review, but at present only the prosecutor is permitted to bring forward reasons for his decisions and complainants do not have a right to address the judge.[134] A complainant in the Netherlands may also seek judicial review of a prosecutor's decision not to prosecute.[135]

February 6, 2006. The federal prosecutor of Germany, as outlined above, also applies criteria not contained in paragraph 153f of the Code of Criminal Procedure.

[131] See for instance the British Crown Prosecution Service's code for prosecutors, available online at http://www.cps.gov.uk/publications/docs/code2004english.pdf (retrieved February 2006).

[132] Antoinette Perrodet, "The Public Prosecutor" in M Delmas-Marty and JR Spencer, *European Criminal Procedure* (Cambridge University Press, 2005), p. 445.

[133] Ibid., p. 444. See also C. Hilson, "Decision to Prosecute and Judicial Review," *Criminal Law Review* (1993), p. 739; M, Burton, "Reviewing Crown Prosecution Service Decisions not to Prosecute," Criminal Law Review, (2001), p. 374.

[134] Cour d'Arbitrage, Judgment Nr 62, 23 March 2005, available online at http://www.arbitrage.be/ (retrieved April 2006). Decisions concerning subsidiarity are within the competence of the prosecutor and are not reviewable.

[135] Netherlands, Code of Criminal Procedure 1994, arts. 12-13.

In Norway, Denmark and Germany, only administrative review is available. The review is generally undertaken by the Director of Prosecutions (Norway, Denmark) or by an officer of the Ministry of Justice (Germany). Administrative review processes do not provide the same measure of transparency and accountability as judicial review and in light of the political sensitivity of universal jurisdiction prosecutions, judicial mechanisms may be more desirable in ensuring that bona fide legal reasons underlie a decision not to prosecute.

E. Subsidiarity

It is widely accepted that universal jurisdiction is a "reserve tool" in the fight against impunity, to be applied where "the justice system of the country that was home to the violations is unable or unwilling to do so."[136] This principle, known as "subsidiarity," implies that courts in the territorial state that are able and willing to prosecute individuals for international crimes should have priority in exercising jurisdiction over the crimes. However, an overly restrictive approach to subsidiarity runs the risk of ignoring or widening an impunity gap that may exist in the state where the crimes occurred. For example, in a 2000 decision, the Spanish National Court held that Spanish courts could not exercise jurisdiction over crimes against humanity allegedly committed in Guatemala because there was a chance that Guatemalan courts would investigate the complaint in the future. Yet the crimes alleged in the complaint were committed in the early 1980s, and no judicial process had been initiated in Guatemala since that time. In 2005, Spain's Constitutional Court reversed this ruling, holding that Spanish courts could exercise universal jurisdiction if the complainant could submit reasonable evidence of legal inactivity by authorities in the territorial state, attributable to a lack of ability or will to effectively investigate and prosecute the crimes alleged.[137]

In his decision in a complaint brought against U.S. Defense Secretary Donald Rumsfeld, the German federal prosecutor determined that the principle of "subsidiarity"[138] meant that German courts could not exercise jurisdiction over allegations that Rumsfeld bore command responsibility for torture committed by the U.S. military, because torture

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[136] UN Secretary-General, "Rule of Law and Transitional Justice," para. 48.

[137] The decision of the Spanish Constitutional Court in the Guatemala case was discussed in detail in National Court, 4th Section of the Criminal Chamber, Roll of Appeal No 196/05, Preliminary Proceedings on 10 January 2006, concerning a further universal jurisdiction case, the Tibetan Genocide case (proceedings available online, in Spanish at http://www.elpais.es/elpaismedia/ultimahora/media/200601/10/espana/20060110elpepunac_1_Pes_DOC.doc, retrieved April 2006). The National Court allowed the appeal, taking into account, inter alia, that the complainants could adduce some evidence as to the failure of Chinese authorities to investigate the crimes and that the events complained of are outside the jurisdiction of the ICC. See this report, Country Case Study: Spain.

[138] Enshrined in Germany, Code of Criminal Procedure, para. 153f(2)(4).

allegations against low-ranking soldiers were already under investigation in the United States. In the prosecutor's view, the fact that the investigations did not address the responsibility of Rumsfeld or other commanders was not relevant to the assessment, provided U.S. authorities were investigating the "complex" as a whole:

> In what order and with what means the state with [primary] jurisdiction carries out an investigation of individuals in the framework of a whole complex, must be left up to this state according to the principle of subsidiarity. An alternative only obtains if the investigation is being carried out only for the sake of appearances or without a serious intent to prosecute.[139]

This approach leaves a very wide margin of discretion to authorities in the territorial state, and may mean that the *specific* crime alleged against a *specific suspect* by a complainant or victim could remain uninvestigated in the territorial state, but no prosecution could be brought under Germany's universal jurisdiction laws. A better approach would be to assess whether the specific crime and specific suspect about which the victim complains have been effectively investigated and prosecuted in the state where the alleged crime took place.

[139] Unofficial translation of prosecutor's decision, p. 4, [online] http://www.ccr-ny.org/v2/legal/september_11th/docs/german_appeal_english_tran.pdf (retrieved February 2006).

IV. Conclusion

Universal jurisdiction is an essential piece of the emerging international fabric of justice and accountability for the gravest crimes recognized by the international community. The experiences reviewed in this report show that, while exercising universal jurisdiction can pose challenges to domestic legal systems, these challenges can be overcome—provided there is an institutional and policy commitment to prosecuting international crimes. On paper, many countries have made this commitment, by signing treaties that mandate the exercise of universal jurisdiction. This report suggests that the yawning gap between principle and practice is slowly closing in some countries in Western Europe, in part because of a real concern that these states not become safe havens for alleged perpetrators of international crimes. The EU has played a leading role in encouraging states to institutionalize their commitment to fight impunity for international crimes, by urging the creation of "specialized units" and establishing the EU Network.

Despite the progress made in the exercise of universal jurisdiction in recent years, it remains a fragile mechanism. States continue to be nervous about the political consequences of using universal jurisdiction laws, and the possibility of alienating nations with which they have political and economic ties. There is still a real risk that states will try to roll back the exercise of universal jurisdiction through, for example, introducing new limits on victims' ability to bring private prosecutions.

The states considered in this report, which have strong investigative capacities and highly developed legal systems, are well-placed to lead the way in the exercise of universal jurisdiction. They have the potential to serve as valuable sources of experience and information concerning the practical exercise of universal jurisdiction, and it is vital that countries cooperate with each other in sharing this knowledge. Most importantly, they must maintain their commitment to ensuring that universal jurisdiction lives up to its promise as an effective tool in the fight against impunity for international crimes.

V. Recommendations

To the EU Council and EU Presidency

- Continue to promote member states' cooperation in criminal matters, and extend the mandate of existing cooperation mechanisms such as Europol to include international crimes.
- Ensure that the EU Network meets regularly and has sufficient resources to function as a forum for law enforcement professionals to exchange information and experiences about ongoing cases. Consider nominating a Network coordinator responsible for strategic planning and the organization of Network meetings.
- Strengthen cooperation between the EU Network and other EU institutions and bodies (for example, EC delegations in third countries, EU police missions, rule of law missions and peace building missions) in order to facilitate extraterritorial investigations into international crimes.

To EU Member States and other National Governments

- Ensure domestic implementation of international crimes, as defined in treaties to which the state is a party, and ensure that statutes of limitations do not apply to international crimes.
- Consider the creation of adequately resourced and staffed "specialized units" within police and prosecutorial authorities, with principal responsibility for investigating and prosecuting universal jurisdiction cases.
- Promote cooperation between immigration authorities and police and prosecutorial authorities in order to ensure that suspected perpetrators of international crimes who are visa or refugee applicants are referred to the appropriate law enforcement authority.
- Commit to appointing contact points in charge of international crimes in accordance with article 1 of the Council Decision establishing the EU Network. Ensure that the meetings of the EU Network are attended by contact points and that information is shared with relevant institutions involved in the investigation and prosecution of international crimes.
- Cooperate with Interpol in the creation of a database on past and current investigations of international crimes in different countries.
- Ensure adequate measures for the protection of witnesses, both foreign and national, in universal jurisdiction cases. Protection should include, where

appropriate, the possibility of relocating (within the country of nationality or another country) seriously at-risk witnesses.

- Do not extend immunities to persons who no longer have official duties entitling them to immunity, or whose duties are not closely analogous to those of a head of state/government or foreign minister.
- Do not remove the right of victims to pursue private prosecutions, where such a right already exists in domestic law. Concerns about vexatious prosecutions can be addressed through less drastic measures, such as strengthening judicial control of the process.
- Enhance transparency in prosecutorial decision-making concerning international crimes through publication of applicable guidelines and judicial review.
- Do not apply amnesties for genocide, war crimes, crimes against humanity or torture.

Country Case Studies

VI. Belgium

Belgium's universal jurisdiction legislation, the "Act concerning Punishment for Grave Breaches of International Humanitarian Law," came into force in 1993 and was amended in 1999 to include universal jurisdiction over crimes against humanity and genocide in addition to war crimes. The Code of Criminal Procedure[140] further granted victims the right to initiate a criminal investigation on the basis of universal jurisdiction. Following a wave of complaints against high-ranking officials of various foreign states,[141] political pressure led to an amendment of the act in April 2003, removing the right of victims to initiate a universal jurisdiction prosecution, and introducing immunity provisions "in accordance with international law."[142] Further pressure led to the act being repealed altogether in August 2003.[143] The act's provisions concerning international crimes were incorporated into the Belgian Criminal Code,[144] and there is no longer a specific law in force in Belgium covering international crimes.

In conjunction with amendments to the Code of Criminal Procedure, Belgian courts currently exercise an extended form of active and passive personality jurisdiction over war crimes, crimes against humanity and genocide.[145] Article 12 bis of the Preliminary Title of the Criminal Procedural Code gives Belgian courts jurisdiction over any offense

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[140] Code of Criminal Procedure of 1878, art. 7.

[141] Complaints were filed, inter alia, against then Israeli Prime Minister Ariel Sharon and others for their role in the Sabra and Shatila massacre; against former Chinese President Jiang Zemin for international crimes allegedly committed against Falungong practitioners; and against former U.S. President George H.W. Bush, then Secretary of Defense (and current U.S. Vice President) Dick Cheney, Gen. (now retired) Norman Schwarzkopf, and Chairman of the Joint Chiefs of Staff Colin Powell for war crimes allegedly committed in the 1991 Gulf War. U.S. Gen. Tommy Franks was also the subject of a complaint for war crimes allegedly committed under his command during the 2003 Iraq war. All of these complaints were dismissed after the change to the legislation in August 2003.

[142] For these amendments see the unofficial translation available in *International Legal Materials*, 42 (2003), p.749.

[143] Loi relative aux violations graves du droit international humanitaire, 5 August 2003, Moniteur Belge (Law Gazette), No. 288, August 7, 2003; unofficial English translation available online in International Legal Materials, vol. 42 (2003), p.1248. For an overview of the changes see Luc Reydams, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law," Journal of International Criminal Justice, vol. 1 (2003), p. 679.

[144] Criminal Code of 1867 (Code Penal), arts. 136 bis – 136 octies, available online at http://www.juridat.be/cgi_loi/legislation.pl (retrieved April 2006).

[145] Preliminary Title of the Code of Criminal Procedure (Titre préliminaire du Code de procedure pénale), Chapter II, arts. 6 (1), 7(1) and 10 (5).

committed outside Belgium that Belgium is under a treaty obligation to prosecute.[146] International crimes are tried in Belgium by the *Court d'Assises*, composed of a judge and a twelve-person jury.[147]

Prosecutions based on universal jurisdiction and leading to a conviction since 2001 include the "Butare Four" case,[148] and the case of Rwandan businessmen Etienne Nzabonimana and Samuel Ndashykirwa ("The Two Brothers" case),[149] both cases concerning crimes committed in Rwanda during the 1994 genocide. Ongoing cases include the case against former Chadian dictator Hissène Habré.[150] The law concerning universal jurisdiction was changed in August 2003, requiring cases against U.S. Gen. Tommy Franks, former Israeli Prime Minister Ariel Sharon and petroleum company TotalFinaElf to be dropped.

A. Jurisdictional Challenges

1. Presence

As of August 2003, Belgian authorities can exercise jurisdiction over alleged perpetrators of genocide, crimes against humanity and war crimes who are either Belgian nationals or Belgian residents, including perpetrators who became residents or citizens after the crime was committed.[151] Courts can also exercise jurisdiction over international crimes if the victims are Belgian nationals or had lived in Belgium for at least three years at the time the crime was committed.[152] Courts therefore exercise a form of passive or active nationality jurisdiction, unless Belgium has an obligation to prosecute under treaty law.

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[146] Preliminary Title of the Code of Criminal Procedure, art. 12 bis; Belgium ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on June 25, 1999. Torture as a criminal offense has been incorporated in article 417 bis of the Criminal Code.

[147] Belgian Constitution, as of February 17, 1994, art. 150.

[148] La Cour d'Assises de L'arrondissement Administratif de Bruxelles-Capitale, verdict of June 8, 2001. Documentation of the whole trial is available online at http://www.asf.be/AssisesRwanda2/fr/fr_ICI_procesassises.htm (retrieved April 2006).

[149] La *Cour d'Assises de L'arrondissement Administratif de Bruxelles-Capitale*, verdict of June 29, 2005. See also "Rwandans sentenced over genocide," BBC News, June 29, 2005, [online] http://news.bbc.co.uk/2/hi/africa/4635637.stm (retrieved April 2006).

[150] For details concerning the Habré case, see [online] http://www.hrw.org/justice/habre/.

[151] Preliminary Title of the Code of Criminal Procedure (Titre préliminaire du Code de procedure pénale), Chapter II, art. 7 (1), introduced in 1964, provides for active personality jurisdiction, with article 6(1) bis providing courts with jurisdiction over international crimes committed abroad by "any person who has his principle residence on [Belgian] territory" ("...toute personne ayant sa residence principale sur le territoire du Royaume"). According to the government's explanatory memorandum, this includes those who became residents after the commission of the crime, see http://www.ulb.ac.be/droit/cdi/fichiers/chbre-51-0103-01.pdf, p. 5.

[152] Article 10 (5), introduced in 1984, provides for general passive personality jurisdiction.

2. Immunities

In the case against former Israeli Prime Minister Ariel Sharon, the *Cour de Cassation* held the complaints inadmissible,[153] underlining the verdict of the International Court of Justice, in the "Arrest Warrant" case,[154] that a sitting prime minister enjoyed a functional immunity from jurisdiction in a foreign court, no matter what crimes were involved. To bring Belgian legislation into line with the judgment of the ICJ, the Law relating to Grave Breaches of International Law was modified in April 2003, and now Belgian law recognizes immunities within the limits established by international law.[155]

3. Limitation

Crimes against humanity, war crimes and genocide are not subject to a period of limitation.[156]

4. Subsidiarity

The principle of subsidiarity was introduced by the changes to the legislation in April 2003. The prosecutor may refrain from referring the complaint to the investigative judge if, taking into consideration the interests of justice and Belgium's international obligations, the particular complaint should be brought before an international tribunal or before a court in the territorial state or the state of nationality of the alleged perpetrator. If the prosecutor determines that the ICC is the appropriate forum, the minister of justice may, after consultations with the Council of Ministers, refer the case to the ICC. If the ICC decides not to exercise its competence over the matter, Belgian courts will have jurisdiction. It is then once again up to the federal prosecutor to decide how to proceed with the complaint.[157]

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[153] La Cour de Cassation, decision of September 24, 2003.

[154] Case Concerning the Arrest Warrant of April 11, 2000 (The Democratic Republic of Congo v. Belgium), judgment of April 14, 2002, available online at http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF (retrieved March 2006).

[155] See Moniteur Belge, May 7, 2003, unofficial English translation available in ILM, vol. 42 (2003) p.204.

[156] Code of Criminal Procedure, art. 21.

[157] Article 7 of the Law amending the law of June 16, 1993, concerning the prohibition of grave breaches of international humanitarian law and article 144 ter of the Judicial Code.

B. Practical Arrangements for the Exercise of Universal Jurisdiction in Belgium

1. Special departments in charge of the investigation and prosecution of international crimes

a. Police

A unit was set up in 1998 to deal exclusively with international crimes following an increase in complaints based on universal jurisdiction, particularly concerning alleged perpetrators from Rwanda. The unit is part of the crime section of the judicial police of the *arrondissement judiciaire Bruxelles*. So far the unit has investigated international crimes committed in a number of countries, including Rwanda, Chad, Guatemala and Burma. It was created to bring together all the relevant expertise within one unit and now includes six experienced investigators.[158]

b. Prosecution

The *Parquet Federal* has had exclusive competence over international crimes since 2003.[159] It decides whether to open an investigation, and can order an investigative judge to start an investigation. While the judge is completely independent once an investigation begins, the *Parquet Federal* is under the direct authority of the Ministry of Justice, which can command the prosecution to prosecute a case but cannot order it to refrain from doing so.

c. Investigative judge

Theoretically, the investigation of international crimes by an investigative judge depends on the whereabouts of the suspect or the location at which the complaint is filed. In practice, however, it has so far been possible to transfer all cases involving international crimes to just a very limited number of investigative judges, who have thus accumulated valuable experience. At present they also deal with the investigation of terrorism cases (among other, ordinary crimes).[160] The budget available to the investigative judge is provided by the Ministry of Justice, and the resources allocated have been considered adequate,[161] although there is no specific budget for the investigation of war crimes, crimes against humanity and genocide.[162]

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[158] Human Rights Watch interview with Belgian officials, October 24, 2005.
[159] Human Rights Watch interview with Belgian prosecutor, April 22, 2004.
[160] Human Rights Watch interview with Belgian investigative judge, October 24, 2005.
[161] Human Rights Watch interview with Belgian investigative judge, October 24, 2005; Human Rights Watch interview with Belgian officials, October 24, 2005.
[162] Human Rights Watch interview with Belgian prosecutor, April 22, 2004.

d. Notification

Both cases that led to conviction, *Butare Four* and *The Two Brothers*, were brought to the attention of the *Parquet* by *parties civiles*. The "*constitution de parties civiles*" is the equivalent of a private petition and *obliges* the investigative judge to start the investigation. At present there is no cooperation with immigration authorities, which is striking in light of the fact that the perpetrators in the Rwanda cases had all claimed asylum in Belgium.[163] This has become even more pressing because of the changes to the legislation in April 2003 that prevent the investigative judge from acting solely on a complaint initiated by *parties civiles*, and because public prosecutors have rarely been the driving force behind complaints based on universal jurisdiction.

2. *Decision to investigate and prosecute*

Since the modification of the universal jurisdiction legislation in August 2003,[164] the prosecutor's discretion has widened. The prosecutor can decide not to investigate a complaint if the complaint is obviously unfounded, the crimes referred to in the complaint do not qualify as serious violations of international humanitarian law, or if an admissible public action cannot result from the complaint. The prosecutor can further reject a complaint if facts of the case indicate that the case should be heard by the courts of the state where the crimes were committed or by an international court.[165]

The decision about whether to investigate a complaint now lies solely at the prosecutor's discretion, and public prosecutors play an increasingly important role in the exercise of universal jurisdiction in Belgium. The police and the investigative judge are only consulted by the prosecution. In exceptional cases, the minister of justice can order the federal prosecutor to initiate an investigation (*droit d'injonction positive*).[166] The investigation is carried out by the special police department in charge of the investigation of international crimes under the supervision of the investigative judge, who acts as a judicial official and police investigator.

In a complaint brought against the modified universal jurisdiction law, the *Cour d'Arbitrage* decided on March 23, 2005, that judicial review of a prosecutor's decision not to open an

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[163] Human Rights Watch interview with Belgian officials, October 24, 2005.

[164] Amendment to the "*Loi relative aux violations graves du droit international humanitaire*" and to article 144 ter of the Judicial Code, April 23, 2003. See *Moniteur Belge*, May 7, 2003.

[165] Code of Criminal Procedure, arts. 10 (5) and 12 bis; *Cour d'Arbitrage*, Judgment Nr. 62, March 23, 2005, available online at http://www.arbitrage.be/ (retrieved April 2006).

[166] Belgian Constitution, as of February 17, 1994, arts. 151. In February 1995, the Belgian minister of justice asked the prosecutor general in Brussels to initiate proceedings against alleged perpetrators of crimes committed in Rwanda in 1994.

investigation was permissible to some extent.[167] If the prosecutor decides not to further proceed with a case, the Indicting Chamber (*Chambres des mises an accusation*) will take the decision whether to continue with a case. However, at no stage of the review are private parties filing the complaint allowed to intervene to present their case, and the chamber will base its decision on the reasons set out by the prosecutor only.

No such judicial review is possible where the prosecutor decides not to investigate because the facts of the case indicate that the case should be heard by the courts of the territorial state or by an international court.[168]

3. *Investigation*

a. Investigation in Belgium

The police and the investigative judge consult experts and check Internet resources as well as related academic and NGO material. Other crucial sources of evidence in past cases were provided by *parties civiles* who supplied names of witnesses and material related to crimes. In the Rwanda cases, emigré communities proved to be a useful starting point for seeking witnesses and additional contacts in the territorial state.[169] Once the investigation in Belgium is complete and all available evidence has been collected, the judge decides whether an investigation abroad is necessary.

b. Extraterritorial investigation

At the date of writing, Belgian investigators have carried out five rogatory missions—three to Rwanda, one to Guatemala and one to Chad. Prior to the rogatory mission to Rwanda, one preparatory commission of investigators went to Rwanda. The rogatory letter is executed by the local authorities in the presence of the Belgian team. In Rwanda, for instance, it was a Rwandan representative of the judiciary who conducted the interviews. The team investigating in the context of a rogatory mission abroad includes one investigative judge, a prosecutor and investigators, and often a registrar and a translator.[170]

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[167] *Cour d'Arbitrage*, Judgment Nr 62, March 23, 2005, available online at http://www.arbitrage.be/ (retrieved April 2006).
[168] Ibid.
[169] Human Rights Watch interview with Belgian officials, October 24, 2005.
[170] Human Rights Watch interview with Belgian investigative judge, October 24, 2005.

C. Cooperation

1. National cooperation

There is no systematic cooperation with immigration authorities. There is extensive cooperation between the *Parquet federal*, investigative judges and the relevant police unit.

2. International cooperation

For the investigation in Guatemala from 1980 onwards, the foreign ministries of Guatemala and Costa Rica cooperated with the Belgian authorities, through the assistance of a Belgian liaison magistrate based in Venezuela. Although Spain is also investigating the events that occurred in Guatemala, there has been no official cooperation between Spain and Belgium. While the Belgian authorities considered it essential to investigate abroad, the Spanish authorities relied on documents and other evidence available without investigating in the territorial state. In the Rwanda cases there was cooperation with Switzerland and Canada.[171]

Before going abroad the investigating team compiles a list of questions, documents and witnesses in which they are interested for local authorities to review and approve (letter rogatory). The Belgian embassy in the territorial state is usually contacted to establish a first contact with local authorities. Where no embassy exists, the Belgian Ministry of Justice has liaison officers in various ministries of justice around the world who help to establish early contacts. In the Guatemala case, a Belgian liaison officer affiliated with the Ministry of Justice of Venezuela contacted all relevant authorities in Guatemala and Costa Rica. For every piece of evidence the Belgian investigation team wanted to seize, the Public Ministry of the territorial state had to be contacted.[172] During the investigation in Rwanda the team of investigators always had a team of local police traveling with them, for their protection.[173] In Guatemala, the team was accompanied by two officers charged with their protection.[174]

Neither the EU Network nor the Interpol working group seem to have played an important role in past investigations, as the majority of investigations carried out by Belgian authorities abroad have taken place before the operation of either cooperation mechanism. However, Belgian officials attend both EU and Interpol meetings,[175]

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[171] Human Rights Watch interview with Belgian officials, October 24, 2005; Human Rights Watch interview with Belgian investigative judge, October 24, 2005.
[172] Human Rights Watch interview with Belgian investigative judge, October 24, 2005.
[173] Human Rights Watch interview with Belgian officials, October 24, 2005.
[174] Human Rights Watch interview with Belgian investigative judge, October 24, 2005.
[175] Past Network meetings as well as Interpol meetings were attended by Belgian officials.

enabling authorities of other countries to benefit from the experience of Belgian authorities in the investigation and prosecution of international crimes and vice versa.

D. Role and Rights of Victims and Witnesses

1. Victims—Compensation and legal representation

Victims may file a civil action for damages in the criminal proceedings.[176] In addition to those who are directly affected by the crime, family members may bring a claim for compensation as long as they can prove a family link to the victim. In the second Rwanda trial a number of victims succeeded in their claims for compensation against the two convicted perpetrators.[177]

Although victims are entitled to legal representation where they cannot afford to pay for it themselves, this does not include costs incurred during the pre-trial phase. During trial, lawyers for victims and for the defense receive €500 per day in court.

2. Witnesses

As the emphasis in Belgium is placed on oral proceedings, the number of witnesses testifying in person during trial is quite large. In the second Rwanda trial, for instance, seventy-six witnesses testified in person.[178] The identity of witnesses cannot be concealed under Belgian law, but investigators indicated that even had they been available, mechanisms to protect anonymity would have been ineffective in the cases tried so far. This was because persons in the territorial state were already aware who testified in the trial, due to media attention, and the fact that a witness travels from Rwanda to Belgium.[179] Post-trial protection in the territorial state does not appear to be extensive. Indeed, according to a Belgian victims' lawyer, the Belgian authorities need to improve their efforts with regard to witness protection and to rely less on local authorities in this respect.[180] This view was supported by an investigative judge, who observed that protection measures for witnesses and victims provided by local police in the territorial state were limited.

Accommodating a large number of witnesses in the same location can have the advantage of providing a system of mutual support for witnesses who are all far away from home,

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[176] Code of Criminal Procedure, arts. 66, 67.
[177] Human Rights Watch interview with Belgian lawyer, August 25, 2005.
[178] Human Rights Watch interview with Belgian officials, October 24, 2005.
[179] Human Rights Watch interview with Belgian officials, October 24, 2005.
[180] Human Rights Watch interview with Belgian lawyer, August 25, 2005.

but it has the obvious disadvantage of accommodating prosecution and defense witnesses together.[181] The majority of witnesses in the second Rwanda trial remained in Belgium for one week and left before the following witnesses arrived. Throughout their stay, they were all entitled to receive psychological help from a witness and victims unit. Twelve witnesses went into hiding once they had testified, and a number of witnesses claimed asylum, especially the defense witnesses who argued that their testimonies in favor of the accused would endanger them on their return to Rwanda.[182]

It is not possible under Belgian law to film a witness testimony in the territorial state, as this method does not allow both parties to challenge statements. Preparing a witness is not allowed under Belgian law and is viewed as a contamination of the original statement given in front of the jury. Witnesses are, however, given the chance to read through copies of their statements before they testify at trial. This reminds them of their original statement, often given years before the trial.[183]

E. Fair Investigation and Trial

With regard to the Rwanda trial in 2005, the team investigating abroad did not encounter difficulties in meeting with and finding witnesses for the defense.[184] The investigative judge is under an obligation to investigate evidence incriminating and exculpating the accused. While the defense lawyer is not entitled to have a private investigator appointed, the lawyer has the right to ask the investigating judge to go back to the territorial state and to take more statements from a list of potential defense witnesses.[185] Since investigations abroad form part of the pre-trial phase, they are not covered by legal aid.

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[181] Witnesses in the Rwanda trials were accommodated in former army barracks, where it was possible to observe them and to keep the costs of accommodation down.
[182] Human Rights Watch interview with Belgian officials, October 24, 2005.
[183] Human Rights Watch interview with Belgian officials, October 24, 2005.
[184] Human Rights Watch interview with Belgian officials, October 24, 2005.
[185] Code of Criminal Procedure, art. 61 ter.

VII. Denmark

Section 8 (5) of the Danish Penal Code[186] provides for universal jurisdiction over crimes that Denmark has an obligation to prosecute under an international convention. This includes torture under the Convention against Torture[187] and grave breaches of the Geneva Conventions.[188] In addition, section 8 (6) provides Danish courts with universal jurisdiction over any crime with a sentence of more than one year's imprisonment, where the crime is also a crime in the territorial state and the suspect cannot be extradited to the territorial state.[189] Due to a lack of implementing legislation, all complaints are investigated, prosecuted and eventually punished on the basis of crimes as defined in the Danish Penal Code. Several complaints have been investigated on this basis since 2001, with three cases leading to a prosecution. One, involving a Ugandan national, led to a conviction for armed robbery and abduction in 2004.[190] Other prosecutions did not lead to trial because of the death or escape of the accused. All other investigations have so far been discontinued for reasons further outlined below.

A. Jurisdictional Challenges

1. Presence

Although not required by section 8 (5), the suspect has to be voluntarily present for Danish authorities to exercise jurisdiction over the crimes that international treaty law commits them to prosecute, and presence is a prerequisite for a police investigation.[191] Should the suspect leave Denmark during an investigation, the investigation will be discontinued. Extradition can only be requested where a suspect has already been charged

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[186] Penal Code (*Straffeloven*) 1930, section 8 (5).

[187] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

[188] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force October 21, 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force October 21, 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force October 21, 1950; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force October 21, 1950.

[189] Penal Code, section 8 (6).

[190] Human Rights Watch telephone interview with staff of the Special International Crimes Office (SICO), August 11, 2005; for more information see the SICO website, at http://www.sico.anklage.dk/page34.aspx (retrieved April 2006).

[191] Human Rights Watch telephone interview with Danish official, August 11, 2005; Human Rights Watch interview with Danish official, August 24, 2005. With regard to torture offenses see *Lee Urzua et al v. Pinochet*, Opinion of the Director of Public Prosecution, December 3, 1998, Case No. 555/98, reported in *Yearbook of International Humanitarian Law*, vol. 3 (2003), p. 469.

and has subsequently fled Denmark.[192] To avoid a suspect's departure, the investigative authorities have to apply for a court order for preliminary detention. Such an order will only be granted where there is substantial reason to believe that a crime was committed by the suspect and where he or she seeks to leave Denmark, tamper with evidence, or commit a crime.[193] Due to the substantial level of evidence required to implicate a suspect, it has only been possible for the investigative authorities to obtain the order in two cases. The first case involved the Ugandan national who was convicted, and the second a former Iraqi general who escaped before the order could be enforced.[194]

The strict adherence to the presence requirement stopped the investigation of a recent complaint filed by a practitioner of Falungong against a Chinese prosecutor who attended a conference in Copenhagen in August 2005. The investigators had five days to establish a link between the crimes in question and the alleged perpetrator.[195] However, it was not possible to collect sufficient evidence to successfully apply to the courts for an arrest warrant within this timeframe. The Chinese prosecutor left Denmark once the conference was over, and the investigation had to be discontinued.

2. *Immunities*

Danish authorities can exercise universal jurisdiction as provided for in article 8 (5) if such an exercise is in accordance with international law.[196] Accordingly, immunities as recognized by international law will prevent an investigation by Danish authorities, as illustrated in the case against the former ambassador of Israel to Denmark, Carmi Gillon, where the Ministry of Foreign Affairs and the Ministry of Justice in July 2001 decided not to open an investigation against him.[197]

Three cases involving international crimes could not be investigated due to amnesties which have been enacted in the country where the crime had been committed.[198] A list of criteria is applied, as a matter of policy, to each amnesty in order to determine

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[192] Human Rights Watch telephone interview with staff of the SICO, October 31, 2005; Danish authorities issued an international arrest warrant against former Iraqi General Nizar al-Khazraji, who escaped from Denmark on March 17, 2003, before a Danish arrest warrant could be enforced.
[193] Human Rights Watch telephone interview with Danish official, October 31, 2005; see further the SICO website, at http://www.sico.ankl.dk/page34.aspx (retrieved May 2006).
[194] Human Rights Watch telephone interview with staff of the SICO, October 31, 2005.
[195] Ibid.
[196] Penal Code, section 12.
[197] On the case against Carmi Gillon see letter by Human Rights Watch to the Danish Ministry of Foreign Affairs, available online at http://hrw.org/english/docs/2001/07/19/denmar311.htm.
[198] Human Rights Watch telephone interview with staff of the SICO, October 31, 2005. All of these cases concerned the Lebanon Amnesty Law of 1991, which grants a general amnesty for crimes committed before March 28, 1991.

whether it will be a bar to prosecution in Denmark. Thus far the Special International Crimes Office (SICO) has never disqualified an amnesty, as the amnesties in question have been general, referring not only to regime officials, but to both parties of the conflict.[199] It appears that amnesties are respected, even if they apply to crimes such as crimes against humanity, torture or war crimes. It is unclear why Danish authorities regards themselves as bound by amnesties issued in the territorial state.

3. Limitation

Because Denmark has not legislated international crimes directly into domestic law and prosecutes the domestic law equivalents of international crimes, statutes of limitation apply to the prosecutions. This has stopped the investigation of three complaints involving allegations of torture, as this is classified as a crime against the person and is therefore subject to a statute of limitation of ten years.[200]

4. Subsidiarity

The issue of subsidiarity is not regulated under Danish law, and practitioners indicated that it has not arisen in any case so far. It would be dealt with on a case by case basis, taking into account extradition requests and whether the territorial state would apply the death penalty. In the case of the Ugandan national who escaped to Denmark where he was convicted for armed robbery and abduction in 2004, three Ugandan nationals were prosecuted and convicted by a Ugandan court for being involved in the same crimes. While Uganda did not ask for the escaped accused's extradition, authorities indicated that they would have only considered extradition if Uganda could have ensured that the death penalty would not be applied.[201]

B. Practical Arrangements for the Exercise of Universal Jurisdiction in Denmark

1. Special departments in charge of the investigation and prosecution of international crimes

The Special International Crimes Office (SICO) was established in 2002 and is in charge of the investigation and prosecution of serious crimes[202] committed abroad by persons present in Denmark. SICO currently has a staff of seventeen: six prosecutors, nine investigators and two translators. The investigators and prosecutors work in teams,

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[199] Human Rights Watch telephone interview with staff of the SICO, October 31, 2005.
[200] Penal Code, sections 93-97.
[201] Human Rights Watch interview with Danish official, May 22, 2006.
[202] Serious crimes are all crimes that carry a minimum sentence of six years of imprisonment.

divided by geographical region. The composition of prosecutors and investigators in the same unit has proven advantageous as both are able to profit from one another's expertise in the complex legal and investigative aspects of the investigation of international crimes. The office's focus is on serious crimes committed abroad, covering anything from murder and rape to genocide. Approximately 20 percent of their work deals exclusively with international crimes.[203] As one of three national police units, its budget is part of the overall police budget and is determined by the Ministry of Justice. According to the officials interviewed, there is neither a lack of financial resources nor of personnel available to SICO.[204]

2. *Notification*

SICO receives about 60 percent of all cases from the immigration authorities. All asylum seekers are screened and interviewed three times in order to enable immigration authorities to verify their stories. SICO has a special contact person within the immigration authority who screens all cases before referring them to the unit.[205] The majority of cases referred to SICO by immigration authorities are determined to lack sufficient credibility to warrant a prosecution.[206] This is established by contacting the country in question or researching background information on the alleged victim.

The Danish immigration authorities and the Danish Red Cross work in conjunction to distribute pamphlets among asylum seekers explaining to them in six languages other than Danish (Albanian, Arabic, Dari, French, English and Bosnian-Croatian-Serbian) where and with whom they can file a complaint. Together with a form on SICO's website,[207] it provides victims and witnesses with the opportunity to directly address the relevant authorities in charge of such complaints. Out of sixty-three complaints received before May 31, 2004, forty-four cases were reported to SICO by the immigration authorities, fifteen by private/anonymous complainants, and four were based on individual initiatives.[208] However, according to the 2005 annual report of SICO, the numbers referred to by the immigration authorities were decreasing, while a rising number of complaints have been referred to SICO by victims or witnesses or started on SICO's own initiative.[209]

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[203] Human Rights Watch interview with Danish official, August 24, 2005.
[204] Human Rights Watch telephone interview with staff of the SICO, October 31, 2005; Human Rights Watch interview with Danish official, August 24, 2005.
[205] Human Rights Watch telephone interview with staff of the SICO, November 25, 2005.
[206] Human Rights Watch telephone interview with staff of the SICO, August 11, 2005.
[207] See http://www.sico.anklage.dk/page33.aspx (retrieved April 2006).
[208] See http://www.sico.anklage.dk/media/beretning_sags_010602-3105.pdf (retrieved April 2006).
[209] See http://www.sico.anklage.dk/media/sico_summary_2005_annual_report.pdf (retrieved April 2006).

3. *Decision to investigate and prosecute*

In cases involving "ordinary crimes," that is crimes committed in Denmark, the police decide whether to investigate a complaint and the prosecution does not get involved in the investigations. However, in all cases referred to SICO, the prosecution has sole authority in deciding whether to initiate an investigation. In practice, this decision is taken jointly with the investigators and the investigation itself is then carried out jointly by the police and SICO. This is one of the advantages of having the expertise of both parties combined in one unit.[210] The decision is taken according to the "investigation strategy" outlined below.

The prosecution is subject to the authority of the minister of justice, who, pursuant to section 98 (1) of the Administration of Justice Act, superintends their work and pursuant to section 98 (2) may issue guidelines concerning the discharge of their duties.[211] The authority to prosecute under section 8 (4-6) lies with the minister of justice.[212] Practitioners interviewed by Human Rights Watch indicated that so far the minister of justice did not interfere with their work, and they believed that it was unlikely that this would happen in the future.[213] Accordingly, the decision to prosecute international crimes is taken by the director of SICO and is based on the evidence available, which must be sufficient to give rise to a reasonable expectation of a successful conviction.[214] On two occasions, the prosecutor decided to discontinue proceedings on the basis that the cost of further investigations required would have been disproportionate to the gravity of the alleged crime. Similarly, investigators would not carry out extensive enquiries abroad for a minor crime.[215]

SICO investigators apply a three-stage test to each complaint that they are requested to investigate. They ask: (i) Is the crime within the jurisdiction of Denmark? (ii) Is the suspect present in Denmark? and (iii) Is the limitation period still running? If the answer to all three questions is yes, SICO begins an investigation.

Where the prosecutor decides not to investigate or prosecute, the complainant—provided he or she has some link to the crime in question—can appeal to the director of

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[210] Human Rights Watch telephone interview with staff of the SICO, August 11, 2005.
[211] Administration of Justice Act (*Retsplejeloven*) 1916, section 98.
[212] Circular letter of the Director of Public Prosecution 3/2002 (*Rigsadvokatens Meddelelse 3/2002*).
[213] Human Rights Watch interview with Danish official, August 24, 2005; Human Rights Watch telephone interview with staff of the SICO, November 15, 2005.
[214] Administration of Justice Act, section 7(2).
[215] Human Rights Watch telephone interviews with staff of the SICO, November 15 and 25, 2005. An example given was theft.

public prosecution who is the first and last official to whom the complainant can turn.[216] The director will take into account the reasons given by the prosecutor not to prosecute and the overall handling of the case. No courts are involved in the appeal as it is a purely administrative procedure. Appeals have been lodged in two instances with the director of public prosecution upholding the decision of SICO not to prosecute, due to insufficient evidence in one case, and the review decision still pending in the other.[217]

4. *Investigation*

a. Investigation in Denmark

When a case is opened, a team of one prosecutor and two investigators searches for evidence through open sources such as NGO reports, newspapers and the Internet. After this preliminary investigation (lasting a maximum of four weeks) the team calls a meeting with the director and the chief detective of SICO and presents a plan of action highlighting areas where further investigation is necessary. Where preliminary evidence does not reveal a need for further investigation, a closing letter is sent to the complainant, setting out the reasons why the investigation has been discontinued.[218]

b. Extraterritorial investigation

Before SICO investigates abroad, they ensure that the incident actually occurred and that the territorial state is willing to cooperate. Other countries with experience of investigation in the territorial states concerned are contacted for advice. Following this, a team of one prosecutor, two investigators and possibly a translator is sent abroad as quickly as possible.[219] As a time-saving measure, the number of complaints from this country is taken into account so that the team can attempt to combine the investigation of all complaints in a particular state.[220] The team works closely with local authorities where possible. In the Ugandan case, Danish investigators traveled to foreign states at least three times, on two occasions together with a judge, prosecutor and a defense lawyer when testimonies were taken.[221]

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[216] Administration of Justice Act, section 724 (1).
[217] Human Rights Watch telephone interview with staff of the SICO, November 25, 2005.
[218] Human Rights Watch interview with Danish official, August 24, 2005.
[219] Human Rights Watch telephone interview with staff of the SICO, October 31, 2005.
[220] Human Rights Watch interview with Danish official, August 24, 2005.
[221] Human Rights Watch telephone interview with staff of the SICO, November 25, 2005

C. Cooperation

1. International cooperation

a. EU Network

The network of contact points was utilized to exchange information with practitioners from other countries.[222] The potential of the EU Network in assisting national authorities in the investigation of international crimes is valued highly by Danish practitioners, and exchange of experiences made by other countries is considered crucial for a successful investigation.[223]

b. Interpol

An initiative by Denmark created the Interpol working group on international crimes in 2004. As a much larger meeting forum, Interpol provides a possibility to meet people from outside Europe. In particular, SICO describes Interpol's database specializing in international crimes as a fundamentally important development in order to avoid duplicating the efforts of different countries working on international crimes.[224]

c. Cooperation with the territorial state

Cooperation with the territorial state is crucial in the event that sufficient evidence to charge a suspect is not available elsewhere. To date, only one investigation could not be continued due to a non-cooperative territorial state, while in all other relevant cases the territorial state has provided assistance to SICO.[225] In the Ugandan case, the first contact was established via the Danish embassy, which forwarded a rogatory letter to the relevant local authorities—the police and prosecution services. The rogatory letter contained specific crime-related questions regarding the identification of witnesses, and whether the state's personnel would be present when statements were taken or whether the Danish authorities could take statements themselves.[226] The letter rogatory was executed together with the local authorities and in the case of Uganda was relatively informal, as it did not have to be renewed for every piece of evidence or new witnesses not included in the original letter. However, other countries require a more detailed letter rogatory.[227]

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[222] Human Rights Watch telephone interview with staff of the SICO, October 31, 2005.
[223] Ibid.
[224] Human Rights Watch telephone interview with staff of the SICO, August 11, 2005.
[225] Ibid.
[226] Ibid.
[227] Human Rights Watch telephone interview with staff of the SICO, October 25, 2005.

D. Role and Rights of Victims and Witnesses

1. Victims—Compensation and legal representation

A victim is considered a person who is directly affected by a crime. Relatives do not fall under the definition of victim, even if they are indirectly affected by the crime.[228] Victims cannot initiate an investigation or bring a private prosecution under Danish law for serious crimes, but may have the right to state-funded legal representation.[229]

In addition to the victim's right to claim compensation in civil proceedings, the prosecution is obliged to pursue civil claims lodged by the victim if the civil aspects involved are not too complex for a criminal court to decide.[230] Although the victim has no right to participate in the penal aspects of criminal proceedings, a victim can be legally represented as far as compensation is concerned. This representation is covered by legal aid for the trial and possible appeals. In the Uganda trial, victims did not receive any compensation as there were no claims regarding the charges on which the accused was convicted. The other claim-related charges had to be dropped. The victims lived in Uganda and did not travel to Denmark for the trial.[231]

2. Witnesses

Although eyewitness testimonies are given much weight, no witnesses have yet traveled to Denmark to testify at trial. Instead, a witness gave testimony in a Ugandan court in the presence of a Danish prosecutor and defense lawyer.[232] This testimony was filmed and later presented in the Danish court. It seems that possibilities such as videotaping a testimony given in court are considered to be preferable for several reasons: a witness can testify in familiar surroundings; the possibility of witnesses claiming asylum in Denmark is avoided; and the costs of travel for a potentially large number of witnesses are also reduced.[233]

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[228] There is no legal definition of the term "victim"/ injured party (*forurettede*), but according to commentary, the term is commonly assumed to be interpreted narrowly, and only those whom the penal provisions specifically seek to protect are considered an injured party, see MEI Brienen and EH Hoegen *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Wolf Legal Productions (2000), [online] http://www.victimology.nl/onlpub/Brienenhoegen/bh-ch8denmark.pdf (retrieved June 2006), p. 235.

[229] Administration of Justice Act, section 275-1, in conjunction with relevant provisions of the Penal Code. A lawyer may be appointed by the court depending on the seriousness of the crime. Administration of Justice Act, section 741a-2, in conjunction with relevant sections of the Penal Code.

[230] Administration of Justice Act, sections 991–996a.

[231] Human Rights Watch telephone interview with staff of the SICO, October 31, 2005.

[232] Human Rights Watch telephone interview with staff of the SICO, August 11, 2005.

[233] Human Rights Watch telephone interview with staff of the SICO, November 25, 2005.

Witness protection has not been an issue in Danish investigations. However, where the witnesses feel afraid in the territorial state, Danish authorities will inform local authorities and try to negotiate a protection agreement.[234] Reliance is thus placed on local mechanisms and the national criminal procedure of the territorial state.

E. Fair Investigation and Trial

It is inherent in the Danish system that the police look for both inculpatory and exculpatory evidence. Therefore, so long as no testimonies are taken, investigators do not specifically ask for a defense counsel to be present in the investigation. The defense can ask the investigators to look for evidence required by the defense. The defense can apply to the court to order the investigators to look for further evidence after the investigation has concluded.[235]

Although there is no "legal aid" available for criminal cases in Denmark, the defense and all related costs are paid for by public funds. The legal costs are settled before the trial, and it is only in the case of a person's conviction that he or she might be ordered by the court to pay for those costs.[236]

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[234] Human Rights Watch telephone interview with staff of the SICO, October 31, 2005.
[235] Ibid.
[236] Ibid.

VIII. France

Article 689 of the French Code of Criminal Procedure[237] provides for universal jurisdiction over offenses committed outside of France when an international convention gives jurisdiction to French courts to deal with this offense.[238] Article 689.1 sets out the conditions for an exercise of universal jurisdiction of French courts, and subsequent paragraphs (689.2-689.9) list the international conventions that provide French courts with universal jurisdiction. As far as international crimes are concerned, the only convention referred to is the Convention against Torture, in article 689.2. No provisions exist for grave breaches of the Geneva Conventions[239] or other war crimes, and French courts have held that the Conventions were not directly applicable in national law. Accordingly grave breaches or war crimes are not subject to universal jurisdiction under French law.[240] French courts can therefore only exercise universal jurisdiction over torture.[241]

By virtue of Law No. 95-1 of January 2, 1995,[242] and Law No. 96-432 of May 22, 1996,[243] which implemented Security Council Resolutions 827 and 955 setting up the ad-hoc tribunals for the former Yugoslavia and Rwanda, French courts can exercise ad hoc universal jurisdiction over war crimes, genocide and crimes against humanity, if

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[237] Code of Criminal Procedure (*Code de procédure pénale*) 1957, as amended by the Act of December 1992, official translation available on the website of the French government at http://www.legifrance.gouv.fr/html/codes_traduits/cpptextA.htm (retrieved May 2006).

[238] France ratified the four Geneva Conventions on June 28, 1951, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment on February 18, 1986.

[239] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force October 21, 1950, art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force October 21, 1950, art. 49; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force October 21, 1950, art. 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force October 21, 1950, art. 146.

[240] The Court of Appeal (Chambre d'accusation) on November 24, 1994 (DOSSIER N A 94/02071, available online at http://www.trial-ch.org/twdoc/JAVOR1994.pdf), confirmed by the Supreme Court (Cour de Cassation) on March 26, 1996 (N° de pourvoi : 95-81527, available online at http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXRXAX1996X03X06X00132X000).

[241] Article 222-1 of the Criminal Code (*Code Pénal*) of 1994 reads as follows: "The subjection of a person to torture or to acts of barbarity is punished by fifteen years' criminal imprisonment." The code is available online at http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm (retrieved May 2006).

[242] Available online at http://www.oup.com/uk/orc/bin/0199259119/resources/cases/ch19/1995_france_icty.pdf (retrieved May 2006).

[243] Available online at http://www.legifrance.gouv.fr/WAspad/Visu?cid=483837&indice=1&table=JORF&ligneDeb=1 (retrieved May 2006).

committed in the former Yugoslavia, Rwanda or by Rwandan citizens in neighbouring countries.[244]

Since 2001, one person has been convicted by a French court on the basis of universal jurisdiction. On July 1, 2005, Ely Ould Dah, a Mauritanian officer was sentenced *in absentia* to ten years in prison for torturing black African members of the military in 1990 and 1991.[245] Other investigations have been discontinued for reasons outlined further below, while some are still ongoing, including that of Rwandan priest Wenceslas Munyeshyaka, the "Disappeared of the Beach" in Congo Brazzaville, and Callixte Mbarushimana for his alleged participation in the 1994 Rwandan genocide.

A. Jurisdictional Challenges

1. Presence

With respect to crimes that may be prosecuted under article 689 of the Criminal Procedure Code and to crimes committed in the former Yugoslavia and Rwanda, presence of the suspect on French territory must be established before a criminal investigation can be launched.[246] Where a complaint has been filed directly with the investigative judge, the private party filing the complaint has to include some indication that the alleged perpetrator is present in France. In the case of Wenceslas Munyeshyaka, for instance, victims included in their complaint an article published in a local French newspaper that mentioned his name in connection with a local event.[247] The judicial authorities can order an investigation to corroborate the allegations that the person is present on French territory.

Presence is only required for an investigation to commence, and can proceed even if the suspect leaves the territory in the course of the investigation. Trials in absentia in universal jurisdiction cases are possible, as in the Ely Ould Dah case, already mentioned.[248] In 1999, while Ely Ould Dah was staying in France, two French organizations filed a complaint on behalf of two victims against him on charges of

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[244] The Criminal Code in articles 211-1 to 212-3 refers to crimes against humanity and genocide. Neither is subject to universal jurisdiction, except as provided for by Laws No. 95-1 of January 2, 1995, and 96-432 of May 22, 1996.

[245] For an overview of the issues involved see documentation by the FIDH available online at http://www.fidh.org/IMG/pdf/ely2005f.pdf (retrieved May 2006).

[246] Code of Criminal Procedure, art. 689.1; Law No. 95-1 of January 2, 1995, art. 2; and Law No. 96-432 of May 22, 1996, art. 2. For further information on presence see FIDH, "Implementing the principle of universal jurisdiction in France," March 2006, [online] http://www.fidh.org/IMG/pdf/universal_juris.pdf (retrieved May 2006).

[247] Human Rights Watch interview with French officials, May 10, 2006.

[248] Code of Criminal Procedure, art. 410 in combination with art. 412.

torture. The lieutenant was first imprisoned and later placed under judicial supervision. In 2000 he managed to escape to Mauritania. The investigating judge continued with the proceedings and ordered a trial before the *Cour d'Assises*. Both the Court of Appeal and the *Cour de Cassation* confirmed the decision of the investigating judge to proceed with the case, even though the accused remained in Mauritania.

2. *Immunities*

Where an investigative judge receives a case involving potential immunity issues, the case is usually referred to the Ministry of Foreign Affairs, which has a special unit dealing with such issues. The case is then referred back to the investigative judge in charge of the case with a determination to proceed or not proceed.[249] In the *Disappeared of the Beach* case, a complaint filed by an NGO against Jean-François Ndengue, chief of the National Police of the Republic of Congo (Brazzaville) for crimes against humanity, enforced disappearances and torture led to the indictment and preliminary arrest of Ndengue on April 1, 2004 while on a private visit to France. The public prosecutor appealed against this decision to the Court of Appeal, which held that Ndengue was entitled to immunity. He was released and left France immediately. The public prosecutor denounced the decision of the investigative judge placing Ndengue in detention as arbitrary, and the French Foreign Ministry justified the decision to release him by the fact that Ndengue was holding a valid diplomatic passport and that he was on an official visit to France.[250]

A warrant for the arrest of Zimbabwean President Robert Mugabe, accused of torture, was issued by a Paris magistrate on February 17, 2003, when Mugabe was visiting Paris for a Franco-African summit. A French court ruled, however, that Mugabe holds immunity from prosecution as a sitting head of state.[251] In the Nezzar case, a complaint was filed against a former Algerian defense minister and member of the High Committee of State, Khaled Nezzar, for torture in Algeria. In response to a press inquiry, the French Ministry of Foreign Affairs said that General Nezzar was on an official mission in France (although he reportedly had no meetings planned with French officials) and the Algerian embassy stated that he was carrying a diplomatic passport. The prosecutor promptly opened a preliminary investigation the same afternoon, but the suspect left a few hours later on a private aircraft.

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[249] Human Rights Watch interview with French officials, May 10, 2006.
[250] See www.fidh.org/afriq/dossiers/sassou/sassou.htm for summary of facts and procedure (French only). (retrieved January 5, 2006).
[251] See Redress, "Universal Jurisdiction Update," April 2003, available online at http://www.redress.org/publications/UJ%20Update%20-%20Apr03%20-%20final.pdf (retrieved May 2006).

In the case against Tunisian vice-consul Khaled Ben Said, accused of torture by a Tunisian national in 2001, the suspect attempted to invoke immunity in connection with his diplomatic status after being identified and located by the French police at the Tunisian Consulate in Strasbourg.[252] However, a French prosecutor did not recognize this claim for immunity and, after a preliminary investigation into the alleged acts, issued proceedings against Ben Said. When the accused fled France, the examining judge issued an international arrest warrant on February 15, 2002.[253]

With respect to allegations that the complaints in the *Ould Dah* case fell under a Mauritanian amnesty law, the judge took the view that "whatever the legitimacy of an amnesty in the context of a local policy of reconciliation, this law has effect only in the territory of the State concerned and is not opposable to third countries in the context of the application of international law".[254] The court stated that recognizing the applicability of a foreign amnesty law in France would be tantamount to a violation by the French national authorities of their international obligations and to negating the very principle and purpose of universal jurisdiction. The magistrate therefore ruled that jurisdiction applied, and issued an indictment against the accused.[255]

3. *Limitation*

Felonies, including the crime of torture, are subject to a limitation period of ten years, starting from the day of the commission of the crime, if during this period no investigative step was taken.[256] Although not yet subject to universal jurisdiction, it is worth mentioning that crimes against humanity and genocide—as contained in the Criminal Code since 1994—are not subject to statutes of limitation.[257]

4. *Subsidiarity*

While the ICTR and ICTY would enjoy primary jurisdiction if they requested it, French courts can exercise jurisdiction concurrently with other jurisdictions. Authorities proceed on the basis that if the other jurisdiction succeeds with a prosecution, they will stop their own investigation, in accordance with the principle of *no bis in idem*. According to

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[252] Human Rights Watch telephone interview with French official, November 22, 2005.
[253] For more information on this case see FIDH at http://www.fidh.org/communiq/2002/tn0403a.htm (retrieved May 2006).
[254] Unofficial translation.
[255] Cour de Cassation, decision N° de pourvoi: 02-85379, October 23, 2002, available online at http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXRXAX2002X10X06X00195X000 (retrieved May 2006).
[256] Code of Criminal Procedural, art. 7. When committed against minors, the limitation period is twenty years, and it does not start running until the minor has "come to age." Art. 7 in combination with art. 706-47.
[257] Criminal Code, art. 213-5.

French officials, this has the advantage of keeping their own proceedings ongoing in case the proceedings in the territorial state do not lead anywhere.[258]

B. Practical Arrangements for the Exercise of Universal Jurisdiction in France

1. Special departments in charge of the investigation and prosecution of international crimes

There is no special police unit that deals exclusively with international crimes in France. The investigative judge or prosecutor in the judicial district where the alleged perpetrator is found or where the complaint is brought has competence to prosecute international crimes cases (territorial competence). In Paris, a number of "special units" have been created to investigate and prosecute terrorism, organized crime, crimes against children and public health-related crimes, among others. International crimes are dealt with by the investigative judges in the "general unit," however, along with ordinary crimes. As no such unit has been created in relation to international crimes, individual investigative judges are seized randomly within their judicial district and are left to manage such cases on their own, without either expert assistance or additional administrative support. As this prevents investigative judges from accumulating experience and expertise, the *Cour de Cassation* in 2001 decided that it was in the interests of the administration of justice to group all cases concerning crimes committed in Rwanda within the jurisdiction of the Paris judicial authorities.[259] However, even within the Paris jurisdiction, no specific competence for these crimes exists and complaints are distributed among the investigative judges of the general unit.[260]

2. Notification

Universal jurisdiction cases that were investigated and/or prosecuted were all initiated by private parties relying on the *parties civiles* provisions of the French Criminal Procedure Code.[261] All complainants in these cases were assisted by NGOs.[262] No special department within the immigration authorities exists to refer cases of alleged perpetrators of international crimes to investigative judges.[263]

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[258] Human Rights Watch interview with French officials, May 10, 2006.
[259] Cour de Cassation, September 26, 2001. For an overview of Rwandan case in France see http://www.fidh.org/article.php3?id_article=857 (retrieved May 2006).
[260] Human Rights Watch interview with French officials, May 10, 2006.
[261] Code of Criminal Procedure, art. 1.
[262] This assistance is based on the Code of Criminal Procedure, art. 2-1, which provides for associations that are committed to assist victims of, inter alia, torture, to exercise the same rights as a private party.
[263] Human Rights Watch interview with French officials, May 10, 2006.

3. Decision to investigate and prosecute

The investigating judge is in charge of the investigation and can require the assistance of the "judicial police."[264] The investigative judge can be seized of a case by the prosecutor, who has a degree of discretion as to whether to refer a complaint to the investigative judge.[265] Should a victim or another third party relying on the *parties civiles* provision decide to file a complaint directly with the investigative judge, an investigation must be initiated taking into account the submissions of the district prosecutor.[266] The complaint is sent to the district prosecutor for the latter's submissions. An investigation can only be refused when the investigative judge is convinced by a submission of the prosecution "that the facts of the case cannot lead to a lawful prosecution for reasons relating to the right to prosecute."[267] If the investigative judge does not investigate a complaint due to the submission of the prosecution, the complainants can appeal that decision to the Chamber of the *Cour d'Assises*, while the prosecutor has the same right should the investigative judge disregard his submission against opening an investigation.[268] Victims thus have direct access to justice, and the first conviction based on universal jurisdiction in France was based on the initiative of the *parties civiles* in the Ely Ould Dah case. An appeal directly against a prosecutor's decision not to investigate is not possible.

The current draft of the legislation implementing the Rome Statute of the International Criminal Court proposes to abrogate the right of private parties to lodge complaints regarding crimes against humanity and war crimes with the investigative judge, and grants this right exclusively to the prosecution. The decision to prosecute is based on a recommendation of the investigative judge, who, once the investigation is complete, takes into account the evidence at his or her disposal. The chamber of the *Cour d'Assises* then decides on the recommendation of the investigative judge.[269]

4. Investigation

Once the investigative judge is seized with a case and the prosecutor's submissions have been received, evidence from open sources and available in France is sought by the investigative judge and the judicial police. This proved to be sufficient in the Ely Ould Dah case, where the conviction in absentia was secured on the basis of witnesses and

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[264] Code of Criminal Procedure, art. 51.
[265] Code of Criminal Procedure, art. 40.
[266] Code of Criminal Procedure, art. 1 and art. 85.
[267] Code of Criminal Procedure, art. 86.
[268] Code of Criminal Procedure, art. 177-2.
[269] Cases involving serious crimes such as torture are usually dealt with by the Cour d'Assises. Code of Criminal Procedure, arts. 231 to 380.

other evidence available in France.[270] To date, no investigation based on universal jurisdiction has been carried out by French officials in another country. This is due to a variety of factors depending on the cases, including lack of cooperation by the authorities of the territorial state, or lack of resources available to the judicial police.[271]

C. Cooperation

1. International cooperation

No use has yet been made of the EU Network or the Interpol working group on International Crimes to exchange experiences gained by other national authorities when investigating abroad. When French officials sent a letter rogatory to their counterparts in Rwanda to obtain permission to investigate as well as assistance from local authorities, it took three years to receive a reply, which was negative. Consequently, no investigation could be carried out and the case is still under investigation. The procedure to establish cooperation is complex and requires follow-up from those in charge of transmitting the request for cooperation. While a contact point for international cooperation in criminal matters exists within the Ministry of Justice, there are no standard procedures in place on how to handle such requests.

D. Role and Rights of Victims and Witnesses

1. Victims—Compensation and legal representation

Civil claims can be brought as part of criminal prosecutions, including those based on universal jurisdiction. Article 3 of the Criminal Procedure Code provides that "the civil action may be exercised at the same time as the public prosecution and before the same court. It is admissible for any cause of damage, whether material, bodily or moral, which ensues from the actions prosecuted." According to article 2, civil litigation can be pursued by anyone for damages suffered as a result of crimes under French law. Victims can claim compensation from the alleged perpetrator of the crimes, or, in another procedure, from the "State Compensation Scheme," which is in place for, inter alia, serious crimes.[272] Victims (bearing French nationality or not) wishing to exercise their right as *parties civiles* and/or as civil claimants are entitled to legal representation, the costs of which are covered by legal aid where they cannot provide for it themselves.[273]

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[270] For an overview of the issues involved see documentation by the FIDH at http://www.fidh.org/IMG/pdf/ely2005f.pdf (retrieved May 2006).
[271] Human Rights Watch interview with French officials, May 10, 2006.
[272] Code of Criminal Procedure, art. 475-1. For further information on victims' rights in French criminal proceedings see MEI Brienen and E.H. Hoegen (2000) *Victims of Crime in 22 European Criminal Justice Systems*, [online] http://www.victimology.nl/onlpub/Brienenhoegen/bh-ch8france.pdf (retrieved May 2006).
[273] Code of Criminal Procedure, art. 53-1.

2. *Witnesses*

While the investigative judge can taken written statements from witnesses, French court proceedings are conducted on the principle of orality. Therefore, the key witnesses will be heard by the trial judge during the trial. It is not permitted under French procedural law to videotape witness statements and to rely on these during trial. Instead, witnesses could testify via video-link.[274] Certain specific provisions exist in French law concerning the protection of witnesses in cases of grave crimes and where there is a serious risk to the witnesses' safety providing, for instance, witnesses with the possibility to give testimony anonymously.[275] Further, the intimidation or threatening of witnesses is considered an aggravating circumstance and will lead to a more severe punishment of the offender.[276]

E. Fair Investigation and Trial

Investigative judges are obliged to investigate inculpatory and exculpatory evidence.[277] Representation of the defendant is guaranteed by providing legal aid where the accused is not able to pay for it.[278] The defense lawyer must be able to challenge all evidence relied upon by the prosecution during trial, as the trial judge must only reach a decision based on the evidence which has been laid before the judge during trial ("principle of contradiction"). Anyone convicted in absentia can file an application with the court to have the enforcement of the judgment set aside.[279]

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[274] Code of Criminal Procedure, art. 706-61.
[275] Code of Criminal Procedure, art. 706-58.
[276] Criminal Code, arts. 222 and 322.
[277] Code of Criminal Procedure, art. 81.
[278] Legal Aid Act (Law No. 91-647 of July 10, 1991), art. 2, reads as follows: "Natural persons with insufficient means to enable them to assert their rights in the courts shall be eligible for legal aid. Such aid may be full or partial."
[279] Code of Criminal Procedure, arts. 489-493.

IX. Germany

The German Code of Crimes against International Law (CCAIL),[280] which came into force on June 30, 2002, provides for universal jurisdiction over genocide, crimes against humanity and war crimes. International crimes committed before this date have to be considered under paragraph 6 number 1 of the German Criminal Code, providing for universal jurisdiction over genocide, and paragraph 6 number 9, which provides for universal jurisdiction over international crimes that Germany has a treaty obligation to prosecute.[281] Except for the crime of genocide,[282] there was no implementing legislation prior to June 30, 2002, and all complaints regarding international crimes thus had to be investigated and prosecuted on the basis of crimes defined in the German Criminal Code.[283] Several international crimes committed in the former Yugoslavia were investigated and prosecuted by German authorities in the 1990s, but no complaints have been investigated since the new Code came into force. A new provision in the Criminal Procedure Code provides the federal prosecutor with considerable prosecutorial discretion.[284] Cases against U.S. Defense Secretary Donald Rumsfeld, former Chinese President Jiang Zemin and former Uzbek Minister of Interior Zokirjon Almatov, have not been investigated as the federal prosecutor relied on the discretion provided for in the Criminal Procedure Code.

A. Jurisdictional Challenges

1. Presence

Before 2002 German courts held with regard to crimes committed in the former Yugoslavia that German authorities could only exercise universal jurisdiction where the suspect was present in Germany, or some other "legitimizing link" existed between the

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[280] Act introducing the Code of Crimes Against International Law (*Gesetz zur Einführung des Völkerstrafgesetzbuchs*), BGBl.2002 I, P 2254 (Federal Law Gazette of the Federal Republic of Germany), June 26, 2002, official English translation available online at http://www.iuscrim.mpg.de/forsch/legaltext/vstgbleng.pdf (retrieved March 2006). For comments see *Bundestag Drucksache* 14/8524, March 13, 2002, available in German at http://www.iuscrim.mpg.de/forsch/straf/docs/BT-Drucks.%20148524%20VStGB.pdf (retrieved March 2006).

[281] German Criminal Code (*Strafgesetzbuch*), unofficial English translation available online at http://www.iuscomp.org/gla/statutes/StGB.htm (retrieved March 2006).

[282] Previously art. 220a, repealed by the CCAIL.

[283] For instance, grave breaches of the Geneva Conventions as murder pursuant to paragraph 211of the Criminal Code or unlawful deprivation of personal liberty pursuant to paragraph 239 of the Criminal Code. In *Public Prosecutor v. Djajic*, the Bavarian High Court (*Bayerisches Oberstes Landesgericht*) in its judgment of May 23, 1997, convicted Novislaw Djajic, a member of the Bosnian Serb forces, for aiding and abetting manslaughter, instead of the war crime of willful killing.

[284] Code of Criminal Procedure (*Strafprozessordnung*), art.153f, introduced with the coming into force of the CCAIL, available (in German) at http://www.gesetze-im-internet.de/bundesrecht/stpo/gesamt.pdf (retrieved March 2006).

crime and Germany.[285] This requirement was thought to have been overcome by the entry into force of the CCAIL, which does not make the exercise of universal jurisdiction by German authorities dependent on the presence of the suspect or any other link to Germany.[286] However, paragraph 153f of the Criminal Procedural Code, introduced in conjunction with the CCAIL, provides the federal prosecutor with discretion to refrain from starting an investigation where the suspect's presence cannot be anticipated.[287] Although not required to start an investigation, practitioners indicated to Human Rights Watch that an investigation is far more likely to start in cases where the suspect is present in Germany, since this would increase the likelihood of a successful investigation.[288] The suspect's presence or anticipated presence makes an investigation obligatory, provided that no other jurisdiction is carrying out a genuine investigation of the crimes.[289] This follows from the principle of not providing a safe haven to perpetrators of international crimes.

2. *Immunities*

While the CCAIL is silent on the issue of immunity, Germany's Judiciary Act (*Gerichtsverfassungsgesetz*) does recognize two forms of immunity: article 20 (1) confers immunity on representatives of other states and their delegations and those present in Germany by invitation of Germany. Article 20 (2) recognizes general rules of public international law concerning sovereign immunity.[290] Relying on this latter provision, the federal prosecutor in 2003 accepted immunity for the former Chinese President Jiang Zemin. The prosecutor adopted an expansive reading of the ruling of the International Court of Justice in the case of the Democratic Republic of the Congo v. Belgium ("Arrest Warrant" case)[291] as conferring immunity on former as well as current heads of state/government and foreign ministers.[292]

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[285] The Federal Supreme Court in the case of Nicola Jorgic, April 30, 1999.

[286] Section 1 of the CCAIL provides for absolute universal jurisdiction: "This Act shall apply to all criminal offenses against international law designated under this Act, to serious criminal offenses designated therein even when the offense was committed abroad and bears no relation to Germany."

[287] Code of Criminal Procedure, para. 153f, (2), No 2. For a commentary in German to paragraph 153f see *Bundestag Drucksache* 14/8542, March 13, 2002, pp. 37-38.

[288] Human Rights Watch interview with German officials, December 12, 2005.

[289] Code of Criminal Procedure, para. 153f, (2).

[290] A German version of the *Gerichtsverfahrensgesetz* is available online at http://bundesrecht.juris.de/gvg/.

[291] *Case concerning the Arrest Warrant of 11 April 2000* (The Democratic Republic of Congo v. Belgium), Judgment of April 14, 2002, available online at http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF (retrieved March 2006).

[292] A copy of the decision of the federal prosecutor is online available (in German) at http://www.diefirma.net/download.php?8851010ea2af5be8f76722e7f35c79de&hashID=44b8c6eba6a3530e554210fa10d99b3a (retrieved May 2006).

3. Limitation

Under the CCAIL, none of the crimes referred to are subject to statutes of limitation.[293] As no implementing legislation existed prior to 2002 except in cases of genocide, other international crimes committed before the enforcement of the CCAIL, such as torture and grave breaches of the Geneva Conventions, have to be investigated and prosecuted on the basis of the German Criminal Code and consequently are subject to a statute of limitations.[294]

4. Subsidiarity

The German federal prosecutor will only exercise universal jurisdiction if the competent authorities of the territorial state, or of the state of nationality of the suspect or victim, refrain from carrying out a genuine investigation and where the International Criminal Court or another competent international tribunal does not investigate the case.[295] These limiting considerations stopped the investigation of a complaint filed by Iraqi torture victims against Donald Rumsfeld and others with the federal prosecutor. Referring explicitly to paragraph 153f, the prosecutor argued that the crimes referred to in the complaint (war crimes against persons and grievous bodily harm), were already under investigation by U.S. authorities and therefore the principle of subsidiarity would not permit German authorities to investigate the complaint. According to the prosecutor's argument, the principle of subsidiarity does not permit national authorities to take into account whether national authorities are investigating the individual referred to in the complaint but rather whether the U.S. authorities were investigating the *complex* as a whole.[296] As the federal prosecutor answered this question in the affirmative, he did not consider it possible or necessary for German authorities to start an investigation.

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[293] Section 5 of the CCAIL: "The prosecution of serious criminal offenses pursuant to this Act and the execution of sentences imposed on their account shall not be subject to any statute of limitation."

[294] Serious Bodily Harm as torture would be subject to a limitation period of twenty years. See Criminal Code, para. 78 (3) 2 in combination with para. 224.

[295] Human Rights Watch interview with German officials, December 12, 2005. See also commentary to the CCAIL, *Bundestag Drucksache* 14/8542, March 13, 2002, pp. 37-38.

[296] The German federal prosecutor referred to investigations and prosecutions carried out by U.S. authorities against low-level soldiers as constituting a genuine investigation; the prosecutor interpreted the principle of complementarity of the Rome Statute to mean that the national authorities are required to consider the concept of prosecution on the basis of the whole complex and not in relation to an individual alleged criminal and his special part in the deed. For an English translation of the prosecutor's decision see http://www.ccr-ny.org/v2/legal/september_11th/docs/german_appeal_english_tran.pdf (retrieved February 2006).

B. Practical Arrangements for the Exercise of Universal Jurisdiction in Germany

1. Special departments in charge of the investigation and prosecution of international crimes

The crimes committed during the wars in the former Yugoslavia led to a wave of refugees arriving in Germany, among them a number of suspected perpetrators of international crimes. A total of 128 investigations into the crimes committed during the wars have been conducted since 1993, and led to the establishment of a specialized unit within the Federal Criminal Police Office (*Bundeskriminalamt*, or BKA) for the investigation of war crimes committed in the former Yugoslavia.[297] German authorities recognized the need to concentrate the competence of experienced practitioners within one unit in order to deal with the challenges of investigating international crimes while also acting as a contact point for both national and international police investigators.[298]

Since 2001, however, the number of BKA staff working on international crimes has been gradually reduced, such that now only one investigator works on international crimes on a daily basis. The investigator is in charge of international crimes and serves as a contact point between the BKA and the federal prosecutor.

The federal prosecutor is in charge of the investigation and prosecution of international crimes. It deals with all cases of international crimes under the CCAIL and with most complaints regarding crimes committed before 2002.[299] Where the federal prosecutor decides that an investigation is necessary, it will usually refer the complaint to the BKA and supervise the investigation.

2. Notification

No special department within the immigration authorities exists, and most complaints to date filed under the CCAIL have been filed by private parties. The German federal prosecutor so far has not considered an investigation on the basis of newspaper reports,

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[297] Claudia Ilgner, investigator of the Federal National Police, "*Besonderheiten und Problemstellungen bei Strafverfolgungsmassnahmen und kriminalpolizeilichen Ermittlungen wegen Völkermordes, Verbrechen gegen die Menschlichkeit und Kriegsverbrechen*," presentation given during the conference "*Der Internationale Strafgerichtshof - fünf Jahre nach Rom*," Berlin, 2003, documentation available at http://files.institut-fuer-menschenrechte.de/488/d30_v1_file_40e162450cb01_Theissen_Nagler_2004_IStGH_Dokumentation.pdf (retrieved March 2006).

[298] Ibid

[299] The competence over international crimes as in the CCAIL lies exclusively with the federal prosecutor, according to paragraph 142 in combination with paragraph 120 I No. 8 of the Judiciary Act ("*Gerichtsverfahrensgesetz*").

as these are deemed insufficient information for a successful investigation.[300] Only a small number of complaints concerning international crimes have been received so far, a fact that is invoked to justify the low number of people working exclusively on international crimes.[301]

3. *Decision to investigate and prosecute*

The decision to investigate and prosecute a complaint of the CCAIL is taken exclusively by the federal prosecutor. As noted above, a new provision in the Code of Criminal Procedure gives the prosecutor the discretion to decline to open an investigation where the suspect is not on (or anticipated to be on) German territory or where the territorial state or an international tribunal is exercising jurisdiction over the matter.[302] Where the suspect is present or likely to be present, the prosecution is obliged to investigate unless a country with priority jurisdiction is already carrying out a genuine investigation.

The case against Jiang Zemin illustrated that where the suspect is not present in Germany, the prosecution will take into account other aspects such as the practical ability of German investigators to investigate the complaint with a view to prosecuting the individual.

Practitioners indicated to Human Rights Watch that the overall context is considered, and that the possibility of questioning witnesses in other European countries is disregarded even where the presence and identity of such witnesses in neighboring countries is specified by the complainants. A decisive element in the exercise of prosecutorial discretion is therefore the suspect's presence, in combination with the principle of subsidiarity and the ease with which German authorities are able to investigate the crimes.[303] The federal prosecutor's decision not to open an investigation against former Uzbek Minister of Interior Zokirjon Almatov illustrates the approach towards international crimes favored by the federal prosecutor. The prosecution argued that the likelihood of a successful investigation was non-existent and that therefore no investigation would be opened.[304]

When the complainants in the case against Donald Rumsfeld and others tried to appeal against the decision of the federal prosecutor not to initiate an investigation, the Higher

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[300] Human Rights Watch interview with German officials, December 12, 2005.
[301] Ibid.
[302] Code of Criminal Procedure, para. 153f, (2), No. 2.
[303] Human Rights Watch interview with German officials, Meckenheim, December 12, 2005.
[304] See press statement issued by the federal prosecutor (*Generalbundesanwalt*) on March 30, 2006, [online] http://www.generalbundesanwalt.de/news/index.php?Artikel=191&Thema=7&Start=0 (retrieved April 2006).

Regional Court dismissed the appeal as inadmissible.[305] Accordingly, complainants do not have the opportunity to appeal to the courts against the decision of the federal prosecutor not to investigate according to 153f Code of Criminal Procedure.[306] Instead complainants must direct their complaint to the Ministry of Justice in a purely administrative procedure.

4. Investigation

The BKA will usually be ordered by the federal prosecutor to investigate complaints filed under the CCAIL.[307] However, as mentioned above, there have been no such referrals as yet. Prior to the coming into force of the CCAIL, German practitioners in 128 cases investigated crimes committed in the former Yugoslavia and heard 4,500 witnesses during the period from 1993 to 2003, including a large number of refugees in Germany and Austria as well as people who had returned to Bosnia-Herzegovina. In light of the considerable experience German practitioners obtained in the investigation of international crimes, and the fact that a specialized unit has existed in this capacity, the current commitment does not seem to correspond to that once shown on a practical level by German authorities.

C. Cooperation

Each complaint is considered first and foremost on the basis of its possible investigation within Germany and therefore cooperation is only considered once it has been decided that an investigation will take place.

1. EU Network

A contact point within the Ministry of Justice deals with all requests for cooperation in international criminal law. As such the contact point has dealt with requests from other countries, but due to a lack of investigations carried out by German authorities he has not yet had to transfer requests regarding international crimes on behalf of German authorities to another country.[308]

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[305] For an English translation of the decision see http://www.ccr-ny.org/v2/legal/september_11th/docs/German_HigherRegionalCourt_decison.pdf (retrieved February 2006).
[306] Code of Criminal Procedure, para. 172 (2).
[307] Human Rights Watch interview with German officials, December 12, 2005.
[308] Human Rights Watch telephone interview with German official, November 7, 2005.

2. Interpol

Interpol is considered a useful platform for sharing information and expertise, but in the absence of active cases it is not used in the investigation of international crimes.

D. Role and Rights of Victims

1. Victims - Compensation and legal representation

Victims can participate in criminal proceedings as joint plaintiffs and theoretically claim compensation from the accused in criminal proceedings, provided that their claim will not require separate evidence and is not too complex.[309] Otherwise, compensation must be pursued in civil proceedings. Victims who cannot pay for their legal representation are entitled to legal aid, the amount of which has to be decided by the relevant court.[310]

Victims are primarily witnesses in German proceedings and as such, their access to justice is limited to the possibility of filing a complaint with the federal prosecutor. The detailed evidence necessary for a complaint that will convince the federal prosecutor to initiate an investigation of the complaints will generally require legal assistance or representation.[311] A complaint filed by a victim or an NGO must contain a selection of evidence, witnesses and some persuasive indications that the accused is in Germany. It must also take account of any political dimensions to the complaint.[312]

E. Fair Investigation and Trial

Any investigation of international crimes under the CCAIL is carried out under the supervision of the federal prosecutor. It is the responsibility of the prosecution to investigate inculpatory and exculpatory evidence.[313] During the investigation, the defense is entitled to be present when statements are taken by the court from the accused or any other witness, and to obtain access to any expert opinion.[314] Once the investigation has been completed, the entire dossier of evidence that the prosecution will rely upon before the court must be made available to the defense.[315] The defense can request the police to carry out further investigation and where the prosecution does not comply, the defense can apply for a court order for further investigation.[316] The court therefore has a

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[309] Code of Criminal Procedure, para. 406 (1).
[310] Code of Criminal Procedure, para. 404 (5).
[311] Human Rights Watch telephone interview with German lawyer, September 21, 2005.
[312] Human Rights Watch interview with German officials, December 12, 2005.
[313] Code of Criminal Procedure, para. 160 (2).
[314] Code of Criminal Procedure, para. 168c (2), (3).
[315] Code of Criminal Procedure, para. 147.
[316] Code of Criminal Procedure, para. 201.

supervisory role from the moment the prosecution decides to indict the accused. The accused is entitled to legal aid where he or she cannot afford to pay for it.[317]

[317] Code of Criminal Procedure, paras.140-150.

X. Netherlands

Under the International Crimes Act of June 19, 2003 (ICA),[318] Dutch courts can exercise universal jurisdiction over genocide, war crimes, crimes against humanity and torture provided that the perpetrator is present in the Netherlands and that the crimes were committed after the entry into force of the act on October 1, 2003.[319] International crimes committed before that date have to be dealt with under previous law, the Wartime Offenses Act of July 10, 1952, the Genocide Convention Implementation Act of 1964 and the Act implementing the Convention against Torture of 1988.[320]

Since 2001 prosecutions based on universal jurisdiction and leading to a conviction include the case of Sebastien Nzapali, a Congolese national who was sentenced to two-and-a-half years of imprisonment on April 7, 2004, for leading death squads in Kinshasa between 1990 and 1995.[321] In October 2005, two perpetrators from Afghanistan were condemned to twelve and nine years of imprisonment respectively for their involvement in war crimes and torture in Afghanistan.[322] Proceedings are currently suspended in a case against former Suriname President Desi Bouterse, accused of playing a key role in the murder of fifteen opposition political party members in Suriname. In 2001 the Dutch Supreme Court found that the accused could not be tried in absentia, and that the Act Implementing the Torture Convention could not be applied retroactively.[323]

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[318] Act of June 19, 2003, containing rules concerning serious violations of international humanitarian law, official English translation available online at http://www.minbuza.nl/default.asp?CMS_ITEM=48969E53AB41497BB614E6E9EAABF9E0X3X35905X73 (retrieved March 2006).

[319] International Crimes Act, sections 2 (1) (a), (c), 2 (3), in conjunction with sections 3 to 8 and section 10 defining the crimes. The introduction to the act emphasizes that the provisions of the act cannot be applied ex post facto. See http://www.minbuza.nl/default.asp?CMS_ITEM=MBZ459385 (retrieved March 2006).

[320] The Wartime Offenses Act (*Wet Oorlogsstrafrecht*) has been modified by the ICA, while both the Genocide Convention Implementation Act (*Uitvoeringswet genocideverdrag*) and the Torture Convention Implementation Act (*Uitvoeringswet folteringverdrag*) have been repealed by articles 19 and 20 of the ICA respectively. Article 21 (1) provides for prosecutions for genocide or torture that had been initiated before the entry into force of the ICA to continue under the previous legislation. Article 21 (2) refers to torture offenses committed before October 1, 2003, to be punishable according to provisions of the Torture Convention Implementation Act.

[321] Rotterdam District Court, April 7, 2004, A0 7287, Rotterdam, 000050-30; official English translation available online at http://www.coeicl.de/dokumente/NL_Nzapali_Judgement.pdf (retrieved March 2006).

[322] The Hague District Court, October 14, 2005, AV 1489 and AV 1163, Gravenhage, 09/751005-04; official English translation of the judgments of both cases are available online at http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp?searchtype=ljn&ljn=AV1163&u_ljn=AV1163 and http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp?searchtype=ljn&ljn=AV1489&u_ljn=AV1489 (retrieved March 2006).

[323] On December 18, 2001, the Supreme Court reversed a decision of the Amsterdam Appeal Court that ordered the public prosecutor to open an investigation into Bouterse's alleged involvement. See http://www.iccnlinbuzanl.econom-l.com/default.asp?CMS_ITEM=5813F8A1C1D44C3EB9120730BFD9318DX3X55889X32&CMS_NOCOOKIES=YES (retrieved March 2006).

A. Jurisdictional Challenges

1. Presence

The ICA expressly requires the suspect's presence in the Netherlands for Dutch authorities to carry out an investigation based on universal jurisdiction.[324] The legislation does not specify at which stage of a case the suspect has to be present for an investigation to start, but practitioners indicated to Human Rights Watch that an investigation will only be opened in cases where the suspect is present in the Netherlands.[325] It is often challenging for individual victims to prove this presence, particularly for those who are not represented by a lawyer or who do not have the support of an NGO. Furthermore, the presence must be voluntary and Dutch courts will not issue an extradition request to secure a suspect's presence in the Netherlands. In *Bouterse*, the Supreme Court found that the accused, who was no longer a Dutch national following Suriname's independence from the Netherlands in 1975, could not be prosecuted in the Netherlands unless he appeared voluntarily on Dutch territory.[326]

2. Immunities

The ICA recognises immunity in accordance with international law for foreign heads of state and government and ministers of foreign affairs. This immunity is expressly limited to the time they are in office. Other persons enjoy immunity from the prosecution of these crimes in so far as it is recognized under customary international law or under any convention applicable within the Netherlands.[327]

3. Limitations

Statutes of limitations as contained in articles 70 and 76 of the Criminal Code do not apply to the crimes referred to in the ICA, with the exception of some war crimes referred to in section 7(1) of the ICA.[328]

4. Subsidiarity

Dutch authorities will only exercise universal jurisdiction if neither the territorial courts nor the ICC is exercising jurisdiction.

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[324] International Crimes Act, section 2 (1) (a).
[325] Human Rights Watch interview with Dutch officials, Special Unit, October 6, 2005; Human Rights Watch interview with Dutch officials, Rotterdam, October 4, 2005.
[326] A brief summary of the case is available in English online at http://www.iccnl.nbuzanl.econom-l.com/default.asp?CMS_ITEM=5813F8A1C1D44C3EB9120730BFD9318DX3X55889X32&CMS_NOCOOKIES=YES (retrieved March 2006).
[327] International Crimes Act, section 16.
[328] International Crimes Act, section 13.

B. Practical Arrangements for the Exercise of Universal Jurisdiction in the Netherlands

1. Special departments in charge of the investigation and prosecution of international crimes

a. Police

In 1998, a specialized war crimes team, NOVO,[329] was set up by the Dutch government following an influx of alleged perpetrators seeking refuge in the Netherlands. After a negative evaluation of the NOVO team's performance in 2002,[330] the war crimes unit now forms part of the Dutch national crime squad and was integrated into the *Landelijk Parket* (Prosecution Services). The capacities of the war crimes unit were doubled, and currently thirty-two people are working in the unit on a day-to-day basis on international crimes, ranging from administrative staff to criminal intelligence officers and investigators. The unit has a pool of experts at its disposal, including chemical weapons experts, criminal scientists, historians and anthropologists. Rather than employing these experts on a permanent basis, the unit recruits them as needed.[331] Since the evaluation in 2002, the strategy of investigating international crimes has changed and the emphasis is now on investigating abroad wherever this is feasible.[332] Cooperation with the immigration authorities, ministries and in particular the Prosecution Service has improved.[333] Following these changes, three perpetrators of international crimes have been brought to justice on the basis of universal jurisdiction, resulting in a positive evaluation of the team's performance in February 2006.[334]

b. Prosecution

Several prosecutors form a department in the *Landelijk Parket*, working in close cooperation with the war crimes unit. The department became operational in 2003 following a decision taken by the Ministry of Justice to extend the mandate of the National Prosecutor's Office in Rotterdam to international crimes.[335] Six staff in the

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[329] Nationaal Opsporingsteam Voor Oorlogsmisdriven.

[330] The evaluation was carried out by the University of Utrecht on behalf of the Ministry of Justice. A summary of the evaluation is available in English online at http://www.wodc.nl/images/ewb02nat_Summary_tcm11-25485.pdf (retrieved March 2006).

[331] Human Rights Watch interview with Dutch officials, October 6, 2005.

[332] Human Rights Watch interview with Dutch officials, October 6, 2005.

[333] Evaluation carried out over the period 2002-2006, summary in English available online at http://www.justitie.nl/english/press/press_releases/archive/archive_2006/60313Improvement_in_war_crimes_investigation.asp (retrieved March 2006).

[334] Summary in English available online at http://www.justitie.nl/english/press/press_releases/archive/archive_2006/60313Improvement_in_war_crimes_investigation.asp (retrieved March 2006).

[335] Human Rights Watch email communication with staff of the *Landelijk Parket* in Rotterdam, January 27, 2006.

department work on international crimes: two prosecutors, two legal assistants (one of whom is an expert in international criminal law), and two administrative assistants.[336]

2. Notification

The two primary modes of notification of international crimes are the immigration services and the media.[337] Persons seeking asylum in the Netherlands are screened by the Immigration and Naturalization Service (IND) for possible involvement in international crimes. The screening forms part of the application of the definition of "refugee" in the 1951 Refugee Convention.[338] The Dutch IND has a special unit dealing exclusively with suspected "1F" cases. Where there is a suspicion of involvement in international crimes after two screening interviews, a third interview focusing exclusively on 1F issues will follow. If an asylum seeker's claim is rejected on the grounds of alleged involvement in an international crime, the file is then sent to the prosecution authorities. One criterion that can place an asylum seeker on the list of 1F files is his or her former profession: in the 2005 Afghan war crimes case, the two accused were placed on the list because of their former rank as generals in the Afghan army.

In 2003, seventy 1F cases were referred to the prosecution services, 82 percent of which were not investigated after applying certain criteria,[339] while the remaining 18 percent are still being considered. In the case of Nzapali, the immigration authorities refused to grant him refugee status on the basis of his possible involvement in international crimes. The police commenced investigations after some of his former victims recognized Nzapali and denounced him to the police.[340]

3. Decision to investigate and to prosecute

Although the war crimes unit and prosecution authorities discuss cases together, each has their own role: while the prosecution authorities look at a case from the judicial point of view, the police assess the evidence and the chances of a successful investigation. A list of criteria drawn up by the unit for every case involving international crimes is available to the prosecution to enable it to reach a decision about whether to

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[336] Ibid.
[337] Human Rights Watch interview with Dutch officials, October 6, 2005.
[338] Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954, art 1. Article 1F of the Refugee Convention renders an asylum seeker ineligible for refugee status if he or she has committed a "crime against peace, a war crime, or a crime against humanity" or a "serious non-political crime."
[339] Human Rights Watch interview with Dutch official, October 6, 2005.
[340] See Human Rights Watch, "Netherlands: Congolese Torturer convicted," *A Human Rights Watch Press Release*, April 7, 2004, [online] http://hrw.org/english/docs/2004/04/07/congo8406.htm.

investigate a complaint.[341] Where legal problems or a lack of evidence do not pose barriers, the prosecution considers a complaint on the basis of its mission statement: that the Netherlands should not become a safe haven for perpetrators of international crimes and should not permit its own nationals to go unpunished for international crimes committed abroad.[342]

Where the prosecution decides not to investigate, the complainant is informed and can appeal to the Appeals Court, which will consider the complaint and, where it considers it appropriate, order the prosecution to start an investigation.[343]

4. *Investigation*

The war crimes unit is proactive in the field—in addition to conducting national research in open sources at the outset of the investigation, the unit travels to the scene of the crimes and investigates on site. In past cases, 80-90 percent of the evidence was gathered abroad.[344] Whenever the unit considers an investigation of international crimes, staff take into account the possibility of going abroad and any associated risks and problems. Before going abroad they look for evidence in the Netherlands, establish contact with exile communities and review NGO reports. When they go abroad, they make several trips: first, an informal trip is organized to establish contacts with the relevant authorities in countries with which no mutual legal assistance agreement exists or with countries where the security of everyone involved cannot be guaranteed. In difficult cases the unit sends two criminal intelligence officers who look for evidence and establish contacts with potential witnesses. Once the investigation by the unit is complete, they present their findings to an investigative judge. Then the prosecution service, an investigative judge and, where possible, the defense lawyer, travel to the territorial state to take statements of the witnesses found by the war crimes unit and carry out further investigations.[345] In the case of Nzapali, Dutch officials spent several months pursuing an investigation in the Democratic Republic of Congo, in collaboration with Congolese authorities and NGOs.[346]

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[341] Matters to consider with respect to every complaint include: possibility of investigation, presence of the suspect, possibility of proving that the suspect bears responsibility for the alleged crimes, severity of the crime, level of involvement of the suspect, prospects of the territorial state cooperating with Dutch authorities, and prospects of completing the case.

[342] Human Rights Watch interview with staff of the *Landelijk Parket*, October 4, 2005.

[343] Code of Criminal Procedure 1994, arts. 12–13.

[344] Human Rights Watch interview with Dutch official, October 6, 2005.

[345] Human Rights Watch interview with Dutch official, October 6, 2005.

[346] See Human Rights Watch, "Netherlands: Congolese Torturer convicted."

C. Cooperation

1. National cooperation

There is cooperation between the immigration authorities, the war crimes unit and the prosecution services in the investigation and prosecution of universal jurisdiction cases. Complexity arises due to the need for coordination between the Prosecution Services and the Ministries of Justice and Foreign Affairs in the execution of requests for legal assistance in foreign countries. Each ministry evaluates requests for cooperation in light of its own mandate and priorities. The Ministry of Justice has a special department responsible for mutual legal assistance in criminal matters, and a policy and legal advisor dealing exclusively with requests from the war crimes unit and units from other countries. The department looks at the legal, policy and ethical implications of requests for legal assistance.[347]

EU mechanisms have streamlined requests for legal cooperation among EU member states, because they permit such requests to be made directly to the relevant judicial authorities. However, where corresponding authorities do not exist in the territorial state, where there is no mutual assistance treaty or where the safety of investigators, witnesses and victims cannot be guaranteed, an alternative approach may be used.[348] The approach favored by Dutch investigators in the past has been to present their case and related requests to the Dutch embassy or consulate in the relevant territorial state, which then attempts to facilitate contacts with local authorities or witnesses. In establishing contact for an extraterritorial investigation the emphasis was placed on ensuring compliance with the principles of international law and respecting the sovereignty of the territorial state.

2. International cooperation

a. EU Network and Interpol

The EU Network is utilized as a mechanism for sharing information and experiences, and to discuss challenges faced in relation to legal assistance.[349] Interpol is engaged as a source of practical guidance in relation to investigations.

b. Cooperation with the territorial state

Investigations have taken place in various countries including Afghanistan, Iraq, the Democratic Republic of Congo, Liberia, and Sierra Leone. Because investigations often

[347] Human Rights Watch interview with Dutch official, October 4, 2005.
[348] Human Rights Watch interview with Dutch official, October 4, 2005.
[349] Human Rights Watch interview with Dutch official, October 4, 2005.

involve more than one country, it has proved impossible for the war crimes unit to contact the relevant Ministry of Justice or Ministry of Foreign Affairs for every piece of evidence they require from foreign states. In one case they received a reply from an authority of another country more than a year after their original request for assistance.[350] Instead, investigators travel directly to the relevant country and present their case to the Dutch embassy and use embassy staff to establish contact with relevant people. Investigators also use their time in the territorial state to explain why they are pursuing the crime, and to encourage witnesses to come forward. They take translators from the Netherlands after screening them carefully for any potential involvement in the case or relationship to witnesses.

D. Role and Rights of Victims and Witnesses

1. Victims—Compensation and legal representation

Victims of international crimes can bring a claim for compensation in criminal proceedings, provided that their claim is not too complex and can be determined by the court during criminal proceedings.[351] (The majority of victims in the Afghan case lived in the territorial state and none lived in the Netherlands. In the Nzapali case, victims who lived in the Netherlands denounced Sebastien Nzapali to the Dutch police. The issue of compensation did not arise in either case, and the investigators do not raise the issue of compensation with victims.[352])

Once the prosecution has been informed or receives a name of a victim, they will contact the victim and explain the proceedings, the rights of the victim and suggest an informal meeting. This includes information on the possibility of appeal should the prosecution decide not to investigate. The decision concerning whether to investigate can take months. The lawyer can assist the victim in lodging a complaint and an appeal if necessary. Legal representation can also push the prosecution to open an investigation, especially where the investigation is politically sensitive.[353]

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[350] Human Rights Watch interview with Dutch officials, October 6, 2005.

[351] Code of Criminal Procedure, section 51ff. The position of victims has been strengthened by the introduction of the Victim Act Terwee (the act is commonly known under the name Terwee, after the chair of the Act's preparatory committee, Mrs. Terwee-van Hilten), which was incorporated into the Code of Criminal Procedure, see: MEI Brienen and EH Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, available online at http://www.victimology.nl/onlpub/Brienenhoegen/bh-ch17netherlands.pdf (retrieved June 2006).

[352] Human Rights Watch interview with Dutch officials, Driebergen, October 6, 2005.

[353] Human Rights Watch telephone interview with Dutch lawyer, October 25, 2005.

2. *Witnesses*

The war crimes unit investigates in the Netherlands within the relevant emigré community and tries to establish contacts there first. Once one witness is identified, this witness is relied on to identify other witnesses in the Netherlands, the territorial state, or elsewhere. The investigators have to find witnesses for both parties, but first look for incriminating witnesses, and only search for defense witnesses at the end of the investigation. This is in order to prevent defense witnesses from warning the suspect that he or she is being investigated against, and thus risking the suspect's escape.

Dutch investigators interview witnesses in Dutch embassies or diplomatic missions in the territorial state (in one case, an interview took place at the headquarters of the UN peacekeeping mission in a state). In order to reduce witnesses' exposure to publicity and help preserve confidentiality, witnesses are sometimes provided with pretexts to visit the place of the interview, and investigators avoid being seen in public with witnesses.[354] Other means of protection have included providing witnesses with mobile phones, relocating witnesses, or providing them with financial means to hide for a certain period. Investigators warn witnesses of potential threats, and explain the limited ability of Dutch investigators to protect the witness in the territorial state.

It is common for Dutch courts to have witness testimonies read out during trial. In the recent Afghan war crimes trial, only one witness from overseas testified in person, while testimonies from other Afghan witnesses were read out in court. According to the prosecution, there are several reasons why witnesses are not heard in person in court, including a lack of funds available to provide for travel and accommodation, and the fact that witnesses often do not have a passport and therefore cannot travel to the Netherlands. In past cases it has been more convenient for Dutch officials to travel to the territorial state to take testimonies on site. No witnesses from Congo testified in person in the Nzapali trial. Witness testimonies were taken by a Dutch magistrate and the lawyer for the accused, who went to Congo to facilitate the questioning of witnesses. The testimonies were subsequently read out at the trial in the Rotterdam district court.

E. *Fair Investigation and Trial*

The accused is entitled to legal aid where he or she cannot afford to pay for legal representation. Witnesses for the defense are often provided by the defendants themselves, but if defense counsel wishes to conduct his or her own investigations in the territorial state, an application must be made to the court for additional funds. In the

[354] Human Rights Watch interview with Dutch officials, Special Unit, Driebergen, October 6, 2005.

Afghan (Hesham and Jalalzoy) case,[355] defense counsel asked the court for funds to pay for a private investigator. Travel costs to Afghanistan were awarded, but not the costs of hiring an investigator or traveling within the country.[356] Additionally, funds for insurance were not sufficient and the lawyer could not accompany the prosecution and investigating judge on a second trip.

Defense counsel for Hesham raised several issues which she contended negatively affected the fairness of the trial. Although the investigative judge is required to investigate inculpatory and exculpatory evidence, defense counsel contended that the defense did not have adequate time and resources to prepare the defense case, and was thus unable to conduct in-country research, obtain the translation of documents or even attend depositions taken by the investigative judge in Afghanistan. The defense also complained that the prosecution was granted unfair access to the defendants' immigration files in violation of their right to privacy. Testimonies of a number of witnesses were taken without the opportunity for defense counsel to be present and question them.[357] The prosecution emphasized, however, that the defense had had the opportunity to question witnesses via video conference but had not made use of this.[358]

[355] In the Hesham and Jalalzoy cases, two former members of the Afghan military were tried and convicted of war crimes and torture committed in Afghanistan in the 1980s.
[356] Human Rights Watch telephone interview with Dutch lawyer, October 25, 2005.
[357] Human Rights Watch telephone interview with Dutch lawyer, October 25, 2005.
[358] Human Rights Watch telephone interview with Dutch official, January 27, 2006.

XI. Norway

Norway has not introduced definitions of international crimes into its domestic law.[359] However, article 12.4 of the Norwegian General Civil Penal Code (Criminal Code) enables the prosecution of non-nationals for crimes committed overseas—including international crimes—provided the criminal acts amount to a crime under Norwegian criminal law. Article 12.4 provides that Norwegian criminal law shall be applicable to acts committed abroad by a foreigner when the act either constitutes murder, assault and certain other crimes under Norwegian law, or "is a felony also punishable according to the law of the country in which it is committed, and the offender is resident in the realm or is staying therein."[360]

Although no trials based on universal jurisdiction have yet taken place in Norway, the country has identified numerous suspects on its territory. Around forty alleged war criminals who sought asylum in Norway remain at liberty. Seventy cases have been examined so far and divided into regional folders. Cases concern suspects from Iraq, Afghanistan, Africa (particularly Rwanda) and the Balkans. As of September 2005, a new unit for international crimes had been set up within Norway's National Criminal Investigation Service (NCIS). The unit, together with a special prosecutor in charge of international crimes, is creating a detailed list of all cases in order to establish guidelines for the selection and prioritizing of cases.[361]

In February 2006, there was an unprecedented request by the prosecution at the International Criminal Tribunal for Rwanda (ICTR) for the transfer of a case from the ICTR to Norway. The request was preceded by negotiations with the Norwegian authorities, who were willing to try Michel Bagaragaza, accused of "conspiracy to commit genocide, genocide or complicity in genocide" under Norway's domestic legislation. However, the ICTR rejected the transfer of the case in May 2006. Without explicitly referring to the lack of implementing legislation, the ICTR concluded that "Norway does not have jurisdiction over the crimes in the indictment against Bagaragaza."[362]

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[359] Norway has been a party to the four Geneva Conventions since August 3, 1951, and ratified the Convention against Torture and Other, Cruel, Inhuman or Degrading Treatment on June 9, 1986.
[360] Criminal Code 1982, art. 12.4.
[361] Human Rights Watch telephone interview with Norwegian official, September 14, 2005.
[362] "UN genocide court rejects transfer of suspect's case to Norway," Agence France-Press, May 19, 2006.

A. Jurisdictional Challenges

1. Presence

The suspect does not have to be present on Norwegian territory for an investigation to be opened, but he or she needs to be present for the indictment. The problem of whether the presence of an accused can be secured by way of extradition is neither dealt with by the Norwegian Criminal Procedure Act[363] nor by rulings of the Supreme Court. So far, out of the seventy cases that the newly created unit within the NCIS has examined, nineteen suspects have fled the country. Although Norway no longer retains jurisdiction over these persons, the unit has decided to continue examining their files prior to closure in order to assess whether to forward the files to the country where the relevant suspect is believed to be.[364]

2. Immunities

The Norwegian Criminal Code is silent on the issue of immunity, but the c-ode is to be applied within the limitations of international law.[365] So far, the issue of immunity has not arisen in any case of international crimes nor has the issue of amnesties, which is not regulated in Norwegian law. Practitioners interviewed by Human Rights Watch indicated that there is no obligation under Norwegian law to respect an amnesty and that this would be considered on a case to case basis.[366]

3. Limitation

Because international crimes can be prosecuted only as analogous domestic crimes such as murder, international crimes may be subject to statutes of limitations. Possible revisions to this situation are being considered by a committee, but any decision regarding this matter has yet to be taken.[367]

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[363] Act of 22 May 1981 No. 25 relating to Legal Procedure in Criminal Cases (The Criminal Procedure Act), with subsequent amendments, most recently by Act of 17 July 1998 No. 56, available online at http://www.ub.uio.no/ujur/ulovdata/lov-19810522-025-eng.doc (retrieved June 2006).
[364] Human Rights Watch telephone interview with Norwegian official, November 16, 2005.
[365] Criminal Code, art. 4.
[366] Human Rights Watch telephone interview with Norwegian official, September 14, 2005.
[367] Human Rights Watch telephone interview with Norwegian official, September 14, 2005.

B. Practical Arrangements for the Exercise of Universal Jurisdiction in Norway

1. Special departments in charge of the investigation and prosecution of international crimes

As mentioned above, a new unit within Norway's National Criminal Investigation Service (NCIS) is responsible for investigating international crimes. One of the reasons why the issue of prosecuting international crimes attracted attention in Norway is related to the creation of the war crimes unit in Denmark (see Country Case Study: Denmark, above). Following the establishment of this unit, suspected perpetrators of international crimes left Denmark for Norway. Norwegian authorities soon realized the problems posed by this development and called for a study to determine the best arrangements for a new unit.

The unit is currently composed of four investigators and one lawyer. One investigator has been trained in The Hague in the investigation of international crimes, and this training will be extended to other investigators and lawyers joining the unit. The unit will be comprised of ten people in total, with two police lawyers who are prosecutors, one historian in charge of explaining and researching the context of the crimes, and seven investigators. The aim is to have teams (as in Denmark) which are in charge of cases concerning specific countries. At present two investigators are working on crimes that occurred in Rwanda.[368] A national chief prosecutor has been nominated to work on international crimes, but does not form part of the special unit (her work also includes issues such as organized crime, child pornography and computer crimes); she is assisted on a case-by-case basis by local prosecutors.[369] It is envisaged that at least three prosecutors will work on international crimes in the future.[370]

2. Notification

Most cases are referred to the police by immigration authorities who are notified about crimes either by witnesses and victims or by the perpetrators themselves.[371] Most alleged perpetrators are already living in Norway, but many cases remain uninvestigated because domestic cases are given priority. The unit has also received notifications from other countries, including the Rwandan government and Denmark, when suspects fled the latter country to hide in Norway.

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[368] Human Rights Watch telephone interview with Norwegian official, November 16, 2005.
[369] Human Rights Watch telephone interview with Norwegian official, November 16, 2005.
[370] Human Rights Watch telephone interview with Norwegian official, September 14, 2005.
[371] According to officials interviewed by Human Rights Watch, perpetrators sometimes admit or even fabricate involvement in international crimes, thinking that it may assist an asylum claim in Norway.

3. Decision to investigate and prosecute

The decision of whether to open an investigation lies with the chief prosecutor of the national prosecution office and an investigation has to be carried out where there are "reasonable grounds" to believe that a crime has been committed.[372] The police commissioner can also order a local investigation by way of a written investigation order. Where the police decide not to investigate, the complainant can appeal to the regional prosecutor and subsequently to the national prosecution office up to the director general of prosecution. No appeal is possible against a decision of the latter.[373] The current chief prosecutor has asked that all decisions not to investigate complaints regarding international crimes are passed to her, enabling her to scrutinize the decisions and to establish a set of guidelines for the investigation of future complaints.

The chief prosecutor will give orders to prosecute based on criteria established by the attorney general, including considerations such as whether the evidence is sufficient to go to court and whether the prosecutor is convinced of the suspect's culpability and likely conviction.

4. Investigation

Before the police can start an investigation, a written investigation order must be issued and signed by either the chief prosecutor or a police commissioner. The special unit of the NCIS will then investigate the case in open sources and try to establish the whereabouts of the alleged perpetrator. As there is a backlog of cases, the unit for the moment is focusing on the files referred to it by immigration authorities and seeks to identify cases where the perpetrator is still present in Norway. All cases concerning international crimes will be reviewed by the national chief prosecutor.[374]

C. Cooperation

1. International cooperation

a. EU Network

The NCIS regards the EU Network as a source of information and a venue for sharing experiences in prosecuting international crimes through face to face meetings. [375]

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[372] Act of Criminal Procedure 1981 (*Straffeprosessloven*), para. 224. The unofficial translation by the Norwegian Ministry of Justice reads as follows: "a criminal investigation shall be carried out when as a result of a report or other circumstances there are reasonable grounds to inquire whether any criminal matter requiring prosecution by the public authorities subsists."

[373] Act of Criminal Procedure 1981, para. 59a.

[374] Human Rights Watch telephone interview with Norwegian official, September 14, 2005.

[375] Human Rights Watch telephone interview with Norwegian official, September 14, 2005.

b. Interpol

The Interpol meetings fulfil a similar role to the EU Network, but on a larger scale.

c. Cooperation with other states

The unit cooperated with Denmark, the UK, the Netherlands and Canada to exchange information and knowledge about best practices.

D. Role and Rights of Victims and Witnesses

1. Victims—Compensation and legal representation

Victims can only claim compensation in civil suits. In criminal cases, the prosecutor will claim compensation on behalf of the victims. The compensation is normally paid by the convicted perpetrator or, if this is not possible, out of a victims' fund provided by the government. This fund is already operational.[376]

2. Witnesses

During a trial witnesses do not have to be physically present in Norway. It is possible to arrange testimonies via video conference or to record testimonies given in the presence of a judge, prosecutor and defense lawyers or to read out statements in court.[377] However, the chief prosecutor has emphasized the importance of at least the main witnesses giving testimony in person at trial, and states that the possibility of witnesses claiming asylum should not constitute a reason to prevent witnesses from testifying in person.[378]

E. Fair Investigation and Trial

No matter where an investigation takes place, the police must look for evidence on behalf of both the accused and the complainant. The accused is entitled to receive legal aid where he or she lacks the means to pay for his or her representation. This only covers representation in court and is not extended to investigations carried out by the defense itself. Should the defense have carried out its own investigations, it can present a

[376] Human Rights Watch telephone interview with Norwegian official, November 16, 2005.
[377] Act of Criminal Procedure, para. 298: "where it is in the interest of the witness to do so."
[378] Human Rights Watch telephone interview with official in the office of the chief prosecutor, November 16, 2005.

salary bill to the court at the end of the trial and the court will decide whether to reimburse the costs of investigation.[379]

[379] Act of Criminal Procedure, para. 107.

XII. Spain

Article 23.4 of the Organic Law 6/1985,[380] confers on Spanish courts universal jurisdiction over genocide and any offense that Spain is obliged to prosecute under international treaties, including the Convention against Torture[381] and the Geneva Conventions and their first additional protocol.[382] Crimes against humanity have been criminalized under the Spanish Criminal Code[383] since 2004.[384] Cases initiated in Spain based on universal jurisdiction include the case of former Chilean dictator Augusto Pinochet, which started when a Spanish investigative judge opened an investigation into Pinochet under Spain's universal jurisdiction laws and subsequently asked for Pinochet's arrest and extradition from the United Kingdom in 1998.[385] Although Pinochet was not extradited, the case was a starting point for subsequent universal jurisdiction cases in Spain.[386] Since Pinochet, completed cases include that against former Peruvian President Alberto Fujimori, and the case of Argentine military officer Adolfo Scilingo, who was convicted and sentenced by the Spanish National Court to 640 years of imprisonment for attempted genocide and other crimes committed during Argentina's "dirty war" in the 1970s.[387] Ongoing cases concern events in Tibet, Rwanda, Guatemala, and the case

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[380] Organic Law 6/1985, of 1 July, of the Judicial Power (*Ley Organica 6/1985, de 1 de julio, del Poder Judicial*), as amended by Organic Law 11/1999, art. 23.4 (a) and (g). For a Spanish version of the relevant article see [online] http://www.juridicas.com/base_datos/Admin/lo6-1985.l1t1.html (retrieved April 2006).

[381] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987, ratified by Spain on October 21, 1987.

[382] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force October 21, 1950; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force October 21, 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force October 21, 1950; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force October 21, 1950. Spain ratified the four Geneva Conventions on August 4, 1952. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force December 7, 1978, ratified by Spain on June 8, 1977, April 21, 1989.

[383] Spanish Penal Code 1995 (*Código Penal*), art. 607 bis. The Code is available, in Spanish, online at http://www.juridicas.com/base_datos/Penal/lo10-1995.html (retrieved May 2006).

[384] The High Court (Audencia Nacional) held in the case of Adolfo Scilingo that crimes against humanity may be prosecuted even if they were committed before the amendment of the Criminal Code: see Giulia Pinazauti, "An Instance of Reasonable Universality: The Scilingo Case," Journal of International Criminal Justice, 3 (2003), p. 1092.

[385] For an English version of the writ of acceptance see [online] http://www.derechos.org/nizkor/chile/juicio/jurie.html (retrieved April 2006).

[386] As this report confines itself to cases after 2001, the Pinochet case will only be referred to where related proceedings occurred after 2001. For more detailed information see: Human Rights Watch, "The Pinochet Prosecution" (1998), [online] http://www.hrw.org/campaigns/chile98/index.htm, and Amnesty International, "Universal Jurisdiction Cases," [online] http://web.amnesty.org/pages/uj-cases-eng (retrieved April 2006).

[387] National Court, Criminal Chamber, April 19, 2005, judgment available, in Spanish, online at http://www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html (retrieved April 2006).

against Ricardo Miguel Cavallo, an Argentine military officer whose trial is scheduled to start later in 2006.[388]

A. Jurisdictional Challenges

1. Presence

Article 23.4 of the Organic Law 6/1985 does not require the suspect's presence for the purpose of opening an investigation or for charging the perpetrator. Presence is required for the trial phase as trials in absentia are generally not permitted, but presence for trial can be achieved through extradition.[389] The ruling of the Constitutional Court in the "Guatemala" case (see below) on the scope of article 23.4 held that the physical presence of the suspect is not required to initiate an investigation based on universal jurisdiction.[390]

2. Immunities

Spanish law recognizes immunity in accordance with the provisions of public international law.[391] Spanish courts have also held that amnesties passed in the territorial state will not be binding on Spanish courts exercising universal jurisdiction.[392]

3. Limitation

Article 131.4 of the Spanish Criminal Code expressly excludes crimes against humanity, genocide, and war crimes from statutes of limitations. For other serious crimes, the statute of limitations varies from three to twenty years according to the sentence the crime carries.[393]

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[388] See, "Prosecutors charge former Argentine officer with genocide," *El Pais* (English edition), January 12, 2006.

[389] Order (*auto*) of November 5, 1998 (no. 1998/22605) of the High Court (*Audiencia Nacional*) in the proceedings against Augusto Pinochet. Spanish courts successfully secured a suspect's extradition from Mexico to ensure his presence at trial in the case of Argentine national Miguel Cavallo. The decision of the Mexican Supreme Court to extradite Cavallo is available, in Spanish, online at http://www.derechos.org/nizkor/arg/espana/cortemex.html (retrieved April 2006). See also "Argentine faces Spanish justice," BBC News, June 29, 2003, [online] http://news.bbc.co.uk/1/hi/world/americas/3029156.stm (retrieved April 2006).

[390] Constitutional Court, Second Chamber, STC 237/2005, September 26, 2005, available, in Spanish, online at http://www.tribunalconstitucional.es/Stc2005/STC2005-237.htm (retrieved April 2006).

[391] Organic Law 6/1985 of 1 July, of the Judicial Power, art. 21 (2).

[392] Spain, Audencia Nacional, Third Chamber, Sentencia Num. 16/2005, 19 April 2005, Part III, section 6, available online at http://www.derechos.org/nizkor/espana/juicional/doc/sentencia.html#I.%20ANTECEDENTES (retrieved May 2006).

[393] Criminal Code, art. 131.

4. Subsidiarity

The Constitutional Court in *Guatemala* concluded that territorial courts and an international court have priority over Spanish courts exercising universal jurisdiction. However, it also held that universal jurisdiction could be exercised by Spanish courts where a party to the case submits evidence demonstrating that courts in the territorial state are unwilling or unable to effectively investigate and prosecute the crimes referred to in the complaint.[394] The National Court in the "Tibetan Genocide" case emphasized that Spain could exercise universal jurisdiction over genocide committed in Tibet in the absence of a "national connection" with Spain and ordered the investigative judge to open an investigation.[395] Hence, it is not necessary for a complainant or prosecutor to show a link between the prosecution of a universal jurisdiction crime and Spain's national interest.

B. Practical Arrangements for the Exercise of Universal Jurisdiction in Spain

1. Special departments in charge of the investigation and prosecution of international crimes:

There is no special unit that deals exclusively with international crimes in Spain. Crimes are investigated by the judicial police under the supervision of an investigative judge. The role of police units in universal jurisdiction cases has been marginal, since most of the evidence and witnesses have been provided by NGOs or in public documents.[396] There have been no investigations abroad, and it has not been considered necessary for the police or investigative judge to collect evidence abroad.

2. Notification

All cases have thus far been raised through filings by victims or NGOs. Article 125 of the Spanish Constitution, the Organic Law of the Judiciary and the Criminal Procedural

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[394] The decision of the Constitutional Court in the Guatemala case of September 26, 2005, was discussed in detail in National Court, 4th Section of the Criminal Chamber, Roll of Appeal No 196/05, Preliminary Proceedings on January 10, 2006, concerning a further universal jurisdiction case, the Tibetan Genocide case, (proceedings available online, in Spanish, at http://www.elpais.es/elpaismedia/ultimahora/media/200601/10/espana/20060110elpepunac_1_Pes_DOC.doc, retrieved April 2006). The National Court allowed the appeal, taking into account, inter alia, that the complainants could adduce some evidence as to the failure of Chinese authorities to investigate the crimes and that the events complained of are outside the jurisdiction of the International Criminal Court.

[395] National Court, 4th Section of the Criminal Chamber, Roll of Appeal No 196/05, Preliminary Proceedings, January 10, 2006.

[396] Human Rights Watch telephone interview with Spanish official, September 14, 2005.

Code all provide expressly for the *acción popular*,[397] enabling Spanish citizens with an interest in a particular case or acting on behalf of a victim to bring private prosecutions. The permissibility of the *acción popular* has been crucial in notifying authorities about international crimes, and has enabled the filing of cases which ultimately resulted in conviction.[398]

Immigration authorities screen asylum seekers for their potential involvement in criminal activities, but have not referred cases to judicial authorities.

3. Decision to investigate and prosecute

An investigative judge is seized of a case either through a referral by the prosecution, or by an *acción popular*.[399] In the past, where the investigative judge was seized of a case by third parties exercising the *acción popular*, the national prosecution office often opposed the investigation and appealed to the High Court (*Audencia Nacional*).[400] However, provided that the third parties can convince the investigative judge that a valid case exists, the investigation may proceed.[401]

Subject to proceedings brought through an *acción popular*, the national prosecution office decides, on the basis of the evidence collected by the investigative judge in the preliminary investigation,[402] whether to prosecute and reports to the attorney general, who is appointed by the national government. The position of the national prosecution office concerning universal jurisdiction cases generally reflects the position of the national government. According to a Spanish official, the former government was particularly opposed to prosecution of crimes committed in Latin America as it had traditionally strong (economic) links to the countries affected by the investigations.[403] Following the 2005 decision of the Constitutional Court in the *Guatemala* case, the

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[397] Constitution of Spain, art. 125, Organic Law 6/1985, art. 20.3, Code of Criminal Procedure, sections 101 and 270.

[398] Human Rights Watch telephone interview with Spanish official, January 17, 2006.

[399] Spanish Constitution of 1987, art. 124–127.

[400] In all cases concerning Argentina and Chile, the prosecution submitted several appeals against judicial decisions affirming jurisdiction. Human Rights Watch telephone interview with Spanish official, September 14, 2005.

[401] The National Court in the Tibetan Genocide case emphasized the right of third parties with an interest in the case to rely on *acción popular* in respect of universal jurisdiction proceedings, taking into account that one issue to decide in each case would be whether the party in question is abusing the law in approaching Spanish courts. The court held that in the present case, the applicants (the Committee to Support Tibet) did not abuse the provision of the *acción popular*, and ordered the investigative judge to investigate the crimes.

[402] Code of Criminal Procedure of 1882 (*Ley de Enjuiciamiento Criminal*), section 229.

[403] Human Rights Watch telephone interview with Spanish official, September 14, 2005.

attorney general is currently working on establishing guidelines on the exercise of universal jurisdiction by the prosecution.[404]

4. Investigation

The investigative judge is in charge of the investigation and is assisted, where necessary, by the "judicial police." Once the complaint is filed, the investigating judge takes the necessary steps to process the complaint, including giving specific orders to the police, hearing witnesses, requesting documents or sending rogatory letters, the latter being particularly important in cases concerning crimes committed in Chile and Argentina.[405]

C. Cooperation

1. International cooperation mechanisms

Use is made of the EU network and Interpol and both are considered to be necessary for the exchange of information. However, cases have not yet required Spanish investigators or judges to conduct investigations in the territorial state, as all necessary evidence was considered to be available elsewhere. In the case against Cavallo, Spanish and Mexican authorities successfully cooperated to obtain the extradition of Cavallo from Mexico to Spain[406] and, in the case of Scilingo, authorities relied on the "Treaty on Extradition and Judicial Assistance in Criminal Matters"[407] signed by Spain and Argentina in 1987 as well as article 9 of the Convention against Torture.[408] This allowed the Spanish court to examine witnesses in Buenos Aires via video link from Madrid.[409]

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[404] Human Rights Watch telephone interview with Spanish official, January 17, 2006.

[405] For some of the issues involved see Equipo Nizkor, "Witnesses located in Buenos Aires began to give their testimony by video-conference in the trial of Lieutenant Commander Scilingo," [online] http://www.derechos.org/nizkor/espana/juicioral/doc/witnesses.html (retrieved May 2006).

[406] On June 11, 2003, the Mexican Supreme Court ruled that Cavallo could be extradited on charges of genocide and terrorism, but not on charges of torture as the crimes of torture allegedly committed by Cavallo were subject to a statute of limitation under Mexican law. The trial against Cavallo is scheduled to start in 2006. The decision of the Mexican Supreme Court is available, in Spanish, online at http://www.derechos.org/nizkor/arg/espana/cortemex.html (retrieved April 2006). For an introductory comment see http://www.law.nyu.edu/kingsburyb/fall03/intl_law/PROTECTED/unit5/rtf/MexicoSup.rtf (retrieved April 2006). Authorities of both countries relied on the Treaty Concerning Extradition and Mutual assistance in Criminal Matters 1978, Reg./10/18/1980.

[407] Treaty on Extradition and Judicial Assistance in Criminal Matters 1987.

[408] Article 9 states that "States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of [torture] including the supply of all evidence at their disposal necessary for the proceedings."

[409] For a detailed account of the challenges involved in requesting legal assistance see: www.derechos.org/nizkor/espana/juicioral/doc/witnesses.html.

D. Role and Rights of Victims and Witnesses

1. Victims—Compensation and legal representation

There is no limit on compensation, but punitive damages are not permitted. The convicted perpetrator is also responsible for compensation and where he or she is unable to pay, the state will intervene (although it has only done so in cases involving terrorism). NGOs generally act as the contact points and sources of support for victims. All victims so far have been represented by NGOs, as legal aid is not available for *acciónes populares*.[410]

In February 2005, parties involved in the prosecution of Pinochet secured an $8 million pension fund for his victims. Previously, in rulings of October 19 and December 10, 1998, the Central Investigative Court No. 5 had ordered the freezing of Pinochet's funds around the world, so as to enable victims to receive compensation in the event of his conviction. On February 25, 2005, the plaintiffs and the Riggs Bank, and two of the latter's board members, settled. While criminal and civil actions against Riggs Bank were terminated, proceedings against Pinochet for concealment of assets continue.[411]

As detailed above, victims can participate in proceedings either as civil claimants or by bringing a private prosecution.

2. Witnesses

Different methods of testifying, including testimonies via video-link, written statements and personal oral statements are permitted under Spanish law. In the trial of Scilingo, witnesses testified in person during trial as well as via video-link.[412] In any case, the defendant lawyer must be permitted to cross examine witnesses and other evidence.[413]

Legal provisions such as those maintaining the anonymity of witnesses have been widely used, mainly in cases concerning terrorism, organized crime and gender violence.[414] So far, protection has not posed a problem during investigations as no threats have been reported and no investigations have been carried out abroad by Spanish investigators. NGOs provide care and support for witnesses during all stages of the investigation and the trial as this is unavailable elsewhere.

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[410] Human Rights Watch telephone interview with Spanish official, September 14, 2005.
[411] Terence O'Hara, "Allbrittons, Riggs to pay victims of Pinochet," *Washington Post*, February 26, 2005, [online] http://www.washingtonpost.com/wp-dyn/articles/A53805-2005Feb25.html (retrieved April 2006).
[412] For an overview of the issues involved in the testimonies given via video-link see www.derechos.org/nizkor/espana/juicioral/doc/witnesses.html
[413] Human Rights Watch telephone interview with Spanish official, September 14, 2005.
[414] Human Rights Watch telephone interview with Spanish official, September 14, 2005.

E. Fair Investigation and Trial

Equality of arms is guaranteed as both parties can submit evidence, both parties must be represented, and the court must always give reasons for its decisions concerning the acceptance or the refusal of proposed evidence. Further, the investigative judge is required to investigate inculpatory and exculpatory evidence. The defense lawyer must be able to challenge all evidence presented by the prosecution.[415] Representation of the defendant is guaranteed by providing legal aid when the accused is not able to pay for it.[416]

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[415] Ley Orgánica del Tribunal del Jurado, May 22, 1995, art. 31.

[416] Spanish Constitution, article 24-2, refers to the defendant's right to a fair trial. Legal aid is provided by the Legal Aid Law 1996 (Ley 1/1996, de 10 de enero 1996 de Assistencia Juridica Gratuit).

XIII. United Kingdom (England and Wales)

Section 134 of the Criminal Justice Act 1988[417] implements the Convention against Torture[418] and authorizes courts in England and Wales to exercise universal jurisdiction over torture. Jurisdiction over certain war crimes, including grave breaches of the four Geneva Conventions[419] and their first additional protocol,[420] can be exercised under the Geneva Conventions Act 1957.[421] Jurisdiction can only be exercised over crimes against humanity and genocide if they were committed after the coming into force of the International Criminal Court Act 2001.[422]

On October 16, 1998, British police, acting on a Spanish arrest warrant, arrested former Chilean dictator Augusto Pinochet in London. The Pinochet case, although not the first case to be based on universal jurisdiction in Europe, became a landmark case for universal jurisdiction.[423] The first successful prosecution under universal jurisdiction laws in the UK occurred more than five years after Pinochet in July 2005, when Afghan militia leader Faryadi Zardad was convicted of acts of torture and hostage-taking that had taken place in Afghanistan in the 1990s.[424] Zardad was sentenced to twenty years of imprisonment. Several other complaints have been filed under the UK's universal jurisdiction laws but none have yet proceeded to trial.

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[417] Criminal Justice Act 1988, section 134, available online at http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880033_en_1.htm (retrieved April 2006).

[418] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

[419] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force October 21, 1950, art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force October 21, 1950, art. 49; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force October 21, 1950, art. 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force October 21, 1950, art. 146.

[420] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force December 7, 1978.

[421] Geneva Conventions Act 1957, section 1, 1A.

[422] International Criminal Court Act 2001, section 50, available online at http://www.opsi.gov.uk/ACTS/acts2001/20010017.htm (retrieved April 2006).

[423] As this report confines itself to cases after 2001, for an overview of the Pinochet case see Human Rights Watch, "The Pinochet Prosecution" (1998), [online] http://www.hrw.org/campaigns/chile98/index.htm; and Amnesty International, "Universal Jurisdiction Cases," [online] http://web.amnesty.org/pages/uj-cases-eng (retrieved April 2006).

[424] *R v. Zardad*, High Court judgment of 19 July 2005, available online at http://www.redress.org/news/zardad%207%20apr%202004.pdf (retrieved April 2006).

A. Jurisdictional Challenges

1. Presence

Police may open an investigation regardless of the whereabouts of the accused. However, for an arrest warrant to be issued and for the suspect to be charged, the accused must either be present or his or her presence anticipated.[425] A trial in absentia is possible under UK law under certain circumstances at the trial judge's discretion.[426] Charges of crimes against humanity and genocide can be prosecuted only where a suspect was a UK resident at the time at which the crime was committed.[427]

2. Immunities

Sitting heads of state enjoy immunity from prosecution under section 14(1) of the State Immunity Act of 1978.[428] Hence, complaints filed under UK universal jurisdiction laws against U.S. President George W. Bush and Zimbabwean President Robert Mugabe have not been investigated.[429] However, immunity also seems to be extended to every sitting minister of foreign governments. In February 2004 a London court rejected an application for an arrest warrant to be issued against Israeli Defense Minister Shaul Mofaz,[430] for immunity reasons, and in November 2005 a magistrate refused to issue an arrest warrant against Chinese Trade Minister Bo Xilai, arguing that as part of an official delegation to the United Kingdom, Bo Xilai would enjoy immunity.[431]

An amnesty passed in the state where the crime was committed has been held not to bind UK courts, which have the discretion not to apply the amnesty law to crimes that, through treaties (such as the Convention against Torture), the UK government has committed itself to prosecuting.[432]

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[425] Application for Arrest Warrant Against General Doron Almog (Bow St. Mag. Ct. Sept.10.05) (per Workman, Sr Dist.J).
[426] *R v. Jones*, 20 February 2002, (2002) UKHL 5.
[427] International Criminal Court Act 2001, section 51 (2) (b).
[428] United Kingdom State Immunity Act of 1978, available online at http://www.law.berkeley.edu/faculty/ddcaron/Documents/RPID%20Documents/rp04038.html (retrieved April 2006).
[429] Application for Arrest Warrant Against Robert Mugabe (Bow St. Mag. Ct. Jan. 14, 2004) (per Workman, Sr. Dist. J).
[430] Application for Arrest Warrant Against General Shaul Mofaz (Bow St. Mag. Ct. Feb. 12, 2004) (per Pratt, Dist. J.)
[431] Application for Arrest Warrant Against Bo Xilai (Bow St. Mag. Ct. Nov. 08,2005) (per Workman, Sr Dist.J).
[432] See the reasoning of Lords Steyn and Nichols in *R v. Bow Street Magistrates Court; ex parte Pinochet (No 1)*, (25 Nov. 1998), [1998] 4 All ER 897 at 938 (Lord Nicholls) and 946-7 (Lord Steyn).

B. Practical Arrangements for the Exercise of Universal Jurisdiction in the England and Wales

1. Special departments in charge of the investigation and prosecution of international crimes

The investigation of universal jurisdiction crimes is the responsibility of two investigators within the Anti-Terrorist Branch of the Metropolitan Police. The branch has a total staff of three hundred. The two investigators who lead universal jurisdiction criminal investigations also investigate terrorism-related crimes due to the relative lack of universal jurisdiction investigations.[433] When an investigation into a universal jurisdiction crime is opened, a team of investigators is selected from the Anti-Terrorist Branch and the investigation is then coordinated by the two investigators in charge.[434] For example, in the Zardad case, two investigators coordinated the investigation from London while sending delegates from the Anti-Terrorist Branch to Afghanistan.

The prosecution of universal jurisdiction crimes is the responsibility of the Crown Prosecution Service (CPS), which has two prosecutors in its Counter-Terrorism Department working permanently on such cases.[435] Due to a lack of case volume these prosecutors also work on terrorism and other transnational crimes. This level of resourcing was considered sufficient by the investigators and prosecutors involved in the Zardad case.[436]

2. Notification

The Metropolitan Police and courts have generally been notified of the presence or anticipated presence of alleged perpetrators of international crimes by the media, victims' lawyers or NGOs.[437] For example, Zardad came to the attention of authorities through a BBC documentary,[438] while the case of Israeli General Doron Almog was brought before a magistrates' court through lawyers acting on behalf of a Palestinian human rights NGO.[439]

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[433] Human Rights Watch telephone interview with British official, Metropolitan Police anti-terrorist branch, September 7, 2005.
[434] Human Rights Watch telephone interview with British official, Metropolitan Police anti-terrorist branch, November 16, 2005.
[435] See http://www.cps.gov.uk/legal/section1/chapter_c.html#02 (retrieved April 2006).
[436] Human Rights Watch telephone interviews with British official, Crown Prosecution Service, November 2, 2005, and with British official, Metropolitan Police anti-terrorist branch, September 7, 2005.
[437] Human Rights Watch telephone interview with British official, Crown Prosecution Service, November 3, 2005.
[438] John Simpson, "How Newsnight found Zardad," BBC News, July 18, 2005, [online] http://news.bbc.co.uk/1/hi/programmes/newsnight/4693783.stm (retrieved April 2006).
[439] For documentation of the case against Almog see http://www.hickmanandrose.co.uk/news05.html (retrieved November 30, 2005).

In principle the Home Office's Immigration and Nationalization Department (IND) can also refer cases that arise through its review of asylum and immigration applications, and a special department has been established within the IND dealing exclusively with allegations of international crimes committed by applicants for UK visas and asylum seekers. Where the department receives a complaint from caseworkers within the IND, the suspect is screened and additional evidence is sought from open sources, before the department considers whether to refer the matter to the police. Since the department's creation, twelve cases have been referred to the police,[440] and this number is likely to increase once the special unit within the IND has established guidelines and screening criteria for the IND as a whole.[441] Prior to the establishment of the special department, it was easier for alleged perpetrators of international crimes to gain access to the UK undetected and an unknown number of those may currently reside in the UK. The IND special department is, as far as possible, also reviewing past cases.[442] In January 2006, a British newspaper discovered the presence in England of a Rwandan accused of participating in the 1994 genocide. The suspect had been living in a small town since being granted leave to remain by the Home Office in 2002, after seeking asylum in 1999.[443]

3. *Decision to investigate and prosecute*

The police usually decide whether to investigate a complaint without the CPS's involvement. In cases of international crimes, however, the investigators consult the CPS for legal advice at the outset of the investigation and enquire about issues such as immunity and jurisdiction.[444] The investigation itself is the responsibility of the police, and the CPS only become involved on request. Where no legal obstacles arise, the investigators consider a complaint taking into account the evidence available and the likelihood of successfully prosecuting. The guiding policy in deciding whether to investigate is to ensure that the UK does not act as a safe haven for perpetrators of international crimes.[445] It would appear, however, that this is not always applied

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[440] Human Rights Watch telephone interviews with British official, Metropolitan Police anti-terrorist branch, November 16, 2005, and with an official of the UK Home Office Immigration and Nationality Directorate, November 28, 2005.

[441] Human Rights Watch telephone interview with an official of the UK Home Office Immigration and Nationality Directorate, November 28, 2005.

[442] Human Rights Watch telephone interview with an official of the UK Home Office Immigration and Nationality Directorate, November 28, 2005.

[443] Jon Swan, "Focus: Rwandan genocide suspect in Britain," *The Sunday Times* (London), January 29, 2006, [online] http://www.timesonline.co.uk/article/0,,2087-2014429,00.html (retrieved February 2006). Further suspects were discovered by the media in May 2006. See Sanrda Laville, "Wanted for Genocide in Kigali. Living Comfortably in Bedford," *The Guardian*, May 13, 2006.

[444] Human Rights Watch telephone interviews with British official, Metropolitan Police anti-terrorist branch, September 7, 2005, and with an official of the UK Home Office Immigration and Nationality Directorate, November 28, 2005.

[445] Human Rights Watch telephone interview with British official, November 16, 2005.

consistently. In the case concerning former Israeli General Almog, the police did not make a decision concerning the arrest of the suspect prior to his arrival in the UK, despite evidence presented by lawyers acting for victims that convinced a senior district judge to issue an arrest warrant for Almog.

The decision of whether to prosecute is largely at the CPS's discretion. Based on the "Code for Crown Prosecutors," the CPS takes into account the issue of jurisdiction, the amount of reliable and admissible evidence available and whether it is in the public interest to prosecute.[446] Should the CPS decide to prosecute international crimes on this basis, the consent of the attorney general is required.[447] The attorney general is a government-appointed official, who acts as the chief legal advisor to the government and superintends the director of public prosecutions, who is head of the CPS. The attorney general has absolute discretion over prosecutions of international crimes.[448]

Third parties, including those not involved in a particular crime, can file a complaint and, where the police refuse to investigate, initiate a private investigation and prosecution.[449] This includes the right to apply for an arrest warrant to be issued against an alleged perpetrator whose presence can either be established or anticipated, even without the consent of the CPS or the attorney general.[450] However, private prosecutions can be subrogated by the CPS, which may then choose to discontinue the prosecution. In addition, the attorney general's consent is needed to prosecute any international crimes, and hence a private party cannot maintain a prosecution in the face of opposition by the CPS.

A complainant can seek judicial review of a police decision not to investigate, or the decision of the CPS not to prosecute.[451] The High Court will consider whether the decision of the relevant authority has been reasonable and in the public interest.

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[446] See http://www.cps.gov.uk/victims_witnesses/prosecution.html#01 The evidence available must be such as to establish a realistic prospect of conviction.

[447] Criminal Justice Act 1988, section 135; Geneva Conventions Act 1957, section 1A (3) (a); International Criminal Court Act 2001, section 53 (3).

[448] Human Rights Watch telephone interview with British official, Crown Prosecution Service, November 3, 2005. The attorney general has confirmed to Parliament that he will apply the same criteria as the CPS for any other criminal offense: first, the amount of sufficient admissible and reliable evidence establishing a realistic prospect of conviction; second, it must be in the public interest to prosecute. Written answer by the attorney general to Mr. Boateng, Parliamentary question 19 July 1993, Hansard, available online at http://www.publications.parliament.uk/pa/cm199293/cmhansrd/1993-07-19/Writtens-3.html (retrieved April 2006). Case law suggests that the decision of the attorney general is not subject to judicial review, see R v. Solicitor-General, ex p Taylor, The Times, August 14, 1995, case no: CO 2117-94.

[449] Prosecution of Offences Act 1985, section 6 (1).

[450] Prosecution of Offences Act 1985, section 25 (2).

[451] *R v. Director of Public Prosecutions, ex parte C* (1995) 1 Cr.App.R 136. The court sets out three criteria for judicial review: (i) the decision was the result of some unlawful policy, (ii) the decision was made because the

4. Investigation

a. Investigation in the UK

The police assess the evidence available, check open sources and conduct research on the complainant, the country in question and on the suspect. Once the investigation is under way, the CPS is approached where legal cooperation from other countries is required.[452]

b. Extraterritorial investigation

In the Zardad case, British officials went to Afghanistan on nine occasions.[453] The prosecution went to Afghanistan together with the police on three occasions to ensure that statements taken from witnesses were sufficiently detailed. The prosecution also traveled with investigators to gain an understanding of the living circumstances of the witnesses and victims in Afghanistan, in order to assess the challenges witnesses might face in court.[454] In order to overcome logistical and security challenges in locating witnesses, television and radio broadcasts were used to encourage witnesses to come forward.[455]

C. Cooperation

1. National cooperation

Cooperation between the police, CPS and the Home Office was necessary to facilitate the bringing of witnesses to testify in the Zardad case. Field investigations in the territorial state rely on cooperation and assistance provided through the Foreign and Commonwealth Office's embassies and consular offices. The Foreign and Commonwealth Office referred the investigators' initial request for assistance to relevant authorities in the Afghan government, which subsequently contacted the British embassy in Kabul. From that time, all further requests for assistance were dealt with by the British embassy directly.[456]

DPP had failed to act in accordance with the code issues pursuant to section 10 of the POA 1985, (iii) the decision was perverse. See http://www.cps.gov.uk/legal/section19/chapter_c.html#_Toc2672291 for the judicial review procedure against a decision of the CPS not to prosecute (retrieved May 2006).

[452] Human Rights Watch telephone interview with British official, Metropolitan Police anti-terrorist branch, September 7, 2005.

[453] Human Rights Watch telephone interview with British official, Metropolitan Police anti-terrorist branch, November 16, 2005.

[454] Human Rights Watch telephone interview with counsel for the prosecution in the Zardad case, November 30, 2005.

[455] Human Rights Watch telephone interview with British official, Metropolitan Police anti-terrorist branch, November 16, 2005.

[456] Human Rights Watch telephone interview with British official, Metropolitan Police anti-terrorist branch, September 7, 2005.

2. International cooperation

a. With other countries

In *Zardad* British authorities cooperated with U.S. military and diplomatic personnel because of the need to conduct investigations in an area of Afghanistan under the effective control of U.S. military forces. Prior to the investigation, the permission of the armed forces was obtained, and during the investigation in these areas protection was provided by U.S. military personnel.[457]

b. The EU Network

While the prosecution in *Zardad* did not make use of the Network or of Interpol, the police relied on Interpol contact points from the Netherlands and Denmark as both had experience of investigation of international crimes committed in Afghanistan. The EU Network was cited as a useful source of information and experiences.[458]

D. Role and Rights of Victims and Witnesses

1. Victims—Compensation and legal representation

The victim has no *locus standi* in UK criminal proceedings, except for the possibility of bringing a private prosecution. However, this possibility is limited as it is expensive and not covered by legal aid, and prosecutions may be subrogated by the CPS. A substantial amount of work in the fields of universal jurisdiction is accordingly dependent on lawyers working on a pro bono basis.[459] The court may make a compensation order for the victim in criminal proceedings and the victim does not have to submit an application. The court must give reasons should it not make a compensation order.[460]

2. Witnesses

Witnesses are permitted to testify via video-link[461] which proved to be extremely useful in the recent Zardad case. Witnesses' testimony was shown via video-link from the British embassy in Kabul to the court room in London. Logistical challenges such as travel and accommodation arrangements as well as visa and potential asylum requests were thus avoided. However, the outcome of the first trial (the jury was unable to reach a verdict) suggests that a lack of key witnesses testifying in person may cause difficulties.

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[457] Human Rights Watch telephone interview with British official, Metropolitan Police anti-terrorist branch, September 7, 2005.

[458] Human Rights Watch telephone interview with British official, Crown Prosecution Service, November 3, 2005.

[459] Human Rights Watch email communication from a British lawyer, November 7, 2005.

[460] Criminal Justice Act, section 104.

[461] Criminal Procedure Rules, Rule 30.1, available online at http://www.dca.gov.uk/criminal/procrules_fin/contents/rules/part_30.htm#rule30_1 (retrieved April 2006).

By contrast, the jury in the second trial, which heard the testimony of three eyewitnesses in person, managed to successfully reach a verdict.

In *Zardad*, the protection of witnesses was guaranteed while they gave statements within the embassy and their identities were not publicly disclosed. At the time of writing, three months after the second trial and one year after the first, no reports of threats to witnesses had been received.[462] British investigators are still in contact with a number of witnesses via local NGOs who provide most of the assistance and care to witnesses due to their access to remote areas and their presence in the country.

E. Fair Investigation and Trial

The UK has an adversarial system of criminal procedure. In this system the defendant is largely responsible for the collection of exculpatory evidence (although prosecutors are usually obliged to disclose such evidence if they come across it). In *Zardad*, the defendant was assisted by legal aid, and legal aid did extend to enabling his defense lawyer to accompany the prosecution to Afghanistan to supervise identification parades and conduct investigations.

[462] Telephone interview with British official, Metropolitan Police anti-terrorist branch, November 16, 2005.

XIV. Acknowledgments

This report was written by Nehal Bhuta, Arthur Helton Fellow with the International Justice Program at Human Rights Watch, and Jürgen Schurr, consultant for the International Justice Program. The report was researched by Jürgen Schurr and Géraldine Mattioli, Advocate with the International Justice Program. Additional research assistance was provided by Kim Roosen and Joni Pegram, interns with the Brussels office of Human Rights Watch. Richard Dicker, Director of the International Justice Program and Géraldine Mattioli edited the report. Wilder Tayler, legal and policy director, conducted legal review and Ian Gorvin, consultant in the Program Office, conducted program review. Hannah Gaertner, Associate with the International Justice Program, and Amber Lewis, intern with the International Justice Program, prepared the report for publication.

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Israeli war crimes suspect evades British justice after UK court issues warrant

11 September 2005

An Israeli war crimes suspect today turned tail to avoid arrest by British police officers under an arrest warrant issued by Bow Street Magistrates' Court

Major General (retired) Doron Almog today spent some time 'airside' at Heathrow airport before taking a return flight to Israel. He had learned that he was facing arrest by British police after a decision on 10th September 2005 by Chief London Magistrate[1] Timothy Workman to issue a warrant for his arrest on suspicion of committing a grave breach of the Fourth Geneva Convention 1949 which is a criminal offence in the UK under the Geneva Conventions Act 1957. (The alleged offence was committed as part of Israel's belligerent occupation of the Occupied Palestinian Territory).

This unprecedented arrest warrant against a senior Israeli soldier was issued after years of failed efforts to obtain justice through the Israeli judicial system. Because of the failure of the Israeli judiciary to combat impunity, PCHR, acting for victims in Gaza, built a file of evidence with the help of Hickman & Rose Solicitors to pursue a case against him (and others) in the UK in accordance with the legal principle of universal jurisdiction over war crimes.

The Court decision legally obliged the Anti-Terrorist and War Crimes Unit of the Metropolitan Police to arrest Doron Almog, which they tried to do. The arrest warrant was made subject to stringent bail conditions. The Palestinian victims are devastated

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that Doron Almog has evaded British justice. An arrest could have led to the prosecution of Doron Almog on the basis of the evidence presented to the court (and passed to the police last month).

The warrant issued on 10th September 2005 is in relation to the wanton destruction of 59 houses in Rafah refugee camp on 10th January 2002.

However, Hickman & Rose also presented the police and the court with PCHR evidence, on behalf of our mutual clients, of Doron Almog's involvement in a number of other alleged grave breaches, including the following:-

- the killing of Noha Shukri al Makadma, who was nine months into her pregnancy at the time of her death on 3rd March 2003
- the killing of Mohammad Abed al Rahman al Madhoun on 30th December 2001
- the mass murder committed on 22nd July 2002, when a one ton bomb was dropped on Gaza City killing fifteen people and injuring over 150 others.

The Court did not issue a warrant in relation to the other cases because Senior District Judge Workman considered that, in these cases, police interrogation may be necessary.[2] The Palestinian victims in these cases had hoped that the police would arrest and question Doron Almog in relation to these other matters under their general arrest powers whilst he remained on bail in the UK.

The decision to apply to the court for an arrest warrant was taken against the background of a series of meetings with the War Crimes Unit of the Metropolitan Police. Last month Hickman & Rose, on behalf of PCHR and the clients in these cases, provided the police with a considerable volume of evidence in relation to this suspect.[3] The police were unable to take a decision about the arrest or prosecution of the suspect before his planned visit to Birmingham on Sunday, 11th September. Consequently, acting on behalf of the victims, Hickman & Rose and PCHR pursued the suspect through the judicial system, in the hope that he could be arrested before fleeing the UK.

Doron Almog is a 54 year old Israeli national who was GOC Southern Commander of the Israeli military from 8th December 2000 to 7th July 2003. Under his command the

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Israeli military were responsible for a countless variety of extensive human rights violations inside the OPT.

The pursuit of war criminals and the prosecution of those responsible for war crimes is a long term strategy designed to combat the culture of impunity which is endemic inside the Israeli military, judicial and political system. PCHR and Hickman & Rose remain hopeful that such cases will eventually be heard in an open and fair trial system which applies international standards as this has not been available through the Israeli judicial system. PCHR anticipates that this decision will open the door for the issue of further arrest warrants, and hopefully arrests and prosecutions of suspected war criminals in the UK and in other jurisdictions.

For more information please contact:

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The Palestinian Centre for Human Rights is an independent human rights organization working on a wide variety of human rights violations by both the Israeli occupation and the Palestinian National Authority

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Hickman & Rose solicitors

1 Timothy Workman is also sometimes described as Senior District Judge

2 When a court issues an arrest warrant in relation to an alleged offence this prevents the police from questioning the suspect in relation to that matter.

3 Five lever arch files, one ring-binder and 4 DVDs.

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THE COMPLAINT AGAINST ARIEL SHARON

Lodged in Belgium on 18 June 2001

For more information, see **indictsharon.net**, the website of the International Campaign for Justice for the Victims of Sabra & Shatila, offering news on the case lodged in Belgium against Israeli Prime Minister Ariel Sharon, Amos Yaron and other Israelis and Lebanese responsible for the massacre, killing, rape and disappearance of civilians that took place in Beirut between 16 and 18 September 1982 in the camps of Sabra and Shatila and the surrounding area.

PRELIMINARIES

1. **Mrs. Samiha Abbas Hijazi**, Lebanese (no passport, document #5496895/90), currently residing near the Austrian school in Al Horch, Beirut.

2. **Mr. Abdel Nasser Alameh**, Lebanese (passport #0473395), currently residing in El Deek Road, Sabra, Beirut.

3. **Mrs. Wadha Hassan Al Sabeq**, Palestinian (special refugee document #205963), currently residing in Bir Hassan, Beirut.

4. **Mr. Mahmoud Younis**, Palestinian (special refugee document #217163), currently residing in Shatila camp, Beirut.

5. **Mrs. Fadia Ali Al Doukhi**, Palestinian (special refugee document #68624), currently residing in Miyeh Miyeh camp, Saida.

6. **Mrs. Amina Hasan Mohsen**, Palestinian (special refugee document #912/4969), currently residing in Hiba complex, Al Hamtari Street, Saida.

7. **Mrs. Sana Mahmoud Sersawi**, Palestinian (special refugee document #76/6931), currently residing in Houssi Building, Ali Al Bacha, Sabra, Beirut.

8. **Mrs. Nadima Yousef Said Nasser**, Palestinian (no passport, document #602/7382), currently residing in 1 Gaza Building, Sabra, Beirut.

9. **Mrs. Mouna Ali Hussein**, Palestinian (special refugee document #214057), currently residing in 1 Gaza Building, Sabra, Beirut.

10. **Mrs. Shaker Abdel Ghani Tatat**, Palestinian (no passport, document #842/2992), currently residing in Al Bacha Quarter, Sabra, Beirut.

11. **Mrs. Souad Srour Al Meri**, Palestinian nationality (document #924/21358, Lebanese passport # 1506939), currently resident in Al Horch region, Shatila, Beirut.

12. **Mr. Akram Ahmad Hussein**, Palestinian (special refugee document #902/9265), currently residing in Shatila camp, Beirut.

13. **Mrs. Bahija Zrein**, Palestinian (Document #108642), currently residing in Al Deek Alley, Sabra, Beirut.

14. **Mr. Muhammad Ibrahim Faqih**, Lebanese (Lebanese passport #322903), currently residing in Bir Hassan, Beirut.

15. **Mr. Muhammad Shawkat Abu Roudeina**, Palestinian (special refugee document #161877), currently residing in Shatila camp, Beirut.

16. **Mr. Fadi Abdel Qader Al Sakka**, Palestinian (no passport, document #471/1144), currently residing in Shatila camp, Beirut.

17. **Mr. Adnan Ali Al Mekdad**, Lebanese (no passport), currently residing in Al Rihab, Shatila, Beirut.

18. **Mrs. Amal Hussein**, Palestinian (no passport), currently residing in Shatila camp, Beirut.

19. **Mrs. Noufa Ahmad Al Khatib**, Lebanese currently residing in Bir Hassan, Beirut.

20. **Mr. Najib Abdel Rahman Al Khatib**, Palestinian (no passport), currently residing in Shatila camp, Beirut.

21. **Mr. Ali Salim Fayad**, Lebanese (no passport), currently residing at the south entrance to Sabra, Beirut.

22. **Mr. Ahmad Ali Al Khatib**, Lebanese currently residing in Bir Hassan, Beirut.

23. **Mrs. Nazek Abdel Rahman Al Jammal**, Lebanese (no passport), currently residing in Al Deek Road, Sabra, Beirut.

Represented by their counsels:

Mr. Luc Walleyn, solicitor, 154 Rue des Palais, 1030 Brussels (Belgium)
Mr. Michael Verhaeghe, solicitor, 60 Waversesteenweg, 3090 Overijse (Belgium)
Mr Chibli Mallat, solicitor, Beirut (Lebanon)

Bring a civil indictment against Messrs. Ariel Sharon, Amos Yaron, and other Israelis and Lebanese responsible for the massacre, killing, rape, and disappearance of civilians that took place in Beirut between Thursday 16 and Saturday 18 September 1982 in the camps of Sabra and Shatila and the surrounding area.

The charge is brought in accordance with the [Belgian] law of 16 June 1993 (as modified by the law of 10 February 1999) relating to the repression of grave violations of international humanitarian law; specifically:

- Acts of genocide (Article 1, §1)
- Crimes against humanity (Article 1, §2)
- Crimes against persons and goods protected by the Geneva Conventions signed in Geneva on 12 August 1949 (article 1 § 3)

The charge is founded on international customary law and on the '*ius cogens*' (the concept of *ius cogens* refers to superior international legal norms of a constitutional order) which relate to these crimes.

The plaintiffs have been personally injured and/or have lost close family members or property as a result of these crimes.

I. FACTS

A. GENERAL

On 6 June 1982, the Israeli army invaded Lebanon in retaliation for the attempted assassination of Israeli Ambassador Argov in London on 4 June. The Israeli secret services had that same day attributed the attempted assassination to a dissident Palestinian organisation backed by the government of Iraq, which was at the time eager to deflect world attention from its recent setbacks in the Iran-Iraq war.[1] The Israeli operation, planned well in advance, was called "Operation Peace for Galilee."

Initially, the Israeli government had announced that its intention was to penetrate just 40km into Lebanese territory. The military command, however, under the orders of Defence Minister Ariel Sharon, decided to execute a more ambitious project that Mr Sharon had prepared several months earlier. Having occupied the south of the country and destroyed any Palestinian and Lebanese resistance there, simultaneously committing a series of violations against the civilian population,[2] Israeli troops proceeded to penetrate as far as Beirut. By 18 June 1982 they had surrounded the Palestine Liberation Organisation's (PLO) armed forces in the western part of the Lebanese capital.

According to Lebanese statistics, the Israeli offensive, particularly the intensive shelling of Beirut, caused 18,000 deaths and 30,000 injuries, mostly among civilians.

After two months of fighting, a cease-fire was negotiated through the mediation of United States Envoy Philip Habib. Under the terms of these negotiations, the PLO was to evacuate Beirut under the supervision of a multinational force deployed in the evacuated part of the town. The Habib Accords envisaged that West Beirut would subsequently be under the control of the Lebanese army, and the Palestinian leadership was given guarantees by the Americans regarding the security of civilians in the camps after their departure.

The evacuation of the PLO ended on 1 September 1982.

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[1] The "Revolutionary Council," better known as the "Abu Nidal Group," cf. Z Schiff and E Ya'ari, *Israel's Lebanon War*, New York, Simon & Schuster, 1994, 97-100, on page 99: "The three detainees [arrested by Scotland Yard] also disclosed that an envoy from Baghdad emissary had brought them orders to carry out the assassination, and that they had received their weapons from the military attaché's office of the Iraqi embassy in London." The name of the Iraqi responsible is mentioned by Dilip Hiro, *Iran under the Ayatollahs*, London, Routledge, 1985, 211: "*Israel's attack was triggered off by an attempt to assassinate Shlomo Argov, the Israeli ambassador to Britain, on the night of 3 June. The London operation was masterminded by Nawal Al Rosan, an Iraqi 'carpet dealer' who was later found to be a colonel in the Iraqi intelligence.*" (Footnotes omitted). It is worth noting that Ambassador Argov later denounced Ariel Sharon's war on Lebanon. [Note to the English text: Some quotes hereafter might be a translation from the French version of the complaint, as the original was not always available to the translators.]

[2] For a detailed catalogue of the violations of the Geneva Conventions with regard to the civilian population, see the report of the MacBride Commission (Nobel Peace Prize 1974), *Israel in Lebanon, The Report of the International Commission to enquire into reported violations of International Law by Israel during its invasion of the Lebanon*, 28 August 1982 – 29 November 1982, London, Ithaca, 1983, 187-192 (Conclusions) – hereafter referred to as the MacBride Commission.

On 10 September 1982, the multinational forces left Beirut. The next day, Mr Ariel Sharon announced that "2,000 terrorists" had remained inside the Palestinian refugee camps around Beirut. On Wednesday 15 September, the day after the assassination of President-elect Bashir Gemayel, the Israeli army occupied West Beirut, "encircling and sealing" the camps of Sabra and Shatila, which were inhabited by Lebanese and Palestinian civilians, the entirety of armed resistors (more than 14,000 people) having evacuated Beirut and its suburbs.[3]

Historians and journalists agree that it was probably during a meeting between Ariel Sharon and Bashir Gemayel in Bikfaya on 12 September that an agreement was made authorising the "Lebanese forces" to "mop up" these Palestinian camps.[4] Mr Sharon had already announced, on 9 July 1982, his intention to send the Phalangist forces into West Beirut,[5] and in his autobiography he confirms having negotiated the operation during his meeting with Gemayel in Bikfaya.[6]

According to statements made by Ariel Sharon on 22 September 1982 in the Knesset (Israeli parliament), the decision that the Phalangists should enter the refugee camps was made on Wednesday, 15 September 1982 at 15.30.[7] Also according to General Sharon, the Israeli Command had received the following instruction: "*`[t]he Tsahal[8] forces are forbidden to enter the refugee camps. The "mopping-up" of the camps will be carried out by the Phalanges or the Lebanese army.*"[9]

By dawn on 15 September 1982, Israeli fighter-bombers were flying low over West Beirut and Israeli troops had secured their entry. From 9 am, General Sharon was present to personally direct the Israeli penetration, installing himself in the general army area at the Kuwait embassy junction situated at the edge of Shatila camp. From the roof of this six-storey building, it was possible to observe the town and the camps of Sabra and Shatila clearly.

By midday, the camps of Sabra and Shatila -- in reality a single zone of refugee camps in the south of West Beirut -- were surrounded by Israeli tanks and soldiers, who had installed checkpoints all around the camps in order to monitor the entry or exit of any person. During the late afternoon and evening, the camps were shelled.

By Thursday 16 September 1982, the Israeli army controlled West Beirut. In a press release, the Israeli military spokesperson declared, "*Tsahal controls all strategic points in Beirut. The refugee camps, inside which there is a concentration of terrorists, are surrounded and sealed.*" On the morning of 16 September, the following order was issued by the army high command: " *[t]he searching and **mopping up** of the camps will be done by the Phalangists/Lebanese army.*"[10]

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[3] According to Kapeliouk, *Sabra et Shatila: Enquête sur un massacre*, Paris, Seuil 1982, citing Ha'aretz of 15 September 1982, General Eitan declared the previous day before the Knesset's Commission for Foreign Affairs that " *[n]othing remains in Beirut but some terrorists and a small PLO office.*" Kapeliouk, p 30.

[4] Benny Morris, *The Righteous Victims*, New York, A. Knopf, 1999, p. 540.

[5] Schiff and Ya'ari, *Israel's Lebanon War*, New York, Simon and Schuster, 1984, p. 251.

[6] Ariel Sharon, *Warrior: An Autobiography*, Simon and Schuster, New York, 1989, p. 498.

[7] Sharon at the Knesset, Annex to the Kahan Commission report, *The Beirut Massacre, The Complete Kahan Commission Report*, Princeton, Karz Cohl, 1983, p. 124 (Hereafter, the *Kahan Commission Report*).

[8] Israeli Defence Forces [actual literal translation from Hebrew; 'tsahal' is an acronym of this phrase.]

[9] Kahan Commission - Report, p. 125.

[10] Kahan Commission Report, p. 14.

During the course of the morning, shells were being fired down at the camps from higher elevations and Israeli snipers were shooting at people in the streets. By approximately midday, the Israeli military command gave the Phalangist militia the green light to enter the refugee camps. Shortly after 5 pm, a unit of approximately 150 Phalangists entered Shatila camp from the south and south-west.

At this point, General Drori telephoned Ariel Sharon and announced, "*Our friends are advancing into the camps. We have co-ordinated their entry.*" To which Sharon replied, "*Congratulations! Our friends' operation is approved.*"[11]

For the next 40 hours the Phalangist militia raped, killed, and injured a large number of unarmed civilians, mostly children, women and elderly people inside the "encircled and sealed" camps. These actions, accompanied or followed by systematic roundups, backed or reinforced by the Israeli army, resulted in dozens of disappearances.

The Israeli army had full knowledge of what was going on in the camps right up until the morning of Saturday 18 September 1982, and its leaders were in continuous contact with the militia leaders who perpetrated the massacre. Yet they never intervened. Instead, they prevented civilians from escaping the camps and arranged for the camps to be illuminated throughout the night by flares launched into the sky from helicopters and mortars.

The count of victims varies between 700 (the official Israeli figure) and 3,500 (in the inquiry launched by the Israeli journalist Kapeliouk). The exact figure can never be determined because, in addition to the approximately 1,000 people who were buried in communal graves by the International Committee of the Red Cross (ICRC) or in the cemeteries of Beirut by members of their families, a large number of corpses were buried beneath bulldozed buildings by the militia members themselves. Also, particularly on 17 and 18 September, hundreds of people were carried away alive in trucks towards unknown destinations, never to return.

The victims and survivors of the massacres have never been deemed entitled to a formal investigation of the tragedy, whether in Lebanon, Israel, or elsewhere. After 400,000 Israelis took to the streets in protest once news of the massacre was broadcast by the international media, the Israeli parliament (Knesset) named a commission of inquiry, to be presided over by Mr Yitzhak Kahan, in September 1982. In spite of the limitations of the Commission's mandate (limited because it was a political rather than a judicial mandate and because the voices and demands of the victims were completely ignored), the Commission concluded that the Minister of Defence was **personally responsible** for the massacres.[12]

Upon the insistence of the Commission, and the demonstrations that followed its report, Mr Sharon resigned from his post of Minister of Defence but remained in the government as Minister without Portfolio. It is worth noting that during the "*Peace Now*" demonstration immediately prior to Sharon's "resignation," demonstrators were attacked with grenades, resulting in the death of a young demonstrator.[13]

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[11] Kapeliouk, p. 37

[12] Kahan Commission Report, p. 104: "We have found...that the Minister of Defence bears personal responsibility." We shall return to this edifying conclusion.

[13] Emil Grunzweig. Avraham Burg, the current Speaker of the Knesset, was hurt during this demonstration.

Several non-official inquiries and reports, including those of MacBride and of the Nordic Commission, based mainly on the testimony of western eyewitnesses, as well as other pieces of journalistic and historical research, have assembled vital pieces of information. Some of these texts, in part or in full, are annexed to this file.[14]

Despite evidence of what the UN Security Council described as a "criminal massacre," and the ranking of the Sabra and Shatila massacres in humankind's collective memory as among the most heinous crimes of the 20th century, the man found **"personally responsible"** for this crime, as well as his associates and the people who carried out the massacres, have never been pursued or punished. In 1984, Israeli journalists Schiff and Ya'ari concluded their chapter on the massacre with this sobering reflection: *"If there is a moral to the painful episode of Sabra and Shatila, it has yet to be acknowledged."*[15] The reality of this impunity remains true to this day.

The United Nations Security Council condemned the massacre with Resolution 521 (19 September 1982). This condemnation was followed by a 16 December 1982 General Assembly resolution qualifying the massacre as an "act of genocide."

B. SPECIFICS

B1. Plaintiffs, survivors of Sabra and Shatila.

In annex to the present charges, the plaintiffs submit a statement of their personal suffering. The originals are in Arabic; each statement has been translated into French [and now English].

1. Samiha Abbas Hijazi:

On Thursday, there was shelling when the Israelis came, then it got worse so we went down into the shelter. (...) We learned on Friday that there had been a massacre. I went to my neighbours' house. I saw our neighbour Mustapha Al Habarat; he was injured and lying in a bath of his own blood. His wife and children were dead. We took him to the Gaza hospital and then we fled. When things had calmed down, I came back and searched for my daughter and my husband for four days. I spent four days looking for them through all the dead bodies. I found Zeinab dead, her face burnt. Her husband had been cut in two and had no head. I took them and buried them.

Madame Abbas Hijazi lost her daughter, her son-in-law, her daughter's godmother and other loved ones.

2. Abdel Nasser Alameh:

On the night of the carnage, we were at home and we heard that there was a massacre at Shatila(....) We kept watch on the road all night, taking turns to sleep a few hours, until

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[14] The most well known works are the reports of the Kahan Commission, the MacBride Commission and the Nordic Commission, and the books of Robert Fisk, Ze'ev Schiff and Ehud Ya'ari, Amnon Kapeliouk, Thomas Friedman, Jonathan Randall and others. An enquiry by the Lebanese military prosecutor, which concluded that no responsibility lay with the executors of the massacre, has never been published. Tabitha Petran, *The Struggle Over Lebanon*, New York, Monthly Review Press, 1987, p. 289.

[15] Schiff and Ya'ari, p. 285.

daybreak when some people managed to escape. I thought my brother had gone ahead of us to West Beirut. We waited for him but he didn't come. In fact my brother was one of the ones they took away, and we never even found his body."

Mr Alameh lost his brother, who was 19 years old.

3. Wadha Hassan Al Sabeq:

We were at home on Friday 17 September; the neighbours came and they started to say: "Israel has come in, go to the Israelis, they are taking papers and stamping them." We went out to surrender ourselves to the Israelis. When we got there, the tanks and the Israeli soldiers were there, but we were surprised to see that they had Lebanese forces with them. They took the men and left us women and children together. When they took the children and all the men from me, they said to us, "Go to the Sports Centre," and they took us there. They left us there until 7pm, then they told us, "Go to Fakhani and don't go back to your house," then they started firing shells and bullets at us.

On one side there were some men who had been arrested; they took them and we have never found out what happened to them. To this day we know nothing about what happened to them; they just disappeared.

Mrs Al Sabeq lost two sons (aged 16 and 19), a brother and about 15 other relatives.

4. Mahmoud Younis:

I was 11 years old. It was night and we could hear shelling and gunfire. (...) We took refuge in the bedroom and stayed there. As soon as they arrived, they went straight to the living room, and they shot at the photos on the walls, especially the one of my brother who was killed in "Black September." They ransacked the living room, cursing and swearing. After having looked for us in vain, they went up to the roof and stayed there all night long. We spent that night in terror in our hiding place, listening to the shooting and people screaming, while Israel fired flares to light the sky until dawn.

The next morning they started saying, "Give yourself up and your life will be spared." My nephew was 18 months old. He was hungry and we were far from the kitchen. My sister wanted him to quieten down, and she put her hand over his mouth, fearing that they would hear his cries. Her husband decided that we would have to give ourselves up, adding that each person's fate was preordained by God anyway. The women went out first, my brothers, my father, my brother-in-law and other members of the family followed. My brother was ill. As soon as they heard our voices, they shot in our direction and came straight back inside the house. They asked us where we had been the day before when they had come in and not found anyone there. Then they ordered the women and children to go out. My brother-in-law started kissing his little girl as if he were saying goodbye. An armed man came towards my niece, tied a rope around her neck and threatened to strangle her if her father didn't let go of her. He let go of her and gave her to me. They wanted to take me too but my mother told them I was a girl. They made my mother and the women walk to the Sports Centre. While I was walking I saw my aunt's husband, Abu Nayef, being murdered near his house with blows of an axe to his head. The dead bodies were disfigured. While I was carrying my niece, I bumped into a dead body that had been hit with an axe and I fell over. They knew then that I was a boy, and one of them put me up against the wall; he wanted to fire a bullet into my head. My

mother begged him and kissed his feet so that he would let me go. He pushed her away. When he did that, he heard the clinking of some money she had hidden in her clothes. He asked her what that meant. She replied that he could have all the money he wanted but he had to let me stay with her. In this way we carried on our way and we arrived at the Sports Centre. The Israeli bulldozers were busy digging large trenches. We were told that we all had to get in because they wanted to bury us all alive. My mother started begging him again, and then she asked for a mouthful of water before dying.

At the Sports Centre, I saw the Israeli military, as well as tanks, bulldozers and artillery, all Israeli. We also saw groups of Phalangists with the Israelis.

The Sports Centre was packed with women and children. We stayed there until sunset. An Israeli then came and he said, "Everyone go to the Cola region, whoever comes back to the camp will die." We left, as they fired shots in our direction.

Mr Younis lost his father, three brothers, his maternal uncle, his maternal cousin, two paternal cousins and other members of his family.

5. Fadia Ali Al Doukhi:

When the shelling started and we knew that Israel had surrounded the camp, my father told us to run away. We asked him to come with us, but he refused because he wanted to protect the house. We ran away, leaving him in the house. Later, we found out that a massacre had taken place. We found out that my father was dead and we saw his picture in the newspaper. His foot had been cut off. Our neighbour, who lived in the house where my father had sheltered, told us how they killed him.

Mrs Al Doukhi, who was 11 years old at the time, lost her father.

6. Amina Hasan Mohsen:

We were at home the Thursday when the shelling started. I didn't know what was going on outside. When the shelling intensified, I tried to leave the house to save myself and the children. When we went out, we saw dead bodies spread out all over the street. My children were scared. An Israeli told us to go out. Then we saw someone speaking Lebanese. When we went out under cover of the Israelis, they started shouting at us. At that moment I counted my children and I saw that Samir was missing; when he saw the dead people on the ground he got scared and ran away. At that moment I didn't have the fortitude to go looking for him because the whole area was full of Israeli and Lebanese troops. We escaped, and when the massacre was over I looked for Samir, but the corpses were so mutilated I couldn't recognise him among them.

Mrs Mohsen lost her 16-year-old son.

7. Sana Mahmoud Sersawi:

We lived in the Said area of Sabra, and when the shelling started we sought refuge at my parents' house in Shatila. This happened on Wednesday. At about midnight, some women who came from the western quarter said that killings were taking place. We escaped once again, towards the center of the camp. Then, when daybreak came, we hid ourselves in

the shelter of the rest home. I was pregnant at the time, and I had two daughters who were still taking milk. We stayed in the rest home for two days, until Saturday. We didn't have any milk left. My husband went out to get some for the girls. That night was so long, and the Israelis were firing flares to illuminate the sky. This is how my husband went to Sabra. The Israelis had come as far as the Gaza hospital. After that, I went out to look for my husband, and my sister went to look for her husband. We arrived at the entrance to Shatila. There, they had put the men on one side and the women on the other . I started looking among all the men. I saw him, and I said to him, "[y]ou know, these are Phalangists." He replied, "[w]hat happened at Tel al Zaater is going to happen to us." The armed men ordered us to walk in front, and the men behind. We walked like this until we got to the communal grave. There, the bulldozer started digging. Among us was a man who was wearing a white nurse's shirt; they called him and filled him with bullets in front of everyone. The women started screaming. The Israelis posted in front of the Kuwaiti embassy and in front of the Rihab station requested through loudspeakers that we be handed over to them.

That's how we found ourselves in their hands. They took us to the Sports Centre, and the men were supposed to walk behind us. But they took the men's shirts off and started blindfolding them. At the Sports Centre, the Israelis submitted the young people to an interrogation, and the Phalangists delivered 200 people to them. And that's how neither my husband nor my sister's husband ever came back.

Mrs Sersawi lost her 30-year-old husband and her brother-in-law.

8. Nadima Yousef Said Nasser:

It was Thursday. Suddenly the street was deserted. My mother went to the neighbours' house, and the shelling started. About 10 families were gathered at the neighbours' house. A little while later, a woman came in from the Irsan quarter. She shouted, "They've killed Hassan's wife!" She was carrying her children and shouting that it was a massacre. I picked up one of my twin daughters, who was a year old, went to my husband and said, "They say that there's a massacre." He replied, "Don't be silly." I took one of my daughters and gave him the other one, but the shelling got stronger and we went back to the neighbours´ shelter. The shelter was full of women, men and children; a woman from Tel Al Zaater was crying, saying, "This is what happened at Tel Al Zaater."

A little later, I went out of the shelter, and I saw armed men who were putting the men against the walls. I saw a neighbour; they tore open her stomach. Some woman came out of the house opposite and started waving her scarf around, saying, "We must give ourselves up." Suddenly I heard my sister shouting, "They've cut his throat!" I thought that my parents had been killed. I rushed to see them, carrying my daughter. They killed my sister's husband in front of me. I went up, I saw them shooting at the men. They killed them all. I fled. My other daughter stayed with her father. The armed men left, taking with them the men from the shelter. My husband was among them. On entering the camp a Lebanese woman came; she had seen my husband holding my daughter. She had seen how my husband had been killed by a Phalangist: with the blow of an axe to his head. My daughter was covered in blood. The man gave her to the Lebanese woman, who came back to the camp and gave her to some relatives of mine. I fled to Gaza hospital. When they entered the hospital, I escaped once again.

Mrs Said Nasser lost her husband, her father-in-law, three of her husband's nephews and five other relatives.

9. Mouna Ali Hussein:

I was in my house in Horch, I was 4 months pregnant and I had an 8-month-old son. We lived peacefully. We heard the Israeli aeroplanes flying intensively overhead, their noise got louder and then the shooting started. I took my son and I said to my husband, "I want to go to my parents' house in the Western quarter." We went, and while we were there, the shooting increased. We stayed with neighbours who had a ground floor 2-storey house. When the shelling got worse, we stayed inside. It was six o'clock. We closed the door and stayed inside. There were only women and children there, except for my husband and a young man. We heard people shouting outside, and the armed men saying, "don't shoot, use the axe. If they hear shooting they will escape." A bomb exploded near the house, and everyone started screaming. They heard us, and started shooting at us. We shouted even louder and a young man was killed in front of us as he was trying to put the candle out. They carried on shooting, and when they heard us they threw a bomb at us. A woman was injured, as was my mother. The bedroom became a river of blood. The soldiers started shouting at us, "Come out! If you don't come out we will dynamite the house!" They insulted us. My mother opened the door, saying that she wanted to sacrifice herself. She saw ten armed men. She said to one of them, "Don't kill us." He replied, "Everyone out, get in a line." One after the other we went out. I stayed with my husband and with my other son, and then we went out. They said to my husband, "Come here, you." My husband was carrying our son, so he gave him to me. The armed man said to him, "Get back." My husband thought he wanted his ID card. As he was backing away, they machine-gunned him down in front of me. He didn't say a word; he fell. I waited for my turn. They insulted me. I followed my mother and my sister to the orphanage, and we fled. The children lived alone, their father didn't have any brothers or close relatives. They had no one at their side. Other orphans will find an uncle, but my children have only me. God help us. My son, even at his age, really needs a father to help him, someone he can talk to about his problems. When you're an only child, what a huge empty space that leaves.

Mrs Ali Hussein lost her husband and her brother-in-law.

10. Shaker Abdel Ghani Natat:

It was Saturday 18 September and we were at home when I went to check the car outside. That's when I saw some soldiers; I thought they were from the Lebanese army. They demanded to search the house; the family was asleep so I woke them up and we all went outside. They took us towards Shatila camp. As we were walking, we passed people who had been killed and corpses and it was then that I realised then that there was a massacre going on. They drove us to the Rihab station; they wanted to take us to the Kuwaiti embassy. That's when the cars stopped and loaded up with youths, no one but youths, including my son.

As for us, they delivered us to the Israelis and the Israelis took us to the Sports Centre, where they kept us.

That's how they took some people away, while they left others. My son was put in a car in front of me; I saw them take him, but I have no idea what became of him that day.

Mr Abdel Gahni Natat's son was 22 years old at the time.

11. Su'ad Srour Meri:

On Wednesday, after Bashir [Gemayel] had been killed, we heard Israeli helicopters flying low overhead , and on Wednesday night the Israelis started firing illumination flares, which lit up the camp as though it were day. Some of my friends went down into the shelter. On Thursday evening I went with my brother Maher to see some friends and tell them to come and sleep at our house; on the way the road was full of corpses. I went into the shelter but I didn't find anyone there, so we went back. Suddenly I saw our neighbour, who was injured and had been thrown on the ground. I asked him where our friends were, he replied that they had taken the girls and asked me to help him, but I was not able to rescue him and I went straight back home with my brother. Maher immediately told my father that there was a massacre. I found out from our neighbour that the Phalangists were there. When my father found out, he said that we had to stay inside the house. Our neighbour was also there. We stayed in the house all night long. On Friday morning my brother Bassam and our neighbour climbed up to the roof to see what was happening, but the Phalangists spotted them straight away. A few moments later, about thirteen men knocked on the front door . My father asked who they were, they said, "Israelis." We got up to see what they wanted; they said, "You're still here," and then they asked my father if he had anything. He said he had some money. They took the money and hit my father. I asked them, "How can you hit an old man?" Then they hit me. They lined us up in the living room and they started discussing whether or not to kill us. Then they lined us up against the wall and shot us. Those who died, died; I survived with my mother. My brothers Maher and Ismail were hiding in the bathroom. When they [the soldiers] left the house, I started to call my brothers' names; when one of them replied I knew he wasn't dead. My mother and my sister were able to escape from the house, but I was not able to. A few moments later while I was moving, they [the soldiers] came back, they said to me, "you're still alive?" and shot me again. I pretended to be dead. That night I got up and I stayed there until Saturday. I pulled myself along crawling into the middle of the room and I covered the bodies. As I put out my hand to reach for the water jug they shot at me immediately. I only felt a bullet in my hand and the man started swearing. The second man came and he hit me on the head with his gun; I fainted. I stayed like that until Sunday, when our neighbour came and rescued me.

Mrs Al Meri lost her father, three brothers, (aged 11, 6 and 3) and two sisters (18 months and 9 months).

12. Akram Ahmad Hussein:

[The twelfth plaintiff, Mr Akram Ahmad Hussein, was not at Sabra and Shatila at the time of the events, cf. infra, part B3 of this submission.]

13. Bahija Zrein:

We were at home and we got wind of a massacre, but we didn't believe it. In the night, two young men came to our house and told us that there was a massacre in the camp. We then went outside to see what was happening. We saw the Lebanese Forces standing outside; they called us. There were a lot of people and we thought they were Israelis. When we heard their Lebanese accents I ran away, but they followed me and arrested us young people, both men and women. All this happened at about 5 o'clock in the morning.

They went into the area and took away about 18 young people, while confining us - men, women and children – to the camp. I saw my brothers and some children among the men they took away. While we were walking, we saw people who had been killed with axes. Among them were doctors from Gaza hospital. They lined them up and slaughtered them; then they started shooting at us and killed a large number of people, including 18 of our neighbours' sons. While they were shooting, the whole camp was surrounded by Israeli tanks and all the diggers were Israeli. An Israeli patrol presented itself to us and asked us to go to the Sports Centre. The men went, while we women were taken to the Kuwaiti embassy.

That's how we saw them loading the young people into the cars. Among those young people was my brother. They blindfolded them and they loaded my brother in the car. That's how he disappeared and I have never seen him again since.

Mrs Zrein's brother was 22 years old at the time of the events.

14. Mohammed Ibrahim Faqih:

That morning, they started shelling around the outside of the camps, including Shatila, and we could hear the sustained shooting. The shelling reached the main roads and we didn't know what the reason for it was. We could not believe it. We couldn't even move from one place to another or escape because of the shelling and machine-gun fire.

We stayed at home and suddenly a shell hit our neighbour's house. Some of the shrapnel hit my son in the chest and the leg, and we took him to Akka hospital, but they wouldn't admit him because of the large number of injured people already there. We took him to Gaza hospital. My brother and I stayed with him at the hospital, and meanwhile the shelling of Sabra and Shatila camps intensified. A woman came to tell us that she had seen them coming; I fled but I saw how they entered and took away all the injured and sick people. So I ran away and I came back three hours later. They had taken away many people and the only one left was my injured son. I don't know how many people they took away alive.

Then we took my son to a hospital in Hamra, and the next day I heard that they had come to Sabra and they had taken away the girls. When I came back here I saw my daughter Fatima had been hit with an axe, along with my little girl. I noticed that they had dug a ditch in the ground and they had buried them alive in the ditch. The baby's throat had been slit. I also saw people who had been killed and pregnant women with their stomachs ripped open. About thirty young people had been massacred near our house, both Lebanese and Palestinian. They didn't spare anyone; they killed everyone they came across. In the home of our neighbour Ali Salim Fayad, they had killed his wife and children.

My God, what can I say, what can I tell you? They had demolished the shops in Sabra road and dug large ditches where they had buried the victims. I saw about 400 children's corpses. They upturned the earth and buried them. From the twelve members of our neighbour's family, eleven were killed and only one escaped.

Mr Faqih's two daughters were aged 2_ and 14 at the time of the events.

15. Mohammed Shawqat Abu Roudeina:

I was at home with my father, my mother, and my sister. When the shelling started, we were at the home of my father's uncle. There, the shelling started again, and we went into the bedroom, the men staying in the living room. Then we went to a neighbour's house. There were about 25 or more of us. A little while later, we heard the cries of a girl who had been injured in the back. Armed men had stationed themselves in the area. Then we heard shooting, screams and strange voices. Aida, my cousin, went up to the shop and turned on the light. A man slit her throat and they dragged her by her hair. She started screaming "Daddy!" then her voice went dead. Her father went to follow her. They killed him immediately. That's how they realised that we were in the house. They came down to the floor above us, where they broke and ransacked everything and we heard them calling out to each other, "George, Tony..." When we heard them breaking everything our voices rose, and that's how they knew that we were on the floor below. One of them came down and saw us. He immediately told the others, and they all came down. My father was sitting on a chair, and as soon as he saw them, he kissed me, put some cologne on me and told my mother to take good care of the children. My father's cousin said to his wife, "the children are your responsibility."

I will never forget. The image of that day is engraved in my memory. They ordered the men to stand against the wall. They made us go out behind them into the road. When I got to the door, I looked up at the red sky, red streaked with flare grenades. Once we arrived at the beginning of the road, we heard the shots fired at my father and my uncle, as well as some shouting. We walked several metres, flanked by armed men. My cousin saw her father and she started screaming. I saw my father's car, which they had opened and were sitting in. That image is also engraved in my memory, because I asked my mother what they were doing with my father's car but she didn't reply. As we walked along we saw the dead people.

They took us to the Sports Centre, and they placed us there in a room where there was a woman and her children. They brought people there. They took some of them away in cars and killed the others. At that moment, the Israeli tanks were there. Suddenly a mine that had been there since the beginning of the Israeli invasion exploded. They ran away, and so did we.

Mr Abu Roudeina lost his father, his (pregnant) sister, his brother-in-law and three other members of his family.

16. Fadi Abdel Qader Al Sakka:

We had spent the whole of Friday hidden in the house, thinking that the Israelis were going to penetrate the camp.

On Saturday at about midday, while we were still at home, we saw the Israelis arriving at our house. They told us all to come out. I was a little boy of 6 at the time. We came out and they took us to the road to the western side. My father was carrying my little brother; they told him to give the child to my grandmother, who was also with us. They wanted to take away my father and my uncle, so my grandmother asked where they were taking them. Someone told her that they would be back soon. While we were walking, the roads were strewn with dead people and I saw how they were treating people. My father and my uncle never came back after that day when they were taken away.

Mr Al Sakka lost his father and an uncle.

17. Adnan Ali Al Mekdad:

At about 3 pm on Thursday, after the death of Bashir, Sharon made some worrying moves. There were foreign men surrounding the region. Some people found out about this and fled. My mother saw the armed men, made them some tea and told them she was Lebanese. They told her that they were only after the Palestinians, and that, being Lebanese, she could stay in the area, no one would bother her, she just had to keep her ID papers with her.

We were looking for family members, when I saw her hanging from a tree. After that we set about gathering the corpses and burying them.

Mr Adnan Ali Al Mekdad lost his father, his mother and more than forty members of his extended family.

18. Amal Hussein:

On Wednesday, Israeli aeroplanes started flying over the area and the shooting and shelling began. My brothers and sisters were scared. Those who were scared went down into the shelter next to our house. Thus, one group slept in the shelter and the other group slept in the house. The aeroplanes continued hovering, and there were more and more of them. My three-month-old nephew, who was with my sister in the shelter, started crying. He wanted to eat. She came out with him and four others, and they all came into the house. As soon as she came in – this was on Thursday – we heard shouting, it was coming from the children and women in the shelter, which we could see from our bathroom window. All of a sudden, the armed Phalangists invaded the area. No one could leave the house. All we could hear was the screaming of babies and women. They started killing people. We stayed in the house; we opened the doors and then went into the bathroom with my little nephew. We had gagged his mouth for fear that they would hear his voice and come to kill us. We stayed in the bathroom; they came in and searched the house, but they didn't find us. We heard the screams and the massacre through the bathroom window. That's how we knew that they had gone into the shelter and taken everyone they found there, including my relatives. On the Saturday, we escaped into the inside of the camp. After that, my mother went back to see my brothers and sisters, but she couldn't recognise them because they were so disfigured. All we knew was that they had been buried in the mass grave. My father taught the child who survived (my father's nephew) to call him Daddy.

Mrs Amal Hussein lost a brother, two sisters and several other relatives.

19. Noufa Ahmad Al Khatib:

Two days before the massacre, the Israelis came to our area. They came, took us, lined us up and then let us go. The next day they withdrew and went into a hospital. We fled, and the day after that I learnt that there had been a massacre. Then the next day I was told the story of the massacre. I was in Shatila, I saw the victims, and I started to look for my relatives. I saw my mother, she was dead and I saw her and recognised her. I saw all the victims who died and those who were still lined up against the walls.

Mrs Noufa Ahmad Al Khatib lost her mother, her sister, and several other close relatives.

20. Ali Salim Fayad:

We were in the house and we had some people there. There was a car across the way and we went to move it. As we were coming back that Thursday, there were some armed men in front of the house. They ordered the separation of the men from the women and children. They lined up the men as well as our Palestinian neighbour and his family, against the wall and they shot them. The women and children were slaughtered in the road. Before shooting, they asked for their identity cards and they kept those. The Phalangists searched the house and the Israelis protected them with their tanks and their flares. When they shot us I was hit in the back, the thigh and the hand. The night was lit up by the flares. I remained laid out on the ground. Later I called out to someone who was passing and asked him to call an ambulance. A short while later my daughter came and took me to Akka hospital. The next day the Phalangists came to the hospital and asked my son, who was in the room next door, about me. They took away some of the injured Palestinians. I saw them dragging a wounded man out of his bed and hitting him on the head with an axe. He was young, and they killed him.

Mr Ali Salim Fayad lost his wife, his two daughters, his son and his sister-in-law.

21. Ahmad Ali Al Kahtib:

It was between five and six pm on Thursday. We were in the area and there was some shooting. A young man from our area was injured. We took him to Gaza hospital. While the massacres were taking place, we tried to go back but the road was closed. I spent three days away from home.

Mr Ahmad Ali Al Khatib lost his father, his mother, four brothers, three sisters and his grandmother.

22. Nazek Abdel Rahman Al Jamal:

My eldest son went to get the car so we could escape; they came and arrested him at Sabra Square. My second son went to get bread and food, we were at home, and the Israelis and the Phalangists took us away from the house and made us walk in a line to Sabra. While we were walking I saw my eldest son walking in another line and my sisters saw my other son. They made us walk as far as the Kuwaiti embassy, and when we got there they said, "Women go home." There was an explosion and the people ran, on the way back I saw dead bodies on both sides of the road, women and old people. They had blown up the corpses and the children were dead. I went home and the children weren't there. I spent four days looking for the children; my brother brought my youngest son's dead body; I had already seen my eldest son dead in the pit.

Mrs Nazek Abdel Rahman Al Jamal lost her two sons aged 20 and 22.

B2. Testimonies, survivors of Sabra and Shatila.

In addition to their own statements, the plaintiffs present a series of statements from other survivors of the massacre.

1. Mohammed Raad:

On Wednesday we were at home waiting for the visit. I was at Sabra and the roads were empty. When I arrived at Ali Hender's cafe, I met some young men who called me over and asked if I knew. I said no. They said that the Israelis had entered with the Phalangists and that they were destroying things. I went straight home, got my wife and we went to her brother's house. We said to him, "Abu Suheil, let's get away from here." He replied, "We are Lebanese, they won't bother us." I was with another relative and I said to him, "Leave your children and go." He called me a coward. My wife and I started walking until we reached the bridge that leads to the airport, and from there I saw the Israelis surrounding the area. An Israeli soldier shouted at me. The Israelis started asking me where I had come from and where I was going; then they said to my wife and to another woman passing by to stay where they were before ordering me to follow them and wait by the mountain. But I was directly behind Harat Horeik and we escaped to Ghobeireh.

On Saturday we went back to see my relatives. What can I say: people were on their backs, black. I found my brother-in-law dead, he had been hit on the head with an axe; we found thirty other members of the family dead.

2. Jamila Mohammed Khalife:

On Thursday at about 4 o'clock pm, they were at Al Horch, and we knew that there was a massacre. We also knew that the Israelis were in the Sports centre; but we were asked not to do anything.

A short while later, the shelling intensified but we thought that things would quieten down soon after. We went to seek shelter at our neighbours' house. Looking towards the Sports Centre, we saw hundreds of armed elements descending upon it and in just a few moments they appeared in front of the house full of people. We started shouting that the Israelis had attacked us. When they reached the house they started insulting us, blaspheming, and then our neighbours' son shut the door in their faces and we fled through another door to hide in the shelter, which was full of people.

The Israelis and the Phalangists came back a short while later with a loudspeaker, through which they asked us to give ourselves up, promising that our lives would be spared if we came out of the shelter. We waved a white flag, but when we came out of the shelter my father said that our lives would not be spared and that they were going to kill us. I told him not to be scared and to come with us. They dragged us all along; women, children and men; my father tried to escape and they killed him in front of my mother and my little sister. They made us all walk; our injured neighbour was with us, carrying her intestines and haemorrhaging. She and I escaped into the Shatila camp, and from there we sought refuge in the Gaza hospital. When they arrived near the Gaza hospital, we ran away once again.

When the massacre was over, we went back and saw the corpses of the dead, including that of our neighbours' son Samir, who had been murdered. And under the corpses, they had placed bombs as booby-traps.

3. Shahira Abu Roudeina:

On Thursday 15 September, after sunset, the Israeli air force carried out some raids against us. We lived in the western part of the camp, and when the shelling started drawing nearer, we – my husband, my children and I – went to my parents' home at the entrance of the camp, to see where they wanted to go. But we all stayed at my parents' house until 7 pm, at which time, seeing as the shelling kept intensifying, my sister went to see what was happening outside. They immediately shot at her. She shouted, "Daddy!" and didn't come back. Hearing her cry, my father went out. He saw her and said, "Our little girl is dead." Then they shot at him, and he fell. The whole camp was lit up by light flares, and none of us could go outside. We stayed locked in like that until 2 am. Then we understood that there had been a massacre.

The noise of the killing and the screams haunted us until dawn. At five in the morning, they came down trough the roof, and suddenly we saw them on the stairs in front of the door of the bedroom where we were. About fifteen armed men positioned themselves at the window, and four of them came in. The children screamed and cried, and we women screamed, too. They put the men against the wall – my husband, my paternal cousin and my brother – and they pumped them full of bullets in front of us. They made us come out and lined us up in our turn against the wall, wanting to pump bullets into us as well, but then they started arguing about who would be the first to shoot. Then they took us to the Sports Centre and took us into a room full of men, women and children. While guarding that room, they were also sharpening their axes and preparing their guns. It was Friday, at about five am. At midday, they brought back the young men and the women from the rest house, as well as some people from the Kuwaiti embassy. In the middle of the Sports Centre there were mines which had been there since the beginning of the Israeli invasion. One of the mines exploded. People fled, and we were among them. What can I say? When we were at the Sports Centre, the Israelis were securing the protection of the Phalangists, and Israeli tanks were stationed there. Also, it was the Israelis who shouted into the loudspeakers, "Give yourselves up and your lives will be spared."

4. Hamad Mohammed Shamas:

On Wednesday, when the Israeli army arrived at the Sports Centre with its tanks, and when we found out that the Israelis were there, I went with a friend to ask them what was going on.

They asked me if I was a terrorist, I said "no". Then they said to us, "stay at home, there's nothing going on". I went home. It was the 15th of September.

On Thursday 16 September, I was talking to Abu Merhef and Abu Nabil when suddenly we heard the sound of bombs falling on the houses, and the screams of injured people. We ran to help the wounded, and to drive them the Akka and Gaza hospitals. Afterwards, I suggested to my father that he go down into the shelter. The shelling kept intensifying, and we went down into the shelter. The children were thirsty. I went to get some water and blankets. My brother had been away from the house for 15 days because he was working. He came, and stood with us at the door to the shelter. Suddenly, we saw some Israelis and some Phalangists coming towards us, swearing and cursing. They told us to come out. We did. They placed us against the wall and pointed at Abu Merhef; he had 500 pounds in his pocket. Abu Merhef told them to take 250 pounds and to leave him with 250 pounds for the children. When they heard that, they immediately shot at the men. I was

hit and I pretended to be dead. Three or four others fell on top of me. They were dead – Abu Hassan Al Bourgi, Kassem Al Bourgi, Abu Nabil and Ali Mehanna. I remember that Ali Mehanna survived his injuries for at least an hour; when he regained consciousness he started calling for help and asking if there was anyone still alive. I said, "I am," and he said, "who?" I said, "Hamad." He said, "Please Hamad, I am injured in the stomach and in the hand. Say hello to my mother, my sister, so-and-so, and tell them Ali sends his love." I said, "How do you know that I'm going to live? Is there anyone else alive near you?" He was sitting up and I was still lying down. A little while later they came back and said to Ali, "Are you still calling?" They insulted him and hit him on the head. But he got up again and he said to them, "Is that how you treat us, you sons of bitches?" because he thought they weren't supposed to attack the Lebanese. They then resumed their task, 5 or 6 times. They fired more shots to make sure that everyone was dead. They pointed the gun at my thigh and fired. They had come back to make sure everyone was dead. At about five in the morning, I tried to get up from where I was. There was a wall next to me. I moved along the road and I heard the sound of the tanks. I went to hide in the home of Osman Houhou, which had been destroyed. Suddenly I heard an Israeli on a microphone saying, "Give up your weapons, you will have your lives spared and those of your family."

I tried to climb up the slope in order to give myself up like they said. When I was almost there, I looked and I saw them placing the men on one side and the women on the other. Then I saw them shooting them. That's why I went back to hide in the house I had left a little while earlier. I stayed there until the evening. They were sitting around a table drinking alcohol, there was only a wall separating me from them. The wall was cracked; I could see what was happening. They were saying to each other, "don't leave anything that moves."

In that way I remained in the house until 10 o'clock on Sunday morning. I lost hope and I couldn't handle any more, I decided to go out even if it meant being killed. I tried to go back to our house, but I found it destroyed. I couldn't walk because of all the dead people strewn over the road. And every time my hand touched one of them, I felt their flesh between my fingers.

I saw Um Bashir who had been killed with her seven children. It was as if she was sleeping with her seven children around her. I went back home and sat down with the dead. The Makdad girl came to call for help, and that's how I got taken to the hospital.

5. Milaneh Boutros:

We were at home that Thursday. There was shelling, and we went into the shelter. The place was packed with men, women, and children.

A little later, someone from, I believe, the Rashidiya camp came to take his family. Mohammed Shamas' brother also came and suggested that he leave. But Mohammed refused and we stayed in the shelter. I picked up my 2-year-old daughter and went out. I saw armed men and Israeli soldiers calling for people.

I went out first, thinking that they were there to protect us. I said to one of them, "You're here to protect us." He said, "Shut up!" and started insulting and swearing. "Shut up! Are you pretending to be Lebanese now?" I told him that I was from Zghorta and that my [husband] was Lebanese. He took us away. I was carrying one of my daughters, another one was holding my hand, and the other children were clinging to my clothes. We stepped over the corpses. The area was light as day because of the illumination flares. When we

got to the Kuwaiti embassy, they took Ali, my husband's nephew, and they loaded us into trucks. We headed towards Dora and then Bikfayya. There, a woman stood on a balcony and said, "you're bringing me women; I want men." With us was a small boy of 13, Ali Zayyoun, who was cowering in a corner of the bus. As soon as they saw him, they took him and killed him. Then they took us to Ouzai. The next day they asked us to go back to our houses. There were Israeli patrols and Phalangist blockades everywhere. The ground was littered with corpses. At the door of the shelter I saw my husband, my son and other murdered people. Another corpse had been thrown on top of my son, who had been killed by an axe to his head.

6. Najib Abdel Rahman Al Khatib:

Before entering our house, the Israelis started firing flares to light the sky. When the shelling got nearer, my father took us into the shelter until the shelling calmed down a little.

We went to Akka hospital, where we slept one night. But at about 5 in the morning, they penetrated the hospital and we fled again. On the Saturday, I came back to the house to pick up some things. I saw only dead bodies on the ground, and I saw the Israelis and the Phalangists passing by. I went back again and I went in through the garden of our house; that's when I saw my dead father. I went to the house and I saw a basin. It was full of people's heads. I fled.

The plaintiffs also present the testimonies of survivors gathered by journalists, and the accounts of eyewitnesses, in particular:

7. **Ellen SIEGEL**, US national, nurse in Beirut in 1982, currently lives in Washington DC (USA).

8. **Robert FISK**, British national, journalist, one of the first journalists to visit the camps after the massacre.

9. **Nabil AHMED**, survivor.

10. **Jean GENET**, French national, poet and playwright, visited the camps immediately after the massacre.

11. **Dr Swee CHAI ANG**, Singaporean national, doctor in Gaza hospital, Sabra, at the time of the massacre.

12. **Dr Per MIEHLUMSHAGEN**, Norwegian national, idem.

13. **Dr Ben ALOFS**, Dutch national, nurse in the Gaza hospital, Sabra, at the time of the massacre, currently lives in Great Britain.

14. **Dr David GREY**, British national, doctor in Gaza hospital, Sabra, at the time of the massacre (one of the three doctors who returned to the hospital after the initial evacuation with an official '*laissez-passer*' from the Israeli army), currently lives in Great Britain.

B3: Other plaintiffs:

12. Akram Ahmad Hussein:

Mr Hussein was in Tripoli at the time of the events. He lost his entire family: his mother, five brothers (aged 17, 13, 12, 11 and 11) and two sisters (aged 10 and 9).

APPLICABLE LAW

A. The Crime of Genocide

At the time of the massacre of Sabra and Shatila, the Security Council adopted Resolution 521 (September 1982) which, in relevant part,

> ***"Condemns the criminal massacre of Palestinian civilians in Beirut"***

On 16 December 1982, the United Nations General Assembly adopted, with an overwhelming majority,[16] the following resolution (37/123D):

> ***"The General Assembly,***
>
> ***Recalling its resolution 95 (I) of 11 December 1946,***
>
> ***Recalling also its resolution 96 (I) of 11 December 1946, in which it, inter alia, affirmed that genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds - are punishable,***
>
> ***Referring to the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly on 9 December 1948,***
>
> ***Recalling the relevant provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949,***
>
> ***Appalled at the large-scale massacre of Palestinian civilians in the Sabra and Shatila refugee camps situated at Beirut,***
>
> ***Recognising the universal outrage and condemnation of that massacre,***
>
> ***Recalling its resolution ES-7/9 of 24 September 1982,***
>
> ***1. Condemns in the strongest terms the large-scale massacre of Palestinian civilians in the Sabra and Shatila refugee camps;***
>
> ***2. Resolves that the massacre was an act of genocide."***

This conclusion merits consideration. In effect, article 2 of the 9 December 1948 Convention on genocide, approved by the law of 26 June 1951,[17] provides the following definition: *"...The crime of genocide consists of one of the following acts,* ***committed***

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[16] Resolution 37/123D was passed with 124 votes in favour, no votes against and 22 abstentions.
[17] MB 11.2.1952.

with the intention of destroying, either in whole or in part, a national, ethnic, racial or religious group : *1) The killing of members of the group; 2) A serious attack on the mental or physical integrity of members of the group…"*[18]

The facts clearly demonstrate that the attack against the refugees at Sabra and Shatila rested upon a profound hatred of Palestinians *because of their national origin.*

The intention to harm them was clearly fuelled by the fact that they were Palestinians. The American journalist Thomas Friedman, who was one of the first witnesses on the scene after the massacre, elucidates this phenomenon in his book:

> *Afterward, the Israeli soldiers would claim they did not know what was happening in the camps. They did not hear the screams and shouts of people being massacred. They did not see the wanton murder of innocents through their telescopic binoculars. Had they seen, they would have stopped it immediately.*
>
> *All of this is true. The Israeli soldiers did not see innocent civilians being massacred and they did not hear the screams of innocent children going to their graves. What they saw was a "terrorist infestation" being "mopped up" and "terrorist nurses" scurrying about and "terrorist teenagers" trying to defend them, and what they heard were "terrorist women" screaming. In the Israeli psyche you don't come to the rescue of "terrorists." There is no such thing as "terrorists" being massacred.*
>
> *Many Israelis had so dehumanised the Palestinians in their own minds and had so intimately equated the words "Palestinian," "PLO," and "terrorists" on their radio and television for so long, actually referring to "terrorist tanks" and "terrorist hospitals," that they simply lost track of the distinction between Palestinian fighters and Palestinian civilians, combatants and non-combatants. The Kahan commission, the Israeli government inquiry board that later investigated the events in Sabra and Shatila, uncovered repeated instances within the first hours of the massacre in which Israeli officials overheard Phalangists referring to the killing of Palestinian civilians. Some Israeli officers even conveyed this information to their superiors, but they did not respond. The most egregious case was when, two hours after the operation began on Thursday evening, the commander of the Israeli troops around Sabra and Shatila, Brigadier General Amos Yaron, was informed by an intelligence officer that a Phalangist militiaman within the camp had radioed the Phalangist officer responsible for liaison with Israeli troops and told him that he was holding forty-five Palestinians. He asked for orders on what to do with them. The liaison officer's reply was, "Do the will of God." Even upon hearing such a report, Yaron did not halt the operation.*[19]

This collective "demonisation" of Palestinians described by Mr Friedman is also evidenced in Ariel Sharon's autobiography *'Warrior'*: The objective of the attack on Sabra and Shatila was *"to clean the PLO cadres out of West Beirut."*[20] In another passage from the same book, Mr Sharon explains the purpose of Israel's invasion of Lebanon in the following terms: *"Any effective approach (…) would have to look not just at specific local targets but at* ***the entire PLO military and political infrastructure in Lebanon.*** *And this, whether we liked it or not, would force us to take into account the* ***entire*** *Lebanese tangle."*

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[18] [Translated from French].
[19] Thomas Friedman, *From Beirut to Jerusalem*, New York, Farrar, 1989, p. 163.
[20] Sharon, p. 498.

It also squares with the infamous comments of the Israeli prime minister at the time, who called Palestinians "two-legged animals," and with those of Rafael Eitan, who, according to the Kahan commission, shared responsibility for the massacre, and who once compared Palestinians to "drugged cockroaches."

Furthermore, it is clear from the testimony of the plaintiffs and other survivors of the massacre that, in addition to the Israeli commanders, those who actually carried out the massacre exhibited a similar hatred for Palestinians as a national group. Although it is true that a large number of Lebanese were also killed, the ethnic nature of the killings is clear from many plaintiffs' accounts of formal or intended distinctions being made between Lebanese and Palestinians. As plaintiff Adnan Ali Mekdad recounts: *"My mother saw the armed men, made them some tea and told them she was Lebanese. They told her that they were only after the Palestinians, and that, being Lebanese, she could stay in the area, no-one would bother her, she just had to keep her ID papers with her."*

The hatred of Palestinians as an ethnic group, on the part of the Israeli military command as much as on behalf of the Phalangist perpetrators, is clearly noted by several journalists including Thomas Friedman:

> *The Israelis had so demonised Sabra and Shatila as nests of Palestinian terrorism and nothing more that they didn't even know that probably one quarter of the Sabra and Shatila neighbourhoods were inhabited by poor Lebanese Shi`ites who had come to Beirut from the countryside.... A picture in the As-Safir paper the day after the massacre was exposed captured the blind tribal rage of the Phalangists who tore through the camps. The picture, which occupied most of the top of the front page, consisted of a single hand. The fingers of this hand were locked around an identity card that could easily be read. The card belonged to Ilham Dakir Mikdaad, age thirty-two. She was a Shiite woman whose entire family, estimated to be forty individuals, was wiped out by the Phalangists. Her body was found lying on the main street in Shatila, with a row of bullets running across her breasts. It was clear what had happened: she must have been holding up her identity card to a Phalangist, trying to tell him she was a Lebanese Muslim, not a Palestinian, when he emptied his bullet clip into her chest.*[21]

These conclusions are supported by the notorious assertions taken up in the enquiries and reports of the day regarding the collective dimension of the massacre (women and children as well as men), and the particular vindictiveness against pregnant women (see for example the testimonies of Mohammed Ibrahim Faqih and of Shawqat Abu Roudeina) and babies. From these numerous reports and testimonies, several instances stand out: a baby being trampled to death,[22] the assertions of Lieutenant Avi Grabowski (who was present during the massacres but was ignored by the superiors to whom he reported what he saw),[23] and, especially, confirmation of the collaboration between the killers and the Israeli Ministry of Defence:

> *At one point,*[24] *Sharon began to stress the need to destroy whatever was left of the PLO's infrastructure in West Beirut and emphasised the danger of letting terrorists*

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[21] Friedman, p. 164.

[22] Schiff and Ya'ari, p. 264; "Infant trampled to death by a man wearing spiked shoes."

[23] "I saw Phalangists killing civilians. [...] One of them said to me: "Pregnant women will give birth to terrorists." Kapeliouk, p. 60. On the orders, idem.: "A parachute sergeant hears his officer announcing on his radio at 11h: 'It may not please us, but I forbid you all to intervene in what happens in the camps'."

[24] Thursday 16 September, just before the entry of the militia into the camps.

remain free in the city: ***"I don't want a single one of them left!"****, he was quoted as saying in a session with Hobeika, a Phalangist militia head.*

"How do you single them out?" *Hobeika asked.*

It was an odd question for a high-ranking officer in a militia known for its talent at ferreting out terrorists, and ***Sharon decided to evade it. "I'm off to Bikfaya now,"*** *was his reply.* ***"We'll discuss that at a more restricted session.***[25]*"*

To that note, which Israeli authors qualified as "sinister," it must be added that, in the jurisprudence of the ICTY,[26] the "*specific intention of the crime of genocide does not have to be clearly expressed. (...) It can be inferred from a certain number of elements, such as the general doctrine of the political project (...) or the repetition of discriminatory destructive acts (or) the perpetration of acts undermining the foundation of the group.*"[27] In the *Akayesu* case, the tribunal concluded that "*[t]his intention can be deduced from a certain number of elements, relevant to genocide, crimes against humanity and war crimes, by example of the massive and/or systematic character or of their atrocity (...)*"[28]

In conclusion, all the constituent elements of the crime of genocide, as defined in the 1948 Convention and as reproduced in article 6 of the ICC Statute and in article 1§1 of the law of 16 June 1993,[29] are present.

B. Crimes Against Humanity

B1: Definition and source(s) of incrimination

According to the Rome Statute of the International Criminal Court (ICC), as approved by the law of 25 May 2000, crimes against humanity occur whenever certain acts[30] are committed "*as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*" (article 7.1). Article 7.2 specifies that the term *"[a]ttack directed against any civilian population"* means *"a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack."* It is clear from the preparatory work of the ICC Statute that the definition of article 7.1, as well as the specification of article 7.2, was conceived in a very broad manner.[31]

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[25] Schiff and Ya'ari, p. 255. Hobeika was the militia head responsible for the first "mopping up" operation.

[26] I.T 95-5 and 19-R61, 11.7.1991 Karadic and Mendic.

[27] David, E., *Legal Principles of Armed Conflict*, Brussels, Bruylant, 1999, p. 661. ICTR, *Akayesu* case, verdict of 2.9.1998, in particular §478: "This intention can be deduced from a certain number of elements, concerning genocide, of the crime against humanity and war crimes, by example of their massive and/or systematic character or of their atrocity (...)"

[28] ICTR, *Akayesu* case, verdict of 2.9.1998, §478.

[29] Law of 16 June 1993, relative to the repression of grave violations of international humanitarian law, as modified by the law of 10 February 1999, article 1§1.

[30] Notably murder, torture, rape and all forms of sexual violence of comparable gravity...all of which occurred at Sabra and Shatila.

[31] It must be known in effect that in the last report of the preparatory committee for the creation of an international criminal court, published on 14 April 1998, several options were retained for the definition of a crime against humanity. One of these options imposed the condition that the crime was committed "in the context of a generalised or systematic campaign against a population," another added the condition that the crime be "perpetrated on a large scale," and a third added that the crimes must be "inspired by political, philosophical, racial, ethnic or religious motives, or

The definition of article 7.1 was taken up again in article 1 §2 of the law of 16 June 1993 relative to the repression of grave violations of international humanitarian law, as modified by the law of 10 February 1999.

It is crucial to note that, in the strictest sense of the term, these legislative texts do not incriminate a crime against humanity but confirm its pre-existent incrimination. The ICC Statute makes this clear in article 10.[32] The Belgian legislator expressed this unequivocally during the preparatory work for the law of 1999.[33]

Once again[34] it is clear that ***International Customary Law*** and the *ius cogens*[35] are the sources of incrimination for crimes against humanity. Several judicial decisions have explicitly confirmed this source of incrimination,[36] including the ICTY.[37] Particularly interesting in this case are, on the one hand, the Israeli Supreme Court's decision in the Eichmann case, which is explicitly drawn from "the Laws of Humanity" and "the dictates of Public Conscience,"[38] and on the other hand, the decision rendered by Judge Vandermeersch in the *Pinochet* case, according to which, "*It is to be considered that before being codified in treaties or laws, crimes against humanity are established in international custom and as such fall under international* 'ius cogens'*, which is imposed in internal jurisdiction with the effect of constraining* 'erga omnes'."[39]

Thus, every definition of 'crime against humanity' is – by definition – always incomplete. It is also important to note that the definition in the ICC Statute (and in Belgian law) is more restrictive than that of Nuremberg,[40] which to this day remains a primary source of customary law (as applied in the Eichmann and Pinochet affairs).

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resting upon any other arbitrary criterion." Not one of these variations, which limited in some way the notion of crimes against humanity, was retained.

[32] Article 10: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

[33] Belgian Senate 1998-1999, document 1-749/3, page 19 ff. In a note to the commission, the Minister of Justice specified that according to Belgian law, incrimination for a crime against humanity comes from the application of international custom, expressly recognised as a legal source in the International Covenant on Civil and Political Rights (ICCP, article 15.2) and in the European Convention on Human Rights (ECHR, article 7.2). In this context, the Minister concludes, "The introduction of an explicit incrimination for crimes of genocide and crimes against humanity constitutes therefore only a confirmation of the existing law, while assuring a higher visibility…(ibid, p. 20).

[34] Another important legal reference is article 7.2 of the CEDH affirming that the imperative of legality, as well as the principle of non-retroactivity that is derived from this imperative, does not in any way oppose the pursuit and the condemnation of persons reputed to be "*criminals according to the wide principles of law recognised by the ensemble of nations.*" An entirely analogous provision is found in the 1966 United Nations Pact (article 15.2).

[35] This idea was enshrined in the 1969 Vienna convention on the Treaties Law (article 53). It concerns customary laws, accepted and recognised by the international community of States, and unconditionally applicable to all.

[36] Among others, the *Barbie* case (with the important decision of principles rendered by the French Cassation Court, 20.12.1985).

[37] ICTY, *Tadic* case, n° IY-94-I-T, judgment of 7.5.1997, §§622-623. In this regard, it is also worth noting that the jurisprudence for the two international criminal tribunals (ICT) has been an important source for the writers of the ICC Statute. This is illustrated in the exposé of the motives of the Belgian government as regards the law of assent of said statute.

[38] Cited by David, E., *Principles of the Law of Armed Conflict*, Brussels, Bruylant, 1999, p. 653.

[39] Investigative judge in Brussels, 6 November 1998, R.D.P.C. 1999, pp 278 ff., J.T., 99, pp. 308 ff.

[40] Given that 'the systematic and/or organised nature' was not a constituent element at the time, cf. the London Accord contains the following definition: "'*Crimes against humanity' means murder,*

The facts of this case clearly indicate the commission of crimes against humanity in the sense of both definitions (Nuremberg and the ICC). The following analysis, based on the strictest definition (that of the ICC), demonstrates this sufficiently.

B2. First and most essential constituent element: an attack against a civilian population.

It is undeniable that the population of Sabra and Shatila was a civilian one. If in the past a limited number of armed resistance fighters were in the camps, these groups had been evacuated several days earlier in conformity with the aforementioned 'Habib' accords. If Israeli reports mentioned isolated acts of resistance, there is every indication that these constituted legitimate acts of resistance on the part of civilians, and such acts in no way alter the civilian nature of the population. According to the jurisprudence of the ICTY, even the presence of a minority of armed people in a group comprised primarily of civilians does not modify the *civilian* character of the group.[41] This jurisprudence conforms to the commentaries of the ICRC in the 8 June 1977[42] Additional Protocol (Protocol 1) to the Fourth Geneva Convention of 12 August 1949 relating to the protection of victims of international armed conflicts.

The concept of protecting the life and integrity of civilians is based on empirical and dramatic historical experience, as is expressed very well in the preamble of the ICC Statute: "*Mindful that during this century millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity...*" Therefore, every attack that targets civilians as such is eminently *grave*.

The exclusively civilian presence in the two refugee camps is confirmed by the ensemble of testimonies and reports. The most revealing testimony came from an (unnamed) information services officer on the evening of the first day of the massacre, Thursday 16 September, at 20.40 – "*There are evidently no terrorists in the camp.*"[43]

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extermination, reduction to slavery, deportation and every inhumane act committed against any civilian population, before or during a war, or even persecution for political, racial or religious motives, when these acts or persecutions were committed following any crime that comes under the competence of the Tribunal, or in liaison with that crime, whether or not they constitute a violation of the internal laws of the country where they are perpetrated."

[41] ICTY, *Kordik* case, n° IT-95-14/2-T, verdict of 12.2.2001, §178ss. ICTY, *Blaskic* case, n° IT-95-14-T, verdict of 3.3.2000. In the verdict, the Tribunal stated (§214): "Crimes against humanity are therefore not only concerned with acts committed against civilians in the strictest sense of the term, but equally incorporate abuse against two categories of people: those who belong to a resistance movement or who were combatants, whether in uniform or not, but who are not participating in hostilities at the moment of perpetration of the crimes, whether because they have left the army, are no longer carrying weapons, or finally they have been placed out of combat, notably through injury or detention. It follows equally that the concrete situation of the victim at the moment of the crime, more than his or her status, must be taken into account in order to determine whether he or she is a civilian. The result is that the presence of a military in the midst of a civilian population does not change its civilian character."

[42] Commentaries of the ICRC (www.icrc.org/dih.nsf/): "(...) In times of war, it is inevitable that individuals belonging to the category of 'combatants' will be found mixed in with the civilian population, for example soldiers visiting their families on leave. However, provided that they do not constitute numerous units, this in no way changes the civilian character of a population."

[43] Schiff and Ya'ari, p. 262. General Yaron interrupts him as he reports his fear that women, children and old people will be massacred.

Not only did civilians exclusively populate the camps, but the Israeli commander had even been aware of this since the previous day.

As indicated above, Article 7.2 of the ICC Statute specifies the notion of attack against a civilian population by adding two additional sub-criteria:

B2.1. First sub-criterion: multiple crimes

The first sub-criterion refers to the number of crimes (multiple commissions). The classic doctrine that the crime be committed on a massive scale is not necessarily to be measured statistically. There are no abstract criteria or specific figures for qualifying these terms.[44] In addition, as mentioned above, the large-scale criterion is not retained as an element in the ICC Statute's definition and neither, therefore, in the Belgian law of 10 February 1999. On the contrary, a proposal to include as a condition that the crime be "perpetrated on a large scale" was rejected.[45]

In any case, multiple murders, rapes, and other crimes specified by the above definition were committed at Sabra and Shatila between 16-18 September 1982, as evidenced by the testimonies of the plaintiffs and witnesses, who constitute only some of the survivors of the massacres.

The references to rape are particularly systematic. The details of the rape and murder of a young woman of 19 who worked at the hospital are well known (cf. the testimony of Ben Alofs), but the phenomenon's recurrence can be found in several passages, mentioned, for example, in Kapeliouk.[46]

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[44] In this sense: ICTY, *Vukovar hospital* case, nº IT-95-13-R61, in particular paragraph 30 of the verdict.

[45] Cf. the report of the preparatory committee of 14.4.1998 doc. UN: A/CONF. 183/2/Add1, page 26. Also see: Human Rights Watch, *Justice in Balance – Recommendations for an Independent and Effective International Criminal Court*, June 1998, pp. 36-37: "(...) to require that crimes against humanity be committed as part of both a widespread and systematic attack imposes too high a threshold and is inconsistent with existing international standards. The same applies to the words 'on a massive scale' (...), which should be deleted... The requirement that the enumerated acts be committed as part of a widespread or systematic attack is consistent with the state of current international law."

[46] Kapeliouk, p 47: *"They crush the heads of children and babies against the walls. Women, and even girls, are raped before being killed with an axe...*
In the same area, several other women are raped before being killed. They are then undressed and their bodies lain out in the shape of a cross. One of the young girls raped, from the Mikdad family, is only seven years old..."
p. 60: *"The entrances to the camp are blocked and again and again the Israeli soldiers order the refugees trying to leave to turn back. The most striking case is a group of 500 people, who had found refuge in the Gaza hospital in Sabra, and who escape during the course of the afternoon when they hear that the militia have entered the hospital killing, wounding and raping everything in their path. Waving white flags, the unfortunate people arrived as far as the Al Mazraa coastal road... They are then stopped by Israeli soldiers. Their spokesperson explains that the people from Saad Haddad are murdering everyone. They receive nonetheless an order to return to the camp. Countering their hesitation, an Israeli tank points its cannon at them and obliges them to turn around."*
p. 64: *"They tell of the torture, the women raped three, four or five times in a row, whose breasts were cut off before they were killed."*
p. 84: *"My neighbour... lived opposite. She and her family stayed at home; no doubt they had not fully understood what was happening, so long have we been living with the noise of fighting and*

B2.2. Second sub-criterion: organisation and/or agreement

The second sub-criterion in the definition of the Statute is that the acts must be committed in the application or the pursuit of a ***political objective*** (of a state or an organisation). The notion 'political' demands a certain degree of co-ordination in the organisation, state or otherwise, to which the perpetrators belong.

The importance of this second sub-criterion must, however, be qualified further: the most recent evolution of the ICTY jurisprudence shows that the criterion of co-operation is no longer considered a *constituent element* of a crime against humanity, but rather, as an index of the systematic nature of the crime.[47] The reverse is already accepted by doctrine and precedents: the general or systematic character in itself constitutes evidence of prior planning.

In any case, even if we set aside the most recent developments in the subject, the present facts sufficiently demonstrate that the massacres were planned and organised.

First of all, the highly efficient cooperation between the Phalangist forces and the regular Israeli army (IDF) clearly indicates the existence of prior planning or at least organisation, without which the massacre at Sabra and Shatila could not have taken place.

Israeli forces completely sealed off the camps, and several reports emphasise how those who attempted to escape the massacre were turned back, often at gunpoint, by the Israeli soldiers who had been commanded to "seal off" the camp.[48]

Several testimonies of foreigners confirm these facts. The testimony of Astrid Barkved before the Nordic Commission is particularly clear on this point:

> *"**Nordic Commission**: Did I understand you correctly that all Thursday, that is the day between those two days which we have been speaking about, soldiers forced people back into the two camps? People were trying to flee from the camps?*
> ***Astrid Barkved**: People tried to flee from the camp and some carried white flags. They went to the Israelis to tell them to stop shooting but they were sent back again to the hospital.*
> ***Nordic Commission**: By Israeli soldiers or by other soldiers?*
> ***Astrid Barkved**: By the Israelis.*
> ***Nordic Commission**: So they were forced back into the camp on Thursday?*
> ***Astrid Barkved:** Yes."*[49]

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shelling. When we came back we found her, her hands and feet bound and her throat having been slit with a knife. Her underwear had been torn off and I think she had been raped."

[47] See, in particular, ICTY, *Kordic* case, nº IT-95-14/2-T, verdict of 26.2.2001, §182: The Trial Chamber agrees that it is not appropriate to adopt a strict view in relation to the plan or policy requirement. In particular, it endorses the Kupreskic finding that "although the concept of crimes against humanity necessarily implies a policy element, there is some doubt as to whether it is strictly a requirement, as such, for crimes against humanity." In the Chamber's view, the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity.

[48] The episode of the delegation of four men aged between 55 and 62 years and carrying a white flag is well known. It was Thursday night, at the beginning of the killing: "They went towards the Israeli post beside the Kuwait embassy, in order to explain that in the camp were neither weapons nor fighters and that its inhabitants would give themselves up...they were seen advancing towards the south side of the camp and then they disappeared. Two days later, three of their corpses were found..." Kapeliouk, p. 51.

In addition to the facts detailed in this first part of this complaint, the premeditated and coordinated nature of the massacre is evidenced by the following incidents:

- Minister Sharon and Lebanese President-elect Bashir Gemayel had several meetings about, among other things, the expulsion of Palestinians from Lebanon. According to various sources,[50] one of these meetings took place in the night of 12-13 September and concerned the "cleaning" of the camps;

- On 9 July 1982, Sharon proposed to U.S. Envoy Habib to send the Phalangists into West Beirut,[51] thus evidencing that he had effective influence and control over them; none would doubt that the militia acted "under the supervision" of the Israeli army (cf. infra);

- Several passages in Sharon's own autobiography (entitled *Warrior*) deal with his intention to "cleanse" Lebanon of everyone involved in or linked to the PLO. It is in accord with this intention that Israeli journalists explain the ensemble of the operation as a grand design of Mr Sharon, which included the "transfer" of Palestinians from South Lebanon, if not from the entire country;[52]

- In his testimony before the official Israeli Commission of Inquiry, General Yaron declared that he completely approved the decision to send the Phalangist forces into the camps of Sabra and Shatila, particularly because: *"The fighting serves their purposes well, so let them participate and not let the IDF do everything."*

- The MacBride Commission posits that the Israeli authorities bear responsibility for the massacres at Sabra and Shatila because they were implicated in their planning and preparation, and because these authorities facilitated the perpetration of the crimes;[53]

- In the same MacBride report, the international commission also placed the massacres of Sabra and Shatila in the larger context of a policy of destruction -- including by shelling – of a series of buildings of clearly civilian character (hospitals, schools etc).[54]

- Finally, various sources,[55] as well as the testimonies of the plaintiffs, demonstrate that the armed Israeli forces not only instigated and facilitated the actions of the

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[49] Nordic Commission report, pp. 117-8.

[50] Alia, J. "Lebanon: What Sharon will never say...", the *Nouvel Observateur*, 6 November 1982; Morris, B., *The Righteous Victims*, New York, Alfred Knopf, 1999, p. 540.

[51] Schiff and Ya'ari, *Israel's Lebanon War*, New York, Simon and Schuster, 1984, p. 251.

[52] Idem., for various quotes see pp. 240-241.

[53] Report of the International Commission to Enquire into Reported Violations of International Law by Israel During its Invasion of the Lebanon, presided over by Sean MacBride. Concerning the implication of the (armed) Israeli forces, the report concludes: "*The commission concludes that the Israeli authorities bear a heavy legal responsibility, as the occupying power, for the massacres at Sabra and Shatila. From the evidence disclosed, Israel was involved in the planning and the preparation of the massacres and played a facilitative role in the actual killings*" and "*8. Israeli authorities or forces were involved, directly or indirectly, in the massacres and other killings reported to have been carried out by Lebanese militiamen in the refugee camps of Sabra and Shatila (...).*"

[54] Cf. in particular conclusions 4 and 5: "*4. There has been deliberate or indiscriminate or reckless bombardment of a civilian character, of hospitals, schools and other non-military targets. 5. There has been systematic bombardment and other destruction of towns, cities, villages and refugee camps.*"

Phalangists, but also that IDF soldiers participated in them on site. This is confirmed by the crucial testimony of a Dutch doctor (then a nurse) who was present at Sabra and Shatila at the time of the massacre and who, among others, confirms having personally witnessed the close coordination between the armed Israeli forces and the Phalangists in the camps.[56]

It is necessary to wait for the convergence of testimonies on this subject, which for the first time are to be heard before a tribunal.[57]

From the statements of the plaintiffs and witnesses arise two important new elements: the first is the presence of Israeli soldiers at the scene of the crime, inside the zone of the camps. The second is the collaboration of the Israelis and the Phalangists, if not in the actual killing, then certainly in the segregation, interrogation and conducting of dozens of civilians to destinations from which they would never return.

It is difficult to imagine that not a single Israeli soldier, whether from the army or from the secret services, penetrated the camps during the three days of the massacres.[58] It must be remembered that the militia were directly solicited for the "mopping up" work, that the various logistical aspects, including using an Israeli bulldozer to raze houses and dig mass graves, as well as the continuous illumination of the night skies by Israeli flares, and the delivery of "fresh" militia on the afternoon of the second day, all hinged upon direct orders from the Israeli command. Gen. Ariel Sharon himself gave the order to allow the Phalangists to enter the camps "under the supervision" of his own army:

> *[Wednesday 15 September]: At 9:00 A.M. Sharon arrived at the forward command post together with Saguy. After being told of the Phalange's willingness to enter the camps, he repeated his order to send them in* ***"under the IDF's supervision."***[59]

It is thus not surprising that different testimonies recount the presence of Israelis inside the camps. In the reports and the inquiries, the names of soldiers who saw the killing and protested to their superiors are numerous.[60] Only a few soldiers made the first move and confided their experiences and concerns to journalists and investigators, but naturally those who were with the militia did not do so, and the inquiry should determine how the claim that no Israeli military personnel ever entered the camps can still be maintained.

Even if an inquiry into the presence of Israelis in the camps during the massacre did not come to fruition, there is no doubt (particularly on Friday 17 and Saturday 18 September) that dozens of civilians, mainly men, disappeared after a "screening" process had been completed in the presence of the Israeli army. There are numerous testimonies about these lethal selections, particularly those that took place at the Sports Centre adjoining the camps, where the Israeli army was present in force.

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[55] Cf. MacBride report: In the report, it is alleged that an ID card belonging to an IDF sergeant was found in the ruins of a house in Shatila, as well as a '*laissez-passer*' written in Hebrew, giving a doctor access to the camps. The latter is confirmed in the testimony of Dr Ben ALOFS (annexed).

[56] Testimony of Dr Ben ALOFS annexed.

[57] Some commendable attempts, including certain extremely persuasive ones, were made to gather the testimonies of victims, but the Kahan Commission did not consider the testimonies of any of the massacre survivors. Even the testimonies of the hospital personnel were considered suspect in the Kahan report.

[58] It is worth noting that the information officers are not named, and that the Kahan commission report had a secret appendix, the contents of which have never been divulged.

[59] Schiff and Ya'ari, p. 254.

[60] Lieutenant Grabowitz and others.

Following are excerpts from some of the testimonies that support these two new elements, which demand a fuller investigation:

Wadha Hassan Al Sabeq:
We were at home on Friday 17 September; the neighbours came and they started to say: Israel had come in, go to the Israelis, they are taking papers and stamping them. Suddenly, after having gone out to see the Israelis, when we got there, the tanks and the Israeli soldiers were there, we were surprised to see that they had the Lebanese forces with them. They took the men and left us, women and children, together. When they took the children and all the men from me, they said to us, "Go to the Sports Centre," and they took us there. They left us there until 7pm, then they told us, "Go to Fakhani and don't go back to your house," then they started firing shells and bullets at us.

There were some men standing to one side; they took them and we have never found out what happened to them. To this day we know nothing about them and they are still considered disappeared.

Mahmoud Younis:
At the Sports Centre, I saw the Israeli military, as well as tanks, bulldozers and artillery, all Israeli. We also saw groups of Phalangists reunited with the Israelis.

Jamila Mohammed Khalife:
The Israelis and the Phalangists came back a short while later with a loudspeaker, through which they asked us to give ourselves up, promising that our lives would be spared if we came out of the shelter. We waved a white flag, but when we came out of the shelter my father said that our lives would not be spared and that they were going to kill us. I told him not to be scared and to come with us. They dragged us all along; women, children and men; my father tried to escape and they killed him in front of my mother and my little sister. They made us all walk; our injured neighbour was with us, carrying her intestines and haemorrhaging.

Amina Hassan Mohsen:
An Israeli told us to go out. Then we saw a person speaking Lebanese. When we went out under cover of the Israelis, they started shouting at us. At that moment I counted my children and I saw that Samir was missing...

Shahira Abu Roudeina
What can I say? When we were at the Sports Centre, the Israelis were securing the protection of the Phalangists, and Israeli tanks were stationed there. Also, it was the Israelis who shouted into the loudspeakers, "Give yourselves up and your lives will be spared."

Bahija Zrein:
An Israeli patrol presented itself to us and asked us to go to the Sports Centre. The men went, while we women were taken to the Kuwaiti embassy.

That's how we saw them loading the young people into the cars. Among those young people was my brother. They blindfolded them and they loaded my brother in the car. That's how he disappeared and I have never seen him again since.

Fadi Al Sakka
On Saturday at about midday, while we were still at home, we saw the Israelis arriving at our house. They told us all to come out. I was a little boy of 6 at the time. We came out

and they took us to the road to the western side. My father was carrying my little brother; they told him to give the child to my grandmother, who was also with us. They wanted to take away my father and my uncle, so my grandmother asked where they were taking them. Someone told her that they would be back soon.

The indications of planning and coordination are numerous and convincing. In every hypothesis, the proof of this constituent element, as with all proof of intention required for the crime of genocide, can be gleaned from the objective circumstances of the event.[61]

B3. Second constituent element: The generalised or systematic character of the attack:

On this point of jurisdiction customary law has also evolved since the Nuremberg and Tokyo trials: currently it is no longer necessary for the attack against a civilian population to be generalised *and* systematic.

Yet the murders and other criminal actions committed at Sabra and Shatila were generalised **and** systematic. The fact that access to the camps was closed and that groups of killers "mopped up" area after area over the course of three days, indicates systematic planning.

B4. Third constituent element: The moral element

Finally, the crimes must be committed **in the knowledge** of a generalised or systematic attack against a civilian population.

As demonstrated in the ICC Statute, it is no longer necessary that a perpetrator of a crime against humanity must have acted according to a policy of persecution, repression or extermination. It is sufficient for the perpetrator to have acted with knowledge of cause (*sciens et volens*, cf. article 30 of the ICC Statute). This regulation is founded in customary law as well as in the relevant conventional law.

Nonetheless, not only did the persons identified in the present complaint as responsible for the Sabra and Shatila massacres commit or participate in this massacre, but they also acted in the context of a policy of persecution, repression and even extermination.

Finally, it is important to recall UN General Assembly resolution 37/123D, by which the Sabra and Shatila massacres qualified as an act of genocide. Given that, by definition, every act of genocide in the sense of the 1948 Convention constitutes a *species* of the same *genus,* that is, a crime against humanity, the acceptance of the qualification of 'genocide' automatically implies that all the criteria for the qualification of a crime against humanity are fulfilled.

This moral element will be developed further during the discussion of the individual penal responsibility for the Sabra and Shatila massacres (cf. infra, point IV).

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[61] David, E. op.cit., p 661, citing the jurisprudence of the ICTY and the ICTR as well as the consultancy of the ICJ.

C. WAR CRIMES

Committed in violation of the provisions of the 1949 IV Geneva Convention relative to the protection of civilians in times of war (ratified by Israel[62] and by Belgium[63]), the Sabra and Shatila massacres must equally be qualified as war crimes according to the terms of article 8 of the ICC Statute, and as grave violations against persons and property protected by the terms of the Geneva Conventions and of Article 1 § 3 of the 16 June 1993 law, these massacres having been perpetrated within the framework of an aggressive invasion by the Israeli army into Lebanese territory, thus introducing an *international* character to the sense of the IV Convention.

The victims of Sabra and Shatila must all be considered as protected persons as defined in the IV Convention, particularly Article 147. Mr Sharon's allegations that 2,000 armed persons were inside the camps[64] are patently contradicted by the facts. Very few of the Sabra and Shatila refugees put up the slightest resistance. Numerous people were found murdered with their identity cards in their hands, dramatically illustrating their faith in the protection that should have been accorded to them as civilians (see *supra*, B2).

The Israeli army was, at the time of the massacres, an occupation force in the sense of article 4 of the same IV Convention, and thus, this army had a clear responsibility towards the protected persons.

War crimes consist of, notably: intentional homicide, torture or other inhumane treatment; the destruction of property without military necessity, as well as generally subjecting a civilian population or civilian people to attack, and subjecting undefended localities to attack. All these crimes were committed at Sabra and Shatila by the Phalangist militia, actively supported by the Israeli Defence Forces, who had given them control of the camps "under their supervision."[65]

D. COMBINATION OF VIOLATIONS

In light of the preceding qualifications, we must conclude that the actions of the different perpetrators of the massacres at Sabra and Shatila constitute a combination of material and intentional violations. The same facts constitute war crimes, crimes against humanity and the crime of genocide.

There is no ruling in either customary or conventional law to oppose the application of several qualifications to the same fact or combination of facts. On the contrary: in the first

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[62] Israel ratified the four 1949 conventions on 6 July 1951. The only reservations formulated in relation to this ratification concerned the use of the Red Shield of David as an emblem and distinctive sign (cf. the list on the ICRC website: http://www.icrc.org).

[63] On 3 September 1952, Belgium ratified the four 1949 conventions. Additional protocols 1 & 2 were ratified on 20 May 1986.

[64] Sharon's declaration, 11 September 1982.

[65] The MacBride Commission developed all these arguments almost twenty years ago to demand the establishment of a Special Tribunal for judging the crimes at Sabra and Shatila: "The Commission recommends that the United Nations set up a special international tribunal to investigate and prosecute individuals charged with crimes of state, especially in connection with the Shatila and Sabra massacres. Such prosecutions should be carried by due legal process and with faimess to the accused." (Recommendation 8, p. 193).

case judged by the ICTR in Arusha (the *Akayesu* case), a combination of violations was established.[66]

A combination of violations was also established by the French Cassation Court in the *Barbie*[67] case.

E. CONCLUSION

The actions committed at Sabra and Shatila together constitute a crime of genocide, a crime against humanity, war crimes and grave violations of the 1949 IV Geneva Conventions.

The present complaint is based on the aforementioned qualifications, which are punishable in international customary law (*ius cogens*) as well as in positive Belgian law.

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[66] ICTR, first chamber, ICTR-96-4-T of 2 September 1998, §§468 and following. See in particular §496, treating the problem of combination of crimes: *"With regard to its Statute, the Chamber is of the opinion that the violations targeted in the Statute – genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and its Additional Protocol II – include different constituent elements and, above all, their suppression aims at protecting distinct interests. There is then reason to retain them for similar facts. Moreover, following the case, it may be necessary to obtain condemnation of more than one of the infractions in order to give the measure of crimes committed by the accused. For example, the general who gave the order to kill all prisoners of war belonging to a given ethnic group, with the intention of eliminating that group, would be guilty at the same time of genocide and of violating article 3, although not necessarily of crimes against humanity. A condemnation for genocide and for violations of article 3 would then give the measure of comportment of the accused general."*

[67] Judgement of 20 December 1985; *Bulletin of Judgments of the Cassation Court*, 1985, pp. 1038 ff.

III. UNIVERSAL COMPETENCE OF BELGIAN COURTS

A. GENOCIDE

Universal competence to pursue and punish the crime of genocide stems primarily from *ius cogens*, and notably from the 1948 Convention. In its 8 April 1993 decision, the International Court of Justice declared, "*all parties have assumed the obligation to prevent and to punish the crime of genocide*"[68] and, "*the rights and obligations established by the 1948 Convention are rights and obligations* erga omnes." The ICTY Appeals Chamber declared in the *Blaskic* case that the obligation for each national jurisdiction "*to judge or to extradite the persons presumed responsible for grave violations of international humanitarian law*"[69] was customary in character. If it is true that Article VI of the Convention effectively expresses preference for the jurisdiction of the tribunals of the State directly concerned with the events, this competence is however not exclusive.[70]

From the preceding considerations there follows the observation that the law of 10 February 1999 (modifying the law of 16 June 1993) is a *procedural law* relative to universal competence for crimes of genocide. This law is therefore immediately applicable, whatever the date of the violation.[71] The Belgian legislator has also clearly applied the same principle in the same domain with the 22 March 1996 law relative to the recognition of the International Tribunal for ex-Yugoslavia and Rwanda: this recognition rests, in effect, on a *formal* competence in positive Belgian law in relation to deeds committed since 1991, well before the law of 22 March 1996.

B. CRIMES AGAINST HUMANITY

The civil parties fully adhering to the reasoning developed in the order rendered on 6 November 1998 in the Pinochet case[72] and based in particular on the observation that the crime against humanity can be incriminated in the *ius cogens*.

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[68] ICJ 8 April 1993, cited by David, op.cit., p. 667.

[69] ICTY, 29 October 1997, case IT-95-14-AR, §29: "(...) *The International Tribunal does not have the mission of replacing the jurisdiction of any State. By virtue of Article 9 of the Statute, the International Tribunal and the national jurisdictions are concurrently competent. The national jurisdictions of the States of Ex-Yugoslavia, as those of all States, are* ***required by customary law to judge or to extradite those persons presumed responsible for grave violations of international humanitarian law****. The primacy of the Tribunal foreseen in article 9 2) is applicable to all national jurisdictions or, if these jurisdictions lack this customary obligation, it can intervene and judge.*" (our emphasis)

[70] David, op. cit., p. 666.

[71] Penal competence is in effect subject to the same regulations as civil competence, cf. article 3 of the Judicial Code and the general principle on which it is based. (Cass., 24-12-1973, Pas., 1974, I, 447; Cass., 16-10-1985, RDPC., 1986, pp. 410-414; Brussels 01-03-1995, RDPC., 1995, p. 756). In the same sense: Closset-Marchal, G., *The Application in time of the laws of civil judicial law*, Bruylant, 1983, p. 29; Tulkens, F. and Van De Kerckhove, M, *Introduction to Penal Law*, Story-Scientia, 1998, p. 208; Verhaegen, J. & Hennau, C., *General Penal Law*, Bruylant, 1995, p. 88, n° 90.

[72] Brussels Investigation and hearing judge, 6 November 1998, RDPC, 1999, p. 278, JT 99, p. 308.

This same reasoning can be found in a number of decisions pronounced in other countries, as, for example, in the *Demjanjuk* decision, in which a United States federal court decided: "*The universality principle is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offences ... Israel or any other nation ... may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.*"[73]

In addition, the civil parties emphasise that the Belgian government and legislature expressly approved this reasoning in the preparation of the law of 19 February 1999, modifying the law of 16 June 1993.[74] In confirming the *ius cogens* as a source for incrimination, the government and legislator also evidenced the **procedural law** character of the law of 10 February 1999. As such, and particularly with regard to universal competence, it is thus (as is the crime of genocide) for immediate application, whatever the date of the violation.[75]

C. WAR CRIMES

According to article 146 of the 1949 Geneva Convention, *"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. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a* prima facie *case."*

Hence, the Military Code of the United States of America contains an express disposition with regard to the universal competence for crimes against humanity.[76]

The law of 16 June 1993 forms, in domestic Belgian law, the execution of this international obligation in terms of universal jurisdiction. Also according to these terms, the law of 16 June 1993 must be immediately applied, whatever the date of the violation (cf. supra).

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[73] US Appeals Chambers, 6th Circuit, 31.10.1985, cited by David, E., op. cit., p. 634.
[74] The customary character of the incrimination of crimes against humanity has already been illustrated with the same preparatory works, in particular: Doc.Parl.Sénat, session 1998-1999, doc. 1-749/3, page 19 onwards.
[75] Cf. Cass., 30-06-1993, Pas., 1993, I, 635. Verhaegen, J. and Hennau, C., *General Penal Law*, Bruylant, 1995, p. 88, n° 90.
[76] US Army Field Manual 27-10, §507(a): "The jurisdiction of United States military tribunals in connection with war crimes (...) extends also to all offences of this nature committed against nationals of allies and of co-belligerents and stateless persons."

IV. RESPONSIBILITIES

Until the completion of an in-depth investigation, it will not be possible to determine the exact responsibilities of the protagonists of these crimes. The Kahan Commission Report concluded that Defence Minister Ariel Sharon bore personal responsibility for the Sabra and Shatila massacres. It also indicated the responsibility of Lieutenant General Rafael Eitan, Commandant Brigadier General Amos Yaron and Commandant Major General Drori, as well as that of the Phalangist leaders.

The central figure is unquestionably General Ariel Sharon, then Israeli Defence Minister, who personally directed the military operations in Lebanon and who was in Beirut at the time of the events. Mr Sharon is currently Prime Minister of Israel.

Certain information indicates that Mr Sharon, although preferring to allow his local collaborators to perform the massacre in the camps, might have planned it with a view to terrorising the entirety of the Palestinian population of the Lebanon into leaving, or retreating to the north of the country.

The constituent elements of these indications are Sharon's public announcement that *"2,000 terrorists remain in the camps"* and his declaration before an assembly of Phalangists after the assassination of their leader Gemayel that they "*shouldn't cry like women,*" but rather that they must "*act like men,*" making explicit reference to the Palestinian camps.

It is noteworthy that in the weeks leading up to the massacre, other war crimes were committed against the civilian Palestinian population of South Lebanon, notably in Tyre and Sidon.[77]

Concerning the Phalangist militia, they could be considered *de facto* auxiliary forces to the military power occupying South Lebanon and Beirut at the time. These militia were armed and trained by Israel. Their leaders would not have been able to take any initiative that contradicted the will of the occupying power, and the operations they carried out were devised and prepared in collaboration with the Israeli military leaders.[78]

Finally, it was the Israeli army that created the necessary environment for the crime to take place, notably by surrounding the camps with troops, providing logistical support to the militia and illuminating the camps throughout each night.

As for the main executioners, one can refer to the names cited in the Kahan reports and in the works of Kapeliouk and Schiff and Ya'ari.[79]

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[77] S. MacBride, Report of the International Commission to Enquire Into Reported Violations of International Law by Israel During its Invasion of the Lebanon, conclusion 6.

[78] See, among others, the 12 February 1983 article in *Der Spiegel*, in which a soldier from the Phalange militia claims that there was a strategic meeting in the early afternoon of Wednesday 15 September 1982. According to the same soldier, about a dozen Israeli soldiers (in uniform) participated in this meeting. Also according to the same source, the Israeli soldiers clearly controlled the strategy for the attack on Sabra and Shatila.

[79] The directors of the killer units are also named in R Hatem's book, published in the USA by Pride Publications and entitled *From Israel to Damascus*.

It is worth considering Article 4 of the law of 16 June 1993 concerning the inclusion of participatory acts to the crime in the sense of Articles 66 and 67 of the Penal Code, and failing actively to intervene to prevent or put an end to the offence in the event that it is possible to do so. This last incrimination – that of the *responsibility of the superior* [or *command responsibility]* – has its origin in the jurisprudence of the Nuremberg tribunals and was clearly marked in Articles 86 and 87 of the 1977 Geneva Protocol 1. These regulations relating to the responsibility of the superior are also present in customary law.[80],[81] Related to this point is the fact that the law of 16 June 1993 has not created a new incrimination. Article 4 of this law states and confirms a pre-existing regulation in international customary law. As such, and in light of Articles 7.2 of the ECHR and 15.2 of the 1966 International Pact on Civil and Political Rights, it can be applied to the facts of the present case.

Regarding the responsibility of the superior, it is necessary to add that it applies not only to offences committed by persons in a formally subordinate relationship, but also to all other persons – whether soldiers or not – who, at the time of the offence find themselves under the control of the superior. The tie of subordination is estimated both *de jure and de facto.*[82]

The plaintiffs bring a civil indictment against Ariel SHARON, Israeli Defence Minister at the time of the events and currently Prime Minister; against Amos YARON, commander of the division and Brigadier General at the time of the events and currently Secretary General of the Defence Ministry, and against all other persons, whether Lebanese or Israeli, whose responsibility will be established during the course of the investigation.

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[80] ICTY, *Deliac* case, IT-96-21-A, Court of Appeal judgment of 20-02-2001, §§215-241. As the Appeals Chamber expressly indicated in this judgment, the question of the origin of the 'responsibility of the superior' is dealt with in terms of principle and with the aim of fixing the jurisprudence of the ICTY. (cf. §221) In its conclusion, the Appeals Chamber decided that – according to customary law – 'superiors are legally responsible for the offences committed by their subordinates, if they know about them or are in possession of information on the basis of which they should know about them'. (§241)

[81] The circumstance that Israel is not a party to Protocol 1 (1977) is not an obstacle to the declaration of a customary incrimination of universal impact. At the time of the Kuwait war, the USA qualified certain attacks by the Iraqi army as "war crimes," including the Scud missile attacks on Israel. According to Professor E. David, this incrimination has its source in Additional Protocol 1 of 1977. In view of the fact that the USA is not party to the Additional Protocol, he concludes that the incrimination with reference to the Scud attack has its origins in customary law. (David, E., op.cit., p. 582).

[82] ICTY, *Deliac* case, IT-96-21-A, Appeals Chamber judgment of 20.2.2001, §195 onwards, in particular §197: "*In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles. (...) The Appeals Chamber considers that the ability to exercise effective control is necessary for the establishment of de facto command or superior responsibility and thus agrees with the Trial Chamber that the absence of formal appointment is not fatal to a finding or criminal responsibility.*"

V. DAMAGES

The plaintiffs claim compensation for all the crimes encompassed in the present complaint that caused them harm.

Awaiting the results of the investigation, they have provisionally estimated their damages, per plaintiff, at the sum of **1€** for moral damages and **1€** for material damages.

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3 October 2001

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Amnesty International urges investigation of Ariel Sharon

A court in Brussels will today (3 October 2001) begin to consider arguments about whether Israel's Prime Minister Ariel Sharon may be investigated in Belgium for alleged war crimes committed in Lebanon in 1982 while he was Israel's Minister of Defence.

"Amnesty International welcomes actions taken in accordance with international law to combat impunity," said the organization. "We support the judicial investigation into Ariel Sharon's responsibility with regard to the Sabra and Shatila massacre."

The complaint against Sharon was first lodged with the Belgian Public Prosecutor's Office in June 2001. Ariel Sharon was Minister of Defence, with overall responsibility for the Israeli Defence Forces (IDF), at the time of the 1982 massacre of Palestinians in Sabra and Shatila refugee camps on the outskirts of Beirut. The IDF allowed the Lebanese Phalange militia to enter the camps where the killing of hundreds, mostly Palestinian refugees, continued for at least 30 hours. The complainants, a group of 23 Lebanese and Palestinians, had filed the case under Belgian legislation enacted in 1993 and 1999 which allows Belgian courts to prosecute foreigners for certain offences committed abroad, including genocide, war crimes and crimes against humanity. However, the resulting investigation was suspended by the investigating magistrate in early September 2001 until doubts about the legal validity of the procedure were resolved.

Amnesty International calls on states to ensure prompt, thorough and independent investigations wherever allegations of crimes under international law are made. If such an investigation shows there is enough evidence for a prosecution, then, in accordance with international law which allows the national courts of any state to try people accused of such crimes, regardless of the nationality of the alleged perpetrators or victims and regardless of where the crimes were committed, Amnesty International calls on states to bring the accused to trial or extradite them to another country for trial, provided certain safeguards are met. No one may be extradited to a country which cannot assure that any trial on such charges meets international standards for fairness and does not result in the imposition of the death penalty or other cruel, inhuman or degrading punishment.

The lawyer representing Israel argued that Belgium lacks the legal authority to try Ariel Sharon on charges relating to the 1982 massacre. Among her arguments the lawyer stated that Prime Minister Ariel Sharon has immunity as a head of government; the case had already been considered in Israel by the Kahan Commission of Inquiry, which was a judicial commission; the 1993 law cannot be used retroactively; and the case has no connection with Belgium. A Brussels public prosecutor rejected the defence arguments and said that the case should go ahead. The court hearing due to start on 3 October will rule on the legality of the proceedings against Ariel Sharon in Belgium, not on the content of the case against him.

Amnesty International has welcomed Belgium's universal jurisdiction laws and the 27 August 2001 statements attributed to Belgian Prime Minister Guy Verhofstadt voicing support for the legislation and suggesting that it be extended to the entire European Union.
The first case involving the exercise of universal jurisdiction to come to trial in Belgium resulted in the conviction in June 2001 of four Rwandan nationals for war crimes committed in 1994. Amnesty International welcomed this judgement as a significant step forward in the use of universal jurisdiction, an essential tool in the struggle against impunity.

A number of criminal complaints have been lodged with the Belgian courts against leaders and prominent members of past and present governments. In addition to Ariel Sharon, these have included: former Chilean President General Augusto Pinochet; former Speaker of Parliament and President of the Islamic Republic of Iran Hojjatoleslam Ali Akbar Rafsanjani; former Moroccan Minister of Interior Driss Basri; former Foreign Minister Abdoulaye Yerodia Ndombasi and several other government ministers of the Democratic Republic of the Congo; President Paul Kagame of Rwanda; former President Hissene Habre of Chad; and President Saddam Hussein of Iraq.

Background
The principle of universal jurisdiction permits the national courts of any state to try people accused of crimes under international law, including war crimes, crimes against humanity, and genocide as well as torture, extrajudicial executions and "disappearances," regardless of the nationality of the alleged perpetrators or victims and regardless of where the crimes were committed.

In 1983 the official Israeli Commission of Inquiry into the Events at the Refugee Camps in Beirut concluded that Minister of Defence Ariel Sharon had "disregarded the danger of acts of vengeance and bloodshed by Phalangists...

failed to take this danger into account when he decided to have the Phalangists enter the camps...[and had not ordered] appropriate measures for preventing or reducing the danger of massacre as a condition for the Phalangists' entry into the camps." The commission recommended that "the Minister of Defence draw the appropriate personal conclusions arising out of the defects revealed with regard to the manner in which he discharged the duties of his office." Ariel Sharon resigned from his position as Minister of Defence following publication of the Commission's report in 1983. In February 2001 Ariel Sharon was elected Prime Minister of Israel; he took office in March.

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Previous

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UNIVERSAL JURISDICTION: Belgian court has jurisdiction in *Sharon* case to investigate 1982 Sabra and Chatila killings

On the eve of oral arguments before a Belgian court, Amnesty International underscored that a Belgian prosecutor had jurisdiction under international law to investigate killings of at least 900 Palestinian civilian men, women and children in the Sabra and Chatila refugee camps in the suburbs of Beirut, Lebanon in September 1982. The organization declared that a recent judgment by the International Court of Justice stating that certain serving high government officials enjoyed immunity from arrest by foreign courts for war crimes and crimes against humanity could not deprive the Belgian prosecutor of jurisdiction to conduct a criminal investigation of the incident.

The Belgian universal jurisdiction law

A law enacted on 16 June 1993, *Loi relative à la répression des infractions graves aux Conventions de Genève du 12 août 1949 aux Protocoles I et II du 8 juin 1977* (1993 law), gave courts universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I and violations of Protocol II, all of which have been ratified by Belgium. That law was amended in February 1999 by the *Loi relative à la répression des violations graves du droit international humanitaire* (Act Concerning the Punishment of Grave Breaches of International Humanitarian Law) which expanded its scope to include genocide in Section 1 of Article 1and crimes against humanity in Section 2 of that article.

Section 3 of Article 1 defines the war crimes subject to Belgian jurisdiction.(1) Although the war crimes included in Section 3 includes many of the war crimes listed in Article 8 of the Rome Statute, in a number of respects the definitions provide greater protection to civilians and other protected persons. The definition of genocide is the same as in Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and in Article 6 of the Rome Statute of the International Criminal Court, but not all forms of ancillary crimes of genocide under Article III of the Genocide Convention are included. However, possibly through an oversight or possibly because Parliament considered that the definitions in international law - prior to the adoption of the draft Elements of Crimes by the Preparatory Commission of the International Criminal Court - were not sufficiently precise, the 1999 law omitted three crimes against humanity (enforced disappearance, the crime of apartheid and other inhumane acts).

Article 2 provides for punishments, up to a maximum of life imprisonment. Article 3 provides that persons who manufacture, hold or transport instruments, devices or objects used to commit or facilitate the commission of a grave breach identified in Article 1 shall be punished as if they had committed the grave breach. Article 4 defines ancillary crimes of ordering, proposing, inciting, participating, failing to prevent or end and attempting grave breaches, although it does not expressly provide for command and superior responsibility for such breaches. Section 1 of Article 5 excludes political, military or national interest or necessity as a justification of a grave breach. Section 2 of Article 5 provides that superior orders are not a defence to genocide, a crime against humanity as defined in the act or a grave breach of the Geneva Conventions or Protocol, but it fails to exclude superior orders as a defence to violations of common Article 3 or of Protocol II of other international humanitarian law. Section 3 of Article 5 expressly states that "[t]he immunity attributed to the official capacity of a person does not prevent the application of the present Act."(2) However, certain principles of criminal responsibility applicable to ordinary crimes are applicable to crimes under the 1999 law.(3) Article 8 provides that statutes of limitation do not apply to breaches of Article 1 of the Act.(4)

Article 7 expressly provides for universal jurisdiction over any of the breaches in the 1999 Act. The first paragraph of that article states that "[t]he Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed."(5) Article 9 provides that when Belgium is in a state of war, breaches of the 1999 Act fall within the jurisdiction of military courts.(6)

The complaint

On 18 June 2001, 23 survivors of the 1982 killings in the Sabra and Chatila refugee camps filed a complaint alleging that Ariel Sharon, then Minister of Defence and now Prime Minister of Israel, Amos Yaron, then Brigadier General commanding Israeli forces, as well as other Israeli military officials and members of the Phalange (Lebanese Christian militia), are responsible for war crimes, crimes against humanity and genocide in connection with the killings.(7)

The history of the proceedings so far

In July 2001, the *juge d'instruction* (investigating magistrate), Patrick Collignon, opened a criminal investigation of the 1982 killings. After an intervention by a lawyer acting on behalf of Israel, who contended that Ariel Sharon was

immune from prosecution in Belgium, that a prosecution would be contrary to the principle of *ne bis in idem* prohibiting a second prosecution for the same conduct, that the Belgian legislation violated the principle of non-retroactivity of criminal law and that there were no links between the suspect and Belgium, the investigating magistrate suspended the investigation on 7 September 2001.(8) Eventually, the court agreed to the request of the survivors, supported by the prosecution, and the lawyer for the State of Israel was prevented from appearing for the accused. In October 2001, Ariel Sharon and Amos Yaron appointed a personal lawyer to represent them, who further contended that the law treated the immunity of Belgian and foreign government officials in an unequal manner. The acting Attorney General of Brussels, Pierre Morlet, used a provision of Belgian criminal procedure that permits pre-trial discussions of issues that may have a bearing on the admissibility of a case to refer these questions to the *Chambre des Mises en Accusation* (the Indictment Chamber) of the Belgian *Cour d'Appel de Bruxelles* (Court of Appeals of Brussels) The Indictment Chamber hears interlocutory appeals for all matters during the different stages of criminal investigation, including the validity of provisional arrest warrants, search warrants, etc.) and decides whether to refer certain serious cases to the *Cour d'Assises* (Court of Assises).

A series of pre-trial hearings took place to consider these questions on 23 October 2001, 28 November 2001, 26 December 2001 and 23 January 2002.(9) At the close of these hearings, the President of the Indictment Chamber ordered that all written submissions, notes and evidence were to be submitted by 30 January 2002, with a ruling on the admissibility of the case on 6 March 2002. After the ICJ judgment in the *Democratic Republic of the Congo v. Belgium* on 14 February 2002, the Attorney General and the lawyers for the 23 survivors asked the Indictment Chamber to re-open the proceedings to permit them to argue that the ICJ judgment had no bearing on the jurisdiction of the investigating magistrate to conduct the criminal investigation of the 1982 killings.(10) The Indictment Chamber agreed to this request and scheduled a hearing for 15 May 2002 on this matter.(11)

The 15 May 2002 hearing

The Indictment Chamber will hear arguments on Wednesday, 15 May 2002 about whether a Belgian prosecutor may resume the suspended criminal investigation of the 1982 killings by the Phalange as well as allegations that the Phalange had carried out large-scale "disappearances" with the knowledge of or under the supervision of Israeli forces after the killings. The prosecutor had opened an investigation of the killings based on a complaint filed in June 2001 by 23 survivors, based on a Belgian law enacted in 1993 providing for universal jurisdiction over war crimes and amended in 1999 to include crimes against humanity and genocide. The lawyers for the 23 survivors sought the hearing in party to argue that a recent judgment by the International Court of Justice (ICJ) in the *Democratic Republic of the Congo v. Belgium* case did not have any bearing on the criminal investigation of the 1982 killings at this stage of the proceedings. One additional issue will also be addressed at the hearing: whether, in the light of a recent decision by the Indictment Chamber of another Court of Appeals in Belgium, Belgian prosecutors may open a criminal investigation under this law for crimes under international law committed abroad at a time when the suspect is outside the country.(12)

The flawed International Court of Justice judgment

On 14 February 2002, the ICJ ruled that Belgium could not issue a warrant for the arrest of the incumbent Foreign Minister of the Democratic Republic of the Congo, Abdulaye Yerodia Ndombasi, because, in its view, under customary international law foreign ministers, as well as prime ministers and heads of state, were immune from arrest by foreign courts for war crimes and crimes against humanity while in office. It recognized only four situations when courts could issue arrest warrants for foreign ministers of other states for such crimes under international law. Although the Democratic Republic of the Congo originally contended that Belgian courts lacked jurisdiction to issue arrest warrants for persons accused of war crimes and crimes against humanity abroad who were not present in Belgium at the time the arrest warrant was issued, it subsequently withdrew this claim. The ICJ, therefore, abstained from deciding whether Belgium could exercise such universal jurisdiction (para. 43).(13)

Amnesty International believes that the ICJ judgment was incorrect as a matter of law and that it must, and one day, will, be reversed. There is no convincing evidence of a customary international law rule that such government officials are immune from prosecution in a foreign court for war crimes and crimes against humanity while in office and the ICJ itself cited no evidence of state practice or *opinio juris* (belief that the practice is a legally binding rule). Indeed, the evidence of instruments adopted by the international community shows a consistent rejection of immunity from prosecution for crimes under international law for *any* government official since the Second World War.

Contrary to the claim in the ICJ judgment (para. 58) that these instruments were limited to providing that there was no immunity for such government officials before international criminal courts, those instruments articulated a customary international law rule and general principle of law. Indeed, several of the international instruments adopted over the past half century were expressly intended to apply to national courts, including the 1945 Allied Control Council Law No. 10, the 1946 General Assembly resolution on the affirmation of the principles of international law recognized by the Charter of the Nuremberg Tribunal, the 1950 Nuremberg Principles prepared by the International Law Commission, the Draft Code of Offences against the Peace and Security of Mankind of 1954 and the 1991 and 1996 Draft Codes of Crimes against the Peace and Security of Mankind. Moreover, even the international instruments establishing international criminal courts envisaged that the same rules of international law reiterated in those

instruments applied with equal force to prosecutions by national courts.

International instruments incorporate a rule of international law applicable to national, as well as international, courts. As stated in Article 7 of the Nuremberg Charter, "[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."(14) The Nuremberg Tribunal made clear that under customary international law and general principles of law the official position of a state official does not protect that official from prosecution for a crime under international law. The Tribunal did not base its decision on the Charter itself:

> "It was submitted that ... where the act in question is an act of state, those who carry it out are not personally responsible, are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, [this argument] must be rejected.
>
> ... The principle of international law, which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.
>
> . . . [T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."(15)

Article 4 of Allied Control Council Law No. 10, which was adopted to govern trials by Allied national courts in occupied Germany of persons charged with war crimes and crimes against humanity committed on a lesser scale than those committed by the persons tried by the Nuremberg Tribunal, provided:

> "The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment."(16)

In 1946, the UN General Assembly "*[a]ffirmed* the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal" and directed its Committee on Codification of International Law, established on the same day, "to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and the judgment of the Tribunal". The General Assembly did not limit the applicability of these principles to international criminal courts and, indeed, did not even mention the establishment of an international criminal court before 12 May 1947, when it was proposed for the first time in the UN by France.(17) The Charter of the International Military Tribunal for the Far East, which was established to try the major Japanese suspected war criminals, contained a similar formulation of the basic principle of international law concerning the absence of immunity of government officials.(18) Trials of other suspected Japanese war criminals were conducted by Allied national courts.

Principle III of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (Nuremberg Principles) adopted by the International Law Commission in 1950 also articulates principles of international law applicable at all times rather than principles applicable only by international criminal courts. Principle III states:

> "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law."(19)

Article 3 of the 1954 draft Code of Offences against the Peace and Security of Mankind prepared by the International Law Commission and intended to be applied by national courts, as well as by a permanent international criminal court when it was established, provided:

> "The fact that a person acted as Head of State or as responsible government official does not relieve him from responsibility for committing any of the offences defined in this Code."(20)

Article 13 of the 1991 Draft Code of Crimes against the Peace and Security of Mankind, intended to be applicable in both national and international criminal courts, provided:

> "The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal

responsibility."(21)

The 1996 Draft Code of Crimes against the Peace and Security of Mankind, which also was intended to be applied by national courts on the basis of universal jurisdiction, as well as by the International Criminal Court, reaffirms the principle of law recognized in the Nuremberg Charter by providing that "[t]he official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment."(22)

Instruments establishing international criminal courts envisaged trials by national courts implementing their principles. Each of the five international criminal courts established since the Second World War were set up with the understanding that the principles of international law reflected in their constituent instruments would be applied without qualification by national courts. Indeed, despite the claim by the ICJ that "the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals . . . which are specifically applicable to the latter" (para. 58), there is no evidence to the contrary. As mentioned above, the Nuremberg and Tokyo Tribunals were established to try only the most significant suspects and the vast majority of trials for war crimes and crimes against humanity were conducted by national courts applying the principles of law in the Nuremberg and Tokyo Charters. In addition, the International Criminal Tribunals for the former Yugoslavia and for Rwanda also were designed to try only a small proportion of the total number of persons suspected of crimes within their jurisdiction and it was always recognized that others would have to be tried by national courts, either in the regions where the crimes occurred or elsewhere, based on universal jurisdiction. These courts were expected to apply the principles of international law incorporated in the Statutes of the two Tribunals and, indeed, the Tribunals could remove cases from national courts that did not conduct fair trials that were not a sham. The Statutes of both Tribunals reiterated the basic principle of international law that officials are not immune from prosecution for war crimes, crimes against humanity or genocide.(23)

Most recently, Article 27 (Irrelevance of official capacity) of the Rome Statute incorporated this principle. It provides:

> "1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

As the Preamble, Article 1 and Article 17 of the Rome Statute make clear, states have the primary responsibility to prosecute persons for crimes within the International Criminal Court's jurisdiction.(24) When they are unable or unwilling to do so, the Court can assert jurisdiction and the failure to investigate or prosecute a government official for such crimes solely on the ground that the official enjoyed immunity in his or her own country would demonstrate an inability or unwillingness of the state to act.

The International Law Commission has explained why an official may not plead immunity as a bar to a prosecution in a national court or an international criminal court for crimes under international law:

> "... crimes against the peace and security of mankind often require the involvement of persons in positions of governmental authority who are capable of formulating plans or policies involving acts of exceptional gravity and magnitude. These crimes require the power to use or to authorize the use of the essential means of destruction and to mobilize the personnel required for carrying out these crimes. A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required to commit the crime, but also abuses the authority and power entrusted to him. He may therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security."(25)

Similarly, "[i]t would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility."(26)

The four limited exceptions to the ICJ rule

The four exceptions posited by the ICJ to its principle of immunity of serving foreign ministers, prime ministers and

heads of state for war crimes and crimes against humanity (para. 61) would, contrary to the claim of the ICJ (para. 60), be a recipe for impunity for the worst possible crimes in the world in most cases. The first two of the four exceptions - the possibility of prosecutions in the official's own state and the possibility of the official's own state waiving immunity in the context of a foreign prosecution - are simply not realistic. Indeed, the very reason for opening a criminal investigation in another state based on universal jurisdiction is because the official's own state is unable or unwilling to investigate such crimes by officials.

The third exception - prosecution after the official leaves office for "acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity" - could be misinterpreted as accepting the outdated distinction between official acts and private acts resoundingly rejected by the United Kingdom House of Lords in 1999 in the *Pinochet* case.(27) It is to be regretted that the ICJ did not make clear that the commission of crimes under international law by officials can never be seen as official acts.

The fourth exception - that "an incumbent of former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction" - fails to recognize the limited scope of the jurisdiction of international criminal courts. The jurisdiction of the Yugoslavia and Rwanda Tribunals is limited to certain time periods, to certain crimes under international law and to crimes committed in two limited geographic areas.(28) The jurisdiction of the Rwanda Tribunal is further limited when the conduct occurred outside Rwanda to crimes committed by Rwandan citizens.(29) The jurisdiction of the International Criminal Court is limited to only certain crimes under international law and to crimes committed after the Rome Statute of the International Criminal Court enters into force on 1 July 2002. It is also limited to jurisdiction over crimes committed in the territory of a state party or a state making a special declaration recognizing the Court's jurisdiction, or by the national of one of these states, except when the Security Council refers a situation to the Court pursuant to its powers under Chapter VII of the United Nations Charter. Although as of 14 May 2002, 66 states had ratified the Rome Statute, almost two-thirds of all states had yet to do so. Moreover, it is unlikely that there will be many more ad hoc international criminal tribunals established in the future.(30)

The inapplicability of the ICJ judgment to the *Sharon* case

In any event, for a number of reasons the ICJ judgment in the *Democratic Republic of the Congo v. Belgium* has no bearing on the criminal investigation pending in Belgium against Ariel Sharon and other suspects concerning the 1982 killings.(31)

First, the ICJ judgment was clearly limited to the issuance of an arrest warrant after a criminal investigation (para. 70). The ICJ did not accept the contention of the Democratic Republic of the Congo that "any act of investigation undertaken with a view to bringing [the official] to court" would violate the official's immunity (para. 47). The current stage of the proceedings in relation to the 1982 killings is limited to a criminal investigation. There has not yet been a decision whether there is sufficient evidence for the issuance of an arrest warrant against any of the officials, former officials or other suspects in the criminal investigation. Therefore, any decision on the applicability of the ICJ judgment at this stage of the proceedings would be premature.

Second, only one of the suspects, Ariel Sharon, is an official who, in the view of the ICJ, would fall within the categories of persons who enjoy immunity from jurisdiction in a foreign court. None of the other suspects fall within the categories of persons whom the ICJ claimed were immune from prosecution for war crimes and crimes against humanity in foreign national courts. Even if the ICJ judgment were held to prevent not merely the issuance of an arrest warrant against Ariel Sharon, but also any criminal investigation of him, the ICJ judgment would permit the investigation of the other suspects and, if there was sufficient evidence, the issuance of arrest warrants.

Third, in contrast to the criminal investigation in the *Democratic Republic of the Congo v. Belgium* case, the criminal investigation of the 1982 killings in the Sabra and Chatila refugee camps involves allegations that the killings constituted genocide. In contrast to war crimes and crimes against humanity, states have expressly provided that no government official enjoys immunities from prosecution in national courts for genocide or ancillary crimes. Article IV of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention) states:

> "Persons committing genocide or any of the other acts enumerated in article III [conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide] shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

Although the Genocide Convention does not expressly require states parties to exercise universal jurisdiction, there is overwhelming evidence that not only may states exercise universal jurisdiction over genocide, but that the drafters of the Genocide Convention did not intend to prevent states parties from exercising such jurisdiction.(32)

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(1) The 1993 law was amended on 10 February 1999 to change its name to *Loi relative à la répression des violations graves du droit international humanitaire* and to expand its scope to include genocide and crimes against humanity. The law renumbered the 1993 section dealing with war crimes. Section 3 of Article 1 of the amended version concerning war crimes defines grave breaches of the Geneva Conventions and of Protocol I in international armed conflict and war crimes in non-international armed conflict, including and violations of common Article 3 of the Geneva Conventions and violations of Protocol II as war crimes. *Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law [10 February 1999]*, 38 Int'l Leg. Mat. 918 (English translation and introductory note giving a brief legislative history of the 1999 law by Stefaan Smis and Kim Van der Borght).

(2) *Ibid.*, Art. 5, § 3. The original French text reads: *"L'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application de la présente loi"*

(3) *Ibid.*, Art. 6 (providing that without prejudice to Articles 4 and 8, provisions of Book I of the Penal Code from Article 70) shall apply to the 1999 Act).

(4) *Ibid.*, Art. 8 ("Article 21 of the Introductory Part of the Code of Penal Procedure and Article 91 of the Penal Code, relative to the statutory limitation of public prosecutions and penalties, shall not be applicable to the breaches listed in Article 1 of the present Act."). The original French text reads: *"Ne sont pas applicables aux infractions prévues à l'article 1er de la présente loi, l'article 21 du Titre préliminaire du Code de procédure pénale et l'article 91 du Code pénal relatifs à la prescription de l'action publique et des peines."*

(5) *Ibid.*, Art. 7. The original French text reads: " *Les juridictions belges sont compétentes pour connaître des infractions prévues à la présente loi, indépendamment du lieu ou celles-ci auront été commises.*"

(6) *Ibid.*, Art. 9.

(7) The complaint is available in English and in French at: http://www.indictsharon.net.

(8) Decision of the Investigating Magistrate, Patrick Collignon, Court of First Instance, Brussels, Dossier No. 56/01, *Case against Ariel Sharon and Amos Yaron,* in response to Note by Michele Hirsh, *Etat d'Israel - Considerations sur l'incompetence des juridictions belges pour connaître de la plainte deposée le 18.6.2001 sans l'affaire portant le no. 54/1 de Monsieur le juge d'instruction Collignon.*

(9) For a summary of the arguments at these hearings prepared by one of the lawyers for the 23 survivors and another author, see Michael Verhaeghe & Laurie King-Irani, *Outline and Explanation of Court Hearings during the Pre-Trial Procedure, June 2001-2002, available at:* http://www.indictsharon.net.

(10) *Lawyers for Sebra and Chatila Plaintiffs Ask to Re-open Debate before Belgian Court following ICJ Ruling of 14 February (statement in English), Press statement,* 1 March 2002, *available at:* http://www.indictsharon.net.

(11) *Belgian Appeals Court agrees to New Hearing, Re-Opening of Arguments, in War Crimes Case against Ariel Sharon and other Israelis and Lebanese, Press release,* 6 March 2002, *available at:* http://www.indictsharon.net.

(12) After the ICJ judgment in the *Democratic Republic of the Congo v. Belgium,* the Indictment Chamber considering the case of the former Foreign Minister decided on 16 April 2002 that the investigating magistrate did not have jurisdiction to continue to investigate the accused or issue a new arrest warrant on the ground that an examination of legislative history of the 1993 law, as amended in 1999, demonstrated in its view that the Parliament intended that Belgian courts could only open a criminal investigation for conduct abroad when the suspect was present in Belgium. *Arrêt de la Cour d'Appel de Bruxelles, Chambre des Mises en Accusation,* 16 April 2002. This decision was appealed to the *Cour de Cassation* (Court of Cassation), Belgium's highest court.

(13) It could be argued that the ICJ implicitly accepted that Belgium did have jurisdiction to issue arrest warrants in such circumstances, since it said that, "[a]s a matter of logic, the second ground [immunity] should be addressed only once there has been a determination of the first [the existence of universal jurisdiction], since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction." (para. 46). The ICJ then went on to decide the question of immunity on the assumption that Belgium did have jurisdiction. Only four judges (Guillaume, Ranjeva, Rezek and Bula-Bula) of the 16 members of the Court expressly stated that international law clearly prevented Belgium from issuing an arrest warrant on the basis of universal jurisdiction for a crime committed abroad when the accused was outside the country.

(14) Charter of the International Military Tribunal (Nuremberg Charter), 8 August 1945, annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), 8 U.N.T.S. 279, 59 Stat. 1544, Art. 7.

(15) Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) - Nuremberg 30th September and 1st October 1946 (Nuremberg Judgment), Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), at 41-42.

(16) Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Art. 4 (a), published in Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946.

(17) G.A. Resolution of 11 December 1946 (Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal). On 13 May 1947, Henri Donnedieu de Vabres, formerly a Judge on the Nuremberg Tribunal, proposed in the Committee on the Progressive Development of International Law and its Codification that certain matters should be tried in a special international criminal chamber of the International Court of Justice and others in a permanent international criminal court. A formal proposal was submitted two days later. Memorandum submitted to the Committee on the Progressive Development of International Law and its Codification, U.N. Doc. A/AC.10/21, 15 May 1947. The Tokyo Charter, which was established by military order in contrast to the Nuremberg Charter established by treaty, provided:

> "Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he was charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires." Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, T.I.A.S. 1589, Art. 6.

(19) Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, in International Law Commission, Report on Principles of the Nuremberg Tribunal, 29 July 1950, 5 U.N. G.A.O.R. Supp. (No. 12) at 11, U.N. Doc. A/1316 (1950).

(20) International Law Commission, Draft Code of Offences against the Peace and Security of Mankind, 28 July 1954, 9 U.N. G.A.O.R. Supp. (No. 9) at 11, U.N. Doc. A/2693 (1954). In the Introduction to the 1954 Draft Code, the International Law Commission explained: "Pending the establishment of a competent international criminal court, a transitional measure might be adopted providing for the application of the code by national courts." (para. 58 (d)).

(21) International Law Commission, Report on the Draft Code of Crimes against the Peace and Security of Mankind, 19 July 1991, 46 U.N. G.A.O.R. (Supp. No. 10) at 238, U.N. Doc. A/46/10 (1991). Article 9 (4) of the 1991 Draft Code stated:

> "Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court of another State for a crime under this Code:
>
> (a) if the act which was the subject of the previous judgment took place in the territory of that State; or
>
> (b) if that State has been the main victim of the crime."

The requirement of a link to the territory of the forum state was dropped in the 1996 Draft Code and numerous provisions in the 1991 Draft Code indicate that the link applied only to the question of *ne bis in idem*, not to an initial prosecution. For example, Article 6 provides for universal jurisdiction over persons suspected of committing crimes in the Draft Code.

(22) International Law Commission, Report on the Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eighth session 6 May - 26 July 1996, 51 U.N. G.A.O.R. Supp. (No. 22), U.N. Doc. A/51/22 (1996), Art. 7. The Commentary to Article 1 of the 1996 Draft Code emphasized that "national courts are expected to play an important role in the implementation of the present Code". *Ibid.*, Commentary to Art. 1, para. 13.

(23) Statute of the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Statute), Art. 7; Statute of the International Criminal Tribunal for Rwanda (Rwanda Statute), Art. 6.

(24) The Preamble states in part:

> "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 measures at the national level and by enhancing international cooperation,

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

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, . . .".

Article 1 states that the Court "shall be complementary to national criminal jurisdictions". Article 17 provides under this principle that cases are inadmissible except when states are unwilling or unable genuinely to carry out investigations or prosecutions.

(25) 1996 ILC Report, commentary on Article 7, p. 39.

(26) *Ibid.*, p. 41.

(27) *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)* (No. 3), 2 All ER 97 [1999].

(28) Yugoslavia Statute, Arts 1 to 5; Rwanda Statute, Arts 1 to 4.

(29) Rwanda Statute, Art. 1 ("The International Criminal Tribunal for Rwanda shall have the power to prosecute . . . Rwandan citizens responsible for such violations committed in the territory of neighbouring States . . .").

(30) Efforts for more than a decade to persuade the Security Council to set up an *ad hoc* international criminal tribunal for Iraq have failed. The recent trend has been to establish mixed tribunals - national courts or panels of national courts with foreign or international components as in East Timor, Cambodia and Sierra Leone. It is not clear from the ICJ judgment whether these courts or panels would be considered as international criminal courts under its fourth exception.

Morever, these special courts are often designed to investigate and prosecute only a small number of those suspected of responsibility for crimes under international law, such as senior leaders and those suspected of the most serious crimes, and, in the case of the failed attempt to establish such a court in Cambodia, primarily targeting persons from only one faction in one particular period. Law on the Establishment of Extra-Ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (unofficial translation by the Legal Assistance Unit, UNCOHCHR), Art. 1 ("The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of the Cambodian penal law, international humanitarian laws and custom, and international Conventions recognized by Cambodia, that were committed during the period from April 17, 1975 to January 6, 1979."). The Special Court for Sierra Leone established pursuant to an agreement between the UN and Sierra Leone expressly provides for no immunity for government officials and does not limit the scope of this provision by nationality.

(31) In addition to the reasons cited below in the text, under Article 59 of the ICJ's Statute, "The decision of the Court has no binding force except between the parties and in respect of that particular case." The drafters of the ICJ Statute, like the drafters of its predecessor, the Statute of the Permanent Court of International Justice, wanted to be sure that customary international law remained free to evolve and not to establish a system of binding precedent foreclosing such evolution. Moreover, they also wished to ensure that ICJ judgments did not bind states, such as Israel, that did not accept the ICJ's jurisdiction.

(32) Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/010/2001, September 2001, Chapter Seven (Genocide: The legal basis for universal jurisdiction). The entire memorandum on universal jurisdiction, which includes state practice concerning genocide, is available on a CD-ROM from: ijp@amnesty.org and on the Amnesty International web site: http://www.amnesty.org. The memorandum was formally submitted to the Belgian court by the lawyers for the survivors in support of their arguments.

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Universal Jurisdiction
Still Trying to Try Sharon

Laurie King-Irani

(Laurie King-Irani, former editor of Middle East Report, *is a lecturer in anthropology at the University of Victoria in British Columbia and North American Coordinator of the International Campaign for Justice for the Victims of Sabra and Shatila.)*

July 30, 2002

Further Info
See the website of the International Campaign for Justice for the Victims of Sabra and Shatila at http://www.indictsharon.net

No sooner had the dust settled in Gaza following Israel's July 23 assassination of Hamas leader Salah Shehada -- an operation that took the lives of 15 civilians, many of them children -- than Palestinian officials began declaring this act the first war crime committed since the inauguration of the International Criminal Court (ICC) on July 1, 2002. Calls to bring Israel to book before the new court multiplied, until legal experts weighed in with deflating news. The 1998 Rome Statute, which established the ICC, specifies that the court can only exercise jurisdiction over crimes occurring on the territory of a state party, or crimes involving an accused who is a national of a state party. Israel is not a signatory to the Rome Statute. Further, as Avril McDonald of Amsterdam's Asser Institute noted: "Palestine is not a country." Until a Palestinian state is recognized by the international community, and signs the relevant instruments of international law, Palestinians "cannot pursue justice independently."

But Palestinians and others do have alternative venues for pursuing justice and halting impunity for war crimes and grave human rights violations not covered by the ICC's mandate. Spain's 1998 extradition of Gen. Augusto Pinochet, then in London, to stand trial for human rights abuses committed in Chile from 1973-1990 awakened the world to the possibility of trials in national courts utilizing the principle of universal jurisdiction.

Lately the debate over universal jurisdiction has centered on two cases lodged in Belgium. One charged former Congolese Foreign

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Minister Yerodia Ndombasi for inciting and abetting crimes against humanity during a rebellion against Congolese President Laurent-Desire Kabila. The other seeks to indict Israeli Prime Minister Ariel Sharon, retired Israeli General Amos Yaron, the late Phalangist leader Elie Hobeika and others with responsibility for the massacre of Palestinians at Sabra and Shatila in 1982, crimes for which no one has ever stood trial. On June 26, a Belgian Court of Appeals ruled that the case against Sharon and others was inadmissible for trial in Belgium on the unexpected grounds that the accused were not found on Belgian soil. But reports of the demise of the Sharon case -- repeated at each twist in the Belgian proceedings -- are greatly exaggerated.

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UNIVERSAL JURISDICTION: WEAPON OF THE WEAK?

The principle of universal jurisdiction, encoded in the Fourth Geneva Conventions, international customary law and the 1984 Convention on Torture, is based on customary law as well as a consensus, strengthened by the horrors of World War II, that some crimes are so heinous that they threaten the entire human race. The jurisdiction for prosecuting these crimes must be universal, not simply territorial. The Geneva Conventions specifically state that all signatories to the convention have not only the right but also the duty to either prosecute or extradite individuals guilty of war crimes, crimes against humanity and genocide.

In 1993, five years before Spain's dramatic attempt to extradite Pinochet from Britain, the Belgian Parliament had already passed a law formally incorporating universal jurisdiction for war crimes into Belgium's criminal code. In 1999, the parliament strengthened the initial law by passing additional legislation removing immunity for sitting heads of state accused of genocide and crimes against humanity. The first complete trial and conviction of individuals accused of war crimes under this law took place in 2001, when a Belgian court found four Rwandans -- two nuns, a political leader and the owner of a match factory -- guilty of complicity in genocidal crimes in Rwanda and sentenced them to prison for 15 years.

Possibly the most controversial case to be pursued under the principle of universal jurisdiction since the Pinochet affair, the case against Sharon and others was lodged in a Belgian court in June 2001 under the 1993 legislation. The plaintiffs were 23 individuals, stateless Palestinian refugees and impoverished Lebanese nationals, usually considered among the least powerful people in the international political system, who had witnessed and survived a massacre two decades ago.

Opponents of the application of universal jurisdiction in national courts argue that such trials will not deter crimes, but will instead create an even more dangerous and volatile international milieu

by eroding the necessary comity in relations between sovereign states. Some detractors of universal jurisdiction have gone so far as to warn that these trials could dismantle the Westphalian system of sovereign nation-states itself. Former Secretary of State Henry Kissinger, himself the subject of universal jurisdiction initiatives in Chile, has compared universal jurisdiction to a "witch hunt" and warned that it could quickly devolve into a "new Inquisition."

But when Belgian magistrate Patrick Collignon ruled that the Sabra and Shatila plaintiffs' case was admissible in Belgium on the same day that former Serbian President Slobodan Milosevic was transported to a prison cell at The Hague to face an ad hoc international tribunal, the progressive evolution of international criminal prosecution seemed to be accelerating at breathtaking speed.

JUDICIAL CLIFFHANGER

The case against Sharon, Yaron and others has not lacked in drama and sudden reversals of fortune, including several previous attempts, all averted at the eleventh hour, to abort the effort completely. Three former Lebanese Forces militia officials (one of whom, Elie Hobeika, was named in the case) have been assassinated by parties unknown since January 2002. In February 2002, the International Court of Justice (ICJ) issued a regressive ruling stating that Belgium erred in putting out an arrest warrant for Yerodia Ndombasi because he was a sitting foreign minister at the time. Most recently, the Belgian Appeals Court decision to halt the Sharon case on June 26 has sparked an unprecedented joint initiative by national and international human rights organizations and members of the Belgian Parliament and government to save and strengthen Belgium's law of universal jurisdiction.

Following the ICJ ruling, few expected the Court of Appeals to render a decision in favor of prosecuting Sharon, who was defense minister at the time of the Sabra and Shatila massacres. But most informed observers assumed, given Belgian Attorney General Pierre Morlet's consistent support of the plaintiffs' arguments during a series of pre-trial hearings, that the Appeals Court would rule that a case could proceed against Yaron and other Israeli officials, as well as surviving Lebanese Forces militia members, none of whom enjoy immunity from prosecution. The Appeals Court's decision to forestall indictment of anyone in the case caught observers by surprise.

Expressing "extreme dismay" with the June 26 ruling, Amnesty International noted that: "This restrictive interpretation of Belgian national law is inconsistent with international law... The organization believes that the Belgian Parliament, in enacting the 1993 law providing for universal jurisdiction over war crimes, as

well as in its 1999 amendment to that law extending its scope to crimes against humanity and genocide, intended to provide Belgian courts with the full extent of universal jurisdiction over these crimes permitted under international law."

Explanations for the Appeals Court's ruling range from speculation that Belgian judges feared an onset of universal jurisdiction fatigue to conspiratorial whispers that US-Israeli pressure had shaped the judges' thinking.

GALVANIZING EFFECT

Regardless of the reason for the Appeals Court's surprising ruling, it has galvanized a broad-based coalition of human rights organizations, victims of war crimes from a variety of countries and politicians from across Belgium's political spectrum. While lawyers for the Sabra and Shatila plaintiffs were busy drafting an appeal to Belgium's Supreme Court arguing that the June 26 ruling violated the spirit and the letter of the 1993 and 1999 laws, human rights activists and Belgian parliamentarians were busy drafting new provisions aimed at sharpening universal jurisdiction legislation as a weapon of the weak. Legislators feared that the Appeals Court decision could render the laws of 1993 and 1999 obsolete.

Their unprecedented legislative initiative has provided an opportunity to bring the 1993 and 1999 legislation into line with the most recent developments in international criminal prosecution. For instance, the proposed interpretive law recognizes that sitting foreign and prime ministers are immune from prosecution until they complete their terms and return to civilian life, bringing Belgium's universal jurisdiction law into conformity with the ICJ ruling in February. The law clarifies the judicial "division of labor" between the ICC and Belgian courts, which limits victims' invocation of universal jurisdiction to the following case: those in which the alleged crimes have not been committed on Belgian territory and the plaintiffs are neither Belgian nor resident on Belgian territory for one year or more, and the accused is not on Belgian territory. Hence the interpretive law clarifies that accused parties need not live in Belgium or be found on Belgian soil in order to be prosecuted.

The new law has a good chance of passing the Senate in October before being sent to the Chamber of Deputies. Should it pass, the Sabra and Shatila plaintiffs' appeal of the Court of Appeals decision will be rendered redundant, since the Supreme Court will be bound by the decisions of Parliament. The proposed interpretive law has the public support of the president of the Senate's Commission of Justice. Lawyers for the Sabra and Shatila plaintiffs noted that the June 26 ruling threatened not only their case, but many others besides. Even conservative newspapers in Belgium were calling for the defense of the 1993

and 1999 law of universal jurisdiction. Crucial to the parliamentary effort are politicians, some from the right, who hope to prosecute the murderers of Belgian peacekeepers in Rwanda in 1994.

A BELLWETHER CASE

In their analyses of the strengths and weaknesses of universal jurisdiction, both Amnesty International and Human Rights Watch have stressed that the political will of governments can make or break the successful prosecution of international crimes in national courts. With the current grassroots, multi-party legislative initiative underway in Belgium, we may be witnessing the collaborative construction of the necessary political will from the ground up.

For the Sabra and Shatila survivors who filed the complaint, no less than all Palestinians subject to grave breaches of international humanitarian law, developments in Belgium's parliament will be scrutinized closely over the coming months. As Luc Walleyn, one of the lawyers for the Sabra and Shatila plaintiffs, noted: "Today, the Palestinian people lack effective courts of law and have no means of defending and vindicating their rights as defined by international humanitarian law and the Geneva Conventions. This absence of judicial recourse cannot continue. The effort to end impunity will not cease."

The jury is still out on the effort to indict those responsible for the Sabra and Shatila massacres, but it is clear that the Sharon case has highlighted the question at the heart of the debate on international criminal prosecution: are the needs, interests and rights of states to be given priority in deciding whether to investigate and prosecute war crimes and crimes against humanity? Or will international law prioritize the needs, interests and rights of victims of states and state officials? The fate of the case against Sharon will be a bellwether for the future trajectory of universal jurisdiction in national courts.

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Bouterse Case

Court of Appeal of Amsterdam, 20 November 2000, Institute's Collection No. 5013.[1]

The Facts: R. Wijngaarde and R.A. Hoost filed a complaint with the Court of Appeal in Amsterdam on 13 and 27 June 1997 respectively under Article 12 of the Code of Criminal Procedure against the decision of the Public Prosecution Service not to prosecute Desi Bouterse.[2] According to them, Bouterse gave orders in Fort Zeelandia in Paramaribo, Surinam, on 8 or 9 December 1982 to a group of military personnel acting under his control to execute 15 people, including Wijngaarde's brother and Hoost's nephew. In doing so Bouterse committed murder. As he possessed Dutch nationality criminal proceedings could be brought on the basis of Article 5 (1)(2) of the Criminal Code. Since the Court of Appeal had doubts about Bouterse's nationality, it requested the examining magistrate to investigate this in more detail (decision of 30 September 1998).[3] The examining magistrate forwarded the results of her investigation to the Court of Appeal on 30 July 1999. As the results of her findings it was no longer possible to proceed on the basis that Bouterse had Dutch nationality. The Court of Appeal therefore had to find a different legal ground for the jurisdiction of the Dutch courts. Prosecution on account of torture, crimes against humanity or war crimes seems to provide a solution. As it was unclear, however, whether such crimes had been committed and also whether the Convention against Torture (the Torture Convention)[4] was applicable, it requested Professor C.J.R. Dugard to submit an opinion as an expert on this point (decision of 3 March 2000).[5] Professor Dugard submitted his opinion on 7 July.[6] The Court of Appeal eventually gave its final judgment on 20 November.

Held in the decision of 3 March 2000:

1.3 The consideration of the complaint was continued on 17 December 1999.

1.4 Bouterse did not enter an appearance. The Court of Appeal requested the local prosecutor's office to arrange for the summons to attend the hearing in chambers to be served on Bouterse. The Advocate General stated as follows in this connection.

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[1] Elrono. AA8395 (www.rechtspraak.nl).

[2] The complainants had previously submitted a complaint under Article 12 of the Criminal Code in 1996. The Court of Appeal dismissed the complaint on that occasion because the Public Prosecution Service had not yet taken a final decision on whether or not to prosecute. After the Public Prosecution Service had informed the complainants on 13 May 1997 that it had definitely decided not to prosecute, they once again filed the present complaint.

[3] Elrono. AA8424 (www.rechtspraak.nl),NJ (2000) No. 266, summarized in DD (2000) p. 756. The Procurator General at the Court of Appeal had for this reason advised against bringing criminal proceedings.

[4] 1465 UNTS p. 85; ILM (1984) p. 1027; Trb. 1985 No. 69.

[5] Elrono. AA5014 (www.rechtspraak.nl). Professor Dugard was appointed by decision of 26 April (Elrono. AA8429, www.rechtspraak.nl). He was requested to reply before 15 July.

[6] Elrono. AA8427 (www.rechtspraak.nl).

3. The facts and the objections raised

3.1 As noted in the decision of 30 September 1998, the complainants accuse Bouterse of having given orders to a group of military personnel acting under his responsibility to execute fifteen people, including Frank Wijngaarde (the brother of complainant Wijngaarde) and Eddy Hoost (the nephew of complainant Hoost), in Fort Zeelandia in Paramaribo (Surinam) on 8 or 9 December 1982. The Court of Appeal understands from documents submitted by the complainants that they also wish the criminal court to investigate whether Bouterse himself took part in the executions. As is apparent from the hearing in chambers on 17 December 1999, they also wish to have Bouterse prosecuted for having tortured the persons concerned before they were killed.

3.2 The file contains a transcript of a conversation between Bouterse and AT-5, a local TV channel in Amsterdam, in which he said, among other things, in clear connection with the events in Fort Zeelandia: 'I'm a soldier, I'm engaged in a war against someone. If the man gets out a rifle, I'll not give him the opportunity to shoot. I'll shoot first and I'll shoot to kill, really! You don't even need to be a soldier; they weren't soldiers, but they too would have shot ... It was him or me, and I choose to go before him ... I have the responsibility because I was head of the army; I was the commander; the commander-in-chief, wasn't I? But, um, I'm not bothered by any of this. As I have already said so many times before: in the army the boss is always guilty.'

3.3 In addition, the December murders were investigated by various organisations. The Special Rapporteur for the Economic and Social Council of the United Nations submitted on the basis of his findings:
"that summary and arbitrary executions took place on the night of 8/9 December in Fort Zeelandia. In view of the fact that there can be no derogation from Article 6 of the International Covenant on Civil and Political Rights, that article is binding also 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed' (Article 4) and therefore even if such a threat had existed or was presumed to exist, the executions of 8-9 December 1982 cannot be justified and cannot but be considered summary or arbitrary. The executions had a traumatic effect on the population of Surinam in view of the prominence or stature of the victims."

When dealing with the involvement of Bouterse the Rapporteur mentions, among other things, his official announcement on 8 December 1982 to the effect, in essence, that there had been an attempted coup by a small economic elite and that a number of suspects had been arrested and detained for questioning. The Rapporteur also refers to the version of events given by the Surinam government on a number of occasions. In this version Bouterse was present at the place in question after there had first been telephone contact between him and Major Horb, who was in charge of Fort Zeelandia, and that he had made statements on 9 December 1982 both to the Cabinet and during a radio broadcast on the events.

(United Nations. Economic and Social Council,12 February 1985, Commission on Human Rights, 41st session, Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories. Summary or arbitrary executions. Report by the Special Rapporteur, Mr S. Amos Wako, appointed pursuant to resolution 1984/35 of 24 May 1984 of the Economic and Social Council.)

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Court of Appeal of Amsterdam, 20 November 2000, Institute's Collection No. 5013.[1]

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[5] Elrono. AA5014 (www.rechtspraak.nl). Professor Dugard was appointed by decision of 26 April (Elrono. AA8429, www.rechtspraak.nl). He was requested to reply before 15 July.

[6] Elrono. AA8427 (www.rechtspraak.nl).

1.5 The summonses to various known addresses of Bouterse were sent to the International Legal Assistance Department of the Ministry of Justice on 1 November 1999 and this was followed by an official request for legal assistance to the Minister of Justice of the Republic of Surinam on 19 November 1999. According to a telephone message from the Procurator General of Surinam to the International Legal Assistance Department the various summonses were served on 13 November 1999, but it was not expected that a written confirmation of the service would be given. In these circumstances the Court of Appeal held that Bouterse had been given proper notice of the proceedings.

1.6 The complainants appeared and were assisted by their counsel, Messrs J. Pen and W. Oostenbrink. Mr Pen submitted a written summary of his arguments and, after partially amending the legal basis for the request, renewed the request to the Court of Appeal to order the prosecution of Bouterse. The Advocate General was present at the hearing. He lodged a further report with the Court of Appeal and also argued in oral submissions that proceedings should be brought against Bouterse.

2. Did Bouterse have Dutch nationality on or around 8/9 December 1982?

2.1 The investigation by the examining magistrate provides no grounds for an affirmative answer to the question whether Bouterse had Dutch nationality at the time of the offences. The Court of Appeal would refer in this connection to the findings and conclusions of the expert witness Professor G.R. de Groot, who was appointed by the examining magistrate. The Court of Appeal adopts these findings and conclusions. Basically, they indicate that it is very likely that Bouterse left by aeroplane for Surinam on or around 7 November 1975, and that he was there on 25 November 1975 and had at that time joined the armed forces of the new Republic.

2.2 In connection with article 3 of the Agreement between the Kingdom of the Netherlands and the Republic of Surinam concerning the Assignment of Nationalities (Trb. 1975, 132) [7] it must be assumed as virtually certain that Bouterse lost his Dutch nationality on 25 November 1975 and simultaneously acquired Surinam nationality. There are no indications that he has regained Dutch nationality since that date.

2.3 In these circumstances the conclusion of the Court of Appeal must be that no results can reasonably be expected of criminal proceedings brought against Bouterse on the basis that he committed one or more of the offences referred to in Article 5 of the Criminal Code as a Dutch national abroad. Consequently no order based on this will be made.

[7] 997 UNTS p. 11. Art. 3 reads: 'All Netherlands nationals of full age who were born in Surinam and whose domicile or place of actual residence is in the Republic of Surinam on the date of the entry into force of this Agreement shall acquire Surinamese nationality'.

3. The facts and the objections raised

3.1 As noted in the decision of 30 September 1998, the complainants accuse Bouterse of having given orders to a group of military personnel acting under his responsibility to execute fifteen people, including Frank Wijngaarde (the brother of complainant Wijngaarde) and Eddy Hoost (the nephew of complainant Hoost), in Fort Zeelandia in Paramaribo (Surinam) on 8 or 9 December 1982. The Court of Appeal understands from documents submitted by the complainants that they also wish the criminal court to investigate whether Bouterse himself took part in the executions. As is apparent from the hearing in chambers on 17 December 1999, they also wish to have Bouterse prosecuted for having tortured the persons concerned before they were killed.

3.2 The file contains a transcript of a conversation between Bouterse and AT-5, a local TV channel in Amsterdam, in which he said, among other things, in clear connection with the events in Fort Zeelandia: 'I'm a soldier, I'm engaged in a war against someone. If the man gets out a rifle, I'll not give him the opportunity to shoot. I'll shoot first and I'll shoot to kill, really! You don't even need to be a soldier; they weren't soldiers, but they too would have shot ... It was him or me, and I choose to go before him ... I have the responsibility because I was head of the army; I was the commander; the commander-in-chief, wasn't I? But, um, I'm not bothered by any of this. As I have already said so many times before: in the army the boss is always guilty.'

3.3 In addition, the December murders were investigated by various organisations. The Special Rapporteur for the Economic and Social Council of the United Nations submitted on the basis of his findings:
"that summary and arbitrary executions took place on the night of 8/9 December in Fort Zeelandia. In view of the fact that there can be no derogation from Article 6 of the International Covenant on Civil and Political Rights, that article is binding also 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed' (Article 4) and therefore even if such a threat had existed or was presumed to exist, the executions of 8-9 December 1982 cannot be justified and cannot but be considered summary or arbitrary. The executions had a traumatic effect on the population of Surinam in view of the prominence or stature of the victims."

When dealing with the involvement of Bouterse the Rapporteur mentions, among other things, his official announcement on 8 December 1982 to the effect, in essence, that there had been an attempted coup by a small economic elite and that a number of suspects had been arrested and detained for questioning. The Rapporteur also refers to the version of events given by the Surinam government on a number of occasions. In this version Bouterse was present at the place in question after there had first been telephone contact between him and Major Horb, who was in charge of Fort Zeelandia, and that he had made statements on 9 December 1982 both to the Cabinet and during a radio broadcast on the events.

(United Nations. Economic and Social Council,12 February 1985, Commission on Human Rights, 41st session, Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories. Summary or arbitrary executions. Report by the Special Rapporteur, Mr S. Amos Wako, appointed pursuant to resolution 1984/35 of 24 May 1984 of the Economic and Social Council.)

3.4 Bouterse is also mentioned in connection with the events in the Report of the Dutch Lawyers Committee for Human Rights. It is, for example, reported that he made a television statement on the evening of 8 December 1982 which amounted to a statement that the military authority had thwarted an attempted coup, that arrests had been made and that other measures had been taken. Shortly afterwards one of the arrested persons was shown. The report contains a summary of the statements of witnesses who saw the executed persons in the mortuary. According to the statements the dead bodies showed signs of bullet wounds and indications that the victims had been tortured before being killed.

(Annex to the report referred to at 7: The Events in Paramaribo, Surinam, 8-13 December 1982: the violent death of 14 Surinamers and 1 Dutchman. Report of the Dutch Lawyers Committee for Human Rights, Chris de Cooker, Chairman, Charles Moons, Executive Secretary, Leiden, 14 February 1983).

3.5 The file of the Court of Appeal also contains a copy of a book by an anonymous author entitled '*De decembermoorden in Suriname. Verslag van een ooggetuige*' (The December murders in Surinam. Report of an eyewitness) (now published under the author's name Sariman). This publication contains detailed particulars of the events and of Bouterse's involvement in them. According to the author, these particulars were noted from - above all - the statements of the above-mentioned Horb, who maintains that Bouterse took an active part in the torture and shootings.

(Jan Sariman, in: Geert Mak, René van Stopriaan, *Ooggetuigen van de wereldgeschiedenis in meer dan honderd rapportages* (Eye witnesses of world history in over 100 reports), Prometheus, Amsterdam 1999)

3.6 On the basis of the above indications, taken together and viewed in their mutual context, the Court of Appeal holds that Bouterse is the subject of serious suspicions and objections and that he played an important role in the present events and is therefore partly responsible.

3.7 In view of the time that has now elapsed and the fact that the available material is partly based on statements of witnesses whose identity is unknown and, although incriminating, must be assumed for the time being to be in part no longer capable of being used automatically as evidence for various reasons, the case cannot be considered ready for trial. The Court of Appeal therefore shares the view of both the Advocate General and the complainants' counsel that any order for prosecution should be accompanied by a direction that the public prosecutor should apply to the examining magistrate responsible for handling criminal cases for the institution of a preliminary judicial examination in this case. One of the objects of this investigation should be to determine whether Bouterse was a perpetrator (i.e. either as a principal who committed the offence himself, caused it to be committed by others by virtue of his authority over them, solicited its commission or committed it jointly with others, or as an accessory).

3.8 The suspicion and objections are, in the view of the Court of Appeal, now of such gravity that Bouterse should be called to account before a criminal court.

4. Trial by the Dutch courts?

4.1 The question is whether the Dutch courts can and should be given responsibility for trying the case.

4.2 The Court of Appeal notes at the outset that the Republic of Surinam is in principle obliged under the International Covenant on Civil and Political Rights to which it has been a party since 1977 to institute a criminal investigation into offences possibly committed in its own territory, which constitute infringements of human rights. (The United Nations and Human Rights, 1945-1995, New York 1995, p. 507). However, the submission of complainants' counsel that it cannot be expected that Bouterse will be prosecuted and tried in Surinam or elsewhere in the world in the foreseeable future for the offences to which the complaint relates is correct. The Netherlands has close historic ties with Surinam. A large number of people of Surinamese origin living in the Netherlands. The events in December 1982 shocked not only this group but also society at large in the Netherlands. There are indications that at least one of the victims and possibly more had Dutch nationality. Finally, the complainants, who are relatives of two of the victims, live in the Netherlands. As a prosecution elsewhere in the world cannot be expected in the foreseeable future, as explained above, they have now applied to the most appropriate authorities. Prosecution in the Netherlands would be appropriate on all these grounds.

4.3 This does not, however, answer the question raised in 4.1. It is bound up with complex issues of a public international law nature, in respect to which the Court of Appeal considers further information to be necessary, as held below.

5. The punishability of these acts under public international law

5.1 Introduction

If the present offences that may have been committed by Bouterse as a principal or an accessory are to be prosecuted by the Dutch Public Prosecution Service and tried by the Dutch courts, it is necessary to determine whether they constitute torture, war crimes or crimes against humanity.

5.2 Torture

5.2.1 The Netherlands entered into agreements in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention of 10 December 1984, Trb. 1985, 69) with the other State Parties concerning, among other things, the establishment of jurisdiction in respect of the prosecution and punishment of persons who have committed the serious offences.

5.2.2 The Torture Convention Implementation Act declares that Dutch criminal law is applicable to anyone who commits one of the offences described in the Act outside the Netherlands. Article 1, paragraph 1, of the Implementation Act states that an assault by an official or other person in the employ of the authorities in the

course of his duties on someone who has been deprived of his liberty, with a view to obtaining information or a confession from him, punishing him or intimidating or coercing him or a third person to do or permit something or an assault committed out in contemptuous disregard of his entitlement to human dignity constitutes a criminal offence. Paragraph 2 of this article provides that intentionally inducing a condition of strong fear or other form of serious mental distress is equivalent to assault.

5.2.3 In the view of the Court of Appeal it must be assumed for the time being that Bouterse was in the service of the Surinamese armed forces at the relevant time (finding of law no. 2.1 of this decision) and that he therefore possessed the capacity specified under the Torture Convention Implementation Act.

5.2.4 There is also a reasonable suspicion that the tortures were committed in order to intimidate and punish the victims who had been deprived of their liberty and in contemptuous disregard of their entitlement to human dignity and/or that, independently of the physical torture, the aim was to induce strong fear or some other form of serious mental distress.

5.2.5 The victims were killed. Paragraph 3 of Article 1 of the Implementation Act provides that if the offence results in death the offender is liable to the sentences specified therein. This provision seems to be based on the assumption that death need not have been the intention and therefore possibly excludes application of the Implementation Act in the present case if killing was the primary aim of the perpetrators.

5.2.6 Further investigation will be necessary in order to answer the factual and legal questions raised here. The Court of Appeal does not exclude the possibility that the criminal courts will find on the basis of the above that the execution of the victims does not come within the scope of the Implementation Act. Nor can the possibility be excluded that injuries were caused after the victims had been killed.

5.2.7 For the time being, however, the Court of Appeal would note in relation to the above considerations that it would be hard to comprehend a situation in which it has to be assumed in law that a torture that results in death in the circumstances described above can be punished in the Netherlands but that a murder preceded by torture cannot be.

5.2.8 The application of the Torture Convention Implementation Act to the preceding events on 8/9 December 1982 also raises complex issues that relate in part to customary international law. These issues will also be included in the request for information as considered below.

5.3 War crimes or crimes against humanity?

5.3.1 In assessing the notices of complaint the Court of Appeal should also examine whether Bouterse can be prosecuted and tried in respect of the execution on grounds other than those contained in the Torture Convention Implementation Act.

5.3.2 In the provisional view of the Court of Appeal there are insufficient indications that such offences constitute war crimes. It does not appear that this involves protracted armed violence between governmental authorities and organised armed groups or between such groups within a State, but that, on the contrary, it concerns action taken by a group of armed people belonging to the governmental authorities against a group of defenceless, unarmed citizens. In order to exclude any doubt on this point, the Court of Appeal will nonetheless request information concerning the application of the laws of war in this case.

Cf. ICTY in the Tadic case (par. 70) and the Furundzija case (par. 59): 'An armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.'

5.3.3 The question raised in 5.3.1 should, in principle, be answered in the affirmative if these executions can be described, according to the state of customary international law in December 1982, as crimes against humanity. In general, such crimes must involve very serious criminal offences which are characterised by their inhumane nature and which are aimed against the entire population or against a particular population group.

Cf. Article 6 of the Charter of the Nuremberg Tribunal: 'namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.'

5.3.4 The Court of Appeal is provisionally of the opinion that recent developments in the law provide important criteria for assuming that it is not or no longer decisive that in order to qualify as a crime against humanity a crime must in any event have been committed on a mass scale. In the provisional view of the Court of Appeal, such a crime may also occur if the offence has been committed and/or prepared in a systematic manner in relation to a population group. The Court of Appeal would refer in this connection to the case law and legislation mentioned below.

* BRvC 11/4/1949, NJ 1949, 425 (Ahlbrecht-II): 'that in view of its manifest distinction from "war crimes" in a more narrow sense and in the light of the case law developed on the basis of the Charter by both the international Military Tribunal of Nuremberg and the various Allied courts charged with trying war criminals, this term should nonetheless be narrowly interpreted as meaning that crimes of this category are characterised either by their seriousness and barbarity or by their scope or by the circumstance that they form part of systematic acts of terror or form a link in a deliberate policy aimed at particular population groups (...)'.

* HR 17/1/1981, NJ 1981, 79 (Menten): crimes against humanity are crimes that 'form part of a system of acts of terror or form a link in a deliberate policy aimed at particular population groups'.

* Statute of the ICTR (Rwanda Tribunal). The English text of Article 3 of this Statute refers to crimes 'committed as part of a widespread or systematic attack against any civilian population'. The French text refers, however, to an 'attaque généralisée et systematique'. The Rwanda Tribunal (in the Akayesu Case) held, however, on this point that it had to be assumed that this text was based on an incorrect translation: 'Since customary international law requires only that the attack be either widespread or systematic (...)'

* The decision of the Yugoslavia Tribunal of 7 May 1997 in the Tadic Case: 'the attack against a civilian population must be either widespread or systematic'.

* In the decision of the ICTR of 2 September 1998 in the Akayesu Case to which reference has already been made attention is paid to the meaning of the terms widespread and systematic. The ICTR comments on this: 'The concept of "widespread" may be defined as massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of "systematic" may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources'.

* Code of Crimes against the Peace and Security of Mankind drawn up by the International The Law Commission in 1996. Article 18 of this draft Code defines crimes against humanity as acts ' committed in a systematic manner or on a large-scale and instigated or directed by a Government or by any organisation or group'.

* Article 7 of the Rome Statute of the International Criminal Court, adopted in July 1998. Paragraph 1 of this article defines crimes against humanity as 'acts when committed as part of a widespread or systematic attack directed against any civilian population'. Paragraph 2 adds that an 'attack against any civilian population' must be understood to mean 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack'.

As a recent publication shows, the text of this article is a compromise reached between advocates of an 'alternative' requirement and that of a 'cumulative' requirement. (D. Robinson, Defining 'Crimes against Humanity' at the Rome Conference, in: The American Journal of International Law, Vol. 93:22, p. 43 et seq.).

5.3.5 In order to exclude any doubt concerning the question of whether the events of 8/9 December 1982 were 'committed on a massive scale', the experts to be mentioned below will be asked to report on this point as well. The Court of Appeal by no means excludes the possibility that the relevant acts are crimes against humanity, in so far as they fulfil the requirement that they were committed in a systematic manner against a population group. An opinion on this point will also be requested against the background of the following findings.

5.3.6 This does not in this case involve sporadic violence on an individual basis. On the contrary, there appears to have been a deliberate liquidation of a select group of people. The selection was made systematically by government officials, whose aim was evidently to eliminate the group concerned who belonged to the intellectual elite and were viewed as potential enemies of the political administration in Surinam. There are strong indications that this elimination, which in itself represented a gross violation of the right to life and integrity of the victims, was accompanied and preceded by acts of particular cruelty which amounted to a denial of the right to human dignity. The Special Rapporteur referred to above also noted that the murder of the 15 victims in the night of 8 to 9 December 1982 was not an isolated event since people were killed or arrested both before and after December 1982 after running foul of the military machinery or its individual members (op. cit., par. 54). To this extent there was a 'course of conduct' within the meaning of Article 7, paragraph 2, of the Rome Statute

referred to above. The relevant crimes were also clearly intended to intimidate the population of Surinam and smother any further opposition to the administration. This is evident among other things from the fact that the corpses of the victims were reported to have been exhibited.

5.4 The Court of Appeal considers, as is evident from the above, that information is necessary. It is therefore thinking of seeking the opinion of an expert in the field of customary international law.

5.5 This will in any event involve the following questions:

5.5.1 Can the acts described above and in more detail at 3.3 in the Report of the Special Rapporteur, if they are found to have indeed been committed, be considered as torture, crimes against humanity or war crimes, involving individual criminal responsibility, according to customary international law as it stood in 1982?

5.5.2 Were the acts subject to statutory limitations according to (peremptory) customary international law in 1982 or at some later date?

5.5.3 Did customary international law as it was in 1982, or later, give the State competence to exercise extraterritorial criminal jurisdiction over a person accused of torture or crimes against humanity when that person was not a national of the State?

5.5.4 Does it make any difference to the answer to the previous question if the accused person is present in the territory of the same State?

5.5.5 Does it make any difference to the answer to the previous question (5.5.3) if the victims of the crime were nationals of that State?

5.5.6 Did customary international law as it stood in 1982, or later, oblige a State to exercise criminal jurisdiction in the circumstances mentioned in 5.5.3, 5.5.4 and 5.5.5?

5.5.7 Are there any other comments which you might wish to make - having regard to what has already been found in this decision - that can be of importance to the decision on the notices of complaint?

5.6 The Advocate General and the complainants and their counsel may file with the clerk of the Court of Appeal within three weeks of the date of this decision additional questions to be put to the expert.

5.7 The expert will subsequently be appointed and sworn in by the Court of Appeal and asked to report to the Court of Appeal within a period to be specified in consultation with him.

5.8 This case also involves important questions about the impact of international customary law on the Dutch legal order. The Court of Appeal intends to deal with these questions after it receives the report of the expert.

5.9 Finally, the Court of Appeal considers that there are grounds for holding that this decision be made generally available.

5.10 Every further decision will be stayed.'

Held in the decision of 20 November 2000:

1.5 The Court of Appeal met in chambers on 19 September 2000 to discuss the above-mentioned report of the expert in his presence.

1.6 The complainants were assisted at the meeting in chambers by Mr J.S. Pen and Dr D. van der Landen, both of whom are attorneys-at-law in Amsterdam. On behalf of the complainants Mr Pen stated that they wished to continue with the complaint.

1.7 The Advocate General was also present at the meeting in chambers. He too reaffirmed his previous position.

1.8 Although he received a proper summons to appear, Bouterse did not attend the meeting in chambers. However, he was represented by his counsel Mr A. Moszkowicz, attorney-at-law in Amsterdam. Mr Moszkowicz requested primarily that the complainants' case be declared inadmissible or, alternatively, that the complaint be dismissed. The written notes of his oral submissions were subsequently filed.

2. The extent and scope of the complaints

2.1 Mr Bouterse's counsel argued that the complainants have clearly wished to complain only in respect of the crimes committed against their respective relatives and that it is not possible in law for these complaints to extend to offences relating to other victims.

2.2 The following should be said in this connection. Although the position of the complainants as interested parties within the meaning of Article 12 of the Code of Criminal Procedure is determined in this case by their relationship with the victims, this by no means precludes the possibility that the prosecution of Bouterse requested by them can extend to acts in relation to other victims in the same context. Neither the text of the article concerned nor the explanatory notes provide sufficient ground for the narrow interpretation of the complaints advocated by Bouterse's counsel.

3. Appropriateness of trial by the Dutch courts

3.1 In its decision of 3 March 2000 the Court of Appeal stated at the outset that since Surinam has been a party to the International Covenant on Civil and Political Rights since 1979, it is obliged to bring criminal proceedings for offences that were committed in its own territory and constituted violations of human rights. However, the Court of Appeal stated that it was not expected that Bouterse would be prosecuted and

tried in Surinam in the foreseeable future for the offences to which the complaint relates.

3.2 Reports have recently appeared in the press to the effect that a preliminary judicial examination has been instituted in Surinam against Bouterse in respect of these offences. This raises the question of whether criminal proceedings in the Netherlands can still be regarded as appropriate, as held at the end of finding no. 4.2 of the decision of 3 March 2000.

3.3 As regards the preliminary judicial examination referred to above, the Court of Appeal has not received any official notice and it is not possible to forecast the what the outcome will be, just as there is no certainty about the question of whether it will subsequently be decided by a court to institute criminal proceedings against Bouterse. In view of this position the Court of Appeal sees insufficient grounds for departing from the position which it took on 3 March 2000 concerning the appropriateness of a prosecution in the Netherlands.

3.4 Finally, it should be noted that criminal proceedings could still be suspended with the consent of the Court of Appeal if developments in any criminal proceedings in Surinam were to warrant this. The position is that a Surinam judgment should in principle be respected by the Dutch courts, in other words other than in exceptional circumstances, in accordance with the provisions of Article 68, paragraph 2, of the Criminal Code. The same applies to a disposal of the case other than through criminal proceedings, although it should be noted that in view of the special gravity of the offences it seems inconceivable that such a course of action would be taken.

4. No immunity for Bouterse as head of state

4.1 Bouterse's counsel has submitted that Bouterse cannot be prosecuted for the offences concerned since he was Head of State at that time.

4.2 The Court of Appeal need not consider whether this insufficiently argued submission concerning the position of Bouterse is correct. This is because the commission of very grave criminal offences of this kind cannot be regarded as part of the official duties of a Head of State.

5. The punishability of the offences in question under international law and the applicability of the universality principle

5.1 The Court of Appeal agrees with the remarks and conclusions of the expert to the effect that the present offences qualify as crimes against humanity/acts of torture under customary international law in that they were systematic and intentionally committed in accordance with a predetermined plan by the military authorities, who were under the control of Bouterse, and were directed against a group of citizens for the purpose of obtaining confessions or intimidating or coercing persons belonging to the civilian population.

5.2 The Court of Appeal also shares the view of the expert:
- that torture was a crime under customary international law in 1982, and that the perpetrator of such a crime can be held personally liable under criminal law;
- that it was probably not the case (or no longer the case) in 1982 that a crime against humanity could be committed only in time of war or during an armed conflict, and that it could therefore also be committed in time of peace;
- that crimes against humanity are not subject to statutory limitation;
- that as customary international law stood in 1982, a State had competence to exercise extraterritorial (universal) criminal jurisdiction over a person accused of a crime against humanity when that person was not a national of the State concerned.

5.3 The Court of Appeal also understands from the report of the expert that it is not necessary for the exercise of jurisdiction that the victim should be a national of the prosecuting State or that the victims are nationals of the prosecuting State, although such a connecting factor - as in the present case where the complainants are relatives of the victims - would strengthen the basis for the exercise of jurisdiction.

5.4 The Court of Appeal has found insufficient grounds in the report of the expert to conclude that prosecution of Bouterse in the Netherlands would not be possible and admissible in accordance with the criteria of customary international law as long as he is not in the Netherlands.

6. Torture

6.1 As far as torture is concerned the Court of Appeal would refer to its findings at 5.2, in its decision of 3 March 2000, which it still upholds. It follows from this and from the findings in the present decision, also at 5.2, that the prosecution of Bouterse for acts of torture is possible in law and will therefore be ordered.

6.2 The Court of Appeal has, however, raised the question at the end of the said findings as to whether the Torture Convention Implementation Act can be applied to offences that were committed on 8/9 December 1982. These are dates that lie before the entry into effect of the Act on 20 January 1989. The Court of Appeal was concerned in this connection that the Act would be granted retroactive effect and that this might constitute a violation of the principle of legality. This principle means that no crime or penalty can exist other than on the basis of a law that predates the crime.

6.3 The expert has indicated in section 8.4.3 et seq. of his report on this matter that the Torture Convention is of a declaratory nature. In other words, the Convention merely confirms what already existed under customary international law as regards the prohibition, punishment and definition of torture as a crime against humanity. It follows, in the opinion of the expert, that the Torture Convention Implementation Act can be applied retrospectively to cover conduct such as assault and murder that was illegal under Dutch law before 1989 but that did not constitute the criminal offence of torture. The expert has made a distinction in this connection between retroactive and retrospective legislation. A retroactive statute is one which is proclaimed to have effect as of a time prior to its enactment. By contrast, a retrospective

statute is not intended to create new criminal offences.[8]

6.4 The Court of Appeal endorses these views of the expert and his conclusion to the effect that if the Dutch courts were to give a retrospective interpretation to the 1988 Torture Convention Implementation Act in prosecuting and trying Bouterse on the basis of universal jurisdiction it would not violate Article 15 of the International Covenant on Civil and Political Rights. In so far as it is relevant here, this Article provides that the principle of legality does not prejudice the trial and punishment of any person for any act or omission which at the time it was committed was criminal according to the general principles of law recognised by the community of nations. On the basis of the same reasoning the Court of Appeal holds that retrospective application is not contrary to Article 16 of the Constitution, which states that no offence is punishable unless it was an offence under the law at the time it was committed.

6.5 In view of the above, it cannot therefore be held that the prosecution, trial and, possibly, punishment of Bouterse would infringe the principle of legality and/or that Bouterse could not have allowed for the possibility that he would be prosecuted at some time other than in Surinam, in particular in the Netherlands. Nor is this altered by the submissions put forward by Bouterse's counsel.

7. The concept of torture in the Torture Convention Implementation Act

7.1 In its decision of 3 March 2000 the Court of Appeal raised questions regarding the applicability of the Torture Convention Implementation Act, in so far as the offences relate to the killing of the victims. The Court of Appeal would refer to findings nos. 5.2.5 to 5.2.7 of that decision.

7.2 Upon further reflection, the Court of Appeal finds insufficient serious grounds for excluding the possibility that killing 'independently', in other words without any preceding torture, comes within the operation of the Act.

7.3 It is important in this connection that Article 1, paragraph 2, of the Torture Convention Implementation Act treats as equivalent to assault the act of intentionally inducing a condition of strong fear or other form of serious mental distress – a state of mind that generally occurs when victims are confronted with their approaching execution. As indicated previously, there do not seem to be any good reasons why inducing fear or distress should be regarded as torture whereas the execution - the ultimate assault - should not be. One of the grounds on which the applicability of the universality principle is based, according to the Explanatory Notes to the Torture Convention Implementation Act (Lower House, 1986-1987, 20 042, no. 3, p. 5), is the unbearable notion that torturers who enjoy the protection of the regime of their country should be freely able to travel to other countries where they may come face to face, unpunished, with their victims who have fled abroad or, as the Court of Appeal would add, with the relatives or acquaintances of these victims. This finding is hard to reconcile with a limited interpretation of the Act since it would mean that the

[8] Dugard advances the following argument in support of the distinction: '[1]'.

perpetrators of serious crimes against humanity would be safeguarded from prosecution and punishment.

7.4 It follows from this reasoning that all the offences that could possibly be the subject of charges here – i.e. assault, whether or not resulting in death, and killing as an offence independent of torture – can be prosecuted in the Netherlands under the Torture Convention Implementation Act.

7.5 The Court of Appeal is of the opinion that this is not contrary to the basic premise that provisions of the criminal law should generally be interpreted in a restrictive manner (Lower House, 1986-1987, 20 042, B, p. 6), since it is only in this way that it is possible to prevent criminal proceedings being brought on the basis of a legal standard which the person concerned could not reasonably have known in advance - and in particular during the commission of the offences - would be violated as a result of his acts. The Court of Appeal refers in this respect to what is stated in the report of the expert at 8.4.4 concerning the term 'torture' - in which connection the word murder is expressly used - and with which the Court of Appeal can agree.

7.6 The Court of Appeal recognises that a difference of opinion is possible on the present point and that the possibility that the criminal courts may choose a more limited interpretation cannot be excluded. Since a wider interpretation can by no means be excluded for the reasons stated by the Court of Appeal, the basis for prosecution in this matter will not be limited. The Court of Appeal would refer in this connection to what is stated in finding of law no. 8.4 of this decision on the basis for prosecution.

7.7 The Court of Appeal wishes to avoid a situation in which the investigation to be ordered into the offences which are the subject of this case and were committed long ago is made extra complicated from the outset by the fact that a distinction has to be made between cases in which torture results in death and cases in which death, although possibly preceded by torture, cannot be regarded as a consequence of the torture.

8. Other bases for prosecution

8.1 The events on 8/9 December 1982 cannot be regarded as war crimes. This was already the provisional view of the Court of Appeal in its decision of 3 March 2000. The expert has indicated in section 3 of his report that he can endorse this view. Partly for this reason, the Court of Appeal cannot arrive at a different view.

8.2 In his report the expert also stated that Bouterse can be prosecuted under customary international law, but also points out - rightly in view of the Court of Appeal - that Dutch law requires a national statute in order to incorporate obligations under international law into its own system as regards the punishability of human behaviour

(cf. Article 94 of the Constitution).[9] The Court of Appeal shares the view of the expert that crimes against humanity outside the scope of the Torture Convention Implementation Act are made punishable to a limited extent in Dutch law, namely in the Wartime Criminal Law Act. In this Act crimes against humanity are not regarded as criminal offences in themselves but as aggravating circumstances in connection with war crimes. As held above, however, war crimes do not occur in this case.

8.3 It follows from the above that the Courts of Appeal sees no reason why the prosecution of Bouterse should be based on different or broader grounds than those contained in the Torture Convention Implementation Act.

8.4 However, the Court of Appeal considers it desirable that the court that hears the merits of this case should retain the freedom to define the offence or offences as it sees fit. The prosecution order will therefore not specify the precise legal grounds on which the prosecution should be brought.

9. Conclusion

The complaints are well-founded. Bouterse's prosecution will be ordered. With reference to finding no. 3.7 of its decision of 3 March 2000, the Court of Appeal will also order that a preliminary judicial examination be demanded.

10. The availability of this decision

The Court of Appeal considers that there are grounds for making this decision generally available.

11. Decision

The Court of Appeal:

- orders the public prosecutor in the district of Amsterdam to prosecute Desiré Delano Bouterse, born in the District of Surinam, Surinam, on 13 October 1945 for the offences to which the complaints relate and which were committed in Paramaribo, Surinam, on or about 8/9 December 1982;
- directs the public prosecutor to file an application with the examining magistrate responsible for dealing with criminal cases in the District Court of Amsterdam for the institution of a preliminary judicial examination into the offences concerned;
- makes the text of this decision generally available.'

[9] Art. 94 reads: 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons'.

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OPINION

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IN: RE BOUTERSE

I. FACTS

1.1 On 8/9 December 1982 fifteen persons were arrested by the Surinam military authority under the command of Lt.Col. D D Bouterse (hereinafter Bouterse) and held in Fort Zeelandia in Paramaribo. The arrested persons comprised prominent persons in Surinam (lawyers, professors, businessmen, trade-union leaders, journalists and army officers) who were seen to pose a threat to the military authority under Bouterse.

1.2 The available evidence shows that the arrested men were tortured before being summarily and arbitrarily executed by the military on the orders of Bouterse. Autopsies were not performed on the bodies but witnesses who saw the bodies in the mortuary shortly after they were killed claim to have seen signs of torture on the bodies of the victims. There is evidence that Bouterse played a major role in the killing of the arrested persons.

1.3 The explanation given by the military authority is that the men were arrested by reason of their involvement in a counter-revolutionary coup attempt and had been shot while attempting to escape. (The veracity of this explanation was undermined by the testimony of witnesses who claimed that the deceased persons had been shot in the front and not in the back).

1.4 There was no armed conflict in Surinam at the time of the killings.

1.5 The killing of the fifteen persons on 8/9 December was not an isolated incident. Persons opposed to the military authority had been killed before this time and were killed after this time. In February 1983 Major Roy Horb, second-in-co~and of the military in December 1982, was found dead in his cell after he had been arrested on 30 January 1982 for allegedly plotting against Bouterse. The official explanation that he had hanged hirnself was not generally believed.

1.6 Bouterse was a national of Surinam at the time of the killings.
See Beschikking van 3 maart van het Gerechtshof te Amsterdam, paras 2.1-2.3

1.7 Fourteen of the persons tortured and killed were Surinam nationals. One person, Frank Wijngaarde, was a Dutch national.

1.8 The killings had serious repercussions in the Netherlands. According to the Amsterdam Court of Appeal in its decision of 3 March 2000:

"Nederland heeft nauwe historische banden met Suriname. In Nederland

bevindt zich een grote, uit Suriname afkomstige, bevolkingsgroep. De gebeurtenissen in december 1982 hebben bij deze groep, maar ook in Nederland in ruimere kring, een schok veroorzaakt. Er zijn aanwijzingen dat ten minste één der slachtoffers, maar mogelijk meer, de Nederlandse nationaliteit bezat. Ten slotte wonen klagers, verwanten van twee van de slachtoffers, in Nederland." Para 4.2.

1.9 Surinam became a party to the International Covenant on Civil and Political Rights in 1977. It is not a party to the 1984 Convention against Torture but it is a party to the 1985 Inter-American Convention to Prevent and Punish Torture (12 November 1987). It is not a party to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

Sources
Report of Special Rapporteur Amos Wako to the United Nations Economic and Social Council E/CN.4/1985/17, 12 February 1985 (Commission on Human Rights, 41st Session, Agenda Item 12).

Report of the Dutch Lawyers Committee for Human Rights, The Events in Paramaribo, Suriname, 8-13 December 1982, Leiden, 14 February 1983.

De Decembermoorden in Suriname. Verslag van een Ooggetuige (1983).

2. QUESTIONS ASKED

I have been asked by the Amsterdam Court of Appeal to advise on the following questions on the basis of the above facts. (The questions appear in para 5.5 of the Court's decision):

2.1 Can the acts described above be considered as torture, crimes against humanity or war crimes, involving individual criminal responsibility, according to customary international law as it stood in 1982? (para 5.5.1.)

2.2 Were the acts subject to statutory limitations according to customary international law in 1982? (para 5.5.2.)

2.3 Did customary international law as it was in 1982, or later, give a state competence to exercise extraterritorial criminal jurisdiction over a person accused of torture or crimes against humanity when that person was not a national of the state? (para 5.5.3.)

2.4 Does it make any difference to the answer to question 2.3 if the accused person is present on the territory of the same state? (Para 5.5.4.)

2.5 Does it make any difference to the answer to question 2.3 if the victims of the crime were nationals of that state? (Para 5.5.5.)

2.6 Did customary international law as it stood in 1982, or later, oblige a state to exercise criminal jurisdiction in the circumstances mentioned in questions 2.3, 2.4 and 2.5? (Para 5.5.6.)

2.7 Are there any other comments that might be made on this matter? (Para 5.5.7.)

In this Opinion I have not responded to each question asked in the order set out in the decision ("Beschikking") of the Amsterdam Court of Appeal of 3 March. Instead I have considered each of the international crimes mentioned in para 2.1 above (Beschikking para 5.5.1) separately, together with the questions posed relating to jurisdiction and the effect of lapse of time under customary international law.

3. DID THE ACTS CONSTITUTE A WARCRIME IN 1982

3.1 In its decision of 3 March 2000 the Amsterdam Court of Appeal expressed the provisional judgment ("voorlopig oordeel") that the acts in question did not constitute a war crime. I share this view for the following reasons.

3.2 Attempts have been made to define the term "war crime" in many international instruments, ranging from the Nuremberg Charter to the 1998 Rome Statute on an International Criminal Court. The threshold for the commission of such a crime is that there be an "armed conflict", whether of an international or non-international nature.
See:
(i) Geneva Conventions of 1949, articles 2 and 3;
(ii) Additional Protocols of 1949, article I (protocol II) and article 1 (4)(Protocol I);
(iii) International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, 1996(1, Article 20;
(iv) Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY)Articles 2, 3
(v) Rome Statute of the International Criminal Court, Article 8.

3.3 The term armed conflict has been defined by the ICTY in the Tadic(2 and Furundzija(3 cases in the following terms.
"[A]n armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state".

3.4 On the facts of the present case it is impossible to suggest that there was an "armed conflict" in Surinam in 1982.
Clearly there was no conflict between states. Nor was there "protracted armed violence between governmental authorities and organized armed groups." At the most there was an attempted counter-revolutionary coup backed by peaceful demonstrations on the part of trade-unions and students. However, it is more likely that the military simply arrested, tortured and executed a group of leaders of civil society that it believed to be threat to its retention of power.

4. DID THE ACTS CONSTITUTE A CRIME AGAINST HUMANITY IN 1982?

4.1.1 There can be no question that the crime against humanity was recognized as an international crime resulting in individual responsibility well before 1982.(4 Evidence for this is to be found in the Nuremberg and Tokyo Charters, the jurisprudence of the tribunals applying these Charters, the decisions of the military courts established by the victorious powers after World War II, resolutions ofthe General Assembly of the United Nations confirming the Nuremberg principles, the legislation and judicial decisions of many states (including the Netherlands) reaffirming the concept and the writings of scholars. The evolution of this crime into an accepted crime under customary international law engaging individual responsibility is thoroughly described by M. Cherif Bassiouni in his seminal study Crimes Against Humanity in International Criminal Law (2nd edition, 1999).

Linkage with war or armed conflict

4.2.1 The Nuremberg Charter of 1945 defined crimes against humanity in Article 6 (c) as:

"Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated" (italics added)(5.

On the face of it, this provision suggests an intention to punish persons for atrocities committed before 1939, but the Nuremberg Tribunal preferred, out of respect for the

principle of legality, to limit crimes against humanity to crimes committed during and in connection with the war.(6

4.2.2 Control Council Law No. 10, enacted by the Allies after World War II to govern criminal prosecutions in their respective zones in occupied Germany also contained a provision on crimes against humanity but unlike the Nuremberg Charter's provision it failed to link crimes against humanity to the conduct of the war.(7 Moreover, it expressly named torture as an act constituting the crime against humanity.

4.2.3 The linkage between crimes against humanity and a state of war appears to have disappeared well before 1982.(8 Thus in 1968 the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity prohibited the prescription of crimes against humanity "whether committed in time of war or in peace"(Article 1).
The ICTY Appeals Chamber observed in the Tadic (Jurisdiction) Case:
"The obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict.... It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all."(9

The Statute of the ICTY provides in Article 5 that the Tribunal shall only have competence to prosecute persons for crimes against humanity committed "in armed conflict." Commentators are, however, agreed that this limitation was designed to deal with the special circumstances of the former Yugoslavia and is not intended to suggest that a new nexus, in the form of armed conflict, has been imposed on crimes against humanity.(10

This is confinned by the Statute of the ICTR(11 and the Rome Statute of the ICC which contain no such limitation.(12

Customary international law today recognizes that a crime against humanity may be committed in time of peace. There is no requirement that it be committed in time of war or armed conflict. Whether this was the position in 1982 is not entirely free from doubt, particularly in respect of armed conflict. Control Council Law No.10 abandoned the nexus between crimes against humanity and war; the Genocide Convention (1948) and Apartheid Convention (1973) stress that these species of crime against humanity are not conditional on a state of war or armed conflict; and the 1968 Convention on the Non-Applicabi1ity of Statutory Limitations to War Crimes and Crimes against Humanity envisages that crimes against humanity may be committed in time of peace. Moreover some jurists, including Kooijmans(13 and Rüter(14, writing before 1982 expressed the view that crimes against humanity could be committed in time of peace. Nevertheless, as far as I am aware, there is no recorded case of a prosecution for the crime against humanity (or for that matter genocide or apartheid) committed in time of peace before 1982 before either an international tribunal or a national Court.(15 The ICTY and ICTR, and national courts in several countries, have tried a large number of cases for genocide and crimes against humanity in the past decade but these have been associated with an armed conflict (former Yugoslavia) or large-scale massacre / civil war (Rwanda). Whether the torture and kil1ings in Paramaribo in 1982 would have been categorized as a crime against humanity in 1982 is therefore unsettled. M Cherif Bassiouni, a prominent academic expert in this field, even expresses doubts as to whether contemporary customary international law recognizes crimes against humanity in the case of "purely internal conflicts and tyrannical regimes which produce significant victimization".(16

Whether the torture and killings in Paramaribo in 1982 would have been categorized as a crime against humanity in 1982 is not therefore completely beyond doubt.

Constitutive Elements of the Crime

4.3.1 All instruments defining crimes against humanity since the Nuremberg and Tokyo Charters have expressly included murder and torture as acts that may constitute a crime against humanity .
(i) Control Council No. Law 10, Article II.
(ii) Draft Code of Crimes against the Peace and Security of Mankind (1996) Article 18.
(iii) ICTY Statute (1993), Article 5.
(iv) ICTR Statute (1994), Article 3.
(v) ICC Statute (1998), Article 7.

4.3.2 In order to qualify as crimes against humanity such acts must be committed against the civilian population.(17
In the first instance this indicates that the acts must not be directed against combatants in armed conflict. Secondly, it is designed to show that the acts must not be isolated acts but must instead be collective in nature. This was emphasized by an ICTY Trial Chamber in Tadic when it stated that "the emphasis is not on the individual victim but rather on the collective, the individual being victimized not because of his individual attributes but because of his membership of a targeted civilian population ".(18 This is confirmed by the Rome Statute which declares that the requirement that there be an attack directed against any civilian population for the crime against humanity "means a course of conduct involving the multiple commission of acts .... against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack"(Article 7(2)(a)).

4.3.3 Not any act of murder or torture against a civilian population will qualify as a crime against humanity. In addition there must be evidence that the acts were committed as part of state (or organized non-state) action or policy in a systematic, widespread or large scale manner.

4.3.4 The requirement that the acts be part of state (or organized non-state) action or policy does not appear in any of the instruments defining crimes against humanity apart from the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind which requires that the acts be "instigated or directed by a government or by any organization or group" (Article 18). Bassiouni in Crimes against Humanity in International Criminal Law (1999), however, argues that the crime must be committed by state actors or non-state actors who have some of the characteristics of the state in their ability to exercise dominion and control over territory and people, and to carry out their victimization in a way that reflects a policy that is analogous to state action or policy.(19 It is this element of "state action or policy" that constitutes "the jurisdictional element that makes 'crimes against humanity' a distinct category of international crimes".(20
Although this requirement is controversial, it is not necessary to consider it further for the purposes of the present opinion as it seems clear that the December 1982 crimes were committed by state actors.

4.3.5 Most instruments defining the crime against humanity since Nuremberg(21 have focused on the requirement that the act be systematic, widespread or large scale as the necessary jurisdictional element that distinguishes crimes against humanity from other international crimes and the national crimes of (say) murder, torture etc. Decisions of national courts have also emphasized this requirement.(22
It is not necessary that the acts be both widespread (large scale) and systematic.(23 This is clear from the texts of international instruments which speak of widespread or systematic acts(24, the commentary on Article 18 in the ILC Draft Code(25, judicial decisions(26 and the debates in the Rome Conference preceding the adoption of Article 7 of the ICC Statute(27 which, in Article 7 adopts the formula of "widespread or systematic attack"(italics added).

In the Prosecutor v Akayesu the ICTR stated that

"The concept of 'widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of' systematic ' may be defined as thoroughly organized and following a regular pattern on the basis of a common policy

involving substantial public or private resources. There is no requirement that this policy must be adopted formally as a policy of a state. There must, however, be some kind of preconceived plan or policy."(28

The concept of "systematic" was elaborated upon in Prosecutor v Blaskic, in which an ICTY Trial Chamber held that "systematic" embraces four elements:
* the existence of a political objective, a plan pursuant to which the attack is perpetrated, or an ideology, in the broad sense of the word, that is, to destroy, persecute or we aken a community;
* the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
* the preparation and use of significant public or private resources, whether military or other;
* the implication of high-level political and/or military authorities in the definition and establishment of a methodical plan.(29

The plan, said the Tribunal, may be inferred from a series of events, such as "the general historical circumstances and the overall political background against which the criminal acts are set."(30

4.3.6 There is no requirement that the acts be carried out in a discriminatory or persecutory manner.(31

4.3.7 The torture and murders in Paramaribo in 1982 appear to fall within the definition of crimes against humanity. They were committed by the military authorities in Surinam (state actors) against a group of civilians who were targeted not because of their individual attributes but because of their status as leaders of the Surinam intellectual elite. Moreover, they were committed in a systematic manner as part of an organized plan, involving public resources, aimed at destroying potential opponents of the military authorities.

Mens Rea

4.4.1 A person charged with a crime against humanity must clearly have the necessary mens rea to commit the crime.(32 It is not necessary that such person have knowledge that his conduct is within the definitional requirements of the crime but he must have knowledge of the facts and circumstances necessary to bring his conduct within the definition of the crime. I was not asked to advise on this matter and in my view it would be premature to embark on an enquiry into Bouterse's state of mind on the available facts. Suffice it to say that Bouterse's military training must have given him a clearer picture than the average person of the existence and nature of the crime against humanity. If the Court is called upon to consider this matter it will find guidance in the decisions of the Ontario Court of Appeal(33 and the Canadian Supreme Court in R v Finta.(34

Statute of Limitations

4.5.1 In 1945 it was anticipated that Nazi and Japanese war criminals would be brought to trial expeditiously. Consequently neither the Nuremberg Charter nor the Tokyo Decree contain provisions on statutory limitations. Control Council Law No.10(35 did, however, provide that accused persons were not entitled to the benefits of any statute of limitation in respect of the period 1933-1945. In 1968 the General Assembly of the United Nations adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity(36 which provides that no statutory limitations shall apply, inter alia, to crimes against humanity "irrespective of the date of their commission" (Article 1) and obliges states parties to adopt legislation to ensure that statutory or other limitations shall not apply to the prosecution and punishment of such crimes (Article 4). Only 43 states have ratified this Convention. (Neither Surinam nor the Netherlands have ratified it). In 1974 European states, objecting to the applicability of the Convention to crimes "irrespective of the date of their commission" on the ground that it offended the principle of non-retroactivity, adopted the Convention on the Non-Applicability of Statutory

Limitations to Crimes against Humanity and War Crimes(37 under the Council of Europe, which stipulated that the Convention would be applicable only to offences committed after its entry into force. Only the Netherlands has ratified this Convention.

4.5.2 The Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission at First Reading in 1991 provided that "no statutory limitation shall apply to crimes against the peace and security of mankind".(38 This provision was, however, dropped from the Second Reading of the Draft Code in 1996(39, on the ground that the principle of imprescriptibility did not apply to all crimes covered in the code, but only to the most serious crimes, such as crimes against humanity.(40

4.5.3 The Statutes of the ICTY and ICTR do not contain provisions on statutory Article 29 of the ICC Statute does, however, provide that "crimes within the jurisdiction of the Court shall not be subject to any statute of limitations". This includes crimes against humanity.

4.5.4 National legal systems are divided on the question of statutory limitations. Common-law countries which know no prescription for murder and other serious crimes have no statutes of limitation for crimes against humanity and war crimes. Several civil law countries, on the other hand, have such statutes.
In 1979 the Parliamentary Assembly of the Council of Europe produced a Report on Statutory Limitation of War Crimes and Crimes against Humanity, designed to encourage states to ratify the 1974 European Convention on statutory limitations, which showed that there was no statutory limitation for war crimes and crimes against humanity in Austria, Denmark, France, Ireland, Italy, Liechtenstein, the Netherlands and the United Kingdom. However there were statutory limitations for such crimes in Belgium, Greece, Malta, Norway, Portugal, Spain, Sweden, Switzerland and Turkey.(41
Since then a number of states have amended their laws on statutory limitations for crimes against humanity. For instance in 1999 Belgium adopted a statute declaring crimes against humanity to be impresciptible.

The question of statutory limitations for crimes against humanity has come before national courts. In the Barbie Case the French Court of Cassation held that the French Statute of 1964 excluding crimes against humanity from statutory limitations was declaratory of international law.(42 In the Priebke case the Rome Military Court held that the principle of the non-applicability of statutory limitations to war crimes and crimes against humanity had the status of peremptory norm or norm of jus cogens.43

4.5.5 The notion that international crimes such as crimes against humanity have the character of jus cogens has important implications for statutory limitations. In the Furundzija case the ICTY Trial Chamber stated, obiter, that the prohibition on torture (a species of crime against humanity) is a peremptory norm or jus cogens with the result that it could not be covered by a statute of limitations.(44 A similar attitude is adopted by the report of Louis Joinet to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which boldly states that "prescription should not apply to serious crimes under international law , which are by their nature impresciptible".(45

4.5.6 Whether customary international law prohibited statutory limitations in respect of crimes against humanity in 1982 cannot be answered with absolute certainty.(46 The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity has not been widely ratified. However, the principal objection to this Convention in respect of crimes committed before 1968 is that it is retrospective. This consideration does not apply to crimes committed in 1982. In my opinion the 1968 Convention was, at least, declaratory of customary international law as it stood in 1968 with the result that crimes against humanity committed thereafter were imprescriptible. In their very nature such crimes, which have the character of a norm of jus cogens, are imprescriptible.

Universal Jurisdiction

4.6.1 Customary international law accepts that a state may exercise "universal jurisdiction"

over certain international crimes committed outside its territorial jurisdiction and not involving its nationals, either as actors or victims, or indeed its national interest. In such a case the state acts as the agent of the international community in the prosecution of an enemy of all mankind in whose punishment all states have an interest.(47

4.6.2 That crimes against humanity, which form part of the corpus of customary international law, are crimes that may be tried in accordance with the principle of universality is accepted by judicial decisions(48, the International Law Commission(49 and the writing of jurists.(50

4.6.3 There is therefore no doubt that under customary international law the Netherlands is permitted to exercise jurisdiction over a crime against humanity with which it is not linked by territoriality or nationality when the suspect is present in its territory.(51

4.6.4 There is no treaty which obliges a state to prosecute a person suspected of a crime against humanity present on its territory.(52 Whether customary international law imposes such an obligation is debatable. Some authors have argued that states are obliged to prosecute those suspected of having committed crimes against humanity present on their territory.(53 Support for this argument is found in the fact that related conventions dealing with war crimes, genocide, apartheid and torture specify such a duty.(54 Further support is found in General Assembly resolutions 2840 (XXVI) of 1970 and 3074 (XXVIII) of 1973. In the former on the Question of Punishment of War Criminals and Persons who have Committed Crimes against Humanity the General Assembly urged all states "To ensure the punishment of all persons guilty of such crimes, including their extradition to those counties where they have committed such crimes". In the latter on Principles of Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity the General Assembly reaffirmed the application of the principle of aut dedere aut judicare to crimes against humanity .

While the Netherlands may be under an obligation to try or prosecute a person suspected of crimes against humanity this is of course limited to the situation in which the person is present in its territory.There is no obligation on the Netherlands (or any other state) to request the extradition of a suspect (e.g. Bouterse) from another state in order to exercise jurisdiction over him in accordance with the principle of universality.

Conclusion

4.7.1 The crime against humanity was a crime under international law, involving individual responsibility, well before 1982. The conduct attributed to Bouterse appears to fall within the definition of the crime under customary international law in 1982. (Para 4.3.7.)
However, it might possibly be argued that customary international law, as reflected in state practice, did not recognize such a crime outside war or armed conflict in 1982. (Para 4.2.3.)
Under customary international law the crime has not prescribed (as it is imprescriptible) and is subject to universal jurisdiction. (Para 4.5.6.)
If Bouterse was found within the territorial jurisdiction of the Netherlands it would be incumbent on the Netherlands, as a matter of policy, to try or extradite him. Whether there is a legal obligation requiring such action is, however, highly debatable. (Para 4.6.4.)

5. DID THE ACTS CONSTITUTE TORTURE IN 1982?

Torture in Armed Conflict.

5.1.1 Torture was clearly punishable as an international crime in war or armed conflict well before 1982, both under customary international law (as an act that might qualify as a crime against humanity) and the Geneva Conventions of 1949 and the 1977 Additional Protocols.(55

Torture in Time of Peace Today

5.2.1 There can be little doubt that torture is today recognized as an international crime under customary international law. Judicial decisions and academic writings assert this and a number of conventions confirm it. The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1985 Inter-Arnerican Convention to Prevent and Punish Torture (ratified by Surinam on 12 November 1987) criminalize torture per se while the ICTY, ICTR and ICC Statutes criminalize it as a species of crimes against humanity .

Torture in Time of Peace in 1982

5.3.1 Torture was probably punishable under international law in time of peace in 1982 as a species of crime against humanity as a result of the unlinking of crimes against humanity from war and armed conflict. See above paras 4.2.1 -4.2.3.

5.3.2 In my opinion torture was recognized as an independent crime under customary international law before the killings in Paramaribo in 1982. This opinion is based on the following evidence, viewed cumulatively.

(a) Both international and regional human rights conventions prohibit the use of torture. Of particular importance are the 1966 International Covenant on Civil and Political Rights (Article 7) and the 1969 American Convention on Human Rights (Article 5(2)). Surinam ratified the fonner on 28 December 1976 and the latter on 12 November 1987. Although these Conventions do not provide for individual crirninal responsibility for violations of the prohibition on torture they do emphasize the special nature of these prohibitions by rnaking them non-derogable in time of national emergency.(56
Moreover the monitoring body of the International Covenant on Civil and Political Rights, the Human Rights Committee, has strongly suggested that there is a duty on Member States to punish torturers. In 1984 in Muteba v Zaire the Human Rights Committee found that Zaire had violated the prohibition on torture in Article 7 and held that it was "under an obligation to conduct an inquiry into the circumstances of [the victim's] torture, to punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future."(57

(b) The General Assembly of the United Nations adopted a number of resolutions between 1973 and 1976(58 which denounced torture. Of particular importance is the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment(59, which defined torture in substantially similar terms as the definition contained in the 1984 Convention Against Torture, called on all States to take effective measures to prevent torture and declared that "each state shall ensure that all acts of torture are offences under its criminal law". Efforts to criminalize the use of torture by treaty under international law were well underway by 1980.(60

As a result of these development a United States Circuit Court of Appeals held in 1980 that the prohibition on torture had become part of customary international law.(61

(C) In 1969 the Vienna Convention on the Law of Treaties in Article 53 gave conventional blessing to the notion that certain international law norms enjoy the character of peremptory norms -that is constitute part of jus cogens. Today the prohibition on torture is accepted as such a norm62 and it is probable that it enjoyed this status before 1982. According to the judgment of ICTY Trial Chamber in Furondzija:
".... at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute, punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction".(63

(d) The 1984 Convention against Torture (to which Surinam is not a party, but the Netherlands is) and the 1985 Inter-American Convention to Prevent and Punish Torture

(ratified by Surinam on 12 November 1987), which oblige states to criminalize acts of torture under their criminal law and to try or extradite torturers purport to be declaratory of existing customary internationallaw in respect of the prohibition on torture and its criminalization.
Only the machinery established by the Conventions to enforce this prohibition is constitutive. The Preamble of the 1984 Convention refers to the prohibitions on torture in the International Covenant on Civil and Political Rights and the 1975 General Assembly Declaration on Torture64 and declares that the Convention is adopted "to make more effective the struggle against torture".(65
The Inter-American Convention is even more clear in its Preamble. It "reaffirms that all acts of torture.... constitute an offence against human dignity" and a violation of fundamental human rights and notes that for the rules contained in human rights instruments "to take effect, it is necessary to draft an Inter-American Convention that prevents and punishes torture."

(e) Several speeches of the Law Lords in the seminal Pinochet(66 decision before the English House of Lords confirm that torture was a crime under international law before 1984.
(i) Lord Browne-Wilkinson
"I have no doubt that long before the Torture Convention state torture was an international crime in the highest sense.... The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal, the torturer, could find no safe haven."(67
(ii) Lord Hutton
"...it is unnecessary to decide when torture became a crime against international law prior to [1988], but I am of opinion that acts of torture were clearly crimes against international law and that the prohibition on torture had acquired status of jus cogens by that date."(68
(iii) Lord Millett
"The Republic of Chile accepts that, by 1973, the use of torture by state authorities was prohibited by international law and that the prohibition had the character of jus cogens or obligation erga omnes."(69

The Nature of the Crime of Torture in 1982

5.4.1 Torture is defined in Article 1 of the 1984 Torture Convention as follows: "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public officialor other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

This, in substance, corresponds with the definition of torture contained in the 1975 Declaration on the Protection of all Persons from Being Subjected to Torture which reads: "For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners."

It is impossible to state with certainty what the ambit of the international crime of torture was before 1984, and, in particular what it was in 1982. Essentially there are two possibilities. First, that it existed in the form of the 1975 definition, adopted by consensus

in the General Assembly, as conflnned by the 1984 Convention against Torture.(70 Secondly, that it did not include "any act" of torture but only the widespread or systematic use of torture, as required for the crime against humanity, of which the crime of torture formed a part. This view was confirmed by Lord Millett in the Pinochet case when he declared:
"The 1984 Torture Convention did not create a new international crime. But it redefined it. Whereas the international community had condemned the widespread and systematic use of torture as an instrument of state policy, the convention extended the offence to cover isolated and individual instances of torture provided that they were committed by a public official. I do not consider that offences of this kind were previously regarded as international crimes attracting universal jurisdiction."(71

5.4.2 On the facts of the present case torture was committed under either definition as the acts of torture were systematic and intentionally committed by public officials either for the purpose of obtaining confessions or intimidating or coercing the arrested persons.

Statute of Limitations

5.5.1 The international crime of torture is not subject to statutory limitations, for two principal reasons.
First, because of its ties with crimes against humanity in respect of which there is no statutory limitation.
It would be ridiculous to permit statutory limitation in respect of acts of torture characterized as an independent international crime while at the same time prohibiting such statutory limitations where the acts are characterized as crimes against humanity.
Secondly, because of the jus cogens character of the prohibition on torture which excludes statutory limitations. Support for this proposition is to be found in an obiter dictum in the Furundzija case.(72

Universal Jurisdiction

5.6.1 The 1984 Convention against Torture recognizes the principle of universal jurisdiction, at least for states parties, in Article 5 in providing that a state shall exercise jurisdiction where the offender is present in its territory.

5.6.2 The prohibition on torture is an obligation erga omnes, that is an obligation in whose enforcement all states have a legal interest. Consequently it is a crime, like the crime against humanity, with which it is historically linked, that may be prosecuted by any state, wherever it was committed.(73

5.6.3 Customary international law also recognizes that universal jurisdiction applies in the case of torture as a consequence of the jus cogens character of the prohibition on torture.74 This was stressed in the Pinochet case. Lord Browne- Wilkinson declared:
"The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may be punished by any state because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution': Demjanjuk v Petrovsky (1985) 603 F Supp 1468,774 F 2d 571."(75

Lord Millett stated:
"In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1971."(76

5.6.4 Article 5 ofthe Convention against Torture obliges a state to exercise jurisdiction over an offender when he is present in its territory and it does not extradite him. Judicial decisions also stress the requirement of presence for the exercise of universal jurisdiction. In Furundzija the ICTY stated that "every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its

jurisdiction" (italics added).(77 In the Pinochet case Lord Millett declared, in respect of the exercise of universal jurisdiction, that
"The limiting factor that prevents the exercise of extra territorial criminal jurisdiction from amounting to an unwarranted interference with the internal affairs of another state, is that, for the trial to be fully effective, the accused must be present in the forum state."(78

5.6.5 It is not clear whether this requirement prevents a state in whose territory the offender is not present from requesting extradition of the offender from a state in whose territory the offender is present, but which elects not to try him itself, when the sole basis for the exercise of jurisdiction is the principle of universality. Some have argued that it is objectionable to allow extradition requests of this kind as this would permit a particular state to act as "policeman" of the world by requesting extradition of torturers from any country. This objection was not raised in the Pinochet proceedings and a number of English courts were prepared to entertain a request from Spain to exercise jurisdiction on grounds of universality.(79

A state that requests extradition of a torturer would probably be wise to stress the presence of some connecting factor between it and the crime to ensure that this objection would not be raised against it. Article 5(1)(c) of the Convention against Torture recognizes that the passive personality principle may provide a basis for the exercise of jurisdiction if the state in question "considers it appropriate." Although the municipal law of the Netherlands does not permit the exercise of jurisdiction on this ground it may nevertheless consider such a ground as the basis of an extradition request, in lieu of or in addition to, universal jurisdiction. This matter is further considered in para 8.

Aut Dedere aut Judicare and the Duty to Prosecute

5.7.1 There is clearly an obligation on parties to the 1984 Convention against Torture to try or extradite torturers present in their territory.(80 Previously such states were entitled to prosecute or extradite but were not obliged to do so.(81 Under the Convention against Torture states are obliged to prosecute even where there has been no refusal of an extradition request.(82

5.7.2 While the Netherlands is under a legal obligation to try or extradite a torturer present in its territory where the crime was committed after the Torture Convention came into effect for the Netherlands on 20 January 1989, doubts may be expressed about its obligation to try or extradite a person who committed the crime oftorture before 1989. In support of this restrictive view it may be argued that the ratification of a treaty has no retrospective effect and that treaty obligations commence upon ratification.(83 The Vienna Convention on the Law of Treaties provides in Article 28 that:
"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

5.7.3 I am not satisfied that the obligation aut dedere aut judicare contained in the Torture Convention is not retrospective to acts of torture committed before 1989.

5.7.4 Torture was a substantive international crime before 1984, albeit subject to the requirement that it be systematic or widespread to accord with constitutive elements of the crime against humanity. The purpose of the Torture Convention was to codify this crime, extend it to cover individual acts of torture and to provide machinery for the effective enforcement of the prohibition on torture.(84 The enforcement machinery is of two kinds. First, the obligation aut dedere aut judicare(85; and, secondly, the institutional machinery created by the Convention providing for establishrnent of a Committee against Torture to receive and consider reports and complaints.(86

5.7.5 The institutional machinery created by the Torture Convention is constitutive and cannot have retrospective effect. This was confirmed by the Committee Against Torture

when it held that it was not competent to consider complaints relative to acts of torture occurring in Argentina before it became a party to the Torture Convention.
The Committee held that:
"its competence with respect to communications is defined by Article 22 of the Convention Against Torture, whereby that competence is limited to violations of this Convention and does not extend to the norms of general international law."(87

5.7.6 The obligation aut dedere aut judicare, however, is not necessarily constitutive and prospective. On the contrary it may be likened to the obligation that a state incurs when it enters into an extradition agreement to extradite fugitives in its territory suspected of having committed crimes in the requesting state before the entry into force of the treaty. That an extradition treaty has retrospective effect is supported by the jurisprudence of many countries, including the Netherlands.(88
In Gallina v Fraser a US court stated that:
"It appears to have been established a long time ago that extradition treaties, unless they contain a clause to the contrary, cover offences committed prior to their conclusion.(89

In 1947 in the case of In re Colman (Court of Appeal of Paris) a Belgian citizen resident in France challenged his extradition to Belgium for crimes arising out of collaboration with the enemy in World War II. He argued that the extradition agreement between Belgium and France, which was signed in 1947, had no retroactive effect to the time that the acts occurred. In rejecting his plea the court held:
"The offender cannot invoke the principle of non-retroactivity of laws. He has no right not to be surrendered for facts which were not provided for, at the time of the consummation of the offence, by the Franco-Belgium Convention to which he is not a party, as long as both French and Belgian law render criminal and punish offences at the time when they were committed."(90

5.7.7 In my view the principle aut dedere aut judicare is procedural and its extension to cover an act of torture committed before 1989 in terms of a multilateral extradition agreement (the Torture Convention) does not offend the rule of legality any more than does the application of a bilateral extradition treaty that entered into force in 1989 to a crime committed in 1982. To interpret the Torture Convention to allow pre-1984 torturers to travel freely would run counter to the object and purpose of the Convention, namely to bring to trial all public officials suspected of committing torture - whenever it might have been committed. In these circumstances the general principle contained in Article 28 of the Vienna Convention seems to be inapplicable.

5.7.8 The Pinochet case does not provide an obstacle in the way of such an argument. There the House of Lords did not consider the question whether the United Kingdom was obliged in terms of the Torture Convention to try or extradite Pinochet for crimes committed before the entry into force of the treaty in the UK in 1988. Instead it held that the rule of double criminality contained in the 1989 Extradition Act did not permit Pinochet to be extradited to Spain for crimes committed before 1988.

5.7.8 Bouterse is not present in the Netherlands. There is therefore no obligation on the Netherlands to exercise criminal jurisdiction over him under intenational law. Nor is the Netherlands under a legal obligation to request his extradition from Surinam or any country that he may visit. On the other hand, if Bouterse were to visit the Netherlands, I am of the opinion that the Netherlands would be obliged to try or extradite him under the Torture Convention.

PASSIVE PERSONALITY AS A BASIS FOR JURISDICTION

6.1.1 Customary international law permits a state to exercise criminal jurisdiction where the victim of the crime is a national.(91

6.2.1 International law would therefore permit the exercise of jurisdiction over Bouterse for the murder of Frank Wijngaarde, a Dutch national tortured and mudered at Paramaribo in December 1982. Dutch municipal-law rules, however, do not allow the exercise of jurisdiction on grounds of passive personality.(92 For this reason the possibility of prosecuting Bouterse for mUfder of a Dutch national is not considered.

6.3.1 Multilateral treaties creating international crimes increasingly recognize passive personality as a basis for the exercise of criminal jurisdiction. The Torture Convention in Article 5(1)(c) recognizes that the passive personality principle may provide a basis for the exercise of jurisdiction if a state party "considers it appropriate." The Netherlands, if its own municipal law recognized this jurisdictional ground, could exercise jurisdiction over Bouterse for the crime of torture on the basis that one of the victims of the 1982 killings was a Dutch national.

OTHER JURISDICTIONAL GROUNDS

7.1.1 Customary international law permits a state to exercise criminal jurisdiction where the effect of the crime is felt in its territory(93; or where the crime threatens its own safety and security (protective principle).(94 It is clear that the 1982 killings in Paramaribo had a profound effect in the Netherlands. See above para 1.8.
Customary international law would therefore permit the Netherlands to exercise jurisdiction over Bouterse on these grounds.

THE PROSECUTION OF BOUTERSE IN THE CONTEXT OF DUTCH LAW

8.1.1 In my opinion Bouterse could be prosecuted in terms of customary international law for the 1982 murders. I am not, however, giving advice to an international tribunal on how to proceed but to a Dutch court that is bound to apply its own national law.
It is not my mandate to advise on Dutch law, a task for which I am in any event unqualified. On the other hand, I believe it is incumbent on me to make certain tentative comments on the basis of my limited understanding of Dutch law. This would seem to be required by the question posed in paragraph 5.5.7 of the decision of the Amsterdam Supreme Court of 3 March 2000.

Prosecution under Customary International Law as part of Dutch law

8.2.1 Customary international law is part of Dutch municipal law.(95 It might therefore be argued that a Dutch court could prosecute Bouterse on the ground that he has committed a crime of universal jurisdiction under customary international law and that this is part of Dutch municipal law. Support for such a step is to be found in the speech of Lord Millett in the Pinochet case(96 where he held that torture was a customary international crime of universal jurisdiction by 1973 and that an English court had extraterritorial criminal jurisdiction on the basis that customary international law is part of English municipal law. Statutory authority for the exercise of extra territorial criminal jurisdiction was therefore unnecessary. (Lord Millett conceded that this view was not shared by his fellow judges who required statutory authority for the exercise of universal jurisdiction.)

8.2.2 Such a course is unlikely to be followed as Dutch law, like English law, appears to require a national statute which translates international law obligations into municipal law where the criminalization of human conduct is concerned.(97

Crimes against Humanity and Dutch Law

8.3.1 I have expressed the opinion that Bouterse might be prosecuted for a crime against humanity under customary international law. Here I have concluded that the events of December 1982 might constitute a crime against humanity, a crime subject to universal jurisdiction. I have also expressed the opinion that crimes against humanity are not subject to statutory limitation.

8.3.2 Dutch municipal law governing crimes against humanity is still rooted in the Nuremberg era. The 1952 Wet Oorlogsstrafrecht does not criminalize crimes against humanity as such but, in Article 8, deals with crimes against humanity as a circumstance aggravating war crimes. Such a crime must be a manifestation of a policy of systematic terror or illegal acts directed against the population or a group of the population. Crimes against humanity, in terms of this law, can be committed only during war or armed conflict.(98 It is not, however, necessary, as was previously believed, that the Netherlands be involved in such a conflict.(99

8.3.3 The events of December 1982 in Paramaribo did not occur in a war or armed conflict. It would therefore be difficult to prosecute Bouterse for crimes against humanity as Dutch Law stands at present.

Torture and Dutch Law

8.4.1 The Netherlands ratified the Convention against Torture on 21 December 1988 and the Convention entered into force for the Netherlands on 20 January 1989. The Netherlands gave effect to its obligations under this Convention in 1988 in the Uitvoeringswet Folteringverdrag (Torture Act). This Act defines torture in language similar to that of the Torture Convention (Article 1.1) and provides for life imprisonment where the torture results in death (Article 1.3). Article 5 recognizes the principle of universality: "De Nederlandse strafwet is toepasselijk op ieder die zich buiten Nederland aan een van de in de artikelen 1 en 2 van deze wet omschreven misdrijven schuldig maakt."

Article 10 provides that the Act is to come into force on the date on which the Convention comes into effect- that is 20 January 1989.

8.4.2 The Netherlands has generally been hesitant about accepting the obligation of universal jurisdiction and has on several occasions attached reservations to its acceptance of treaties providing for universal jurisdiction; thereby limiting its acceptance of the principle of universal jurisdiction. It did not, however, attach any such reservation when it became a party to the Torture Convention.(100

8.4.3 I have expressed the opinion that Bouterse's involvement in the acts of torture of December 1982 might make him punishable under customary international law for the crime of torture, which is subject to universal jurisdiction, and in respect of which there is no statutory limitation. Clearly Bouterse would be punishable under the Uitvoeringswet Folteringverdrag of 1988 if his conduct had occurred after 20 January 1989. The question that must be addressed, however, is whether he might be punished under the 1988 Act for acts committed in 1982. No doubt the immediate response to such a suggestion is that this would be retroactive and violate the principle of legality, a principle of both customary international law and national law. The matter does, however, require closer consideration.

8.4.4 The Convention against Torture is declaratory of existing customary law in so far as its prohibition, punishment and definition of torture are concerned.(101 This applies particularly to the crime of torture in so far as it meets the requirements of the crime against humanity of which it was, and still is, an integral part. Thus it might persuasively be argued that the 1988 Torture Act could be applied retrospectively to cover conduct that was illegal under Dutch law before 1989 but was not criminalized under the name of torture -such as assault, murder, etc.(102

8.4.5 The question then arises whether the Netherlands may exercise jurisdiction on grounds of universality over the events occurring in 1982 in terms of Article 5 of the 1988 Torture Act. Some may argue this would offend the principle of retroactivity. On the other hand, it might be argued that the acts constituting the crime of torture were punishable in the Netherlands under other names and that Article 5 is a procedural provision which extends extraterritorial jurisdiction to the prosecution of such crimes without offending the principle of legality. Here retrospective effect could be given to the exercise of jurisdiction in the same way that retrospective effect is given to the granting of extradition in respect

of crimes committed before the adoption of an extradition treaty.(103
This is an issue to be decided by a Dutch court applying its own rules of interpretation, general principles and traditions. It may, however, be helpful to consider the experience of the Canadian courts in applying a statute which gave retrospective effect to crimes against humanity committed outside Canada in the face of a prohibition on retroactive legislation contained in the Canadian Charter of Rights and Freedoms. Here the courts upheld the validity of the Canadian statute on the ground that it did not violate the prohibition on retrospectivity because the conduct in question was "criminal according to the general principles of law recognized by the community of nations."(104 In so deciding the courts drew a helpful distinction between a retroactive statute, which violated the Charter of Rights and Freedoms, and a retrospective statute which did not.

"The distinction between a "retroactive" statute, as opposed to one with a "retrospective" application, is significant. According to the definition contained in 44 Hals. 4th ed., p. 572, a retroactive penal statute is one which is "intended to render criminal an act which was innocent when it was committed".

David H. Doherty (now Mr. Justice Doherty), in an article entitled "What is Done is Done: An argument in Support of a Purely Prospective Application of the Charter of Rights" (1982),26 C.R. (3d) 121, defines both "retroactive" and "retrospective" statutes as follows [at p. 125]:
A retroactive statute is one which is proclaimed to have effect as of a time prior to its enactment. The statute operates backward and changes the law as of some date prior to proclamation. ..
A retrospective statute is one which proclaims that the consequences of an act done prior to proclamation are to be given a different legal effect after proclamation as a result of the enactment of the statute. It operates only in the future, after proclamation, but changes the legal effect of an event which occurred prior to proclamation.

Keeping these definitions in mind, there is clearly a difference between a retroactive and a retrospective application. A retroactive application takes an act or omission that was not previously criminal, and retroactively deems that act or omission to be criminal as at a later date. A retrospective statute, on the other hand, does not create new offences. Rather, as in this case, it merely operates to retrospectively give Canadian courts jurisdiction over criminal offences committed outside of Canada."(105

If a Dutch court were to give a retrospective interpretation to the 1988 Act to permit Bouterse to be prosecuted for torture committed in 1982 on the basis of universal jurisdiction it would not violate Article 15 of the International Covenant on Civil and Political Rights which provides that nothing in the prohibition on the retroactivity of criminal law "shall prejudice the trial and punishment of any person for any act or omission which at the time it was committed, was criminal according to the general principles of law recognized by the community of nations."(106

EXTRADITION

9.1.1 Bouterse is presently in Surinam and is unlikely to visit the Netherlands. If he were to visit a third state with which the Netherlands has a multilateral (e.g. Torture Convention) or bilateral extradition treaty, the question might arise whether the Netherlands could request the extradition of Bouterse for torture on the basis of universal jurisdiction. On the authority of Pinochet, in which the European Convention on Extradition provided the basis for extradition, there would appear to be no objection to such a request.(107 Moreover, Article 5 of the 1988 Dutch Torture Act would appear to permit this as it does not require the presence of the accused in the Netherlands for the exercise of jurisdiction. However, as indicated above(108 the requested state may object to the Netherlands request on the ground that a closer connecting factor is required for extradition.

9.1.2 In such a case the Netherlands might request extradition on the passive personality principle, which is increasingly accepted today as a ground for the exercise of criminal

jurisdiction and is recognized by the Torture Convention itself in Article 5 (1) (c), or the protective principle. See above paras 1.7, 1.8 and 7.1.1.

9.1.3 If Bouterse were extradited in such a case the Netherlands could exercise criminal jurisdiction over him under Article 5 of the 1988 Torture Act which provides for universal jurisdiction -provided Dutch courts were prepared to apply this provision retrospectively. The requested state could not object to this change in the exercise of jurisdiction as the principle of speciality applies only to the crime itself. Here Bouterse would be tried for the same offence -torture -but on a different jurisdictional ground to accommodate the Netherlands' own jurisdictional rules.

SUMMARY OF CONCLUSIONS

War Crimes

10.1.1 The acts that took place in Paramaribo in December 1982 could not be described as war crimes.

Crimes Against Humanity

11.1.1 In 1982 the crime against humanity was a crime under customary international law, involving individual responsibility.

11.1.2 The crime against humanity had probably been unlinked from war and armed conflict in 1982 and could be committed in time of peace.

11.1.3 The crime against humanity was not subject to statutory limitation in 1982.

11.1.4 Customary interntional law, as it stood in 1982, gave a state competence to exercise extraterritorial criminal jurisdiction over a person accused of a crime against humanity when that person was not a national of the state.

11.1.5 It is not necessary for the victim of the crime to be a national of the prosecuting state for it to exercise jurisdiction. This connecting factor would, however, strengthen the jurisdictional basis for the exercise of jurisdiction.

11.1.6 A state is permitted to exercise jurisdiction over a person suspected of having committed a crime against humanity when that person is present on its territory.

11.1.7 It is debatable whether a state is under a legal obligation to prosecute or extradite a person suspected of having committed a crime against humanity when that person is present on its territory.

11.1.8 The acts attributed to Bouterse in December 1982 appear to qualify as a crime against humanity in that they were committed in a systematic manner as part of an organized plan by the military authorities, of which Bouterse was commander, against a group of civilians.

Torture

12.1.1 In 1982 torture was a crime under customary international law, both as a species of the crime against humanity and as an independent crime.

12.1.2 Torture, as a crime under customary international law, was not subject to statutory limitation in 1982.

12.1.3 Customary international law, as it stood in 1982, gave a state competence to exercise extraterritorial criminal jurisdiction over a person accused of torture when that person was not a national of the state.

12.1.4 It is not necessary for the victim of the crime to be a national of the prosecuting state for it to exercise jurisdiction. The Convention against Torture of 1984 does, however, recognize this factor as an additional ground for the exercise of jurisdiction.

12.1.5 A state is under a legal obligation to prosecute or extradite a person suspected of torture when that person is present on its territory. This legal obligation extends to acts of torture commmitted in 1982.

12.1.6 The acts attributed to Bouterse in December 1982 appear to qualify as torture under customary international law in that they were systematic and intentionally committed by public officials either for the purpose of obtaining confessions or intimidating or coercing persons belonging to the civilian population.

C.J.R. DUGARD
Leiden, 7 july 2000

1Report of the International Law Commission on the Work ofits 48th Session, 1996, UNGAOR 51st Session, Supplement No 10 (N51/10), p 110.
2 Prosecutor v. Tadic (1996) 35 International Legal Materials (ILM) 32 at 54 (para 70).
3 Prosecutor v Furundzija Case no IT-95-17/I-T; (1999) 38 ILM 317, para 50.
4 In 1977 the ICTY stated that "since the Nuremberg Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned" (Prosecutor v Tadic no IT-94-T-(merits) 7 May 1997; (1997) 36 ILM 908, 937.
5 82 UNTS 279. Article 5 (c) of the declaration establishing the International Military Tribunal in Tokyo contained an identical provision.
6 For a discussion of the linking of crimes against humanity with the initiation or conduct of war, see M. Cherif Bassiouni International Criminal Law 2nd ed (Crimes) (1999) 552-555,571-574.
7 Control Council Law No.10, Punishment ofPersons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, 50-55, Article 2. This feature of CCL No 10 was stressed in In Re Ohlendorf and others (Einsatzgruppen Trial, (US Military Tribunal, 1948) 15 International Law Reports (ILR) 656,664.
8 Supra note 6 at 573.
9 Supra note 2 at 72, paras 140-1. See too Article 18 ofthe International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, and the commentary thereto, supra note I at 93,96. In R v Bow Street Metropolitan Stipendiary Magistrate and others, Ex Parte Pinochet Ugarte (No 3) Lord Millett stated that the requirement that crimes against humanity be linked to war was a "jurisdictional restriction based on the language of the [Nuremberg] Charter. There is no reason to suppose that it was considered to be a substantive requirement of international law.... The need to establish such a connection was natural in the immediate aftermath of the 1939-45 war. As memory of war receded, it was abandoned"(at 174 g - h).
10 V Morris & MP Scharf An Insiders Guide to the International Criminal Tribunal for the Former Yugoslavia Vol I (1995) 81-3. See too the Report of the Secretary-General Pursuant to Para 2 of Security Council Resolution 808 (1993), S/25704 of 3 May 1993, para 47: "Crimes against humanity .... are prohibited regardless of whether they are committed in an armed conflict, international or internal in character."
11 Article 3. See further V Morris & M P Scharf The International Criminal Tribunal for Rwanda (1998) 202-205; T Meron "International Criminalization of Internal Atrocities"(1995) 89 AJIL 554, 557; Prosecutor v Akayesu Case No ICTR-96-4- T (2 September 1998) p 229 (para 565).
12 Article 7.
13 Op het Grensgebied van Internationaal en Nationaal Recht; De Verjaring van Internationale Misdrijven (1968) 17.
14 Enkele Aspekten van de Strafrechtelijke Reactie op Oorlogsmisdrijven en Misdrijven

tegen de Menselijkheid (diss. UvA 1973) 41.
15 The prosecution before national courts of Eichmann, Demjanjuk (Israel), Barbie, Touvier, Papon (France), Menten, Ahlbrecht (the Netherlands), Finta (Canada) etc for crimes against humanity all relate to the events ofthe Second World War.
16 Supra note 6 at 573.
17 This requirement is included in all but one (the 1996 ILC Draft Code, supra note 1) of the instruments defining the Crime against Humanity, including the Nuremberg Charter.
18 See Prosecutor v Tadic IT 94-1-T, para 644 (1997) 36 ILM at 941); D. Robinson "Defining 'Crimes against Humanity' at the Rome Conference" (1999) 93 American Journl of International Law (AJIL)43 at 48.
19 At 243-6, Supra note 6 at 578-81.
20 Crimes against Humanity at 277. Bassiouni's view gains support from Article 7(2)(a) of the Rome Statute of the ICC (supra para 4.3.2) which requires that the acts be "in furtherance of a state or organization policy" and Tadic (supra note 15) at para 644 (1997) 36 ILM 941. See further Robinson, supra note 18 at 49-50.
21 This requirement does not appear in the Nuremberg Charter but it does feature in the jurisprudence of the Tribunal. In its discussion of crimes against humanity the Nuremberg Tribunal declared: "The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic."Nazi Conspiracy and Aggressian: Opinion and Judgment 84 (US Govt and Printing Office 1947); 1996 ILC Report supra note 1 at 94 footnote 126.
22 Ahlbrecht, Bijz. Raad van Cassatie, 11 April 1949, Nederlandse Jurisprudentie 1949, No.427 at p. 750; Menten. Hoge Raad, 13 January 1951, Nederlandse Jurisprudentie 1981, No.29 atp. 215; Barbie Case 78 International Law Reports (ILR) 137.
23As stated by the French text of the ICTR Statute; see the Akayesu case, supra note 11, p. 235 (footnote 144).
24 ICTR Statute, Article 3; ILC Draft Code (supra note 1), Article 18; Rome Statute of ICC, Article 7.
25 Supra note 1 at 94-5.
26 Akayesu, supra note 11, at 235 (para 575); Prosecutor v Tadic, IT-94-1-T (7 May 1997) para 647; (1997) 36 ILM 908 at 942; Prosecutor v Blaskic, Case No IT-95-14-T (3 March 2000) para 207.
27 See Darryl Robinson "Defining 'Crimes Against Humanity' at the Rome Conference"(1999) 93, American Journal of International Law (AJIL) 43 at 47,51.
28 Supra note 11, p 235-6 (para 580).
29 Case No IT-95-14-T (3 March 2000), para 203.
30 Ibid para 204.
31 Prosecutor v Tadic, case no IT-94-1-A (15 july 1999) p 130, para 292.
32 Bassiouni supra note 20 at 411.
33 98 ILR 520,627-8,542-5.
34 104 ILR 284 at 358-363.
35 Supra note 7, Article 2(5).
36 Resolution 2391 (XXIII) of 26 November 1968; 754 UNTS 73.
37 European Treaty Series, No.82.
38 Report of the ILC, 43rd Session, UNGAOR, 46th Session, Supp. No 10, A/46/10 (1991).
39 Supra note I.
40 YBILC 1994, vol. I at 125, 130; vol. II, part two at 80.
41 Parliamentary Assembly of the CoUncil of Europe, 31 January 1979, Doc. 4275. On the position in the Netherlands, see R van Dongen "De Decembermoorden berecht?" Nm 9 JUne 2000, p. 1142.
42 78 ILR 134-5,
43 (1998) 1 Yearbook of International Humanitarian Law 352. The Argentine Supreme Court adopted a similar approach when it approved the extradition of Priebke to Italy: ibid at 341.
44 Judgment of 10 December 1998, IT-95-17/1-T para 157.
45 E/CN.4.Sub.2/1997/20 Rev./(2 October 1997) at 24 (principle 24). italics added. See too Bassiouni supra note 20 at 224.7.
461 A study by Friedl Weiss published in 1982 concluded that crimes against humanity could not be subjected to statutory limitation under customary international law: "Time Limits for the Prosecution of Crimes against International Law" (1982) 53 British Year Book

of International Law 162, 194.
47 Attorney-General of the Government of Israel v Eichmann 36 ILR 277 at 298-304.
48 Eichmann Case, ibid; Demjanjuk v Petrovsky 776 F 2d 571 (1985) at 528-3; In the Matter of the Extradition of Demjanjuk 612 F Supp 544 (DC Ohio 1985), 555-8; R v Finta 82 ILR 425,443-44; 98 ILR 520; 104 ILR 284.
49 Draft Code of Crimes against the Peace and Security of Mankind. See Article 8 and commentary there to, supra note 1 at 42 and 46.
50 K Randall "Universal Jurisdiction under International Law (1988) 66 Texas Law Review 785; Baggiouni, supra note 20 at 240; 1 Brownlie Principles of Public International Law, 5th ed. (1998) 308.
51 In R v Finta the Ontario High Court of Jugtice stressed that "The condition precedent to the exercise of jurisdiction with respect to such international crimes is that the accused person be found within the territory of the country asserting jurisdiction": 82 ILR 444.
52 Such a treaty obligation exists in the case of war crimes constituting "grave breaches" of the Geneva Conventions and Protocol I.
53M Cherif Bassiouni & E Wise Aut Dedere Aut Judicare (1995) 21; Bassiouni supra note 20 at 217-
224; D. Orentlicher "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime"(1991) 100 Yale Law Journal2537, 2593.
54 Bassiouni, supra note at 77; supra note 20 at 221-224.
55 Prosecutor v Furundzija, ICTY, Case No 1T-9S-17/1-T; (1999) 38 ILM paras 134-142.
56 ICCPR, Article 4; American Convention Article 27.
57 Report of the Human Rights Committee, GAOR 39th Session, Suppl. No (Al39/40), Annex xm, p 182, at 188.
58 GA Res 3059 (XXVIII) of 2 November 1973; GA Res 3218 (XX(X) of 6 November 1974; GA Res 3452 (XXX) of 9 December 1975; GA Res 31/85 of 13 December 1976.
59 GA Res 3452 (XXX) of 9 December 1975.
60 A Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Degrading Treatment or Punishment was adopted in 1980. ECOSOC Resolution, 6 March 1984, UN Doc E/CN/4/1984/72/Annex I (1980); (1984) 23 ILM 1027. The 1985 Inter-American Convention to Prevent and Punish Torture was also initiated before 1980. See (1986) 25 ILM 519.
61 Filartiga v Pena-Irala 630 F 2d 876 (1980).
62 Furondzija, supra note 55 at paras 153-157.
63 Ihid para 156.
64 Supra note 55.
65 Para 6. Burgers and Danelius in their Handhook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) write:
"Many people assume that the Convention 's principal aim is to outlaw torture and other cruel, inhuman or degrading treatment or punishment. This assumption is not correct insofar as it would imply that the prohibition on these practices is established under international law by the Convention only and that the prohibition will be binding as a rule of international law only for those States which have become parties to the Convention. On the contrary, the Convention is based upon the recognition that the above mentioned practices are already outlawed under international law. The principle aim of the Convention is to strengthen the existing prohibition of such practices by a number of supportive measures." Lord Millet, in the Pinochet Case, below note 66, supported this view when he stated that the 1984 Convention did not create a new international crime but "redefined" it to cover "isolated and individual instances of torture" committed by a public official (at 178 d-f).
66 R v Bow Street Metropolitan Magistrate and others, Ex Parte Pinochet Ugarte (Anmesty International and others intervening) (No 3) [1999] 2 All ER 97 (HL).
67 At 109 c-d, g-h.
68 164 b-c.
69 177 b-c.
70 Furundzija, supra note 55 at para 160.
71 Supra note 66 at 178 d- f.
72 Prosecutor v Furundzija, supra note 55 at para 157.
73 Ibid at paras 151, 156. This passage is quoted at footnote 63 above
74 Ibid at para 156. This passage is quoted at footnote 63 above.

75 Supra note 66 at 109 b- c.
76 Supra note 66 at 178 b -c.
77 Supra note 55 at para 156.
78 Supra note 66 at para 175 9 -h.
79 In Spain v Pinochet (Bow Street Magistrate's Court, 8 October 1999) the extraditing magistrate was satisfied that the principle of universality gave Spain jurisdiction in this case. Article 7 of the European Convention on Extradition, under which Pinochet's extradition was ordered, permits extradition where both the requesting and requested state recognize the principle of universal jurisdiction in the case in question.
80 Articles 5 and 7. See too Furundzija, supra note 55 atpara 145.
81 In the Pinochet case Lord Millett stated: "whereas previously states were entitled to take jurisdiction in resect of the offence wherever it was committed, they were now placed under an obligation to do so"(supra note 66 at 178).
82 Pinochet, supra note 66 at 111 a -b; Burgers and Danelius supra note 65 at 72, 137.
83 R Jennings & A Watts Oppenheim 's International Law 9th Ed (1992) 1234-5.
84 Supra para 5.3.2 (d); and supra the dictum of Lord Millett at note 71.
85 Articles 5 and 7.
86 Part II, articles 17 -24.
87 Report of the Committee Against Torture, UNGAOR, 45th Session, Suppl No 44, UN DOC A 45/44 E 108, at 111 (para 7.2).
88 Swart & A Klip (eds) International Criminal Law in the Netherlands (1997) 92.
89 177 F Supp 856 (D Conn, 1959) at 864-5. See too Cleugh v Strakosch 109 F 2d 230 (9th-Cir 1940) at 335; In re Extradition of D'Amico 177 F Supp 648 (SDNY, 1959); MM Whiteman Digest of International Law, vo16 (1968) 753 ff.
90 (1947) 14 Annual Digest and Reports of Public International Law Cases 139,140; In re Spiessens (1949) 16 Annual Digest and Reports of Public International Law Cases, 275.
91 G R Watson"The Passive Personality Principle"(1993) 28 Texas Int'l LI 1; United States v Yunis No 2) 82 ILR 344, 349-50.
92 B Swart & A Klip, supra note 88 at 58.
93 Lotus Case 1927 Permanent Court of International Justice Reports, Series A, No.10.
94 Oppenheim 's International Law, supra note 83 at 470-1.
95 Nyugat. HR 6-3-1959; NJ 1962, no 2; P.H. Kooijmans Internationaal Publiekrecht in Vogelvlucht 7 ed, chapter 5.
96 Supra note 66 at 177-78.
97 B Swart & A Klip (eds) International Criminal Law in the Netherlands (1997) 27-38.
98 Swart & Klip, ibid at 31-32.
99 See Knesevic case, Hoge Raad, 11 November 1997, NI 1998, 463; (1998) 1 Yearbook of International Humanitarian law 601-07; (1998) 73 NJB 1587-1593.
100 Swart & Klip, supra note 97 at 63-64,69.
101 See above, para 5.3.2 (d) and 5.7.4.
102 See the Australian War Crimes Amendment Act of 1988 and the 1987 Canadian legislation providing for the prosecution of persons guilty of war crimes and crimes against humanity. Both statutes, in providing for the retrospectivity of such crimes, cover conduct that would have been criminal under some other name in Australia or Canada respectively. See Polyukhovich v Commonwealth of Australia 19 ILR 1; R v Finta 82 ILR 429; 98 ILR 520; 104 ILR 284.
103 Supra para 5.7.6.
104 Section 11 (g) ofthe Charter of Rights and Freedoms.
105 R v Finta 82 ILR 425 at 432. This approach was followed by the Ontario Court of Appeal in R v Finta 98 ILR 520, 574.
106 See too Article 7 (2) of the European Convention on Human Rights. See R van Dongen "De Decembermoorden berecht?"23 NJB (9 June 2000) 1137, 1141.
107 Supra para 5.6.4 at footnote 79.
108 Supra para 5.6.5.

11Report of the International Law Commission on the Work ofits 48th Session, 1996, UNGAOR 51st Session, Supplement No 10 (N51/10), p 110.
2 Prosecutor v. Tadic (1996) 35 International Legal Materials (ILM) 32 at 54 (para 70).
3 Prosecutor v Furundzija Case no IT-95-17/I-T; (1999) 38 ILM 317, para 50.
4 In 1977 the ICTY stated that "since the Nuremberg Charter, the customary status of the

prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned" (Prosecutor v Tadic no IT-94-T-(merits) 7 May 1997; (1997) 36 ILM 908, 937.

5 82 UNTS 279. Article 5 (c) of the declaration establishing the International Military Tribunal in Tokyo contained an identical provision.

6 For a discussion of the linking of crimes against humanity with the initiation or conduct of war, see M. Cherif Bassiouni International Criminal Law 2nd ed (Crimes) (1999) 552-555,571-574.

7 Control Council Law No.10, Punishment ofPersons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, 50-55, Article 2. This feature of CCL No 10 was stressed in In Re Ohlendorf and others (Einsatzgruppen Trial, (US Military Tribunal, 1948) 15 International Law Reports (ILR) 656,664.

8 Supra note 6 at 573.

9 Supra note 2 at 72, paras 140-1. See too Article 18 ofthe International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, and the commentary thereto, supra note I at 93,96. In R v Bow Street Metropolitan Stipendiary Magistrate and others, Ex Parte Pinochet Ugarte (No 3) Lord Millett stated that the requirement that crimes against humanity be linked to war was a "jurisdictional restriction based on the language of the [Nuremberg] Charter. There is no reason to suppose that it was considered to be a substantive requirement of international law.... The need to establish such a connection was natural in the immediate aftermath of the 1939-45 war. As memory of war receded, it was abandoned"(at 174 g - h).

10 V Morris & MP Scharf An Insiders Guide to the International Criminal Tribunal for the Former Yugoslavia Vol I (1995) 81-3. See too the Report of the Secretary-General Pursuant to Para 2 of Security Council Resolution 808 (1993), S/25704 of 3 May 1993, para 47: "Crimes against humanity .... are prohibited regardless of whether they are committed in an armed conflict, international or internal in character."

11 Article 3. See further V Morris & M P Scharf The International Criminal Tribunal for Rwanda (1998) 202-205; T Meron "International Criminalization of Internal Atrocities"(1995) 89 AJIL 554, 557; Prosecutor v Akayesu Case No ICTR-96-4- T (2 September 1998) p 229 (para 565).

12 Article 7.

13 Op het Grensgebied van Internationaal en Nationaal Recht; De Verjaring van Internationale Misdrijven (1968) 17.

14 Enkele Aspekten van de Strafrechtelijke Reactie op Oorlogsmisdrijven en Misdrijven tegen de Menselijkheid (diss. UvA 1973) 41.

15 The prosecution before national courts of Eichmann, Demjanjuk (Israel), Barbie, Touvier, Papon (France), Menten, Ahlbrecht (the Netherlands), Finta (Canada) etc for crimes against humanity all relate to the events ofthe Second World War.

16 Supra note 6 at 573.

17This requirement is included in all but one (the 1996 ILC Draft Code, supra note 1) of the instruments defining the Crime against Humanity, including the Nuremberg Charter.

18See Prosecutor v Tadic IT 94-1-T, para 644 (1997) 36 ILM at 941); D. Robinson "Defining 'Crimes against Humanity' at the Rome Conference" (1999) 93 American Journl of International Law (AJIL)43 at 48.

19 At 243-6, Supra note 6 at 578-81.

20 Crimes against Humanity at 277. Bassiouni's view gains support from Article 7(2)(a) of the Rome Statute of the ICC (supra para 4.3.2) which requires that the acts be "in furtherance of a state or organization policy" and Tadic (supra note 15) at para 644 (1997) 36 ILM 941. See further Robinson, supra note 18 at 49-50.

21This requirement does not appear in the Nuremberg Charter but it does feature in the jurisprudence of the Tribunal. In its discussion of crimes against humanity the Nuremberg Tribunal declared: "The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic."Nazi Conspiracy and Aggressian: Opinion and Judgment 84 (US Govt and Printing Office 1947); 1996 ILC Report supra note 1 at 94 footnote 126.

22Ahlbrecht, Bijz. Raad van Cassatie, 11 April 1949, Nederlandse Jurisprudentie 1949, No.427 at p. 750; Menten. Hoge Raad, 13 January 1951, Nederlandse Jurisprudentie 1981, No.29 atp. 215; Barbie Case 78 International Law Reports (ILR) 137.

23As stated by the French text of the ICTR Statute; see the Akayesu case, supra note 11, p. 235 (footnote 144).
24ICTR Statute, Article 3; ILC Draft Code (supra note 1), Article 18; Rome Statute of ICC, Article 7.
25 Supra note 1 at 94-5.
26 Akayesu, supra note 11, at 235 (para 575); Prosecutor v Tadic, IT-94-1-T (7 May 1997) para 647; (1997) 36 ILM 908 at 942; Prosecutor v Blaskic, Case No IT-95-14-T (3 March 2000) para 207.
27 See Darryl Robinson "Defining 'Crimes Against Humanity' at the Rome Conference"(1999) 93, American Joumal of International Law (AJIL) 43 at 47,51.
28Supra note 11, p 235-6 (para 580).
29Case No IT-95-14-T (3 March 2000), para 203.
30 Ibid para 204.
31 Prosecutor v Tadic, case no IT-94-1-A (15 july 1999) p 130, para 292.
32 Bassiouni supra note 20 at 411.
33 98 ILR 520,627-8,542-5.
34 104 ILR 284 at 358-363.
35 Supra note 7, Article 2(5).
36 Resolution 2391 (XXIII) of 26 November 1968; 754 UNTS 73.
37 European Treaty Series, No.82.
38 Report of the ILC, 43rd Session, UNGAOR, 46th Session, Supp. No 10, A/46/10 (1991).
39 Supra note I.
40 YBILC 1994, vol. I at 125, 130; vol. II, part two at 80.
41 Parliamentary Assembly of the CoUncil of Europe, 31 January 1979, Doc. 4275. On the position in the Nether1ands, see R van Dongen "De Decembermoorden berecht?" Nm 9 JUne 2000, p. 1142.
42 78 ILR 134-5,
43 (1998) 1 Yearbook of International Humanitarian Law 352. The Argentine Supreme Court adopted a simi1ar approach when it approved the extradition of Priebke to Ita1y: ibid at 341.
44 Judgment of 10 December 1998, IT-95-17/1-T para 157.
45 E/CN.4.Sub.2/1997/20 Rev./(2 October 1997) at 24 (principle 24). italics added. See too Bassiouni supra note 20 at 224.7.
46 A study by Friedl Weiss published in 1982 conc1uded that crimes against humanity could not be subjected to statutory limitation under customary international law: "Time Limits for the Prosecution of Crimes against International Law" (1982) 53 British Year Book of International Law 162, 194.
47 Attorney-General of the Government of Israel v Eichmann 36 ILR 277 at 298-304.
48 Eichmann Case, ibid; Demjanjuk v Petrovsky 776 F 2d 571 (1985) at 528-3; In the Matter of the Extradition of Demjanjuk 612 F Supp 544 (DC Ohio 1985), 555-8; R v Finta 82 ILR 425,443-44; 98 ILR 520; 104 ILR 284.
49 Draft Code of Crimes against the Peace and Security of Mankind. See Article 8 and commentary there to, supra note 1 at 42 and 46.
50 K Randa11 "Universal Jurisdiction under International Law (1988) 66 Texas Law Review 785; Baggiouni, supra note 20 at 240; 1 Brownlie Principles of Public International Law, 5th ed. (1998) 308.
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56 ICCPR, Article 4; American Convention Article 27.
57 Report of the Human Rights Committee, GAOR 39th Session, Suppl. No (A139/40), Annex xm, p 182, at 188.

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58 GA Res 3059 (XXVIII) of 2 November 1973; GA Res 3218 (XX(X) of 6 November 1974; GA Res 3452 (XXX) of 9 December 1975; GA Res 31/85 of 13 December 1976.
59 GA Res 3452 (XXX) of 9 December 1975.
60 A Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Degrading Treatment or Punishment was adopted in 1980. ECOSOC Resolution, 6 March 1984, UN Doc E/CN/4/1984/72/Annex I (1980); (1984) 23 ILM 1027. The 1985 Inter-American Convention to Prevent and Punish Torture was also initiated before 1980. See (1986) 25 ILM 519.
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66 R v Bow Street Metropolitan Magistrate and others, Ex Parte Pinochet Ugarte (Anmesty International and others intervening) (No 3) [1999] 2 All ER 97 (HL).
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88 Swart & A Klip (eds) International Criminal Law in the Netherlands (1997) 92.
89 177 F Supp 856 (D Conn, 1959) at 864-5. See too Cleugh v Strakosch 109 F 2d 230 (9th-Cir 1940) at 335; In re Extradition of D'Amico 177 F Supp 648 (SDNY, 1959); MM Whiteman Digest of International Law, vo16 (1968) 753 ff.

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91 G R Watson"The Passive Personality Principle"(1993) 28 Texas Int'l LI 1; United States v Yunis No 2) 82 ILR 344, 349-50.
92 B Swart & A Klip, supra note 88 at 58.
93 Lotus Case 1927 Permanent Court of International Justice Reports, Series A, No.10.
94 Oppenheim 's International Law, supra note 83 at 470-1.
95 Nyugat. HR 6-3-1959; NJ 1962, no 2; P.H. Kooijmans Internationaal Publiekrecht in Vogelvlucht 7 ed, chapter 5.
96 Supra note 66 at 177-78.
97 B Swart & A Klip (eds) International Criminal Law in the Netherlands (1997) 27-38.
98 Swart & Klip, ibid at 31-32.
99 See Knesevic case, Hoge Raad, 11 November 1997, NI 1998, 463; (1998) 1 Yearbook of International Humanitarian law 601-07; (1998) 73 NJB 1587-1593.
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104 Section 11 (g) ofthe Charter of Rights and Freedoms.
105 R v Finta 82 ILR 425 at 432. This approach was followed by the Ontario Court of Appeal in R v Finta 98 ILR 520, 574.
106 See too Article 7 (2) of the European Convention on Human Rights. See R van Dongen "De Decembermoorden berecht?"23 NJB (9 June 2000) 1137, 1141.
107 Supra para 5.6.4 at footnote 79.
108 Supra para 5.6.5.

R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)

HOUSE OF LORDS

LORD SLYNN OF HADLEY, LORD LLOYD OF BERWICK, LORD NICHOLLS OF BIRKENHEAD, LORD STEYN AND LORD HOFFMANN

4, 5, 9–11, 25 NOVEMBER 1998

Extradition – Immunity from extradition – Former head of state – Immunity for acts performed in exercise of functions as head of state – Former head of state accused of crimes of torture and hostage-taking while in office – Whether torture and hostage taking a function of a head of state – Whether former head of state entitled to claim immunity from extradition for crimes of torture and hostage taking – State Immunity Act 1978, ss 1, 14(1), 20 – Taking of Hostages Act 1982, s 1(1) – Criminal Justice Act 1988, s 134(1).

The applicant was the former head of state of Chile, and was presently a senator of the Republic of Chile. He was accused in Spain of being responsible for serious crimes committed between 1973 and 1990 while he was head of state, including genocide, murder, torture and the taking of hostages, as well as the murder of Spanish citizens. Proceedings were brought in the National Court of Madrid, which held that it had jurisdiction to try the applicant and issued an international warrant for his arrest. When the applicant entered the United Kingdom in 1998 a Spanish magistrate and then the Spanish government issued a request for the extradition of the applicant. A warrant for his arrest was issued by the metropolitan stipendiary magistrate pursuant to s 8(1)(b) of the Extradition Act 1989 on the basis that there was evidence that he was accused of using the power of the state intentionally to inflict severe pain or suffering on others and cause the taking of hostages and murder in the performance or purported performance of his official duties in Chile, which offences were said to have been committed within the jurisdiction of the Spanish government. Under the Taking of Hostages Act 1982, enacted to implement the International Convention against the Taking of Hostages 1979, the taking of hostages was an offence under international law punishable by the courts of the United Kingdom while, under s 134(1)[a] of the Criminal Justice Act 1988, enacted to implement the Convention against Torture etc, torture by public officials and persons acting in a public capacity was a criminal offence. The applicant claimed immunity from criminal process, including extradition, in the form of (i) state immunity under s 1[b] of the State Immunity Act 1978, which provided for the immunity of a foreign state from the courts of the United Kingdom, and which was extended to a head of state in his public capacity by s 14(1)[c], (ii) the personal immunity of a head of state under s 20[d] of the 1978 Act, which, modifying art 39.2[e] of the Vienna Convention on Diplomatic Relations 1961, provided immunity with respect to acts performed by a head of state or former head of state in the exercise of his functions as a head of

a Section 134(1) is set out at p 916 d, post
b Section 1, so far as material, is set out at p 904 j, post
c Section 14(1), so far as material, is set out at p 905 c, post
d Section 20 is set out at p 905 j to p 906 a, post
e Article 39.2 is set out at p 906 j, post

The Equal Treatment Commission gives as its ruling that owing to the applicability of the exception to the prohibition of discrimination on the basis of nationality contained in Article 2, paragraph 5(a), of the Equal Treatment Act the Federation of Employees in the Shipping Industry in Rotterdam has not acted in breach of this Act ...'

2.3 GENERAL PRINCIPLES OF LAW

See: 1.203 (pp. 238-240)

2.71 UNILATERAL ACTS OF STATES

H.F. v. State Secretary for Justice, District Court of The Hague, 19 July 1996, RV (1996) No. 14.[27]

— In a Letter of 5 August 1983 the State Secretary for Justice gave an undertaking to the representative of UNHCR in the Netherlands that persons designated by UNHCR as refugees would not be expelled and returned to their country of origin.
— It is not clear whether a policy is pursued by the State Secretary with regard to these matters and, if so, what this policy is and how it has been applied in the present case. If there is no policy, the State Secretary will have to indicate how this can be reconciled with the obligation of Contracting States contained in Article 35 of the Convention relating to the Status of Refugees[28] to cooperate with UNHCR and with the undertaking given in 1983.

The Facts: F., who had Somalian nationality and belonged to the Issaq clan, had stayed in Egypt for one and a half years prior to coming to the Netherlands in December 1994. He was recognised in Cairo by UNHCR as a refugee.[29] He applied on 1 January 1995 to be admitted to the Netherlands as a refugee and to be granted a residence permit for compelling reasons of a humanitarian nature. These applications were dismissed by the State Secretary for Justice. F. sought a review. The State Secretary then decided that F. could not remain in the Netherlands to await the decision on the request for review. F. applied to the President of the District Court of The Hague and asked for provisional relief in the form of an order restraining the State Secretary from expelling him pending the review. The President granted the application.

27. With note by R. Fernhout, discussed by P. van Mansfeld in *NAV* (1996) p. 782.
28. 89 *UNTS* p. 137; *Trb.* 1951 No. 131, amended by protocol of 31 January 1967, 606 *UNTS* p. 267; *Trb.* 1967 No. 76. Art. 35(1) reads: '1. The Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.'
29. According to Van Mansfeld, op. cit. n. 27, p. 783.

Held: The President first examined whether the expulsion should be stayed in connecti with the application to be admitted as a refugee. He came to the conclusion that the could not be any reasonable doubt that F. was in no danger of persecution (Art. 32(Aliens Act). Article 32(2) specifies a different criterion for staying expulsion decisio in the context of admission for compelling reasons of a humanitarian nature, namely th expulsion should stayed if it cannot be said that the objection would not have reasonable chance of success. The President found that this was not the case. He h as follows:

'... 11. The investigation in the present case was reopened on 22 May because it w not clear to the President, partly in view of the obligation on Contracting States in Arti 35 of the Refugee Convention to cooperate with UNHCR, what weight the defend should give to recognition as a refugee by UNHCR or what substantive criteria t defendant applies to such recognition. The President instructed the defendant to expl the policy. It was pointed out in particular in this connection that the President was awa of a Letter from the State Secretary for Justice of 5 August 1983 in which t representative of UNHCR in the Netherlands was given an undertaking that persons w had been designated by UNHCR as refugees would not be expelled and returned to th country of origin.

12. In the provisional view of the President the defendant had not sufficien indicated in his response to the interim judgment (by letter of 10 June 1996) what policy is in cases in which there has been recognition by UNHCR as a refugee and, particular, whether the policy means that in such cases the person concerned is expelled and returned to the country of origin. The defendant merely remarked t UNHCR had designated all members of the Issaq clan as "*prima facie* refugees" a matter of course from around the beginning of 1990 up to and including the summe 1993, in particular on account of the violent situation then existing in northern Soma and that there had therefore been no individual assessment. According to the defend the applicant should be treated as belonging to this category.

13. This part of the defendant's reply and the defendant's intention to expel applicant and return him to Somalia could be interpreted in two ways, either as mean that there is no policy to the effect that persons designated by UNHCR as refug cannot be expelled to their country of origin or as meaning that such a policy does e but that an exception to it must be made in cases in which recognition by UNHCF *prima facie*.

14. The President fails to see the point of the defendant's submission that UNH has the possibility of intervening within the meaning of Article 35 of the Refu Convention in the event that a request for asylum is turned down but has nonethel hitherto failed to express an opinion on the disputed decision of 2 August 1995, si the UNHCR representative in the Netherlands is not informed of all decisions applications to be admitted as a refugee. In addition, the communication of 6 May 1

state, or (iii) the common law act of state doctrine, and applied for an order of certiorari to quash the warrant for his arrest. The Queen's Bench Divisional Court held that the applicant was entitled to have the warrant quashed on the grounds that he was head of the Chilean state at the time of the alleged offences and therefore, as a foreign sovereign, he was entitled under s 1 of the 1978 Act to immunity from the criminal processes of the English courts. The respondents, the Commissioner of Police and the Spanish government, appealed to the House of Lords.

Held (Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting) – A claim to immunity by a head of state or a former head of state applied only to acts performed by him in the exercise of his functions as head of state. Although that referred to any of his functions as a head of state and not just those acts which had an international character, acts of torture and hostage-taking could not be regarded in any circumstances as a function of a head of state. It was a principle of international law, as shown by the Conventions against the Taking of Hostages and Torture, that hostage-taking and torture were not acceptable conduct on the part of anyone, including a head of state. It followed that since the acts of torture and hostage-taking with which the applicant was charged were offences under United Kingdom statute law, in respect of which the United Kingdom had taken extra-territorial jurisdiction, the applicant could not claim immunity from the criminal processes, including extradition, of the United Kingdom. Accordingly, the appeal would be allowed (see p 938 *g* to p 939 *c g* to p 940 *a h* to p 941 *h*, p 946 *d* to *f* and p 947 *g* to *j*, post).

Per curiam. The act of state immunity is a principle of domestic law reflecting a recognition by the courts that certain questions of foreign affairs are not justiciable. However, where Parliament has shown that a particular issue is to be justiciable in the English courts, the self-denying principle of act of state cannnot be applied by the courts. The definition of torture in s 134(1) of the Criminal Justice Act 1988, by specifically referring to a 'public official or person acting in an official capacity, whatever his nationality', makes it clear that a prosecution under the section requires an investigation into the conduct of officials acting in an official capacity in foreign countries. It is therefore clear that Parliament did not intend the act of state doctrine to apply in such cases. Similarly, although s 1(1) of the Taking of Hostages Act 1982 merely refers to 'any person, whatever his nationality' who commits the international crime of hostage-taking in the United Kingdom or elsewhere and does not define the offence as one which can be committed only by a public official, it is inconceivable that Parliament is to be taken to have intended that such officials are to be outside the reach of the offence (see p 938 *a* to *c* and p 947 *j*, post).

Notes

For persons subject to extradition, see 18 *Halsbury's Laws* (4th edn) para 210.

For immunity of foreign states and sovereigns, see ibid para 1548.

For the State Immunity Act 1978, ss 1, 14, 20, see 10 *Halsbury's Statutes* (4th edn) (1995 reissue) 757, 766, 771.

For the Taking of Hostages Act 1982, s 1, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 748.

For the Criminal Justice Act 1988, s 134, see ibid 1079.

For the Extradition Act 1989, s 8, see 17 *Halsbury's Statutes* (4th edn) (1993 reissue) 570.

Cases referred to in opinions

Al Adsani v Kuwait (1996) 107 ILR 536, CA.
Alcom Ltd v Republic of Colombia (Barclays Bank plc, garnishees) [1984] 2 All ER 6, [1984] AC 580, [1984] 2 WLR 750, HL.
Argentina v Amerada Hess Shipping Corp (1989) 488 US 428, US SC.
A-G of Israel v Eichmann (1961) 36 ILR 5, Jerusalem District Ct.
Banco Nacional de Cuba v Sabbatino (1964) 376 US 398, US SC; *rvsg* (1962) 307 F 2d 845, US Ct of Apps (2nd Cir).
Brunswick (Duke) v King of Hanover (1848) 2 HL Cas 1, 9 ER 993.
Buttes Gas and Oil Co v Hammer (Nos 2 and 3), Occidental Petroleum Corp v Buttes Gas and Oil Co (Nos 1 and 2) [1981] 3 All ER 616, [1982] AC 888, [1981] 3 WLR 787, HL.
Dempanjuk v Petrovsky (1985) 776 F 2d 571, US Ct of Apps (6th Cir).
Filartiga v Peña-Irala (1984) 577 F Supp 860, US District Ct (ED NY); *rvsd* (1980) 630 F 2d 876, US Ct of Apps (2nd Cir).
Hatch v Baez (1876) 7 Hun 596, NY SC.
Hilao v Marcos (1994) 25 F 3d 1467, US Ct of Apps (9th Cir).
I Congreso del Partido [1981] 2 All ER 1064, [1983] 1 AC 244, [1981] 3 WLR 328, HL.
International Association of Machinists v OPEC (1981) 649 F 2d 1354, US Ct of Apps (9th Cir).
Jimenez v Aristeguieta (1962) 311 F 2d 547, US Ct of Apps (5th Cir).
Kirkpatrick & Co Inc v Environmental Tectonics Corp International (1990) 493 US 400, US SC.
Kuwait Airways Corp v Iraqi Airways Co (29 July 1998, unreported), QBD.
Oetjen v Central Leather Co (1918) 246 US 297, US SC.
Prosecutor v Tadic (1997) 105 ILR 419, Int Trib.
Schooner Exchange v McFaddon (1812) 11 US (7 Cranch) 116, US SC.
Siderman de Blake v Argentina (1992) 965 F 2d 699, US Ct of Apps (9th Cir).
Trendtex Trading Corp Ltd v Central Bank of Nigeria [1977] 1 All ER 881, [1977] QB 529, [1977] 2 WLR 356, CA.
Underhill v Hernandez (1897) 168 US 250, US SC.
US v Noriega (1990) 746 F Supp 1506, US District Ct (SD of Florida).

Appeal

The Commissioner of Police of the Metropolis and the Spanish government appealed with leave from the decision of the Divisional Court of the Queen's Bench Division (Lord Bingham of Cornhill CJ, Collins and Richards JJ) ([1998] All ER (D) 629) delivered on 28 October 1998 allowing an application by Senator Augusto Pinochet Ugarte for judicial review by way of an order of certiorari to quash provisional warrants issued for the arrest of the applicant under s 8(1) of the Extradition Act 1989. The Divisional Court certified that a point of law of general public importance was involved in the court's decision, namely the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed when he was head of state, and ordered that the applicant was not to be released from custody pending an appeal to the House of Lords. Amnesty International, the Medical Foundation for the Care of Victims of Torture, the Redress Trust, Ms Mary Ann Beausire, Ms Juana Francisca Beausire and Dr Sheila Cassidy applied for and were granted leave to intervene in the proceedings before the House. Leave was also granted to Human Rights Watch, Ms Nicole Francois Drouilly, of the Association of the Relatives of the Disappeared Detainees, and

Marco Antonio Enriguez Espinoza to submit the arguments they wished to lay before the House to the lawyers representing Amnesty International and thereafter to apply to present additional written submissions. The facts are set out in the judgment of Lord Slynn of Hadley.

R Alun Jones QC, Christopher Greenwood, James Lewis and *Campaspe Lloyd-Jacob* (instructed by the *Crown Prosecution Service*, International Division) for the Spanish government and the Commissioner of Police.

Clive Nicholls QC, Clare Montgomery QC, Helen Malcolm, James Cameron and *Julian Knowles* (instructed by *Kingsley Napley*) for the applicant.

David Lloyd Jones (instructed by the *Treasury Solicitor*) as amicus curiae.

Ian Brownlie QC, Michael Fordham, Owen Davies and *Frances Webber* (instructed by *Bindman & Partners*) for Amnesty International and others as interveners.

Their Lordships took time for consideration.

25 November 1998. The following opinions were delivered.

LORD SLYNN OF HADLEY. My Lords, the respondent to this appeal is alleged to have committed or to have been responsible for the commission of the most serious of crimes—genocide, murder on a large scale, torture, the taking of hostages. In the course of 1998, 11 criminal suits have been brought against him in Chile in respect of such crimes. Proceedings have also now been brought in a Spanish court. The Spanish court has held that it has jurisdiction to try him. In the latter proceedings, none of these specific crimes is said to have been committed by the respondent himself.

If the question for your Lordships on the appeal were whether these allegations should be investigated by a criminal court in Chile or by an international tribunal, the answer, subject to the terms of any amnesty, would surely be Yes. But that is not the question and it is necessary to remind oneself throughout that it is not the question. Your Lordships are not being asked to decide whether proceedings should be brought against the respondent, even whether he should in the end be extradited to another country (that is a question for the Secretary of State) let alone whether he in particular is guilty of the commission or responsible for the commission of these crimes. The sole question is whether he is entitled to immunity as a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts alleged to have been committed whilst he was head of state. We are not, however, concerned only with this respondent. We are concerned on the arguments advanced with a principle which will apply to all heads of state and all alleged crimes under international law.

THE PROCEEDINGS

The proceedings have arisen in this way. On 16 October 1998 Mr Nicholas Evans, a metropolitan magistrate, issued a provisional warrant for the arrest of the respondent pursuant to s 8(1)(b) of the Extradition Act 1989 on the basis that there was evidence that he was accused that—

> 'between 11 September 1973 and 31 December 1983 within the jurisdiction of the Fifth Central Magistrate of the National Court of Madrid did murder Spanish citizens in Chile within the jurisdiction of the Government of Spain.'

A second warrant was issued by Mr Ronald Bartle, a metropolitan magistrate, on 22 October 1998 on the application of the Spanish government, but without the respondent being heard, despite a written request that he should be heard to oppose the application. That warrant was issued on the basis that there was evidence that he was accused—

> 'between 1 January 1988 and December 1992 being a public official intentionally inflicted severe pain or suffering on another in the performance or purported performance of his official duties within the jurisdiction of the Government of Spain.'

Particulars of other alleged offences were set out, namely (i) between 1 January 1988 and 31 December 1992, being a public official, conspired with persons unknown to intentionally inflict severe pain or suffering on another in the performance or purported performance of his official duties; (ii) between 1 January 1982 and 31 January 1992: (a) he detained, (b) he conspired with persons unknown to detain other persons (the hostages) and in order to compel such persons to do or to abstain from doing any act, threatened to kill, injure or continue to detain the hostages; (iii) between January 1976 and December 1992, conspired together with persons unknown to commit murder in a convention country. It seems, however, that there are alleged at present to have been only one or two cases of torture between 1 January 1988 and 11 March 1990.

The respondent was arrested on that warrant on 23 October.

On the same day as the second warrant was issued, and following an application to the Home Secretary to cancel the warrant pursuant to s 8(4) of the 1989 Act, solicitors for the respondent issued a summons applying for an order of habeas corpus. Mr Michael Caplan, a partner in the firm of solicitors, deposed that the plaintiff was in hospital under medication following major surgery and that he claimed privilege and immunity from arrest on two grounds. The first was that, as stated by the Ambassador of Chile to the Court of St James's, the respondent was 'President of the Government Junta of Chile' according to Decree No 1, dated 11 September 1973, from 11 September 1973 until 26 June 1974 and 'Head of State of the Republic of Chile' from 26 June 1974 until 11 March 1990 pursuant to Decree Law No 527, dated 26 June 1974, confirmed by Decree Law No 806, dated 17 December 1974, and subsequently by the 14th Transitory Provision of the Political Constitution of the Republic of Chile 1980. The second ground was that the respondent was not and had not been a subject of Spain and accordingly no extradition crime had been identified.

An application was also made on 22 October for leave to apply for judicial review to quash the first warrant of 16 October and to direct the Home Secretary to cancel the warrant. On 26 October a further application was made for habeas corpus and judicial review of the second warrant. The grounds put forward were (in addition to the claim for immunity up to 1990) that all the charges specified offences contrary to English statutory provisions which were not in force when the acts were done. As to the fifth charge of murder in a convention country, it was objected that this charged murder in Chile (not a convention country) by someone not a Spanish national or a national of a convention country. Objection was also taken to the issue of a second provisional warrant when the first was treated as being valid.

These applications were heard by the Divisional Court on 26 and 27 October. On 28 October leave was given to the respondent to move for certiorari and the decision to issue the provisional warrant of 16 October was quashed. The

magistrate's decision of 22 October to issue a provisional warrant was also quashed, but the quashing of the second warrant was stayed pending an appeal to your Lordships' House for which leave was given on an undertaking that the Commissioner of Police and the government of Spain would lodge a petition to the House on 2 November 1998. It was ordered that the applicant was not to be released from custody other than on bail, which was granted subsequently. No order was made on the application for habeas corpus, save to grant leave to appeal and as to costs.

The Divisional Court certified—

> 'that a point of law of general public importance is involved in the Court's decision, namely the proper interpretation and scope of the immunity enjoyed by a former Head of State from arrest and extradition proceedings in the United Kingdom in respect of acts committed when he was Head of State.'

The matter first came before your Lordships on Wednesday, 4 November. Application for leave to intervene was made first by Amnesty International and others representing victims of the alleged activities. Conditional leave was given to these interveners, subject to the parties showing cause why they should not be heard. It was ordered that submissions should so far as possible be in writing, but that, in view of the very short time available before the hearing, exceptionally leave was given to supplement those by oral submissions, subject to time limits to be fixed. At the hearing no objection was raised to Professor Brownlie QC on behalf of these interveners being heard. Leave was also given to other interveners to apply to put in written submissions, although an application to make oral submissions was refused. Written submissions were received on behalf of these parties. Because of the urgency and the important and difficult questions of international law which appeared to be raised, the Attorney General, at your Lordships' request, instructed Mr David Lloyd Jones as amicus curiae and their Lordships are greatly indebted to him for the assistance he provided in writing and orally at such very short notice. Many cases have been cited by counsel, but I only refer to a small number of them.

At the date of the provisional warrants and of the judgment of the Divisional Court no extradition request had been made by Spain, a party to the European Convention on Extradition 1957 (the Extradition Convention) (Paris, 13 December 1957; TS 97 (1991); Cmnd 1762), nor accordingly any authority to proceed from the Secretary of State under the 1989 Act.

The Divisional Court held that the first warrant was defective. The offence specified of murder in Chile was clearly not said to be committed in Spain so that s 2(1)(a) of the 1989 Act was not satisfied. Nor was s 2(1)(b) of the Act satisfied since the United Kingdom courts could only try a defendant for murder outside the United Kingdom if the defendant was a British citizen (s 9 of the Offences against the Person Act 1861 as amended). Moreover, s 2(3)(a) was not satisfied, since the accused is not a citizen of Spain and it is not sufficient that the victim was a citizen of Spain. The Home Secretary, however, was held not to have been in breach of his duty by not cancelling the warrants. As for the second provisional warrant, the Divisional Court rejected the respondent's argument that it was unlawful to proceed on the second warrant and that the magistrate erred in not holding an inter partes hearing. The court did not rule at that stage on the respondent's argument that the acts alleged did not constitute crimes in the United Kingdom at the time they were done, but added that it was not necessary

that the conduct alleged did constitute a crime here at the time the alleged crime was committed abroad.

As to the sovereign immunity claim, the court found that from the earliest date in the second warrant (January 1976), the respondent was head of state of Chile and, although he ceased to be head of state in March 1990, nothing was relied on as having taken place after March 1990 and indeed the second international warrant issued by the Spanish judge covered the period from September 1973 to 1979. Section 20 in Pt III of the State Immunity Act 1978 was held to apply to matters which occurred before the coming into force of the 1978 Act. The court read the international warrant as accusing the respondent not of personally torturing or murdering victims or causing their disappearance, but of using the powers of the state of which he was head to do that. They rejected the argument that s 20(1) of the 1978 Act and art 39 of the Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention) (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565) only applied to acts done in the United Kingdom, and held that the applicant was entitled to immunity as a former head of state from the criminal and civil process of the English courts.

A request for the extradition of the respondent, signed in Madrid on 3 November 1998 by the same judge who signed the international warrant, set out a large number of alleged murders, disappearances and cases of torture which, it is said, were in breach of Spanish law relating to genocide, to torture and to terrorism. They occurred mainly in Chile, but there are others outside Chile—eg an attempt to murder in Madrid, which was abandoned because of the danger to the agent concerned. The respondent personally is said to have met an agent of the intelligence services of Chile, the Direction de Inteligencia Nacional (the DINA), following an attack in Rome on the Vice-President of Chile in October 1975 and to have set up and directed 'Operation Condor' to eliminate political adversaries, particularly in South America.

> 'These offences have presumably been committed, by Augusto Pinochet Ugarte, along with others in accordance with the plan previously established and designed for the systematic elimination of the political opponents, specific segments of sections of the Chilean national groups, ethnic and religious groups, in order to remove any ideological dispute and purify the Chilean way of life through the disappearance and death of the most prominent leaders and other elements which defended Socialist, Communist (Marxist) positions, or who simply disagreed.'

By order of 5 November 1998, the judges of the national court criminal division in plenary session held that Spain had jurisdiction to try crimes of terrorism, and genocide even committed abroad, including crimes of torture which are an aspect of genocide and not merely in respect of Spanish victims.

> 'Spain is competent to judge the events by virtue of the principle of universal prosecution for certain crimes—a category of international law—established by our internal legislation. It also has a legitimate interest in the exercise of such jurisdiction because more than 50 nationals were killed or disappeared in Chile, victims of the repression reported in the proceedings.'

THE VALIDITY OF THE ARREST

Although before the Divisional Court the case was argued on the basis that the respondent was at the relevant times head of state, it was suggested that he was

not entitled to such recognition, at any rate for the whole of the period during which the crimes were alleged to have been committed and for which immunity is claimed. An affidavit sworn on 2 November 1974 was produced from Professor Faundez to support this. His view was that by Decree Law No 1 of 11 September 1973, the respondent was only made President of the military junta; that Decree Law was in any event unconstitutional. By Decree Law No 527 of 26 June 1974, the respondent was designated 'Supreme Chief of the Nation' and by Decree Law No 806 of 17 December 1974, he was given the title President of the Republic of Chile. This, too, it is said was unconstitutional, as was the Decree Law No 788 of 4 December 1974 purporting to reconcile the Decree Laws with the constitution. He was not, in any event, appointed in a way recognised by the constitution. It seems clear, however, that the respondent acted as head of state. In affidavits from the Ambassador of Chile to the Court of St James's, sworn on 21 October 1998, and by affidavits of two former Ambassadors, his position has been said to be that of President of the Junta from 11 September 1973 until 26 June 1974 and then head of state from 26 June 1974 until 11 March 1990. Moreover, it was the respondent who signed the letters of credential presented to the Queen by the Chilean Ambassador to the United Kingdom on 26 October 1973. Further, in the request for extradition dated 3 November 1998, the Spanish government speak of him as being head of state. He is said not to have immunity 'in regard to the allegedly criminal acts committed when [the respondent] was head of state in Chile' and in considering whether an immunity should be accorded, it was relevant to take into account that 'Mr Pinochet became head of state after overthrowing a democratically elected Government by force'. I accordingly accept for the purposes of this appeal that, although no certificate has been issued by the Secretary of State pursuant to s 21(a) of the 1978 Act, on the evidence at all relevant times until March 1990, the respondent was head of state of Chile.

The protection claimed by the respondent is put essentially on two different bases, one a procedural bar to the proceedings for extradition and the other an objection that the issues raised are not justiciable before the English courts. They are distinct matters, though there are common features (see eg *Argentine v Amerada Hess Shipping Corp* (1989) 488 US 428, *Filartiga v Peña-Irala* (1984) 577 F Supp 860, *Siderman de Blake v Argentina* (1992) 965 F 2d 699 and *Al Adsani v Kuwait* (1996) 107 ILR 536).

THE CLAIM OF IMMUNITY

Chronologically, it is the procedural bar which falls to be considered first. Can the respondent say either that because the state is immune from proceedings he cannot be brought before the court, or can he say that as a former head of state he has an immunity of his own which, as I see it, is a derivative of the principle of state immunity. The starting point for both these claims is now the 1978 Act. The long title of the 1978 Act states that this is to (a) make new provision in respect of proceedings in the United Kingdom by or against other states and (b) to make new provision with respect to the immunities and privileges of heads of state.

Part I deals with (a); Pt III with (b).

Part I

By s 1, with the sidenote 'General immunity from jurisdiction', it is provided: '(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.' The first

part of the sentence is general and the exceptions which follow in ss 2 to 11 relate to specific matters—commercial transactions, certain contracts of employment and injuries to persons and property caused by acts or omissions in the United Kingdom—and do not indicate whether the general rule applies to civil or criminal matters, or both. Some of these exceptions—patents, trade-marks and business names, death or personal injury—are capable of being construed to include both civil and criminal proceedings.

Section 1 refers only to states and there is nothing in its language to indicate that it covers emanations or officials of the state. I read it as meaning states as such. Section 14(1), however, goes much further, since references to a state—

> 'include references to—(a) the sovereign or other head of that State in his public capacity; (b) the government of that State; and (c) any department of that government, but not to any entity (hereinafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or of being sued.'

A 'separate entity' is immune from jurisdiction 'if, and only if—(a) the proceedings relate to anything done by it in the exercise of sovereign authority, and (b) the circumstances are such that a State ... would have been so immune'. This section does not deal expressly with the position of a former head of state.

Section 16(4), however, under the sidenote 'Excluded matters', provides: 'This Part of this Act does not apply to criminal proceedings'. Mr Nicholls QC contends that this must be read subject to the terms of the provision of s 1(1) which confers absolute immunity from jurisdiction on states. Section 16(4) therefore excludes criminal proceedings from the exceptions provided in ss 2 to 11, but it does not apply to s 1(1), so that a state is immune from criminal proceedings and accordingly heads of state enjoy immunity from criminal proceedings under s 14. I am not able to accept this. Section 16(4) is in quite general terms and must be read as including s 1 as well as ss 2 to 11 of the Act. It is hardly surprising that crimes are excluded from s 1, since the number of crimes which may be committed by the state as opposed to by individuals seems likely to be limited. It is also consistent with the Federal State Immunity Act of the United States which, as I understand it, does not apply to criminal proceedings. Since extradition proceedings in respect of criminal charges are themselves regarded as criminal proceedings, the respondent cannot rely on Pt I of the 1978 Act.

Part III

Part III of the Act contains the provisions of this Act on which it seems that this claim turns, curiously enough under the heading 'Miscellaneous and supplementary'. By s 20, 'Heads of State', it is provided:

> '(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—(a) a sovereign or other head of State; (b) members of his family forming part of his household; and (c) his private servants, as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants ...
>
> (5) This section applies to the sovereign or other head of any State on which immunities and privileges are conferred by Part I of this Act and is

without prejudice to the application of that Part to any such sovereign or head of State in his public capacity.'

Again there is no mention of a former head of state.

The Diplomatic Privileges Act 1964, unlike the 1978 Act, provides in s 1 that the provisions of the Act, 'with respect to the matters dealt with shall 'have effect in substitution for any previous enactment or rule of law'. By s 2, articles of the Vienna Convention set out in the Schedule, 'shall have the force of law in the United Kingdom'.

The Preamble to the Vienna Convention (which though not part of the Schedule may in my view be looked at in the interpretation of the articles so scheduled) refers to the fact that—

'an international convention on diplomatic privileges and immunities would contribute to the development of friendly relations among nations, irrespective of the differing constitutional and social systems'

and records that the purpose of such privileges and immunities is 'not to benefit individuals, but to ensure the efficient performance of the functions of diplomatic missions as representing States'. It confirmed, however, 'that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention'.

It is clear that the provisions of the convention were drafted with the head and the members of a diplomatic staff of the mission of a sending state (whilst in the territory of the receiving state and carrying out diplomatic functions there) in mind and the specific functions of a diplomatic mission are set out in art 3 of the convention. Some of the provisions of the Vienna Convention thus have little or no direct relevance to the head of state: those which are relevant must be read 'with the necessary modifications'.

The relevant provisions for present purposes are as follows. (i) Article 29:

'The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.'

(ii) By art 31(1) a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. (iii) By art 39:

'1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceedings to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist ...'

It is also to be noted that in art 38, for diplomatic agents who are nationals of or resident in the receiving state, immunity is limited. Such immunity is only in respect of 'official' acts performed in the exercise of his functions.

Reading the provisions 'with the necessary modifications' to fit the position of a head of state, it seems to me that when references are made to a 'diplomatic agent' one can in the first place substitute only the words 'Head of State'. The provisions made cover, prima facie, a head of state whilst in office. The next question is how to relate the time limitation in art 39(1) to a head of state. He does not, in order to take up his post as head of state, 'enter the territory of a receiving State', ie a country other than his own, in order to take up his functions or leave it when he finishes his term of office. He may, of course, as head of state visit another state on an official visit and it is suggested that his immunity and privileges are limited to those visits. Such an interpretation would fit into a strictly literal reading of art 39. It seems to me, however, to be unreal and cannot have been intended. The principle functions of a head of state are performed in his own country and it is in respect of the exercise of those functions that if he is to have immunity that immunity is most needed. I do not accept therefore that s 20 of the 1978 Act read with art 39(2) of the Vienna Convention is limited to visits abroad.

Nor do I consider that the general context of this convention indicates that it only grants immunity to acts done in a foreign state or in connection only with international diplomatic activities as normally understood. The necessary modification to 'the moment he enters the territory of the receiving state on proceeding to take up his post' and to 'the moment when he leaves the country' is to the time when he 'becomes Head of State' to the time 'when he ceases to be Head of State'. It therefore covers acts done by him whilst in his own state and in post. Conversely there is nothing to indicate that this immunity is limited to acts done within the state of which the person concerned is head.

If these limitations on his immunity do not apply to a head of state they should not apply to the position of a former head of state, whom it is sought to sue for acts done during his period as head of state. Another limitation has, however, been suggested. In respect of acts performed by a person in the exercise of his functions as head of a mission, it is said that it is only 'immunity' which continues to subsist, whereas 'privileges and immunities normally cease at the moment when he leaves the country [ie when he finishes his term of office]'. It is suggested that all the provisions of art 29 are privileges not immunities. Mr Nicholls replies that even if being treated with respect and being protected from an attack on his person, freedom or dignity are privileges, the provision that a diplomatic agent (ie head of state) 'shall not be liable to any form of arrest or detention' is an immunity. As a matter of ordinary language and as a matter of principle it seems to me that Mr Nicholls is plainly right. In any event, by art 31 the diplomatic agent/head of state has immunity from the criminal jurisdiction of the receiving state: that immunity would cover immunity from arrest as a first step in criminal proceedings. Immunity in art 39(2) in relation to former heads of state in my view covers immunity from arrest, but so also does art 29.

Where a diplomatic agent (head of state) is in post, he enjoys these immunities and privileges as such—ie ratione personae just as in respect of civil proceedings he enjoys immunity from the jurisdiction of the courts of the United Kingdom under s 14 of the 1978 Act because of his office.

For one who ceases to occupy a post 'with respect to acts performed by such a person in the exercise of his functions as a member of the mission [head of state]

immunity shall continue to subsist'. This wording is in one respect different from the wording in art 38 in respect of a diplomat who is a national of the receiving state. In that case, he has immunity in respect of 'official' acts performed in the exercise of his function, but as Professor Eileen Denza suggests, the two should be read in the same way (see *Diplomatic Law* (2nd edn, 1998) p 363).

The question then arises as to what can constitute acts (ie official acts) in the exercise of his functions as head of state.

It is said (in addition to the argument that functions mean only international functions which I reject): (i) that the functions of the head of state must be defined by international law, they cannot be defined simply as a matter of national law or practice; and (ii) genocide, torture and the taking of hostages cannot be regarded as the functions of a head of state within the meaning of international law when international law regards them as crimes against international law.

As to (i), I do not consider that international law prescribes a list of those functions which are, and those which are not, functions for the purposes of art 32. The role of a head of state varies very much from country to country, even as between Presidents in various states in Europe and the United States. International law recognises those functions which are attributed to him as head of state by the law, or in fact, in the country of which he is head as being functions for this purpose, subject to any general principle of customary international law or national law, which may prevent what is done from being regarded as a function.

As to (ii), clearly international law does not recognise that it is one of the specific functions of a head of state to commit torture or genocide. But the fact that in carrying out other functions, a head of state commits an illegal act does not mean that he is no longer to be regarded as carrying out one of his functions. If it did, the immunity in respect of criminal acts would be deprived of much of its content. I do not think it right to draw a distinction for this purpose between acts whose criminality and moral obliquity is more or less great. I accept the approach of Sir Arthur Watts QC in his *Hague Lectures* (see 'Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 Recueil des Cours pp 56–57):

> 'A Head of State clearly can commit a crime in his personal capacity; but it seems equally clear that he can, in the course of his public functions as Head of State, engage in conduct which may be tainted by criminality or other forms of wrongdoing. The critical test would seem to be whether the conduct was engaged in under colour of or in ostensible exercise of the Head of State's public authority. If it was, it must be treated as official conduct, and so not a matter subject to the jurisdiction of other States *whether or not* it was wrongful or illegal under the law of his own State.'

In the present case it is accepted in the international warrant of arrest that in relation to the repression alleged 'the plans and instructions established beforehand from the Government enabled these actions to be carried out'. 'In this sense [the] Commander in Chief of the Armed Forces and Head of the Chilean Government at the time committed punishable acts.'

I therefore conclude that in the present case the acts relied on were done as part of the carrying out of his functions when he was head of state.

The next question is, therefore, whether this immunity in respect of functions is cut down as a matter of the interpretation of the Vienna Convention and the

1978 Act. The provisions of the 1978 Act 'fall to be construed against the background of those principles of public international law as are generally recognised by the family of nations' (see *Alcom Ltd v Republic of Colombia (Barclays Bank plc, garnishees)* [1984] 2 All ER 6 at 8, [1984] AC 580 at 597 per Lord Diplock). So also as I see it must the convention be interpreted.

The original concept of the immunity of a head of state in customary international law in part arose from the fact that he or she was a monarch who by reason of personal dignity and respect ought not to be impleaded in a foreign state. it was linked no less to the idea that the head of state was, or represented, the state and that to sue him was tantamount to suing an independent state extra territorially, something which the comity of nations did not allow. Moreover, although the concepts of state immunity and sovereign immunity have different origins, it seems to me that the latter is an attribute of the former and that both are essentially based on the principles of sovereign independence and dignity (see eg Suchariktul in his report to the International Law Commission (1980) Vol II Doc A and Marshall CJ in *Schooner Exchange v McFaddon* (1812) 11 US (7 Cranch) 116).

In *Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1, 9 ER 993 the Duke claimed that the King of Hanover had been involved in the removal of the Duke from his position as reigning Duke and in the maladministration of his estates. Lord Cottenham LC said (2 HL Cas 1 at 17–18, 9 ER 903 at 998–999):

> '... a foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country, whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his Sovereign authority abroad, an act not done as a *British* subject, but supposed to be done in the exercise of his authority vested in him as Sovereign.' (My emphasis.)

He further said (2 HL Cas 1 at 22, 9 ER 998 at 1000):

> '... if it be a matter of sovereign authority, we cannot try that fact whether it be right or wrong. The allegation that it is contrary to the laws of Hanover, taken in conjunction with the allegation of the authority under which the defendant had acted, must be conceded to be an allegation, not that it was contrary to the existing laws as regulating the right of individuals, but that it was contrary to the laws and duties and rights and powers of a Sovereign exercising Sovereign authority. If that be so, it does not require another observation to shew, because it has not been doubted, that no Court in this country can entertain questions to bring Sovereigns to account for their acts done in their sovereign capacities abroad.'

This case has been cited since both in judicial decisions and in the writing of jurists and in *Buttes Gas and Oil Co v Hammer (Nos 2 and 3), Occidental Petroleum Corp v Buttes Gas and Oil Co (Nos 1 and 2)* [1981] 3 All ER 616 at 628, [1982] AC 888 at 932 was said by Lord Wilberforce to be 'a case in this House which is still authoritative and which has influenced the law both here and overseas'. In *Hatch v Baez* (1876) 7 Hun 596 the plaintiff claimed that he had suffered injuries in the Dominican Republic as a result of acts done by the defendant in his official capacity of President of that republic. The court accepted that because the

defendant was in New York, he was within the territorial jurisdiction of the state. The court said, however (at 600):

> 'But the immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of the sovereignty thereof, it is essential to preserve the peace and harmony of nations, and has the sanction of the most approved writers on international law. It is also recognised in all the judicial decisions on the subject that have come to my knowledge ... The fact that the defendant has ceased to be president of St Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government.'

Jurists since have regarded this principle as still applying to the position of a former head of state. Thus in *Oppenheim's International Law* (9th edn, 1992) it is said that a head of state enjoys all the privileges set out as long as he holds that position (ie ratione personae) but that thereafter he may be sued in respect of obligations of a private character. 'For his official acts as Head of State, he will like any other agent of the State enjoy continuing immunity.'

Satow in *Guide to Diplomatic Practice* (5th edn, 1978) is to the same effect. Having considered the Vienna Convention, the Convention on Special Missions 1969 (UN General Assembly, 8 December 1969; Misc 3 (1970); Cmnd 4300) and the European Convention on State Immunity 1972 (Basle, 16 May 1972; Misc 31 (1972); Cmnd 5081), the editors conclude (p 9):

> '(2) The personal status of a head of a foreign state therefore continues to be regulated by long established rules of customary international law which can be stated in simple terms. He is entitled to immunity—probably without exception—from criminal and civil jurisdiction ... (2.4) A head of state who has been deposed or replaced or has abdicated or resigned is of course no longer entitled to privileges or immunities as a head of state. He will be entitled to continuing immunity in regard to acts which he performed while head of state, provided that the acts were performed in his official capacity; in this his position is no different from that of any agent of the state. He cannot claim to be entitled to privileges as of right, although he may continue to enjoy certain privileges in other states on a basis of courtesy.'

In his *Hague Lectures* ((1994) 247 Recueil des Cours pp 88–89) Sir Arthur Watts QC wrote that a former head of state had no immunity in respect of his private activities taking place whilst he was head of state:

> 'A Head of State's official acts, performed in his public capacity as Head of State, are however subject to different considerations. Such acts are acts of the State rather than the Head of State's personal acts and he cannot be sued for them even after he has ceased to be Head of State.'

One critical difference between a head of state and the state of course resides in the fact that a head of state may resign or be removed. As these writers show, customary international law whilst continuing to hold immune the head of state for acts performed in such capacity during his tenure of the office, did not hold him immune from personal acts of his own. The distinction may not always be easy to draw, but examples can be found. On the one side in the United States was *Hatch v Baez* (1876) 7 Hun 596 to which I have referred, *Nobili v Charles I of Austria* (1921) 1 Annual Digest of Public International Law Cases 136. On the other side, in France is *Mellerio v Isabel de Bourbon ex Queen of Spain* (1974) *Journal of International Law* 32; more recently the former King Farouk was held not immune from suits for goods supplied to his former wife whilst he was head of state (see (1964) Review Critique 689).

The reasons for this immunity as a general rule both for the actual and a former head of state still have force and, despite the changes in the role and the person of the head of state in many countries, the immunity still exists as a matter of customary international law. For an actual head of state as was said in *US v Noriega* (1990) 746 F Supp 1506 the reason was to ensure that 'leaders are free to perform their Governmental duties without being subject to detention, arrest or embarrassment in a foreign country's legal system'. There are in my view analogous if more limited reasons for continuing to apply the immunity ratione materiae in respect of a former head of state.

Rules of customary international law change, however, and as Lord Denning MR said in *Trendtex Trading Corp Ltd v Central Bank of Nigeria* [1977] 1 All ER 881 at 890, [1977] QB 529 at 554, we should give effect to those changes and not be bound by any idea of stare decisis in international law. Thus, for example, the concept of absolute immunity for a sovereign has changed to adopt a theory of restrictive immunity in so far as it concerns the activities of a state engaging in trade (see *I Congreso del Partido* [1981] 2 All ER 1064, [1983] 1 AC 244). One must therefore ask is there 'sufficient evidence to show that the rule of international law has changed?' (see [1977] 1 All ER 881 at 891, [1977] QB 529 at 556).

This principle of immunity has, therefore, to be considered now in the light of developments in international law relating to what are called international crimes. Sometimes these developments are through conventions. Thus, for example, art 1 of the International Convention against the Taking of Hostages 1979 (the Taking of Hostages Convention) (New York, 18 December 1979; TS 81 (1983); Cmnd 7893) provides:

> '(1) Any person who seizes or detains and threatens to kill, to injure ... another person ... in order to compel a third party, namely a State, an international governmental organisation, a natural or juridical person, or a group of persons, to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking hostages ...'

States undertake to prosecute if they do not extradite an offender (any offender 'without exception whatsoever') through proceedings in accordance with the law of that state, but subject to 'enjoyment of all the rights and guarantees provided by the law of the State in the territory of which he is present'. This convention entered into force on 3 June 1983 and was enacted in the United Kingdom in the Taking of Hostages Act 1982 which came into force on 26 November 1982.

By art I of the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (the Genocide Convention) (Paris, 9 December 1948; TS 58 (1970); Cmnd 4421):

> 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.'

By art IV:

'Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.'

The Genocide Act 1969 made the acts specified in art II of the convention the criminal offence of genocide, but it is to be noted that art IV of the convention which on the face of it would cover a head of state was not enacted as part of domestic law. It is, moreover, provided in art VI that persons charged with genocide 'shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction'. It seems to me to follow that if an immunity otherwise exists, it would only be taken away in respect of the state where the crime was committed or before an international tribunal.

There have in addition been a number of charters or statutes setting up international tribunals. There is the Charter of the International Military Tribunal appended to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the Nuremberg Charter) (London, 8 August 1945; TS 27 (1946); Cmd 6903) in 1945 which gave jurisdiction to try crimes against peace, war crimes and crimes against humanity (art 6). By art 7:

'The official position of defendants, whether as Heads of State or responsible officials in Government Departments shall not be considered as freeing them from responsibility or mitigating punishment.'

A similar provision was found in the Charter of the International Military Tribunal for the Far East. In 1993 the Statute of the International Tribunal for the Prosecution of Person Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the Statute of the Tribunal for the Former Yugoslavia) (UN Security Council Resolution 827 (1993)) gave the tribunal power to prosecute persons 'responsible for serious violations of international humanitarian law' (art 1) including grave breaches of the Geneva Conventions of 1949, torture and taking civilians as hostages (art 2), genocide (art 4), crimes against humanity 'when committed in armed conflict whether international or internal in character, and directed against any civilian population' including murder, torture, persecution on political racial or religious grounds (art 5). In dealing with individual criminal responsibility it is provided in art 7(2) that: 'The official position of any accused person whether as Head of State or Government or as responsible Government Official shall not relieve such person of criminal responsibility ...'

The Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994 (the Statute of the Tribunal for Rwanda) (UN SC Resolution 955 (1994)) also empowered the tribunal to prosecute persons committing genocide and specified crimes against humanity 'when committed as part of a widespread or systematic attack against any civilian population on national political ethnic or other specified grounds' (art 3). The same clause as to head of state as in the Statute of the Tribunal for the Former Yugoslavia is in this statute (see art 6).

The Statute of the International Criminal Court 1998 (the Rome Statute) (Rome, 17 July 1998, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court) provides in art 5 for jurisdiction in respect of genocide as defined in art 6, and crimes against humanity as defined in art 7 but in each case only with respect to crimes committed after the entry into force of this statute (art 11(2)). Official capacity as a head of state or government shall in no case exempt the person from criminal responsibility under this statute (art 27). Although it is concerned with jurisdiction, it does indicate the limits which states were prepared to impose in this area on the tribunal.

There is thus no doubt that states have been moving towards the recognition of some crimes as those which should not be covered by claims of state or head of state or other official or diplomatic immunity when charges are brought before international tribunals.

Movement towards the recognition of crimes against international law is to be seen also in the decisions of national courts, in the resolution of the General Assembly of the United Nations 1946, in the reports of the International Law Commission and in the writings of distinguished international jurists.

It has to be said, however, at this stage of the development of international law that some of those statements read as aspirations, as embryonic. It does not seem to me that it has been shown that there is any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in national courts on the basis of the universality of jurisdiction. Nor is there any jus cogens in respect of such breaches of international law which require that a claim of state or head of state immunity, itself a well-established principle of international law, should be overridden. I am not satisfied that even now there would be universal acceptance of a definition of crimes against humanity. They had their origin as a concept after the 1914–18 war and were recognised in the Nuremberg Tribunal as existing at the time of international armed conflicts. Even later it was necessary to spell out that humanitarian crimes could be linked to armed conflict internally and that it was not necessary to show that they occurred in international conflict. This is no doubt a developing area but states have proceeded cautiously.

That international law crimes should be tried before international tribunals or in the perpetrator's own state is one thing; that they should be impleaded without regard to a long-established customary international law rule in the courts of other states is another. It is significant that in respect of serious breaches of 'intransgressible principles of international customary law' when tribunals have been set up it is with carefully defined powers and jurisdiction as accorded by the states involved, that the Genocide Convention provides only for jurisdiction before an international tribunal of the courts of the state where the crime is committed, that the Rome Statute lays down jurisdiction for crimes in very specific terms but limits its jurisdiction to future acts.

So, starting with the basic rule to be found both in art 39(2) and in customary international law that a former head of state is entitled to immunity from arrest or prosecution in respect of official acts done by him in the exercise of his functions as head of state, the question is what effect, if any, the recognition of acts as international crimes has in itself on that immunity. There are two extreme positions. The first is that such recognition has no effect. Head of state immunity is still necessary for a former head of state in respect of his official acts; it is long established, well recognised and based on sound reasons. States must be treated as recognising it between themselves so that it overrides any criminal act, whether national or international. This is a clear cut rule, which for that reason

has considerable attraction. It, however, ignores the fact that international law is not static and that the principle may be modified by changes introduced in state practice, by conventions and by the informed opinions of international jurists. Just as it is now accepted that, contrary to an earlier principle of absolute immunity, states may limit state immunity to acts of sovereign authority (acta jure imperii) and exclude commercial acts (acta jure gestionis) as the United Kingdom has done and just as the immunity of a former head of state is now seen to be limited to acts which he did in his official capacity and to exclude private acts, so it is argued, the immunity should be treated as excluding certain acts of a criminal nature.

The opposite extreme position is that all crimes recognised as, or accepted to be, international crimes are outside the protection of the immunity in respect of former heads of state. I do not accept this. The fact even that an act is recognised as a crime under international law does not mean that the courts of all states have jurisdiction to try it, nor in my view does it mean that the immunity recognised by states as part of their international relations is automatically taken away by international law. There is no universality of jurisdiction for crimes against international law: there is no universal rule that all crimes are outside immunity ratione materiae.

There is, however, another question to be asked. Does international law now recognise that some crimes are outwith the protection of the former head of state immunity so that immunity in art 39 (2) is equally limited as part of domestic law; if so, how is that established? This is the core question and it is a difficult question.

It is difficult partly because changes in international law take place slowly as states modify existing principles. It is difficult because in many aspects of this problem the appropriate principles of international law have not crystallised. There is still much debate and it seems to me still much uncertainty so that a national judge should proceed carefully. He may have to say that the position as to state practice has not reached the stage when he can identify a positive rule at the particular time when he has to consider the position. This is clearly shown by the developments which have taken place in regard to crimes against humanity. The concept that such crimes might exist was as I have said recognised, for the Nuremberg and Tokyo Tribunals in 1946 in the context of international armed conflict when the tribunals were given jurisdiction to try crimes against humanity. The Affirmation of the Principles of International Law adopted by the United Nations General Assembly in December 1946 (UN GA Resolution 95(I) (1946)), the International Law Commission reports and the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ((Rome 4 November 1950; TS 71 (1953); Cmnd 8969) also recognised these crimes as international crimes. Since then there have been, as I have shown, conventions dealing with specific crimes and tribunals have been given jurisdiction over international crimes with a mandate not to treat as a defence to such crimes the holding of official office including that of head of state. National courts as in *A-G of Israel v Eichmann* (1961) 36 ILR 5 held that they had jurisdiction to deal with international crimes (see also *Demjanjuk v Petrovsky* (1985) 776 F 2d 571).

But except in regard to crimes in particular situations before international tribunals these measures did not in general deal with the question as to whether otherwise existing immunities were taken away. Nor did they always specifically recognise the jurisdiction of, or confer jurisdiction on, national courts to try such crimes.

I do not find it surprising that this has been a slow process or that the International Law Commission eventually left on one side its efforts to produce a convention dealing with head of state immunity. Indeed, until *Prosecutor v Tadic* (1997) 105 ILR 419 after years of discussion and perhaps even later there was a feeling that crimes against humanity were committed only in connection with armed conflict even if that did not have to be international armed conflict.

If the states went slowly so must a national judge go cautiously in finding that this immunity in respect of former heads of state has been cut down. Immunity, it must be remembered, reflects the particular relationship between states by which they recognise the status and role of each other's head and former head of state.

So it is necessary to consider what is needed, in the absence of a general international convention defining or cutting down head of state immunity, to define or limit the former head of state immunity in particular cases. In my opinion it is necessary to find provision in an international convention to which the state asserting, and the state being asked to refuse, the immunity of a former head of state for an official act is a party; the convention must clearly define a crime against international law and require or empower a state to prevent or prosecute the crime, whether or not committed in its jurisdiction and whether or not committed by one of its nationals; it must make it clear that a national court has jurisdiction to try a crime alleged against a former head of state, or that having been a head of state is no defence and that expressly or impliedly the immunity is not to apply so as to bar proceedings against him. The convention must be given the force of law in the national courts of the state; in a dualist country like the United Kingdom that means by legislation, so that with the necessary procedures and machinery the crime may be prosecuted there in accordance with the conditions to be found in the convention.

In that connection it is necessary to consider when the pre-existing immunity is lost. In my view it is from the date when the national legislation comes into force, although I recognise that there is an argument that it is when the convention comes into force, but in my view nothing earlier will do. Acts done thereafter are not protected by the immunity; acts done before, so long as otherwise qualifying, are protected by the immunity. It seems to me wrong in principle to say that once the immunity is cut down in respect of particular crimes it has gone even for acts done when the immunity existed and was believed to exist. Equally, it is artificial to say that an evil act can be treated as a function of a head of state until an international convention says that the act is a crime when it ceases ex post facto to have been a function. If that is the right test, then it gives a clear date from which the immunity was lost. This may seem a strict test and a cautious approach, but in laying down when states are to be taken as abrogating a long-established immunity it is necessary to be satisfied that they have done so.

THE CRIMES ALLEGED

What is the position in regard to the three groups of crimes alleged here: torture, genocide and taking hostages?

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention) (10 December 1984; UN General Assembly Resolution 39/46, Doc A/39/51; Cmnd 9593) defines torture as severe pain or suffering intentionally inflicted for specific purposes, 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.

Each state party is to ensure that all acts of torture are offences under its criminal law and to establish jurisdiction over offences committed in its territory, or by a national of that state or, if the state considers it appropriate, when the victim is a national of that state (art 5). It must also establish jurisdiction where, 'the alleged offender is present under its jurisdiction and it does not extradite pursuant to art 8'. Thus, where a person is found in the territory of a state in the cases contemplated in art 5, then the state must, by art 7 '... if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.' States are to give each other the greatest measure of assistance in connection with criminal proceedings.

The important features of this convention are: (1) that it involves action 'by a public official or other person acting in an official capacity', (2) that by arts 5 and 7, if not extradited, the alleged offender must be dealt with as laid down; and (3) Chile was a state party to this convention and it therefore accepted that, in respect of the offence of torture, the United Kingdom should either extradite or take proceedings against offending officials found in its jurisdiction.

The Torture Convention was incorporated into English law by s 134 of the Criminal Justice Act 1988. Section 134(1) and (2) provides:

> '(1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.
>
> (2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if:—(a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence:—(i) of a public official; or (ii) of a person acting in an official capacity; and (b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.'

If committed other than in the United Kingdom lawful authority, justification or excuse under the law of the place where the torture was inflicted is a defence, but in Chile the constitution forbids torture.

It is thus plain that torture was recognised by the state parties as a crime which might be committed by the persons, and be punishable in the states, referred to. In particular, the convention requires that the alleged offender, if found in the territory of a state party, shall be, if not extradited, submitted to the prosecution authorities.

This, however, is not the end of the inquiry. The question remains—have the state parties agreed, and in particular have the United Kingdom and Chile, which asserts the immunity, agreed that the immunity enjoyed by a former head of state for acts ratione materiae, shall not apply to alleged crimes of torture? That depends on whether a head of state, and therefore a former head of state, is covered by the words 'a public official or a person acting in that capacity'. As a matter of ordinary usage, it can obviously be argued that he is. But your Lordships are concerned with the use of the words in their context in an international convention. I find it impossible to ignore the fact that in the very conventions and charters relied on by the appellants as indicating that jurisdiction in respect of certain crimes was extended from 1945 onwards, there are specific provisions in respect of heads of state as well as provisions covering officials. These provisions may relate to jurisdiction, or to the removal of a defence, and immunity of course is different from each, both as a concept and in that it is only

pleadable in bar to proceedings in national courts. These provisions do, however, serve as a guide to indicate whether states have generally accepted that former heads of state are to be regarded as 'public officials' and accordingly that the immunity has been taken away from former heads of state in the Torture Convention.

Thus, in the Nuremberg Charter (art 7), the official position of defendants 'whether as *Heads of State* or responsible officials' does not free them from responsibility. In the Genocide Convention persons committing the act shall be punished 'whether they are *constitutionally responsible rulers*, public officials or private individuals'. In the Tribunals for the Former Yugoslavia and Rwanda, 'the official position of any accused person, whether as *Head of State* or Government or as a responsible Government official' is not a defence (art 7). Even as late as the Rome Statute by art 27 'official capacity as a *Head of State* or Government ... or Government official' is not exempted from criminal responsibility.

In these cases, states have not taken the position that the words public or government official are wide enough to cover heads of state or former heads of state, but that a specific exclusion of a defence or of an objection to jurisdiction on that basis is needed. It is nothing to the point that the reference is only to head of state. A head of state on ceasing to be a head of state is not converted into a public official in respect of the period when he was a head of state if he was not so otherwise. This is borne out by the experience of the International Law Commission in seeking to produce a draft in respect of state immunity. The reports of its meeting show the difficulties which arose in seeking to deal with the position of a head of state.

I conclude that the reference to public officials in the Torture Convention does not include heads of state or former heads of state, either because states did not wish to provide for the prosecution of heads of state or former heads of state or because they were not able to agree that a plea in bar to the proceedings based on immunity should be removed. I appreciate that there may be considerable political and diplomatic difficulties in reaching agreement, but if states wish to exclude the long-established immunity of former heads of state in respect of allegations of specific crimes, or generally, then they must do so in clear terms. They should not leave it to national courts to do so because of the appalling nature of the crimes alleged.

The second provisional warrant does not mention genocide, though the international warrant and the request for extradition do. The Genocide Convention in art 6 limits jurisdiction to a tribunal in the territory in which the act was committed and is not limited to acts by public officials. The provisions in art 4 making 'constitutionally responsible rulers' liable to punishment is not incorporated into the English Genocide Act of 1948. Whether or not your Lordships are concerned with the second international warrant and the request for extradition (and Mr Nicholls submits that you are not), the Genocide Convention does not therefore satisfy the test which I consider should be applied.

The Taking of Hostages Convention, which came into force in 1983, and the 1982 Act clearly make it a crime for 'any person, whatever his nationality ... in the United Kingdom or elsewhere' to take hostages for one of the purposes specified. This again indicates the scope both of the substantive crime and of jurisdiction, but neither the convention nor the Act contain any provisions which can be said to take away the customary international law immunity as head of state or former head of state.

It has been submitted that a number of other factors indicate that the immunity should not be refused by the United Kingdom—the United Kingdom's relations with Chile, the fact that an amnesty was granted, that great efforts have been made in Chile to restore democracy and that to extradite the respondent would risk unsettling what has been achieved, the length of time since the events took place, that prosecutions have already been launched against the respondent in Chile, that the respondent has, it is said, with the United Kingdom government's approval or acquiescence, been admitted into this country and been received in official quarters. These are factors, like his age, which may be relevant on the question whether he should be extradited, but it seems to me that they are for the Secretary of state (the executive branch) and not for your Lordships on this occasion.

[...]

LORD LLOYD OF BERWICK.

BACKGROUND

My Lords, on 11 September 1973 General Augusto Pinochet Ugarte assumed power in Chile after a military coup. He was appointed president of the governing junta the same day. On 22 September the new regime was recognised by Her Majesty's government. By a decree dated 11 December 1974 General Pinochet assumed the title of President of the Republic. In 1980 a new constitution came into force in Chile, approved by a national referendum. It provided for executive power in Chile to be exercised by the President of the Republic as head of state. Democratic elections were held in December 1989. As a result, General Pinochet handed over power to President Aylwin on 11 March 1990.

In opening the appeal before your Lordships Mr Alun Jones QC took as the first of the three main issues for decision whether General Pinochet was head of state throughout the whole period of the allegations against him. It is clear beyond doubt that he was. So I say no more about that.

I return to the narrative. On 19 April 1978, while General Pinochet was still head of state, the senate passed a decree granting an amnesty to all persons involved in criminal acts (with certain exceptions) between 11 September 1973 and 10 March 1978. The purpose of the amnesty was stated to be for the 'general tranquillity, peace and order' of the nation. After General Pinochet fell from power, the new democratic government appointed a Commission for Truth and Reconciliation, thus foreshadowing the appointment of a similar commission in South Africa. The Commission consisted of eight civilians of varying political viewpoints under the chairmanship of Don Raul Rettig. Their terms of reference were to investigate all violations of human rights between 1973 and 1990, and to make recommendations. The Commission reported on 9 February 1991.

In 1994 Senator Pinochet came to the United Kingdom on a special diplomatic mission (he had previously been appointed senator for life). He came again in 1995 and 1997. According to the evidence of Professor Walters, a former foreign minister and ambassador to the United Kingdom, Senator Pinochet was accorded normal diplomatic courtesies. The Foreign Office was informed in advance of his visit to London in September 1998, where at the age of 82 he has undergone an operation at the London Clinic.

At 11.25 pm on 16 October he was arrested while still at the London Clinic pursuant to a provisional warrant (the first provisional warrant) issued under s 8(1)(b) of the Extradition Act 1989. The warrant had been issued by Mr Evans, a metropolitan stipendiary magistrate, at his home at about 9 pm the same evening. The reason for the urgency was said to be that Senator Pinochet was returning to Chile the next day. We do not know the terms of the Spanish international warrant of arrest, also issued on 16 October. All we know is that in the first provisional warrant Senator Pinochet was accused of the murder of Spanish citizens in Chile between 11 September 1973 and 31 December 1983.

For reasons explained by the Divisional Court the first provisional warrant was bad on its face. The murder of Spanish citizens in Chile is not an extradition crime under s 2(1)(b) of the 1989 Act for which Senator Pinochet could be extradited, for the simple reason that the murder of a British citizen in Chile would not be an offence against our law. The underlying principle of all extradition agreements between states, including the Extradition Convention, is reciprocity. We do not extradite for offences for which we would not expect and could not request extradition by others.

On 17 October the Chilean government protested. The protest was renewed on 23 October. The purpose of the protest was to claim immunity from suit on behalf of Senator Pinochet both as a visiting diplomat and as a former head of state, and to request his immediate release.

Meanwhile the flaw in the first provisional warrant must have become apparent to the Crown Prosecution Service, acting on behalf of the state of Spain. At all events, Garzon J in Madrid issued a second international warrant of arrest dated 18 October, alleging crimes of genocide and terrorism. This in turn led to a second provisional warrant of arrest in England issued on this occasion by Mr Ronald Bartle. Senator Pinochet was rearrested in pursuance of the second warrant on 23 October.

The second warrant alleges five offences, the first being that Senator Pinochet—

> 'being a public official conspired with persons unknown to intentionally inflict severe pain or suffering on another in the ... purported performance of his official duties ... within the jurisdiction of the government of Spain.'

In other words, that he was guilty of torture. The reason for the unusual language is that the second provisional warrant was carefully drawn to follow the wording of s 134 of the Criminal Justice Act 1988 which itself reflects art 1 of the Torture Convention. Section 134(1) provides:

> 'A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.'

It will be noticed that unlike murder, torture is an offence under English law wherever the act of torture is committed. So unlike the first provisional warrant, the second provisional warrant is not bad on its face. The alleged acts of torture are extradition crimes under s 2 of the 1989 Act, as art 8 of the convention required, and as Mr Nicholls QC conceded. The same is true of the third alleged offence, namely the taking of hostages. Section 1 of the Taking of Hostages Act 1982 creates an offence under English law wherever the act of hostage-taking takes place. So hostage-taking, like torture, is an extradition crime. The remaining offences do not call for separate mention.

It was argued that torture and hostage-taking only became extradition crimes after 1988 (torture) and 1982 (hostage-taking) since neither s 134 of the 1988 Act, nor s 1 of the 1982 Act are retrospective. But I agree with the Divisional Court that this argument is bad. It involves a misunderstanding of s 2 of the 1989 Act. Section 2(1)(a) refers to conduct which *would* constitute an offence in the United Kingdom *now*. It does not refer to conduct which *would have* constituted an offence *then*.

The torture allegations in the second provisional warrant are confined to the period from 1 January 1988 to 31 December 1992. Mr Alun Jones does not rely on conduct subsequent to 11 March 1990. So we are left with the period from 1 January 1988 to 11 March 1990. Only one of the alleged acts of torture took place during that period. The hostage-taking allegations relate to the period from 1 January 1982 to 31 January 1992. There are no alleged acts of hostage-taking during that period. So the second provisional warrant hangs on a very narrow thread. But it was argued that the second provisional warrant is no longer the critical document, and that we ought now to be looking at the complete list of crimes alleged in the formal request of the Spanish government. I am content to assume, without deciding, that this is so.

Returning again to the narrative, Senator Pinochet made an application for certiorari to quash the first provisional warrant on 22 October and a second application to quash the second provisional warrant on 26 October. It was these applications which succeeded before the Divisional Court on 28 October 1998, with a stay pending an appeal to your Lordships' House. The question certified by the Divisional Court was as to—

> 'the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state.'

On 3 November 1998 the Chilean Senate adopted a formal protest against the manner in which the Spanish courts had violated the sovereignty of Chile by asserting extra-territorial jurisdiction. They resolved also to protest that the British government had disregarded Senator Pinochet's immunity from jurisdiction as a former head of state. This latter protest may be based on a misunderstanding. The British government has done nothing. This is not a case where the Secretary of State has already issued an authority to proceed under s 7 of the Extradition Act 1989, since the provisional warrants were issued without his authority (the case being urgent) under s 8(1)(b) of the 1989 Act. It is true that the Secretary of State might have cancelled the warrants under s 8(4). But as the Divisional Court pointed out, it is not the duty of the Secretary of State to review the validity of provisional warrants. It was submitted that it should have been obvious to the Secretary of State that Senator Pinochet was entitled to immunity as a former head of state. But the Divisional Court rejected that submission. In the event leave to move against the Secretary of State was refused.

There are two further points made by Professor Walters in his evidence relating to the present state of affairs in Chile. In the first place he gives a list of eleven criminal suits which have been filed against Senator Pinochet in Chile and five further suits where the Supreme Court has ruled that the 1978 amnesty does not apply. Secondly, he has drawn attention to public concern over the continued detention of Senator Pinochet.

> 'I should add that there are grave concerns in Chile that the continued detention and attempted prosecution of Senator Pinochet in a foreign court will upset the delicate political balance and transition to democracy that has been achieved since the institution of democratic rule in Chile. It is felt that the current stable position has been achieved by a number of internal measures including the establishment and reporting of the Rettig Commission on Truth and Reconciliation. The intervention of a foreign court in matters more proper to internal domestic resolution may seriously undermine the balance achieved by the present democratic government.'

SUMMARY OF ISSUES

The argument has ranged over a very wide field in the course of a hearing lasting six days. The main issues which emerged can be grouped as follows. (1) Is Senator Pinochet entitled to immunity as a former head of state at common law? This depends on the requirements of customary international law, which are observed and enforced by our courts as part of the common law. (2) Is Senator Pinochet entitled to immunity as a former head of state under Pt I of the State Immunity Act 1978? If not, does Pt I of the 1978 Act cut down or affect any immunity to which he would otherwise be entitled at common law? (3) Is Senator Pinochet entitled to immunity as a former head of state under Pt III of the 1978 Act, and the articles of the Vienna Convention as set out in the Schedule to the Diplomatic Privileges Act 1964? It should be noticed that despite an assertion by the Chilean government that Senator Pinochet is present in England on a diplomatic passport at the request of the Royal Ordnance, Miss Clare Montgomery QC does not seek to argue that he is entitled to diplomatic immunity on that narrow ground, for which, she says, she cannot produce the appropriate evidence. (4) Is this a case where the court ought to decline jurisdiction on the ground that the issues raised are non-justiciable?

The last of these four heads is sometimes referred to as 'the Act of State' doctrine, especially in the United States. But 'Act of State' is a confusing term. It

is used in different senses in many different contexts. So it is better to refer to non-justiciability. The principles of sovereign immunity and non-justiciability overlap in practice. But in legal theory they are separate. State immunity, including head of state immunity, is a principle of public international law. It creates a procedural bar to the jurisdiction of the court. Logically therefore it comes first. Non-justiciability is a principle of private international law. It goes to the substance of the issues to be decided. It requires the court to withdraw from adjudication on the grounds that the issues are such as the court is not competent to decide. State immunity, being a procedural bar to the jurisdiction of the court, can be waived by the state. Non-justiciability, being a substantive bar to adjudication, cannot.

Issue 1: head of state immunity at common law

As already mentioned, the common law incorporates the rules of customary international law. The matter is put thus in *Oppenheim's International Law* (9th edn, 1992) p 57:

> 'The application of international law as part of the law of the land means that, subject to the overriding effect of statute law, rights and duties flowing from the rules of customary international law will be recognised and given effect by English courts without the need for any specific Act adopting those rules into English law.'

So what is the relevant rule of customary international law? I cannot put it better than it is put by the appellants themselves in para 26 of their written case:

> 'No international agreement specifically provides for the immunities of a former head of state. However, under customary international law, it is accepted that a state is entitled to expect that its former head of state will not be subjected to the jurisdiction of the courts of another state for certain categories of acts performed while he was head of state unless immunity is waived by the current government of the state of which he was once the head. The immunity is accorded for the benefit not of the former head of state himself but for the state of which he was once the head and any international law obligations are owed to that state and not to the individual.'

The important point to notice in this formulation of the immunity principle is that the rationale is the same for former heads of state as it is for current heads of state. In each case the obligation in international law is owed to the state, and not the individual, though in the case of a current head of state he will have a concurrent immunity ratione personae. This rationale explains why it is the state, and the state alone, which can waive the immunity. Where, therefore, a state is seeking the extradition of its own former head of state, as has happened in a number of cases, the immunity is waived ex hypothesi. It cannot be asserted by the former head of state. But here the situation is the reverse. Chile is not waiving its immunity in respect of the acts of Senator Pinochet as former head of state. It is asserting that immunity in the strongest possible terms, both in respect of the Spanish international warrant, and also in respect of the extradition proceedings in the United Kingdom.

Another point to notice is that it is only in respect of 'certain categories of acts' that the former head of state is immune from the jurisdiction of municipal courts. The distinction drawn by customary international law in this connection is between private acts on the one hand, and public, official or governmental acts

on the other. Again I cannot put it better than it is put by the appellants in para 27 of their written case. Like para 26 it has the authority of Professor Greenwood; and like para 26 it is not in dispute.

> 'It is generally agreed that private acts performed by the former head of state attract no such immunity. Official acts, on the other hand, will normally attract immunity ... Immunity in respect of such acts, which has sometimes been applied to officials below the rank of head of state, is an aspect of the principle that the courts of one state will not normally exercise jurisdiction in respect of the sovereign acts of another state.'

The rule that a former head of state cannot be prosecuted in the municipal courts of a foreign state for his official acts as head of state has the universal support of writers on international law. They all speak with one voice. Thus Sir Arthur Watts QC in his monograph on the 'Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 *Recueil des Cours* at p 89 says:

> 'A head of state's official acts, performed in his public capacity as head of state, are however subject to different considerations. Such acts are acts of the state rather than the head of state's personal acts, and he cannot be sued for them even after he has ceased to be head of state.'

In Satow's *Guide to Diplomatic Practice* (5th edn, 1978) we find:

> '(2.2) The personal status of a head of a foreign state therefore continues to be regulated by long-established rules of customary international law which can be stated in simple terms. He is entitled to immunity—probably without exception - from criminal and civil jurisdiction ... (2.4) A head of state who has been deposed or replaced or has abdicated or resigned is of course no longer entitled to privileges or immunities as a head of state. He will be entitled to continuing immunity in regard to acts which he performed while head of state, provided that the acts were performed in his official capacity; in this his position is no different from that of any agent of the state.'

In *Oppenheim's International Law* (9th edn, 1992) (para 456), we find:

> 'All privileges mentioned must be granted to a head of state only so long as he holds that position. Therefore, after he has been deposed or has abdicated, he may be sued, at least in respect of obligations of a private character entered into while head of state. For his official acts as head of state he will, like any other agent of a state, enjoy continuing immunity.'

It was suggested by Professor Brownlie that the *Third Restatement of The Foreign Relations Law of the United States* was to the contrary effect. But I doubt if this is so. In vol 1 (para 464) we find:

> 'Former heads of state or government have sometimes sought immunity from suit in respect of claims arising out of their official acts while in office. Ordinarily, such acts are not within the jurisdiction to prescribe of other states. However a former head of state appears to have no immunity from jurisdiction to adjudicate.'

The last sentence means only that it is competent for the court of the foreign state to inquire whether the acts complained of were official acts of the head of state,

or private acts. Unless the court is persuaded that they were private acts the immunity is absolute.

Decided cases support the same approach. In *Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1, 9 ER 993, a case discussed by Professor F A Mann in his illuminating article 'The sacrosanctity of the foreign act of state' (1943) 59 LQR 42, the reigning King of Hanover (who happened to be in England) was sued by the former reigning Duke of Brunswick. It was held by this House that the action must fail, not on the ground that the King of Hanover was entitled to personal immunity so long as he was in England (ratione personae) but on the wider ground (ratione materiae) that a foreign sovereign—

> 'cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his sovereign authority abroad ...' (See (1848) 2 HL Cas 1 at 18; 2 ER 993 at 999.)

In *Hatch v Baez* (1876) 7 Hun 596 the plaintiff complained of an injury which he sustained at the hands of the defendant when president of the Dominican Republic. After the defendant had ceased to be president, he was arrested in New York at the suit of the plaintiff. There was a full argument before what would now, I think, be called the Second Circuit Court of Appeals, with extensive citation of authority including *Duke of Brunswick v King of Hanover*. The plaintiff contended (just as the appellants have contended in the present appeal) that the acts of the defendant must be regarded as having been committed in his private capacity. I quote from the argument ((1876) 7 Hun 596 at 596–597):

> 'No unjust or oppressive act committed by his direction upon any one of his subjects, or upon others entitled to protection, is in any true sense the act of the executive in his public and representative capacity, but of the man simply, rated as other men are rated in private stations; for in the perpetration of unauthorized offences of this nature, he divests himself of his "regal prerogatives" and descends to the level of those untitled offenders, against whose crimes it is the highest purpose of government to afford protection.'

But the court rejected the plaintiff's argument. Gilbert J said (at 599):

> 'The wrongs and injuries of which the plaintiff complains were inflicted upon him by the Government of St Domingo, while he was residing in that country, and was in all respects subject to its laws. They consist of acts done by the defendant in his official capacity of president of that republic. The sole question is, whether he is amenable to the jurisdiction of the courts of this state for those acts.'

A little later we find (at 600):

> 'The general rule, no doubt, is that all persons and property within the territorial jurisdiction of a state are amenable to the jurisdiction of its courts. But the immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of the sovereignty thereof, is essential to preserve the peace and harmony of nations, and has the sanction of the most approved writers on international law. It is also recognized in all the judicial decisions on the subject that have come to my knowledge.'

The court concluded:

> 'The fact that the defendant has ceased to be president of St Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government.'

In *Underhill v Hernandez* (1897) 168 US 250 the plaintiff was an American citizen resident in Venezuela. The defendant was a general in command of revolutionary forces, which afterwards prevailed. The plaintiffs brought proceedings against the defendant in New York, alleging wrongful imprisonment during the revolution. In a celebrated passage Fuller CJ said (at 252):

> 'Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.'

The Supreme Court (at 254) approved a statement by the Circuit Court of Appeals 'that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government'.

On the other side of the line is *Jimenez v Aristeguieta* (1962) 311 F 2d 547. In that case the state of Venezuela sought the extradition of a former chief executive alleging four charges of murder, and various financial crimes. There was insufficient evidence to connect the defendant with the murder charges. But the judge (at 558) found that the alleged financial crimes were committed for his private financial benefit, and that they constituted 'common crimes committed by the Chief of State done in violation of his position and not in pursuance of it'. The defendant argued that as a former chief executive he was entitled to sovereign immunity, and he relied on *Underhill v Hernandez*. Not surprisingly the Fifth Circuit Court of Appeals rejected this argument. They said ((1962) 311 F 2d 547 at 557): 'It is only when officials having sovereign authority act in an official capacity that the act of state doctrine applies.' To the same effect is *US v Noriega* (1990) 746 F Supp 1506. The defendant was charged with various drug offences. He claimed immunity as de facto head of the Panamanian government. The court considered the claim under three heads, sovereign immunity, the act of state doctrine and diplomatic immunity. Having referred to *Hatch v Baez* and *Underhill v Hernandez*, the court continued ((1990) 746 F Supp 1506 at 1521–1522):

> 'In order for the act of state doctrine to apply, the defendant must establish that his activities are "acts of state", ie that they were taken on behalf of the state and not, as private acts, on behalf of the actor himself ... "That the acts must be *public* acts of the *sovereign* has been repeatedly affirmed" ... Though the distinction between the public and private acts of government officials may prove elusive, this difficulty has not prevented courts from scrutinizing the character of the conduct in question.'

The court concluded that Noriega's alleged drug trafficking could not conceivably constitute public acts on behalf of the Panamanian state.

These cases (and there are many others to which we were referred) underline the critical distinction between personal or private acts on the one hand, and public or official acts done in the execution or under colour of sovereign

authority on the other. Despite the plethora of authorities, especially in the United States, the appellants were unable to point to a single case in which official acts committed by a head of state have been made the subject of suit or prosecution after he has left office. The nearest they got was *Hilao v Marcos* (1994) 25 F 3d 1467, in which a claim for immunity by the estate of former President Marcos failed. But the facts were special. Although there was no formal waiver of immunity in the case, the government of the Philippines made plain their view that the claim should proceed. Indeed they filed a brief in which they asserted that foreign relations with the United States would not be adversely affected if claims against ex President Marcos and his estate were litigated in US courts. There is an obvious contrast with the facts of the present case.

So the question comes to this: on which side of the line does the present case come? In committing the crimes which are alleged against him, was Senator Pinochet acting in his private capacity or was he acting in a sovereign capacity as head of state? In my opinion there can be only one answer. He was acting in a sovereign capacity. It has not been suggested that he was personally guilty of any of the crimes of torture or hostage-taking in the sense that he carried them out with his own hands. What is alleged against him is that he organised the commission of such crimes, including the elimination of his political opponents, as head of the Chilean government, and that he did so in co-operation with other governments under 'Plan Condor', and in particular with the government of Argentina. I do not see how in these circumstances he can be treated as having acted in a private capacity.

In order to make the above point good it is necessary to quote some passages from the second international warrant.

> 'It can be inferred from the inquiries made that, since September 1973 in Chile and since 1976 in the Republic of Argentina a series of events and punishable actions were committed under the fiercest ideological repression against the citizens and residents in these countries. The plans and instructions established beforehand from the government enabled these actions to be carried out ... It has been ascertained that there were coordination actions at international level that were called "Operativo Condor" in which different countries, Chile and Argentina among them, were involved and whose purpose was to coordinate the oppressive actions among them. In this sense Augusto Pinochet Ugarte, Commander-in-Chief of the Armed Forces and head of the Chilean government at the time, committed punishable acts in coordination with the military authorities in Argentina between 1976 and 1983 ... as he gave orders to eliminate, torture and kidnap persons and to cause others to disappear, both Chileans and individuals from different nationalities, in Chile and in other countries, through the actions of the secret service (DINA) and within the framework of the above-mentioned "Plan Condor".'

Where a person is accused of organising the commission of crimes as the head of the government, in co-operation with other governments, and carrying out those crimes through the agency of the police and the secret service, the inevitable conclusion must be that he was acting in a sovereign capacity and not in a personal or private capacity.

But the appellants have two further arguments. First they say that the crimes alleged against Senator Pinochet are so horrific that an exception must be made to the ordinary rule of customary international law. Secondly they say that the crimes in question are crimes against international law, and that international law

cannot both condemn conduct as a breach of international law and at the same time grant immunity from prosecution. It cannot give with one hand and take away with the other.

As to the first submission, the difficulty, as the Divisional Court pointed out, is to know where to draw the line. Torture is, indeed, a horrific crime, but so is murder. It is a regrettable fact that almost all leaders of revolutionary movements are guilty of killing their political opponents in the course of coming to power, and many are guilty of murdering their political opponents thereafter in order to secure their power. Yet it is not suggested (I think) that the crime of murder puts the successful revolutionary beyond the pale of immunity in customary international law. Of course it is strange to think of murder or torture as 'official' acts or as part of the head of state's 'public functions'. But if for 'official' one substitutes 'governmental' then the true nature of the distinction between private acts and official acts becomes apparent. For reasons already mentioned I have no doubt that the crimes of which Senator Pinochet is accused, including the crime of torture, were governmental in nature. I agree with Collins J in the Divisional Court that it would be unjustifiable in theory, and unworkable in practice, to impose any restriction on head of state immunity by reference to the number or gravity of the alleged crimes. Otherwise one would get to this position: that the crimes of a head of state in the execution of his governmental authority are to be attributed to the state so long as they are not too serious. But beyond a certain (undefined) degree of seriousness the crimes cease to be attributable to the state, and are instead to be treated as his private crimes. That would not make sense.

As to the second submission, the question is whether there should be an exception from the general rule of immunity in the case of crimes which have been made the subject of international conventions, such as the Taking of Hostages Convention and the Torture Convention. The purpose of these conventions, in very broad terms, was to ensure that acts of torture and hostage-taking should be made (or remain) offences under the criminal law of each of the state parties, and that each state party should take measures to establish extra-territorial jurisdiction in specified cases. Thus in the case of torture a state party is obliged to establish extra-territorial jurisdiction when the alleged offender is a national of that state, but not where the victim is a national. In the latter case the state has a discretion (see art 5(1)(b)–(c)). In addition there is an obligation on a state to extradite or prosecute where a person accused of torture is found within its territory—aut dedere aut judicare (see art 7). But there is nothing in the Torture Convention which touches on state immunity. The contrast with the Genocide Convention could not be more marked. Article 4 of the Genocide Convention provides:

> 'Persons committing genocide or any of the other acts enumerated in article 3 shall be punished whether they are constitutionally responsible rulers or public officials or private individuals.'

There is no equivalent provision in either the Torture Convention or the Taking of Hostages Convention.

Moreover, when the Genocide Convention was incorporated into English law by the Genocide Act 1969, art 4 was omitted. So Parliament must clearly have intended, or at least contemplated, that a head of state accused of genocide would be able to plead sovereign immunity. If the Torture Convention and the Taking of Hostages Convention had contained a provision equivalent to art 4 of the

Genocide Convention (which they did not) it is reasonable to suppose that, as with genocide, the equivalent provisions would have been omitted when Parliament incorporated those conventions into English law. I cannot for my part see any inconsistency between the purposes underlying these conventions and the rule of international law which allows a head of state procedural immunity in respect of crimes covered by the conventions.

Nor is any distinction drawn between torture and other crimes in state practice. In *Al Adsani v Kuwait* (1996) 107 ILR 536 the plaintiff brought civil proceedings against the government of Kuwait alleging that he had been tortured in Kuwait by government agents. He was given leave by the Court of Appeal to serve out of the jurisdiction on the ground that state immunity does not extend to acts of torture. When the case came back to the Court of Appeal on an application to set aside service, it was argued that a state is not entitled to immunity in respect of acts that are contrary to international law, and that since torture is a violation of jus cogens, a state accused of torture forfeits its immunity. The argument was rejected. Stuart-Smith LJ observed that the draftsman of the 1978 Act must have been well aware of the numerous international conventions covering torture (although he could not, of course, have been aware of the Torture Convention). If civil claims based on acts of torture were intended to be excluded from the immunity afforded by s 1(1) of the 1978 Act, because of the horrifying nature of such acts, or because they are condemned by international law, it is inconceivable that s 1(1) would not have said so.

The same conclusion has been reached in the United States. In *Siderman de Blake v Argentina* (1992) 965 F 2d 699 the plaintiff brought civil proceedings for alleged acts of torture against the government of Argentina. It was held by the Ninth Circuit Court of Appeals that although prohibition against torture has attained the status of jus cogens in international law (citing *Filartiga v Peña-Irala* (1980) 630 F 2d 876) it did not deprive the defendant state of immunity under the Foreign Sovereign Immunities Act 1976.

Admittedly these cases were civil cases, and they turned on the terms of the Sovereign Immunity Act in England and the Foreign Sovereign Immunity Act in the United States. But they lend no support to the view that an allegation of torture 'trumps' a plea of immunity. I return later to the suggestion that an allegation of torture excludes the principle of non-justiciability.

Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971 India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about one million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government.

In some cases the validity of these amnesties has been questioned. For example, the Committee against Torture (the body established to implement the Torture Convention under art 17) reported on the Argentine amnesty in 1990. In 1996 the Inter-American Commission investigated and reported on the Chilean amnesty. It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators. Notwithstanding the wide terms of the Torture Convention and the Taking of Hostages Convention, state practice does not at present support an obligation to

extradite or prosecute in all cases. Professor David Lloyd Jones (to whom we are all much indebted for his help as amicus) put the matter as follows:

> 'It is submitted that while there is some support for the view that generally applicable rules of state immunity should be displaced in cases concerning infringements of jus cogens, eg cases of torture, this does not yet constitute a rule of public international law. In particular it must be particularly doubtful whether there exists a rule of public international law requiring states not to accord immunity in such circumstances. Such a rule would be inconsistent with the practice of many states.'

Professor Greenwood took us back to the Nuremberg Charter, and drew attention to art 7, which provides:

> 'The official position of defendants, whether as Heads of State or responsible officials in Government Departments shall not be considered as freeing them from responsibility or mitigating punishment.'

One finds the same provision in almost identical language in art 7(2) of the Statute of the Tribunal for the Former Yugoslavia, art 6(2) of the Statute of the Tribunal for Rwanda and most recently in art 27 of the Rome Statute. Like the Divisional Court, I regard this as an argument more against the appellants than in their favour. The setting up of these special international tribunals for the trial of those accused of genocide and other crimes against humanity, including torture, shows that such crimes, when committed by heads of state or other responsible government officials cannot be tried in the ordinary courts of other states. If they could, there would be little need for the international tribunal.

Professor Greenwood's reference to these tribunals also provides the answer to those who say, with reason, that there must be a means of bringing such men as Senator Pinochet to justice. There is. He may be tried (1) in his own country, or (2) in any other country that can assert jurisdiction, provided his own country waives state immunity, or (3) before the International Criminal Court when it is established, or (4) before a specially constituted international court, such as those to which Professor Greenwood referred. But in the absence of waiver he cannot be tried in the municipal courts of other states.

On the first issue I would hold that Senator Pinochet is entitled to immunity as former head of state in respect of the crimes alleged against him on well-established principles of customary international law, which principles form part of the common law of England.

R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No 3)

HOUSE OF LORDS

LORD BROWNE-WILKINSON, LORD GOFF OF CHIEVELEY, LORD HOPE OF CRAIGHEAD, LORD HUTTON, LORD SAVILLE OF NEWDIGATE, LORD MILLETT AND LORD PHILLIPS OF WORTH MATRAVERS

18-21, 25-28 JANUARY, 1-4 FEBRUARY, 24 MARCH 1999

Extradition – Extradition crime – Definition – Conduct which if it occurred in the United Kingdom, would constitute an offence – Date when conduct must constitute an offence – Spanish government accusing former head of state of conspiracy to torture and torture outside United Kingdom between 1972 and 1990 – Torture abroad only becoming offence in United Kingdom in 1988 – Whether sufficient that torture an offence at date of extradition request – Criminal Justice Act 1988, s 134(1) – Extradition Act 1989, s 2.

Extradition – Immunity from extradition – Former head of state – Immunity for acts performed in exercise of official functions as head of state – Whether torture part of official functions of a head of state – Whether former head of state entitled to claim immunity from extradition for crime of torture – State Immunity Act 1978, s 20.

The applicant was the former head of state of Chile. Following his arrival in the United Kingdom in 1998, the Spanish government issued a request for his extradition, and the metropolitan stipendiary magistrate issued a warrant for his arrest charging the applicant, inter alia, with offences of torture or conspiracy to torture. Under s 134(1)[a] of the Criminal Justice Act 1988, which was enacted to implement the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention), torture by a public official or person acting in a public capacity was a criminal offence in the United Kingdom after 29 September 1988. The applicant applied for judicial review to quash the warrant. That application was allowed by the Queen's Bench Divisional Court which held that, as a former head of state, the applicant was entitled to immunity from extradition proceedings in the United Kingdom in respect of acts committed when he was head of state under s 20[b] of the State Immunity Act 1978. Accordingly, the warrant was quashed and the Commissioner of Police and the Spanish government appealed to the House of Lords. The Spanish government submitted further material in the form of draft charges in order to define more clearly the subject of its extradition request. Those charges included conspiracy to torture between January 1972 and September 1973 and between August 1973 and January 1990 (charge 2), conspiracy to torture between January 1972 and January 1990 (charge 4) and torture in June 1989 (charge 30). Two issues arose on the appeal: (i) whether the applicant had been accused of any extradition crimes within the meaning of s 2 of the Extradition Act 1989, and (ii) if so, whether the applicant enjoyed immunity in respect of such crimes.

a Section 134(1), so far as material, is set out at p 132 j to p 133 a, post

b Section 20, so far as material, is set out at p 138 b, post

Held – (1) On the true construction of s 2 of the 1989 Act, the references to conduct which 'if it occurred in the United Kingdom, would constitute an offence' required that conduct to be an offence in the United Kingdom at the date it took place and not merely at the date of the request for extradition. It followed, in the instant case (Lord Millett dissenting), that only those parts of the conspiracy to torture alleged in charges 2 and 4 which related to the period after 29 September 1988 and the act of torture alleged in charge 30 were extradition crimes (see p 107 *c d f*, p 118 *a c* to *e*, p 136 *j*, p 143 *h* to p 144 *a* p 145 *e* to *g*, p 153 *f g* p 168 *b*, p 178 *h* and p 180 *j*, post).

(2) (Lord Goff dissenting) Having regard to the provisions of the Torture Convention, the applicant had no immunity in respect of acts of torture and conspiracy to torture which he had allegedly committed after that Convention had been ratified by Spain, Chile and the United Kingdom. Such a conclusion was not affected by s 20(1)(a) of the 1978 Act, by which former heads of state enjoyed immunity in respect of acts done by them as part of their official functions. Accordingly, the extradition proceedings could continue in respect of the extradition crimes to which no immunity attached, and to that extent the appeal would be allowed (see p 113 *d e*, p 114 *g h*, p 115 *d* to *f*, p 152 *b* to *j*, p 155 *a* to *c*, p 163 *b*, p 165 *d*, p 166 *e j*, p 167 *h*, p 169 *h*, p 170 *d*, p 179 *e f*, p 180 *j*, p 190 *c* to *e j* and p 192 *b c g*, post).

Notes

For crimes which are extradition crimes, see 18 *Halsbury's Laws* (4th edn) paras 215–216.

For immunity of foreign states and sovereigns, see 18 *Halsbury's Laws* (4th edn) para 1548.

For the State Immunity Act 1978, s 20, see 10 *Halsbury's Statutes* (4th edn) (1995 reissue) 771.

For the Criminal Justice Act 1988, s 134, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 1079.

For the Extradition Act 1989, ss 2, 8, see 17 *Halsbury's Statutes* (4th edn) (1993 reissue) 560, 570.

Cases referred to in opinions

A-G of Israel v Eichmann (1961) 36 ILR 5, Jerusalem District Ct and Israel SC.
Al Adsani v Kuwait (1996) 107 ILR 536, CA.
Alcom Ltd v Republic of Colombia (Barclays Bank plc, garnishees) [1984] 2 All ER 6, [1984] AC 580, [1984] 2 WLR 750, HL.
Argentina v Amerada Hess Shipping Corp (1989) 109 S Ct 683, US SC.
Bingham's Case, McNair's International Law Opinions, Vol 1, p 196.
Brunswick (Duke) v King of Hanover (1848) 2 HL Cas 1, 9 ER 993.
Buck v A-G [1965] 1 All ER 882, [1965] Ch 475, [1965] 2 WLR 1033, CA.
Demjanjuk v Petrovsky (1985) 603 F Supp 1468, US District Ct (ND of Ohio); *affd* (1985) 776 F 2d 571, US Ct of Apps (6th Cir).
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I Congreso del Partido [1981] 2 All ER 1064, [1983] 1 AC 244, [1981] 3 WLR 328, HL.
Jaffe v Miller (No 1) (1993) 95 ILR 446, Ont CA.

Jimenez v Aristeguieta (1962) 311 F 2d 547, US Ct of Apps (5th Cir).
Lafontant v Aristide (1994) 844 F Supp 128, US District Ct (ED of New York).
Lotus Case, The, PCIJ, Series A, No 10.
Marcos v Federal Dept of Police (1990) 102 ILR 198, Swiss Fed Trib.
Persinger v Islamic Republic of Iran (1984) 729 F 2d 835, US Ct of Apps (DC Cir).
Piracy Jure Gentium, Re [1934] AC 586, [1934] All ER Rep 506, PC.
Princz v Federal Republic of Germany (1994) 26 F 3d 1166, US Ct of Apps (DC Cir).
Prosecutor v Anto Furundzija (10 December 1998, unreported), Int Trib.
R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International and ors intervening) [1998] 4 All ER 897, [1998] 3 WLR 1456, HL.
R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2) [1999] 1 All ER 577, [1998] 2 WLR 272, HL.
R v Sansom [1991] 2 All ER 145, [1991] 2 QB 130, [1991] 2 WLR 366, CA.
Rahimtoola v The Nizam of Hyderabad [1957] 3 All ER 441, [1958] AC 379, [1957] 3 WLR 884, HL.
Republic of Ireland v UK (1978) 2 EHRR 25, ECt HR.
Saltany v Reagan (1988) 702 F Supp 319, US District Ct (DC); *affd* (1992) 960 F 2d 1060, US Ct of Apps (DC Cir).
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Schooner Exchange v McFaddon (1812) 11 US (7 Cranch) 116, US SC.
Siderman de Blake v Argentina (1992) 965 F 2d 699, US Ct of Apps (9th Cir).
Smith v Libya (1995) 886 F Supp 306, US District Ct (ED NY); *affd* (1996) 101 F 3d 239, US Ct of Apps (2nd Cir).
Société Jean Dessès v Prince Farouk (1963) 65 ILR 37, Tribunal de grande instance of the Seine.
Liangsiriprasert v US Government [1990] 2 All ER 866, [1991] 1 AC 225, [1990] 3 WLR 606, PC.
Trendtex Trading Corp Ltd v Central Bank of Nigeria [1977] 1 All ER 881, [1977] QB 529, [1977] 2 WLR 356, CA.
Underhill v Hernandez (1897) 168 US 250, US SC.
US v Noriega (1990) 746 F Supp 1506, US District Ct (SD of Florida).
US v Noriega (1997) 117 F 3d 1206, US Ct of Apps (11th Cir).

Appeal

The Commissioner of Police of the Metropolis and the Spanish government appealed with leave from the decision of the Divisional Court of the Queen's Bench Division (Lord Bingham of Cornhill CJ, Collins and Richards JJ) ([1998] All ER (D) 509) delivered on 28 October 1998 allowing an application by Senator Augusto Pinochet Ugarte for judicial review by way of an order of certiorari to quash provisional warrants issued for his arrest under s 8(1) of the Extradition Act 1989. The Divisional Court certified that a point of law of general public importance was involved in the court's decision, namely the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed when he was head of state, and ordered that the applicant was not to be released from custody pending an appeal to the House of Lords. On 25 November 1988 the appeal was allowed ([1998] 4 All ER 897), but on 15 January 1999 the House of Lords set that decision aside and ordered the matter to be reheard ([1999] 1 All ER 577). Amnesty International and the Republic of Chile applied for and were granted leave to intervene in the proceedings before the House. Leave was also granted to Human Rights Watch to present written submissions. The facts are set out in the opinion of Lord Browne-Wilkinson.

Alun Jones QC, Christopher Greenwood, James Lewis and *Campaspe Lloyd-Jacob* (instructed by the *Crown Prosecution Service*, International Divison) for the Commissioner of Police and the government of Spain.

Clive Nicholls QC, Clare Montgomery QC, Helen Malcolm, James Cameron and *Julian Knowles* (instructed by *Kingsley Napley*) for Senator Pinochet.

David Lloyd Jones (instructed by the *Treasury Solicitor*) as amicus curiae.

Ian Brownlie QC, Peter Duffy QC, Michael Fordham and *David Scorey* (instructed by *Bindmans*) for Amnesty International.

Lawrence Collins QC of *Herbert Smith* for the Republic of Chile.

Their Lordships took time for consideration.

24 March 1999. The following opinions were delivered.

LORD BROWNE-WILKINSON. My Lords, as is well known, this case concerns an attempt by the government of Spain to extradite Senator Pinochet from this country to stand trial in Spain for crimes committed (primarily in Chile) during the period when Senator Pinochet was head of state in Chile. The interaction between the various legal issues which arise is complex. I will therefore seek, first, to give a short account of the legal principles which are in play in order that my exposition of the facts will be more intelligible.

Outline of the law

In general, a state only exercises criminal jurisdiction over offences which occur within its geographical boundaries. If a person who is alleged to have committed a crime in Spain is found in the United Kingdom, Spain can apply to the United Kingdom to extradite him to Spain. The power to extradite from the United Kingdom for an 'extradition crime' is now contained in the Extradition Act 1989. That Act defines what constitutes an 'extradition crime'. For the purposes of the present case, the most important requirement is that the conduct complained of must constitute a crime under the law both of Spain and of the United Kingdom. This is known as the double criminality rule.

Since the Nazi atrocities and the Nuremberg trials, international law has recognised a number of offences as being international crimes. Individual states have taken jurisdiction to try some international crimes even in cases where such crimes were not committed within the geographical boundaries of such states. The most important of such international crimes for present purposes is torture which is regulated by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention) (10 December 1984; UN General Assembly Resolution 39/46, Doc A/39/51; Cmnd 9593). The obligations placed on the United Kingdom by that convention (and on the other 110 or more signatory states who have adopted the convention) were incorporated into the law of the United Kingdom by s 134 of the Criminal Justice Act 1988. That Act came into force on 29 September 1988. Section 134 created a new crime under United Kingdom law, the crime of torture. As required by the Torture Convention 'all' torture wherever committed worldwide was made criminal under United Kingdom law and triable in the United Kingdom. No one has suggested that before s 134 came into effect torture committed outside the United Kingdom was a crime under United Kingdom law. Nor is it suggested that s 134 was retrospective so as to make torture committed outside the United Kingdom before 29 September 1988 a United Kingdom crime. Since torture outside the United Kingdom was not a crime under UK law until 29 September 1988, the principle of double criminality which requires an Act to be a crime under both the law of Spain and of the United Kingdom cannot be satisfied in relation to conduct before that date if the principle of double criminality requires the conduct to be criminal under United Kingdom law *at the date it was committed*. If, on the other hand, the double criminality rule only requires the conduct to be criminal under UK law *at the date of extradition* the rule was satisfied in relation to all torture alleged against Senator Pinochet whether it took place before or after 1988. The Spanish courts have held that they have jurisdiction over all the crimes alleged.

In these circumstances, the first question that has to be answered is whether or not the definition of an 'extradition crime' in the 1989 Act requires the conduct to be criminal under UK law at the date of commission or only at the date of extradition.

This question, although raised, was not decided in the Divisional Court. At the first hearing in this House it was apparently conceded that all the matters charged against Senator Pinochet were extradition crimes. It was only during the hearing before your Lordships that the importance of the point became fully apparent. As will appear, in my view only a limited number of the charges relied upon to extradite Senator Pinochet constitute extradition crimes since most of the conduct relied upon occurred long before 1988. In particular, I do not consider that torture committed outside the United Kingdom before 29 September 1988 was a crime under UK law. It follows that the main question discussed at the earlier stages of this case—is a former head of state entitled to sovereign immunity from arrest or prosecution in the UK for acts of torture—applies to far fewer charges. But the question of state immunity remains a point of crucial importance since, in my view, there is certain conduct of Senator Pinochet (albeit a small amount) which does constitute an extradition crime and would enable the Home Secretary (if he thought fit) to extradite Senator Pinochet to Spain unless he is entitled to state immunity. Accordingly, having identified which of the crimes alleged is an extradition crime, I will then go on to consider whether Senator Pinochet is entitled to immunity in respect of those crimes. But first I must state shortly the relevant facts.

[. . .]

Extradition crimes

As I understand the position, at the first hearing in the House of Lords the Crown Prosecution Service did not seek to rely on any conduct of Senator Pinochet occurring before 11 September 1973 (the date on which the coup occurred) or after 11 March 1990 (the date when Senator Pinochet retired as head of state). Accordingly, as the case was then presented, if Senator Pinochet was entitled to immunity such immunity covered the whole period of the alleged crimes. At the second hearing before your Lordships, however, the Crown Prosecution Service extended the period during which the crimes were said to have been committed: for example, see charges 1 and 4 where the conspiracies are said to have started on 1 January 1972, ie at a time before Senator Pinochet was head of state and therefore could be entitled to immunity. In consequence at the second hearing counsel for Senator Pinochet revived the submission that certain of the charges, in particular those relating to torture and conspiracy to torture, were not 'extradition crimes' because *at the time the acts were done* the acts were not criminal under the law of the United Kingdom. Once raised, this point could not be confined simply to the period (if any) before Senator Pinochet became head of state. If the double criminality rule requires it to be shown that at the date of the conduct such conduct would have been criminal under the law of the United Kingdom, any charge based on torture or conspiracy to torture occurring before 29 September 1988 (when s 134 of the 1988 Act came into force) could not be an 'extradition crime' and therefore could not in any event found an extradition order against Senator Pinochet.

Under s 1(1) of the 1989 Act a person who is accused of an 'extradition crime' may be arrested and returned to the state which has requested extradition. Section 2 defines 'extradition crime' so far as relevant as follows:

> '(1) In this Act, except in Schedule 1, "extradition crime" means—(a) conduct in the territory of a foreign state, a designated Commonwealth country or a colony which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, Commonwealth country or colony, is so punishable under that law; (b) an extra-territorial offence against the law of a foreign state, designated Commonwealth country or colony which is punishable under that law with imprisonment for a term of 12 months, or any greater punishment, and which satisfies—(i) the condition specified in subsection (2) below; or (ii) all the conditions specified in subsection (3) below.
>
> (2) The condition mentioned in subsection (1)(b)(i) above is that in corresponding circumstances equivalent conduct would constitute an extra-territorial offence against the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment.
>
> (3) The conditions mentioned in subsection (1)(b)(ii) above are—(a) that the foreign state, Commonwealth country or colony bases its jurisdiction on the nationality of the offender; (b) that the conduct constituting the offence occurred outside the United Kingdom; and (c) that, if it occurred in the United Kingdom, it would constitute an offence under the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment.'

The question is whether the references to conduct 'which, if it occurred in the United Kingdom, would constitute an offence' in sub-ss 2(1)(a) and (3)(c) refer to a hypothetical occurrence which took place at the date of the request for extradition (the request date) or the date of the actual conduct (the conduct date). In the Divisional Court, Lord Bingham CJ held that the words required the acts to be criminal only at the request date. He said

> 'I would however add on the retrospectivity point that the conduct alleged against the subject of the request need not in my judgment have been criminal here at the time the alleged crime was committed abroad. There is nothing in s 2 which so provides. What is necessary is that at the time of the extradition request the offence should be a criminal offence here and that it should then be punishable with 12 months' imprisonment or more. Otherwise s 2(1)(a) would have referred to conduct which would at the relevant time "have constituted" an offence, and s 2(3)(c) would have said "would have constituted". I therefore reject this argument.'

Lord Lloyd (who was the only member of the committee to express a view on this point at the first hearing) took the same view. He said ([1998] 4 All ER 897 at 921, [1998] 3 WLR 1456 at 1481):

> 'But I agree with the Divisional Court that this argument is bad. It involves a misunderstanding of s 2 of the 1989 Act. Section 2(1)(a) refers to conduct which *would* constitute an offence in the United Kingdom *now*. It does not refer to conduct which *would have* constituted an offence *then*.' (Lord Lloyd's emphasis.)

My Lords, if the words of s 2 are construed in isolation there is room for two possible views. I agree with Lord Bingham CJ and Lord Lloyd that, if read in isolation, the words 'if it occurred ... would constitute' read more easily as a reference to a hypothetical event happening now, ie at the request date, than to a past hypothetical event, ie at the conduct date. But in my judgment the right construction is not clear. The word 'it' in the phrase 'if it occurred' is a reference back to the actual conduct of the individual abroad which, by definition, is a past event. The question then would be 'would that past event (including the date of its occurrence) constitute an offence under the law of the United Kingdom'. The answer to that question would depend upon the United Kingdom law at that date.

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But of course it is not correct to construe these words in isolation and your Lordships had the advantage of submissions which strongly indicate that the relevant date is the conduct date. The starting point is that the 1989 Act regulates at least three types of extradition.

First, extradition to a Commonwealth country, to a colony or to a foreign country which is not a party to the European Convention on Extradition 1957 (the Extradition Convention) (Paris, 13 December 1957; TS 97 (1991); Cmnd 1762). In this class of case (which is not the present one) the procedure under Pt III of the 1989 Act requires the extradition request to be accompanied by evidence sufficient to justify arrest under the 1989 Act: s 7(2)(b). The Secretary of State then issues his authority to proceed which has to specify the offences under UK law which 'would be constituted by equivalent conduct in the United Kingdom': s 7(5). Under s 8 the magistrate is given power to issue a warrant of arrest if he is supplied with such evidence 'as would in his opinion justify the issue of a warrant for the arrest of a person accused': s 8(3). The committal court then has to consider, amongst other things, whether 'the evidence would be sufficient to warrant his trial if the extradition crime had taken place within jurisdiction of the court': s 9(8). In my judgment these provisions clearly indicate that the conduct must be criminal under the law of the United Kingdom at the conduct date and not only at the request date. The whole process of arrest and committal leads to a position where under s 9(8) the magistrate has to be satisfied that, under the law of the United Kingdom, if the conduct 'had occurred' the evidence was sufficient to warrant his trial. This is a clear reference to the position at the date when the conduct in fact occurred. Moreover, it is in my judgment compelling that the evidence which the magistrate has to consider has to be sufficient 'to warrant his trial'. Here what is under consideration is not an abstract concept whether a hypothetical case is criminal but of a hard practical matter—would this case in relation to this defendant be properly committed for trial if the conduct in question had happened in the United Kingdom? The answer to that question must be No unless at that date the conduct was criminal under the law of the United Kingdom.

The second class of case dealt with by the 1989 Act is where extradition is sought by a foreign state which, like Spain, is a party to the Extradition Convention. The requirements applicable in such a case are the same as those I have dealt with above in relation to the first class of case save that the requesting state does not have to present evidence to provide the basis on which the magistrate can make his order to commit. The requesting state merely supplies the information. But this provides no ground for distinguishing convention cases from the first class of case. The double criminality requirement must be the same in both classes of case.

Finally, the third class of case consists of those cases where there is an Order in Council in force under the Extradition Act 1870. In such cases, the procedure is ... Pt III of the 1989 Act but by Sch 1 to the 1989 Act: see s 1(3). ... relevant provisions of the 1870 Act, which ... to the passing of the ...

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the 1870 Act the double criminality rule required the conduct to be criminal under English law at the conduct date not at the request date. Paragraph 20 of Sch 1 to the 1989 Act provides—

> '... "extradition crime", in relation to any foreign state, is to be construed by reference to the Order in Council under section 2 of the Extradition Act 1870 applying to that state as it had effect immediately before the coming into force of this Act and to any amendments thereafter made to that Order ...'

Therefore in this class of case regulated by Sch 1 to the 1989 Act the same position applies as is formerly did under the 1870 Act, ie the conduct has to be a crime under English law at the conduct date. It would be extraordinary if the same Act required criminality under English law to be shown at one date for one form of extradition and at another date for another. But the case is stronger than that. We were taken through a trawl of the travaux préparatoires relating to the Extradition Convention and the departmental papers leading to the 1989 Act. They were singularly silent as to the relevant date. But they did disclose that there was no discussion as to changing the date on which the criminality under English law was to be demonstrated. It seems to me impossible that the legislature can have intended to change that date from the one which had applied for over a hundred years under the 1870 Act (ie the conduct date) by a side wind and without investigation.

The charges which allege extradition crimes

The consequences of requiring torture to be a crime under UK law at the date the torture was committed are considered in Lord Hope's speech. As he demonstrates, the charges of torture and conspiracy to torture relating to conduct before 29 September 1988 (the date on which s 134 came into effect) are not extraditable, ie only those parts of the conspiracy to torture alleged in charge 2 and of torture and conspiracy to torture alleged in charge 4 which relate to the period after that date and the single act of torture alleged in charge 10 are extradition crimes relating to torture.

Lord Hope also considers, and I agree, that the only charge relating to hostage-taking (charge 3) does not disclose any offence under the Taking of Hostages Act 1982. The statutory offence consists of taking and detaining a person (the hostage), so as to compel someone who is not the hostage to do or abstain from doing some act: s 1. But the only conduct relating to hostages which is charged alleges that the person detained (the so-called hostage) was to be forced to do something by reason of threats to injure other non-hostages which is the exact converse of the offence. The hostage charges therefore are bad and do not constitute extradition crimes.

Finally, Lord Hope's analysis shows that the charge of conspiracy in Spain to murder in Spain (charge 9) and such conspiracies in Spain to commit murder in Spain, and such conspiracies in Spain prior to 29 September 1988 to commit acts of torture in Spain, as can be shown to form part of the allegations in charge 4 are extradition crimes.

I must therefore consider whether, in relation to these two surviving ... Senator Pinochet enjoys sovereign immunity. But first it is ... Governor

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... fundamental standards of the international community. Furthermore, this ... torture are offences under its criminal law. Article 2(3) outlaws any defence of

The traditional subjects of international law are states not human beings. But consequent upon the war crime trials after the 1939–45 war, the international community came to recognise that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity. Although there may be legitimate doubts as to the legality of the Charter of the International Military Tribunal appended to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the Nuremberg Charter) (London, 8 August 1945; TS 27(1946); Cmd 6903), in my judgment those doubts were stilled by the Affirmation of the Principles of International Law recognised by the Charter of Nuremberg Tribunal adopted by the United Nations General Assembly on 11 December 1946 (see UN GA Resolution 95(I) (1946)). That affirmation affirmed the principles of international law recognised by the Nuremberg Charter and the judgment of the tribunal and directed the committee on the codification of international law to treat as a matter of primary importance plans for the formulation of the principles recognised in the Nuremberg Charter. At least from that date onwards the concept of personal liability for a crime in international law must have been part of international law. In the early years state torture was one of the elements of a war crime. In consequence torture, and various other crimes against humanity, were linked to war or at least to hostilities of some kind. But in the course of time this linkage with war fell away and torture, divorced from war or hostilities, became an international crime on its own: see *Oppenheim's International Law* (9th edn, 1992) vol 1, p 996; note 6 to art 18 of the ILC Draft Code of Crimes against the Peace and Security of Mankind; *Prosecutor v Anto Furundzija* (10 December 1998, unreported). Ever since 1945, torture on a large scale has featured as one of the crimes against humanity: see, for example, UN General Assembly Resolutions 3059 (1973), 3452 and 3453 (1975), Statutes of the International Criminal Tribunals for the Former Yugoslavia (art 5) (see the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the Statute of the Tribunal for the Former Yugoslavia) (UN Security Council Resolution 827 (1993)) and Rwanda (art 3) (see the Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994 (the Statute of the Tribunal for Rwanda) (UN SC Resolution 955 (1994)).

Moreover, the Republic of Chile accepted before your Lordships that the international law prohibiting torture has the character of jus cogens or a peremptory norm, ie one of those rules of international law which have a particular status. In *Furundzija*'s case at para 153, the tribunal said:

> 'Because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force ... Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.' (See also the cases cited in note 170 to the *Furundzija* case.)

The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may be punished by any state because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution': *Demjanjuk v Petrovsky* (1985) 603 F Supp 1468, 776 F 2d 571.

It was suggested by Miss Montgomery QC, for Senator Pinochet, that although torture was contrary to international law it was not strictly an international crime in the highest sense. In the light of the authorities to which I have referred (and there are many others) I have no doubt that long before the Torture Convention state torture was an international crime in the highest sense.

But there was no tribunal or court to punish international crimes of torture. Local courts could take jurisdiction: see *Demjanjuk's* case and *A-G of Israel v Eichmann* (1961) 36 ILR 5. But the objective was to ensure a general jurisdiction so that the torturer was not safe wherever he went. For example, in this case it is alleged that during the Pinochet regime torture was an official, although unacknowledged, weapon of government and that, when the regime was about to end, it passed legislation designed to afford an amnesty to those who had engaged in institutionalised torture. If these allegations are true, the fact that the local court had jurisdiction to deal with the international crime of torture was nothing to the point so long as the totalitarian regime remained in power: a totalitarian regime will not permit adjudication by its own courts on its own shortcomings. Hence the demand for some international machinery to repress state torture which is not dependent upon the local courts where the torture was committed. In the event, over 110 states (including Chile, Spain and the United Kingdom) became state parties to the Torture Convention. But it is far from clear that none of them practised state torture. What was needed therefore was an international system which could punish those who were guilty of torture and which did not permit the evasion of punishment by the torturer moving from one state to another. The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal—the torturer—could find no safe haven. Burgers and Danelius (respectively the chairman of the United Nations Working Group on the Torture Convention and the draftsmen of its first draft) say in their *Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) p 131 that it was 'an essential purpose [of the convention] to ensure that a torturer does not escape the consequences of his acts by going to another country'.

The Torture Convention

Article 1 of the convention defines torture as the intentional infliction of severe pain and of suffering with a view to achieving a wide range of purposes: '... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.' Article 2(1) requires each state party to prohibit torture on territory within its own jurisdiction and art 4 requires each state party to ensure that 'all' acts of torture are offences under its criminal law. Article 2(3) outlaws any defence of

superior orders. Under art 5(1) each state party has to establish its jurisdiction over torture (a) when committed within territory under its jurisdiction, (b) when the alleged offender is a national of that state, and (c) in certain circumstances, when the victim is a national of that state. Under art 5(2) a state party has to take jurisdiction over any alleged offender who is found within its territory. Article 6 contains provisions for a state in whose territory an alleged torturer is found to detain him, inquire into the position and notify the states referred to in art 5(1) and to indicate whether it intends to exercise jurisdiction. Under art 7 the state in whose territory the alleged torturer is found shall, if he is not extradited to any of the states mentioned in art 5(1), submit him to its authorities for the purpose of prosecution. Under art 8(1) torture is to be treated as an extraditable offence and under art 8(4) torture shall, for the purposes of extradition, be treated as having been committed not only in the place where it occurred but also in the state mentioned in art 5(1).

Who is an 'official' for the purposes of the Torture Convention?

The first question on the convention is to decide whether acts done by a head of state are done by 'a public official or a person acting in an official capacity' within the meaning of art 1. The same question arises under s 134 of the 1988 Act. The answer to both questions must be the same. In his judgment at the first hearing Lord Slynn ([1998] 4 All ER 897 at 916–917, [1998] 3 WLR 1456 at 1476–1477) held that a head of state was neither a public official nor a person acting in an official capacity within the meaning of art 1: he pointed out that there are a number of international conventions (for example the Statute of the Tribunal for the Former Yugoslavia and the Statute of the Tribunal for Rwanda) which refer specifically to heads of state when they intend to render them liable. Lord Lloyd apparently did not agree with Lord Slynn on this point since he thought that a head of state who was a torturer could be prosecuted in his own country, a view which could not be correct unless such head of state had conducted himself as a public official or in an official capacity.

It became clear during the argument that both the Republic of Chile and Senator Pinochet accepted that the acts alleged against Senator Pinochet, if proved, were acts done by a public official or person acting in an official capacity within the meaning of art 1. In my judgment these concessions were correctly made. Unless a head of state authorising or promoting torture is an official or acting in an official capacity within art 1, then he would not be guilty of the international crime of torture even within his own state. That plainly cannot have been the intention. In my judgment it would run completely contrary to the intention of the convention if there was anybody who could be exempt from guilt. The crucial question is not whether Senator Pinochet falls within the definition in art 1: he plainly does. The question is whether, even so, he is procedurally immune from process. To my mind the fact that a head of state can be guilty of the crime casts little, if any, light on the question whether he is immune from prosecution for that crime in a foreign state.

Universal jurisdiction

There was considerable argument before your Lordships concerning the extent of the jurisdiction to prosecute torturers conferred on states other than those mentioned in art 5(1). I do not find it necessary to seek an answer to all the points raised. It is enough that it is clear that in all circumstances, if the art 5(1) states do not choose to seek extradition or to prosecute the offender, other states must do so. The purpose of the convention was to introduce the principle aut dedere aut punire—either you extradite or you punish. Burgers and Danelius p 131.

Throughout the negotiation of the convention certain countries wished to make the exercise of jurisdiction under art 5(2) dependent upon the state assuming jurisdiction having refused extradition to an art 5(1) state. However, at a session in 1984 all objections to the principle of aut dedere aut punire were withdrawn: 'The inclusion of universal jurisdiction in the draft convention was no longer opposed by any delegation': Working Group on the Draft Convention UN Doc E/CN 4/1984/72, para 26. If there is no prosecution by, or extradition to, an art 5(1) state, the state where the alleged offender is found (which will have already taken him into custody under art 6) must exercise the jurisdiction under art 5(2) by prosecuting him under art 7(1).

I gather the following important points from the Torture Convention: (1) torture within the meaning of the convention can only be committed by 'a public official or other person acting in an official capacity,' but these words include a head of state. A single act of official torture is 'torture' within the convention; (2) superior orders provide no defence; (3) if the states with the most obvious jurisdiction (the art 5(1) states) do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, ie there is universal jurisdiction; (4) there is no express provision dealing with state immunity of heads of state, ambassadors or other officials. (5) Since Chile, Spain and the United Kingdom are all parties to the convention, they are bound under treaty by its provisions whether or not such provisions would apply in the absence of treaty obligation. Chile ratified the convention with effect from 30 October 1988 and the United Kingdom with effect from 8 December 1988.

State immunity

This is the point around which most of the argument turned. It is of considerable general importance internationally since, if Senator Pinochet is not entitled to immunity in relation to the acts of torture alleged to have occurred after 29 September 1988 it will be the first time, so far as counsel have discovered, when a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes.

Given the importance of the point, it is surprising how narrow is the area of dispute. There is general agreement between the parties as to the rules of statutory immunity and the rationale which underlies them. The issue is whether international law grants state immunity in relation to the international crime of torture and, if so, whether the Republic of Chile is entitled to claim such immunity even though Chile, Spain and the United Kingdom are all parties to the Torture Convention and therefore 'contractually' bound to give effect to its provisions from 8 December 1988 at the latest.

It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability. State immunity probably grew from the historical immunity of the person of the monarch. In any event, such personal immunity of the head of state persists to the present day: the head of state is entitled to the same immunity as the state itself. The diplomatic representative of the foreign state in the forum state is also afforded the same immunity in recognition of the dignity of the state which he represents. This immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attaching to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they

relate to matters done for the benefit of the state. Such immunity is said to be granted ratione personae.

What then when the ambassador leaves his post or the head of state is deposed? The position of the ambassador is covered by the Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention) (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565). After providing for immunity from arrest (art 29) and from criminal and civil jurisdiction (art 31), art 39(1) provides that the ambassador's privileges shall be enjoyed from the moment he takes up post; and sub-s 2(2) provides:

> 'When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission immunity shall continue to subsist.'

The continuing partial immunity of the ambassador after leaving post is of a different kind from that enjoyed ratione personae while he was in post. Since he is no longer the representative of the foreign state he merits no particular privileges or immunities as a person. However in order to preserve the integrity of the activities of the foreign state during the period when he was ambassador, it is necessary to provide that immunity is afforded to his *official* acts during his tenure in post. If this were not done the sovereign immunity of the state could be evaded by calling in question acts done during the previous ambassador's time. Accordingly under art 39(2) the ambassador, like any other official of the state, enjoys immunity in relation to his official acts done while he was an official. This limited immunity, ratione materiae, is to be contrasted with the former immunity ratione personae which gave complete immunity to all activities whether public or private.

In my judgment at common law a former head of state enjoys similar immunities, ratione materiae, once he ceases to be head of state. He too loses immunity ratione personae on ceasing to be head of state: see Sir Arthur Watts QC 'Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 Recueil des Cours p 88 and the cases there cited. He can be sued on his private obligations: *Ex King Farouk of Egypt v Christian Dior, SARL* (1957) 24 ILR 228 and *Jimenez v Aristeguieta* (1962) 311 F 2d 547. As ex-head of state he cannot be sued in respect of acts performed whilst head of state in his public capacity: *Hatch v Baez* (1876) 7 Hun 596. Thus, at common law, the position of the former ambassador and the former head of state appears to be much the same: both enjoy immunity for acts done in performance of their respective functions whilst in office.

I have belaboured this point because there is a strange feature of the United Kingdom law which I must mention shortly. The State Immunity Act 1978 modifies the traditional complete immunity normally afforded by the common law in claims for damages against foreign states. Such modifications are contained in Pt I of the 1978 Act. Section 16(1) provides that nothing in Pt I of the 1978 Act is to apply to criminal proceedings. Therefore Pt I has no direct application to the present case. However, Pt III of the 1978 Act contains s 20(1), which provides: 'Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—(a) a sovereign or other head of State ... as it applies to a head of a diplomatic mission ...'

The correct way in which to apply art 39(2) of the Vienna Convention to a former head of state is baffling. To what 'functions' is one to have regard? When do they cease since the former head of state almost certainly never arrives in this country let alone leaves it? Is a former head of state's immunity limited to the exercise of the functions of a member of the mission, or is that again something which is subject to 'necessary modification'? It is hard to resist the suspicion that something has gone wrong. A search was done on the parliamentary history of the section. From this it emerged that the original s 20(1)(a) read: '... a sovereign or other head of State *who is in the United Kingdom at the invitation or with the consent of the Government of the United Kingdom.*' On that basis the section would have been intelligible. However it was changed by a government amendment the mover of which said that the clause as introduced 'leaves an unsatisfactory doubt about the position of heads of state who are not in the United Kingdom'; he said that the amendment was to ensure that heads of state would be treated like heads of diplomatic missions 'irrespective of presence in the United Kingdom'. The parliamentary history, therefore, discloses no clear indication of what was intended. However, in my judgment it does not matter unduly since Parliament cannot have intended to give heads of state and former heads of state greater rights than they already enjoyed under international law. Accordingly, 'the necessary modifications' which need to be made will produce the result that a former head of state has immunity in relation to acts done as part of his official functions when head of state. Accordingly, in my judgment, Senator Pinochet as former head of state enjoys immunity ratione materiae in relation to acts done by him as head of state as part of his official functions as head of state.

The question then which has to be answered is whether the alleged organisation of state torture by Senator Pinochet (if proved) would constitute an act committed by Senator Pinochet as part of his official functions as head of state. It is not enough to say that it cannot be part of the functions of the head of state to commit a crime. Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity ratione materiae. The case needs to be analysed more closely.

Can it be said that the commission of a crime which is an international crime against humanity and jus cogens is an act done in an official capacity on behalf of the state? I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function. This is the view taken by Sir Arthur Watts, who said:

> 'While generally international law ... does not directly involve obligations on individuals personally, that is not always appropriate, particularly for acts of such seriousness that they constitute not merely international wrongs (in the broad sense of a civil wrong) but rather international crimes which offend against the public order of the international community. States are artificial legal persons: they can only act through the institutions and agencies of the State, which means, ultimately, through its officials and other individuals acting on behalf of the State. For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal State and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice. The idea that individuals who commit international crimes are *internationally* accountable for them has now become an accepted part of international law. Problems in this area—such as the non-existence of any standing international tribunal to have jurisdiction over such crimes, and the lack of agreement as to what acts are internationally criminal for this

purpose—have not affected the general acceptance of the principle of individual responsibility for international criminal conduct.' (Sir Arthur Watt's emphasis.) (See (1994) 247 Recueil des Cours p 82.)

Later, he said (p 84):

'It can no longer be doubted that as a matter of general customary international law a Head of State will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes.'

It can be objected that Sir Arthur was looking at those cases where the international community has established an international tribunal in relation to which the regulating document *expressly* makes the head of state subject to the tribunal's jurisdiction: see, for example, the Nuremberg Charter art 7; the Statute of the Tribunal for the Former Yugoslavia; the Statute of the Tribunal for Rwanda and the Statute of the International Criminal Court (the Rome Statute) (Rome, 17 July 1998, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court). It is true that in these cases it is expressly said that the head of state or former head of state is subject to the court's jurisdiction. But those are cases in which a new court with no existing jurisdiction is being established. The jurisdiction being established by the Torture Convention and the International Convention against the Taking of Hostages 1979 (the Taking of Hostages Convention) (New York, 18 December 1979; TS 81 (1983); Cmnd 7893) is one where existing domestic courts of all the countries are being authorised and required to take jurisdiction internationally. The question is whether, in this new type of jurisdiction, the only possible view is that those made subject to the jurisdiction of each of the state courts of the world in relation to torture are not entitled to claim immunity.

I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as jus cogens was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a worldwide universal jurisdiction. Further, it required all member states to ban and outlaw torture: art 2. How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises? Thirdly, an essential feature of the international crime of torture is that it must be committed 'by or with the acquiescence of a public official or other person acting in an official capacity.' As a result all defendants in torture cases will be state officials. Yet, if the former head of state has immunity, the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention.

Finally, and to my mind decisively, if the implementation of a torture regime is a public function giving rise to immunity ratione materiae, this produces bizarre results. Immunity ratione materiae applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state. Such immunity is necessary in order to prevent state immunity being circumvented by prosecuting or suing the official who, for

example, actually carried out the torture when a claim against the head of state would be precluded by the doctrine of immunity. If that applied to the present case, and if the implementation of the torture regime is to be treated as official business sufficient to found an immunity for the former head of state, it must also be official business sufficient to justify immunity for his inferiors who actually did the torturing. Under the convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the state of Chile is prepared to waive its right to its officials' immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention—to provide a system under which there is no safe haven for torturers—will have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.

For these reasons in my judgment if, as alleged, Senator Pinochet organised and authorised torture after 8 December 1988 he was not acting in any capacity which gives rise to immunity ratione materiae because such actions were contrary to international law, Chile had agreed to outlaw such conduct and Chile had agreed with the other parties to the Torture Convention that all signatory states should have jurisdiction to try official torture (as defined in the convention) even if such torture were committed in Chile.

As to the charges of murder and conspiracy to murder, no one has advanced any reason why the ordinary rules of immunity should not apply and Senator Pinochet is entitled to such immunity.

For these reasons, I would allow the appeal so as to permit the extradition proceedings to proceed on the allegation that torture in pursuance of a conspiracy to commit torture, including the single act of torture which is alleged in charge 30, was being committed by Senator Pinochet after 8 December 1988 when he lost his immunity.

In issuing to the magistrate an authority to proceed under s 7 of the 1989 Act, the Secretary of State proceeded on the basis that the whole range of torture charges and murder charges against Senator Pinochet would be the subject matter of the extradition proceedings. Your Lordships' decision excluding from consideration a very large number of those charges constitutes a substantial change in the circumstances. This will obviously require the Secretary of State to reconsider his decision under s 7 in the light of the changed circumstances.

LORD GOFF OF CHIEVELEY. My Lords,

I. INTRODUCTION

IV STATE IMMUNITY

Like my noble and learned friend Lord Browne-Wilkinson, I regard the principles of state immunity applicable in the case of heads of state and former heads of state as being relatively non-controversial, though the legislation on which they are now based, the State Immunity Act 1978, is in a strange form which can only be explained by the legislative history of the Act.

There can be no doubt, in my opinion, that the Act is intended to provide the sole source of English law on this topic. This is because the long title to the Act provides (inter alia) that the Act is 'to make new provision with respect to the immunities and privileges of heads of State'. Since in the present case we are concerned with immunity from criminal process, we can ignore Pt I (which does not apply to criminal proceedings) and turn straight to Pt III, and in particular to s 20. Section 20(1) provides as follows: 'Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—(a) a sovereign or other head of State ... as it applies to the head of a diplomatic mission ...' The function of the Diplomatic Privileges Act 1964 is to give effect to the Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention) (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565) in this country, the relevant articles of which are scheduled to the Act. The problem is, of course, how to identify the 'necessary modifications' when applying the Vienna Convention to heads of state. The nature of the problem is apparent when we turn to art 39 of the convention, which provides:

> '1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
>
> 2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.'

At first this seems very strange, when applied to a head of state. However, the scales fall from our eyes when we discover from the legislative history of the Act that it was originally intended to apply only to a sovereign or other head of state in this country at the invitation or with the consent of the government of this country, but was amended to provide also for the position of a head of state who was not in this country—hence the form of the long title, which was amended to apply simply to heads of state. We have, therefore, to be robust in applying the Vienna Convention to heads of state 'with the necessary modifications'. In the case of a head of state, there can be no question of tying art 39(1) or (2) to the territory of the receiving state, as was suggested on behalf of the appellants. Once that is realised, there seems to be no reason why the immunity of a head of state under the Act should not be construed as far as possible to accord with his immunity at customary international law, which provides the background against which this statute is set: see *Alcom Ltd v Republic of Colombia (Barclays Bank plc, garnishees)* [1984] 2 All ER 6 at 8, [1984] AC 580 at 597 per Lord Diplock. The effect is that a head of state will, under the statute as at international law, enjoy state immunity ratione personae so long as he is in office, and after he ceases to hold office will enjoy the concomitant immunity ratione materiae 'in respect of acts performed [by him] in the exercise of his functions [as head of state]', the critical question being 'whether the conduct was engaged in under colour of or in ostensible exercise of the Head of State's public authority' (see Sir Arthur Watts QC 'Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 Recueil des Cours p 56). In this context, the contrast is drawn between governmental acts, which are functions of the head of state, and private acts, which are not.

There can be no doubt that the immunity of a head of state, whether ratione personae or ratione materiae, applies to both civil and criminal proceedings. This is because the immunity applies to any form of legal process. The principle of state immunity is expressed in the Latin maxim par in parem non habet imperium, the effect of which is that one sovereign state does not adjudicate on the conduct of another. This principle applies as between states, and the head of a state is entitled to the same immunity as the state itself, as are the diplomatic representatives of the state. That the principle applies in criminal proceedings is reflected in the 1978 Act, in that there is no equivalent provision in Pt III of the 1978 Act to s 16(4) which provides that Pt I does not apply to criminal proceedings.

However, a question arises whether any limit is placed on the immunity in respect of criminal offences. Obviously the mere fact that the conduct is criminal does not of itself exclude the immunity, otherwise there would be little point in the immunity from criminal process; and this is so even where the crime is of a serious character. It follows, in my opinion, that the mere fact that the crime in question is torture does not exclude state immunity. It has however been stated by Sir Arthur Watts (at pp 81–84) that a head of state may be personally

responsible: '... for acts of such seriousness that they constitute not merely international wrongs (in the broad sense of a civil wrong) but rather international crimes which offend against the public order of the international community.' He then referred to a number of instruments, including the Charter of the International Military Tribunal appended to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the Nuremberg Charter) (London, 8 August 1945; TS 27(1946); Cmd 6903), the Charter of the Tokyo Tribunal (1948), the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind (provisionally adopted in 1988), and the Statute of the International Tribunal for the Prosecution of Person Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the Statute of the Tribunal for the Former Yugoslavia) (UN Security Council Resolution 827 (1993)), all of which expressly provide for the responsibility of heads of state, apart from the Charter of the Tokyo Tribunal which contains a similar provision regarding the official position of the accused. He concluded (p 84) that: 'It can no longer be doubted that as a matter of general customary international law a Head of State will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes.'

So far as torture is concerned, however, there are two points to be made. The first is that it is evident from this passage that Sir Arthur is referring not just to a specific crime as such, but to a crime which offends against the public order of the international community, for which a head of state may be internationally (his emphasis) accountable. The instruments cited by him show that he is concerned here with crimes against peace, war crimes and crimes against humanity. Originally these were limited to crimes committed in the context of armed conflict, as in the case of the Nuremberg and Tokyo Charters, and still in the case of the Statute of the Tribunal for the Former Yugoslavia, though there it is provided that the conflict can be international or internal in character. Subsequently, the context has been widened to include (inter alia) torture 'when committed as part of a widespread or systematic attack against a civilian population' on specified grounds. A provision to this effect appeared in the International Law Commission's Draft Code of Crimes of 1996 (which was, I understand, provisionally adopted in 1988), and also appeared in the Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994 (the Statute of the Tribunal for Rwanda) (UN SC Resolution 955 (1994)), and in the Statute of the International Criminal Court (the Rome Statute) (Rome, 17 July 1998, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court); and see also the view expressed obiter by the US Court of Appeals in *Siderman de Blake v Argentina* (1992) 965 F 2d 699 at 716. I should add that these developments were foreshadowed in the International Law Commission's Draft Code of Crimes of 1954; but this was not adopted, and there followed a long gap of about 35 years before the developments in the 1990s to which I have referred. It follows that these provisions are not capable of evidencing any settled practice in respect of torture outside the context of armed conflict until well after 1989 which is the latest date v[illegible] which we are concerned in the present case. The second point is that these [illegible]aments are all concerned

with international responsibility before international tribunals, and not with the exclusion of state immunity in criminal proceedings before national courts. This supports the conclusion of Lord Slynn ([1998] 4 All ER 897 at 914, [1998] 3 WLR 1456 at 1474) that: '... except in regard to crimes in particular situations before international tribunals these measures did not in general deal with the question whether otherwise existing immunities were taken away ...', with which I have already expressed my respectful agreement.

It follows that, if state immunity in respect of crimes of torture has been excluded at all in the present case, this can only have been done by the Torture Convention itself.

[. . .]

LORD HOPE OF CRAIGHEAD.

State immunity

Section 20(1)(a) of the State Immunity Act 1978 provides that the Diplomatic Privileges Act 1964 applies, subject to 'any necessary modifications', to a head of state as it applies to the head of a diplomatic mission. The generality of this provision is qualified by s 20(5), which restricts the immunity of the head of state in regard to civil proceedings in the same way as Pt I of the State Immunity Act 1978 does for diplomats. This reflects the fact that s 14 already provides that heads of state are subject to the restrictions in Pt I. But there is nothing in s 20 to indicate that the immunity from criminal proceedings which art 31.1 of the Vienna Convention as applied by the 1964 Act gives to diplomats is restricted in any way for heads of state. Section 23(3), which provides that the provisions of Pts I and II of the State Immunity Act 1978 do not operate retrospectively, makes no mention of Pt III. I infer from this that it was not thought that Pt III would give rise to the suggestion that it might operate in this way.

It seems to me to be clear therefore that what s 20(1) did was to give statutory force in the United Kingdom to customary international law as to the immunity which heads of state, and former heads of state in particular, enjoy from proceedings in foreign national courts. *Marcos v Federal Dept of Police* (1990) 102 ILR 198 at 203 supports this view, as it was held in that case that the art 39.2 immunity was available under customary international law to the former head of state of the Republic of the Philippines.

The question then is to what extent does the immunity which art 39.2 gives to former diplomats have to be modified in its application to former heads of state? The last sentence of art 39.2 deals with the position after the functions of the diplomat have come to an end. It provides that: '... with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.' It is clear that this provision is dealing with the residual immunity of the former diplomat ratione materiae, and not with the immunity ratione personae which he enjoys when still serving as a diplomat. In its application to a former head of state this provision raises two further questions: (1) does it include functions which the head of state performed outside the receiving state from whose jurisdiction he claims immunity, and (2) does it include acts of the kind alleged in this case—which Mr Alun Jones accepts were not private acts but were acts done in the exercise of the state's authority?

As to the first of these two further questions, it is plain that the functions of the head of state will vary from state to state according to the acts which he is expected or required to perform under the constitution of that state. In some countries which adhere to the traditions of constitutional monarchy these will be confined largely to ceremonial or symbolic acts which do not involve any executive responsibility. In others the head of state is head of the executive, with all the resources of the state at his command to do with as he thinks fit within the sphere of action which the constitution has given to him. I have not found anything in customary international law which would require us to confine the expression 'his functions' to the lowest common denominator. In my opinion the functions of the head of state are those which his own state enables or requires him to perform in the exercise of government. He performs these functions wherever he is for the time being as well as within his own state. These may include instructing or authorising acts to be done by those under his command at home or abroad in the interests of state security. It would not be right therefore to confine the immunity under art 39.2 to acts done in the receiving state. I would not regard this as a 'necessary modification' which has to be made to it under s 20(1) of the 1978 Act.

As to the second of those questions, I consider that the answer to it is well settled in customary international law. The test is whether they were private acts on the one hand or governmental acts done in the exercise of his authority as head of state on the other. It is whether the act was done to promote the state's interests—whether it was done for his own benefit or gratification or was done for the state: *US v Noriega* (1990) 746 F Supp 1506 at 1519–1521. Sir Arthur Watts QC in his Hague Lectures 'Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 Recueil des Cours p 56, said: 'The critical test would seem to be whether the conduct was engaged in under colour of or in ostensible exercise of the Head of State's public authority.' The sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate: *I Congreso del Partido* [1981] 2 All ER 1064 at 1070, [1983] 1 AC 244 at 262 per Lord Wilberforce. The fact that acts

done for the state have involved conduct which is criminal does not remove the immunity. Indeed the whole purpose of the residual immunity ratione materiae is to protect the former head of state against allegations of such conduct after he has left office. A head of state needs to be free to promote his own state's interests during the entire period when he is in office without being subjected to the prospect of detention, arrest or embarrassment in the foreign legal system of the receiving state: see *US v Noriega* (1990) 746 F Supp 1506 at 1519 and *Lafontant v Aristide* (1994) 844 F Supp 128 at 132. The conduct does not have to be lawful to attract the immunity.

It may be said that it is not one of the functions of a head of state to commit acts which are criminal according to the laws and constitution of his own state or which customary international law regards as criminal. But I consider that this approach to the question is unsound in principle. The principle of immunity ratione materiae protects all acts which the head of state has performed in the exercise of the functions of government. The purpose for which they were performed protects these acts from any further analysis. There are only two exceptions to this approach which customary international law has recognised. The first relates to criminal acts which the head of state did under the colour of his authority as head of state but which were in reality for his own pleasure or benefit. The examples which Lord Steyn gave ([1998] 4 All ER 897 at 945, [1998] 3 WLR 1456 at 1506) of the head of state who kills his gardener in a fit of rage or who orders victims to be tortured so that he may observe them in agony seem to me plainly to fall into this category and, for this reason, to lie outside the scope of the immunity. The second relates to acts the prohibition of which has acquired the status under international law of jus cogens. This compels all states to refrain from such conduct under any circumstances and imposes an obligation erga omnes to punish such conduct. As Sir Arthur Watts QC said, in respect of conduct constituting an international crime, such as war crimes, special considerations apply (see (1994) 247 Recueil des Cours p 89, note 198).

But even in the field of such high crimes as have achieved the status of jus cogens under customary international law there is as yet no general agreement that they are outside the immunity to which former heads of state are entitled from the jurisdiction of foreign national courts. There is plenty of source material to show that war crimes and crimes against humanity have been separated out from the generality of conduct which customary international law has come to regard as criminal. These developments were described by Lord Slynn of Hadley ([1998] 4 All ER 897 at 914, [1998] 3 WLR 1456 at 1474) and I respectfully agree with his analysis. As he said, except in regard to crimes in particular situations where international tribunals have been set up to deal with them and it is part of the arrangement that heads of state should not have any immunity, there is no general recognition that there has been a loss of immunity from the jurisdiction of foreign national courts. This led him to sum the matter up in this way:

> 'So it is necessary to consider what is needed, in the absence of a general international convention defining or cutting down head of state immunity, to define or limit the former head of state immunity in particular cases. In my opinion it is necessary to find provision in an international convention to which the state asserting, and the state being asked to refuse, the immunity of a former head of state for an official act is a party; the convention must clearly define a crime against international law and require or empower a state to prevent or prosecute the crime, whether or not committed in its jurisdiction and whether or not committed by one of its nationals; it must make it clear that a national court has jurisdiction to try a crime alleged

> against a former head of state, or that having been a head of state is no defence and that expressly or impliedly the immunity is not to apply so as to bar proceedings against him. The convention must be given the force of law in the national courts of the state; in a dualist country like the United Kingdom that means by legislation, so that with the necessary procedures and machinery the crime may be prosecuted there in accordance with the conditions to be found in the convention.' (See [1998] 4 All ER 897 at 915, [1998] 3 WLR 1456 at 1475.)

That is the background against which I now turn to the Torture Convention. As all the requirements which Lord Slynn laid out ([1998] 4 All ER 897 at 915, [1998] 3 WLR 1456 at 1475) save one are met by it, when read with the provisions of ss 134 and 135 of the 1988 Act which gave the force of law to the convention in this country, I need deal only with the one issue which remains. Did it make it clear that a former head of state has no immunity in the courts of a state which has jurisdiction to try the crime?

[. . .]

LORD HUTTON My Lords, the rehearing of this appeal has raised a number of separate issues which have been fully considered in the speech of my noble and learned friend Lord Browne-Wilkinson which I have had the benefit of reading in draft. I am in agreement with his reasoning and conclusion that the definition of an 'extradition crime' in the Extradition Act 1989 requires the conduct to be criminal under United Kingdom law at the date of commission. I am also in agreement with the analysis and conclusions of my noble and learned friend Lord Hope of Craighead as to the alleged crimes in respect of which Senator Pinochet could be extradited apart from any issue of immunity. I further agree with the view of Lord Browne-Wilkinson that Senator Pinochet is entitled to immunity in respect of charges of murder and conspiracy to murder, but I wish to make some observations on the issue of immunity claimed by Senator Pinochet in respect of charges of torture and conspiracy to torture.

Senator Pinochet ceased to be head of state of Chile on 11 March 1990, and he claims immunity as a former head of state. The distinction between the immunity of a serving head of state and the immunity of a former head of state is discussed by Sir Arthur Watts QC in his monograph in the *Hague Lectures* 'Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 Recueil des Cours at 53, 88, 89:

> 'It is well established that, put broadly, a Head of State enjoys a wide immunity from the criminal, civil and administrative jurisdiction of other States. This immunity—to the extent that it exists—becomes effective upon his assumption of office, even in respect of events occurring earlier. A Head of State's immunity is enjoyed in recognition of his very special status as a holder of his State's highest office ... A former Head of State is entitled under international law to none of the facilities, immunities and privileges which international law accords to heads of States in office ... After his loss of office

he may be sued in relation to his private activities, both those taking place while he was still Head of State, as well as those occurring before becoming Head of State or since ceasing to be Head of State ... A Head of State's official acts, performed in his public capacity as Head of State, are however subject to different considerations. Such acts are acts of the State rather than the Head of State's personal acts, and he cannot be sued for them even after he has ceased to be head of state. The position is similar to that of acts performed by an ambassador in the exercise of his functions for which immunity continues to subsist even after the ambassador's appointment has come to an end.'

Section 20 in Pt III of the State Immunity Act 1978 provides that, subject to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to a sovereign or other head of state, and s 2 of the 1964 Act provides that the articles of the Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention) (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565), set out in Sch 1 to the 1964 Act, shall have the force of law in the United Kingdom. The articles set out in Sch 1 include arts 29, 31 and 39. Article 29 provides: 'The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention.' Article 31(1) provides: 'A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State ...' Article 39 provides:

'1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceedings to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.'

One of the issues raised before your Lordships is whether s 20 of the 1978 Act relates only to the functions carried out by a foreign head of state when he is present within the United Kingdom, or whether it also applies to his actions in his own state or in another country. Section 20 is a difficult section to construe, but I am of opinion that, with the necessary modifications, the section applies the provisions of the 1964 Act, and therefore the articles of the Vienna Convention, to the actions of a head of state in his own country or elsewhere, so that, adopting the formulation of Lord Nicholls of Birkenhead in the earlier hearing ([1998] 4 All ER 897 at 939, [1998] 3 WLR 1456 at 1499), with the addition of seven words, the effect of s 20 of the 1978 Act, s 2 of the 1964 Act and of the articles of the Vienna Convention is that—

'A former head of state shall continue to enjoy immunity from the criminal jurisdiction of the United Kingdom with respect to acts performed by him in the exercise of his functions as a head of state.'

I consider, however, that s 20 did not change the law in relation to the immunity from criminal jurisdiction to which a former head of state was entitled

in the United Kingdom but gave statutory form to the relevant principle of international law which was part of the common law.

Therefore the crucial question for decision is whether, if committed, the acts of torture (in which term I include acts of torture and conspiracy to commit torture) alleged against Senator Pinochet were carried out by him in the performance of his functions as head of state. I say 'if committed' because it is not the function of your Lordships in this appeal to decide whether there is evidence to substantiate the allegations and Senator Pinochet denies them. Your Lordships had the advantage of very learned and detailed submissions from counsel for the parties and the interveners and from the amicus curiae (to which submissions I would wish to pay tribute) and numerous authorities from many jurisdictions were cited.

It is clear that the acts of torture which Senator Pinochet is alleged to have committed were not acts carried out in his private capacity for his personal gratification. If that had been the case they would have been private acts and it is not disputed that Senator Pinochet, once he had ceased to be head of state, would not be entitled to claim immunity in respect of them. It was submitted on his behalf that the acts of torture were carried out for the purposes of protecting the state and advancing its interests, as Senator Pinochet saw them, and were therefore governmental functions and were accordingly performed as functions of the head of state. It was further submitted that the immunity which Senator Pinochet claimed was the immunity of the State of Chile itself. In the present proceedings Chile intervened on behalf of Senator Pinochet and, in para 10 of its written case, Chile submitted:

'... the immunity of a head of state (or former head of state) is an aspect of state immunity ... Immunity of a head of state in his public capacity is equated with state immunity in international law ... Actions against representatives of a foreign government in respect of their governmental or official acts are in substance proceedings against the state which they represent, and the immunity is for the benefit of the state.'

Moreover, it was submitted that a number of authorities established that the immunity which a state is entitled to claim in respect of the acts of its former head of state or other public officials applies to acts which are unlawful and criminal.

My Lords, in considering the authorities it is necessary to have regard to a number of matters. First, it is a principle of international law that a state may not be sued in the courts of another state without its consent (although this principle is now subject to exceptions—the exceptions in the law of the United Kingdom being set out in the 1978 Act). Volume 18 of *Halsbury's Laws* (4th edn, 1977 issue) para 1548 stated.

'An independent sovereign state may not be sued in the English courts against its will and without its consent. This immunity from the jurisdiction is derived from the rules of international law, which in this respect have become part of the law of England. It is accorded upon the grounds that the exercise of jurisdiction would be incompatible with the dignity and independence of any superior authority enjoyed by every sovereign state. The principle involved is not founded upon any technical rules of law, but upon broad considerations of public policy, international law and comity.'

Secondly, many of the authorities cited by counsel were cases where an action in tort for damages was brought against a state. Thirdly, a state is responsible for the actions of its officials carried out in the ostensible performance of their official

functions notwithstanding that the acts are performed in excess of their proper functions. *Oppenheim's International Law* (9th edn, 1992) p 545 states:

> 'In addition to the international responsibility which a state clearly bears for the official and authorised acts of its administrative officials and members of its armed forces, a state also bears responsibility for internationally injurious acts committed by such persons in the ostensible exercise of their official functions but without that state's command or authorisation, or in excess of their competence according to the internal law of the state, or in mistaken, ill-judged or reckless execution of their official duties. A state's administrative officials and members of its armed forces are under its disciplinary control, and all acts of such persons in the apparent exercise of their official functions or invoking powers appropriate to their official character are *prima facie* attributable to the state. It is not always easy in practice to draw a clear distinction between unauthorised acts of officials and acts committed by them in their private capacity and for which the state is not directly responsible. With regard to members of armed forces the state will usually be held responsible for their acts if they have been committed in the line of duty, or in the presence of and under the orders of an official superior.'

Fourthly, in respect of the jurisdiction of the courts of the United Kingdom, foreign states are now expressly given immunity in civil proceedings (subject to certain express exceptions) by statute. Part I of the 1978 Act, relating to civil proceedings, provides in s 1(1): 'A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.' But Pt I of the Act has no application to criminal jurisdiction and s 16(4) in Pt I provides: 'This Part of this Act does not apply to criminal proceedings.' In the United States, the Foreign Sovereignty Immunities Act 1976 (28 USSC-1602) (FSIA) provides:

> 'Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the states except as provided in sections 1605 to 1607 of this chapter.'

Counsel for Senator Pinochet and for Chile relied on the decision of the Court of Appeal in *Al Adsani v Kuwait* (1996) 107 ILR 536 where the plaintiff brought an action for damages in tort against the government of Kuwait claiming that he had been tortured in Kuwait by officials of that government. The Court of Appeal upheld a claim by the government of Kuwait that it was entitled to immunity. Counsel for the plaintiff submitted that the rule of international law prohibiting torture is so fundamental that it is jus cogens which overrides all other principles of international law, including the principle of sovereign immunity. This submission was rejected by the Court of Appeal on the ground that immunity was given by s 1 of the FSIA 1976 and that the immunity was not subject to an overriding qualification in respect of torture or other acts contrary to international law which did not fall within one of the express exceptions contained in the succeeding sections of the Act. Ward LJ stated (at 549):

> 'Unfortunately, the Act is as plain as plain can be. A foreign State enjoys no immunity for acts causing personal injury committed in the United Kingdom and if that is expressly provided for the conclusion is impossible to escape that state immunity is afforded in respect of acts of torture committed outside this jurisdiction.' (Ward LJ's emphasis.)

A similar decision was given by the United States Court of Appeals, 9th Circuit, in *Siderman de Blake v Argentina* (1992) 965 F 2d 699 where an Argentine family brought an action for damages in tort against Argentina and one of its provinces for acts of torture by military officials. Argentina claimed that it was entitled to immunity under the FSIA 1976 and the Court of Appeals, with reluctance, upheld this claim. The argument advanced on behalf of the plaintiffs was similar to that advanced in *Al-Adsani's* case, but the court ruled that it was obliged to reject it because of the express provisions of the FSIA 1976, stating (at 718):

> 'The Sidermans argue that since sovereign immunity itself is a principle of international law, it is trumped by *jus cogens*. In short, they argue that when a state violates *jus cogens*, the cloak of immunity provided by international law falls away, leaving the state amenable to suit. As a matter of international law, the Sidermans' argument carries much force ... Unfortunately, we do not write on a clean slate. We deal not only with customary international law, but with an affirmative Act of Congress, the FSIA. We must interpret the FSIA through the prism of *Amerada Hess [Argentina v Amerada Hess Shipping Corp* (1989) 109 S Ct 683]. Nothing in the text or legislative history of the FSIA explicitly addresses the effect violations of *jus cogens* might have on the FSIA's cloak of immunity. Argentina contends that the Supreme Court's statement in *Amerada Hess* that the FSIA grants immunity "in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions," (109 S Ct 683 at 688), precludes the Sidermans' reliance on *jus cogens* in this case. Clearly, the FSIA does not specifically provide for an exception to sovereign immunity based on *jus cogens*. In *Amerada Hess*, the Court had no occasion to consider acts of torture or other violations of the peremptory norms of international law, and such violations admittedly differ in kind from transgressions of *jus dispositivum*, the norms derived from international agreements or customary international law with which the *Amerada Hess* Court dealt. However, the Court was so emphatic in its pronouncement "that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions," *Amerada Hess* (109 S Ct 683 at 688), and so specific in its formulation and method of approach (at 690) ("Having determined that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court, we turn to whether any of the exceptions enumerated in the Act apply here"), we conclude that if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.'

It has also been decided that where an action for damages in tort is brought against officials of a foreign state for actions carried out by them in ostensible exercise of their governmental functions, they can claim state immunity, notwithstanding that their actions were illegal. The state itself, if sued directly for damages in respect of their actions would be entitled to immunity and this immunity would be impaired if damages were awarded against the officials and then the state was obliged to indemnify them. In *Jaffe v Miller (No 2)* (1993) 95 ILR 446 government officials were sued in tort for laying false criminal charges and for conspiracy for kidnap, and it was held that they were entitled to claim

immunity. Finlayson JA, delivering the judgment of the Ontario Court of Appeal, stated (at 458–459):

> 'I also agree with the reasoning on this issue put forward by counsel for the respondents. Counsel submitted that to confer immunity on a government department of a foreign state but to deny immunity to the functionaries, who in the course of their duties performed the acts, would render the *State Immunity Act* ineffective. To avoid having its action dismissed on the ground of state immunity, a plaintiff would have only to sue the functionaries who performed the acts. In the event that the plaintiff recovered judgment, the foreign state would have to respond to it by indemnifying its functionaries, thus, through this indirect route, losing the immunity conferred on it by the Act. Counsel submitted that when functionaries are acting within the scope of their official duties, as in the present case, they come within the definition of "foreign state".'

In my opinion these authorities and similar authorities relating to claims for damages in tort against states and government officials do not support the claim of Senator Pinochet to immunity from criminal proceedings in the United Kingdom because the immunity given by Pt I of the 1978 Act does not apply to criminal proceedings.

Counsel for Senator Pinochet and for Chile further submitted that, under the rules of international law, courts recognise the immunity of a former head of state in respect of criminal acts committed by him in the purported exercise of governmental authority. In *Marcos v Federal Dept of Police* (1990) 102 ILR 198 the United States instituted criminal proceedings against Ferdinand Marcos, the former President of the Philippines, and his wife, who had been a minister in the Philippine government. They were accused of having abused their positions to acquire for themselves public funds and works of art. The United States authorities sought legal assistance from the Swiss authorities to obtain banking and other documents in order to clarify the nature of certain transactions which were the subject of investigation. Mr Marcos and his wife claimed immunity as the former leaders of a foreign state. In its judgment, the Swiss federal tribunal stated (at 203):

> "The immunity in relation to their functions which the appellants enjoyed therefore subsisted for those criminal acts which were allegedly committed while they were still exercising their powers in the Republic of the Philippines. The proceedings brought against them before the United States courts could therefore only be pursued pursuant to an express waiver by the State of the Philippines of the immunity which public international law grants them not as a personal advantage but for the benefit of the state over which they ruled."

The tribunal then held that the immunity could not be claimed by Mr and Mrs Marcos in Switzerland because there had been an express waiver by the State of the Philippines. However, I would observe that in that case Mr and Mrs Marcos were not accused of violating a rule of international law which had achieved the status of *jus cogens*.

Counsel also relied on the decision of the Federal Constitutional Court of the Federal Republic of Germany in *Re Former Syrian Ambassador to the German Democratic Republic* (unreported, 10 June 1997). In that case the former Syrian ambassador to the German Democratic Republic was alleged to have failed to prevent a terrorist group from removing a bag [illegible] explosives from the Syrian

Embassy, and a few hours later the explosives were used in an attack which left one person dead and more than 20 persons seriously injured. Following German unification and the demise of the German Democratic Republic in 1990, a district court in Berlin issued an arrest warrant against the former ambassador for complicity in murder and the causing of an explosion. The provincial court quashed the warrant but the Court of Appeal overruled the decision of the provincial court and restored the validity of the warrant, holding: 'The complainant was held to have contributed to the attack by omission. He had done nothing to prevent the explosives stored at the embassy building from being removed.' The former ambassador then lodged a constitutional complaint claiming that he was entitled to diplomatic immunity.

The constitutional court rejected the complaint and held that the obligation limited to the former German Democratic Republic to recognise the continuing immunity of the complainant, according to art 39(2) of the Vienna Convention, was not transferred to the Federal Republic of Germany by the international law of state succession.

Counsel for Senator Pinochet and for Chile relied on the following passage in the judgment of the constitutional court:

> 'For the categorization as an official act, it is irrelevant whether the conduct is legal according to the legal order of the Federal Republic of Germany ... and whether it fulfilled diplomatic functions in the sense of Article 3 of the [Vienna Convention] (see also the position taken by the [Swiss] Federal Political Department on 12 May [82] 1961, *Schweizerisches Jahrbuch für internationles Recht* (SJIR) 21 (1964) p 171, however, a different position was taken by the Federal Political Department on 31 January 1979, reproduced in SJIR 36 (1980), p 210 at 211). The commission of criminal acts does not simply concern the functions of the mission. If a criminal act was never considered as official, there would be no substance to continuing immunity. In addition, there is no relevant customary international law exception from diplomatic immunity here (see Preamble to the [Vienna Convention], 5th paragraph) ... Diplomatic immunity from criminal prosecution basically knows no exception for particularly serious violations of law. The diplomat can in such situations only be declared persona non grata.'

However, two further parts of the judgment are to be noted. First, it appears that the explosives were left in the embassy when the ambassador was absent, and his involvement began after the explosives had been left in the embassy. The report states:

> "The investigation conducted by the Public Prosecutor's Office concluded that the bombing attack was planned and carried out by a terrorist group. The complainant's sending state had, in a telegram, instructed its embassy in East Berlin to provide every possible assistance to the group. In the middle of August 1983 a member of the terrorist group appeared in the embassy while the complainant was absent and requested permission from the then third secretary to deposit a bag in the embassy. In view of the telegram, which was known to him, the third secretary granted that permission. Later, the member of the terrorist group returned to the embassy and asked the third secretary to transport the bag to West Berlin for him in an embassy car. At the same time, he revealed that there were explosives in the bag. The third secretary informed the complainant of the request. The complainant first ordered the [illegible]ird secretary to bring him the telegram, in order to read

through the text carefully once again, and then decided that the third secretary could refuse to provide the transportation. After the third secretary had returned and informed the terrorist of this, the terrorist took the bag, left the embassy and conveyed the explosive in an unknown manner towards West Berlin.'

It appears that these facts were taken into account by the constitutional court when it stated:

> 'The complainant acted in the exercise of his official functions as a member of the mission, within the meaning of Article 39(2)(2) of the [Vienna Convention], because he is charged with an omission that lay within the sphere of his responsibility as ambassador, and which is to that extent attributable to the sending state. The complainant was charged with having done nothing to prevent the return of the explosive. The Court of Appeal derived the relevant obligation of conduct out of the official responsibility of the complainant, as leader of the mission, for objects left in the embassy. After the explosive was left in the embassy and therefore in the complainant's sphere of control and responsibility, he was obligated, within the framework of his official duties, to decide how the explosive would then be dealt with. The complainant made such a decision, apparently on the basis of the telegraphed instruction from his sending state, so that private interests are not discernible (on the classification of activities on the basis of instructions see the Bingham Case in McNair *International Law Opinions* vol 1 (1956) p 196 at 197; Denza *Diplomatic Law* (1976) p 249; Salmon *Manuel de Droit Diplomatique* (1994) p 458). Instead, the complainant responded to the third secretary directly, in his position as the superior official, and, according to the view of the Court of Appeal, sought the best solution for the embassy.'

In addition the constitutional court stated that the rules of diplomatic law constitute a self-contained regime and drew a distinction between the immunity of a diplomat and the immunity of a head of state or governmental official and stated:

> 'Article 7 of the Charter of the International Military Tribunal of Nuremberg (UNTS Vol. 82, p. 279) [7] and following it Article 7(2) of the Statute of the International Criminal Tribunal for Yugoslavia (ILM 32 (1993), p. 1192), as well as Article 6(2) of the Statute for the International Criminal Tribunal for Rwanda (ILM 33 (1994), p. 1602) state that the official position of an accused, whether as a leader of a state or as a responsible official in a Government department, does not serve to free him from responsibility or mitigate punishment. Exemptions from immunity for cases of war criminals, violations of international law and offences against jus cogens under international law have been discussed as developments of this rule ... However, as the wording of Article 7 of the Charter of the International Military Tribunal of Nuremberg makes clear, these exceptions are relevant only to the applicable law of state organs that flows directly from it, in particular for members of the Government, and not to diplomatic immunity. State immunity and diplomatic immunity represent two different institutions of international law, each with their own rules, so that no inference can be drawn from any restrictions in one sphere as to possible effects in the other.'

Therefore I consider that the passage in the judgment relied on by counsel does not give support to the argument that acts of torture, although criminal, can be regarded as functions of a head of state.

In 1946 the General Assembly of the United Nations affirmed 'The principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal' and gave the following directive to its International Law Commission (the Affirmation of the Principles of International Law adopted by the United Nations General Assembly in December 1946 (UN GA Resolution 95(I) (1946)):

> 'This Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an international criminal code, of the principles recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.'

Pursuant to this directive, the 1950 Report of the International Law Commission to the General Assembly set out the following principle followed by the commentary contained in para 103:

> '*The fact that a person who committed an act which constitutes a crime under international law acted as head of state or responsible Government official does not relieve him from responsibility under international law.* 103. This principle is based on article 7 of the Charter of the Nürnberg Tribunal. According to the Charter and the judgment, the fact that an individual acted as head of state or responsible government official did not relieve him from international responsibility. "The principle of international law which, under certain circumstances, protects the representatives of a state", said the Tribunal, "cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment ...". The same idea was also expressed in the following passage of the findings: "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorising action moves outside its competence under international law."'

The International Law Commission's Draft Code of Offences against the Peace and Security of Mankind 1954 provided in art 3:

> 'The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code.'

The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the Statute of the Tribunal for the Former Yugoslavia) (UN Security Council Resolution 827 (1993)) provided in art 7(2):

> 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

The Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International

Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994 (the Statute of the Tribunal for Rwanda) (UN SC Resolution 955 (1994)) provided in art 6(2):

> 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official shall not relieve such person of criminal responsibility nor mitigate punishment.'

The International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind 1996 provided in art 7:

> 'The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State of Government, does not relieve him of criminal responsibility or mitigate punishment.'

In July 1998 in Rome the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Statute of the International Criminal Court 1998 (the Rome Statute) (Rome, 17 July 1998). The preamble to the statute states (inter alia):

> '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 measures at the national level and by enhancing international cooperation,
>
> *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 in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.
>
> *Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,
>
> *Resolved* to guarantee lasting respect for the enforcement of international justice,
>
> *Have agreed as follows* ...'

Article 5 of the statute provides that jurisdiction of the court shall be limited to the most serious crimes of concern to the international community as a whole which include crimes against humanity. Article 7 states that 'crime against humanity' means a number of acts including murder and torture when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 27 provides:

> '(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

Therefore since the end of the 1939–45 war there has been a clear recognition by the international community that certain crimes are so grave and so inhuman that they constitute crimes against international law and that the international community is under a duty to bring to justice a person who commits such crimes. Torture has been recognised as such a crime. The preamble to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention) (10 December 1984; UN GA Resolution 39/46, Doc A/39/51; Cmnd 9593), which has been signed by the United Kingdom, Spain and Chile and by over 100 other nations, states:

> 'Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that those rights derive from the inherent dignity of the human person, Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms, Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, Having regard also to the Declaration on Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975, Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world, Have agreed as follows ...'

Article 1 defines 'torture' as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes specified in the article, such as punishment, or intimidation, or obtaining information, or a confession, and such pain and suffering is inflicted 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.

The convention then contains a number of articles designed to make the measures against public officials who commit acts of torture more effective. In their handbook on the convention, Burgers and Danelius *Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* p 1 stated:

> 'It is expedient to redress at the outset a widespread misunderstanding as to the objective of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the General Assembly of the United Nations in 1984. Many people assume that the *Convention's* principal aim is to outlaw torture and other cruel, inhuman or degrading treatment or punishment. This assumption is not correct insofar as it would imply that the prohibition of these practices is established under international law by the *Convention* only and that this prohibition will be binding as a rule of

international law only for those States which have become parties to the *Convention*. On the contrary, the *Convention* is based upon the recognition that the above-mentioned practices are already outlawed under international law. The principal aim of the Convention is to strengthen the existing prohibition of such practices by a number of supportive measures.'

As your Lordships hold that there is no jurisdiction to extradite Senator Pinochet for acts of torture prior to 29 September 1988, which was the date on which s 134 of the Criminal Justice Act 1988 came into operation, it is unnecessary to decide when torture became a crime against international law prior to that date, but I am of opinion that acts of torture were clearly crimes against international law and that the prohibition of torture had required the status of *ius cogens* by that date.

The appellants accepted that in English courts a serving head of state is entitled (ratione personae) to immunity in respect of acts of torture which he has committed. Burgers and Danelius, referring to the obligation of a state party to the convention to establish its jurisdiction over offences of torture, recognise that some special immunities may exist in respect of acts of torture and state (p 131):

> 'Under international or national law, there may be certain limited exceptions to this rule, e.g. in relation to foreign diplomats, foreign troops, parliament members or other categories benefiting from special immunities, and such immunities may be accepted insofar as they apply to criminal acts in general and are not unduly extensive.'

It is also relevant to note that art 98(1) of the Rome Statute of the International Criminal Court 1998 provides:

> 'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the court can first obtain the cooperation of that third State for the waiver of the immunity.'

But the issue in the present case is whether Senator Pinochet, as a former head of state, can claim immunity (ratione materiae) on the grounds that acts of torture committed by him when he was head of state were done by him in exercise of his functions as head of state. In my opinion he is not entitled to claim such immunity. The Torture Convention 1984 makes it clear that no state is to tolerate torture by its public officials or by persons acting in an official capacity and art 2 requires that:

> '1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
>
> 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'

Article 4 provides:

> '1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
>
> 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.'

Article 7(1) provides:

> 'The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.'

I do not accept the argument advanced by counsel on behalf of Senator Pinochet that the provisions of the convention were designed to give one state jurisdiction to prosecute a public official of another state in the event of that state deciding to waive state immunity. I consider that the clear intent of the provisions is that an official of one state who has committed torture should be prosecuted if he is present in another state.

Therefore, having regard to the provisions of the Torture Convention, I do not consider that Senator Pinochet or Chile can claim that the commission of acts of torture after 29 September 1988 were functions of the head of state. The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime. It is relevant to observe that in 1996 the military government of Chile informed a United Nations working group on human rights violations in Chile that torture was unconditionally prohibited in Chile, that the constitutional prohibition against torture was fully enforced and that:

> 'It is therefore apparent that the practice of inflicting unlawful ill-treatment has not been instituted in our country as is implied by the resolution [a UN resolution critical of Chile] and that such ill-treatment is not tolerated; on the contrary, a serious, comprehensive and coherent body of provisions exist to prevent the occurrence of such ill-treatment and to punish those responsible for any type of abuse.'

It is also relevant to note that, in his opening oral submissions on behalf of Chile, Dr Collins QC stated:

> '... the Government of Chile, several of whose present members were in prison or exile during those years, deplores the fact that the governmental authorities of the period of the dictatorship committed major violations of human rights in Chile. It reaffirms its commitment to human rights, including the prohibition of torture.'

In its written submissions (which were repeated by Dr Collins in his oral submissions) Chile stated:

> 'The Republic intervenes to assert its own interest and right to have these matters dealt with in Chile. The purpose of the intervention is not to defend the actions of Senator Pinochet whilst he was head of state. Nor is the purpose to prevent him from being investigated and tried for any crime he is alleged to have committed whilst in office, provided that any investigation and trial takes place in the only appropriate courts, namely those of Chile. The democratically elected Government of the Republic of Chile upholds the commitment of the Republic under international conventions to the maintenance and promotion of human rights. The position of the Chilean

Government on state immunity is not intended as a personal shield for Senator Pinochet, but is intended to defend Chilean national sovereignty, in accordance with generally accepted principles of international law. Its plea, therefore, does not absolve Senator Pinochet from responsibility in Chile if the acts alleged against him are proved.'

My Lords, the position taken by the democratically elected government of Chile that it desires to defend Chilean national sovereignty and considers that any investigation and trial of Senator Pinochet should take place in Chile is understandable. But in my opinion that is not the issue which is before your Lordships; the issue is whether the commission of acts of torture taking place after 29 September 1988 was a function of the head of state of Chile under international law. For the reasons which I have given I consider that it was not.

Article 32(2) of the Vienna Convention 1961 set out in Sch 1 to the Diplomatic Privileges Act 1964 provides that 'waiver must always be express'. I consider, with respect, that the conclusion that after 29 September 1988 the commission of acts of torture was not, under international law, a function of the head of state of Chile does not involve the view that Chile is to be taken as having impliedly waived the immunity of a former head of state. In my opinion there has been no waiver of the immunity of a former head of state in respect of his functions as head of state. My conclusion that Senator Pinochet is not entitled to immunity is based on the view that the commission of acts of torture is not a function of a head of state, and therefore, in this case, the immunity to which Senator Pinochet is entitled as a former head of state does not arise in relation to, and does not attach to, acts of torture.

A number of international instruments define a crime against humanity as one which is committed on a large scale. Article 18 of the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind 1996 provides:

> 'A crime against humanity means any of the following acts, when committed in a systematic manner on a large scale or instigated or directed by a Government or by any organization or a group: (a) murder, (b) extermination; (c) torture ...'

Article 7(1) of the Rome Statute of the International Criminal Court 1988 provides:

> 'For the purposes of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination ... (f) Torture ...'

However, art 4 of the Torture Convention 1984 provides: 'Each State Party shall ensure that *all* acts of torture are offences under its criminal law.' (My emphasis.)

Therefore I consider that a single act of torture carried out, or instigated by, a public official, or other person acting in a official capacity constitutes a crime against international law, and that torture does not become an international crime only when it is committed or instigated on a large scale. Accordingly, I am of the opinion that Senator Pinochet cannot claim that a single act of torture, or a small number of acts of torture carried out by him did not constitute international crimes and did not constitute acts committed outside the ambit of his functions as head of state.

For the reasons given by *Oppenheim's International Law* (9th edn, 1992) p 545, which I have cited in an earlier part of this judgment, I consider that under international law Chile is responsible for acts of torture carried out by Senator Pinochet, but could claim state immunity if sued for damages for such acts in a court in the United Kingdom. Senator Pinochet could also claim immunity if sued in civil proceedings for damages under the principle stated in *Jaffe v Miller (No 2)* (1993) 95 ILR 446. But I am of the opinion that there is no inconsistency between Chile and Senator Pinochet's entitlement to claim immunity if sued in civil proceedings for damages and Senator Pinochet's lack of entitlement to claim immunity in criminal proceedings for torture brought against him personally. This distinction between the responsibility of the state for the improper and unauthorised acts of a state official outside the scope of his functions and the individual responsibility of that official in criminal proceedings for an international crime is recognised in art 4 and the commentary thereon in the International Law Commission's 1996 Draft Code.

> '*Article 4—Responsibility of States* The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.
>
> *Commentary* (1) Although, as made clear by article 2, the present Code addresses matters relating to the responsibility of individuals for the crimes set out in Part II, it is possible, indeed likely, as pointed out in the commentary to article 2, that an individual may commit a crime against the peace and security of mankind as an "agent of the State", "on behalf of the State", "in the name of the State" or even in a de facto relationship with the State, without being vested with any legal power. (2) The "without prejudice" clause contained in article 4 indicates that the present Code is without prejudice to any question of the responsibility of a State under international law for a crime committed by one of its agents. As the Commission already emphasized in the commentary to article 19 of the draft articles on State responsibility, the punishment of individuals who are organs of the State "certainly does not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs". The State may thus remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime.'

Therefore, for the reasons which I have given, I am of opinion that Senator Pinochet is not entitled to claim immunity in the extradition proceedings in respect of conspiracy to torture and acts of torture alleged to have been committed by him after 29 September 1988 and, to that extent, I would allow the appeal. However I am in agreement with the view of Lord Browne-Wilkinson that the Secretary of State should reconsider his decision under s 7 of the Extradition Act 1989 in the light of the changed circumstances arising from your Lordships' decision.

LORD MILLETT. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Browne-Wilkinson. Save in one respect, I agree with his reasoning and conclusions. Since the one respect in which I differ is of profound importance to the outcome of this appeal, I propose to set out my own process of reasoning at rather more length than I might otherwise have done.

State immunity is not a personal right. It is an attribute of the sovereignty of the state. The immunity which is in question in the present case, therefore, belongs to the Republic of Chile, not to Senator Pinochet. It may be asserted or waived by the state, but where it is waived by treaty or convention the waiver must be express. So much is not in dispute.

The doctrine of state immunity is the product of the classical theory of international law. This taught that states were the only actors on the international plane; the rights of individuals were not the subject of international law. States were sovereign and equal: it followed that one state could not be impleaded in the national courts of another; par in parem non habet imperium. States were obliged to abstain from interfering in the internal affairs of one another. International law was not concerned with the way in which a sovereign state treated its own nationals in its own territory. It is a cliché of modern international law that the classical theory no longer prevails in its unadulterated form. The idea that individuals who commit crimes, recognised as such by international law, may be held internationally accountable for their actions, is now an accepted doctrine of international law. The adoption by most major jurisdictions of the restrictive theory of state immunity, enacted into English law by Pt I of the State Immunity Act 1978, has made major inroads into the doctrine as a bar to the jurisdiction of national courts to entertain civil proceedings against foreign states. The question before your Lordships is whether a parallel, though in some respects opposite, development has taken place so as to restrict the availability of state immunity as a bar to the criminal jurisdiction of national courts.

Two overlapping immunities are recognised by international law: immunity ratione personae and immunity ratione materiae. They are quite different and have different rationales.

Immunity ratione personae is a status immunity. An individual who enjoys its protection does so because of his official status. It enures for his benefit only so long as he holds office. While he does so he enjoys absolute immunity from the civil and criminal jurisdiction of the national courts of foreign states. But it is only narrowly available. It is confined to serving heads of state and heads of diplomatic missions, their families and servants. It is not available to serving heads of government who are not also heads of state, military commanders and those in charge of the security forces, or their subordinates. It would have been available to Hitler but not to Mussolini or Tojo. It is reflected in English law by s 20(1) of the 1978 Act, enacting customary international law and the Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention) (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565).

The immunity of a serving head of state is enjoyed by reason of his special status as the holder of his state's highest office. He is regarded as the personal embodiment of the state itself. It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts or private affairs. His person is inviolable; he is not liable to be arrested or detained on any ground whatever. The head of a diplomatic mission represents his head of state and thus embodies the sending state in the territory of the receiving state. While he remains in office he is entitled to the same absolute immunity as his head of state, in relation both to his public and private acts.

This immunity is not in issue in the present case. Senator Pinochet is not a serving head of state. If he were, he could not be extradited. It would be an intolerable affront to the Republic of Chile to arrest him or detain him.

Immunity ratione materiae is very different. This is a subject matter immunity. It operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another, and only incidentally confers immunity on the individual. It is therefore a narrower immunity but it is more widely available. It is available to former heads of state and heads of diplomatic missions, and any one whose conduct in the exercise of the authority of the state is afterwards called into question, whether he acted as head of government, government minister, military commander or chief of police, or subordinate public official. The immunity is the same whatever the rank of the office holder. This too is common ground. It is an immunity from the civil and criminal jurisdiction of foreign national courts, but only in respect of governmental or official acts. The exercise of authority by the military and security forces of the state is the paradigm example of such conduct. The immunity finds its rationale in the equality of sovereign states and the doctrine of non-interference in the internal affairs of other states: see *Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1, 9 ER 993, *Hatch v Baez* (1876) 7 Hun 596 and *Underhill v Hernandez* (1897) 168 US 250. These hold that the courts of one state

cannot sit in judgment on the sovereign acts of another. The immunity is sometimes also justified by the need to prevent the serving head of state, or diplomat, from being inhibited in the performance of his official duties by fear of the consequences after he has ceased to hold office. This last basis can hardly be prayed in aid to support the availability of the immunity in respect of criminal activities prohibited by international law.

Given its scope and rationale, it is closely similar to, and may be indistinguishable from, aspects of the anglo-american 'Act of State' doctrine. As I understand the difference between them, state immunity is a creature of international law and operates as a plea in bar to the jurisdiction of the national court, whereas the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state.

Immunity ratione materiae is given statutory form in English law by the combined effect of s 20(1) of the 1978 Act, the Diplomatic Privileges Act 1964 and art 39(2) of the Vienna Convention. The 1978 Act is not without its difficulties. The former head of state is given the same immunity 'subject to all necessary modifications' as a former diplomat, who continues to enjoy immunity in respect of acts committed by him 'in the exercise of his functions.' The functions of a diplomat are limited to diplomatic activities, ie acts performed in his representative role in the receiving state. He has no broader immunity in respect of official or governmental acts not performed in exercise of his diplomatic functions: see Dinstein 'Diplomatic Immunity from Jurisdiction Ratione Materiae' (1966) 15 ICLQ 76. There is, therefore, a powerful argument for holding that, by a parity of reasoning, the statutory immunity conferred on a former head of state by the 1978 Act is confined to acts performed in his capacity as head of state, ie in his representative role. If so, the statutory immunity would not protect him in respect of official or governmental acts which are not distinctive of a head of state, but which he performed in some other official capacity, whether as head of government, commander in chief or party leader. It is however, not necessary to decide whether this is the case, for any narrow statutory immunity is subsumed in the wider immunity in respect of other official or governmental acts under customary international law.

The charges brought against Senator Pinochet are concerned with his public and official acts, first as commander in chief of the Chilean army and later as head of state. He is accused of having embarked on a widespread and systematic reign of terror in order to obtain power and then to maintain it. If the allegations against him are true, he deliberately employed torture as an instrument of state policy. As international law stood on the eve of the 1939–45 war, his conduct as head of state after he seized power would probably have attracted immunity ratione materiae. If so, I am of opinion that it would have been equally true of his conduct during the period before the coup was successful. He was not then, of course, head of state. But he took advantage of his position as commander in chief of the army and made use of the existing military chain of command to deploy the armed forces of the state against its constitutional government. These were not private acts. They were official and governmental or sovereign acts by any standard.

The immunity is available whether the acts in question are illegal or unconstitutional or otherwise unauthorised under the internal law of the state, since the whole purpose of state immunity is to prevent the legality of such acts from being adjudicated upon in the municipal courts of a foreign state. A sovereign state has the exclusive right to determine what is and is not illegal or

unconstitutional under its own domestic law. Even before the end of the 1939–45 war, however, it was questionable whether the doctrine of state immunity accorded protection in respect of conduct which was prohibited by international law. As early as 1841, according to Quincy Wright (see (1947) 41 AJIL 71), many commentators held the view that 'the Government's authority could not confer immunity upon its agents for acts beyond its powers under international law'. Thus state immunity did not provide a defence to a crime against the rules of war: see Sir Hersch Lauterpacht 'The Subjects of the Law of Nations' (1947) 63 LQR 438. Writing in 1946 before the Nuremberg Tribunal delivered its judgment and commenting on the seminal judgment of Marshall CJ in *Schooner Exchange v McFaddon* (1812) 11 US (7 Cranch) 116, Sheldon Glueck 'The Nuemberg Trial and Aggressive War' (1946) 59 Harv LR 396 at 426–427 observed:

> '... as Marshall implied, even in an age when the doctrine of sovereignty had a strong hold, the non-liability of agents of a State for "acts of State" must rationally be based on the assumption that no member of the Family of Nations will order its agents to commit flagrant violations of international and criminal law ... in modern times a State is—*ex hypothesi*—incapable of ordering or ratifying acts which are not only criminal according to generally accepted principles of domestic penal law but also contrary to that international law to which all States are perforce subject. Its agents, in performing such acts, are therefore acting outside their legitimate scope; and must, in consequence be held personally liable for their wrongful conduct.'

It seems likely that Glueck was contemplating trial before municipal courts, for more than half a century was to pass before the establishment of a truly international criminal tribunal. This would also be consistent with the tenor of his argument that the concept of sovereignty was of relatively recent origin and had been mistakenly raised to what he described as the 'status of some holy fetish'.

Whether conduct contrary to the peremptory norms of international law attracted state immunity from the jurisdiction of national courts, however, was largely academic in 1946, since the criminal jurisdiction of such courts was generally restricted to offences committed within the territory of the forum state or elsewhere by the nationals of that state. In this connection it is important to appreciate that the International Military Tribunal (the Nuremberg Tribunal) which was established by the four allied powers at the conclusion of the 1939–45 war to try the major war criminals was not, strictly speaking, an international court or tribunal. As Sir Hersch Lauterpacht explained in *Oppenheim's International Law* (7th edn, 1952) vol II, pp 580–581, the tribunal was—

> 'the joint exercise by the four States which established the Tribunal, of a right which each of them was entitled to exercise separately on its own responsibility in accordance with international law.'

In its judgment, the tribunal described the making of the Charter of the International Military Tribunal appended to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the Nuremberg Charter) (London, 8 August 1945; TS 27 (1946); Cmd 6903) as an exercise of sovereign legislative power by the countries to which the German Reich had unconditionally surrendered, and of the undoubted right of those countries to legislate for the occupied territories which had been recognised by the whole civilised world.

Article 7 of the Nuremb Charter provided:

> 'The official position of defendants, *whether as Heads of State or responsible officials in Government Departments* shall not be considered as freeing them from responsibility or mitigating punishment.' (My emphasis.)

In its judgment, the tribunal ruled (see 'Trial of Major War Criminals before the International Military Tribunal, Nuremberg, 1 November 1945—1 October 1946', 42 vols. IMT Secretariat)

> '... the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates *the rules of war cannot obtain immunity while acting in pursuance of the authority of the State* if the State in authorising action moves outside its competence under international law ... The principle of international law, which under certain circumstances protects the representatives of a State, *cannot be applied to acts which are condemned as criminal by international law.*' (My emphasis.)

The great majority of war criminals were tried in the territories where the crimes were committed. As in the case of the major war criminals tried at Nuremberg, they were generally (though not always) tried by national courts or by courts established by the occupying powers. The jurisdiction of these courts has never been questioned and could be said to be territorial. But everywhere the plea of state immunity was rejected in respect of atrocities committed in the furtherance of state policy in the course of the 1939–45 war; and nowhere was this justified on the narrow (though available) ground that there is no immunity in respect of crimes committed in the territory of the forum state.

The principles of the Nuremberg Charter and the judgment of the tribunal were unanimously affirmed by the Affirmation of the Principles of International Law adopted by the United Nations General Assembly in December 1946 (UN GA Resolution 95(I) (1946)). Thereafter it was no longer possible to deny that individuals could be held criminally responsibility for war crimes and crimes against peace and were not protected by state immunity from the jurisdiction of national courts. Moreover, while it was assumed that the trial would normally take place in the territory where the crimes were committed, it was not suggested that this was the only place where the trial could take place.

The Nuremberg Tribunal ruled that crimes against humanity fell within its jurisdiction only if they were committed in the execution of, or in connection with, war crimes or crimes against peace. But this appears to have been a jurisdictional restriction based on the language of the charter. There is no reason to suppose that it was considered to be a substantive requirement of international law. The need to establish such a connection was natural in the immediate aftermath of the 1939–45 war. As memory of the war receded, it was abandoned.

In 1946 the General Assembly had entrusted the formulation of the principles of international law recognised in the Nuremberg Charter and the Judgment of the Tribunal to the International Law Commission. It reported in 1954. It rejected the principle that international criminal responsibility for crimes against humanity should be limited to crimes committed in connection with war crimes or crimes against peace. It was, however, necessary to distinguish international crimes from ordinary domestic offences. For this purpose, the commission proposed that acts would constitute international crimes only if they were committed at the instigation or the toleration of state authorities. This is the distinction which was later adopted in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention) (10 December 1984; UN General Assembly Resolution 39/46, Doc A/39/51; Cmnd 9593). In my judgment it is of critical importance in relation to the concept of immunity ratione materiae. The very official or governmental character of the acts, which is necessary to found a claim to immunity ratione materiae and which still operates as a bar to the civil jurisdiction of national courts, was now to be the essential element which made the acts an international crime. It was, no doubt, for this reason that art 3 of the commission's Draft Code against the Peace and Security of Mankind 1954 (see Yearbook of the International Law Commission 1954, Vol II) provided: 'The fact that a person acted as Head of State or as a responsible government official does not relieve him of responsibility for committing any of the offences defined in the Code.'

The landmark decision of the Supreme Court of Israel in *A-G of Israel v Eichmann* (1961) 36 ILR 5 is also of great significance. Eichmann had been a very senior official of the Third Reich. He was in charge of Department IV D-4 of the Reich main security office, the department charged with the implementation of the 'final solution', and subordinate only to Heydrich and Himmler. He was abducted from Argentina and brought to Israel, where he was tried in the District Court for Tel Aviv. His appeal against conviction was dismissed by the Supreme Court. The means by which he was brought to Israel to face trial has been criticised by academic writers, but Israel's right to assert jurisdiction over the offences has never been questioned.

The court dealt separately with the questions of jurisdiction and act of state. Israel was not a belligerent in the 1939–45 war, which ended three years before the state was founded. Nor were the offences committed within its territory. The district court found support for its jurisdiction in the historic link between the State of Israel and the Jewish people. The Supreme Court preferred to concentrate on the international and universal character of the crimes of which the accused had been convicted, not least because some of them were directed against non-Jewish groups (Poles, Slovenes, Czechs and gipsies).

As a matter of domestic Israeli law, the jurisdiction of the court was derived from an Act of 1950. Following the English doctrine of parliamentary supremacy, the court held that it was bound to give effect to a law of the Knesset even if it conflicted with the principles of international law. But it went on to hold that the law did not conflict with any principle of international law. Following a detailed examination of the authorities, including the judgment of the Permanent Court of International Justice in *The Lotus Case* PCIJ, Series A, No 10, it concluded that there was no rule of international law which prohibited a state from trying a foreign national for an act committed outside its borders. There seems no reason to doubt this conclusion. The limiting factor that prevents the exercise of extra territorial criminal jurisdiction from amounting to an unwarranted interference with the internal affairs of another state is that, for the trial to be fully effective, the accused must be present in the forum state.

Significantly, however, the court also held that the scale and international character of the atrocities of which the accused had been convicted fully justified the application of the doctrine of universal jurisdiction. It approved the general consensus of jurists that war crimes attracted universal jurisdiction: see eg Greenspan *The Modern Law of Land Warfare* (1959) p 420, where he writes:

> 'Since each sovereign power stands in the position of a guardian of international law, and is equally interested in upholding it, any state has the legal right to try war crimes, even though the crimes have been committed against the nationals of another power and in a conflict to which that state is not a party.'

This seems to have been an independent source of jurisdiction derived from customary international law, which formed part of the unwritten law of Israel, and which did not depend on the statute. The court explained that the limitation often imposed on the exercise of universal jurisdiction, that the state which apprehended the offender must first offer to extradite him to the state in which the offence was committed, was not intended to prevent the violation of the latter's territorial sovereignty. Its basis was purely practical. The great majority of the witnesses and the greater part of the evidence would normally be concentrated in that state, and it was therefore the most convenient forum for the trial.

Having disposed of the objections to its jurisdiction, the court rejected the defence of act of state. As formulated, this did not differ in any material respect from a plea of immunity ratione materiae. It was based on the fact that in committing the offences of which he had been convicted, the accused had acted as an organ of the state, 'whether as head of the state or a responsible official acting on the government's orders'. The court applied art 7 of the Nuremberg Charter (which it will be remembered expressly referred to the head of state) and which it regarded as having become part of the law of nations.

The case is authority for three propositions. (1) There is no rule of international law which prohibits a state from exercising extraterritorial criminal jurisdiction in respect of crimes committed by foreign nationals abroad. (2) War crimes and atrocities of the scale and international character of the Holocaust are crimes of universal jurisdiction under customary international law. (3) The fact that the accused committed the crimes in question in the course of his official duties as a responsible officer of the state and in the exercise of his authority as an organ of the state is no bar to the exercise of the jurisdiction of a national court.

The case was followed in the United States in *Demjanjuk v Petrovsky* (1985) 603 F Supp 1468; *affd* 776 F 2d 571. In the context of an extradition request by the State of Israel the court accepted Israel's right to try a person charged with murder in the concentration camps of Eastern Europe. It held that the crimes were crimes of universal jurisdiction, observing (at 1472):

> 'International law provides that certain offences may be punished by any state because the offenders are enemies of all mankind and all nations have an equal interest in their apprehension and punishment.'

The difficulty is to know precisely what is the ambit of the expression 'certain offences'.

Article 5 of the Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226) and art 7 of the International Covenant on Civil and Political Rights (New York, 16 December 1966; TS 6 (1977); Cmnd 6702) both provided that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. A resolution of the General Assembly in 1973 proclaimed the need for international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. A further resolution of the General Assembly in 1975 proclaimed the desire to make the struggle against torture more effective throughout the world. The fundamental human rights of individuals, deriving from the inherent dignity of the human person, had become a commonplace of international law. Article 55 of Statute of the International Court of Justice (the United Nations Charter) (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) (art 38) was taken to impose an obligation on all states to promote universal respect for and observance of human rights and fundamental freedoms.

The trend was clear. War crimes had been replaced by crimes against humanity. The way in which a state treated its own citizens within its own borders had become a matter of legitimate concern to the international community. The most serious crimes against humanity were genocide and torture. Large scale and systematic use of torture and murder by state authorities for political ends had come to be regarded as an attack upon the international order. Genocide was made an international crime by the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (the Genocide Convention) (Paris, 9 December 1948; TS 38 (1970); Cmnd 4421). By the time Senator Pinochet seized power, the international community had renounced the use of torture as an instrument of state policy. The Republic of Chile accepts that, by 1973, the use of torture by state authorities was prohibited by international law and that the prohibition had the character of jus cogens or obligation erga omnes. But it insists that this does not confer universal jurisdiction or affect the immunity of a former head of state ratione materiae from the jurisdiction of foreign national courts.

In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria. The first criterion is well attested in the authorities and textbooks: for a recent example, see the judgment of the international tribunal for the territory of the former Yugoslavia in *Prosecutor v Anto Furundzija* (10 December 1998, unreported), where the court stated:

> 'At the individual level, that is, of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute, and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction.'

The second requirement is implicit in the original restriction to war crimes and crimes against peace, the reasoning of the court in *A-G of Israel v Eichmann* (1961) 36 ILR 5, and the definitions used in the more recent conventions establishing ad hoc international tribunals for the former Yugoslavia and Rwanda.

Every state has jurisdiction under customary international law to exercise extra-territorial jurisdiction in respect of international crimes which satisfy the relevant criteria. Whether its courts have extra-territorial jurisdiction under its internal domestic law depends, of course, on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts. The jurisdiction of the English criminal courts is usually statutory, but it is supplemented by the common law. Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extra-territorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law.

Burgers and Danelius *Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) p 1 wrote:

> 'Many people assume that the Convention's principal aim is to outlaw torture and other cruel, inhuman or degrading treatment or punishment. This assumption is not correct insofar as it would imply that the prohibition of these practices is established under international law by the Convention [illegible]

only and that the prohibition will be binding as a rule of international law only for those States which have become parties to the *Convention*. On the contrary, the *Convention* is based upon the recognition that the above-mentioned practices are already outlawed under international law. The principal aim of the Convention is to strengthen the existing prohibition of such practices by a number of supportive measures.'

In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973. For my own part, therefore, I would hold that the courts of this country already possessed extra-territorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it. I understand, however, that your Lordships take a different view, and consider that statutory authority is required before our courts can exercise extra-territorial criminal jurisdiction even in respect of crimes of universal jurisdiction. Such authority was conferred for the first time by s 134 of the Criminal Justice Act 1988, but the section was not retrospective. I shall accordingly proceed to consider the case on the footing that Senator Pinochet cannot be extradited for any acts of torture committed prior to the coming into force of the section.

The 1984 Torture Convention did not create a new international crime. But it redefined it. Whereas the international community had condemned the widespread and systematic use of torture as an instrument of state policy, the convention extended the offence to cover isolated and individual instances of torture provided that they were committed by a public official. I do not consider that offences of this kind were previously regarded as international crimes attracting universal jurisdiction. The charges against Senator Pinochet, however, are plainly of the requisite character. The convention thus affirmed and extended an existing international crime and imposed obligations on the parties to the convention to take measures to prevent it and to punish those guilty of it. As Burgers and Danelius explained, its main purpose was to introduce an institutional mechanism to enable this to be achieved. Whereas previously states were entitled to take jurisdiction in respect of the offence wherever it was committed, they were now placed under an obligation to do so. Any state party in whose territory a person alleged to have committed the offence was found was bound to offer to extradite him or to initiate proceedings to prosecute him. The obligation imposed by the convention resulted in the passing of s 134 of the 1988 Act.

I agree, therefore, that our courts have statutory extra-territorial jurisdiction in respect of the charges of torture and conspiracy to torture committed after the section had come into force and (for the reasons explained by my noble and learned friend, Lord Hope of Craighead) the charges of conspiracy to murder where the conspiracy took place in Spain.

I turn finally to the plea of immunity ratione materiae in relation to the remaining allegations of torture, conspiracy to torture and conspiracy to murder. I can deal with the charges of conspiracy to murder quite shortly. The offences are alleged to have taken place in the requesting state. The plea of immunity ratione materiae is not available in respect of an offence committed in the forum state, whether this be England or Spain.

The definition of torture, both in the convention and s 134 of the 1988 Act, is in my opinion entirely inconsistent with the existence of a plea of immunity ratione materiae. The offence can be committed only by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity. The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is co-extensive with the offence.

In my view a serving head of state or diplomat could still claim immunity ratione personae if charged with an offence under s 134. He does not have to rely on the character of the conduct of which he is accused. The nature of the charge is irrelevant; his immunity is personal and absolute. But the former head of state and the former diplomat are in no different position from anyone else claiming to have acted in the exercise of state authority. If the respondent's arguments were accepted, s 134 would be a dead letter. Either the accused was acting in a private capacity, in which case he cannot be charged with an offence under the section; or he was acting in an official capacity, in which case he would enjoy immunity from prosecution. Perceiving this weakness in her argument, counsel for Senator Pinochet submitted that the United Kingdom took jurisdiction so that it would be available if, but only if, the offending state waived its immunity. I reject this explanation out of hand. It is not merely far-fetched; it is entirely inconsistent with the aims and object of the convention. The evidence shows that other states were to be placed under an obligation to take action precisely because the offending state could not be relied upon to do so.

My Lords, the Republic of Chile was a party to the Torture Convention, and must be taken to have assented to the imposition of an obligation on foreign national courts to take and exercise criminal jurisdiction in respect of the official use of torture. I do not regard it as having thereby waived its immunity. In my opinion there was no immunity to be waived. The offence is one which could only be committed in circumstances which would normally give rise to the immunity. The international community had created an offence for which immunity ratione materiae could not possibly be available. International law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.

In my opinion, acts which attract state immunity in civil proceedings because they are characterised as acts of sovereign power may, for the very same reason, attract individual criminal liability. The respondents relied on a number of cases which show that acts committed in the exercise of sovereign power do not engage the civil liability of the state even if they are contrary to international law. I do not find those decisions determinative of the present issue or even relevant. In England and the United States they depend on the terms of domestic legislation; though I do not doubt that they correctly represent the position in international law. I see nothing illogical or contrary to public policy in denying the victims of state sponsored torture the right to sue the offending state in a foreign court, while at the same time permitting (and indeed requiring) other states to convict and punish the individuals responsible if the offending state declines to take action. This was the very object of the Torture Convention. It is important to emphasise that Senator Pinochet is not alleged to be criminally liable because he was head of state when other responsible officials employed torture to maintain him in power. He is not alleged to be vicariously liable for the wrongdoing of his subordinates. He is alleged to have incurred direct criminal responsibility for his own acts in ordering and directing a campaign of terror involving the use of torture. Chile insists on the exclusive right to prosecute him. The Torture Convention, however, gives it only the primary

right. If it does not seek his extradition (and it does not) then the United Kingdom is obliged to extradite him to another requesting state or prosecute him itself.

My Lords, we have come a long way from what I earlier described as the classical theory of international law—a long way in a relatively short time. But as the Privy Council pointed out in *Re Piracy Jure Gentium* [1934] AC 586 at 597, [1934] All ER Rep 506 at 512–513, international law has not become a crystallised code at any time, but is a living and expanding branch of the law. Sheldon Glueck 'The Nuernberg Trial and Aggressive War' (1946) 59 Harv LR 396 at 398 observed—

> '... unless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has its right to institute customs ... Much of the Law of Nations has its roots in custom. Custom must have a beginning; and customary usages of states in the matter of national and personal liability for resort to prohibited methods of warfare and to wholesale criminalism have not been petrified for all time.'

The law has developed still further since 1934, and continues to develop in the same direction. Further international crimes have been created. Ad hoc international criminal tribunals have been established. A permanent international criminal court is in the process of being set up. These developments could not have been foreseen by Glueck and the other jurists who proclaimed that individuals could be held individually liable for international crimes. They envisaged prosecution before national courts, and this will necessarily remain the norm even after a permanent international tribunal is established. In future those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence.

For my own part, I would allow the appeal in respect of the charges relating to the offences in Spain and to torture and conspiracy to torture, wherever and whenever carried out. But the majority of your Lordships think otherwise and consider that Senator Pinochet can be extradited only in respect of a very limited number of charges. This will transform the position from that which the Secretary of State considered last December. I agree with my noble and learned friend Lord Browne-Wilkinson that it will be incumbent on the Secretary of State to reconsider the matter in the light of the very different circumstances which now prevail.

LORD PHILLIPS OF WORTH MATRAVERS. My Lords, the Spanish government seeks extradition of Senator Pinochet to stand trial for crimes committed in a course of conduct spanning a lengthy period. My noble and learned friend Lord Browne-Wilkinson has described how, before your Lordships' House, the Spanish government contended for the first time that the relevant conduct extended back to 1 January 1972, and now covered a significant period before Senator Pinochet became head of state and thus before acts done in that capacity could result in any immunity. This change in the Spanish government's case rendered critical issues that have hitherto barely been touched on. What is the precise nature of the double criminality rule that governs whether conduct amounts to an extradition crime and what parts of Senator Pinochet's alleged conduct satisfy that rule? On the first issue I agree with the conclusion reached by Lord Browne-Wilkinson and on the second I agree with the analysis of my noble and learned friend Lord [illegible] of Craighead.

These conclusions greatly reduce the conduct that can properly form the subject of a request for extradition under our law. They leave untouched the question of whether the English court can assert any criminal jurisdiction over acts committed by Senator Pinochet in his capacity of head of state. It is on that issue, the issue of immunity, that I would wish to add some comments of my own.

State immunity

There is an issue as to whether the applicable law of immunity is to be found in the State Immunity Act 1978 or in principles of public international law, which form part of our common law. If the statute governs, it must be interpreted, so far as possible, in a manner which accords with public international law. Accordingly I propose to start by considering the position at public international law.

The nature of the claim to immunity

These proceedings have arisen because Senator Pinochet chose to visit the United Kingdom. By so doing, he became subject to the authority that this state enjoys over all within its territory. He has been arrested and is threatened with being removed against his will to Spain to answer criminal charges which are there pending. That has occurred pursuant to our extradition procedures. Both the executive and the court has a role to play in the extradition process. It is for the court to decide whether the legal requirements, which are a precondition to extradition, are satisfied. If they are, it is for the Home Secretary to decide whether to exercise his power to order that Senator Pinochet be extradited to Spain.

If Senator Pinochet were still the head of state of Chile, he and Chile would be in a position to complain that the entire extradition process was a violation of the duties owed under international law to a person of his status. A head of state on a visit to another country is inviolable. He cannot be arrested or detained, let alone removed against his will to another country, and he is not subject to the judicial processes, whether civil or criminal, of the courts of the state that he is visiting. But Senator Pinochet is no longer head of state of Chile. While, as a matter of courtesy, a state may accord a visitor of Senator Pinochet's distinction certain privileges, it is under no legal obligation to do so. He accepts, and Chile accepts, that this country no longer owes him any duty under international law by reason of his status ratione personae. Immunity is claimed, ratione materiae, on the ground that the subject matter of the extradition process is the conduct by Senator Pinochet of his official functions when he was head of state. The claim is put thus in his written case:

> 'There is no distinction to be made between a head of state, a former head of state, a state official or a former state official in respect of official acts performed under colour of their office. Immunity will attach to all official acts which are imputable or attributable to the state. It is therefore the nature of the conduct and the capacity of the Respondent at the time of the conduct alleged, not the capacity of the Respondent at the time of any suit, that is relevant.'

We are not, of course, here concerned with a civil suit, but with proceedings that are criminal in nature. Principles of the law of immunity that apply in relation to civil litigation will not necessarily apply to a criminal prosecution. The nature of the process with which this appeal is concerned is not a prosecution but extradition. The crit[illegible]cial issue that the court has to address in that process is,

however, whether the conduct of Senator Pinochet which forms the subject of the extradition request constituted a crime or crimes under English law. The argument in relation to extradition has proceeded on the premise that the same principles apply that would apply if Senator Pinochet were being prosecuted in this country for the conduct in question. It seems to me that that is an appropriate premise on which to proceed.

Why is it said to be contrary to international law to prosecute someone who was once head of state, or a state official, in respect of acts committed in his official capacity? It is common ground that the basis of the immunity claimed is an obligation owed to Chile, not to Senator Pinochet. The immunity asserted is Chile's. Were these civil proceedings in which damages were claimed in respect of acts committed by Senator Pinochet in the government of Chile, Chile could argue that it was itself indirectly impleaded. That argument does not run where the proceedings are criminal and where the issue is Senator Pinochet's personal responsibility, not that of Chile. The following general principles are advanced in Chile's written case as supporting the immunity claimed:

> '(a) the sovereign equality of states and the maintenance of international relations require that the courts of one state will not adjudicate on the governmental acts of another state; (b) intervention in the internal affairs of other states is prohibited by international law; (c) conflict in international relations will be caused by such adjudication or intervention.'

These principles are illustrated by the following passage from *Hatch v Baez* (1876) 7 Hun 596 at 599–600, a case in which the former President of the Dominican Republic was sued in New York for injuries allegedly sustained at his hands in San Domingo.

> 'The counsel for the plaintiff relies on the general principle, that all persons, of whatever rank or condition, whether in or out of office, are liable to be sued by them in violation of law. Conceding the truth and universality of that principle, it does not establish the jurisdiction of our tribunals to take cognizance of the official acts of foreign governments. We think that, by the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sitting in judgement on the acts of another government done within its own territory. Each State is sovereign throughout its domain. The acts of the defendant for which he is sued were done by him in the exercise of that part of the sovereignty of St. Domingo which belongs to the executive department of that government. To make him amenable to a foreign jurisdiction for such acts, would be a direct assault upon the sovereignty and independence of his country. The only remedy for such wrongs must be sought through the intervention of the government of the person injured ... The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government.'

This statement was made in the context of civil proceedings. I propose to turn to the sources of international law to see whether they establish that those principles have given rise to a rule of immunity in relation to criminal proceedings.

The sources of immunity

Many rules of public international law are founded upon or reflected in conventions. This is true of those rules of state immunity which relate to civil suit—see the European Convention on State Immunity 1972 (Basle, 16 May 1972; Misc 31 (1972), Cmnd 5081). It is not, however, true of state immunity in relation to criminal proceedings. The primary source of international law is custom, that is 'a clear and continuous habit of doing certain actions which has grown up under the conviction that these actions are, according to international law, obligatory or right' (see *Oppenheim's International Law* (9th edn, 1992) p 27). Other sources of international law are judicial decisions, the writing of authors and 'the general principles of law recognised by all civilised nations' (see art 38 of the Statute of the International Court of Justice (the United Nations Charter) (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015)). To what extent can the immunity asserted in this appeal be traced to such sources?

Custom

In what circumstances might a head of state, or other state official commit a criminal offence under the law of a foreign state in the course of the performance of his official duties?

Prior to the developments in international law which have taken place in the last 50 years, the answer is very few. Had the events with which this appeal is concerned occurred in the nineteenth century, there could have been no question of Senator Pinochet being subjected to criminal proceedings in this country in respect of acts, however heinous, committed in Chile. This would not have been because he would have been entitled to immunity from process, but for a more fundamental reason. He would have committed no crime under the law of England and the courts of England would not have purported to exercise a criminal jurisdiction in respect of the conduct in Chile of any national of that state. I have no doubt that the same would have been true of the courts of Spain. Under international practice criminal law was territorial. This accorded with the fundamental principle of international law that one state must not intervene in the internal affairs of another. For one state to have legislated to make criminal acts committed within the territory of another state, by the nationals of the latter, would have infringed this principle. So it would to have exercised jurisdiction in respect of such acts. An official of one state could only commit a crime under the law of another state by going to that state and committing a criminal act there. It is certainly possible to envisage a diplomat committing a crime within the territory to which he was accredited, and even to envisage his doing so in the performance of his official functions—though this is less easy. Well established international law makes provision for the diplomat. The Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention) (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565) provides for immunity from civil and criminal process while the diplomat is in post and, thereafter, in respect of conduct which he committed in the performance of his official functions while in post. Customary international law provided a head of state with immunity from any form of process while visiting a foreign state. It is possible to envisage a visiting head of state committing a criminal offence in the course of performing his official functions while on a visit and when clothed with status immunity. What seems inherently unlikely is that a foreign head of state should commit a criminal offence in the performance of his official functions while on a visit and subsequently return after ceasing to be head of state. Certainly this cannot have happened with sufficient frequency for any custom to have developed in relation to it. Nor am I aware of any custom which would have protected, from criminal process, a visiting official of a foreign state who was not a member of a special mission, had he had the temerity to commit a criminal offence in the pursuance of some official function. For these reasons I do not believe that custom can

provide any foundation for a rule that a former head of state is entitled to immunity from criminal process in respect of crimes committed in the exercise of his official functions.

Judicial decisions

In the light of the considerations to which I have just referred, it is not surprising that Senator Pinochet and the Republic of Chile have been unable to point to any body of judicial precedent which supports the proposition that a former head of state or other government official can establish immunity from criminal process on the ground that the crime was committed in the course of performing official functions. The best that counsel for Chile has been able to do is to draw attention to the following obiter opinion of the Swiss Federal Tribunal in *Marcos v Federal Dept of Police* (1990) 102 ILR 198 at 202–203.

> 'The privilege of the immunity from criminal jurisdiction of heads of state ... has not been fully codified in the Vienna Convention ... But it cannot be concluded that the texts of conventions drafted under the aegis of the United Nations grant a lesser protection to heads of foreign states than to the diplomatic representatives of the state which those heads of state lead or universally represent ... Articles 32 and 39 of the Vienna Convention must therefore apply by analogy to heads of state.'

Writings of authors

We have been referred to the writings of a number of learned authors in support of the immunity asserted on behalf of Senator Pinochet. In his *International Law* (9th edn, 1992) p 1043, para 456, Oppenheim comments:

> 'All privileges mentioned must be granted to a Head of State only so long as he holds that position. Therefore, after he has been deposed or has abdicated, he may be sued, at least in respect of obligations of a private character entered into while Head of State. For his official acts as Head of State he will, like any other agent of a State, enjoy continuing immunity.'

This comment plainly relates to civil proceedings.

Satow's *Guide to Diplomatic Practice* (5th edn, 1978) ch 2 deals with the position of a visiting head of state. The authors deal largely with immunity from civil proceedings but state (see p 10) that under customary international law 'he is entitled to immunity—probably without exception—from criminal and civil jurisdiction'. After a further passage dealing with civil proceedings, the authors state (p 9):

> '(2.4) A head of state who has been deposed or replaced or has abdicated or resigned is of course no longer entitled to privileges or immunities as a head of state. He will be entitled to continuing immunity in regard to acts which he performed while head of state, provided that the acts were performed in his official capacity; in this his position is no different from that of any agent of the state.'

Sir Arthur Watts in his monologue in the *Hague Lectures* 'Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 Recueil des Cours, deals with the loss of immunity of a head of state who is deposed on a foreign visit. He then adds (p 89):

> 'A Head of State's official acts, performed in his public capacity as Head of State, are however subject to different considerations. Such acts are acts of the State rather than the Head of State's personal acts and he cannot be sued

> for them even after he has ceased to be Head of State. The position is similar to that of acts performed by an ambassador in the exercise of his functions, for which immunity continues to subsist even after the ambassador's appointment has come to an end.'

My Lords, I do not find these writings, unsupported as they are by any reference to precedent or practice, a compelling foundation for the immunity in respect of criminal proceedings that is asserted.

General principles of law recognised by all civilised nations

The claim for immunity raised in this case is asserted in relation to a novel type of extra-territorial criminal jurisdiction. The nature of that jurisdiction I shall consider shortly. If immunity from that jurisdiction is to be established it seems to me that this can only be on the basis of applying the established general principles of international law relied upon by Chile to which I have already referred, rather than any specific rule of law relating to immunity from criminal process.

These principles underlie some of the rules of immunity that are clearly established in relation to civil proceedings. It is time to take a closer look at these rules, and at the status immunity that is enjoyed by a head of state ratione personae.

Immunity from civil suit of the state itself

It was originally an absolute rule that the court of one state would not entertain a civil suit brought against another state. All states are equal and this was said to explain why one state could not sit in judgment on another. This rule was not viable once states began to involve themselves in commerce on a large scale and state practice developed an alternative restrictive rule of state immunity under which immunity subsisted in respect of the public acts of the state but not for its commercial acts. A distinction was drawn between acts done jure imperii and acts done jure gestionis. This refinement of public international law was described by Lord Denning MR in *Trendtex Trading Corp Ltd v Central Bank of Nigeria* [1977] 1 All ER 881, [1977] QB 529. In that case the majority of the Court of Appeal held that the common law of England, of which international law forms part, had also changed to embrace the restrictive theory of state immunity from civil process. That change was about to be embodied in statute, the State Immunity Act 1978, which gave effect to the European Convention on State Immunity 1972 (Basle, 16 May 1972; Misc 31 (1972); Cmnd 5081).

Part I of the Act starts by providing:

> '1. *General immunity from jurisdiction.*—(1) A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.'

Part I goes on to make provision for a number of exceptions from immunity, the most notable of which is, by s 3, that in relation to a commercial transaction entered into by the state. Part I does not apply to criminal proceedings (s 16(4)).

The immunity of a head of state ratione personae

An acting head of state enjoyed, by reason of his status, absolute immunity from all legal process. This had its origin in the times when the head of state truly personified the state. It mirrored the absolute immunity from civil process in respect of civil proceedings and reflected the fact that an action against a head of state in respect of his public acts was, in effect, an action against the state itself. There were, however, other reasons for the immunity. It would have been

contrary to the dignity of a head of state that he should be subjected to judicial process and this would have been likely to interfere with the exercise of his duties as a head of state. Accordingly the immunity applied to both criminal and civil proceedings and, insofar as civil proceedings were concerned, to transactions entered into by the head of state in his private as well as his public capacity.

When the immunity of the state in respect of civil proceedings was restricted to exclude commercial transactions, the immunity of the head of state in respect of transactions entered into on behalf of the state in his public capacity was similarly restricted, although the remainder of his immunity remained (see ss 14(1)(a) and 20(5) of the 1978 Act).

Immunity ratione materiae

This is an immunity of the state which applies to preclude the courts of another state from asserting jurisdiction in relation to a suit brought against an official or other agent of the state, present or past, in relation to the conduct of the business of the state while in office. While a head of state is serving, his status ensures him immunity. Once he is out of office, he is in the same position as any other state official and any immunity will be based upon the nature of the subject matter of the litigation. We were referred to a number of examples of civil proceedings against a former head of state where the validity of a claim to immunity turned, in whole or in part, on whether the transaction in question was one in which the defendant had acted in a public or a private capacity. *Ex-King Farouk of Egypt v Christian Dior, SARL* (1957) 24 ILR 228, *Société Jean Dessès v Prince Farouk* (1963) 65 ILR 37, *Jimenez v Aristeguieta* (1962) 311 F 2d 547 and *US v Noriega* (1997) 117 F 3d 1206.

There would seem to be two explanations for immunity ratione materiae. The first is that to sue an individual in respect of the conduct of the state's business is, indirectly, to sue the state. The state would be obliged to meet any award of damage made against the individual. This reasoning has no application to criminal proceedings. The second explanation for the immunity is the principle that it is contrary to international law for one state to adjudicate upon the internal affairs of another state. Where a state or a state official is impleaded, this principle applies as part of the explanation for immunity. Where a state is not directly or indirectly impleaded in the litigation, so that no issue of state immunity as such arises, the English and American courts have nonetheless, as a matter of judicial restraint, held themselves not competent to entertain litigation that turns on the validity of the public acts of a foreign state, applying what has become known as the act of state doctrine. Two citations well illustrate the principle.

(1) *Underhill v Hernandez* (1897) 168 US 250 at 252 per Fuller CJ:

> 'Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves ... The immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact.'

(2) *Buck v A-G* [1965] 1 All ER 882 at 887, [1965] Ch 745 at 770 per Diplock LJ:

> 'As a member of the family of nations, the government of the United Kingdom (of which this court forms part of the judicial branch) observes the rules of comity, viz., the accepted rules of mutual conduct as between state and state, which each state adopts in relation to other states and expects other states to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or to its property, except in accordance with the rules of public international law. One of the commonest applications of this rule by the judicial branch of the United Kingdom government is the well-known doctrine of sovereign immunity. A foreign state cannot be impleaded in the English courts without its consent; see [*Duff Development Co Ltd v Kelantan Government* [1924] AC 797, [1924] All ER Rep 1]. As was made clear in [*Rahimtoola v The Nizam of Hyderabad* [1957] 3 All ER 441, [1958] AC 379], the basis of the sovereign immunity does not depend upon the persons between whom the issue is joined, but upon the subject-matter of the issue. For the English court to pronounce upon the validity of a law of a foreign sovereign state within its own territory, so that its validity became the res of the res judicata in the suit, would be to assert jurisdiction over the internal affairs of that state. That would be a breach of the rules of comity'

It is contended on behalf of the respondent that the question of whether an official is acting in a public capacity does not depend upon whether he is acting within the law of the state on whose behalf he purports to act, or even within the limits of international law. His conduct in an official capacity will, whether lawful or unlawful, be conduct of the state and the state will be entitled to assert immunity in respect of it. In the field of civil litigation these propositions are supported by authority. There are a number of instances where plaintiffs have impleaded states claiming damages for injuries inflicted by criminal conduct on the part of state officials which allegedly violated international law. In those proceedings it was of the essence of the plaintiffs' case that the allegedly criminal conduct was conduct of the state and this was not generally in issue. What was in issue was whether the criminality of the conduct deprived the state of immunity and on that issue the plaintiffs failed. Counsel for the respondent provided us with an impressive, and depressing, list of such cases: *Saltany v Reagan* (1988) 702 F Supp 319 (claims of assassination and terrorism); *Siderman de Blake v Argentina* (1992) 965 F 2d 699 (claim of torture); *Princz v Federal Republic of Germany* (1994) 26 F 3d 1166 (claim in respect of the holocaust); *Princz v Federal Republic of Germany* (1994) 26 F 3d 1166 (claim of torture); *Sampson v Federal Republic of Germany* (1997) 975 F Supp 1108 (claim in respect of the holocaust); *Smith v Libya* (1995) 886 F Supp 306; *affd* (1996) 101 F 3d 239 (claim in respect of Lockerbie bombing); and *Persinger v Islamic Republic of Iran* (1984) 729 F 2d 835 (claim in relation to hostage taking at the US Embassy).

It is to be observed that all but one of those cases involved decisions of courts exercising the federal jurisdiction of the United States. *Al-Adsani*'s case being a decision of the Court of Appeal of this country. In each case immunity from civil suit was afforded by statute—in America, the Foreign Sovereignty Immunities Act 1976 (28 USSC-1602) (FSIA) and, in England, the State Immunity Act 1978. In each case the court felt itself precluded by the clear words of the statute from acceding to the submission that state immunity would not protect against liability for conduct which infringed international law.

The vital issue

The submission advanced on behalf of the respondent in respect of the effect of public international law can, I believe, be summarised as follows. (1) One

state will not entertain judicial proceedings against a former head of state or other state official of another state in relation to conduct performed in his official capacity. (2) This rule applies even if the conduct amounts to a crime against international law. (3) This rule applies in relation to both civil and criminal proceedings.

For the reasons that I have given and if one proceeds on the premise that Pt I of the 1978 Act correctly reflects current international law, I believe that the first two propositions are made out in relation to civil proceedings. The vital issue is the extent to which they apply to the exercise of criminal jurisdiction in relation to the conduct that forms the basis of the request for extradition. This issue requires consideration of the nature of that jurisdiction.

The development of international criminal law

In the latter part of this century there has been developing a recognition among states that some types of criminal conduct cannot be treated as a matter for the exclusive competence of the state in which they occur. In *Oppenheim's International Law* (9th edn, 1992) p 998 the authors commented:

> 'While no general rule of positive international law can as yet be asserted which gives to States the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect. That principle consists both in the adoption of the rule of universality of jurisdiction and in the recognition of the supremacy of the law of humanity over the law of the Sovereign State when enacted or applied in violation of elementary human rights in a manner which may justly be held to shock the conscience of mankind.'

The appellants, and those who have on this appeal been given leave to support them, contend that this passage, which appears verbatim in earlier editions, is out of date. They contend that international law now recognises a category of criminal conduct with the following characteristics. (1) It is so serious as to be of concern to all nations and not just to the state in which it occurs. (2) Individuals guilty of it incur criminal responsibility under international law. (3) There is universal jurisdiction in respect of it. This means that international law recognises the right of any state to prosecute an offender for it, regardless of where the criminal conduct took place. (4) No state immunity attaches in respect of any such prosecution.

My Lords, this is an area where international law is on the move and the move has been effected by express consensus recorded in, or reflected by, a considerable number of international instruments. Since the 1939–45 war states have recognised that not all criminal conduct can be left to be dealt with as a domestic matter by the laws and the courts of the territories in which such conduct occurs. There are some categories of crime of such gravity that they shock the consciousness of mankind and cannot be tolerated by the international community. Any individual who commits such a crime offends against international law. The nature of these crimes is such that they are likely to involve the concerted conduct of many and liable to involve the complicity of the officials of the state in which they occur, if not of the state itself. In these circumstances it is desirable that jurisdiction should exist to prosecute individuals for such conduct outside the territory in which such conduct occurs.

I believe that it is still an open question whether international law recognises universal jurisdiction in respect of international crime (that is the right, under international law, of the courts of any state to prosecute for such crimes wherever they occur. In relation to war crimes, such a jurisdiction has been asserted by the State of Israel, notably in the prosecution of Adolf Eichmann, but this assertion of jurisdiction does not reflect any general state practice in relation to international crimes. Rather, states have tended to agree, or to attempt to agree, on the creation of international tribunals to try international crimes. They have, however, on occasion, agreed by conventions, that their national courts should enjoy jurisdiction to prosecute for a particular category of international crime wherever occurring.

The principle of state immunity provides no bar to the exercise of criminal jurisdiction by an international tribunal, but the instruments creating such tribunals have tended, nonetheless, to make it plain that no exception from responsibility or immunity from process is to be enjoyed by a head of state or other state official. Thus, the Charter of the International Military Tribunal appended to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the Nuremberg Charter) (London, 8 August 1945; TS 27 (1946); Cmd 6903) provides by art 7:

> 'The official position of defendants, whether as head of state or responsible officials in Government Departments shall not be considered as freeing them from responsibility or mitigating punishment.'

The Tokyo Charter of 1946, the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the Statute of the Tribunal for the Former Yugoslavia) (UN Security Council Resolution 827 (1993)), the Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994 (the Statute of the Tribunal for Rwanda) (UN SC Resolution 955 (1994)) and the Statute of the International Criminal Court 1998 (the Rome Statute) (Rome, 17 July 1998) all have provisions to like effect.

Where states, by convention, agree that their national courts shall have jurisdiction on a universal basis in respect of an international crime, such agreement cannot implicitly remove immunities ratione personae that exist under international law. Such immunities can only be removed by express agreement or waiver. Such an agreement was incorporated in the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (the Genocide Convention) (Paris, 9 December 1948; TS 58 (1970); Cmnd 4421), which provides in art IV:

> 'Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.'

Had the Genocide Convention not contained this provision, an issue could have been raised as to whether the jurisdiction conferred by the convention was subject to state immunity ratione materiae. Would international law have required a court to grant immunity to a defendant upon his demonstrating that he was acting in an official capacity? In my view it plainly would not. I do not reach that conclusion on the ground that assisting in genocide can never be a function of a state official. I reach that conclusion on the simple basis that no

established rule of international law requires state immunity ratione materiae to be accorded in respect of prosecution for an international crime. International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that state immunity ratione materiae can co-exist with them. The exercise of extra-territorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail. An international crime is as offensive, if not more offensive, to the international community when committed under colour of office. Once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.

There can be no doubt that the conduct of which Senator Pinochet stands accused by Spain is criminal under international law. The Republic of Chile has accepted that torture is prohibited by international law and that the prohibition of torture has the character of jus cogens and or obligation erga omnes. It is further accepted that officially sanctioned torture is forbidden by international law. The information provided by Spain accuses Senator Pinochet not merely of having abused his powers as head of state by committing torture, but of subduing political opposition by a campaign of abduction, torture and murder that extended beyond the boundaries of Chile. When considering what is alleged, I do not believe that it is correct to attempt to analyse individual elements of this campaign and to identify some as being criminal under international law and others as not constituting international crimes. If Senator Pinochet behaved as Spain alleged, then the entirety of his conduct was a violation of the norms of international law. He can have no immunity against prosecution for any crime that formed part of that campaign.

It is only recently that the criminal courts of this country acquired jurisdiction, pursuant to s 134 of the Criminal Justice Act 1988, to prosecute Senator Pinochet for torture committed outside the territorial jurisdiction, provided that it was committed in the performance, or purported performance, of his official duties. Section 134 was passed to give effect to the rights and obligations of this country under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention) (10 December 1984; UN General Assembly Resolution 39/46, Doc A/39/51; Cmnd 9593), to which the United Kingdom, Spain and Chile are all signatories. That convention outlaws the infliction of torture 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. Each state party is required to make such conduct criminal under its law, wherever committed. More pertinently, each state party is required to prosecute any person found within its jurisdiction who has committed such an offence, unless it extradites that person for trial for the offence in another state. The only conduct covered by this convention, is conduct which would be subject to immunity ratione materiae, if such immunity were applicable. The convention is thus incompatible with the applicability of immunity ratione materiae. There are only two possibilities. One is that the state parties to the convention proceeded on the premise that no immunity could exist ratione materiae in respect of torture, a crime contrary to international law. The other is that the state parties to the convention expressly agreed that immunity ratione materiae should not apply in the case of torture. I believe that the first of these alternatives is the correct one, but either must be fatal to the assertion by Chile and Senator Pinochet of immunity in respect of extradition proceedings based on torture.

The State Immunity Act 1978

I have referred earlier to Pt I of the 1978 Act, which does not apply to criminal proceedings. Part III of the Act, which is of general application, is headed 'Miscellaneous and Supplementary'. Under this part, s 20 provides:

> '(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—(a) a sovereign or other head of State, (b) members of his family forming part of his household; and (c) his private servants, as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.'

The Diplomatic Privileges Act 1964 was passed to give effect to the Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention) (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565). The preamble to the convention records that 'peoples of all nations from ancient times have recognised the status of diplomatic agents'. The convention codifies long standing rules of public international law as to the privileges and immunities to be enjoyed by a diplomatic mission. The 1964 Act makes applicable those articles of the convention that are scheduled to the Act. These include art 29, which makes the person of a diplomatic agent immune from any form of detention and arrest, art 31 which confers on a diplomatic agent immunity from the criminal and civil jurisdiction of the receiving state and art 39, which includes the following provisions:

> '1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceedings to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
>
> 2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.'

The question arises of how, after the 'necessary modifications', these provisions should be applied to a head of state. All who have so far in these proceedings given judicial consideration to this problem have concluded that the provisions apply so as to confer the immunities enjoyed by a diplomat upon a head of state in relation to his actions wherever in the world they take place. This leads to the further conclusion that a former head of state continues to enjoy immunity in respect of acts committed 'in the exercise of his functions' as head of state, wherever those acts occurred.

For myself, I would not accord s 20 of the 1978 Act such broad effect. It seems to me that it does no more than to equate the position of a head of state and his entourage visiting this country with that of a diplomatic mission within this country. Thus interpreted, s 20 accords with established principles of international law, is readily applicable and can appropriately be described as supplementary to the other parts of the Act. As Lord Browne-Wilkinson has demonstrated, reference to the parliamentary history of the section discloses that this was precisely the original intention of s 20, for the section expressly provided

that it applied to a head of state who was '*in the United Kingdom at the invitation or with the consent of the Government of the United Kingdom*'. Those words were deleted by amendment. The mover of the amendment explained that the object of the amendment was to ensure that heads of state would be treated like heads of diplomatic missions 'irrespective of presence in the United Kingdom'.

Senator Pinochet and Chile have contended that the effect of s 20, as amended, is to entitle Senator Pinochet to immunity in respect of any acts committed in the performance of his functions as head of state anywhere in the world, and that the conduct which forms the subject matter of the extradition proceedings, insofar as it occurred when Senator Pinochet was head of state, consisted of acts committed by him in performance of his functions as head of state.

If these submissions are correct, the 1978 Act requires the English court to produce a result which is in conflict with international law and with our obligations under the Torture Convention. I do not believe that the submissions are correct, for the following reasons.

As I have explained, I do not consider that s 20 of the 1978 Act has any application to conduct of a head of state outside the United Kingdom. Such conduct remains governed by the rules of public international law. Reference to the parliamentary history of the section, which I do not consider appropriate, serves merely to confuse what appears to me to be relatively clear.

If I am mistaken in this view, and we are bound by the 1978 Act to accord to Senator Pinochet immunity in respect of all acts committed 'in performance of his functions as head of state', I would not hold that the course of conduct alleged by Spain falls within that description. Article 3 of the Vienna Convention, which strangely is not one of those scheduled to the 1964 Act, defines the functions of a diplomatic mission as including 'protecting in the receiving state the interests of the sending state and of its nationals, *within the limits permitted by international law*' (my emphasis).

In so far as Pt III of the 1978 Act entitles a former head of state to immunity in respect of the performance of his official functions, I do not believe that those functions can, as a matter of statutory interpretation, extend to actions that are prohibited as criminal under international law. In this way one can reconcile, as one must seek to do, the provisions of the 1978 Act with the requirements of public international law.

For these reasons, I would allow the appeal in respect of so much of the conduct alleged against Senator Pinochet as constitutes extradition crimes. I agree with Lord Hope as to the consequences which will follow as a result of the change in the scope of the case.

Appeal allowed in part.

Celia Fox Barrister.

the pinochet prosecution

On the night of October 16, 1998, London police arrested Gen. Augusto Pinochet Ugarte. They were acting on a Spanish warrant charging the former dictator with human rights crimes committed in Chile during his seventeen-year rule.

Although Pinochet was returned to Chile on medical grounds in March 2000, his arrest and detention in London significantly advanced human rights both internationally and in Chile. Indeed, in move of landmark significance, Judge Juan Guzman indicted Pinochet on December 1, 2000, ordering that he be placed under house arrest. While the charges against Pinochet were dropped by the Santiago Appeals Court on December 11 — a ruling subsequently confirmed on technical grounds by Chile's Supreme Court — the Supreme Court ordered that Pinochet be questioned. When this preliminary step in the prosecution has been completed, criminal charges against Pinochet should be reinstated.

> > > CURRENT DISPATCHES FROM SANTIAGO

Pinochet Escapes Justice
(New York, July 1, 2002) The Chilean Supreme Court's decision to terminate the prosecution of Gen. Augusto Pinochet was regrettable even though widely expected, Human Rights Watch said today. In a ruling made public this afternoon, the court held that the former dictator was too ill to undergo trial for grave human rights crimes, upholding an appeals court ruling issued a year ago.More . . .

Re-instatement of Pinochet Charges Hailed
(New York, January 29, 2001)-- Human Rights Watch hailed today's indictment of former Chilean dictator Augusto Pinochet as a historic contribution to international justice. The defendant, charged with kidnaping and murder by investigating judge Juan Guzman, now faces arrest, fingerprinting, and other police procedures.More . . .

Keep Pinochet-Era Prosecutions Alive
(New York, January 12, 2001) — Even though the Chilean armed forces have admitted responsibility in the deaths of some 200 people who "disappeared" under military rule, the Chilean courts should continue to prosecute those and all other cases of the "disappeared," Human Rights Watch said today. More . . .

Pinochet to Undergo Questioning
(New York, December 20, 2000) — Human Rights Watch today praised the decision by the Chilean Supreme Court to order Gen. Augusto Pinochet to undergo questioning.

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Chilean Appellate Court Ruling on Pinochet Criticized
(New York, December 11, 2000) — Human Rights Watch today expressed dismay over the Santiago appellate court ruling in favor of General Augusto Pinochet, which dismissed criminal charges filed against Pinochet on December 1. In a unanimous (3-0) decision, the Fifth Chamber of the Santiago Appeals Court granted a habeas corpus writ challenging Pinochet's indictment for ordering kidnappings and extrajudicial executions following the 1973 military coup. More . . .

Pinochet Arrest Hailed
(New York, December 1, 2000) — Human Rights Watch hailed Friday's decision by a Chilean judge to arrest and try former dictator Augusto Pinochet. Judge Juan Guzman indicted Pinochet on a charge of kidnapping, asking that he be held under house arrest and ordering him to face trial in connection with the "disappearances" of prisoners in the first months of his seventeen-year dictatorship. More . . .

Chile Supreme Court Rejects Pinochet Immunity
(Santiago, August 8, 2000) — Human Rights Watch today hailed the Chilean Supreme Court's decision to reject the appeal by Senator Augusto Pinochet Ugarte against a lower court ruling stripping him of his parliamentary immunity. The verdict, in which an overwhelming majority of the court upheld the lifting of immunity, means that Pinochet should now face trial for human rights violations committed at the start of his seventeen-year dictatorship. More . . .

More "Pinochet Style" Prosecutions Urged
(New York, March 3, 2000) — Human Rights Watch today called on abuse victims to use the "Pinochet precedent" to press criminal actions against exiled or traveling officials who have committed atrocities. More . . .

Pinochet Case a Milestone
(New York, March 2, 2000) — Human Rights Watch said today that the arrest of Augusto Pinochet represented a permanent advance in the cause of human rights, despite the decision by British Home Secretary Jack Straw to allow him to return to Chile. More . . .

New Obstacle to Pinochet Prosecution
(New York, February 21, 2000) — Human Rights Watch today condemned a proposed constitutional reform in Chile that would give permanent immunity from prosecution to all former heads of state. More . . .

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U.K. Ruling on Pinochet Praised
(London, February 15, 2000) — Human Rights Watch today welcomed a U.K. High Court ruling that Home Secretary Jack Straw should divulge details of the medical examination of the former Chilean dictator Augusto Pinochet to the four states that are seeking his extradition. More . . .

U.K. Home Secretary Should Back Justice
(London, January 31, 2000) — Human Rights Watch today expressed dismay at being denied the right to question the fairness of the procedure used to assess Augusto Pinochet's fitness to stand trial. It urged British Home Secretary Jack Straw to release to interested parties the medical evaluation of the former Chilean dictator. More . . .

Court Order Sought on Pinochet Medical Judgment
(London, January 24, 2000) — Human Rights Watch has joined with five allied organizations to seek a judicial order preventing the British Home Secretary from releasing Augusto Pinochet without certain basic steps of procedural fairness. More . . .

Straw Urged to Reveal Pinochet Data
(London, January 18, 2000) — Human Rights Watch today urged British Home Secretary Jack Straw to make Augusto Pinochet's medical records available to Spain and the other countries seeking his extradition. More . . .

Pinochet Case a Landmark
(New York, January 12, 2000) — Human Rights Watch said today that the arrest of Augusto Pinochet represented a permanent advance in the cause of human rights, despite the fact that a British medical evaluation may prevent Gen. Pinochet's extradition to Spain. More . . .

> > > PINOCHET PRESS ARCHIVE

17 December 1998	Amnesty International's position on the decision by the House of Lords to open a new hearing on the Pinochet case	EUR 45/35/98	English Espanol
1 January 1999	Universal jurisdiction and absence of immunity for crimes against humanity	EUR 45/01/99	English Espanol
15 January 1999	"Crimes against international law are committed by men, not by abstract entities" – Amnesty International spells out its legal arguments on the Pinochet case	EUR 45/03/99	English Espanol
27 January 1999	Pinochet case: The Chilean government is making a mockery of its duties to its citizens and to international law	AMR 22/04/99	English Espanol
24 March 1999	Pinochet ruling: a step forward for justice	EUR 45/15/99	English
26 March 1999	Pinochet case: One person tortured is one too many	EUR 45/17/99	English Espanol
7 April 1999	Pinochet case: Extradition proceedings for torture charges must go ahead	EUR 45/19/99	English Espanol
15 April 1999	Pinochet decision: No turning back	EUR 45/21/99	English Espanol
7 May 1999	Pinochet case: let justice take its course	EUR 45/25/99	English Espanol
3 August 1999	Bringing torturers to justice is an international obligation	AMR 22/18/99	English
27 July 1999	Pinochet case: extradite or prosecute	AMR 22/22/99	Espanol
30 September 1999	Pinochet case – No question now: extradite or prosecute	EUR 45/34/99	English
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22 October 1999	Pinochet case: Amnesty International is studying the appeal of the lawyers	EUR 45/43/99	English Espanol
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8 February 2000	Pinochet case: a chance to be heard	EUR 45/28/00	English Espanol
15 February 2000	Pinochet case: Court ruling a victory for justice	EUR 45/33/00	English Espanol
28 February 2000	Pinochet Case: Clarification of Amnesty International's Position on the Case	EUR 45/37/00	English
2 March 2000	Pinochet case: no turning back in the global fight against impunity	EUR 45/38/00	English Espanol
10 March 2000	Chile: The quest for truth and justice – a challenge for the new President	AMR 22/05/00	English Espanol

26 April 2000	Chile: No immunity for crimes against humanity	AMR 22/09/00	English Espanol
6 June 2000	Pinochet case: Step by step towards justice	AMR 22/12/00	English Espanol
19 July 2000	Justice or impunity the choice for Chile's Supreme Court	AMR 22/15/00	English Espanol
8 August 2000	Chile: Supreme Court chooses justice	AMR 22/16/00	English Espanol
6 December 2000	Chile: The Pinochet case -- Military must stay out of the judicial process	AMR 22/25/00	English Espanol Francais
20 December 2000	Chile: Response to Supreme Court's Rejection of Appeal in Pinochet Case	AMR 22/26/00	English Espanol
30 January 2001	Chile: The long quest for justice reaches a crucial stage	AMR 22/04/01	English Espanol Francais
9 July 2001	Chile: Truth and justice must not be hindered	AMR 22/09/01	English Espanol Francais
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Other universal jurisdiction cases

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14 December 2000	Spain/Guatemala: Universal Jurisdiction should apply to crimes against humanity	EUR 41/15/2000	English
5 February 2001	Mexico/ Argentina / Spain : Extradition decision raises hopes in the struggle against impunity	AMR 41/06/01	English Espanol
8 June 2001	Rwanda: Belgian court judgment is a great step in the fight against impunity	AFR 47/01/01	English Espanol
3 October 2001	Amnesty International urges investigation of Ariel Sharon	MDE 15/89/01	English Espanol Francais
16 October 2001	Peru/Japan: Former Peruvian President must be brought to justice for human rights violations	AMR 46/18/01	English Espanol
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