



# **European States confronted with Impunity**

## **Report on Universal Jurisdiction in Europe**

**April 2010**

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## 1 Executive Summary

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Universal jurisdiction was intended to fight the impunity of perpetrators of serious crimes and violations of human rights, according to international law, such as torture enforced disappearances, war crimes and genocide. Impunity occurs when the perpetrators of such crimes are not punished or prosecuted. It is true that the national courts of the State in which the crimes were committed are best positioned to pursue and prosecute perpetrators. However, such lawsuits are not always effective, for example due to the lack of political will to punish the perpetrators of such crimes, the risk incurred by the victim in case he/ she files a complaint, corruption in the State's judiciary etc.

The concept of "universal jurisdiction" emerged following World War Two, but it has only truly been practiced in most European countries over the past two decades. This last decade has seen a noticeable increase in the number of complaints filed and sentences issued by courts using the principle of universal jurisdiction. This has been followed by various legislative measures in each country to regulate the practice of universal jurisdiction, either restricting certain elements or further re-enforcing its implementation.

Alkarama has extensive experience working with victims of torture and other human rights violations in the Arab World and chose to focus on submitting such cases to the United Nations human rights mechanisms due to the failure of domestic courts and regional mechanisms to effectively provide protection to the victims of serious human rights violations. The universal jurisdiction given to courts in European countries offers a further recourse for victims of these violations, allowing for them to submit complaints against those who violated their most basic rights regardless of their origins or where the violations took place. This jurisdiction can be used by the victims Alkarama defends, from the Arab region, but also by victims around the world.

To inform victims, their families and representatives, as well as NGOs and academics, of the most up to date information about the use of universal jurisdiction, Alkarama prepared this "Report on Universal Jurisdiction". The report aims to identify within the judicial system of each European country the provisions which allow the exercising of universal jurisdiction, the admissibility of complaints, the procedural provisions and limitations of the law. It considers certain complaints filed using the principle of universal jurisdiction by highlighting the relevant jurisprudence.

## 2 About Alkarama

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Alkarama is a Geneva-based human rights non-governmental organisation, working on human rights throughout the Arab world. We have offices and representatives in Geneva (our head office), Egypt, Lebanon, Qatar and Yemen. Alkarama participates in all of the United Nations human rights procedures including submission of communications and reports to the Special Procedures and Treaty bodies as well as the newly established Universal Periodic Review. The aim of Alkarama is to work in a constructive dialogue with all actors – including States, the Office of the High Commissioner for Human Rights and all members of civil society. We focus on following four priority areas: arbitrary detention, torture, enforced disappearances and extra-judicial executions.

## 3 Introduction

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### 3.1 Definition and clarification

Generally, national courts are competent only to consider cases within their territorial jurisdiction, when the offence is committed on the territory of the State concerned, or their personal jurisdiction, where the suspect or victim is a citizen of the State in which the court is established.

However, a new jurisdiction has been developed in recent decades to allow national courts to exercise a kind of extraterritorial jurisdiction. This is known as **universal jurisdiction**. It allows **a domestic court to prosecute international crimes, even if they are not committed within the territory of the State in which the courts are found, and even if the author or the victim are not nationals of that State.**

Universal jurisdiction was intended to fight the impunity of perpetrators of international crimes such as torture and other serious violations of human rights such as enforced disappearances, war crimes and genocide. Indeed, impunity is a term used when the perpetrators are not punished or prosecuted. It is true that the national courts of the State in which the crimes were committed are best positioned to pursue and prosecute perpetrators. However, such lawsuits are not always effective, for example due to the lack of political will to punish the perpetrators of such crimes, the risk incurred by the victim in cases of complaints, corruption in the State's judiciary etc.

The implementation of the principle of universal jurisdiction has its limitations and the fight against impunity is not always effective. However, increasing interest from the international community in this issue is a very important step. The mobilization of the international community for an effective system to punish perpetrators of international crimes is a necessary step. Indeed, the fight against impunity is essential to prevent serious crimes being repeated. This is also essential for the purpose of achieving international justice and social peace. In this regard, Amnesty International states that "The climate is changing, and the goal of overcoming impunity comes a step closer with every successful prosecution."<sup>1</sup>

### 3.2 The basis of universal jurisdiction under international law

International law provides the opportunity for victims and their representatives to bring cases before the courts of a state based on universal jurisdiction. In addition, the States of the international community are obliged under international law to prosecute international crimes. Thus, international agreements reflect the existence of such a commitment to providing certain standards relating to the implementation of these treaties into domestic law. For example, the Convention Against Torture of 1984 requires acceding States, in Article 5, to take the necessary measures for establishing universal jurisdiction to try the offences provided for in the text of the Convention. The same article, in paragraph 2, provides that "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him (...)". Similarly, European states are committed under the Statute of Rome<sup>2</sup>, the Geneva Conventions and the Additional Protocols<sup>3</sup> to exercise universal jurisdiction in the prosecution of suspected perpetrators of serious violations of human rights.

### 3.3 The Primacy of international law

Thus, the principle of universal jurisdiction is expressly provided for by international law. Without a doubt it has primacy over national law. International law provides that no party to a treaty may invoke provisions of its internal law to justify non-application of provisions of the Treaty<sup>4</sup>. Therefore, international conventions shall prevail over the national laws.<sup>5</sup> Similarly, under the Vienna Convention on the Law of Treaties, international commitments prevail over domestic law. Article 27 of the Convention states that "a party may not invoke provisions of its internal law as justification for its failure to perform a treaty". In addition to the superiority of international law over national law, another principle reinforces the effectiveness of universal jurisdiction, namely the obligation to incorporate the provisions of treaties in domestic law. This means the inclusion of provisions of the Conventions in domestic legislation of States members. In this context, European states have enacted

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<sup>1</sup> Amnesty international, *Document - End impunity: Justice for the victims of torture*, p.86, found on: <http://www.amnesty.org/en/library/info/ACT40/024/2001/en> (accessed on 6 March 2010).

<sup>2</sup> Cf. paragraph 4 of the preamble, available on: <http://www.preventgenocide.org/law/icc/statute/> (accessed on 6 March 2010)

<sup>3</sup> The four Geneva Conventions of August 12, 1949 provides that contracting states' undertake to enact any legislation necessary to provide effective penal sanctions to apply to persons committing, or ordering to be committed, one or other of the serious crimes in this Convention [...]. Each Contracting Party shall have the obligation to search for persons alleged to have committed or have ordered to be committed, any of these serious crimes, and it will bring them to its own courts, regardless nationality (...). (Art. 49, GC I, 50, GC II, 129, GC III and 146 GC IV). For more details, see ICRC, *What are the means of implementing humanitarian law?* available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/humanitarian-law-factsheet> (consulted 6 March 2010)

<sup>4</sup> See the advisory opinion of PCIJ, *The Case of the Treatment of Polish Nationals in Danzig*, Advisory Opinion, Series A / B, No. 44, p. 24. See also Article 27 of the Vienna Convention.

<sup>5</sup> Indeed states, in principle, are not bound by a treaty unless they agree and adhere to them. These states are free to sign an international convention or not. However, once the acceptance of a State to be bound by a treaty is gained, it requires certain commitments from that State under international law.

decrees amending existing laws or introducing new legislation in order to make certain provisions relating to universal jurisdiction provided in international conventions, fully apply their national courts. Finally, "the obligation to investigate and prosecute such crimes has been recognized as an obligation *erga omnes*, that is to say that this is a common legal interest to all States; it reflected in international treaties and the principles of customary international law"<sup>6</sup>. Indeed, the fight against these crimes is a concern for humanity. It follows that States are obliged to investigate international crimes and bring the perpetrators to justice.

### 3.4 Challenges and Prospects

However, universal jurisdiction is not absolute; it is often subject to limitations or obstacles related to the prescriptibility of crimes, the presence of the perpetrators of the crime in the territory of the States concerned, the admissibility of complaints, immunity and amnesty granted by a third State. This shows the importance of adequate legal reform in this area. In addition to this, there is not only a lack of political willpower, but also the political pressure exerted by certain States which intend to exercise universal jurisdiction, as was the case with the abortion of the Belgian law of 1993.<sup>7</sup> Indeed, the repeal of this law on universal jurisdiction has demonstrated the fragility of this way of recourse<sup>8</sup>. However, the situation is far from hopeless, as illustrated by the various trials carried out and ongoing today in Europe based on universal jurisdiction. These trials relate in particular to crimes committed in Yugoslavia and Rwanda. Furthermore, some courts of European states were engaged in litigation against torturers. The most spectacular is the arrest of Augusto Pinochet, former Chilean dictator, in October 1998 in London<sup>9</sup>.

### 3.5 The Countries selected

This guide covers European countries because of the increasing importance of universal jurisdiction in Europe, in particular with the current legal reforms in this field<sup>10</sup>. Similarly, the large number of perpetrators of international crimes who find refuge in or travel around Europe has not gone unnoticed by human rights NGOs as well as the victims and their representatives<sup>11</sup>. It would be abnormal that the European countries, States which uphold the law, allow their territories to be "safe havens" for perpetrators of serious violations of international law.

### 3.6 Method of work and interests

The actual exercising of universal jurisdiction differs from one state to another due to historical, political and legal circumstances<sup>12</sup>. The variations in legislation and jurisprudence requires a separate examination of each European state. This report aims to identify within the judicial system of each of the six selected European country that deals with provisions to exercise universal jurisdiction, the admissibility of complaints, the procedural provisions and limitations of the law. It considers certain complaints filed using the principle of universal jurisdiction by highlighting the relevant jurisprudence.

To inform victims, their families and representatives, as well as NGOs and academics, of the most up to date information about the use of universal jurisdiction, Alkarama prepared this "Report on Universal Jurisdiction". The report aims to identify within the judicial system of each European country the provisions which allow the exercising of universal jurisdiction, the admissibility of complaints, the procedural provisions and limitations of the law. It considers certain complaints filed using the principle of universal jurisdiction by highlighting the relevant jurisprudence.

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<sup>6</sup> Report of Fidh and Redress, *Fostering a European Approach to Accountability for Genocide, Crimes Against Humanity, War Crimes and Torture*, April 2007, p.1, available at: <http://www.redress.org/publications/Fostering%20an%20EU%20Approach.pdf>

<sup>7</sup> Cf., *Section 5*

<sup>8</sup> The Belgian judicial apparatus has jurisdiction to prosecute, including Ariel Sharon for the massacres of the Palestinian camps of Sabra and Shatila. See *infra*.

<sup>9</sup> Cf., *Section 6.2*

<sup>10</sup> It is important to note that a large majority of these reforms have been adopted following the encouragement of the EU as an intergovernmental organization.

<sup>11</sup> Many of the NGOs which deal with cases of human rights violations are based in European countries.

<sup>12</sup> For example, some European countries like Spain can prosecute suspects, even when they are not present on its territory, while others require the presence of the suspect. Similarly, the rules on immunity and prescription are not the same in all European states.

The prosecution of those responsible for international crimes contributes to the fight against impunity, which is becoming a mandatory requirement to which states, or at least states upholding the law, should comply. Indeed, the fight against the most serious crimes under international law cannot be effective without a real fight against impunity, which "creates a climate in which some people continue to commit abuses without fear of being arrested, prosecuted or punished"<sup>13</sup>. The fight against impunity is essential to help improve the situation of human rights in Arab countries where violations of the most essential rights of citizens, such as the right to life or the right not to be tortured, are especially prevalent. The commitment to such judicial processes will certainly reduce the magnitude of these violations and also lead to a moral and material compensation to victims. This guide focuses on new developments relating to the exercise of universal jurisdiction, including progress made in the field, but also the major challenges it is facing.

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<sup>13</sup> Amnesty international, *Document - End impunity: Justice for the victims of torture*, p. 1, available at : <http://www.amnesty.org/en/library/asset/ACT40/024/2001/en/cf7a2813-d916-11dd-ad8c-f3d4445c118e/act400242001fr.html> , accessed on 6 March 2010.

## 4 France

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Since 1995, France has enacted several laws ensuring that the principle of universal jurisdiction can be used to prosecute torturers, and other perpetrators of other crimes against humanity in national courts. At present, a victim can only submit a complaint against a perpetrator of such crimes if the perpetrator has "habitual residence" in France. Further legislation which would lift such restrictions in place currently is likely to be adopted soon.

### 4.1 Universal jurisdiction in the legislation

The French national legal system explicitly allows courts to exercise universal jurisdiction. This is regulated by the Code of Criminal Procedure, which gives national courts jurisdiction in the extraterritorial application of international conventions<sup>14</sup>. Indeed, Article 689-1 of the Code of Criminal Procedure provides: "In applying the international conventions referred to below, any suspect from outside the territory of the Republic may be prosecuted and tried by French courts for the offences listed in these articles, if he or she is found in France." This article shows that the exercise of universal jurisdiction in France is subject to two conditions. The first condition is the presence of the suspect is required French territory. The second requires that France be committed, under an international convention, to follow the perpetrators of certain crimes listed in the article. The paragraph following Article 689 expressly cites covenants which confer universal jurisdiction, including the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>15</sup>.

However, the Geneva Conventions of 1949 and the two Additional Protocols of 1977 are not included in this list. Thus, the French courts are unable to initiate proceedings against persons suspected of having committed any serious crimes mentioned in the Conventions and Protocols, namely war crimes, crimes against humanity and genocide. This legal deficiency was partially corrected by the adoption of two laws on universal jurisdiction in cases of crimes against humanity, war crimes and genocide.

The first law, dated 2 January 1995, adapts French legislation to the provisions of UN Security Council resolution 827, which established an international tribunal to prosecute crimes committed in former Yugoslavia. The second is the law dated 22 May 22, 1996, adopted following the adoption of UN Security Council resolution 955, which established an international tribunal for crimes committed in Rwanda. These two laws are not only limited to crimes committed in former Yugoslavia and Rwanda, but they also only allow the prosecution of suspects present on French territory.

The limitations on the exercise of universal jurisdiction in French legislation raised some objections that led to the proposal by the Senate, in June 2008, of a draft law on the subject of universal jurisdiction. It still has not satisfied the supporters of universal jurisdiction, given the survival of certain crucial limitations. Under this arrangement, the "habitual residence" of the suspect in France is a prerequisite for exercising universal jurisdiction<sup>16</sup>. This excludes the prosecution of suspects passing through or on short stays in France<sup>17</sup>, which in practice includes the majority of cases. The current

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<sup>14</sup> It is also important to note that Article 1-2 of the Code of Criminal Procedure provides the possibility for human rights NGOs to call on the universal jurisdiction of national courts. In this context, a number of cases based on universal jurisdiction have been submitted by human rights NGOs such as the International Federation for Human Rights (FIDH).

<sup>15</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York December 10, 1984; entered into force January 26, 1987.

<sup>16</sup> The French courts have clarified in several cases the condition related to the suspect's presence on French territory. Thus the Supreme Court said, during a case involving universal jurisdiction, that this condition for presence is met provided "they identified, at the time of the commencement of proceedings, sufficient evidence for the presence in France of at least one of the "suspects". See, Supreme Court, Criminal Division, January 10, 2007, Case No. 7513. On January 21, 2009, the Supreme Court, Criminal Chamber, delivered a judgment on the same issue in Case No. 07-88.330, whereby it states: "for the application of universal jurisdiction under Articles 689-1 and 689-2 of the Code of Criminal Procedure, in assessing the evidence for the presence in France of the alleged perpetrators of acts of torture, this should be done at the opening of the investigation and falls within the sovereign power of the lower courts and, accordingly, beyond the control of the Supreme Court."

<sup>17</sup> Other conditions required for the exercise of universal jurisdiction include that there be no request for for the extradition of the suspect and that the case be referred to the court by the public prosecution. For more details, see National Assembly, No. 1828, the notice is on behalf of the Committee on Foreign Affairs on the bill, passed by the Senate, adapting criminal law to the

legislation is also criticized for its inconsistency with the provisions of the Rome Statute on the ICC to which France is committed. The restrictions imposed by the new system raised strong protests which culminated in July 2009 in the adoption of improvements by the Foreign Affairs Committee of the National Assembly. These include the abandoning of all restrictions on the exercise of universal jurisdiction, and should soon be submitted to Parliament for final adoption<sup>18</sup>.

## 4.2 Case studies

French law permits the exercise of universal jurisdiction for torture, even before the new reform of 2009-2010. In this context, the judiciary has intervened on several occasions to pursue those present in France who are suspected of committing acts of torture. Thus, the Court d'Assises de Nimes (Criminal Court) sentenced the Mauritanian officer Ely Ould Dah on 1 July 2005, for his involvement in torture. The verdict was delivered despite the fact that Ould Dah had fled to Mauritania. Sentencing in the absence of the accused shows that the condition of "presence on the territory" need only be established in order to begin the investigation. The procedure can then be pursued even in cases of the suspect's escape during the investigation. The judiciary also took the positive step in this case by rejecting the amnesty granted to Dah Ould by Mauritanian law. In this regard, the Supreme Court stated that "the exercise by a French court of universal jurisdiction upholds the jurisdiction of French law, even in the presence of a foreign law of amnesty."<sup>19</sup> The decision of the European Court of Human Rights (ECHR) confirmed the decision of the Supreme Court following an appeal by Ely Ould Dah, filed in 2003, against the verdict. The ECHR declared the application inadmissible, while rejecting the Mauritanian amnesty law in his favour.<sup>20</sup>

In 2008, the Court d'Assises du Bas-Rhin (Lower Rhine Criminal Court) invoked universal jurisdiction to sentence Khaled Ben Said, a former vice-consul of Tunisia in Strasbourg, to eight years in prison, for complicity in torture and barbarism. The Court stated, regarding the question of the presence of Ben Said on French territory, that conditions were met when the suspect was in France at the opening of the preliminary investigation.<sup>21</sup> More recently, on January 21, 2009, the Court of Cassation has accepted the exercise of universal jurisdiction to prosecute acts of torture committed in Cambodia. This ruling of the Supreme Court intervened to overturn the decision of the Paris Court of Appeal of October 24, 2007, under which the prosecution of suspects was rejected.<sup>22</sup>

The exercise of universal jurisdiction in the case of the "Disparus du Beach" is worth mentioning. It concerns the disappearance of hundreds of Congolese citizens in the river port of Brazzaville Beach. Some Human Rights NGOs<sup>23</sup> brought this case before the French courts. The Examining Chamber of the Court of Appeal of Paris decided on 22 November 2004, to quash the entire proceedings in this case. However, on 9 April 2008, the Court of Cassation overturned the decision of the Court of Appeal, ruling for the exercise of universal jurisdiction to initiate prosecution of the criminals.<sup>24</sup>

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institution of the International Criminal Court, 8 July 2009, p.52, available at: <http://www.assemblee-nationale.fr/13/pdf/rapports/r1828.pdf>

<sup>18</sup> This fundamental reform on universal jurisdiction has made this a topical issue in France. Thus, Bernard Kouchner, Minister of Foreign Affairs, and Michelle Alliot-Marie, Minister of Justice announced in January 2010 the creation of a centre for "Genocide and Crimes against Humanity" at the High Court of Paris. The creation of this centre was also planned in the draft law on the specialization of courts and litigation which will be presented to Parliament during its first session in 2010.

<sup>19</sup> Supreme Court, Criminal Division, appeal No.: 02-85379, October 23, 2002, available at: <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007070167&dateTexte=>

<sup>20</sup> CEDH, Notice of the Registrar, Decision on admissibility in the case OULD DAH v France (No. 13113/03), 30.3.2009, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=848779&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

<sup>21</sup> Court of Assizes of the Lower Rhine default Criminal Case No. CA 08/36, December 15, 2008. For more details, see FIDH, Khaled Ben Said, the first trial in France for an official Tunisian accused of torture, No. 512f, March 2009, available at: [http://www.ldh-france.org/IMG/pdf/Rapport\\_de\\_la\\_FIDH\\_et\\_de\\_la\\_LDH\\_sur\\_l\\_affaire\\_Ben\\_Said.pdf](http://www.ldh-france.org/IMG/pdf/Rapport_de_la_FIDH_et_de_la_LDH_sur_l_affaire_Ben_Said.pdf) (accessed on 14 Avril 2010)

<sup>22</sup> For more detail, *La Cour de cassation française relance une procédure concernant des actes de torture commis au Cambodge*, 23 janvier 2010, available on : <http://www.fidh.org/La-Cour-de-cassation-francaise-relance-une>, (accessed 20 March 2010).

<sup>23</sup> The French League for Human Rights, the Congolese Observatory of Human Rights and FIDH.

<sup>24</sup> Supreme Court, Criminal Chamber, Decision No. 1530, April 9, 2008, available at: [http://www.fidh.org/IMG/pdf/ArretCCBeach9avril08\\_exp.pdf](http://www.fidh.org/IMG/pdf/ArretCCBeach9avril08_exp.pdf) (accessed 4 April 2010)

Finally, the trial of 15 leaders of the Chilean dictatorship is ongoing in the French courts<sup>25</sup>.

The action of the French courts with regard to complaints of torture cases, however, has known limitations. Experience has shown that immunity has been a hindrance in its implementation. Such was the case during the visit of Zimbabwean President Robert Mugabe to Paris for a Franco-African summit in 2003. The arrest warrant from a judge in Paris on 17 February 2003, did not result in his arrest because of a court decision holding that Mugabe enjoyed immunity against prosecution as head of State.<sup>26</sup> The question of immunity was also the source of non-arrest of Khaled Nezzar, former defense minister of Algeria, and Donald Rumsfeld, former Minister of Defense, for their involvement in acts of torture. The presence of these two suspects in France did not lead to their arrest given the intervention of the French Ministry of Foreign Affairs granting them immunity. However, this contradicts international law which does not provide immunity for perpetrators of international crimes, which includes torture.

Crimes against humanity and war crimes committed in former Yugoslavia and Rwanda, are the only crimes which can be prosecuted in France under the aforementioned laws. Universal jurisdiction has been exercised on several occasions to prosecute crimes committed in former Yugoslavia and Rwanda, as was the case recently in cases involving Simbikangwa Pascal, a Rwandan arrested in Mayotte in 2009 transferred Paris.<sup>27</sup>

It seems that France is trying to strengthen its universal jurisdiction. This can be seen by the increasing number of cases using universal jurisdiction before the French courts in recent years and especially the new reforms adopted in 2009-2010. The question which remains is whether the likely forthcoming legislative opening will be accompanied by sufficient willingness to stand against any political pressure and exercise universal jurisdiction in good faith. This question will probably be clarified during the year 2010.

### 4.3 Summary

- **The prosecution of an alleged perpetrator of torture is possible in France.**
- A new law, which will, in principle, be adopted in the coming months, will allow victims and their representatives to bring a case before a French court if the suspect is present in France.
- Until this draft law is adopted, the concept of "habitual residence" of the suspect in France is required in order to initiate a prosecution. However, the condition of presence of the suspect is only necessary to begin the investigation procedure. The suspect may then be pursued even in case of their escape during the investigation.
- Under the new arrangement, the prosecution of suspects passing through or making short trips to France is possible. The presence of the suspect on French territory is a mandatory requirement. This device also requires, in order to exercise universal jurisdiction, a lack of demand for extradition of suspects and referral to the court by the prosecution.

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<sup>25</sup> For more details on this trial, see *The International mission of FIDH in Santiago, 15-23 April 2008*, <http://www.fidh.org/IMG/pdf/dossier-proces.pdf> (accessed on 17 march 2010)

<sup>26</sup> For more details, see HRW, in *Europe: The State of the Art, 2006*, p. 57, available at: <http://www.hrw.org/en/node/11297/section/1>

<sup>27</sup> Colette Braeckman, *Captain Pascal Simbikangwa transferred to Paris, 20.11.2009*, available at: <http://www.france-rwanda.info/article-le-capitaine-pascal-simbikangwa-transfere-a-paris-39724872.html>

It should be noted that Rwandans arrested in France are often the subject of an extradition request by the Government of Rwanda. These requests are not always acceptable as is the case with Isaac Kamali in December 2008 and the case of Marcel Bivugabagabo in October 2008. See, Cf., Collectif des Parties Civiles pour le Rwanda, *Un présumé génocidaire s'invite impunément aux commémorations à la mémoire des victimes !*, le 28 mai 2009, [http://www.collectifpartiescivilesrwanda.fr/un\\_presume\\_genocidaire\\_aux\\_commemorations.html](http://www.collectifpartiescivilesrwanda.fr/un_presume_genocidaire_aux_commemorations.html) (accessed on 20 march 2010)

#### 4.4 Useful Contacts

- **Some local councils offer free consultations with a lawyer:**  
see: <http://vosdroits.service-public.fr/F1435.xhtml#formulaire-contact>
- **To contact the Department of Justice, you can:**  
Write to the following address:  
Ministère de la Justice  
13, place Vendôme  
75042 PARIS CEDEX 01  
Call the switchboard on +33 1 44 77 60 60  
[http://www.annuaires.justice.gouv.fr/inc\\_alias/contact.php?contact=annuaires](http://www.annuaires.justice.gouv.fr/inc_alias/contact.php?contact=annuaires)
- **Assistance to victims by the County Council of access to the law, Paris**  
4, bd du Palais  
75001 Paris  
[http://www.cdad-paris.justice.fr/aide\\_victime/index.html](http://www.cdad-paris.justice.fr/aide_victime/index.html)
- **Prosecutor's Office of the Republic**  
6 Rue Pablo Neruda, 92000 Nanterre, France  
Tel. +33 1 40 97 10 10  
<https://pastel.diplomatie.gouv.fr/editorial/francais/familles/enlevements/adresse0103.html>

## 5 Belgium

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Belgium adopted very open laws enacting the concept of universal jurisdiction in the early 1990s. This openness led to a large number of complaints against perpetrators of international crimes in Belgian courts, causing the Belgian authorities to push through a more restrictive law in 2003. The conditions for submitting a complaint against the perpetrator of torture or crimes against humanity are that: (1) he or she be in Belgium at the time of the complaint; (2) that he or she is not given immunity; and (3) that the federal prosecutor agrees to launch an investigation.

### 5.1 Universal jurisdiction in the legislation

Belgium is known for its efforts at implementing universal jurisdiction at the national level, notably by the adoption of the 1993 Act which allowed Belgium to exercise universal jurisdiction for violations of the Geneva Convention and its two protocols. In addition to this is the adoption of a 1999 law to extend universal jurisdiction to genocide and crimes against humanity. The provisions of the 1999 law considered torture as a crime against humanity.

The new Belgian law differed from other laws relating to universal jurisdiction in Europe in two aspects. Firstly, it allowed the prosecution of an offender no matter where he is, even if he is not present on Belgian territory. Further, it expressly stated that no immunity would be prosecution. The two laws of 1993 and 1999 were designed to introduce the provisions of the Geneva Convention in domestic law and to enforce the commitments undertaken by the Belgian State in signing the Rome Statute. They also facilitated the prosecution of perpetrators of genocide committed in Rwanda.

The enthusiasm for universal jurisdiction in Belgium has led courts to confirm that the prosecution of offences criminalized under customary international law is possible, even if the 1999 law does not apply.<sup>28</sup> The flexibility of these provisions has naturally increased the number of complaints filed. Thus, the Belgian courts were used to prosecute the authors of international crimes worldwide. However, complaints about U.S. and Israeli nationals, including Rumsfeld and Sharon, have not been followed through by the Belgian judiciary. Ultimately, the pressure on the Belgian Government, and also the considerable number of complaints, led to the adoption of amendments in 2003, limiting universal jurisdiction.

The legal basis for the exercise of universal jurisdiction is encapsulated in article 12a of the Preliminary Title of the Code of Criminal Procedure, adopted 5 August, 2003. This article provides that "prosecution, including the investigation, must be initiated at the request of the federal prosecutor who considers potential complaints".<sup>29</sup> However, the legislation repealed earlier legislation which recognised, even for the claimant, the right to initiate public action by filing a complaint. The Belgian parliament later partially modified this article by adopting on 11 May, 2006, a law strengthening the independence of Belgian courts vis-à-vis the Federal Prosecutor, regarding the decision of whether or not to prosecute a case by virtue of universal jurisdiction.<sup>30</sup> To this restriction is added the fact that prosecution is possible only if there is a connection between the suspect and Belgium; this means that the absence of the criminal prevents the admissibility of the complaint. As for immunity, the new 2003 law prohibits any form of constraint against an official guest of the government but also, in order to

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<sup>28</sup> Cf., REDRESS, *Universal Jurisdiction in Europe : criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide*, 30 juin 1999, p. 19.

<sup>29</sup> Article 12a also indicates that in the case of its application, the matter will be put to trial, by the federal prosecutor, unless:

1. the complaint is manifestly unfounded or
2. the facts noted in the complaint do not correspond to a qualifying offense referred to in Book II, Title Ibis of the Penal Code or any other offense in question by international treaty binding Belgium, or
3. admissible public action can result from the complaint or
4. due to the circumstances of the case, it appears that in the interests of good administration of justice and respect for international obligations of Belgium, the case should be brought before international courts or before the court the place where the acts were committed either in the court of the State whose nationality the perpetrator or the place where he can be found, provided that this court has the qualities of independence, impartiality and equity, as this may highlight particular relevant international commitments binding upon Belgium and that State".

<sup>30</sup> Committee against Torture, Summary record of the first part (public) of the 850th meeting], 05/05/2009, CAT/C/SR.850, paragraph 19, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/435/47/PDF/G0743547.pdf?OpenElement> CAT/C/SR.850 (accessed on 4 march 2010)

satisfy Rumsfeld against an international organization with which Belgium has concluded a headquarters agreement.

It is true that the reform of 2003 has profoundly limited the application of universal jurisdiction in Belgium, without, however, bringing things to a complete standstill. Without doubt, the opposition to international justice is formidable; yet universal competence in Belgium has survived as illustrated by the prosecution of perpetrators of violations of international crimes in Belgium after 2003. Today, the exercise of universal jurisdiction in Belgium is still possible without it being applied in as "extensive" a manner as was previously the case. The Committee against Torture said in 2009 that Belgium has the "necessary measures to establish universal jurisdiction in its courts".<sup>31</sup>

## 5.2 Case studies

It was to be expected that the number of complaints has increased considerably after the strengthening of universal jurisdiction in 1993 and until the 2003 amendment. Thus, during this period, a significant number of complaints were filed against alleged perpetrators of international crimes, whether present on Belgian territory or not. Cases were brought before Belgian courts including to prosecute criminals from Rwanda, Cambodia, Chile, Morocco, Chad, United States, Israel, etc. Four Rwandans were convicted in 2001 for their involvement in the genocide committed in 1994. However, the admissibility of these complaints has been greatly reduced since the 2003 reform. In addition, the prosecution of the torturer Ely Ould Vall, the former head of state of Mauritania, has still not been initiated, despite a complaint using Belgium's universal jurisdiction<sup>32</sup>. The absence of the suspect on the Belgian territory is an obstacle to the prosecution.

However, the Belgian judicial system remains functional in this regard. Thus, 2009 was marked not only by a high number of complaints but also judgments in this field. The 2003 reform did not affect the prosecution of Hissène Habré, former president of Chad, as the investigation had already begun and victims with Belgian nationality had brought the claim.<sup>33</sup> The Belgian government is actively seeking Habré's extradition from Senegal, where he resides. Belgium has brought a claim to the International Court of Justice against Senegal in a proceeding on 19 February, 2009. The proceedings are still pending before the ICJ.<sup>34</sup> On 1 December 2009, the Court d'Assise de Bruxelles (Brussels Criminal Court) sentenced, the Rwandan Ephrem Nkezabera to thirty years imprisonment. Nkezabera, known as the "banker of the genocide", was arrested in 2004 in Brussels following the warrant for his arrest issued by the International Criminal Tribunal for Rwanda.

## 5.3 Summary

- The exercise of universal jurisdiction in Belgium is still possible without it being applied in an "extensive" way, as was the case before 2003.
- The prosecution of an alleged perpetrator of torture is still possible in Belgium.
- The suspect's presence on Belgian territory is a mandatory requirement for beginning an investigation. Prosecution is possible only if there is a connection between the suspect and Belgium, this means that the absence of the criminal prevents the admissibility of the complaint.
- The claimant no longer has the right to submit a complaint. "The prosecution, including the investigation, must be initiated at the request of the federal prosecutor who considers any complaints."

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<sup>31</sup> Committee against Torture, Summary record of the first part (public) of the 850th meeting], 05/05/2009, CAT/C/SR.850, paragraph 19, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/435/47/PDF/G0743547.pdf?OpenElement> CAT/C/SR.850 (accessed on 4 March 2010)

<sup>32</sup> The promise of the federal prosecutor in Brussels, given to Ousmane Sarr, the President of the Association of widows and orphans of soldiers of Mauritania, to establish a commission of judges to follow this matter has still not been achieved. See the interview with Mr. Ousmane Sarr, Interviewed in Paris by Moustapha Barry, February 21, 2007, published at <http://www.avomm.com> (accessed on 4 April 2010)

<sup>33</sup> HRW prosecution against Hissène Habré, an "African Pinochet," Summary of the case, February 11, 2009, available at: <http://www.hrw.org/fr/news/2009/02/11/les-poursuites-contre-hiss-ne-habr-un-pinochet-africain> (accessed on 10 April 2010)

<sup>34</sup> To follow the case on the website of the ICJ, see: Questions regarding the obligation to prosecute or extradite (Belgium v. Senegal), available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=bs&case=144&k=5e> (accessed on 4 March 2010)

- It is not possible to prosecute the suspect if he is an official guest of the government.

## 5.4 Useful Contacts

- **Victim Services:**  
[http://www.belgium.be/fr/justice/victime/aide\\_aux\\_victimes/services\\_d\\_aide\\_aux\\_victimes/](http://www.belgium.be/fr/justice/victime/aide_aux_victimes/services_d_aide_aux_victimes/)
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## 6 United Kingdom

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The United Kingdom included the principle of universal jurisdiction in its national laws in 1957, and has regularly modified the requirements and jurisprudence on its use. Many of the most public cases of the use of universal jurisdiction occurred in the United Kingdom including that of the former Chilean dictator Augusto Pinochet.

### 6.1 Universal jurisdiction in the legislation

The UK is committed under international conventions to the exercise of universal jurisdiction against the perpetrators of international crimes. Thus, the United Kingdom has had a law on the application of the Geneva Conventions since 1957<sup>35</sup>. This law was subject to an amendment in 2001 to adapt its provisions relating to prosecution for violations of the Geneva Conventions to similar provisions in the framework of the International Criminal Court.<sup>36</sup> As required by the Convention against Torture of 1984, the United Kingdom allows for the prosecution by its national courts of acts of torture committed abroad under the 1988 Act (the Criminal Justice Act, Section 134).<sup>37</sup> However, immunity, which finds its legal basis in Article 14 (1) of the Law on Immunity of 1978<sup>38</sup>, has long been an obstacle to the exercise of universal jurisdiction. This situation does not satisfy the human rights NGOs nor the Committee Against Torture, which has brought to the attention of the United Kingdom the fact that "Articles 1 and 14 of the State Immunity Act (an act on the immunity of Heads of State) of 1978 seem to be totally incompatible with the obligations of the State Party under Articles 4, 5, 6 and 7 of the Convention"<sup>39</sup>.

The pressure has resulted in more flexibility for the issuance of an arrest warrant against alleged perpetrators of international crimes. Thus, such a warrant may be issued by a judge in case of sufficient evidence, without necessarily receiving the approval of the Attorney General. National court decisions are based notably on the Rome Convention, which requires UK courts, under Article 51(2)(b) to exercise universal jurisdiction for war crimes or crimes against humanity when the alleged offender is a British citizen or resident.<sup>40</sup> These recent prosecutions in the United Kingdom are based on Article 25(2) of the Code of Prosecution for infringements of the "Prosecution of Offences Act 1985". It is true that this article requires the consent of the Attorney General in the exercise of universal jurisdiction. However, this requirement does not prevent the arrest without a warrant or the issuance or execution of an arrest warrant against those suspected of having committed international crimes. The agreement of the Attorney General would be needed later to proceed<sup>41</sup>. Thus, the current legislation allows victims to bring cases before the UK courts, which can then order the arrest of suspects if they have sufficient evidence.

### 6.2 Case studies

Addressing universal jurisdiction in the United Kingdom leads inevitably to the mention of the famous case of former Chilean President Augusto Pinochet. He was arrested in October 1998 for his responsibility in acts of torture, though he was finally allowed to return to Chile in March 2000 for medical reasons. Nevertheless, the most important result of this case on the legal level was the decision of the House of Lords, handed down on 24 March 1999, in which it noted that "torture was a

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<sup>35</sup> For more details on this law, see the website of the Office of Public Sector Information:

[http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1957/cukpga\\_19570052\\_en\\_1](http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1957/cukpga_19570052_en_1) (accessed on 10 April 2010)

<sup>36</sup> Similarly, a law was enacted in 1991 to allow the prosecution of war crimes committed during the Second World War.

<sup>37</sup> Section 134 also contains a definition of torture. This definition brought to a narrower than that given by the Convention against Torture. The full text is available at: [http://www.opsi.gov.uk/acts/acts1988/ukpga\\_19880033\\_en\\_1.htm](http://www.opsi.gov.uk/acts/acts1988/ukpga_19880033_en_1.htm)

<sup>38</sup> For more information see the text of the Act on:

[http://www.oup.com/uk/orc/bin/9780199259113/resources/cases/ch14/1978\\_state\\_immunity.pdf](http://www.oup.com/uk/orc/bin/9780199259113/resources/cases/ch14/1978_state_immunity.pdf)

<sup>39</sup> *Summary record of the public part of the 360th meeting: United Kingdom of Great Britain and Northern Ireland, Committee against Torture, CAT/C/SR.360*, 23 November 1998, paragraph D, f, available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.SR.360.Fr?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.SR.360.Fr?Opendocument)

<sup>40</sup> Amnesty International, *United Kingdom. We must strengthen the protection of witnesses in cases of war crimes*, July 3, 2008, available at: <http://www.amnesty.org/fr/for-media/press-releases/royaume-uni-il-faut-renforcer-la-protection-des-t%C3%A9moins-dans-les-affaire>

<sup>41</sup> Cf., Application for Arrest Warrant Against General Shaul Mofaz, First instance, unreported (Bow Street Magistrates' Court), 12 February 2004, found on: [http://www.adh-geneva.ch/RULAC/pdf\\_state/Application-for-Arrest-Warrant-Against-General-Shaul-Mofaz.pdf](http://www.adh-geneva.ch/RULAC/pdf_state/Application-for-Arrest-Warrant-Against-General-Shaul-Mofaz.pdf) and David Byers, 'War crimes' Israeli minister cancels UK trip, 6 December 2007, found on: <http://www.timesonline.co.uk/tol/news/uk/article3012503.ece> (accessed 2 April 2010)

crime for the whole international community on which the parties to the UN Convention Against Torture had universal jurisdiction and a former head of state was not entitled to immunity for such crimes."<sup>42</sup> Consequently, the Heads of State in office, and also the foreign ministers, do enjoy immunity. This principle has been a hindrance to the courts for the arrest of some suspects such as U.S. President George W. Bush and Zimbabwean President Robert Mugabe<sup>43</sup>. Similarly, the immunity sometimes protects ministers in office of a foreign state as was the case in the British courts' refusal to execute a arrest warrant against the Israeli Defense Minister Shaul Mofaz, in February 2004.

In recent years, remarkable progress in the exercise of universal jurisdiction in the United Kingdom. As recently as 2009, a British court issued an arrest warrant against Tzipi Livni<sup>44</sup>, because of war crimes committed during the Israeli offensive against Gaza<sup>45</sup>. In the same context, a group of Israeli officers cancelled their visit to the United Kingdom in January 2010, for fear of prosecution<sup>46</sup>. However, it is possible that the United Kingdom shall, in response to pressure from the Israeli government, make some legislative amendments to provide protection to alleged perpetrators of international crimes. However, supporters of universal jurisdiction are struggling to expand universal jurisdiction in order to allow the arrest of all suspects, not only citizens and residents of the United Kingdom but also the perpetrators of crimes who are visiting the United Kingdom. Reforms are under consideration to address the shortcomings of the UK legislation and to strengthen its application of universal jurisdiction<sup>47</sup>. The year 2010 will clarify the level of independence of the British judiciary but also the political will of the United Kingdom to fight against impunity.

### 6.3 Summary

- Currently, some reforms are under way with regard to universal jurisdiction in the United Kingdom.
- The United Kingdom allows for the prosecution by its national courts of acts of torture committed abroad.
- Immunity currently does not constitute an obstacle to the exercise of universal jurisdiction. However, it is possible that certain legislative amendments will be adopted soon in order to strengthen the immunity which provides protection to alleged perpetrators of international crimes, including Israeli nationals.
- Arrest warrants against alleged perpetrators of international crimes may be issued by a judge in case of sufficient evidence, without necessarily receiving the endorsement of Attorney General. For example, the Goldstone report, approved by the UN, which accuses Israel of war crimes, is an important piece of evidence admissible in British courts. In case of torture, medical reports may be sufficient evidence.
- The presence of the suspect in the United Kingdom is required or expected in order to issue an arrest warrant or to initiate the prosecution. The opinion of the judge plays an important role in this.

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<sup>42</sup> *Fourth Periodic Report of the United Kingdom and Northern Ireland pursuant to article 19 of the Convention Against Torture*, 27 May 2004, (CAT/C/67/Add.2), paragraph 67

<sup>43</sup> Similarly, the prosecution of a Sudanese doctor accused of torture in September 1997, in front of a Scottish court has not led to condemnation. That court decided in May 1999, to end the prosecution without explanation.

<sup>44</sup> She was the Minister of Foreign Affairs during this offensive.

<sup>45</sup> It seems that the report of Goldstone, approved by the United Nations, accusing Israel of war crimes, is an important evidence admissible in British courts.

<sup>46</sup> However, in September 2009, a complaint for the arrest of the new Defense Minister of Israel, Ehud Barak, was suspended by a British court (Westminster Magistrates Court).

<sup>47</sup> For more details, see: FIDH, *Ending Impunity in the United Kingdom for genocide, crimes against humanity, war crimes, torture and other crimes under international law*, in July 2008, available at: [http://www.redress.org/reports/UJ\\_Paper\\_15%20Oct%2008%20\\_4\\_.pdf](http://www.redress.org/reports/UJ_Paper_15%20Oct%2008%20_4_.pdf)

## 6.4 Useful Contacts

- **Victim Services:**  
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102 Petty France  
London SW1H 9AT - [victimschampion@cjs.gsi.gov.uk](mailto:victimschampion@cjs.gsi.gov.uk)
- **Ministry of Justice:**  
Tel. +44 (0) 20 3334 3555  
Mail: [general.queries@justice.gsi.gov.uk](mailto:general.queries@justice.gsi.gov.uk)
- **The Prosecutor General:**  
<http://www.cps.gov.uk/contact/index.html>

## 7 Germany

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Germany incorporated the concept of universal jurisdiction in its laws following the Second World War, with the aim of prosecuting Nazi leaders who had perpetrated crimes against humanity and genocide. These laws were reinforced by the adoption of a new law in 2002 which incorporated the requirements of the Rome Statute. In Germany, the physical presence of the suspect is not necessary to initiate an investigation, but other restrictions do exist.

### 7.1 Universal jurisdiction in the legislation

Germany accept to exercise universal jurisdiction since the introduction into domestic legislation of tools to fight international crimes against humanity, essentially with regards to the barbaric acts committed by the Nazis during the Second World War. Law n°10 of 1945, adopted by the Interallied Control Council, has been the basis for the prosecution of numerous Nazi war criminals.<sup>48</sup> With regard to universal jurisdiction, the legislation permitting the execution of a universal jurisdiction before 2002 was found in Article 6 (para. 1 and 9) of the penal code. This article allows German Tribunals a jurisdiction in prosecuting international crimes, when this is required by an international convention to which Germany is a party. The exercise of universal jurisdiction was reinforced by the adoption on 30 June 2002 of a code against crimes of international public law. The new code adapts German legislation to the Rome Statute by introducing crimes against humanity, war crimes, and genocide into existing German law. These crimes are prosecuted without regard to the nationality of the accused, nor the place or time where they were committed. It is true that torture was not expressly mentioned in the new Code, although law n°10 mentioned above had already qualified torture as a crime against humanity. As a result, those who commit acts of torture can be the subject of judicial prosecution in Germany.

Article 153f of the Penal Procedure code has just given the Federal Prosecutor more power over the issue.<sup>49</sup> The Prosecutor is also required to intervene to begin prosecution against the suspect, according to the law. The physical presence of the suspect on German territory is no longer a necessity since the introduction of the 2002 law (mentioned above). However, the procedural penal code and said law from 2002 anticipates that the Federal Prosecutor would refrain from opening an investigation into the matter when the presence of the suspect cannot be readily foreseen.<sup>50</sup> This is to say, the German judicial system can decide to not intervene in case of "an inability to investigate". Finally, German legislation requires, in order to exercise a universal jurisdiction, that the case in question is not under review by another legal authority, what is called the "principle of subsidiarity". A further limitation of universal jurisdiction in Germany is that immunity is granted to those who are present in Germany at the invitation of the government.

### 7.2 Case studies

Several prosecutions of international crimes committed by Nazis were brought before the Nuremberg Tribunal, based on law n°10 of 1945. The most recent case concerning ex-Nazis is that of John Demjanjuk, an American of Ukrainian origin. Germany succeeded in obtaining his extradition from the United States in May 2009 after having issued a warrant for his arrest. Demjanjuk has already been tried 1988 in Israel, and is now the object of judicial proceedings by the prosecutors in Munich who have accused him of having participated in genocide carried out against Jews. The Federal Constitutional Court rejected a request by the lawyer representing the accused to end prosecution based on his advanced age (89 years). 2009 was also marked by the life imprisonment of another ex-Nazi, Josef Scheungraber, by the lower court of Munich.<sup>51</sup>

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<sup>48</sup> 2 December 2000, a new law was enacted permitting the surrender of German nationals before international tribunals.

<sup>49</sup> The Code is available on : <http://www.gesetze-im-internet.de/bundesrecht/stpo/gesamt.pdf>

<sup>50</sup> HRW, *Universal Jurisdiction in Europe: The State of the Art*, juin 2006, pp. 63-64, available on: <http://www.hrw.org/en/reports/2006/06/27/universal-jurisdiction-europe>, (consulted on 12 April 2010)

<sup>51</sup> *Un ancien nazi condamné à perpétuité en Allemagne (Former Nazi convicted to life in prison in Germany)*, Le monde (The World), 11/08/2009, available on : [http://www.lemonde.fr/europe/article/2009/08/11/un-ancien-nazi-condamne-a-perpetuite-en-allemande\\_1227477\\_3214.html#ens\\_id=1214930](http://www.lemonde.fr/europe/article/2009/08/11/un-ancien-nazi-condamne-a-perpetuite-en-allemande_1227477_3214.html#ens_id=1214930)

Aside from Nazi criminals, numerous convictions have taken place against perpetrators of international crimes, such as the case of Novislav Djajicpour, for his participation in genocide committed in Bosnia and the case of Nikolai Jorgic, who was sentenced to life in prison for the same reasons. Certain cases concerning Rwandans have also been the subject of prosecution in Germany. The main political leader of the rebellion in Rwanda and his lieutenant were arrested in Germany in November 2009.<sup>52</sup> More recently, an arrest warrant was announced on 25 January 2010 for ex-dictator Videla of Argentina. He is accused of being responsible for the massacre of thousands, including a German national, Rolf Stawowiok.<sup>53</sup>

The efficiency of the judicial system in the implementation of universal jurisdiction does however have serious limitations. For example, many cases are closed due to "the inability to investigate",<sup>54</sup> or under the principal of the subsidiarity, mentioned above. This principal is at the heart of the case against Donald Rumsfeld being closed by German federal prosecutors. The Supreme Regional Court subsequently declared the appeal against the closing of this file inadmissible, considering that acts of torture committed in Iraq under the authority of Rumsfeld was already under examination by American authorities.<sup>55</sup> As a result, the principal of subsidiarity prevented the prosecution of this individual. Following the example of other European states, the Rumsfeld case has shown the fragility of universal jurisdiction in Germany when the prosecution of certain foreign officials is in question.

The Federal Prosecutor has also refused to open an investigation into Chinese President Jiang Zemin or of Uzbekistan's Minister of the Interior, Zokirjon Almatov.<sup>56</sup> The accused author of acts of torture, Almatov eluded the German justice system due to the refusal of the Federal Prosecutor to prosecute on the grounds that success in this case was an idealistic idea, given that Uzbekistan was not likely to cooperate and that an investigation in Uzbekistan would be necessary.<sup>57</sup> This case has once again shown the limits imposed by the Procedural Penal Code in the execution of universal jurisdiction in Germany.

### 7.3 Summary

- Torture is considered a crime against humanity, and as a result, perpetrators of acts of torture can be prosecuted in Germany
- In the event that the suspect is present on German territory, the federal prosecutor is obliged to initiate a prosecution, according to the law. The physical presence of the suspect on German territory is no longer required, however the Federal Prosecutor must refrain from opening an investigation when the presence of the suspect is not certain and cannot be anticipated.
- The Germany judiciary can decide to not intervene in instances of "an inability to investigate".
- German legislation requires, in order to execute universal jurisdiction, that the case at hand is not under examination by another legal authority; this is referred to as the principal of subsidiarity.
- Immunity is granted to those who are present in Germany at the invitation of the government.

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<sup>52</sup> For more details, please see De Audrey Kauffmann, *Rwanda: le chef de la rébellion hutu et son adjoint arrêtés en Allemagne* (Rwanda : leader of the Hutu rebellion and his lieutenant arrested in Germany), AFP, 17 November 2009, available on : [http://www.google.com/hostednews/afp/article/ALeqM5jejS2MKLe6KxMYIo\\_QV9mJfiK35A](http://www.google.com/hostednews/afp/article/ALeqM5jejS2MKLe6KxMYIo_QV9mJfiK35A) (accessed on 26 March 2010)

<sup>53</sup> RFI, *Mandat d'arrêt allemand contre l'ex-dictateur argentin Videla*, (German arrest warrant against ex-dictator Videla) 25 janvier 2010, available on : <http://www.rfi.fr/contenu/20100125-mandat-arret-allemand-contre-ex-dictateur-argentin-videla> (accessed on 26 March 2010)

<sup>54</sup> Cf., article 151f of the procedural penal code, mentioned above.

<sup>55</sup> For more details on this case and the principal of subsidiary in particular, please see HRW, *Universal Jurisdiction in Europe: The State of the Art*, *op. cit.*, p. 65. Available on : <http://www.hrw.org/en/reports/2006/06/27/universal-jurisdiction-europe> (accessed on 26 March 2010)

<sup>56</sup> The request of his victims was supported by HRW. For more details, *Germany: Victims Appeal Decision on Uzbek Ex-Minister*, 1 February 2007, available on :

<http://www.hrw.org/en/news/2007/02/01/germany-victims-appeal-decision-uzbek-ex-minister> (accessed on 26 March 2010)

<sup>57</sup> HRW, *Germany: Prosecutor Denies Uzbek Victims Justice*, 5 April 2006, available on :

<http://www.hrw.org/en/news/2006/04/05/germany-prosecutor-denies-uzbek-victims-justice> (accessed on 26 March 2010)

## 7.4 Useful Contacts

- **Federal Ministry of Justice:**  
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[www.generalbundesanwalt.de](http://www.generalbundesanwalt.de)
- **Help for Victims:**  
[http://ec.europa.eu/civiljustice/legal\\_aid/legal\\_aid\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/legal_aid/legal_aid_ger_en.htm)

## 8 Spain

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Spain, like Belgium, implemented laws in the late 1980s allowing for a wide application of universal jurisdiction. This was used extensively and led the authorities to restrict its application in 2009.

### 8.1 Universal jurisdiction in the legislation

Spain has the reputation of a relatively extensive application of universal jurisdiction. The legal provisions relative to the implementation of universal jurisdiction were adopted over 20 years ago. Article 23.4 of organic law 6/1985 gives national courts the option of exercising universal jurisdiction in cases involving genocide, as well as crimes in accordance with international conventions to which Spain is a member. Crimes such as these involve terrorism, war crimes, or torture. Torture was incorporated into the Spanish penal code in 1978. Spain has been obliged to prosecute perpetrators of acts of torture committed abroad since its decision to ratify the Convention against Torture in 1987. The pledge to prosecute presumed perpetrators of acts of torture was expressly confirmed by way of jurisprudence of the Spanish Supreme Court.<sup>58</sup> As for crimes against humanity, they were made a criminal act in the Penal Code in 2004.<sup>59</sup>

The fight against impunity was considerably reinforced in 2005 when the Spanish legislation ascribed wide universal jurisdiction to the national courts.<sup>60</sup> The abolition of the Belgian Law of 2003 made universal jurisdiction in Spain the most expansive in the world. For example, the condition of outlining the presence of the suspect on the state's territory was not required in Spain. Due to this, the Spanish courts had the power to prosecute regardless of the place of residence or the nationality of perpetrators<sup>61</sup> of international crimes, or the nationality of their victims. Spanish jurisprudence has equally judged that amnesties granted to suspects will not prevent Spanish courts from implementing universal jurisdiction.<sup>62</sup> As for the subject of immunity in Spain, it is granted in a restrictive manner, in conformity with the provisions of international public law. This particular type of law does not afford immunity to actors involved in international crimes.

The flexibility of Spanish legislation in the matter of universal jurisdiction has led to a considerable number of complaints. This includes requests to prosecute suspected perpetrators of Moroccan, Rwandan, Salvadorian, Chinese, Israeli, and US origin. Nevertheless, in 2009, the fight against impunity in Spain underwent difficulties similar to those in Belgium. The initiating of prosecutions against Chinese, US, and Israeli war criminals and torturers led to heavy international pressure to limit the implementation of universal jurisdiction in Spain. With this in mind, the Spanish Senate intervened in 2009 with the passing of organic law n° 1/2009 on 3 November 2009. This law imposes certain conditions on the Spanish judicial process when exercising powers of universal jurisdiction, namely the presence of the suspect on Spanish territory, if the victims are of Spanish nationality. This modification prompted the Committee against Torture to call upon Spain to "ensure that this reform does not become an obstacle to the exercise of its jurisdiction for other acts of torture, conforming to articles 5 and 7 of the Convention (...)"<sup>63</sup>

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<sup>58</sup> Cf., REDRESS, *Universal Jurisdiction in Europe : criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide*, 30 juin 1999, p. p. 37.

<sup>59</sup> HRW, *Universal Jurisdiction in Europe: The State of the Art*, juin 2006, p. 86, available on: <http://www.hrw.org/en/reports/2006/06/27/universal-jurisdiction-europe>, (accessed 12 april 2010)

<sup>60</sup> As stated in article 21.2 of organic law 6/1985.

<sup>61</sup> Article 23.4 of organic law 6/1985 does not require the physical presence of the subject to engage in prosecution.

<sup>62</sup> HRW, *Universal Jurisdiction in Europe: The State of the Art*, juin 2006, p. 87, available on: <http://www.hrw.org/en/reports/2006/06/27/universal-jurisdiction-europe>, (accessed 12 april 2010)

<sup>63</sup> Committee Against Torture, 43rd Session, *Concluding Observations of the Committee Against Torture on the fifth periodic report of Spain*, 9 December 2009 (CAT/C/ESP/CO/5) paragraph 17.

## 8.2 Case studies

The broad exercise of universal jurisdiction in Spain has been at the center of a number of important prosecutions. The Committee against Torture recognized in 2009 that "Spanish tribunals were pioneers in the application of universal jurisdiction in cases of international crime, notably those concerning torture".<sup>64</sup> The oldest case in Spain, and certainly one of the most well known cases worldwide is that of Augusto Pinochet. Pinochet was arrested in London following the opening of an investigation initiated by Spanish Judge Baltasar Garzón. While it is true that Pinochet was not extradited to Spain,<sup>65</sup> his arrest constituted a vital step in the fight against impunity. In a similar fashion, the criminal section of a Spanish court issued a decision in the case against Pinochet that had important international repercussions. It stated that the absence of an explicit provision in the Geneva Convention does not preclude a member State from exercising universal jurisdiction". It further added that it would be contrary to the spirit of the Genocide Convention to consider Article 6 as limiting the freedom of national courts to prosecute for genocide committed abroad.<sup>66</sup>

The Spanish justice system over the past decade has efficiently engaged in the prosecution of suspected perpetrators of international crimes, with several trials based on the application of universal jurisdiction ongoing today. In April 2005 a Spanish tribunal sentenced Argentinean former lieutenant commander Adolfo Scilingo to 640 years in prison for torture and crimes against humanity. Even after the new reform of 2009, Baltasar Garzón, investigating judge in the National Court of Spain (Spain's highest criminal court), continues his fight against impunity in international criminal cases. He is one of the most well respected defenders of the principle of universal jurisdiction on the international scene today. Mr. Garzón went so far as to plead in 2010 for the opening of an investigation into presumed acts of genocide committed by Moroccan authorities in Western Sahara.<sup>67</sup> He has also investigated acts of torture committed in Guantanamo Bay<sup>68</sup> and cases of war crimes committed by Israel. The Spanish justice system has also initiated an investigation into serious violations committed against the residents of the camp of Achraf in Iraq in 2009.<sup>69</sup>

It is true that the Spain's courage in the fight against impunity has resulted in a limitation of the exercise of universal jurisdiction at the legislative level. Nonetheless, Spanish courts remain active in this domain as illustrated by the abovementioned cases. According to Judge Garzón "the modification of the law of universal jurisdiction in Belgium, and in some respects in Spain, is not a restriction as much as it is a reconfiguration of the path that we should take when developing the principle of universal justice. Never, before the Madrid judgements, was this principal applied in Spain in a case of crimes against humanity, genocide or torture. We didn't know what the limits were. The ideas were on paper, but they weren't well developed. The beginnings of improvement are always marked by advances and retreats."<sup>70</sup>

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<sup>64</sup> Committee Against Torture, 43rd Session, *Concluding Observations of the Committee Against Torture on the fifth periodic report of Spain*, 9 December 2009 (CAT/C/ESP/CO/5) paragraph 17.

<sup>65</sup> Cf., *supra*. Section 6.2

<sup>66</sup> REDRESS, *Universal Jurisdiction in Europe : criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide*, 30 juin 1999, p. 39.

<sup>67</sup> For more details please see ANGOP, *Le juge Garzon veut interroger des victimes en Algérie* (Judge Garzon wants to interrogate victims in Algeria) 06/01/10, available on sur : [http://www.portalangop.co.ao/motix/fr\\_fr/noticias/afrika/2010/01/juge-Garzon-veut-interroger-des-victimes-Algerie-presse,fbe0c15f-3f79-4bc2-8a6d-5acabb5f8af.html](http://www.portalangop.co.ao/motix/fr_fr/noticias/afrika/2010/01/juge-Garzon-veut-interroger-des-victimes-Algerie-presse,fbe0c15f-3f79-4bc2-8a6d-5acabb5f8af.html) (Accessed 4 April 2010)

<sup>68</sup> AFP, Spain: Judge Garzon opens an investigation into torture at Guantanamo Bay, 29 April 2009, available on : <http://droithumanitaire.blogspot.com/2009/04/espagne-le-juge-garzon-ouvre-une.html> (accessed 4 April 2010)

<sup>69</sup> For more information on the investigations, please see FIDH, *Universal Jurisdiction Developments: January 2006- May 2009*, p. 22 et s.

<sup>70</sup> Cf., *Entretien avec Monsieur Baltasar Garzon sur la question de la compétence universelle en 2004* (Interview with his Honour Judge Baltasar Garzon on the question of universal jurisdiction in 2004), available on : <http://www.rnw.nl/nl/node/26594> (accessed on 4 April 2010)

### **8.3 Summary**

- The commitment to prosecute suspected perpetrators of acts of torture was expressly confirmed by jurisprudence handed down by the Spanish Supreme Court.
- The presence of a suspect on Spanish territory is now no longer required. However, a reform regarding this statute is under review.
- Immunity for past crimes is granted in restricted circumstances conforming to provisions to international public law. However, international public law does not provide immunity to perpetrators of international crime.

### **8.4 Useful Contacts**

- **Superior Court of Justice de Madrid**  
General Castaños nº 1  
28071 Madrid  
Telephone : 0034 91 3971755

## 9 Switzerland

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Switzerland incorporated the concept of universal jurisdiction into its Penal Code in 2007 and subsequently reinforced it with various ordinances and laws. The provisions in Swiss law regarding universal jurisdiction are similar to those in place in France: requiring that the perpetrator have a "close link" to Switzerland. As in France, legislation is currently being considered to further strengthen Switzerland capabilities for using universal jurisdiction.

### 9.1 Universal jurisdiction in the legislation

Universal jurisdiction in Switzerland has based itself up until very recent times on the military penal code.<sup>71</sup> Article 2 of this penal code stipulates that the suspected perpetrators of international crimes, notably violators of the Geneva Conventions, be made the object of prosecutions before the military court.<sup>72</sup> Nevertheless, the necessity to reinforce the fight against impunity in Switzerland has brought about the introduction of specific provisions in the Swiss penal code. Uniquely, the new Penal Code of 1 January 2007 allows the prosecution under the principle of universal jurisdiction of perpetrators of acts of sexual aggression abroad against minors. Article 6 of the same code, on the other hand, is taken from French legislation,<sup>73</sup> stipulating that universal jurisdiction should be exercised when Switzerland, in accordance with an international convention, is obliged to prosecute perpetrators of international crimes.

In effect, the Swiss and French legislations are very similar when considering the conditions necessary for exercising universal jurisdiction. Thus, the aforementioned Article 5 would only be applied in the event of existence of a "close link" between a suspected perpetrator of torture and Switzerland, especially in the case where the suspect had a home or resided permanently in Switzerland, however can include. Switzerland only intervenes if the perpetrator of an international crime will not be extradited. Finally, the Swiss Penal Code necessitates that the act under investigation be considered a crime in the state in which it was committed in order to permit Swiss judiciary to intervene. Switzerland has also promulgated several laws reinforcing cooperation with international courts. These are the law of 22 January 2001<sup>74</sup> and the ordinance enacted 1 January 2009.<sup>75</sup>

The exercising of universal jurisdiction was in the process of being reinforced when the Swiss National Council adopted a set of legislative protocols in March 2009 adapting existing law to conform to the Rome Statute of the International Criminal Court. This legal development has the objective of reinforcing the fight against impunity from war crimes<sup>76</sup>, genocide<sup>77</sup>, and crimes against humanity.<sup>78</sup> The provisions of this law have made the exercise of universal jurisdiction more flexible.

The condition of a "close link" is no longer required; the physical presence of the perpetrator in Switzerland is still necessary, however the suspect does not have to have permanent residence or possess a home in the country<sup>79</sup>. The condition concerning the non-extradition of the perpetrator for prosecution in Switzerland would be in place under the new regulations.<sup>80</sup> The jurisdiction of military

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<sup>71</sup> Code Penal Militaire of 13 June 1927, Available on : <http://www.admin.ch/ch/f/rs/3/321.0.fr.pdf> (accessed 4 April 2010)

<sup>72</sup> Cf., article 2 and articles 108 to 114. For more details, please see the TRIAL legal handbook – Swiss law against impunity, 2003, available on : <http://www.trial-ch.org/fr/suisse/le-manuel-juridique-de-trial-la-lutte-contre-limpunite-en-droit-suisse.html> (accessed 4 April 2010)

<sup>73</sup> Cf., Article 689 of the French procedural penal code mentioned above.

<sup>74</sup> *Loi fédérale sur la coopération avec la Cour pénale internationale* - 22 January 2001 Available on : <http://www.admin.ch/ch/f/rs/3/351.6.fr.pdf> (accessed 4 April 2010)

<sup>75</sup> To see the full text go to <http://www.admin.ch/ch/f/rs/3/351.20.fr.pdf> (accessed 4 April 2010)

<sup>76</sup> See the definition in title 12 of the legislation.

<sup>77</sup> The crime of genocide was expressly singled out in the Swiss penal code (article 264) since its modification on 24 March 2000.

<sup>78</sup> Crimes against humanity was not officially incorporated in Swiss legislation before this.

<sup>79</sup> The "close link" clause was introduced in 2005.

<sup>80</sup> The text of the new legislation is available on :

[http://www.ejpd.admin.ch/etc/medialib/data/sicherheit/gesetzgebung/internationaler\\_strafgerichtshof.Par.0015.File.tmp/entw-f.pdf](http://www.ejpd.admin.ch/etc/medialib/data/sicherheit/gesetzgebung/internationaler_strafgerichtshof.Par.0015.File.tmp/entw-f.pdf) (accessed 4 April 2010)

courts has also been eliminated in favour of the Federal Penal Tribunal, unless a member of the Swiss military is implicated in the case.

The text of the new law paves the way for a broad interpretation of crimes against humanity, including murder, ethnic cleansing, enslavement, sequestration, forced disappearances, torture, violation of the right to sexual self-determination, deportation or forced population transfers, persecution, apartheid and other inhumane acts. These acts are considered crimes against humanity if they are committed "in the framework of a generalized or systematic attack aimed against the civil population".<sup>81</sup> Torture includes acts "of great suffering or those that risk serious bodily harm or the physical or psychiatric health of a person, inflicted during a period of torture control or custody".<sup>82</sup> The draft laws being considered since 2009 will enter into effect after its adoption by the Swiss Council of States.

## 9.2 Case studies

We noted above that the prosecution of international crimes revealed itself as a jurisdictional prerogative of the military justice system. This system had intervened previously to prosecute perpetrators of international crimes, in particular in former Yugoslavia and in Rwanda.<sup>83</sup> Nevertheless, as the limits imposed by the law have prevented the exercise of universal jurisdiction in certain cases specified by a judgement of the Federal Tribunal: "the Tribunal declares itself unable to rule on cases of crimes of genocide and crimes against humanity, Swiss law awarding it no jurisdiction of a universal nature in the matters".<sup>84</sup> Similarly, the Swiss Federal Chambers (Parliament) clarified in 2003 that war crimes are not prosecuted in Switzerland, unless there is a "close link" between the perpetrators and the country.<sup>85</sup>

The limits of the law have equally been illustrated by the refusal to prosecute Habib Ammar, a suspect of acts of torture in Tunisia. The Attorney General of the canton of Geneva estimated that Habib Ammar benefited from immunity as a member of the Tunisian delegation of the International Telecommunications Union.<sup>86</sup> On 12 October 2009 TRIAL, a Swiss association fighting against impunity, filed a complaint to the investigating judge of the canton of Fribourg against Bouguerra Soltani, a former Algerian Minister and suspected torturer. The Swiss justice system decided to pursue the case, but the suspect succeeded in fleeing the country before his arrest.<sup>87</sup>

It is clear that the adoption of the draft law of 2009 would constitute a new step in the fight against impunity in Switzerland by lifting the restrictive provisions of present day legislation. The question of immunity<sup>88</sup> and of "close link"<sup>89</sup> with Switzerland would be modified in favour of the implementation of a more efficient universal jurisdiction. Nonetheless, the political will of the Swiss government and the independence of its justice system will be crucial elements in making the exercise of universal jurisdiction a more efficient tool.

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<sup>81</sup> See article *Art. 264a*.

<sup>82</sup> Art. 264, f.

<sup>83</sup> Cf., *Sixth periodic report of States parties*, Switzerland, 18 March 2009, paragraph 110, available on :

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/412/98/PDF/G0941298.pdf?OpenElement> (accessed 4 April 2010)

<sup>84</sup> Cited in the d'Amnesty international Amnesty international, *Document - End impunity: Justice for the victims of torture*, 86 p, disponible sur :

<http://www.amnesty.org/en/library/asset/ACT40/024/2001/en/cf7a2813-d916-11dd-ad8c-f3d4445c118e/act400242001fr.html> , (accessed 6 March 2010)

<sup>85</sup> *Les crimes contre l'humanité enfin dans le code pénal suisse (Crimes against humanity finally in the Swiss penal code)*, 9 March 2009, available on :

<http://www.droitshumains-geneve.info/spip.php?article4209>, (accessed 6 March 2010)

<sup>86</sup> See the decision :

[http://www.trial-ch.org/fileadmin/user\\_upload/documents/ammar-proc.pdf](http://www.trial-ch.org/fileadmin/user_upload/documents/ammar-proc.pdf) (accessed 6 March 2010)

<sup>87</sup> For more details on the exercise of universal jurisdiction in the Swiss justice system please see :

<http://www.trial-ch.org/fr/suisse/les-affaires-en-suisse.html>

<sup>88</sup> See article 264n of the legislation.

### 9.3 Summary

- The exercise of universal jurisdiction is in the process of being reinforced with the adoption in March 2009 by the Swiss National Council of a set of legislative protocols adapting existing law to conform to the Rome Statute of the International Penal Court. This set of protocols will enter into being following their adoption by the Council of States.
- The provisions of this law have made the exercise of universal jurisdiction more flexible. The condition of a "close link" is no longer required however the physical presence of the perpetrator in Switzerland is still necessary. The suspect does not have to hold permanent residence or possess a home in the country.
- The condition concerning non-extradition of the perpetrator for judgement in Switzerland is still in place under the new regulation
- The prosecution of a suspected perpetrator of torture is possible, the crime of torture being expressly mentioned in the new legislation. Article 264, f of the legislation stipulates that torture includes "of great suffering or those that risk serious bodily harm or the physical or psychiatric health of a person, inflicted during a period of torture control or custody".

### 9.4 Useful Contacts

- **Office of the Attorney General:**

Place du Bourg-de-Four 1  
Case postale 3565  
tél : 022 327 26 00

- **Juges d'instruction :**

Rue des Chaudronniers 9  
Case postale 3344  
1211 Genève 3  
tél : 022 327 26 11

- **Help for Victims :**

**Alkarama:** Téléphone: + 41 22 734 1006  
Fax: +41 22 734 1034  
[info@alkarama.org](mailto:info@alkarama.org)

**Trial:** <http://www.trial-ch.org/en/about-us/contact.html>