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## THE LONG ARM OF JUSTICE

Lessons from Specialized War Crimes Units in France, Germany,  
and the Netherlands



# **The Long Arm of Justice**

## **Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands**

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# The Long Arm of Justice

## Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands

- Summary ..... 1**
  
- Lessons Learned ..... 5**
  - The Value of Specialized War Crimes Units.....5
  - Improved and Tailored Investigative Techniques ..... 11
  - Varied Trial Practices ..... 17
  - Bolstering Witness Protection .....18
  - Enhancing Fair Trial Guarantees ..... 20
  - Strengthening International Cooperation ..... 21
  
- Recommendations..... 22**
  - To Countries Wanting to Set Up or Improve Existing War Crimes Units.....22
  - To the Netherlands .....24
  - To Germany .....25
  - To France.....27
  - To the European Union ..... 29
  
- Methodology..... 31**
  
- The Netherlands..... 32**
  - Specialized War Crimes Units .....32
  - Investigations..... 41
  - Witness Protection ..... 48
  
- Germany .....51**
  - Specialized War Crimes Units .....52
  - Investigations.....58
  - Witness Protection ..... 66
  
- France .....69**
  - Specialized War Crimes Units ..... 69
  - Investigations.....77

|  |            |
|--|------------|
| Witness Protection .....                       | 83         |
| <b>International Cooperation .....</b>         | <b>85</b>  |
| The European Union .....                       | 85         |
| International Initiatives .....                | 92         |
| <b>Acknowledgments.....</b>                    | <b>96</b>  |
| <b>Annex I: Cases in the Netherlands .....</b> | <b>97</b>  |
| <b>Annex II: Cases in Germany .....</b>        | <b>102</b> |
| <b>Annex III: Cases in France .....</b>        | <b>104</b> |

## Summary

Certain crimes such as genocide, crimes against humanity, and war crimes are of such gravity that they shock the conscience of humanity. Prohibitions on such crimes are among the most fundamental in national legal systems worldwide and in international law. While it is preferable to prosecute those responsible for these crimes in the country where the crimes occurred, justice is not always possible there. Consequently, other avenues for seeking redress have emerged over the years.

International criminal tribunals for the former Yugoslavia and Rwanda were created by the United Nations in the early 1990s following conflicts in the two countries because both countries lacked the capacity to bring perpetrators of atrocities to justice. Other hybrid tribunals and mixed courts have followed in their footsteps, and now the International Criminal Court may be called upon where states cannot or will not carry out fair and credible trials for grave international crimes. But these tribunals cannot meet the full demands of justice due to restrictions on their jurisdiction and limited resources.

A third alternative—the focus of this report—involves the national courts of countries other than the country where the crimes occurred, through application of what is known as “universal jurisdiction.” This principle, when suitably integrated into domestic law, allows prosecutors in other countries to pursue individuals believed to be responsible for certain grave international crimes, even though the crimes were committed elsewhere and neither the accused nor the victims are nationals of that country.

Universal jurisdiction prosecutions are an increasingly important part of international efforts to hold perpetrators of atrocities to account for their crimes. They can provide justice to victims who have nowhere else to turn, send a powerful signal to potential human rights abusers that they cannot commit crimes with impunity and then spend their remaining years living comfortably in another country, and help ensure that other countries do not become safe havens for war criminals. Although the universal jurisdiction principle has existed in international law for centuries, its application only began gaining real momentum following the 1998 arrest of former Chilean President Augusto Pinochet in the United Kingdom on torture charges.

However, investigating and prosecuting grave international crimes on the basis of universal jurisdiction is not easy. In addition to appropriate legislation, it requires complex investigations by national criminal justice authorities of often large-scale crimes that happened years earlier in a foreign country, which can be extremely difficult and costly. Gathering evidence—most often victims and witnesses to the actual crimes—usually requires traveling to the country where the crimes occurred. This presents a range of challenges, including linguistic and cultural barriers and possible resistance from national authorities who may not want to see justice served.

A number of countries have responded to these challenges by establishing specialized war crimes units. More than a dozen countries, including several European countries, Canada, South Africa, and the United States, have specialized police, prosecution, or immigration units dedicated to international crimes; a few even have all three.<sup>1</sup> Human Rights Watch research shows that these specialized units can help domestic law enforcement officials and prosecutors overcome the investigative difficulties of universal jurisdiction cases.

This report—based on interviews with prosecutors, investigative judges, police and other investigators, immigration officials, defense and victims’ lawyers, government officials, academics, civil society activists, and trial observers in each country—looks at the practice of specialized war crimes units in France, Germany, and the Netherlands. It offers an analysis of the structure and inner workings of the units, and an assessment of their successes and continued challenges.

We chose France, Germany, and the Netherlands because they offer a rich set of experiences, with the Netherlands having the most longstanding and robust war crimes units and France and Germany being among the most recent countries to create such units. Specialized units in the Netherlands go back more than a decade and have developed particularly strong practice which may be useful for other countries contemplating the creation of war crimes units. Similar units in Germany and France became fully operational less than five years ago and saw completion of their first trials only in 2014, but have already gained valuable investigative experience.

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<sup>1</sup> These countries include Belgium, Canada, Croatia, Denmark, France, Germany, the Netherlands, Norway, South Africa, Sweden, Switzerland, the United Kingdom, and the United States. A few countries like Denmark and the United Kingdom have personnel dedicated to grave international crimes within larger units handling a range of international crimes, including terrorism and financial crimes. Not all countries have specialized units within their police and immigration services.

A key benefit of specialized war crimes units is their depth of experience. Practitioners in the units of the three countries have gained significant knowledge and expertise that enable them to handle cases with increasing effectiveness and efficiency. The quality of investigations has improved and the time it takes to carry out investigations has decreased, particularly where police return to investigate crimes in countries where they have worked before. In addition to having motivated and experienced staff and specifically earmarked budgets, the decision to create specialized war crimes units often reflects heightened political will within the countries in question to fight impunity for the gravest international crimes. This is key given the political sensitivities and diplomatic tensions that are often raised by prosecutors' decisions to launch investigations or issue arrest warrants in universal jurisdiction cases.

Cooperation among practitioners in specialized war crimes units is also crucial to their success. In all three countries, cooperation between police and prosecutors has significantly improved over the years, further enhancing the units' ability to handle cases effectively. However, more attention needs to be paid to immigration services' role in these cases, including cooperation between immigration officials, on the one hand, and police and prosecutors, on the other. This is because perpetrators of mass atrocities increasingly flee their own countries and seek safe haven elsewhere. Immigration officials should not simply refuse suspects of grave international crimes entry or deport them but should instead alert police and prosecutors when suspects attempt to enter the country so that criminal proceedings may be considered.

Immigration officials should also identify and interview potential victims and witnesses to these crimes, who may be seeking refuge in the country, and let them know they can report the crimes to local police and participate in criminal proceedings. This must be done in a way that respects these individuals' rights and the confidential nature of the asylum process. The Netherlands has devoted tremendous resources to ensuring its immigration service plays its part in fighting impunity for grave international crimes and offers a rich source of lessons for other countries to consider.

International cooperation is also vital to the success of specialized war crimes units and the effective application of universal jurisdiction. The European Union Genocide Network illustrates the value of such cooperation. This initiative brings together representatives from the EU's 28 member states and representatives from Norway, Switzerland, Canada,



and the United States to discuss legal and practical issues related to their work and to share information on specific cases. The network's success has inspired the African Union to begin efforts to establish a similar network of prosecutors from African countries and may pave the way for other regional cooperation mechanisms in the future. Other efforts to enhance international cooperation are underway, both within Europe and beyond, and should be actively supported as a way of strengthening universal jurisdiction and ensuring that those responsible for grave international crimes do not escape justice.

Appropriate laws and strong political will are essential to a more robust application of domestic universal jurisdiction laws. But so too is the creation of specialized units staffed with criminal justice and immigration professionals mandated to apply these laws. We encourage countries committed to the fight against impunity for the most serious crimes to establish specialized war crimes units in their countries and to empower them with the necessary resources and staffing to carry out their work effectively.

## Lessons Learned

The experiences of practitioners in France, Germany, and the Netherlands demonstrate the value of having specialized war crimes units and offer important lessons on how to improve the investigation and prosecution of grave international crimes on the basis of universal jurisdiction. While a longer discussion of practices in each country follows, this section summarizes certain best practices by national authorities and notes continued challenges.

### The Value of Specialized War Crimes Units

One of the most significant obstacles to the successful investigation and prosecution of grave international crimes on the basis of universal jurisdiction has been the lack of specialized knowledge and experience of domestic law enforcement and judicial authorities. Cases involving grave international crimes differ in important respects from ordinary domestic criminal cases and require skilled police investigators and prosecutors to handle the myriad practical and legal challenges. The crimes have often taken place years earlier in a faraway country, presenting linguistic and cultural barriers, and may involve many different actors. Reliable evidence may be hard to find given the length of time that has elapsed since the crimes occurred and may be spread across multiple countries. Criminal justice authorities must usually conduct investigations abroad, including in the country where the crimes occurred, which entail securing cooperation from national authorities who may have had involvement in the crimes or may be reluctant to see justice served.

Experience shows that without specialized war crimes units, authorities often find these challenges daunting and consequently choose not to prioritize universal jurisdiction cases. For example, investigations into Rwandan genocide suspects living in France sat idle for years, in large part due to prosecutors' and investigative judges' lack of experience, resources, and time—resulting in criticism from the European Court of Human Rights in 2004. It was not until the establishment of a specialized unit of prosecutors and investigative judges in Paris in 2012 that these cases were meaningfully pursued.

The creation of specialized war crimes units effectively institutionalizes the investigation and prosecution of grave international crimes by bringing together the necessary resources, staff, and expertise. The result is better, more-focused investigations and, with time, the ability of practitioners in these units to take on a larger caseload and complete investigations more quickly. The Netherlands is a prime example of this.

The creation of specialized war crimes units requires a strong commitment from political leaders to fight impunity through the application of universal jurisdiction. Such political will is critical because the cases are often politically sensitive and can cause significant diplomatic tensions, especially where high-ranking foreign officials are the subject of investigations.<sup>2</sup>

The experiences of Germany and France illustrate the importance of political will and show that it can be a catalyst both for the creation of specialized war crimes units and for a more robust application of universal jurisdiction laws. Growing awareness that grave international crime suspects were living in those countries strongly contributed to decisions to establish specialized war crimes units there and paved the way for cases to be brought before domestic courts. Prosecutors in both countries' war crimes units successfully concluded their first trials in 2014, both in connection with the Rwandan genocide, and have other cases in or nearing trial. These cases would not have happened so quickly—or perhaps at all—without the establishment of specialized war crimes units.

### *Useful Components of Specialized Units*

Specialized war crimes units vary greatly in size and composition. Among those we studied, the Dutch units are the largest and most longstanding.<sup>3</sup> France and Germany have newer units that tend to be smaller. While there is no magic formula for how big units need to be,

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<sup>2</sup> Despite being at the forefront of universal jurisdiction following the *Pinochet* decision, Spain does not have specialized war crimes units, and political will to support accountability for grave international crimes has wavered over the years. Two recent cases targeting former Chinese Presidents Hu Jintao and Jiang Zemin in connection with events in Tibet in the 1980s caused a diplomatic row between Spain and China in late 2013. In an attempt to dispose of the cases, Spain's parliament swiftly enacted new legislation in March 2014 limiting Spanish courts' ability to prosecute suspects of grave international crimes committed outside of Spain. See "Spanish Lawmakers Should Reject Proposal Aimed at Closing the Door on Justice for the Most Serious Crimes," Human Rights Watch news release, February 10, 2014, <http://www.hrw.org/news/2014/02/10/spanish-lawmakers-should-reject-proposal-aimed-closing-door-justice-most-serious-cri>.

<sup>3</sup> The Netherlands established specialized war crimes units in its immigration service and police department in 1998 and in the national prosecutor's office in 2002. These units are composed of 25 immigration officers, 31 staff in the police unit, and six staff in the prosecutor's office.

policymakers in each country should ensure that staffing and resources are sufficient to enable practitioners in the units to carry out investigations and prosecutions effectively. Only the Netherlands has separate units within its police, prosecution, and immigration services that are dedicated to grave international crimes cases and a special department within the Ministry of Justice to support the work of these units. The Netherlands also has a specialized investigative judge and specialized judges at the trial and appellate levels who handle all grave international crimes cases. The Netherlands provides a good model for countries that are contemplating the establishment of specialized war crimes units.

The experiences of France, Germany, and the Netherlands show that it is useful for practitioners in war crimes units to have a diverse set of skills. Here too, the Netherlands is a good model with staff in the specialized police and prosecution units being drawn from a wide range of backgrounds, including historians, anthropologists, weapons and military experts, financial analysts, lawyers, and police officers with experience in various parts of the world.

It is also beneficial for war crimes units to have a pool of experts at their disposal who can be brought in where cases raise particular issues on which practitioners do not have specific expertise. Finally, it is of paramount importance that practitioners in the specialized war crimes units receive regular training so that they can develop and expand their skills. Periodic assessments should be carried out to identify topics requiring additional training, such as the investigation of sexual and gender based violence and interviewing severely traumatized witnesses.

### *The Important Role of Specialized Immigration Units*

In addition to creating specialized units within the police and prosecution services, countries should consider creating units, or at the very least a team of dedicated staff, within their immigration services to identify suspects of grave international crimes and ensure they do not find safe haven in their countries. With the number of asylum seekers in the world at its highest in nearly 70 years, many of whom are coming from conflict zones where large-scale atrocities may have been committed, the importance of appropriate immigration screening and refugee status determination procedures cannot

be understated.<sup>4</sup> In 2013, the United Kingdom’s Home Office, which is responsible for immigration matters, identified nearly 100 suspected war criminals living in the UK.<sup>5</sup> Other European countries have not released similar statistics, but it is unlikely that the UK is alone in hosting immigrants implicated in grave international crimes.

In 1998, the Netherlands established a specialized immigration unit following a public outcry over the number of suspected war criminals from Afghanistan who were seeking asylum in the country. Since that time, the country has prioritized detecting suspects of grave international crimes and has dedicated significant resources to that end, including through the establishment of a specialized immigration unit with 25 staff members. The Dutch experience demonstrates the key role that specialized immigration units can play in ensuring that those who have committed grave international crimes do not obtain asylum.

Article 1F of the 1951 UN Convention on the Status of Refugees (Refugee Convention) sets out the grounds upon which countries may deny a person refugee status, including the commission of grave international crimes.<sup>6</sup> Like with specialized units within police and prosecution services, the establishment of a specialized 1F unit within immigration services enables immigration officers to acquire the necessary expertise and experience to handle these types of cases. The specialized unit may also develop guidelines and other tools that regular immigration officers can use to identify potential suspects of grave international crimes.

Immigration authorities can also contribute to ensuring that perpetrators of grave abuses do not escape justice. Once a person has been denied refugee status on the basis of article 1F,

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<sup>4</sup> In 2013, the United Nations High Commission for Refugees documented a total of 51.2 million refugees. Imogen Foulkes, “Global Refugee Figures Highest Since WW2, UN Says,” *BBC News Online*, June 20, 2014, <http://www.bbc.com/news/world-27921938> (accessed September 8, 2014).

<sup>5</sup> Tom Bateman, “Nearly 100 War Crimes Suspects’ in UK Last Year,” *BBC News Online*, July 30, 2013, <http://www.bbc.com/news/uk-23495314> (accessed September 8, 2014).

<sup>6</sup> Article 1F of the 1951 Convention Relating to the Status of the Refugees provides: “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.” Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954. UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* notes that: “Considering the serious consequences of exclusion for the person concerned... the interpretation of these exclusion clauses must be restrictive.” UNHCR, “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,” January 1992, para. 149, <http://www.unhcr.org/3d58e13b4.html> (accessed September 8, 2014).

immigration officials should be authorized to share all information relevant to the commission of grave international crimes with law enforcement and prosecution services so that they can consider criminal action against the person. Here too, the Dutch experience is illustrative. Numerous suspects have come to the attention of Dutch prosecutors following immigration screening, leading to successful trials in at least three instances.

At the same time, immigration authorities and law enforcement and prosecution services should take steps to maintain the integrity of the asylum process and ensure that it is not viewed or used as an extension of the criminal justice system. This can be achieved in several ways.

First and foremost, before refugee status determination interviews, asylum seekers should be informed that any information they provide which suggests they have committed grave international crimes may be shared with other government agencies, including police and prosecution services, in accordance with national law. Immigration officials should specify the crimes at issue and make clear that not all criminal activity will lead to the sharing of individuals' files with law enforcement or prosecution services. They should also make clear that only information relevant to the commission of such crimes will be shared.

Second, once immigration officials suspect that an asylum seeker has committed a grave international crime as defined in article 1F, they should ensure that the person has legal assistance during any further interviews or exchanges with the immigration services. Third, when persons are denied refugee status on the basis of article 1F, immigration officials should inform them that relevant information from their files will be forwarded to law enforcement or prosecution services.

Police and prosecutors also have their part to play in upholding the integrity of the asylum process. They should use information received from immigration services as investigative leads but not as actual evidence in any subsequent criminal trial. In addition, they should ensure that persons denied refugee status are provided with legal assistance as soon as they become a suspect in a criminal investigation.

Germany and France receive the largest number of asylum seekers in the European Union yet do not give adequate attention to identifying suspects of grave international crimes through immigration screening and to sharing relevant information with law enforcement

and prosecution services.<sup>7</sup> Germany has an immigration unit for all cases raising security concerns but has only one person responsible for 1F cases. Where persons are excluded on the basis of article 1F, that information is shared with German law enforcement authorities. France has no specialized 1F unit and, until very recently, the agency responsible for deciding refugee applications did not systematically share information gathered during the asylum process with prosecutors, despite an obligation to do so under French law.

Immigration officials also have a role to play in identifying potential victims and witnesses of grave international crimes and, at the very least, informing them that they can report crimes to police or prosecutors. Asylum seekers who have been victims or witnesses to crimes may share valuable information related to these crimes during the refugee status determination process. Immigration officials should take the opportunity to note this information in their files and inform persons of their right to report the crimes and participate in domestic criminal proceedings, but a person's immigration status should not be contingent on cooperation in criminal proceedings. With the consent of the victim or witness, information can be shared with police and prosecutors as appropriate under domestic law with careful regard to the privacy and confidentiality of the asylum procedure itself. In a creative development, German immigration officers now request asylum seekers coming from Syria to complete a form asking whether they have witnessed any war crimes and whether they can provide details, including the names of those responsible. It is too soon to evaluate the effectiveness of the initiative, but it is an interesting experiment in how to identify potential leads for later war crimes investigations.

### *Ensuring Adequate Collaboration among Relevant Actors*

The creation of specialized war crimes units is the first step toward effective investigation and prosecution of grave international crimes. However, ensuring that the units work together closely and collaborate with other relevant government departments is equally important. The experiences of France, Germany, and the Netherlands show that cooperation between war crimes units, and in particular police and prosecutors, is a critical factor in the units' success. Regular communication is essential, with regards both to specific cases and to broader issues faced by practitioners.

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<sup>7</sup> "Asylum in the EU28: Large increase to almost 435,000 asylum applicants registered in the EU28 in 2013, Largest group from Syria," Eurostat news release, March 24, 2014, [http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/3-24032014-AP/EN/3-24032014-AP-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-24032014-AP/EN/3-24032014-AP-EN.PDF) (accessed September 8, 2014).

Our research reveals that a disconnect can exist between the work of these units and relevant ministries, such as ministries of justice and foreign affairs. This disconnect may negatively impact the work of the specialized war crimes units, leaving them without necessary logistical assistance and other support to carry out their work effectively. It may also lead to reduced political support for their work.

The Netherlands is a useful model for other countries in this regard. Police investigators and prosecutors in the Dutch war crimes units work together very closely, with prosecutors closely monitoring and supervising investigations. The Netherlands has also established a special department within the Ministry of Justice to assist with mutual legal assistance requests and to evaluate broader legal and policy issues raised by grave international crimes cases. In addition, the Netherlands has created an interagency International Crimes Taskforce that holds regular meetings to improve cooperation among all actors involved in these cases, both at the policy level and on practical matters. Other countries, including France and Germany, should consider implementing similar measures to ensure that relevant actors do not operate in isolation and instead work together effectively.

The Dutch government also takes steps to ensure that Parliament is kept aware of and supports the work of the specialized war crimes units. With input from the three war crimes units, a special department within the Ministry of Justice produces an annual report detailing the units' activities, which is usually followed by a debate in Parliament. Not only does the initiative reflect the close collaboration of relevant actors, but it is also key to raising broader awareness and political support for the specialized units' work. Other countries, including France and Germany, may benefit from similar efforts, especially given that political support and resources for pursuing such cases appear weaker than in the Netherlands.

## **Improved and Tailored Investigative Techniques**

Police and prosecutors in the specialized war crimes units in France, Germany, and the Netherlands have gained valuable experience in conducting investigations of grave international crimes. Mistakes have been made at times, including in the use of third parties to locate witnesses (often referred to as “intermediaries”), the hiring of interpreters, and unnecessary reliance on national authorities in third countries, but practitioners appear to have learned from many of these errors. It is important that they share their



experiences with their own national colleagues and with counterparts in other countries so that similar mistakes may be avoided.

### *Identifying Suspects*

As discussed above, immigration services can play an important role in identifying potential suspects of grave international crimes and in alerting police and prosecutors to their presence in the country. Immigration officials should also be in a position to share information relevant to the alleged crimes so that criminal prosecution may be considered, so long as adequate safeguards are in place to protect the integrity of the asylum process and the due process rights of potential suspects.

While jurisdiction to pursue grave international crimes cases on the basis of universal jurisdiction may be limited under domestic law to suspects who are present, or in some cases even resident, in the country, practice has shown how difficult it is for specialized war crimes units to act quickly and carry out the necessary investigations that would allow them to arrest a suspect when this person is only present in the country for a few days. This does not mean that police and prosecutors should be excused from taking on these cases but instead underscores the need for specialized war crimes units to prepare for these types of transient cases where they can anticipate the arrival of potential suspects in the country.

One example from outside the countries surveyed for this report comes from the United Kingdom. A case is currently pending in the UK against former Nepalese army commander Kumar Lama who is accused of torture in connection with Nepal's decade-long civil war that ended in 2006.<sup>8</sup> Lama, who had been serving as a UN peacekeeper in South Sudan, regularly came to the UK to visit his family. These visits put UK authorities on notice and gave police and prosecutors in the specialized war crimes units time to gather sufficient evidence to finally arrest and charge him during one of his visits. Other countries should consider taking similar steps where authorities have reason to believe that a suspect will come onto their territory.

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<sup>8</sup> Lama headed the Goringhate army barracks in 2005 and is alleged to have been responsible for the torture of at least two individuals. "Nepal's Colonel Kumar Lama Charged in UK with Torture," *BBC News Online*, January 5, 2013, <http://www.bbc.com/news/world-asia-20914282> (accessed September 8, 2014).

To date, most universal jurisdiction cases have involved low- or mid-level perpetrators and have not extended to senior government officials. In addition, prosecutions have been limited to a range of countries, including Rwanda, the former Yugoslavia, and Afghanistan, with officials from powerful states such as the United States, Israel, and China eluding judicial scrutiny in other countries. It is important for practitioners in the specialized war crimes units to apply universal jurisdiction laws evenly, without political considerations, and to investigate and prosecute all persons against whom there is reliable evidence of involvement in grave international crimes who come onto their territory. Official immunity should not be a bar to investigations and should prevent prosecution in only the most limited circumstances in accordance with international law and only for the time that a person is in office.<sup>9</sup>

### *Locating Victims and Witnesses*

Since documentary or forensic evidence is often hard to find in grave international crimes cases, police and prosecutors in the specialized war crimes units generally focus on finding victims and witnesses of the crimes to support their cases. The importance of selecting credible individuals who have direct knowledge of the events at issue cannot be understated, and cases can easily fall apart where investigators and prosecutors do not devote sufficient attention to witness selection. Police and prosecutors in the specialized war crimes units in France, Germany, and the Netherlands appear to have learned important lessons in this regard.

Most often, the process of identifying victims and witnesses begins in the country where the case is being investigated and prosecuted. It may start with a victim who has filed a complaint with police or prosecutors or a witness identified through the course of police investigations. That person may be used to identify other persons, either in the same country or in the state where the crimes were committed (often referred to as the “territorial state”), and the same process may be repeated again to gradually extend the investigation.

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<sup>9</sup> In the *Arrest Warrant* case (*Democratic Republic of Congo v. Belgium*), the International Court of Justice ruled that certain foreign government officials, such as accredited diplomats, heads of state and government, and foreign ministers, are entitled to temporary immunity from prosecution by foreign states, even with regards to grave international crimes. The immunity ceases once the person leaves office and should not bar later prosecutions. *The Democratic Republic of Congo v. Belgium*, International Court of Justice, Judgment, April 14, 2002, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=121&p3=4> (accessed September 8, 2014).

Diaspora communities and nongovernmental organizations (NGOs) may be two other useful sources.<sup>10</sup> Individuals and NGOs are also occasionally used as intermediaries to identify potential victims and witnesses but require careful vetting and supervision. Social media and other tools for public outreach, including government websites and the issuance of press releases by police or prosecution services, may assist in persuading persons with relevant information to come forward. As already discussed, immigration officials should also inform victims and witnesses of their right to report crimes and may, with the consent of individuals and as appropriate under domestic law, share relevant information with law enforcement and prosecution services. The granting of refugee status should not be contingent on cooperation with criminal proceedings.

Countries should draw lessons from Germany's use of so-called "structural investigations." These broad preliminary investigations, which prosecutors in Germany's specialized war crimes unit have undertaken with respect to several countries, are not directed against specific individuals but instead attempt to catalogue crimes that have occurred in a particular country, gather details about them, and identify victims and witnesses present in Germany for future criminal cases. Having learned that it is easier to collect evidence in real-time or soon after the events as opposed to years later, police and prosecutors in the specialized war crimes units are trying to gather as much evidence as possible within Germany concerning Libya, Syria, and several other crisis or post-conflict countries.

Some other European countries have begun gathering information about crimes committed in Syria by interviewing refugees and other persons living in their country who may have been victims or witnesses to crimes or who may have relevant information. While these types of investigations consume significant resources, they have the potential to drastically advance efforts to ensure accountability for grave international crimes in national jurisdictions and in turn to enhance the application of universal jurisdiction. Where permitted under national law, countries should conduct similar investigations with a view toward identifying potential victims and witnesses and preserving all available evidence for use in future trials in that country, before international courts, or elsewhere.

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<sup>10</sup> NGOs may, however, be limited in the information they can provide to national criminal justice authorities, in particular the names of sources and their contact information, due to the importance to their work and reputations of keeping the identity of sources confidential when they have pledged in advance to do so (typically for such purposes as protecting victims of abuse against potential retaliation, safeguarding confidential information gathered as part of efforts to improve public health or other service delivery responses, etc.). NGOs may be further limited by concerns over their own staff's security and the scope of their mandate.

### *Handling Extraterritorial Investigations*

Practitioners in the specialized war crimes units of all three countries have learned the importance of carrying out extraterritorial investigations and have grappled with the challenges that such investigations pose. Most often, this means traveling to the country where the crimes occurred to conduct investigations. Police and prosecutors should consider traveling to third countries, if any, where victims and witnesses may be located before traveling to the territorial state as it may raise fewer witness protection concerns. Doing so also minimizes reliance on national authorities in the territorial state who may or may not want to see justice done. In addition, it may enable police and prosecutors to pursue cases even where cooperation with authorities in the territorial state is not possible.

Before traveling to the territorial state, war crimes unit practitioners should ensure that they have adequate information on the historical and cultural background of the country as well as the current political situation. They should also ensure they have a carefully vetted interpreter who has no connection to the case or the parties, no past involvement in any conflict giving rise to the alleged crimes, and no strong political affiliation. In some cases, it is possible to find interpreters who do not come from the territorial state which also helps to minimize potential problems in the investigation. Practitioners in the Dutch and German war crimes units usually bring interpreters with them when traveling abroad and do not rely on local interpreters, which is good practice. It is also important to have an interpreter who does not make victims or witnesses feel uncomfortable, such as female interpreters in certain cultural contexts or where the interview concerns sexual violence against women and girls.

Extraterritorial investigations are dependent on mutual legal assistance and must respect the sovereignty and national laws of the country where the investigation is being carried out. Most often, this means that government authorities in the prosecuting state must submit a formal request to the authorities of the target state, and it is the law enforcement or judicial authorities of the latter state who will perform the investigative act (such as questioning witnesses, searching premises, or obtaining documentary evidence). Experience has shown, however, that there are potential risks in relying too heavily on national authorities in the territorial state for assistance, particularly the risk of possible interference—or at least the appearance of interference—in the investigation.

While practitioners in the specialized units of all three countries said they were unaware of any instances where foreign authorities had interfered with their investigations, many said that they were aware of the potential risk and a few even said that they could not rule out that it might have happened. Several defense lawyers told us they believed interference had taken place but none had been able to prove it in court. Interference may include pressuring witnesses to testify or not to testify, and in some cases to provide false testimony or falsified documentary evidence.

To minimize these risks, war crimes unit practitioners should take steps to carefully plan their investigations and seek outside expertise and guidance where investigations are undertaken in a country with which they have no prior experience. They should exercise caution in relying on national authorities in the territorial state for assistance and, where possible, carry out investigations independently. For example, Rwandan authorities have allowed law enforcement and judicial authorities in France, Germany, and the Netherlands to carry out genocide-related investigations in the country independently and have not requested to be present during the questioning of witnesses. While this does not eliminate the possibility of interference behind the scenes, it is an important first step that could be replicated in other countries. Other steps that should be strongly considered include limiting the amount of information provided to national authorities in the territorial state, in particular the names of witnesses to be interviewed and the precise questions to be asked during witness interviews, and not relying on national authorities to make contact with or transport witnesses to the place where questioning will occur.

Practitioners in specialized war crimes units have gained valuable experience in conducting extraterritorial investigations and have developed certain tools to assist them. For example, the placement of a liaison officer in the German embassy in Rwanda has provided significant practical assistance to police and prosecutors in the specialized war crimes unit, particularly in coordinating travel logistics for witnesses. In the Netherlands, investigative judges have used social workers or psychologists to provide support for victims and witnesses during interviews and to advise investigative judges on these persons' mental state. In France, investigative judges have been innovative in using video conferencing to allow prosecutors and defense and victims' lawyers to participate in the formal questioning of witnesses without having to travel to the territorial state.

## Varied Trial Practices

A detailed analysis of trial practices in each country is beyond the scope of this report, but a few points merit brief mention. First, trials look different in the three countries, with few to no witnesses testifying in person in Dutch trials<sup>11</sup> and dozens or even more than a hundred witnesses testifying in French<sup>12</sup> and German trials.<sup>13</sup> Courts may hear cases intermittently, as in Germany and the Netherlands, or continuously, as in France, meaning that trials can range anywhere from a few weeks to several years. No one system is better than another, but trials in each country reveal complexities and challenges that merit careful consideration.

Procedures that work in domestic criminal cases may not work as well in grave international crimes cases and may warrant some modification. Practitioners in the war crimes units and policymakers should seek to ensure the efficiency and reliability of proceedings as they assess past trials and determine whether changes may be beneficial.

Only the Netherlands has specialized judges to preside over grave international crimes trials.<sup>14</sup> Trials involve a panel of three judges with an alternate judge present in case he or she is needed later in the case. Most practitioners in the Netherlands believe that having specialized judges is extremely useful given the complexity of grave international crimes cases.<sup>15</sup> For example, certain legal concepts such as command responsibility may not be familiar to regular Dutch judges since this form of responsibility is normally limited to a military context.<sup>16</sup>

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<sup>11</sup> In at least two grave international crimes cases before Dutch courts, not a single witness testified at trial. For details on the *Nzapali* (Democratic Republic of Congo) and *Mpambara* (Rwanda) cases, see Annex I. It is more common for written testimonies gathered by the investigative judge, and sometimes police investigators, to be read aloud or orally summarized and then introduced into the court record.

<sup>12</sup> The *Simbikangwa* (Rwanda) case in France lasted six weeks and involved testimony from more than 50 witnesses, almost half of whom traveled from Rwanda. Approximately five witnesses testified by video conference from Kigali or Arusha, Tanzania (the seat of the International Criminal Tribunal for Rwanda), including detainees and infirm persons who could not travel. Human Rights Watch interview with French officials, May 13, 2014.

<sup>13</sup> The *Rwabukombe* (Rwanda) trial lasted just over three years, from January 2011 to February 2014, during which time the court held 120 days of court proceedings and heard testimony from 122 witnesses, including forty who traveled from Rwanda to Germany to give testimony. The *FDLR* (Democratic Republic of Congo) trial in Stuttgart began on May 4, 2011 and is still ongoing at the time of writing. It is expected that the trial will end later this year or in early 2015. As of March, there had been over 245 trial days and 49 witnesses. Trials in Germany can be lengthy, in part due to the fact that judges usually hold court sessions only two to three days per week. Human Rights Watch telephone interview with German academic, March 10, 2014; Human Rights Watch interview with German officials, March 18, 2014; Human Rights Watch email correspondence with trial monitor, July 18, 2014; Human Rights Watch trial observations between May 2011 and August 2014.

<sup>14</sup> The district court (*rechtbank*) and court of appeals (*gerechtshof*) in The Hague have exclusive jurisdiction over cases involving grave international crimes. Both the Netherlands and France have specialized investigative judges that assist during the investigation phase of cases however.

<sup>15</sup> Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, January 29, 2014; Human Rights Watch telephone interview with Dutch official, February 18, 2014; Human Rights Watch interview with Dutch official, March 28, 2014.

<sup>16</sup> Human Rights Watch telephone interview with Dutch official, March 10, 2014.

Cases in Germany are decided by panels of three to five judges,<sup>17</sup> while France relies on a non-permanent court composed of three judges and six lay jurors.<sup>18</sup> German and French practitioners were divided on whether specialization of judges, as exists in the Netherlands, would be useful in their countries. Having specialized judges would be a logical extension of the rationale for having specialized war crimes units, namely the concentration of expertise and experience. However a number of practitioners said specialization was critical to investigations but not necessary for trials since judges and juries are expected to approach cases without any prior knowledge or preconceptions. Countries seeking to strengthen the application of domestic universal jurisdiction laws should consider the experiences of these three countries before deciding whether to have specialized judges preside over trials.

## Bolstering Witness Protection

Since most evidence in grave international crimes cases consists of testimony from victims and witnesses, protecting these individuals from intimidation and other negative consequences is of crucial importance. Prosecutors in the specialized war crimes units of France, Germany, and the Netherlands all said witness protection is an important consideration, with Dutch prosecutors noting that witnesses have been threatened or intimidated in almost every case. Protection is rendered more difficult by the fact that most witnesses still live in the country where the crimes occurred, far beyond the reach of law enforcement and judicial authorities handling the case. Most witnesses travel to France, Germany, or the Netherlands to testify at trial and soon after return to their home country. Despite the added challenge of witnesses being in a different country, protection is possible and should be given careful attention.

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<sup>17</sup> Ordinary criminal cases are normally decided by a panel of three judges. However, for more complex cases like grave international crimes, five judges may be involved with one or two alternate judges present in the courtroom during all proceedings in case one of the other judges has to leave the case. This is important given the length of grave international crimes trials in Germany—both the *Rwabukombe* and *FDLR* trials lasted more than three years. Jurisdiction for grave international crimes cases rests with the Higher Regional Court (*Oberlandesgerichte*) of one of the sixteen states, depending on where the suspect lives or is arrested. Appeals are heard by the Federal Court of Justice (*Bundesgerichtshof*).

<sup>18</sup> Jurisdiction for serious crimes, including grave international crimes, rests with the *cour d'assises*, a non-permanent court composed of a presiding judge, two other judges, and six lay jurors. Paris and each of the 96 administrative departments in France have *cours d'assises*, which sit as needed and in most instances about three to four times a year. Jurisdiction normally rests with the *cour d'assises* in the location where the suspect or victim reside assuming the investigation was handled in that same department. Appeals are heard by another *cour d'assises* and essentially constitute a new trial with all relevant witnesses and evidence reheard. Parties can make further appeals to the Supreme Court (*Cour de Cassation*), but only on issues of law. In 2001, the Supreme Court decided that it was in the interests of justice to centralize Rwandan genocide cases within the jurisdiction of Paris' judicial authorities. See "La répression des présumés génocidaires rwandais devant les juridictions françaises: Etat des lieux," FIDH news release, January 29, 2014, <http://www.fidh.org/fr/afrique/rwanda/affaires-rwandaïses/La-repression-des-presumes> (accessed September 8, 2014).

The experiences of the specialized war crimes units in the three countries offer insight into the formal and practical tools that war crimes unit practitioners have at their disposal. An adequate legal framework, with comprehensive and varied witness protection measures, is essential.<sup>19</sup> Certain practical steps can also be taken to minimize risks for witnesses, and inspiration may be drawn from Dutch war crimes unit practitioners.

As a starting point, police and prosecutors should develop basic guidelines for handling contact with victims and witnesses. Conducting interviews outside of witnesses' home communities and avoiding being seen in public with witnesses are easy steps to implement and can provide a strong degree of protection. As already mentioned, not conducting interviews in the presence of national authorities in the territorial state is another vital measure where it is permitted under national law. Dutch investigators in the specialized war crimes unit routinely give witnesses their own telephone number and also provide the telephone number or address of a local contact that can assist in case of a problem. Useful local contacts may include NGOs, foreign embassies, and UN agencies in addition to any national police or witness protection authorities in the country. In some instances, mobile phones have been given to individuals so that they have the means to call investigators or local contacts if they have a problem.

Dutch investigators also maintain contact with individuals they have interviewed after they leave the country, periodically calling to update them on the case and check on their well-being. Having a liaison officer on the ground in the territorial state, such as Germany does, can also provide assistance in the event that a witness faces problems as a result of his or her testimony. Embassies in the relevant country should also be authorized to assist if serious witness protection issues arise. In the most serious cases, temporary or permanent relocation to the state exercising jurisdiction should be available.

Another valuable lesson learned is that police and prosecutors should evaluate whether a victim or witness may have protection issues upon their first contact with the person and

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<sup>19</sup> Appropriate witness protection measures may include redacting identifying information from witness statements or the entire case file; ensuring the witness' name is not mentioned publicly at trial; testimony in closed session with only the parties to the case present; testimony through the use of a protective screen or other means to distort witness' image or voice; testimony from a separate location so that witnesses may only be heard but not seen; and completely anonymous testimony in the absence of the parties, including the defense, in the most exigent circumstances. The Netherlands and Germany appear to have comprehensive witness protection schemes, but French law offers only limited means to protect witnesses and many practitioners suggested that improvements are needed.



should explain what forms of protection are available. They should periodically review protection measures to ensure they are effective and make changes where necessary. Witness protection units within police or prosecution services may be well-placed to offer guidance and assistance.

## Enhancing Fair Trial Guarantees

In civil law systems, police, prosecutors, and investigative judges are responsible for finding both incriminating and exculpatory evidence. The defense does not typically conduct its own independent investigation.<sup>20</sup> While this practice may work well in domestic criminal offense cases and continues to be the norm in France, Germany, and the Netherlands, defense counsel have increasingly sought court authorization to conduct their own investigations in cases involving grave international crimes. Judges have permitted, and even funded, defense investigations in at least two cases in the Netherlands and one case in Germany.<sup>21</sup>

As already discussed, the creation of specialized war crimes units has led to more thorough and effective investigations. In France, several lawyers said that having specialized investigative judges has resulted in a stronger commitment to finding evidence favorable to the defense and in more rigorous scrutiny of witness testimony. Despite these improvements, there is a strong argument for allowing independent defense investigations in universal jurisdiction cases. Many practitioners, including but not limited to defense lawyers, said that no real equality of arms exists in these types of cases and that allowing independent defense investigations might help level the playing field. As noted above, grave international crimes cases are not easy to investigate because the crimes typically were committed in distant countries, often many years earlier, witnesses may be dispersed or hard to find, and national authorities in the territorial state may not cooperate with the investigation. Even with the best of intentions, police, prosecutors, and investigative judges may fall short in uncovering all relevant evidence and this may directly impact an accused's ability to defend him- or herself.

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<sup>20</sup> The defense normally has the right to conduct its own independent investigation in common law systems and before the international criminal tribunals.

<sup>21</sup> Defense investigations were allowed in the Dutch cases of Hesamuddin Hesam and Habibullah Jalalzoy (Afghanistan) and Yvonne Ntacyobatabara Basebya (Rwanda) and the German case of Onesphore Rwabukombe (Rwanda).

To ensure a fair trial, the accused must have a reasonable opportunity to present evidence and confront witnesses against him or her. It is extremely difficult to do this without setting foot in the territorial state and being able to probe evidence uncovered by law enforcement and judicial authorities in an effective manner. While the defense may ask for further investigative steps to be taken by prosecutors or investigative judges, an accused who left the country where the crimes occurred years earlier may not be well-placed to suggest other courses of action. For these reasons, it may be useful to allow the defense to conduct its own independent investigation and, where an accused is indigent, to have the state cover the costs of such investigation. Witnesses identified through independent defense investigations may also face security threats or other repercussions for their testimony and should be afforded protection measures comparable to those afforded to other witnesses.

## **Strengthening International Cooperation**

The establishment of specialized war crimes units is an important step, but meaningful international cooperation among states is also vital. It allows war crimes unit practitioners to share their knowledge and experiences, learn from counterparts in other countries and develop best practices, and work together when cases transcend national borders.

The EU Genocide Network is a prime example of such cooperation. Its bi-annual meetings offer national contact points from EU member states and other countries the opportunity to discuss issues of relevance to their work, share their experiences, and hone their own expertise. The meetings also allow national practitioners to develop strong bilateral relationships with counterparts in other countries which may be useful for future cases and to exchange information on specific cases in their respective jurisdictions. The network's success has already inspired the African Union to begin efforts to establish a similar network of prosecutors in African countries.

Other initiatives to enhance international cooperation for grave international crimes cases are underway, both within Europe and beyond, and should be actively supported as a means of strengthening universal jurisdiction. These include creating a European network for immigration officers that handle article 1F screening, a database that police investigators in EU member states can use to share information, a new mutual legal assistance treaty for grave international crimes, and an expanded role for the exchange of information through Interpol.

## Recommendations

### To Countries Wanting to Set Up or Improve Existing War Crimes Units

- Establish specialized war crimes units within law enforcement and prosecution services and, ensure that such units are adequately resourced and staffed.
- Establish a specialized unit within immigration services to screen all asylum seekers and other immigrants coming to the country on the basis of article 1F of the Refugee Convention (“1F unit”).
- Consider establishing specialized units within the Ministry of Justice to support the work of the specialized units, in particular mutual legal assistance with third countries.
- Ensure effective and meaningful collaboration between the specialized units, including through the establishment of an interagency taskforce and the convening of regular meetings to discuss specific cases and broader issues related to cases.
- Consider having specialized judges, or a single specialized court with a pool of specialized judges, to adjudicate grave international crimes cases.
- Provide adequate ongoing training for war crimes unit practitioners, judges, and defense and victims’ lawyers, including training in investigating sexual and gender-based violence, interviewing traumatized witnesses, and assessing witness protection needs.
- Ensure an adequate legal framework for prosecuting grave international crimes, including through domestic implementation of the Rome Statute and other relevant international treaties and removal of any limitations on the exercise of jurisdiction (such as requirements that a suspect be resident in a country or statutes of limitations).
- Encourage specialized police investigators and prosecutors to be proactive in gathering all available information and preserving potential evidence about grave international crimes committed in certain conflict or post-conflict countries, such as Syria, that may be relevant to future prosecutions. Do not require identification of specific suspects before such investigations may be undertaken.
- Develop a standardized procedure to assess individuals’ possible involvement in grave international crimes as part of the refugee status determination process and other immigration screening procedures for all persons seeking legal status in the country.

Such a procedure should ensure that the due process rights of suspects and the integrity of the asylum process are in no way compromised.

- Establish a clear and transparent framework for cooperation between immigration services and specialized law enforcement and prosecution units, requiring immigration officials to notify police or prosecutors when individuals are denied status on the basis of article 1F so that criminal prosecution may be considered. Ensure that the focus is on accountability rather than exclusion or deportation, and provide adequate procedural safeguards for individuals facing possible extradition.
- Notify asylum seekers and others screened by immigration services that, by law, any information suggesting that they have committed grave international crimes may be shared with other government agencies, including law enforcement and prosecution services, once a final decision on their legal status in the country has been taken.
- Inform asylum seekers and others screened by immigration services who may have been victims or witnesses to grave international crimes that they have the right to report these crimes to the police and to participate in criminal proceedings. If the person gives consent, share information relevant to the commission of such crimes with law enforcement and prosecution services but guarantee as a matter of law that refugee status for victims and witnesses is not contingent on cooperation with criminal proceedings.
- Encourage prosecutors to establish clear and transparent guidelines for deciding whether to initiate investigations. Ensure that decisions on whether to investigate and prosecute are made impartially on the basis of the evidence and exclude political considerations, and ensure decisions not to prosecute can be subject to review.
- To minimize risks to potential witnesses, seek to identify victims and witnesses who live outside the country where the crimes were committed (“territorial state”) before deciding traveling to the territorial state to conduct investigations.
- Avoid unnecessary reliance on national authorities in the territorial state during extraterritorial investigations wherever possible, including by limiting the amount of information provided to national authorities on the identities of victims and witnesses and the questions to be asked of witnesses during interviews and not depending on national authorities for logistical and other practical assistance.

- Consider establishing a liaison officer in the country where the crimes were committed if repeated trips or multiple investigations are needed.
- Provide additional support to victims, including psychological assistance, before, during, and after their involvement in criminal proceedings.
- Ensure that adequate measures are in place to protect victims and witnesses, including victims and witnesses living in the state exercising jurisdiction and those living in foreign countries, including in the country where the crimes were committed. These measures should include the possibility of temporary or permanent relocation for seriously at-risk witnesses, including in the state exercising jurisdiction.
- Ensure police investigators and prosecutors take practical steps to minimize risks to victims and witnesses, including avoiding being seen in public with them and interviewing them away from their home community.
- Ensure police investigators and prosecutors provide victims and witnesses with adequate means to alert them to any problems they encounter as a result of their cooperation with the judicial process, including by giving their own contact details and those of a local NGO or other contact in the relevant state, periodically following-up with individuals to check on them, and where needed providing them with mobile phones or phone cards so that they have the necessary means to alert authorities to any problems.
- Authorize embassies in relevant countries to intervene and assist where serious witness protection issues arise.
- Allow the defense to conduct its own independent investigation in all grave international crimes cases, including at state expense where accused are indigent.

## To the Netherlands

- Renew the mandate of the International Crimes Taskforce to maintain and strengthen cooperation among relevant actors involved in the investigation and prosecution of grave international crimes cases.
- Encourage specialized police investigators and prosecutors to be proactive in gathering all available information and preserving potential evidence about grave international crimes committed in certain conflict or post-conflict countries, such as Syria, that may

be relevant to future prosecutions. Do not require identification of specific suspects before such investigations may be undertaken.

- Inform asylum seekers and others screened by immigration services who may have been victims or witnesses to grave international crimes that they have the right to report these crimes to the police and to participate in criminal proceedings. If the person gives consent, share information relevant to the commission of such crimes with law enforcement and prosecution services but guarantee as a matter of law that refugee status for victims and witnesses is not contingent on cooperation with criminal proceedings.
- Encourage police, prosecutors, and investigative judges to avoid any unnecessary reliance on national authorities in the territorial state during extraterritorial investigations wherever possible, including by limiting the amount of information provided to national authorities on the identities of victims and witnesses and the questions to be asked of witnesses during interviews and not depending on national authorities for logistical and other practical assistance.
- Authorize Dutch embassies in relevant countries to intervene and assist where serious witness protection issues arise.
- Authorize the defense to conduct its own independent investigation in all grave international crimes cases, including at state expense where accused are indigent.

## To Germany

- Increase staffing within the immigration service to screen potential suspects of article 1F crimes and consider establishing a separate 1F unit within the immigration services.
- Notify asylum seekers and others screened by immigration services that, by law, any information suggesting that they have committed grave international crimes may be shared with other government agencies, including law enforcement and prosecution services, once a final decision on their legal status in the country has been taken.
- Inform asylum seekers and others screened by immigration services who may have been victims or witnesses to grave international crimes that they have the right to report these crimes to the police and to participate in criminal proceedings. If the person gives consent, share information relevant to the commission of such crimes with law enforcement and prosecution services but guarantee as a matter of law that refugee

status for victims and witnesses is not contingent on cooperation with criminal proceedings.

- Dedicate additional resources for structural investigations and encourage police and prosecutors in the specialized war crimes units to be proactive in gathering all available information and preserving potential evidence about grave international crimes committed in certain conflict or post-conflict countries, such as Syria, that may be relevant to future prosecutions. Do not require identification of specific suspects before such investigations may be undertaken.
- Create an interagency taskforce to ensure effective cooperation among the specialized war crimes units and other relevant actors, including the ministries of justice and foreign affairs.
- Encourage prosecutors in the specialized war crimes unit to establish clear and transparent guidelines for their exercise of discretion under section 153f of the German Code of Criminal Procedure. Make certain that political considerations do not influence decisions on whether to prosecute, and ensure decisions not to prosecute can be reviewed.
- Encourage police and prosecutors to avoid any unnecessary reliance on national authorities in the territorial state during extraterritorial investigations wherever possible, including by limiting the amount of information provided to national authorities on the identities of victims and witnesses and the questions to be asked of witnesses during interviews and not depending on national authorities for logistical and other practical assistance.
- Provide additional support to victims, including psychological assistance, before, during, and after their involvement in criminal proceedings.
- Ensure that adequate measures are in place to protect victims and witnesses, including victims and witnesses living in the state exercising jurisdiction and those living in foreign countries, including in the country where the crimes were committed. These measures should include the possibility of temporary or permanent relocation for seriously at-risk witnesses, including in Germany.
- Direct police investigators and prosecutors take practical steps to minimize risks to victims and witnesses, including avoiding been seen in public with them and interviewing them away from their home community.

- Ensure police investigators and prosecutors provide victims and witnesses with adequate means to alert them to any problems they encounter as a result of being interviewed or providing testimony, including by giving their own contact details and those of a local NGO or other contact in the relevant state, periodically following-up with individuals to check on them, and where needed providing them with mobile phones or phone cards so that they have the necessary means to alert authorities to any problems.
- Authorize German embassies in relevant countries to intervene and assist where serious witness protection issues arise.
- Authorize the defense to conduct its own independent investigation in all grave international crimes cases, including at state expense where accused are indigent.

## To France

- Adopt as a matter of priority pending legislation that would establish a single legal framework for all grave international crimes, including the reinstatement of the civil party procedure for genocide, crimes against humanity, and war crimes.
- Create an interagency taskforce to ensure effective cooperation among the specialized war crimes units and other relevant actors, including the ministries of justice and foreign affairs.
- Establish a specialized unit within the Office for the Protection of Refugees and Stateless Persons (OFPRA) to screen potential suspects of article 1F crimes on a systematic basis and ensure other immigrants coming to France receive similar screening by immigration services.
- Formalize and make public cooperation procedures for the sharing of information between OFPRA and prosecutors in the specialized war crimes unit for individuals whose asylum claims have been denied in a final refugee status determination on the basis of article 1F. Notify asylum seekers and others screened by OFPRA that, by law, any information suggesting that they have committed grave international crimes may be shared with other government agencies, including prosecution services, once a final decision on their legal status in the country has been taken.
- Inform asylum seekers and others screened by immigration services who may have been victims or witnesses to grave international crimes that they have the right to report



these crimes to the police and to participate in criminal proceedings. If the person gives consent, share information relevant to the commission of such crimes with law enforcement and prosecution services but guarantee as a matter of law that refugee status for victims and witnesses is not contingent on cooperation with criminal proceedings.

- Encourage specialized police investigators and prosecutors to be proactive in gathering all available information and preserving potential evidence about grave international crimes committed in certain conflict or post-conflict countries, such as Syria, that may be relevant to future prosecutions. Do not require identification of specific suspects before such investigations may be undertaken.
- In view of the large number of cases pending in connection with the Rwandan genocide, establish a liaison officer position within the French embassy in Rwanda to provide assistance with extraterritorial investigations, and end any unnecessary reliance on Rwandan authorities to locate witnesses and provide other practical assistance.
- Encourage police, prosecutors, and investigative judges to avoid any unnecessary reliance on national authorities in the territorial state during extraterritorial investigations where possible, including by limiting the amount of information provided to national authorities on the identities of victims and witnesses and the questions to be asked of witnesses during interviews and not depending on national authorities for logistical and other practical assistance.
- Expand current witness protection measures under domestic law, including for victims and witnesses who live in foreign countries. Measures should include the possibility of temporary or permanent relocation for seriously at-risk witnesses, including in the state exercising jurisdiction.
- Consider establishing a dedicated witness protection unit within the national police and prosecution services and enable staff in the specialized war crimes units to make use of the expertise and resources of these units where witness protection issues arise.
- Direct police and prosecutors to take practical steps to minimize risks for victims and witnesses during extraterritorial investigations, including by avoiding being seen in public with them and interviewing them away from their home community.
- Ensure police investigators and prosecutors provide victims and witnesses with adequate means to alert them to any problems they encounter as a result of being

interviewed or providing testimony, including by giving their own contact details and those of a local NGO or other contact in the relevant state, periodically following-up with individuals to check on them, and where needed providing them with mobile phones or phone cards so that they have the means to alert authorities to any problems.

- Authorize embassies in relevant countries to intervene and assist where serious witness protection issues arise.
- Provide additional support to victims, including psychological assistance, before, during, and after their involvement in criminal proceedings.
- Authorize the defense to conduct its own independent investigation in all grave international crimes cases, including at state expense where accused are indigent.

## **To the European Union**

- Provide the EU Genocide Network with additional resources to enable it to broaden its work and provide more support to member states.
- Strengthen cooperation between the EU Genocide Network and EU institutions through more regular consultations and the holding of an annual debate in the European Parliament.
- Adopt a Council framework decision establishing an EU network of immigration focal points concerning exclusion cases, in particular relating to article 1F of the Refugee Convention, and provide it with the means necessary to carry out its work effectively.
- Encourage EU member states to press their law enforcement and prosecution services to be proactive in gathering all available information and preserving potential evidence about grave international crimes committed in certain conflict or post-conflict countries such as Syria that may be relevant to future prosecutions.
- Encourage EU member states to enable their immigration services to play a role in identifying potential suspects of grave international crimes during refugee status determination interviews and sharing information relevant to the commission of such crimes with law enforcement and prosecution services.
- Encourage EU member states to allow their immigration services to inform asylum seekers and others screened by immigration services who may have been victims or witnesses to grave international crimes that they have the right to report these crimes to

the police and to participate in criminal proceedings. If the person gives consent, authorize immigration officials to share information relevant to the commission of such crimes with law enforcement and prosecution services but guarantee as a matter of law that refugee status for victims and witnesses is not contingent on cooperation with criminal proceedings.

- Promote enhanced cooperation among member states on immigration matters through financial support for initiatives like the Arab Spring project in the Netherlands.
- Explore new ways of sharing information among EU member states in connection with the investigation and prosecution of grave international crimes, including through the initiative to create a focal point and shared database within Europol.
- Reach a common position in support of efforts to draft a new mutual legal assistance treaty and promote the idea with non-EU countries.

## Methodology

This report is based on Human Rights Watch research in France, Germany, and the Netherlands between December 2013 and June 2014. As part of the research, we conducted 94 interviews with prosecutors, investigative judges, legal support staff, police and other investigators, immigration officials, defense and victims' lawyers, government officials, academics, non-governmental organizations, and trial observers. The majority of interviews were conducted in person, but several interviews took place by telephone or over email. Most interviews were conducted in English and French, but a few interviews took place in German with the assistance of an interpreter. Additional information was gathered by telephone and email from persons who had already been interviewed in person.

Many of the individuals we interviewed wanted to speak candidly but did not wish to be cited by name or otherwise identified. As a result, we have withheld information in citations that could be used to identify them. We have also used the term "practitioner" at various points in the text to ensure that sources are not inadvertently revealed; we use the term variously to refer to prosecutors, legal support staff, police investigators, immigration officials, and lawyers involved in universal jurisdiction cases.

## The Netherlands

The Netherlands has been a proactive supporter of universal jurisdiction and has dedicated tremendous resources to ensuring that the country does not become a safe haven for war criminals. It also tries to bring to justice those responsible for grave international crimes committed abroad, including Dutch nationals. For well over a decade, it has had specialized units within its immigration, police, and prosecution services to handle these cases.

Dutch war crimes units are the most robust and well-resourced units in the world dedicated to pursuing grave international crimes on the basis of universal jurisdiction. They work together closely to identify suspects present in the country, investigate their alleged crimes, and prosecute them before Dutch courts. The Netherlands also has specialized investigative, trial, and appellate judges.

Dutch authorities have gained significant experience conducting investigations in several countries where grave international crimes have occurred, spending weeks and sometimes even months in the field, and appear committed to improving their methods of working. In addition to the regular cooperation that takes place among the units, the government established an International Crimes Taskforce in 2012 to strengthen collaboration and tackle remaining challenges. The Netherlands has also been an advocate for stronger cooperation and information sharing among European countries and for an international mutual legal assistance treaty which would facilitate investigations in grave international crimes cases.

A review of how the specialized war crimes units came to exist and how they carry out their work, in particular their investigations, offers valuable lessons for other countries. Close collaboration between the specialized units has been a key factor in their success.

### Specialized War Crimes Units

#### *Immigration Service*

In February 1997, a Dutch newspaper published an article alleging that at least 35 Afghan war criminals had sought asylum in the Netherlands and were walking around freely in the

country—at times coming face-to-face with victims of their crimes.<sup>22</sup> The article caused a public outcry, leading to questions in Parliament and, a year later, to the creation of a specialized team within the Immigration and Naturalization Service (IND) to ensure that the country did not become a safe haven for perpetrators of grave international crimes.<sup>23</sup> The team’s mandate was to identify all persons suspected of having committed crimes within the meaning of article 1F of the Refugee Convention and deny them refugee status.

In 2001, the IND transformed the team into an International Crimes Unit, referred to as the “1F unit.”<sup>24</sup> As of 2014, the 1F unit has a full-time staff of 25, most of whom are senior immigration officers with years of prior experience.<sup>25</sup> Each year, the unit conducts investigations into the background of between 120 and 150 asylum applicants who are suspected of having committed grave international crimes and excludes approximately 20 percent, or 30 persons.<sup>26</sup> Since its creation, more than 810 individuals have been denied refugee status in the country on 1F grounds.<sup>27</sup>

As part of the refugee status determination process, asylum seekers and their lawyers are notified if the person’s file has been sent to the 1F unit and, during the interview with the 1F unit, are also notified that information they provide may be shared with others where required by Dutch law.<sup>28</sup> Once a final decision has been taken by the 1F unit, the entire file

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<sup>22</sup> “Murderers. More than 35 of them. Afghan war criminals walk around freely in the Netherlands,” *Vrij Nederland*, February 22, 1997, on file with Human Rights Watch. See also Jos Slats, “Het barst hier van de Afghaanse oorlogsmisdadigers,” *Vrij Nederland*, February 22, 1997, <http://www.vn.nl/Meer-dossiers/Immigratie/Artikel-Immigratie/Het-barst-hier-van-de-Afghaanse-oorlogsmisdadigers.htm> (accessed September 8, 2014).

<sup>23</sup> The unit became operational in 1998. Human Rights Watch telephone interview with Dutch official, February 24, 2014, and email correspondence, May 8, 2014.

<sup>24</sup> The unit originally included staff looking at both terrorism and grave international crimes cases. However, in 2005, it was divided into two separate units. Human Rights Watch interview with Dutch official, January 27, 2014, and email correspondence, May 31, 2014; Human Rights Watch email correspondence with Dutch official, May 8, 2014.

<sup>25</sup> Staffing in the unit has remained relatively constant since 2001. Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>26</sup> The IND told Human Rights Watch that this number is relatively constant from one year to the next. Human Rights Watch interview with Dutch official, January 27, 2014. To put it into perspective, it is worth noting that the Netherlands processed 13,650 asylum applications in 2012 with Afghans, Iraqi, and Somalis constituting the largest number of asylum applicants. See IND, Ministry of Security and Justice, “The IND explained: Annual Results 2012,” May 2013, [https://ind.nl/EN/Documents/A6\\_ENG\\_WEB%20Annual%20results%202012.pdf](https://ind.nl/EN/Documents/A6_ENG_WEB%20Annual%20results%202012.pdf) (accessed September 8, 2014). The asylum acceptance rate is approximately 50 percent. See Fred Teeven, response to question during Parliamentary debate “1F policy,” Dutch Government, June 19, 2014, transcript at <http://www.tweedekamer.nl/vergaderingen/commissievergaderingen/details/index.jsp?id=2014A00496> (accessed September 8, 2014).

<sup>27</sup> Peter ten Hove, Deputy Manager of 1F Unit, IND, press conference at the Ministry of Justice in The Hague, February 3, 2014, attended by Human Rights Watch researcher.

<sup>28</sup> Refugee status determinations normally entail two interviews with immigration officials. However, if immigration officials suspect an asylum seeker has committed a grave international crime, the person’s file is forwarded to the 1F unit for a third,

of individuals denied refugee status are automatically passed on to prosecutors in the specialized war crimes unit for possible criminal action rather than simply being dealt with through exclusion or deportation.<sup>29</sup> This sharing of information, which is formalized in an official protocol, has become an important means of identifying grave international crimes suspects.<sup>30</sup> The standard applied by immigration services to deny persons refugee status is not the same standard applied by prosecutors in deciding whether to initiate criminal action, so not all 1F cases result in criminal prosecutions. Information gathered by the Dutch 1F unit has led to the successful prosecution of at least two Afghans and one Rwandan and has contributed to several other criminal investigations and prosecutions.<sup>31</sup>

Defense counsel in one of the Afghan cases challenged the legality of sharing immigration files with prosecutors on the grounds that it violates an individual's right against self-incrimination and interferes with his or her right to privacy. A Dutch court found no violation on the grounds that immigration services were not working as a proxy for criminal justice authorities. It noted that immigration officials were focused on the asylum process and that the handing over of immigration files to prosecutors was only a by-product of the asylum procedure. Moreover, it found that there was a legal basis for sharing the information and that any violation of privacy was proportionate to the interests served, namely ensuring war criminals do not escape justice.<sup>32</sup> One of the convicted persons has filed a challenge before the European Court of Human Rights.<sup>33</sup>

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more focused interview. Human Rights Watch interview with Dutch official, January 27, 2014. For more information on the Dutch asylum procedure, see "EDAL Country Overview – the Netherlands," European Database of Asylum Law, <http://www.asylumlawdatabase.eu/en/content/edal-country-overview-netherlands> (accessed September 8, 2014).

<sup>29</sup> Human Rights Watch interview with Dutch official, January 27, 2014, and email correspondence, May 31, 2014; Human Rights Watch interview with Dutch official, May 21, 2014.

<sup>30</sup> Repatriation and Departure Service, Dutch Ministry of Security and Justice, "VRIS-protocol," February 13, 2014, <http://www.dtenv.nl/Kennisbank/VRIS-protocol/> (accessed September 8, 2014); Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch interview with Dutch official, March 28, 2014. See also Fred Teeven, State Secretary of Security and Justice, response to question during Parliamentary debate on "1F policy," Dutch Parliament, The Hague, June 19, 2014.

<sup>31</sup> Hesamuddin Hesam, Habibullah Jalalzoy, both from Afghanistan, and Joseph Mpambara, from Rwanda, were identified as suspects through immigration screening. At least one other case may have originated in the immigration service, but this information could not be confirmed. Several other persons investigated or prosecuted by Dutch authorities had been denied refugee status in the country on the basis of article 1F, and information provided by the immigration service proved useful to prosecutors in these cases. Human Rights Watch interview with Dutch official, March 28, 2014.

<sup>32</sup> The defense alleged violations of articles 6 and 8 of the European Convention on Human Rights. The court found no violation of article 6 on the grounds that the asylum procedure is not primarily aimed at gathering criminal information and that the suspects were not under pressure to give a statement to the IND (applying for a residence permit is a voluntary act). It noted that at the time the statements were given, in 1992 and 1993, there was no formal sharing of information between immigration services and prosecutors, and that the persons' files were not shared with prosecutors until 2000. However, the court found a violation of the suspects' right to privacy since the IND told them that their statements would be treated confidentially. It nonetheless found that there was a legal basis for the violation and that the violation was proportional to

Cooperation between the specialized war crimes units within the immigration and prosecution services has significantly improved in recent years. Practitioners in both units said they want to build on this cooperation but remain committed to ensuring that it does not compromise the integrity of the asylum procedure or lead to the perception that the immigration screening process has become a criminal investigation tool for prosecutors.<sup>34</sup>

Practitioners in the 1F unit said they have made significant progress in handling cases over the years. With adequate resources to look into the situation in relevant countries, they have better information to evaluate asylum applications effectively and have learned how to ask better and more focused questions during refugee status determination interviews. They also said they have learned from the experiences of Afghanistan, Rwanda, and other post-war countries and now try to gather as much information as possible in real time because gathering information years later is more difficult and often less reliable.<sup>35</sup>

Facing large numbers of asylum seekers from Syria and other Middle East countries in the past few years, the task of gathering relevant information has become all the more pressing. As part of that effort, the 1F unit has begun a special EU-financed project to gather information and documentation about grave international crimes committed in the Middle East and to develop guidelines and tools that can be used by immigration officers in the Netherlands and other European countries in assessing 1F cases.<sup>36</sup>

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the interest pursued—namely ensuring accountability for serious war criminals. Prosecutor v. Hesamuddin Hesam, The Hague District Court, Case No. 09/751004-04, October 14, 2005, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2005:AV1163> (accessed September 8, 2014); and Prosecutor v. Habibullah Jalalzoy, The Hague District Court, Case No. 09/751005-04, October 14, 2005, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2005:AV1489> (accessed September 8, 2014). See also Prosecutor v. Hesamuddin H., The Hague Court of Appeals, Case No.22-006131-05, Judgment (Appeal), January 29, 2007, section 6, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AGHSGR%3A2007%3AAZ9365> (accessed September 8, 2014).

<sup>33</sup> Human Rights Watch email correspondence with Dutch lawyer, May 23, 2014.

<sup>34</sup> Immigration officials and prosecutors can provide general information to each other, such as the names of countries under investigation, but refrain from giving more specific information on cases they are handling. The IND only gives the names of individuals or any documentation from their files after a final decision has been made on their asylum application. Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>35</sup> According to IND officials, the IND has made mistakes over the years and has granted asylum to a number of individuals who should have been denied refugee status on the basis of article 1F, in particular Afghans and Rwandans. The IND is still trying to withdraw status and even Dutch citizenship from some of these individuals. Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch phone interview with Dutch official, February 24, 2014.

<sup>36</sup> Over 27,000 Syrians applied for refugee status in the Netherlands in 2013. As of early February 2014, they had rejected two Syrian asylum seekers on the basis of article 1F. Peter ten Hove, Deputy Manager of 1F Unit, IND, press conference at the Ministry of Justice in The Hague, February 3, 2014, attended by Human Rights Watch researcher. For more information, see IND, Ministry of Security and Justice, “Arab Spring and Beyond: Safeguarding the Integrity and Acceptance of International Protection,” undated, on file with Human Rights Watch.



## *Police Department*

The first specialized unit within the national police department was established in 1994 to investigate crimes committed in the former Yugoslavia.<sup>37</sup> Four years later, in 1998, the team changed its name and broadened its mandate to include all grave international crimes.<sup>38</sup> The unit operated under the authority of the military prosecutor's office.<sup>39</sup> An evaluation of the team's performance in 2002 revealed that most investigations were discontinued due to lack of evidence and that the unit's work was hampered by turnover in staff, inadequate coordination with other government agencies, and lack of an interdisciplinary approach.<sup>40</sup>

Following this negative evaluation, the minister of security and justice transferred oversight for the team to the National Public Prosecutor's Office in Rotterdam and re-named the team the "Dutch War Crimes Unit."<sup>41</sup> Capacity in the new unit was doubled, and as of 2014 the team has 31 staff, including analysts, police investigators and detectives, military and financial experts, an international criminal lawyer, an international relations specialist, an African Studies specialist, and several administrative staff. The unit also has a pool of experts at its disposal for use on a case-by-case basis, comprised of interpreters, historians, anthropologists, weapons experts, and police officers with experience in various parts of the world. None of the staff have special training in sexual and gender-based violence, but the unit may bring in specialized investigators from other parts of the police department as needed for such cases.<sup>42</sup>

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<sup>37</sup> Following the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the Dutch government set up the *Nationaal opsporingsteam Joegoslavische Oorlogsmisdrijven* (NOJO) in 1994. Its mandate stemmed from a ruling by the Supreme Court on November 11, 1997 in the *Knesevic* case, which held that Dutch courts had jurisdiction to prosecute war criminals even though the crimes were committed outside of Dutch territory.

<sup>38</sup> The team became known as the *Nationaal Opsporingsteam Voor Oorlogsmisdrijven* (NOVO) ("National Investigation Team for War Crimes").

<sup>39</sup> Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>40</sup> Wetenschappelijk Onderzoek- en Documentatiecentrum, Ministry of Security and Justice and the Willem Pompe Institute for Criminal Law and Criminology, University of Utrecht, "Evaluation of the Netherlands National Investigation Team for War Crimes," 2002, <https://www.wodc.nl/onderzoeksdatabase/evaluatie-novoteam.aspx> (accessed September 8, 2014), official English summary available at [https://english.wodc.nl/images/ewbo2nat-summary\\_tcm45-57331.pdf](https://english.wodc.nl/images/ewbo2nat-summary_tcm45-57331.pdf) (accessed September 8, 2014).

<sup>41</sup> The Team Internationale Misdrijven (TIM) now forms part of the Dutch national crime squad, a division within the national police agency. For background, see Letter from Benk Korthals, Minister of Justice, Dutch Ministry of Justice, to the House of Representatives of the Dutch Parliament, April 3, 2002, <https://zoek.officielebekendmakingen.nl/kst-28317-1.pdf> (accessed September 8, 2014).

<sup>42</sup> Dutch law now provides for specific measures that must be taken when interviewing victims of sexual violence, including recording of the interview. Human Rights Watch telephone interview with Dutch official, February 18, 2014.

As of January 2014, the unit had 18 ongoing investigations and had opened more than 40 preliminary investigations.<sup>43</sup> One team member typically handles preliminary investigations, while open investigations are usually handled by two persons, or more if needed. The unit aims to complete three criminal investigations a year. An investigation is considered completed when it leads to an arrest, trial, extradition, or is discontinued by prosecutors.<sup>44</sup> The unit periodically reviews the status of each case and prioritizes those cases that have the best chance of leading to a successful prosecution.<sup>45</sup>

The size, resources, and growing expertise of the Dutch War Crimes Unit have led to impressive results. Each year the team has taken on a larger number of cases, jumping from six investigations in 2010 to 15 investigations with 23 suspects in 2013.<sup>46</sup> In addition, the length of time needed for investigations has decreased, taking between three and four years in countries where the team has not previously worked and approximately one year in countries where they have worked before, such as Rwanda.<sup>47</sup>

Staff cited the diverse background of team members, their interest in handling these types of cases, and their willingness to travel for extended periods of time as key factors in the success of the unit.<sup>48</sup> The police team said that they have learned from past experiences and now know how to better organize investigative teams and be more creative in their investigations.<sup>49</sup>

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<sup>43</sup> Preliminary investigations are general in nature, allowing basic evidence to be gathered so that investigators and prosecutors can decide whether to proceed with a case. Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>44</sup> This goal was met in 2013 and they expect that it will be met again in 2014. Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>45</sup> Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>46</sup> The TIM had six open investigations in 2010, seven in 2011, ten in 2012, and 15 in 2013. Ministry of Security and Justice, "Rapportagebrief Internationale Misdrijven 2010" ("2011 Annual Report"), July 5, 2011, <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2011/07/07/5702638-rapportagebrief-internationale-misdrijven-2010.html> (accessed September 8, 2014); Ministry of Security and Justice, "Rapportagebrief Internationale Misdrijven 2011" ("2012 Annual Report"), June 21, 2012, <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2012/06/23/rapportagebrief-internationale-misdrijven-2011.html> (accessed September 8, 2014); and Ministry of Security and Justice, "Rapportagebrief Internationale Misdrijven 2012" ("2013 Annual Report"), November 13, 2013, <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/11/22/rapportagebrief-internationale-misdrijven.html> (accessed September 8, 2014); Human Rights Watch email correspondence with Dutch official, September 9, 2014.

<sup>47</sup> Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch telephone interview with Dutch official, February 24, 2014.

<sup>48</sup> Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch telephone interview with Dutch official, February 18, 2014; Human Rights Watch telephone interview with Dutch official, February 24, 2014.

<sup>49</sup> Human Rights Watch telephone interview with Dutch official, February 18, 2014; Human Rights Watch telephone interview with Dutch official, February 24, 2014.

### *Prosecutor's Office*

Despite a number of investigations, the specialized team within the military prosecutor's office did not initiate a single prosecution for grave international crimes between 1998 and 2002. Consequently, responsibility for these cases was transferred to the National Public Prosecutor's Office in September 2002.<sup>50</sup> A specialized unit was created within the office to handle grave international crimes, which became operational in 2003. As of 2014, it has a staff of six persons, including two prosecutors, two legal assistants, a policy officer, and an analyst.<sup>51</sup> The two prosecutors work mainly on grave international crimes cases but also occasionally handle domestic criminal cases if time permits.<sup>52</sup> Two outside practitioners said additional prosecutors could be useful to bolster the office's capacity to take on more cases.<sup>53</sup>

Prosecutors in the specialized war crimes unit have taken eight cases to trial, involving crimes committed in the Democratic Republic of Congo, Afghanistan, Iraq, Liberia, Rwanda, and Sri Lanka, resulting in six convictions, one acquittal, and one retrial. Two other cases were dismissed before trial, one after an Afghan suspect died and the other after a Dutch company accused of wrongdoing agreed to stop providing equipment for use in the construction of a wall and settlements in the West Bank.<sup>54</sup> Both cases had far-reaching implications despite not resulting in trials.

While victims and other parties can file complaints with the prosecutor's office in the hopes of triggering criminal proceedings, prosecutors make the final decision of whether to investigate and prosecute.<sup>55</sup> Relevant factors include the seriousness of the alleged

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<sup>50</sup> Letter from Benk Korthals, Minister of Justice, to the House of Representatives of the Dutch Parliament, April 3, 2002.

<sup>51</sup> The office has funding for an additional position which will be dedicated to appellate work. Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, March 28, 2014, and telephone interview, June 16, 2014.

<sup>52</sup> Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, March 28, 2014. One prosecutor estimated that the breakdown was 70 percent international crimes cases and 30 percent regular criminal cases and said that it was interesting to continue handling regular criminal cases. Given that international crimes cases do not go to trial regularly, it appears to also maintain the prosecutors' trial experience.

<sup>53</sup> Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch telephone interview with Dutch official, February 18, 2014.

<sup>54</sup> These cases were against former Afghan intelligence officer Amanullah Osman and the Dutch company Riwal. They are discussed in more detail in Annex I.

<sup>55</sup> If the prosecutor's office decides not to proceed with a case, the party that filed the complaint is notified of the decision. The party, or anyone with an interest in the case (which one legal practitioner said may be interpreted broadly), may challenge the prosecutor's decision before the Court of Appeals. The court usually looks at whether there is a reasonable suspicion of guilt, whether a conviction is feasible, and whether it is in the public interest to prosecute the case. The court's decision is final and

crimes, the level of involvement of the accused, the likelihood of cooperation from the territorial state, the chance of securing a conviction, and the prosecution service's general workload.<sup>56</sup> Prosecutors also consider whether the case will help achieve the overarching goal of keeping the Netherlands from becoming a safe haven for war criminals and try to ensure that their case selection represents a broad range of countries rather than focusing only on certain countries like Rwanda or the former Yugoslavia.<sup>57</sup>

Practitioners in the war crimes unit said that they have gathered significant experience, particularly in Afghanistan and Rwanda. In their view, the expertise acquired over the years allows them to move faster, be more creative in conducting investigations, and assess potential witness protection issues more easily.<sup>58</sup> Practitioners confirmed that the amount of time needed to investigate a case has decreased and that investigations have become more efficient. In addition, the unit now has the capacity and expertise to handle multiple cases simultaneously rather than focusing on a single case.<sup>59</sup>

### *International Crimes Taskforce*

In 2012, the Netherlands established an International Crimes Taskforce to improve cooperation among the various actors involved in grave international crimes cases.<sup>60</sup> The interagency taskforce includes immigration, police, and prosecution services as well as officials from the ministries of justice and foreign affairs.<sup>61</sup> Everyone interviewed for the report spoke highly of the project, emphasizing that it has improved collaboration and has helped identify and solve certain problems associated with international crimes cases.<sup>62</sup>

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cannot be appealed. Wetboek van Strafvordering ("Dutch Code of Criminal Procedure"), entered into force on January 15, 1921, arts. 12-13a, [http://wetten.overheid.nl/BWBR0001903/geldigheidsdatum\\_09-09-2014](http://wetten.overheid.nl/BWBR0001903/geldigheidsdatum_09-09-2014) (accessed September 9, 2014); Human Rights Watch interview with Dutch official, January 27, 2014. See also De Rechtspraak, "Complaint not prosecuting a criminal offence," undated, <http://www.rechtspraak.nl/Naar-de-rechter/Hoger-beroep/Pages/Klacht-over-het-niet-%28verder%29-vervolgen-van-een-straftbaarfeit-artikel-12-Sv.aspx> (accessed September 8, 2014).

<sup>56</sup> Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, March 28, 2014.

<sup>57</sup> Human Rights Watch interview with Dutch official, March 28, 2014.

<sup>58</sup> Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, March 28, 2014.

<sup>59</sup> Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>60</sup> Ministry of Security and Justice, 2013 Annual Report; Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>61</sup> The taskforce has a three-fold mandate: (i) to prevent perpetrators of international crimes from entering the Netherlands, (ii) to prevent them from settling in the country, and (iii) to ensure that they do not enjoy impunity. See Ministry of Security and Justice, 2013 Annual report.

<sup>62</sup> Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, January 28, 2014.

Although the taskforce was established for an initial period of two years, most expect its mandate to be renewed given the positive results so far. Regular meetings take place at a high level to discuss policy matters and at a lower, operational level to discuss practical issues and exchange information on specific cases.<sup>63</sup> Several working groups have also been created to look at particular countries or issues.<sup>64</sup>

### *Ministry of Justice*

The Ministry of Justice has a Department for International Legal Assistance in Criminal Matters that facilitates the work of the specialized units, in particular by forwarding judicial cooperation requests from the Dutch war crimes units to foreign countries and dealing with incoming requests from other countries.<sup>65</sup> The department also deals with assistance requests to and from the international criminal tribunals and requests for extradition.<sup>66</sup> In 2012, Dutch authorities received 23 requests for assistance from foreign countries in relation to ongoing investigations of grave international crimes.<sup>67</sup> In an effort to streamline cooperation among judicial authorities in different countries, the special department has been leading an initiative to establish an international mutual legal assistance treaty (see below).

The ministerial department also evaluates broader legal and policy issues raised by the specialized war crimes units' work and coordinates submission of an annual report to Parliament highlighting the units' activities and key developments from the year.<sup>68</sup> Parliament often holds a public debate to discuss the report. The annual report and parliamentary debate appear to be important means of raising awareness and sustaining broad political support for the specialized units and their work.<sup>69</sup>

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<sup>63</sup> Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>64</sup> Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>65</sup> European Union mechanisms have streamlined requests for legal assistance within the EU such that requests can now be made directly to the relevant judicial authorities (most often, the prosecutor's office). However, where there is no mutual legal assistance treaty in place between the Netherlands and another country or where no contact point for international crimes exists in that country, the special department in the Ministry of Justice oversees the request. In many instances, a bilateral treaty is needed to allow the cooperation (*e.g.*, searches and seizures conducted in the Netherlands). Human Rights Watch interview with Dutch official, January, 27, 2014; Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>66</sup> The special department handles a growing number of extradition cases, in particular from Rwanda.

<sup>67</sup> Ministry of Security and Justice, 2013 Annual Report, p. 2.

<sup>68</sup> Human Rights Watch interview with Dutch official, January 28, 2014. See Ministry of Security and Justice, Annual Reports for 2010, 2011 and 2013.

<sup>69</sup> Human Rights Watch interview with Dutch official, January 29, 2014.

## Investigations

Police investigators and prosecutors within the specialized war crimes units have gained tremendous experience in grave international crimes cases over the years. They work together closely in carrying out investigations, which has been critical to their success.<sup>70</sup> Quite early in the course of an investigation, they explore the possibility of going abroad to look for evidence—most often to the country where the crimes occurred but also to other countries where victims and witnesses may be located. Since experience has shown that 80 to 90 percent of the evidence in these cases is gathered abroad, it is crucial to assess the feasibility and associated risks of extraterritorial investigations at an early stage.<sup>71</sup>

Police investigators and prosecutors within the specialized units usually make several trips abroad: first to establish contact with the relevant national authorities in the territorial state and then, in subsequent trips, to carry out the actual investigation.<sup>72</sup> Investigators typically travel in teams of two or three, but larger teams are sometimes needed.<sup>73</sup> Most cases require multiple trips, each lasting anywhere from one to three weeks. In the *Basebya* case, investigators undertook approximately 20 trips to Rwanda over the course of several years.<sup>74</sup> In the *Nzapali* case, investigators spent several months pursuing an investigation in the Democratic Republic of Congo.<sup>75</sup> Prosecutors also travel abroad to interview witnesses but usually for shorter periods of time and instead oversee the work of investigators remotely.<sup>76</sup>

An investigative judge usually becomes involved once a suspect has been arrested and formally charged, although the investigative judge may become involved earlier where certain measures like telephone interceptions or house searches are sought by

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<sup>70</sup> Human Rights Watch interview with Dutch official, March 28, 2014.

<sup>71</sup> Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>72</sup> On the first trip, a prosecutor usually comes along to meet relevant authorities in the country. On subsequent trips, police investigators often travel alone but report regularly by phone to prosecutors. Human Rights Watch telephone interview with Dutch official, February 18, 2014; Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>73</sup> Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch telephone interview with Dutch official, February 18, 2014.

<sup>74</sup> Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch telephone interview with Dutch official, February 24, 2014.

<sup>75</sup> “Netherlands: Congolese Torturer Convicted,” Human Rights Watch news release, April 7, 2004, <http://www.hrw.org/news/2004/04/07/netherlands-congolese-torturer-convicted>.

<sup>76</sup> Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, January 28, 2014.

prosecutors.<sup>77</sup> Once the investigative judge becomes involved, the case file is disclosed to the defense and the investigative judge hears from prosecutors and the defense as to what investigative steps should be carried out.<sup>78</sup> The investigative judge normally travels to the territorial state, often several times, in order to question witnesses.<sup>79</sup> Where possible, the investigative judge brings prosecutors and defense counsel along for these interviews.<sup>80</sup> A few countries do not allow defense counsel to travel, in which case the investigative judge travels alone so as not to prejudice the rights of the defense. The use of a specialized investigative judge has contributed positively to the investigative process.<sup>81</sup>

### *Locating Victims and Witnesses*

After gathering initial information about a suspect and his or her alleged crimes through a review of open sources and national and international police databases, investigators in the specialized war crimes unit begin their search for persons with relevant information, including victims and witnesses to the actual crimes. First, they typically try to find people living in the Netherlands or third countries because that often presents fewer witness protection issues, although most witnesses are found in the territorial state.<sup>82</sup> Once a victim or witness has been identified, that person is asked to identify other persons with relevant information.<sup>83</sup>

Investigators and prosecutors within the specialized war crimes units expressed a desire to improve their methods for locating victims and witnesses.<sup>84</sup> The police department has

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<sup>77</sup> Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, March 27, 2014. Dutch Code of Criminal Procedure, arts. 97, 108, and 126l. See also Patrick Van der Meij, “De rechter-commissaris als onmisbare schakel in het strafrechtelijk vooronderzoek?” *Trema Tijdschrift voor de Rechterlijke Macht*, Vol. 8, 2010, pp. 331-338.

<sup>78</sup> The prosecutor’s office may request that certain information be withheld from the defense if necessary to protect witnesses. Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>79</sup> The prosecutor’s office can continue its own investigation even after the investigative judge has become involved, but in practice this is rarely done. Prosecutors usually continue to direct the police even after the investigative judge takes over the investigation, although the investigative judge is authorized to direct the police’s actions. Dutch Code of Criminal Procedure, art. 177; Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch interview with Dutch official, March 27, 2014.

<sup>80</sup> The Netherlands does not yet use video conferencing to allow the accused to participate in the questioning of witnesses. Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, March 27, 2014.

<sup>81</sup> A single specialized investigative judge handles all investigations in grave international crimes cases, at both the trial and appellate levels. The investigative judge also handles regular criminal cases where time permits. *Ibid.*

<sup>82</sup> Human Rights Watch telephone interview with Dutch official, February 18, 2014; Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>83</sup> Human Rights Watch telephone interview with Dutch official, February 24, 2014.

<sup>84</sup> Human Rights Watch telephone interview with Dutch official, February 18, 2014; Human Rights Watch telephone interview with Dutch official, February 24, 2014.

provided the immigration service with a brochure that can be distributed to potential victims and witnesses explaining their work and encouraging people to report crimes to the police.<sup>85</sup> The initiative has been relatively unsuccessful, however, and practitioners in both units said they are looking for other ways to reach out to persons with relevant information.<sup>86</sup> Investigators also reach out to diaspora communities and groups that work with asylum seekers and are also turning to social media such as Facebook.<sup>87</sup>

Finding individuals in the country where the crimes occurred is especially challenging. Emphasizing that they have learned valuable lessons from past cases, investigators and prosecutors in the specialized war crimes units said they want to continue improving their techniques for locating relevant witnesses abroad.<sup>88</sup> Investigators occasionally rely on intermediaries—individuals or NGOs located in a particular country—but this practice caused problems in the *Van Kouwenhoven* case (see below).<sup>89</sup> Despite past problems, several practitioners said that local and international NGOs have the potential to be a valuable source of information and contacts.<sup>90</sup> Embassies in relevant countries are not generally relied on for assistance in identifying victims and witnesses.<sup>91</sup>

### *Cooperation with Foreign Authorities*

As mentioned above, prosecutors usually make a first trip to a country to establish contacts with relevant national authorities in the territorial state and to assess the situation in the country before beginning their investigation. During this trip, the prosecutor usually meets with ministry of justice officials and the national prosecutor or

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<sup>85</sup> International Crimes Unit, Korps Landelijke Politiediensten (“Netherlands Police Agency”), “War crimes: report them to us!” September 2009, <https://www.ind.nl/Documents/Folder-Oorlogsmisdaden.pdf> (accessed September 8, 2014).

<sup>86</sup> According to police and immigration officials, asylum seekers may be weary of Dutch authorities given the experiences they may have had in their home countries. Dutch officials are looking into whether other groups or organizations such as the Dutch Refugee Council (*Vluchtelingenwerk*), an independent non-governmental organization that provides support to refugees during the asylum procedure, might be better placed to distribute the brochure and encourage individuals to report crimes to the police. Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch telephone interview with Dutch official, February 24, 2014; Human Rights Watch telephone interview with Dutch official, February 18, 2014.

<sup>87</sup> Human Rights Watch telephone interview with Dutch official, February 18, 2014; Human Rights Watch telephone interview with Dutch official, February 24, 2014; Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>88</sup> Human Rights Watch telephone interview with Dutch official, February 18, 2014; Human Rights Watch telephone interview with Dutch official, February 24, 2014.

<sup>89</sup> Human Rights Watch telephone interview with Dutch official, February 24, 2014; Human Rights Watch interview with Dutch official, March 28, 2014.

<sup>90</sup> Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, March 28, 2014; Human Rights Watch telephone interview with Dutch official, February 18, 2014.

<sup>91</sup> Human Rights Watch telephone interview with Dutch official, February 24, 2014.



attorney general to explain the nature of the case and make practical arrangements for carrying out the investigation.<sup>92</sup> This step is all the more important in countries where the specialized war crimes units have not previously worked or where no mutual legal assistance agreement exists between the two countries. Prosecutors from the specialized war crimes unit typically handle contacts with national authorities in the territorial state, but the investigative judge may also meet with relevant officials as needed.<sup>93</sup>

The information provided to national authorities in the territorial state varies depending on the level of formality required by the host country and whether there are any security concerns, but investigators and prosecutors try to minimize the amount of information given to maintain the independence of their investigations and minimize security risks for witnesses in the country. They try not to give suspects' names if the case is only at the preliminary investigation stage but are often required to do so. Where possible, they also avoid giving the names of potential victims and witnesses that they seek to meet.<sup>94</sup>

Dutch experiences with national authorities in foreign countries have varied widely. In one instance, a Dutch prosecutor decided not to proceed with an investigation despite the stated willingness of national authorities in that state to cooperate, where the prosecutor believed that it would not be possible to investigate without government interference and where the security situation was poor.<sup>95</sup> In contrast, investigators and prosecutors in the Dutch specialized war crimes units have established a good working relationship with the Rwandan government and usually obtain a government authorization letter allowing them to investigate on their own in Rwanda.<sup>96</sup>

Investigators and prosecutors try to carry out their investigations without the involvement of national authorities in the territorial state in order to mitigate potential interference, but this is not always possible and valuable lessons have been learned over the years. For example, investigators used to accept government offers to transport witnesses to meet with them but now try to avoid reliance on national authorities in the territorial state for such practical assistance.<sup>97</sup>

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<sup>92</sup> Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch interview with Dutch official, March 27, 2014.

<sup>93</sup> Human Rights Watch interview with Dutch official, March 27, 2014.

<sup>94</sup> Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>95</sup> Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>96</sup> Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>97</sup> Human Rights Watch interview with Dutch official, January 28, 2014.

Once the case becomes more advanced and reaches the investigative judge, national authorities in the territorial state are normally provided with the names of all persons to be interviewed, and in approximately 30-40 percent of cases the investigative judge is obliged to provide them with a list of questions that the judge intends to ask each witness. The investigative judge tries to inquire about potential government influence by asking witnesses what their relations are with the government and whether they have already seen the questions they are being asked.<sup>98</sup> In some instances, national authorities in the territorial state also require being present during interviews or conducting the interviews themselves.

Dutch authorities told Human Rights Watch that they were not aware of any instances in which national authorities in the territorial state interfered with their investigations.<sup>99</sup> Nonetheless, they should exercise greater caution in providing information to national authorities in territorial states to minimize the risk of interference in their investigations.

### *Challenges and Lessons Learned*

Police and prosecutors said that investigative practices have improved over the years.<sup>100</sup> At the same time, nearly all practitioners within the specialized war crimes units agreed that finding key witnesses and assessing their credibility remain the most challenging part of their work.<sup>101</sup> The fact that the crimes happened in a foreign country many years ago and in a very different cultural context makes this task even more difficult.<sup>102</sup>

Assessing witness credibility is an issue both during the investigation and at trial. As one practitioner put it, “it is simply difficult to verify what they [witnesses] tell us.”<sup>103</sup> Practitioners felt that having staff with a wide range of backgrounds within the specialized war crimes units,

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<sup>98</sup> No witness has ever said that he or she had seen the questions ahead of questioning by the investigative judge. Human Rights Watch interview with Dutch official, March 27, 2014.

<sup>99</sup> Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, March 28, 2014; Human Rights Watch telephone interview with Dutch official, February 18, 2014; Human Rights Watch interview with Dutch official, March 27, 2014.

<sup>100</sup> Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch telephone interview with Dutch official, February 24, 2014; Human Rights Watch interview with Dutch official, March 28, 2014; Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>101</sup> Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch telephone interview with Dutch official, February 18, 2014; Human Rights Watch telephone interview with Dutch official, February 24, 2014; Human Rights Watch interview with Dutch official, March 27, 2014.

<sup>102</sup> Human Rights Watch interview with Dutch official, March 27, 2014.

<sup>103</sup> Human Rights Watch telephone interview with Dutch official, February 24, 2014.

in particular the police unit, and using temporary experts allow them to better assess the reliability of information received from witnesses. They seem to recognize their own areas of expertise and those areas where they need outside assistance to respond effectively to the challenges of universal jurisdiction cases. Using local social workers and psychologists in the territorial state has become another important tool.<sup>104</sup> In at least two cases involving Rwanda, the investigative judge had a local psychologist present during interviews in order to provide support to witnesses and to advise the judge on their state of mind.<sup>105</sup>

Investigators and prosecutors within the specialized war crimes units say they have learned from past mistakes. For example, investigators sometimes relied on intermediaries with too little oversight as they tried to locate witnesses. In a case involving the prosecution of a Dutch national who was alleged to have imported arms into Liberia, the *Van Kouwenhoven* case, the court of appeals concluded that it was unclear how intermediaries had gone about finding relevant witnesses and could not exclude the possibility of witness manipulation. Given that the investigative judge had barred the defense from asking intermediaries questions on this issue, the court found that the reliability of the evidence could not be tested and the defense had been prejudiced. Consequently, judges declined to consider several statements given by witnesses.<sup>106</sup> This ruling has led the war crimes units to be more careful in how they select and use intermediaries.<sup>107</sup>

Use of interpreters has also caused problems. Necessary in almost all cases, interpreters are drawn from a roster maintained by the police department and they travel from the Netherlands with Dutch authorities.<sup>108</sup> They are vigorously vetted before being hired on a

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<sup>104</sup> Human Rights Watch interview with Dutch official, March 27, 2014.

<sup>105</sup> Usually the psychologist meets with the witness before and after the interview with the investigative judge and can alert the judge to any particular issues in advance of the interview. The psychologist was also able to refer witnesses to local support groups. See *Prosecutor v. Yvonne Basebya*, The Hague District Court, Case No. 09/748004-09, Judgment (Trial), March 1, 2013, ch. 4, para. 27, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2013:8710> (accessed September 8, 2014); and *Prosecutor v. Joseph Mpambara*, The Hague District Court, Case Nos. 09/750009-06 and 09/750007-07, Judgment (Trial), March 23, 2009, ch. 5, para. 29, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2009:BK0520> (accessed September 8, 2014).

<sup>106</sup> *Prosecutor v. Guus van Kouwenhoven*, The Hague Court of Appeal, Case No. 22-004337-06, Judgment (Appeal), March 10, 2008, paras. 7.1 and 7.4, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSGR:2008:BC7373> (accessed September 8, 2014).

<sup>107</sup> Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch telephone interview with Dutch official, February 24, 2014; Human Rights Watch interview with Dutch official, March 28, 2014.

<sup>108</sup> Human Rights Watch interview with Dutch official, January 28, 2014. The investigative judge never uses the same interpreter that was used by the police or prosecutor's office during the earlier phase of the investigation. Human Rights Watch interview with Dutch official, March 27, 2014.

particular case.<sup>109</sup> Nonetheless there have been surprises in a few cases. In one particularly egregious incident, investigators in the specialized war crimes unit discovered that their interpreter was actually related to the suspect and caught the two talking on the phone together through a wiretap.<sup>110</sup> In another instance, they learned that their interpreter was quite politically active in the territorial state and had to dismiss him.<sup>111</sup>

### *Defense Investigations*

In the Dutch legal system, as in other civil law jurisdictions, prosecutors and investigative judges have an obligation to look for incriminating and exculpatory evidence and the defense does not generally conduct its own independent investigation. While having experienced staff in the specialized war crimes units has significantly improved the quality of investigations, defense counsel still argue that there is no equality of arms between the prosecution and the defense and that police, prosecutors, and investigative judges do not take enough steps to find evidence favorable to the defense.<sup>112</sup> In at least universal jurisdiction cases in the Netherlands, defense counsel have secured authorization and funding from the court to conduct their own independent investigations.<sup>113</sup>

Allowing defense investigations in these types of cases has not been without controversy or pushback from other actors in the criminal justice system but is slowly gaining acceptance by the courts.<sup>114</sup> Practitioners differed on whether an amendment to the law was necessary to institutionalize the practice, with one leading defense lawyer saying

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<sup>109</sup> Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>110</sup> Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>111</sup> Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>112</sup> Human Rights Watch interview with Dutch lawyer, January 29, 2014; Human Rights Watch interview with Dutch academic, March 27, 2014; Human Rights Watch email correspondence with Dutch lawyer, May 1, 2014.

<sup>113</sup> In the Afghan case of Hesam and Jalalzoy, defense counsel persuaded the court to pay several thousand euros in advance of trial to cover costs for an investigator—in this case, a relative of one of the accused—to travel to Afghanistan. The funding only covered the investigator's expenses to travel to Afghanistan and did not cover any expenses on the ground or any fees for carrying out the investigation. In the most recent case, involving Yvonne Basebya from Rwanda, the same defense counsel obtained approximately €20,000 (about US\$26,000) to carry out investigations in Rwanda and other African countries. Human Rights Watch interview with Dutch lawyer, January 29, 2014 and May 22, 2014; Human Rights Watch telephone interview with Dutch lawyer, May 1, 2014; Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>114</sup> Human Rights Watch interview with Dutch academic, March 27, 2014; Human Rights Watch interview with Dutch official, March 28, 2014; Human Rights Watch telephone interview with Dutch official, February 18, 2014; Human Rights Watch telephone interview with Dutch lawyer, May 1, 2014. One court of appeals judge, who previously worked as defense counsel, has endorsed the granting of funds to the defense in order to conduct its own independent investigation. See Tj.E. van der Spoel, "Gefinancierde rechtshulp bij internationale misdrijven," *Stafblad*, vol. 6, no. 4 (2008), pp. 385-386, on file with Human Rights Watch.

legislators should change the law to do so.<sup>115</sup> Practitioners we spoke with had varied views on the usefulness of defense investigations in past cases.<sup>116</sup>

## Witness Protection

Since most evidence in grave international crimes cases consists of victim and witness testimony, protecting these individuals from intimidation or other consequences is of crucial importance for the success of current and future prosecutions. According to practitioners in the Dutch specialized war crimes units, witnesses have been threatened or intimidated in almost every case.<sup>117</sup> Consequently, the well-being and safety of these individuals has become a primary concern. Investigators and prosecutors have recourse to formal and comprehensive legal protections under Dutch law,<sup>118</sup> but also take practical steps to minimize risks for individuals whom they interview. At the same time, they acknowledge their limitations in being able to protect individuals, particularly where they reside in the country where the crimes occurred.<sup>119</sup>

Upon first contact, investigators and prosecutors explain to individuals what Dutch authorities can and, perhaps more importantly, cannot do to protect them.<sup>120</sup> Investigators generally avoid being seen in public with witnesses and often interview them away from their home community.<sup>121</sup> Where a person feels particularly threatened or is worried about remaining anonymous, investigators arrange for the person to travel to another city such

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<sup>115</sup> Human Rights Watch email correspondence with Dutch lawyer, May 1, 2014.

<sup>116</sup> Human Rights Watch interview with Dutch lawyer, January 29, 2014; Human Rights Watch interview with Dutch academic, March 27, 2014; Human Rights Watch interview with Dutch official, March 28, 2014; Human Rights Watch telephone interview with Dutch official, February 18, 2014.

<sup>117</sup> Human Rights Watch interview with Dutch official, March 28, 2014; Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>118</sup> Witness protection measures include redacting identifying information from the case file, allowing witnesses to testify without their identity being revealed to the public and in some limited cases even to the defense. Completely anonymous testimony is allowed in only the most serious of cases, and steps must be taken to ensure that the accused is afforded an adequate opportunity to challenge the witness in line with article 6(3)(d) of the European Convention on Human Rights. Dutch Code of Criminal Procedure, arts. 187, 190, 226a, and 226m-226s.

<sup>119</sup> Human Rights Watch interview with Dutch official, March 28, 2014.

<sup>120</sup> Hester van Bruggen, Senior Prosecutor, Dutch National Prosecutor's Office, contribution to panel discussion "Universal Jurisdiction Trial Strategies: Focus on Victims and Witnesses," Redress and International Federation for Human Rights (FIDH) seminar, Brussels, November 9-11, 2009, conference report at [http://www.redress.org/Universal\\_Jurisdiction\\_Nov2010.pdf](http://www.redress.org/Universal_Jurisdiction_Nov2010.pdf) (accessed September 9, 2014).

<sup>121</sup> Public places such as hotels or bars are often used as venues for the interviews. Human Rights Watch telephone interview with Dutch official, February 18, 2014; Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch interview with Dutch official, January 27, 2014.

as the capital or even abroad if needed to conduct the interview.<sup>122</sup> In these instances, witnesses are often provided with pretexts so that they can explain their absence from their local communities or their presence at the place where the interview will be held.

Investigators in the specialized war crimes units routinely give witnesses their own telephone number and also the phone number or address of a local contact that can assist in case of a problem, such as an NGO, the United Nations, or national police or witness protection officials in that country.<sup>123</sup> In some instances, investigators have given witnesses mobile phones so that they can call them in case of a problem.<sup>124</sup> They do not put persons in touch with the nearest Dutch embassy, however.<sup>125</sup> Investigators also try to maintain contact with persons who have been interviewed even after they leave the country, calling periodically to update them on the case and to check how they are doing. If serious witness protection issues arise after investigators have left the country, the Dutch embassy in the relevant country should be authorized to assist. In the most extreme cases, police and prosecutors have the ability to temporarily or permanently relocate a witness to the Netherlands.<sup>126</sup>

To date, the intimidation appears to have always come from the accused's family or entourage, and Dutch authorities were not aware of any instance in which national authorities in a territorial state have tried to intimidate or influence a witness' testimony.<sup>127</sup> They nonetheless take this possibility into consideration when evaluating the potential protection needs for witnesses and when evaluating the information provided by witnesses. The specialized war crimes units take witness protection concerns very seriously, although in many cases the intimidation is subtle and difficult to prove.<sup>128</sup> In the *Mpambara* case, a prosecution witness contacted Dutch authorities to say he was scared after being

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<sup>122</sup> Having witnesses travel abroad is rare. Human Rights Watch telephone interview with Dutch official, February 18, 2014.

<sup>123</sup> Ibid.; Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>124</sup> The practice has been challenged in court by defense counsel who argue it is an incentive to provide testimony favorable to the prosecution, but Dutch law enforcement and judicial authorities continue to view it as an important measure to protect witnesses in certain circumstances and said they are prepared to defend the practice in court. Human Rights Watch interview with Dutch official, March 28, 2014; Human Rights Watch telephone interview with Dutch official, February 18, 2014.

<sup>125</sup> Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>126</sup> Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official; Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>127</sup> Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, March 28, 2014; Human Rights Watch telephone interview with Dutch official, February 18, 2014.

<sup>128</sup> Human Rights Watch interview with Dutch official, March 28, 2014; Human Rights Watch interview with Dutch official, January 28, 2014.

approached by relatives of the suspect who had asked him to change his testimony or consider leaving the country.<sup>129</sup> At the same time, investigators and prosecutors in the specialized war crimes units learned that two other prosecution witnesses in the case had disappeared—neither has since been located. They made immediate arrangements with the witness protection unit of the Rwandan national prosecutor’s office so that the witness who had said he was scared could be placed in a safe house and they immediately traveled to Rwanda, Finland, and Mali to investigate the allegations. Through phone records obtained in Rwanda, they were able to confirm that the witness had been contacted by Mpambara’s brother in Mali, who was serving a prison sentence handed down by the International Criminal Tribunal for Rwanda (ICTR), and another relative in Finland. Prosecutors made clear to the accused and his family members that the intimidation would not be tolerated and informed the court, which noted the interference in its final judgment.<sup>130</sup>

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<sup>129</sup> According to one war crimes practitioner, the relatives are alleged to have offered to pay for the witness to flee to Europe. Human Rights Watch interview with Dutch official, March 28, 2014.

<sup>130</sup> *Ibid.*; Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch interview with Dutch official, January 28, 2014. See also *Prosecutor v. Joseph Mpambara*, The Hague District Court, Case Nos. 09/750009-06 and 09/750007-07, Judgment (Trial), March 23, 2009, ch. 5, para. 32.

## Germany

Germany is one of the few remaining countries that has genuine universal jurisdiction, meaning that its laws do not require any connection between grave international crimes committed abroad and Germany before prosecutors can initiate an investigation. This means that the accused does not have to be present in Germany and neither the victims nor accused need be German nationals. Despite this fact, Germany was late to create war crimes units and to effectively implement its international law obligations to exercise universal jurisdiction over grave international crimes. A team of specialized police investigators was created in 1993 and undertook more than 100 investigations related to crimes committed in the Balkans in the 1990s. However, only a handful of trials resulted and pursuing justice for grave international crimes committed abroad quickly ceased to be a priority for national authorities. It was not until 2009, with the establishment of a specialized war crimes unit in the federal prosecutor's office, that police and prosecutors began actively pursuing cases on the basis of universal jurisdiction.

Despite procedural restrictions giving prosecutors wide discretion not to investigate where a suspect is not in Germany or expected to come to the country, Germany has taken the novel and ambitious step of conducting broad preliminary investigations in connection with serious crimes committed in several countries, including Libya and Syria, in order to identify potential victims and witnesses of grave international crimes who are living in Germany. These "structural investigations" allow valuable information to be gathered for future cases and have the potential to place Germany at the forefront of universal jurisdiction practice.

Two important trials have been initiated since the creation of specialized war crimes units in the federal police and prosecutor's offices. The cases, relating to the 1994 genocide in Rwanda and more recent events in the eastern part of the Democratic Republic of Congo, demonstrate the legal complexities and practical challenges of universal jurisdiction cases. While one of these trials is still ongoing, it is an appropriate moment for German authorities to take stock of their progress and assess whether any modifications may be needed.



## Specialized War Crimes Units

### *Police Department*

The first war crimes unit in Germany was created in 1958 to look into Nazi crimes.<sup>131</sup> Then, in the summer of 1993 following the conflict in the former Yugoslavia, national authorities decided to create a small specialized police team within the Federal Criminal Police Office to investigate suspects of crimes committed in the Balkans who were living in Germany and to handle cooperation with International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>132</sup> Over the next decade, the team investigated 127 cases and heard testimony from more than 4,500 witnesses.<sup>133</sup> Nearly all of the investigations were later closed without results, however, with only four persons tried before German courts and one transferred to the ICTR for trial.<sup>134</sup>

In 2003, following the adoption of the Code of Crimes against International Law (CCAIL),<sup>135</sup> the team's mandate was extended to include all grave international crimes and it was transformed into a full-fledged unit.<sup>136</sup> However, the new police unit lacked necessary political backing from the government and adequate financial resources to

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<sup>131</sup> In November 1958, the Central Office of the Judicial Authorities for the Investigation of National Socialist Crimes (*Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung von NS-Verbrechen*) was created and mandated to look into crimes committed outside of Germany during the war but which were not part of military operations, such as abuses committed in connection with concentration camps. In 1964 and 1966, the office's jurisdiction was extended to include crimes committed within Germany. At the height of its existence, the unit had 121 staff but, as of 2012, had only 18 staff members, consisting of public prosecutors and judges. Central Office of the Judicial Authorities for the Investigation of National Socialist Crimes, "Information Sheet," December 2012, [http://www.zentrale-stelle.de/pb/site/jum/get/documents/jum1/JuM/import/zentrale%20stelle%20ludwigsburg/pdf/in/Informationsblatt-ZSt\\_Dez12-en.pdf](http://www.zentrale-stelle.de/pb/site/jum/get/documents/jum1/JuM/import/zentrale%20stelle%20ludwigsburg/pdf/in/Informationsblatt-ZSt_Dez12-en.pdf) (accessed September 9, 2014).

<sup>132</sup> Human Rights Watch email correspondence with press officer from the *Bundeskriminalamt* (BKA) ("Federal Criminal Police Office"), August 13, 2014; Amnesty International, "Germany: End Impunity through Universal Jurisdiction," October 1, 2008, <http://www.amnesty.org/en/library/asset/EUR23/003/2008/en/73077b6c-9c5b-11dd-b0c5-35f205e84deo/eur230032008en.pdf> (accessed September 9, 2014), p. 87.

<sup>133</sup> Rolf Hannich, "Justice in the Name of All: Die praktische Anwendung des Völkerstrafgesetzbuchs aus der Sicht des Generalbundesanwalts beim Bundesgerichtshof," *Zeitschrift für Internationale Strafrechtsdogmatik*, Vol. 13 (2007), [http://www.zis-online.com/dat/artikel/2007\\_13\\_187.pdf](http://www.zis-online.com/dat/artikel/2007_13_187.pdf) (accessed September 9, 2014).

<sup>134</sup> Duško Tadić was transferred to the ICTY and Novislav Djalić, Nikola Jorgić, Maksim Sokolović, Kjuradj Kušljčić were tried before German courts. See also Amnesty International, "Germany: End Impunity through Universal Jurisdiction," pp. 91-98; Hannich, "Justice in the Name of All: Die praktische Anwendung des Völkerstrafgesetzbuchs aus der Sicht des Generalbundesanwalts beim Bundesgerichtshof."

<sup>135</sup> The CCAIL came into force on June 30, 2002, giving German courts universal jurisdiction over genocide, crimes against humanity, and war crimes. *Völkerstrafgesetzbuch* (VStGB) ("German Code of Crimes against International Law" or CCAIL), entered into force on June 30, 2002, <http://www.gesetze-im-internet.de/vstgb/BJNR225410002.html> (accessed September 10, 2014), unofficial English translation, undated, <http://www.iuscomp.org/gla/statutes/VoeStGB.pdf> (accessed September 10, 2014).

<sup>136</sup> The *Zentralstelle für die Bekämpfung von Kriegsverbrechen* ("Central Unit for the Fight against War Crimes") was part of the state security division of the federal police department. Human Rights Watch email correspondence with press officer from the Federal Criminal Police Office, August 13, 2014.

carry out its work. In fact, staffing was gradually reduced to the point that the unit had only one investigator by 2006.<sup>137</sup> It was not until 2009 when a specialized war crimes unit was created within the federal prosecutor's office that the situation changed. At that time, the police unit was restructured and renamed the "Central Unit for the Fight against War Crimes and Further Offenses Pursuant to the Code of Crimes against International Law" (ZBKV).<sup>138</sup> As of 2014, the ZBKV has 10 police staff, including police detectives and analysts.<sup>139</sup> As needed, the unit can bring in additional staff from other parts of the federal or state police departments or external consultants, usually in the form of experts on a particular country, on a short-term basis.<sup>140</sup>

As of June 2014, the unit had 31 ongoing investigations which is a slight increase from prior years.<sup>141</sup> Several investigations have focused on alleged members of the Democratic Forces for the Liberation of Rwanda (*Forces démocratiques pour la libération du Rwanda* or FDLR), a predominantly Rwandan Hutu armed opposition group based in eastern Congo, leading the ZBKV to establish a special team to work on FDLR cases.<sup>142</sup> The FDLR is composed in part of people who took part in the Rwandan genocide, but investigations in Germany relate to crimes allegedly committed in Congo after the genocide.

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<sup>137</sup> Human Rights Watch, *Europe-Universal Jurisdiction in Europe: The State of the Art*, vol. 18, no. 5(D), June 2006, <http://www.hrw.org/sites/default/files/reports/ij0606web.pdf>, p. 66.

<sup>138</sup> In German, the unit is known as the *Zentralstelle für die Bekämpfung von Kriegsverbrechen und weiteren Straftaten nach dem Völkerstrafgesetzbuch* (ZBKV). Written response from the German Federal Criminal Police Office to questions from Human Rights Watch and Redress, June 3, 2014.

<sup>139</sup> *Deutscher Bundestag* ("German Parliament"), "Zehn Jahre Völkerstrafgesetzbuch," Berlin, November 7, 2012, at <http://dip21.bundestag.de/dip21/btd/17/113/1711339.pdf> (accessed September 9, 2014), question 4; Human Rights Watch email correspondence with press officer from the Federal Criminal Police Office, August 13, 2014.

<sup>140</sup> Written response from the German Federal Criminal Police Office to questions from Human Rights Watch and Redress, June 3, 2014.

<sup>141</sup> In 2013, the ZBKV had 29 investigations. See also written response from the German Federal Criminal Police Office to questions from Human Rights Watch and Redress, June 3, 2014.

<sup>142</sup> For more information on human rights abuses by the FDLR in eastern Congo, see Human Rights Watch, *You Will be Punished: Attacks on Civilians in Eastern Congo* (New York: Human Rights Watch, 2009), <http://www.hrw.org/sites/default/files/reports/drc1209webwcover2.pdf>. See also Redress and FIDH, "Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union," December 2010, [http://www.redress.org/downloads/publications/Extraterritorial\\_Jurisdiction\\_In\\_the\\_27\\_Member\\_States\\_of\\_the\\_European\\_Union.pdf](http://www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf) (accessed September 9, 2014), p. 141. See also written response from the German Federal Criminal Police Office to questions from Human Rights Watch and Redress, June 3, 2014.

## *Prosecutor's Office*

In October 2007, Parliament held a hearing to discuss implementation of the CCAIL.<sup>143</sup> As already noted, investigation and prosecution of grave international crimes had not been a priority for criminal justice authorities despite a new law vesting German courts with jurisdiction and the creation of a specialized war crimes unit within the police department. During the hearing, a number of legal experts, practitioners, and NGOs (including Human Rights Watch) advocated for a more proactive approach to universal jurisdiction. In particular, they called for the establishment of a specialized war crimes unit within the federal prosecutor's office and more resources to be dedicated to handling grave international crimes cases.<sup>144</sup> The following month, the Green Party presented a motion in parliament to this effect but it failed to gather sufficient votes.<sup>145</sup> It took almost two more years for the specialized prosecution unit to be created, but the 2007 parliamentary hearing marked a turning point in German policy.<sup>146</sup>

In addition to the parliamentary hearing, political pressure to tackle impunity before domestic courts began to mount, in part due to concerns over the presence in Germany of FDLR leader Ignace Murwanashyaka and other international crimes suspects. Media attention and pressure from the United Nations and the European Union over Murwanashyaka finally prodded the German government into action. In the spring of 2009, it decided to create a specialized unit in the federal prosecutor's office.<sup>147</sup> The new unit has exclusive jurisdiction over genocide, crimes against humanity, and war crimes.<sup>148</sup> Its

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<sup>143</sup> German Parliament, 16th Legislative Period, Committee for Human Rights and Humanitarian Assistance, Transcript Nr. 16/44, available at Deutscher Bundestag, undated, [http://www.redress.org/downloads/publications/Extraterritorial\\_Jurisdiction\\_In\\_the\\_27\\_Member\\_States\\_of\\_the\\_European\\_Union.pdf](http://www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf) (accessed September 9, 2014).

<sup>144</sup> At the time, three prosecutors within the federal prosecutor's office, known as the *Generalbundesanwaltschaft* (GBA), were working on grave international crimes cases on a part-time basis only. German Parliament, "Nationale Umsetzung des Völkerstrafgesetzbuches," October 24, 2007, <http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=1366&id=1136> (accessed September 9, 2014), statement Kaul, p. 2, statement Mattioli-Zeltner, p. 6, statement Kaleck, p. 3 and 6, statement Ambos, pages 4 et seq., statement Kreß, p. 16 et seq. See also Amnesty International, "Germany: End Impunity through Universal Jurisdiction," p. 87.

<sup>145</sup> German Parliament, "Völkerstrafgesetzbuch wirksam anwenden," Berlin, November 14, 2007, <http://dip21.bundestag.de/dip21/btd/16/071/1607137.pdf> (accessed September 9, 2014).

<sup>146</sup> Andreas Schüller, "The Role of National Investigations in the System of International Criminal Justice – Developments in Germany," in *Security and Peace (Sicherheit und Frieden)*, vol. 4 (2013), p. 228.

<sup>147</sup> Human Rights Watch interview with German official, January 27, 2010; Human Rights Watch email correspondence with German official, June 18, 2014.

<sup>148</sup> The unit does not deal with the crimes of torture, rape, or enforced disappearance except insofar as these crimes are considered constituent acts of genocide, crimes against humanity, or war crimes or are charged in addition to these CCAIL-defined crimes. Human Rights Watch interview with German officials, March 18, 2014. See also *Gerichtsverfassungsgesetz* ("German Judiciary Act"), entered into force in 1938, sections 120(1)(8) and 142a, <http://www.gesetze-im-internet.de/gvg/>

staffing has varied over the years, starting with only three persons, then reaching a peak of nine from 2010 to 2012, before falling to four-and-a-half staff in the spring of 2013 because of general budget reductions in Germany.<sup>149</sup> As of 2014, it has two permanent and one half-time prosecutors with three other prosecutors seconded on a temporary basis from the 16 state prosecution services for a period of approximately two years.<sup>150</sup> The office would like to hire two additional prosecutors, and several outside practitioners believed this is necessary to handle the office's current workload.<sup>151</sup>

The war crimes unit in the federal prosecutor's office has brought two cases to trial on the basis of universal jurisdiction.<sup>152</sup> The first is still ongoing in Stuttgart and involves FDLR leaders Ignace Murwanashyaka and Straton Musoni, alleged to have committed crimes in eastern Congo. The second, involving former Rwandan mayor Onesphore Rwabukombe, resulted in a conviction for complicity in genocide in February 2014 and is now on appeal.<sup>153</sup> As of June 2014, the war crimes unit had seven open investigations involving at least 20 identified suspects, and several broad preliminary investigations, known as "structural investigations" (see below).<sup>154</sup> The trials take up the bulk of the office's capacity and leave little room for prosecutors to take on new cases.<sup>155</sup>

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(accessed September 10, 2014), official English translation, 2014, [http://www.gesetze-im-internet.de/englisch\\_gvg/englisch\\_gvg.html#p0040](http://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html#p0040) (accessed September 9, 2014).

<sup>149</sup> Schüller, "The Role of National Investigations in the System of International Criminal Justice – Developments in Germany," *Security and Peace*, p. 229.

<sup>150</sup> The office recently hired its first female prosecutor, which will be useful since the office has had to bring in two female prosecutors from other parts of the office to assist in interviewing rape survivors for the FDLR case in Stuttgart. Those seconded from the state prosecutor's offices often have international criminal experience. Human Rights Watch interview with German officials, March 18, 2014, and email correspondence, June 18, 2014; Human Rights Watch interview with German officials, March 13, 2014.

<sup>151</sup> Human Rights Watch interview with German officials, March 18, 2014; Human Rights Watch telephone interview with German academic, March 10, 2014; Human Rights Watch interview with NGO, March 12, 2014.

<sup>152</sup> The specialized war crimes unit is handling a third case that also involves the FDLR and events in eastern Congo. The case only involves allegations of membership in a criminal or terrorist organization and not charges of grave international crimes, however, so it is not discussed in this report. The trial was still ongoing in Dusseldorf at the time of writing.

<sup>153</sup> The trial court sentenced Rwabukombe to 14 years' imprisonment. Hilke Fischer, "14 Year Jail Term in Germany's First Rwandan Genocide Trial," *Deutsche Welle*, February 17, 2014, <http://www.dw.de/14-year-jail-term-in-germanys-first-rwandan-genocide-trial/a-17438793> (accessed September 9, 2014).

<sup>154</sup> Many of these investigations are not known publicly. The office also monitors the situation in a number of other countries where grave international crimes are believed to have been committed. Human Rights Watch interview with German officials, March 18, 2014, and email correspondence, June 18, 2014.

<sup>155</sup> Human Rights Watch interview with German officials, March 18, 2014.

## *Immigration Service*

In response to growing concerns over terrorism, the government established a special section within its immigration services in 2004 to handle cases raising security concerns.<sup>156</sup> Given that Germany currently receives the largest number of asylum seekers of any European country, processing asylum applications and identifying these sensitive cases is no small task.<sup>157</sup> The nature of cases referred to the unit varies widely and includes serious non-political criminal offenses like murder as well as terrorism and grave international crimes. The specialized unit has a staff of 20 persons with one person acting as a focal point for all cases where article 1F of the Refugee Convention may provide a basis for denying individuals refugee status. With so many asylum seekers coming to Germany, it is difficult to see how a single person is sufficient to deal with 1F cases. There are no publicly available statistics as to how many 1F cases the immigration service handles, but the figures are said to be very low and not comparable to other European countries.<sup>158</sup> Germany should consider dedicating more resources to 1F cases, including through additional staffing.

To identify potential 1F suspects, caseworkers review asylum applications and conduct refugee status determination interviews. Where they come across a potential 1F suspect, the file is referred to the specialized unit which reviews the file.<sup>159</sup> During asylum interviews, immigration officials do not notify applicants that information they provide may be shared with other government agencies such as the federal police or prosecutor's office.<sup>160</sup> Information may be shared with these agencies, but it may only be used as leads for police investigations and cannot be introduced as evidence in any later criminal proceedings.<sup>161</sup>

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<sup>156</sup> The *Bundesamt für Migration und Flüchtlinge* (BAMF) has a specialized department known as *referat 416* ("unit 416") to handle these cases. Human Rights Watch and Redress joint interview with German official, March 11, 2014; Human Rights Watch email correspondence with German official, July 9, 2014.

<sup>157</sup> In 2013, the BAMF received almost 110,000 asylum applications—a significant increase from 2012 when it received less than 65,000 applications. Syria has been a growing source of refugees for the country with approximately 10 percent of all asylum applications coming from Syria. Since March 2012, the immigration service has granted all Syrian nationals subsidiary (temporary) protection. Federal Office for Migration and Refugees, Federal Ministry of Interior, "Das Bundesamt in Zahlen 2013: Asyl," February 2014, [http://www.bamf.de/SharedDocs/Anlagen/DE/Publikationen/Broschueren/bundesamt-in-zahlen-2013-asyl.pdf?\\_\\_blob=publicationFile](http://www.bamf.de/SharedDocs/Anlagen/DE/Publikationen/Broschueren/bundesamt-in-zahlen-2013-asyl.pdf?__blob=publicationFile) (accessed September 9, 2014), pp. 18, 33-34, 36. For more information on the German asylum procedure, see "EDAL Country Overview – Germany," European Database of Asylum Law, <http://www.asylumlawdatabase.eu/en/content/edal-country-overview-netherlands> (accessed September 9, 2014).

<sup>158</sup> Human Rights Watch and Redress joint interview with German official, March 11, 2014.

<sup>159</sup> *Ibid.*

<sup>160</sup> Information may also be shared with the German intelligence service. See Wolfgang Dick, "German Spies Keep Tabs on Asylum-Seekers," *Deutsche Welle*, November 22, 2013 <http://www.dw.de/german-spies-keep-tabs-on-asylum-seekers/a-17244769> (accessed September 9, 2014).

<sup>161</sup> Human Rights Watch and Redress joint interview with German official, March 11, 2014.

The specialized unit within the immigration service has no direct contact with asylum seekers and is not the final arbiter of their asylum applications, but it advises regular immigration caseworkers and liaises with other relevant government agencies as appropriate.<sup>162</sup> If the specialized unit has reason to believe a person should be denied refugee status on the basis of 1F, German law obliges the unit to notify the police—in this case, the ZBKV.<sup>163</sup> The asylum procedure is then suspended pending the results of the police investigation.<sup>164</sup> In Human Rights Watch’s view, the direct role that police have in determining an individual’s asylum claim is problematic, and a system that maintains the independence of the asylum procedure from the criminal justice system, as for example practiced in the Netherlands, is preferable.

If the police investigation finds evidence that a person has committed a grave international crime and prosecutors decide not to pursue the case before German courts, the person is denied refugee status in Germany and usually returned to his or her home country.<sup>165</sup> If the police investigation cannot confirm involvement in an international crime, the person’s asylum application is then considered by the immigration service. The status of all persons granted refugee status in Germany is reviewed at least once every three years and can be withdrawn if new evidence of past criminal activity emerges.<sup>166</sup>

The immigration service now requests that Syrian asylum seekers complete an additional form which asks whether they have witnessed any war crimes and whether they are able to name the person responsible for the crimes.<sup>167</sup> Immigration officials do not, however, notify asylum seekers of their right to report these crimes and participate in criminal proceedings. In addition, information gathered from potential asylum seekers that is relevant to these crimes is not routinely provided to police or prosecutors in the specialized war crimes units.

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<sup>162</sup> The specialized section also conducts training with all other sections of BAMF so that caseworkers are aware of potential article 1F issues. Ibid.

<sup>163</sup> Human Rights Watch telephone interview with German official, September 10, 2014. See also Asylverfahrensgesetz (AsylVfG) (“German Asylum Procedure Act”), entered into force on June 26, 1992, section 8(3), [http://www.gesetze-im-internet.de/asylvfg\\_1992](http://www.gesetze-im-internet.de/asylvfg_1992) (September 10, 2014), official English translation, 2013, [http://www.gesetze-im-internet.de/englisch\\_asylvfg/index.html](http://www.gesetze-im-internet.de/englisch_asylvfg/index.html) (accessed September 10, 2014).

<sup>164</sup> The person is granted temporary leave to remain in the country and will not be returned to their home country until the police investigation is completed. Human Rights Watch and Redress joint interview with German official, March 11, 2014.

<sup>165</sup> The asylum seeker can challenge the denial of refugee status before an administrative court before the decision becomes final. The ZBKV decides whether the state to which the person returned is informed of the existence of evidence of alleged participation in international crimes. Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> The form was designed in collaboration with the ZBKV. Ibid.

Rather, police may request information on specific persons from the immigration service and can obtain access to their entire immigration file without judicial authorization.<sup>168</sup> While the new procedure relating to Syria has the potential to be of great value to police and prosecutors, it is too soon to draw conclusions given that the form has only been in use since late 2013.

Practitioners describe cooperation between the immigration service and the specialized police unit as strong, but the immigration service has almost no direct contact with the specialized unit within the federal prosecutor's office. At least one German official said that more contact between the immigration service and federal prosecutors would be useful.<sup>169</sup>

## Investigations

The creation of a specialized war crimes unit in 2009 in the federal prosecutor's office was accompanied by an increase in political will to support the investigation and prosecution of grave international crimes before German courts. The first non-Yugoslav investigations were initiated soon after. In more recent years, prosecutors have begun pursuing cases even where there is no immediate prospect that a suspect will come to Germany, including through "structural investigations," and to undertake extraterritorial investigations, including in countries where crimes occurred. Investigations abroad have proven difficult at times, but police and prosecutors in the specialized war crimes units appear to have learned valuable lessons.<sup>170</sup> The two cases brought to trial by the specialized war crimes units are analyzed in some detail in this section, but it was not possible for practitioners to discuss many aspects of the *FDLR* case because the trial is ongoing.

### *The Decision to Investigate*

At the same time that the CCAIL, the law that incorporates grave international crimes into German law, was adopted in 2002, legislators amended the German Code of Criminal Procedure to provide federal prosecutors with wide discretion as to which cases to pursue.<sup>171</sup> Most notably, it allows prosecutors to decline to investigate where the suspect is

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<sup>168</sup> Ibid.; Human Rights Watch interview with German officials, March 18, 2014.

<sup>169</sup> Human Rights Watch interview with German officials, March 18, 2014.

<sup>170</sup> Ibid.

<sup>171</sup> Strafprozessordnung (StPO) ("German Code of Criminal Procedure"), entered into force on April 7, 1987, section 153f, <http://www.gesetze-im-internet.de/stpo/> (accessed September 10, 2014), official English translation, 2014, [http://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html](http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html) (accessed September 9, 2014),

not in Germany and his or her presence is not anticipated so long as neither the suspect nor the victim is a German national. While the discretion is intended to safeguard against overly burdensome or abusive complaints filed by private parties, it has sparked significant criticism from legal practitioners, academics, and NGOs who argue that prosecutorial decisions may be influenced by political considerations.

The federal prosecutor's decision not to proceed with an investigation against then US Secretary of Defense Donald Rumsfeld and other high-ranking US government officials on allegations of war crimes and torture in 2005 and 2006, based on two separate complaints filed by NGOs, has become emblematic of this discretion.<sup>172</sup> There are indications that the *Rumsfeld* case might possibly be decided differently now, in part due to increased political will that has accompanied the creation of the specialized war crimes unit and the new prosecutorial policy to exercise discretion only where the suspect is not likely to ever come to Germany and where no potential victims and witnesses can be identified in the country.<sup>173</sup> This is a positive development and the federal prosecutor's office should ensure that political considerations do not influence any future decisions on whether to prosecute and should apply the law equally regardless of the nationality or rank of potential suspects.

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<sup>172</sup> In February 2005, the federal prosecutor decided not to pursue an investigation against Rumsfeld and other high-ranking government officials on allegations of war crimes and torture on the grounds that the *complex* of crimes was already under investigation in the United States. Emphasizing that the US had a closer connection to the alleged crimes, the federal prosecutor said that it need not look at whether Rumsfeld was himself under investigation or whether the exact same crimes were being investigated. NGOs that had filed the initial complaint challenged the decision, but the appeals court upheld the prosecutor's decision not to investigate. The timing of the prosecutor's decision was significant in that it came just two days before Rumsfeld was scheduled to speak at a security conference in Munich, leading to criticism from the UN special rapporteur on the independence of judges and lawyers who noted the suspicious timing of the federal prosecutor's decision and the fact that there were no indications that US judicial authorities were actually investigating the alleged crimes, with the exception of very low-ranking officers, or had any intention to look at criminal responsibility of senior military officials. In November 2006, the same NGOs filed a second complaint against Rumsfeld and, in their complaint, documented that no investigations had taken place in the US or Iraq. The federal prosecutor again rejected the request to initiate proceedings, this time arguing that none of the suspects resided in Germany or was expected to come there. Another challenge was filed with the court but was equally unsuccessful. The court held that, while the possibility of the former US officials coming to Germany could not be excluded, it was not a sufficient basis to compel an investigation. In both of the *Rumsfeld* appeals, the court found the legal challenges inadmissible on the grounds that a prosecutor's decision under section 153f of the German Code of Criminal Procedure is not subject to legal review absent evidence of arbitrariness. For more information on the cases, see European Center for Constitutional and Human Rights (ECCHR), "Rumsfeld Torture Cases," undated, <http://www.ecchr.de/index.php/rumsfeld.html> (accessed September 9, 2014); and Center for Constitutional Rights (CCR), "German War Crimes Complaint Against Donald Rumsfeld, et al." undated, <https://www.ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld-et-al> (accessed September 9, 2014).

<sup>173</sup> Federal prosecutors can keep an investigation open for as long as they choose and can also reopen an investigation closed under section 153f at a later date if the circumstances warrant. Human Rights Watch interview with German officials, March 18, 2014. See also German Parliament, "Zehn Jahre Völkerstrafgesetzbuch," Berlin, November 7, 2012, question 11.



### *Structural Investigations*

The new prosecutorial policy has translated into a decision to conduct “structural investigations,” which are broad investigations aimed at gathering evidence available in Germany to facilitate future criminal proceedings before domestic courts or elsewhere. They are not investigations directed against specific individuals but are instead attempts to catalogue crimes, gather details about these crimes, and identify potential victims and witnesses living in Germany.<sup>174</sup> They are the first step toward more focused investigations of specific suspects. Prosecutors currently have several structural investigations ongoing. Only two of these investigations are publicly known—those relating to Libya and Syria—and little information is known about how these investigations are conducted and what authorities do with the information they gather.

Germany appears to be the only country to have initiated these types of broad investigations in universal jurisdiction cases, but its approach could be a model for other countries. While such structural investigations necessitate significant additional resources, they are a powerful tool to fight impunity and ensure that those responsible for some of the world’s worst crimes do not escape justice. As practitioners in most countries handling grave international crimes cases have come to learn, it is much easier to collect evidence in real-time or soon after the events rather than years later. Moreover, given the large numbers of refugees coming to Europe from Syria and other crisis or post-conflict countries, immigration and criminal justice authorities have a unique opportunity to be proactive in gathering information and evidence and in identifying potential victims and witnesses for future criminal proceedings. Authorities may also be able to identify potential suspects through structural investigations. The information gathered may be useful for later cases in Germany or other countries or before international criminal tribunals, and pave the way for enhanced cooperation and mutual legal assistance in bringing suspects to justice. Germany appears to have already assisted the International Criminal Court (ICC) with at least one case relating to Libya.<sup>175</sup>

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<sup>174</sup> See German Parliament, “Zehn Jahre Völkerstrafgesetzbuch,” Berlin, November 7, 2012, question 7.

<sup>175</sup> See Schüller, “The Role of National Investigations in the System of International Criminal Justice – Developments in Germany,” *Security and Peace*, p. 229. See also Christian Denso, “Libyen: Deutschland ermittelt gegen Gadhafi,” *Zeit Online*, June 21, 2011, <http://www.zeit.de/politik/ausland/2011-06/gadhafi-bundesanwaltshaft> (accessed September 9, 2014).

## *Investigations Abroad*

While the starting point for investigations is evidence available in Germany, police and prosecutors in the specialized war crimes units have learned the importance of conducting extraterritorial investigations. In their first investigations relating to the Balkans in the mid-1990s, police found sufficient witnesses and other evidence within Germany.<sup>176</sup> However, as police and prosecutors took on cases elsewhere, they quickly discovered that extraterritorial investigations are crucial to successful prosecutions.

The *Rwabukombe* case drove this point home. German authorities first arrested Rwabukombe in March 2008 after discovering that he was wanted in Rwanda on charges of genocide.<sup>177</sup> After a German court denied his extradition to Rwanda, the federal prosecutor's office started its own investigation.<sup>178</sup> This investigation was limited to Germany and other parts of Europe, in part due to a break in diplomatic relations between Germany and Rwanda.<sup>179</sup> However, the investigation proved inadequate and a court ordered his release in May 2009.<sup>180</sup> At that point, German authorities realized they could not successfully prosecute him without traveling to Rwanda to gather evidence and, in July 2009, made their first trip there.<sup>181</sup> The investigation led to Rwabukombe's re-arrest and trial, resulting in a conviction for complicity in genocide in February 2014.<sup>182</sup>

Police and prosecutors usually travel together during extraterritorial investigations, taking as many as 10 staff in order to conduct as many interviews as possible. They typically conduct the interviews in pairs of at least two, with one person from each office.<sup>183</sup>

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<sup>176</sup> Human Rights Watch telephone interview with German academic, March 10, 2014.

<sup>177</sup> Ibid.

<sup>178</sup> Human Rights Watch interview with German lawyer, March 12, 2014.

<sup>179</sup> In November 2008, Rose Kabuye, a senior aide to Rwanda's president, Paul Kagame, and a former officer in the Rwandan Patriotic Front (RPF), was arrested when traveling to Germany on the basis of an arrest warrant issued by a French judge in connection with the assassination of former Rwandan president Juvénal Habyarimana in April 1994. The Rwandan government responded to the arrest by expelling the German ambassador in Rwanda and breaking diplomatic relations with Germany. Chris McGreal, "Top Rwandan aide chooses French terror trial," *The Guardian*, November 10, 2008, <http://www.theguardian.com/world/2008/nov/10/rwanda-congo-kabuye> (accessed September 9, 2014).

<sup>180</sup> Human Rights Watch interview with German officials, March 18, 2014.

<sup>181</sup> Human Rights Watch interview with German lawyer, March 12, 2014; Human Rights Watch interview with German official, January 27, 2010; Human Rights Watch telephone interview with German academic, March 10, 2014; Human Rights Watch email correspondence with German official, June 18, 2014.

<sup>182</sup> Fischer, "14 Year Jail Term in Germany's First Rwandan Genocide Trial," *Deutsche Welle*.

<sup>183</sup> Sometimes the interview pairs include two police investigators or two prosecutors without anyone from the other office. Human Rights Watch interview with German officials, March 18, 2014.

### *Locating Victims and Witnesses*

Finding credible victims and witnesses is critical to successful prosecutions. Police and prosecutors in the specialized war crimes units have made mistakes in their first two cases but appear to have learned valuable lessons from them. In the *Rwabukombe* case, very few witnesses were screened and vetted before traveling to Germany to testify at trial. A number of witnesses turned out to have little relevant information, wasting valuable resources and time.<sup>184</sup>

In the *FDLR* case, police and prosecutors traveled to the Great Lakes region to conduct initial screening interviews but lacked sufficient time to conduct thorough and adequate investigations. Instead, they approached NGOs to assist in locating victims and witnesses.<sup>185</sup> They also visited demobilization camps inside Rwanda to interview former FDLR fighters.<sup>186</sup> Because the trial is ongoing, it is too soon to reach any definitive conclusions as to whether these investigations were sufficient, but a number of charges have already been dropped.

Another important lesson learned by the specialized war crimes unit has been the utility of having someone on the ground to assist with the logistical side of investigations. The police department has posted one person from its witness protection unit to the German embassy in Kigali to assist with the *Rwabukombe* and *FDLR* cases. This liaison officer is not familiar with the intricacies of the case and does not conduct actual investigations.<sup>187</sup> Instead, his role is limited to contacting witnesses and making arrangements for them to travel to Germany to give testimony at trial. Practitioners in the specialized war crimes unit said that the liaison officer has provided significant practical assistance and has been invaluable to the cases.<sup>188</sup> It could be a useful model for other cases, both in Germany and in other countries that have multiple cases pending with respect to a single country.<sup>189</sup>

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<sup>184</sup> Human Rights Watch interview with German officials, March 18, 2014, and email correspondence, June 18, 2014.

<sup>185</sup> Human Rights Watch interview with German lawyer, March 20, 2014; Human Rights Watch interview with NGO, March 16, 2014; Human Rights Watch telephone interview with German lawyer, June 5, 2014; Human Rights Watch interview with German officials, March 18, 2014.

<sup>186</sup> Human Rights Watch interview with German officials, March 18, 2014.

<sup>187</sup> The officer has been in Kigali on a semi-permanent basis but is not expected to remain in Rwanda once the FDLR trials are concluded. Human Rights Watch interview with German officials, March 18, 2014.

<sup>188</sup> *Ibid.*

<sup>189</sup> For example, France has more than two dozen investigations ongoing in connection with the Rwandan genocide and could benefit from a liaison officer in its Kigali embassy.

The *Rwabukombe* and the *FDLR* cases both involved allegations of sexual violence against women, and police and prosecutors took additional precautions when interviewing victims of these crimes. For example, the persons handling the interviews were all female and had received some advance training.<sup>190</sup> They were, however, unable to offer any psychological or social support to victims before or during the interviews. Instead authorities tried to reach out to a German NGO that had a local presence in eastern Congo and might have been able to offer this type of assistance. While the initiative failed due largely to a lack of funding from the German government, practitioners in the specialized war crimes units said that they believed longer term assistance for victims is important to put in place in future cases.<sup>191</sup>

### *Investigative Challenges*

The *Rwabukombe* and *FDLR* cases have revealed the challenges of extraterritorial investigations. Prosecutors have faced difficulties in proving the allegations in both cases and have had to accept modifications to the original charges. The prosecutor may, on his or her own initiative or at the suggestion of the court, drop or amend charges against an accused during trial.<sup>192</sup> The practice is fairly common in ordinary criminal cases in order to focus the case and reduce the amount of evidence to be presented at trial, especially where the charges to be dropped do not carry a higher penalty than the remaining charges. However, several practitioners expressed concern over dropping charges in grave international crimes cases given the gravity of the crimes. They suggested that the dropping of charges reflects weaknesses in the investigations and said it sent a poor signal to communities in the affected countries, in particular victims.<sup>193</sup>

In the *Rwabukombe* case, the accused was originally charged with six counts of genocide and another count of complicity in genocide in connection with several massacres in eastern Rwanda. However, all but one charge were dropped and the trial ended up

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<sup>190</sup> Since the specialized unit within the federal prosecutor's office did not have any female staff at the time, they brought in female colleagues from other parts of the office to conduct the interviews. Human Rights Watch interview with German officials, March 18, 2014; written response from the German Federal Criminal Police Office to questions from Human Rights Watch and Redress, June 3, 2014.

<sup>191</sup> The federal prosecutor's office tried to locate an NGO that could provide assistance to victims after their interviews, but the NGO was unable to assist, in part due to the fact that the prosecutor's office did not offer funding for the project. Human Rights Watch interview with German officials, March 18, 2014; Human Rights Watch interview with NGO, March 16, 2014.

<sup>192</sup> German Code of Criminal Procedure, art. 154.

<sup>193</sup> Human Rights Watch interview with German lawyer, March 14, 2014; Human Rights Watch interview with German lawyer, March 12, 2014; Human Rights Watch interview with German lawyer, March 14, 2014.

focusing solely on a massacre at Kiziguro church.<sup>194</sup> In an unusual move, investigations continued during trial, with witnesses who testified at trial identifying new witnesses with relevant information.<sup>195</sup> Without these investigations, the case may have collapsed. Prosecutors sought to prove that Rwabukombe was a direct perpetrator of the Kiziguro massacre, but approximately a year into trial the court informed the parties that the evidence suggested that he might be more appropriately charged as an accomplice. Further investigations during trial were insufficient to adduce additional evidence to change the judges' minds. The court convicted Rwabukombe of complicity in genocide and sentenced him to 14 years' imprisonment.<sup>196</sup> Victims who participated in the trial as civil parties were said to be disappointed by the lower level of responsibility.<sup>197</sup> The case is currently on appeal.

Prosecutors in the *FDLR* case have encountered similar problems. The initial indictment charged Murwanashyaka and Musoni with 26 counts of crimes against humanity and 39 counts of war crimes in connection with 16 separate incidents in which FDLR troops are alleged to have committed crimes in eastern Congo between January 2008 and November 2009.<sup>198</sup> Both were also charged with membership in a criminal or terrorist organization. At the court's suggestion, prosecutors have dropped all but the terrorism-related charges against Musoni and have dropped charges involving three separate incidents against Murwanashyaka, including allegations of sexual violence and the recruitment and use of child soldiers.<sup>199</sup> There are no child soldier charges left in the case, but several sexual violence allegations remain. In announcing the decision, prosecutors stated that hearing evidence from victims of these crimes would "significantly burden and potentially personally endanger" the victims and noted that the sentences for these charges would be relatively insignificant in comparison with the remaining charges.<sup>200</sup>

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<sup>194</sup> Human Rights Watch interview with German lawyer, March 14, 2014. See also Human Rights Watch telephone interview with German academic, March 10, 2014; Human Rights Watch interview with German lawyer, March 12, 2014; Human Rights Watch interview with German lawyer, March 14, 2014.

<sup>195</sup> Once trial began, the court directed the investigation with prosecutors and defense counsel able to make requests to the court for any investigative steps they deem necessary. Human Rights Watch interview with German officials, March 18, 2014; Human Rights Watch telephone interview with German academic, March 10, 2014.

<sup>196</sup> Fischer, "14 Year Jail Term in Germany's First Rwandan Genocide Trial," *Deutsche Welle*.

<sup>197</sup> Human Rights Watch interview with German lawyer, March 14, 2014.

<sup>198</sup> "Germany: Groundbreaking Trial for Congo War Crimes," Human Rights Watch news release, May 2, 2011, <http://www.hrw.org/news/2011/05/02/germany-groundbreaking-trial-congo-war-crimes>.

<sup>199</sup> The court had suggested dropping charges in connection with seven incidents, but prosecutors only agreed to drop three. ECCHR, "[Third] Status Report February 2014: FDLR-Leadership Trial in Stuttgart," February 17, 2014; "Zweifel an der Anklage," *Taz*, September 11, 2013, <http://www.taz.de/!123552/> (accessed September 9, 2014).

<sup>200</sup> ECCHR, "[Third] Status Report February 2014: FDLR-Leadership Trial in Stuttgart."

These changes to the case merit reflection by police and prosecutors in the specialized war crimes units. While these types of cases are extremely difficult to investigate, successful investigations are possible if conducted well. Practitioners with knowledge or involvement in both cases were critical of how investigations had been handled, in particular by police, and said that more attention should have been paid to witness selection.<sup>201</sup>

### *Cooperation with Foreign Authorities*

Practitioners in the war crimes units said that cooperation with authorities in Rwanda and Congo had gone well and that both countries had allowed them to carry out their investigations independently.<sup>202</sup> German police investigators were usually accompanied by a Rwandan police officer when traveling in the country and were asked to disclose the names of the witnesses they sought to meet to Rwandan authorities in advance of traveling to the country.<sup>203</sup>

Practitioners told Human Rights Watch that they were not aware of any instances in which national authorities in either country had interfered with their investigations.<sup>204</sup> However, they said they have tried to avoid relying too heavily on national authorities in both countries to limit potential interference with their investigations. At least one defense lawyer strongly suspected that witnesses had been influenced to provide testimony.<sup>205</sup>

### *Defense Investigations*

Like other civil law systems, German law places an obligation on prosecutors and the court to look for both incriminating and exculpatory evidence and does not expressly give the defense the right to conduct its own investigation.<sup>206</sup> While the quality of investigations has improved since the establishment of specialized war crimes units in Germany, two outside practitioners with involvement in cases gave concrete examples where police and

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<sup>201</sup> Human Rights Watch telephone interview with German academic, March 10, 2014; Human Rights Watch interview with German lawyer, March 14, 2014; Human Rights Watch interview with second German lawyer, March 14, 2014; Human Rights Watch interview with German lawyer, March 12, 2014; Human Rights Watch interview with German lawyer, March 20, 2014.

<sup>202</sup> Human Rights Watch interview with German officials, March 18, 2014.

<sup>203</sup> Written response from the German Federal Criminal Police Office to questions from Human Rights Watch and Redress, June 3, 2014.

<sup>204</sup> Human Rights Watch interview with German officials, March 18, 2014.

<sup>205</sup> Human Rights Watch interview with German lawyer, March 12, 2014.

<sup>206</sup> German Code of Criminal Procedure, sections 160(2) and 244(2); Human Rights Watch interview with German officials, March 18, 2014; Human Rights Watch telephone interview with German academic, March 10, 2014; Human Rights Watch telephone interview with German lawyer, June 5, 2014.

prosecutors in the units had failed to explore potential leads that might have uncovered evidence favorable to the defense.<sup>207</sup> They and several other practitioners argued that the defense should have the ability and financial means to conduct its own investigation in grave international crimes cases.<sup>208</sup> It is not clear whether allowing independent defense investigations would require a change in German law, but several practitioners did not think it would.<sup>209</sup> Investigative steps by the defense were allowed—and even partially funded by the court—in the *Rwabukombe* case.<sup>210</sup>

## Witness Protection

German law offers a wide range of formal witness protection measures which most practitioners believed were sufficient to address the potential needs of victims and witnesses in grave international crimes cases.<sup>211</sup> Police in the specialized war crimes unit do not generally stay in touch with individuals after they have been questioned or testified and therefore are not in a position to know if individuals later faced problems.<sup>212</sup> In theory,

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<sup>207</sup> Human Rights Watch interview with German lawyer, June 5, 2014; Human Rights Watch interview with German lawyer, March 12, 2014.

<sup>208</sup> Human Rights Watch interview with German lawyer, March 14, 2014; Human Rights Watch telephone interview with German lawyer, June 5, 2014; Human Rights Watch interview with German lawyer, March 12, 2014; Human Rights Watch telephone interview with German academic, March 10, 2014.

<sup>209</sup> Human Rights Watch interview with German officials, March 18, 2014; Human Rights Watch interview with German lawyer, March 14, 2014.

<sup>210</sup> The court financed the two lawyers' travel to Rwanda and provided an interpreter, but it did not pay fees for the time they spent in Rwanda conducting actual investigations. It took defense counsel almost a year to secure permission for the trip from Rwandan authorities, further delaying the trial and requiring the German court and the Ministry of Justice to intervene. Defense counsel made a second trip to Rwanda during trial, this time traveling with police and prosecutors and again at state expense. Human Rights Watch interview with German lawyer, March 12, 2014; Human Rights Watch interview with German officials, March 18, 2014.

<sup>211</sup> German law expressly provides for witness protection measures during court proceedings and outside of the courtroom, but these measures can only be implemented when the witness is on German territory. These measures include allowing a witness to testify without his or her identity being revealed, having the public excluded from the courtroom during witness' testimony, and in some limited cases allowing anonymous testimony in the absence of the accused. A witness protection unit exists within the federal police department and is responsible for assessing and putting in place all necessary protection measures, including where appropriate psychological care, assistance finding employment, and child care. German Code of Criminal Procedure, sections 68, 247, 255a; German Judiciary Act, sections 171b and 172; Gesetz zur Harmonisierung des Schutzes gefährdeter Zeugen- Zeugenschutz-Harmonisierungsgesetz (ZSHG) ("German Witness Protection Harmonization Act"), entered into force on March 24, 1999, <http://dip21.bundestag.de/dip21/btd/14/062/1406279.pdf> (accessed September 9, 2014); Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten ("German Federal Criminal Police Act"), entered into force on August 1, 1997, section 6, [http://www.gesetze-im-internet.de/bkag\\_1997/index.html#BJNR165010997BJNE000801320](http://www.gesetze-im-internet.de/bkag_1997/index.html#BJNR165010997BJNE000801320) (accessed September 9, 2014). See also written response from the German Federal Criminal Police Office to questions from Human Rights Watch and Redress, June 3, 2014; Human Rights Watch interview with German officials, March 18, 2014; Human Rights Watch interview with German lawyer, March 12, 2014; Human Rights Watch interview with German lawyer, March 14, 2014.

<sup>212</sup> Written response from the German Federal Criminal Police Office to questions from Human Rights Watch and Redress, June 3, 2014.

the liaison officer in the Germany embassy in Kigali could provide assistance if a problem were to arise. However, practitioners in the specialized war crimes units acknowledged that their means of protection are limited. Moreover, the liaison officer will leave Rwanda once the current FDLR case is completed, leaving practitioners with even less capacity to step in where problems arise.<sup>213</sup>

Witness protection has been a concern in both the *Rwabukombe* and *FDLR* cases. In the *Rwabukombe* case, all court proceedings were held in open session but the judges told the public not to publish the names of certain witnesses.<sup>214</sup> One witness claimed to have been threatened by the accused's family after she returned to Rwanda and asked to be relocated.<sup>215</sup> Police and prosecutors were unable to confirm the incident but informed Rwandan authorities, who then relocated her.<sup>216</sup> Another witness temporarily disappeared during the course of trial and later claimed asylum in Germany.<sup>217</sup> The defense alleged that the Rwandan government may have influenced the testimony of some witnesses but was unable to provide concrete evidence of witness tampering. In response, prosecutors invited the head of Rwanda's fugitive tracking unit to testify and explain the assistance provided by the Rwandan government to German authorities during the investigation.<sup>218</sup>

In the *FDLR* case, prosecutors in the specialized war crimes unit had significant concerns over the safety of victims and decided to have all victims testify in closed session.<sup>219</sup> Approximately 10 victims gave testimony by video conference from an undisclosed location. Several practitioners believed that having them testify remotely helped minimize

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<sup>213</sup> Human Rights Watch interview with German officials, March 18, 2014.

<sup>214</sup> Human Rights Watch telephone interview with German academic, March 10, 2014; Human Rights Watch interview with German lawyer, March 14, 2014; Human Rights Watch interview with second German lawyer, March 14, 2014; Human Rights Watch interview with NGO, March 13, 2014; Human Rights Watch interview with German lawyer, March 12, 2014; Human Rights Watch interview with German officials, March 18, 2014.

<sup>215</sup> Human Rights Watch interview with German lawyer, March 12, 2014.

<sup>216</sup> Human Rights Watch interview with German officials, March 18, 2014; Human Rights Watch interview with German lawyer, March 12, 2014.

<sup>217</sup> Between court sessions, the witness disappeared and later emerged in Belgium claiming asylum on the grounds that he would face problems if returned to Rwanda. The witness, who said he was a former presiding judge of one of Rwanda's community based *gacaca* courts used to adjudicate cases related to the 1994 genocide, was returned to Germany but is still in asylum proceedings. Human Rights Watch telephone interview with German academic, March 10, 2014; Human Rights Watch interview with German lawyer, March 12, 2014; Human Rights Watch interview with German lawyer, March 14, 2014.

<sup>218</sup> Jean-Bosco Siboyintore, head of the Genocide Fugitive Tracking Unit in the Rwandan prosecution service, explained that his office had provided practical assistance to German police and prosecutors but said he did not know the persons who were being questioned and therefore could not have interfered in the investigation. Human Rights Watch interview with German lawyer, March 12, 2014.

<sup>219</sup> Human Rights Watch interview with German officials, March 18, 2014.



risks for the victims.<sup>220</sup> Since the testimony was given behind closed doors, not much is known about these individuals and how their testimony went. Some of the victims are believed to have been rape survivors. The court appointed a female German lawyer to assist them during their testimony, and a local Congolese organization was on hand to provide further support.<sup>221</sup> The court denied a defense request to allow the accused to question the victims directly, but counsel for the defense was allowed to question them at length.<sup>222</sup> Two victims decided to stop testifying before their testimony was completed due to repetitive and lengthy questioning by the defense.<sup>223</sup> All other court proceedings have been open to the public, although the court has cautioned the public against writing down the names and contact details of witnesses that have been revealed during their testimony or when surveillance communications have been read aloud.<sup>224</sup>

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<sup>220</sup> Human Rights Watch interview with German lawyer, March 20, 2014; Human Rights Watch interview with German officials, March 18, 2014.

<sup>221</sup> ECCHR, “Status Report February 2014: FDLR-Leadership Trial in Stuttgart.”

<sup>222</sup> Human Rights Watch trial observations, December 18, 2013.

<sup>223</sup> This meant that the court could not consider any portions of their testimony. Human Rights Watch trial observations, March 17, 2014.

<sup>224</sup> Human Rights Watch interview with NGO, March 16, 2014.

## France

France has the largest number of grave international crimes cases pending of any country in Europe, but only three universal jurisdiction trials have taken place. Two of them were held in the absence of the accused, and the third ended in early 2014 against Rwandan genocide suspect Pascal Simbikangwa. That case was the first to be handled by the specialized war crimes units. With more than two dozen other cases pending against Rwandan nationals, more trials are expected in the years ahead. Two groundbreaking investigations are underway targeting French companies that are alleged to have been complicit in torture through the sale of surveillance technology to the Libyan and Syrian regimes.

Despite the large volume of cases, France implemented the Rome Statute and established specialized war crimes units relatively late in comparison to the Netherlands and Germany. In August 2010, it adopted legislation incorporating the crimes of genocide, crimes against humanity, and war crimes into domestic law and soon after assigned a small team of specialized police officers to investigate these crimes. A specialized unit of prosecutors and investigative judges became operational in January 2012 and a formal police unit followed in February 2014.

The formation of these specialized units marked a breakthrough in the application of universal jurisdiction in France, although it may be too soon to draw conclusions given they have only been in existence for a short time. Practitioners in the units have made progress, particularly in conducting investigations in Rwanda, and plan to expand their capacity and take on new extraterritorial investigations. As non-Rwandan cases advance and proceed to trial, practitioners will be able to assess whether their experiences in Rwanda are applicable to other contexts and what modifications may be needed.

### Specialized War Crimes Units

The impetus for creating specialized war crimes units in France came, in large part, from the lingering number of investigations related to the Rwandan genocide. These cases had not been prioritized by the French authorities, which was problematic due to France's role in Rwanda prior to and during the 1994 genocide.<sup>225</sup> A significant

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<sup>225</sup> Human Rights Watch, *Rwanda: Justice After the Genocide*, March 28, 2014, <http://www.hrw.org/node/124218>.

contributing factor was that prosecutors and investigative judges lacked the necessary time, resources, and expertise to handle these cases.<sup>226</sup> In January 2010, while visiting Rwanda, former Foreign Affairs Minister Bernard Kouchner announced plans to establish a specialized war crimes unit.<sup>227</sup> It took a couple of years for plans to be fully implemented, but specialized units composed police, prosecutors, and investigative judges now exist in Paris.

French law provides for two phases of a criminal investigation: preliminary investigations (“*enquêtes préliminaires*”) undertaken by prosecutors, and judicial investigations (“*informations judiciaires*”) handled by investigative judges (see below).<sup>228</sup> As of late May 2014, the specialized units had initiated 36 judicial investigations, approximately three-quarters of which relate to Rwanda, and another 10 preliminary investigations.<sup>229</sup>

While it may be too early to assess the full extent of changes brought about by the new war crimes units, practitioners spoke positively about them and said they have already seen improvements in how investigations are handled.<sup>230</sup> They described staff in the war crimes units as motivated, competent, and willing to travel abroad for lengthy periods of

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<sup>226</sup> Human Rights Watch interview with French officials, June 3, 2014; Human Rights Watch interview with additional French official, June 3, 2014.

<sup>227</sup> The announcement came in the form of a joint-editorial published in the French newspaper *Le Monde* which coincided with Kouchner’s visit to Rwanda to re-establish relations following a diplomatic row. Rwanda had severed ties with France in October 2006, following the opening of a judicial investigation in France by Judge Jean-Louis Bruguière into the 1994 assassination of President Juvénal Habyarimana which sparked the genocide. Michèle Alliot-Marie and Bernard Kouchner, “Pour la création d’un pôle « génocides et crimes contre l’humanité » au TGI de Paris,” *Le Monde*, January 6, 2010, [http://www.lemonde.fr/idees/article/2010/01/06/pour-la-creation-d-un-pole-genocides-et-crimes-contre-l-humanite-au-tgi-de-paris-par-michele-alliot-marie-et-bernard-kouchner\\_1287995\\_3232.html](http://www.lemonde.fr/idees/article/2010/01/06/pour-la-creation-d-un-pole-genocides-et-crimes-contre-l-humanite-au-tgi-de-paris-par-michele-alliot-marie-et-bernard-kouchner_1287995_3232.html) (accessed September 9, 2014). See also “Rwanda Breaks diplomatic relations with France,” *International Herald Tribune*, October 24, 2006, [http://www.nytimes.com/2006/11/24/news/24iht-rwanda.3660589.html?\\_r=0](http://www.nytimes.com/2006/11/24/news/24iht-rwanda.3660589.html?_r=0) (accessed September 9, 2014). Just over three years later, in November 2009, the two countries re-established diplomatic relations. “Rwanda and France Restore Diplomatic Relations,” *BBC News Online*, November 30, 2009, <http://news.bbc.co.uk/2/hi/africa/8385887.stm> (accessed September 9, 2014).

<sup>228</sup> Code de Procédure Pénale (“French Code of Criminal Procedure”), entered into force on March 2, 1959, arts. 75-84, <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071154> (accessed September 9, 2014), official English translation, 2006, <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> (accessed September 9, 2014). Revised French Code of Criminal Procedure as of September 1, 2014, [http://www.legifrance.gouv.fr/affichCode.do;jsessionid=DA7956739FD101F26E23CD144B032676.tpdj002v\\_1?cidTexte=LEGITEXT000006071154](http://www.legifrance.gouv.fr/affichCode.do;jsessionid=DA7956739FD101F26E23CD144B032676.tpdj002v_1?cidTexte=LEGITEXT000006071154) (accessed September 9, 2014); Human Rights Watch interview with French lawyer, November 26, 2013; Human Rights Watch interview with French official, December 11, 2013.

<sup>229</sup> Human Rights Watch interview with French officials, May 13, 2014; Human Rights Watch interview with French official, June 3, 2014.

<sup>230</sup> Human Rights Watch interview with French lawyers, December 9, 2013; Human Rights Watch interview with French lawyer, December 10, 2013; Human Rights Watch interview with French lawyer, December 11, 2013; Human Rights Watch interview with French lawyer, May 14, 2014.

time, and noted that the result has been better and more efficient investigations.<sup>231</sup> Staff within the units said that they are able to advance investigations more quickly than before the creation of specialized war crimes units, particularly Rwandan cases.<sup>232</sup>

### *National Investigative Office*

In September 2010, the national *gendarmerie* put in place a small team of four full-time police officers to investigate grave international crimes cases.<sup>233</sup> Two years later, in October 2012, staffing increased to 12 in order to bolster the team's capacity.<sup>234</sup> Even with the increased staffing, however, the team faced challenges in carrying out its work as the number of crimes cases grew steadily and police were occasionally pulled off to work on pressing domestic criminal cases.<sup>235</sup>

On November 5, 2013, the government issued a decree establishing a new, centralized investigative office.<sup>236</sup> The "National Office for Investigation of Crimes against Humanity," which became operational in February 2014, currently has a staff of 14 but is projected to grow to 20 within a few years.<sup>237</sup> It will include both *gendarmes* and police officers and possibly a diplomat on secondment from the Ministry of Foreign Affairs to help the team navigate the political intricacies of extraterritorial investigations.<sup>238</sup> The office may also use short-term external consultants as needed, both to assist with specific cases and to provide more general training to staff. The office's mandate includes grave international

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<sup>231</sup> Human Rights Watch telephone interview with French lawyer, November 22, 2013; Human Rights Watch telephone interview with French lawyer, November 26, 2013; Human Rights Watch telephone interview with NGO, November 27, 2013; Human Rights Watch interview with French lawyer, December 11, 2013.

<sup>232</sup> Human Rights Watch interview with French officials, May 13, 2014; Human Rights Watch interview with additional French officials, May 13, 2014; Human Rights Watch interview with French officials, December 9, 2013.

<sup>233</sup> In France, there are two types of police officers: *gendarmes* and *policiers*. *Gendarmes* are police officers with military status. The unit was placed within the *Section de Recherches* of the Paris *Gendarmerie*, which is a branch of the armed services. Human Rights Watch interview with French officials, May 13, 2014.

<sup>234</sup> Human Rights Watch interview with French official, December 10, 2013.

<sup>235</sup> Human Rights Watch interview with French officials, May 13, 2014. See also Delphine Carlens, "The French Specialized War Crimes Unit: First 18 Months, EU Update on international Crimes," Redress Newsletter, Issue 10, July 8, 2013, <http://www.redress.org/downloads/1401-newsletteramended.pdf> (accessed September 9, 2014).

<sup>236</sup> The new unit, known as the *Office Central de Lutte contre les Crimes contre l'Humanité* in French, remains part of the *Gendarmerie*. Décret n° 2013-987 du 5 novembre 2013 portant création d'un office central de lutte contre les crimes contre l'humanité, les génocides et les crimes de guerre, November 5, 2013, <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028160634&categorieLien=id> (accessed September 10, 2014).

<sup>237</sup> Human Rights Watch interview with French official, December 10, 2013; Human Rights Watch interview with French officials, December 9, 2013; Human Rights Watch interview with French officials, May 13, 2014.

<sup>238</sup> *Gendarmes* will remain the majority of the office's staff. Human Rights Watch interview with French official, December 10, 2013; Human Rights Watch interview with French officials, May 13, 2014.

crimes and hate crimes, including domestic cases that have no international dimension.<sup>239</sup> It is responsible for carrying out judicial investigations both in France and abroad and for coordinating the investigation with all relevant agencies in France.<sup>240</sup> Investigators work under the supervision of prosecutors and the investigating judges.<sup>241</sup>

For the first time since the police team's creation in 2010, investigators now have the capacity to proactively look for suspects rather than relying solely on victims and NGOs to bring them to their attention.<sup>242</sup> With increased staffing, a dedicated annual budget, and a higher overall profile, the national investigative office appears to reflect a growing political commitment to grave international crimes cases.<sup>243</sup>

### *Specialized Judicial Unit*

On January 1, 2012, almost two years after Kouchner's announcement in Kigali, a specialized war crimes unit was established within the Paris *Tribunal de Grande Instance*.<sup>244</sup> The unit, which includes prosecutors and investigative judges, has primary but not exclusive jurisdiction for grave international crimes.<sup>245</sup> The majority of cases handled by the unit relate to the Rwandan genocide, but other cases are slowly emerging.

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<sup>239</sup> The office does not take primary responsibility for hate crimes cases and instead comes in as needed to assist with more complex issues. Human Rights Watch interview with French officials, May 13, 2014.

<sup>240</sup> Décret n° 2013-987 du 5 novembre 2013 portant création d'un office central de lutte contre les crimes contre l'humanité, les génocides et les crimes de guerre, art. 4.

<sup>241</sup> Human Rights Watch interview with French officials, May 13, 2014.

<sup>242</sup> Ibid.

<sup>243</sup> Human Rights Watch interview with French official, December 10, 2013; Human Rights Watch telephone interview with French lawyer, November 26, 2013.

<sup>244</sup> In January 2008, the Minister of Justice created a new commission to look at improving the judicial system. The Guinchard Commission, as it became known, recommended establishing specialized units for certain civil and criminal matters, including a specialized unit for cases involving genocide, war crimes, and crimes against humanity. In 2011, Parliament adopted a law to this effect. Loi n° 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles ("Case Distribution Law"), No. 0289, entered into force on December 14, 2011, art. 22, <http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=?cidTexte=JORFTEXT000024960344&dateTexte=&oldAction=rechJO&categorieLien=id> (accessed June 25, 2014). See also Commission sur la Répartition des Contentieux, Ministry of Justice, "L'ambition raisonnée d'une justice apaisée," August 2008, <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/084000392/0000.pdf> (accessed September 8, 2014), pp. 277-279.

<sup>245</sup> Local courts in other parts of the country retain jurisdiction over international crimes cases but can refer them to the specialized unit in Paris. In practice, nearly all cases since 2012 have been handled by the specialized unit. Prior to the unit's creation, cases were randomly assigned to prosecutors and investigative judges in the judicial district where the suspect was found or where the criminal complaint was filed. This meant that prosecutors and investigative judges had to manage these cases together with their regular caseload and had no additional resources or assistance to facilitate their handling of international crimes cases. In 2001, the Supreme Court (*Cour de Cassation*) decided that it was in the interests of justice to centralize Rwandan genocide cases within the jurisdiction of Paris judicial authorities. See "La répression des présumés génocidaires rwandais devant les juridictions françaises: Etat des lieux," FIDH news release, January 29, 2014, <http://www.fidh.org/fr/afrique/rwanda/affaires-rwandaises/La-repression-des-presumes> (accessed September 9, 2014).

## Prosecutors

The specialized unit has two prosecutors and three assistants with backgrounds in international criminal law.<sup>246</sup> The prosecutors work on both grave international crimes cases and regular criminal cases and divide their cases geographically to ensure expertise and maximum efficiency. Staffing is unlikely to be increased in the near future, but the unit has requested a third prosecutor and at least two practitioners said that more prosecutors are needed to handle the office's current caseload.<sup>247</sup>

Prosecutors completed their first trial in April 2014—that of Pascal Simbikangwa, a former senior intelligence officer from Rwanda. In June, the judicial investigation into two other Rwandan genocide suspects—Octavien Ngenzi and Tita Barahirwa, former mayors in eastern Rwanda—was completed and their trial is expected in 2015.<sup>248</sup>

In addition to carrying out its own investigations, the prosecutor's office also handles approximately 40 mutual legal assistance requests per year from other countries or international criminal tribunals, in particular the ICC.<sup>249</sup> It does not, however, deal with extradition requests which are handled by appellate courts in the district where suspects are located.<sup>250</sup>

## Investigative Judges

The specialized unit currently has three investigative judges but another is likely to join the unit soon.<sup>251</sup> Two assistants with backgrounds in international criminal law and two

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<sup>246</sup> It also relies on students from France's leading political science university, the Institut d'Etudes Politiques (Sciences Po), for background research. Human Rights Watch interview with French official, June 25, 2013; Human Rights Watch interview with French official, December 11, 2013.

<sup>247</sup> Human Rights Watch interview with French official, December 11, 2013; Human Rights Watch interview with French officials, May 14, 2014; Human Rights Watch interview with additional French officials, May 13, 2014.

<sup>248</sup> "Deux Rwandais renvoyés aux assises en France pour un 2e procès sur le génocide," *Le Point*, May 30, 2014, [http://www.lepoint.fr/societe/deux-rwandais-renvoyes-aux-assises-en-france-pour-un-2e-proces-sur-le-genocide-30-05-2014-1829646\\_23.php](http://www.lepoint.fr/societe/deux-rwandais-renvoyes-aux-assises-en-france-pour-un-2e-proces-sur-le-genocide-30-05-2014-1829646_23.php) (accessed September 9).

<sup>249</sup> A significant number of cases pending before the ICC involve Francophone countries, so France receives a significant number of requests from the ICC—the highest of any country in Europe. In fact, it received 17 requests from the ICC between October 2013 and May 2014. Human Rights Watch interview with French officials, May 13, 2014; Human Rights Watch interview with French official, June 3, 2014.

<sup>250</sup> Human Rights Watch interview with French officials, May 13, 2014.

<sup>251</sup> Human Rights Watch interview with French officials, December 9, 2013; Human Rights Watch interview with French official, December 11, 2013; Human Rights Watch interview with French officials, May 13, 2014.

registrars support their work.<sup>252</sup> Each case is handled by two investigative judges and, where a case is particularly complex, the third investigative judge is involved. Like the specialized prosecutors, the investigative judges divide their cases geographically in order to develop expertise in particular countries or regions and increase efficiency.<sup>253</sup> Practitioners stated that the quality of investigations has significantly improved since the appointment of specialized judges, and defense counsel noted a stronger commitment to looking for both incriminating and exculpatory evidence.<sup>254</sup>

### *Asylum Agency*

The French Office for the Protection of Refugees and Stateless Persons (OFPRA) is the independent administrative agency responsible for processing asylum applications in France. Like other countries, OFPRA can deny individuals refugee status on the basis of article 1F.<sup>255</sup> However, it has no specialized 1F unit. Instead all asylum officers are trained on the possible grounds for exclusion, including article 1F, and are expected to be able to conduct appropriate questioning. OFPRA conducts individual refugee status determination interviews in nearly all cases, and although asylum seekers are not expressly asked whether they have committed any international crimes—either on the initial application form or as part of the screening interview—such information is typically elicited during the refugee status determination interview according to OFPRA officials.<sup>256</sup> As in Germany, there are no publicly available statistics as to how many 1F cases OFPRA handles.

France received the second highest number of asylum seekers in the European Union in 2013, and ensuring adequate staffing and resources for such cases is imperative.<sup>257</sup> France

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<sup>252</sup> A third assistant was being recruited as of June. Human Rights Watch interview with French officials, December 9, 2013; Human Rights Watch interview with French official, June 3, 2014.

<sup>253</sup> Human Rights Watch interview with French officials, December 9, 2013.

<sup>254</sup> Defense counsel were the most outspoken on the value of having specialized investigative judges. Human Rights Watch interview with French lawyers, December 9, 2013; Human Rights Watch interview with French lawyer, December 10, 2013; Human Rights Watch interview with French lawyer, December 11, 2013; Human Rights Watch interview with French lawyer, May 14, 2014.

<sup>255</sup> Code de l'Entrée et du Séjour des Étrangers et du Droit d'Asile ("Immigration and Asylum Code"), entered into force on March 1, 2005, arts. L741-4 and L811-5, <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070158> (accessed September 8, 2014). For more information on the French asylum procedure, see "EDAL Country Overview: France," EDAL, undated, <http://www.asylumlawdatabase.eu/en/content/edal-country-overview-france> (accessed September 8, 2014).

<sup>256</sup> Human Rights Watch interview with French official, December 10, 2013; Human Rights Watch telephone interview with NGO, December 6, 2013.

<sup>257</sup> In 2013, OFPRA received over 66,000 asylum applications. The largest number of requests to OFPRA came from nationals of the Democratic Republic of Congo, Kosovo, and Albania, although Syrian nationals totaled approximately 900 (a doubling

should therefore consider establishing a specialized unit within OFPRA to handle potential 1F cases and should develop a uniform approach to handling 1F cases, including through asking a standardized set of questions designed to detect involvement in grave international crimes. Any information relevant to these crimes should be systematically shared with prosecutors.

### **Cooperation between OFPRA and the Prosecutor's Office**

Article 40 of the French Code of Criminal Procedure obliges all public officials who become aware of a crime to promptly notify the prosecutor's office and to provide whatever information they have in support of the allegations.<sup>258</sup> Until recently, however, there was no exchange of information between OFPRA and prosecutors, including in cases where immigration officials suspected a person had committed a 1F crime.<sup>259</sup>

It is a sensitive topic for French authorities, who appear to recognize their legal obligation but also emphasize the need for confidentiality in asylum proceedings.<sup>260</sup> French authorities fear that exchange of information between OFPRA and prosecutors might compromise the integrity of the asylum procedure and lead asylum seekers to withhold certain information from their applications for fear of having it used against them in later criminal proceedings.<sup>261</sup> Lawyers are divided on the legality of sharing information from immigration files and on whether to advocate for a more formalized procedure.<sup>262</sup> Some said that OFPRA has the potential to be an important source for detecting suspects of grave international crimes.<sup>263</sup>

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of applications from 2012). OFPRA, "Activity Report 2013," April 28, 2014, [http://www.ofpra.gouv.fr/documents/OFPRA\\_BD\\_28-04-2014.pdf](http://www.ofpra.gouv.fr/documents/OFPRA_BD_28-04-2014.pdf) (accessed September 9, 2014), pp. 8-9, 13, 32-33.

<sup>258</sup> Article 40 appears to apply to all crimes, not just grave international crimes. French Code of Criminal Procedure, art. 40.

<sup>259</sup> Human Rights Watch interview with French official, December 10, 2013; Human Rights Watch telephone interview with French lawyer, November 22, 2013; Human Rights Watch telephone interview with French lawyer, November 26, 2013; Human Rights Watch telephone interview with former French official, November 26, 2013; Human Rights Watch telephone interview with NGO, December 6, 2013, Human Rights Watch interview with French official, December 11, 2013.

<sup>260</sup> Human Rights Watch interview with French official, December 10, 2013, and telephone interview, April 24, 2014; Human Rights Watch interview with French officials, May 13, 2014.

<sup>261</sup> *Ibid.*

<sup>262</sup> Human Rights Watch telephone interview with French lawyer, November 22, 2013; Human Rights Watch telephone interview with French lawyer, November 26, 2013; Human Rights Watch telephone interview with NGO, November 27, 2013; Human Rights Watch telephone interview with French lawyer, December 9, 2013.

<sup>263</sup> Human Rights Watch interview with French officials, May 13, 2014.



OFPPRA officials and the prosecutor's office began to discuss the feasibility of information sharing in the second half of 2013 and, in the spring of 2014, agreed to more formalized cooperation.<sup>264</sup> The details of this arrangement have not been publicly disclosed, but OFPPRA officials now provide some form of notification to the prosecutor's office in all cases where they decide to exclude a person on the basis of article 1F. The notification takes place only after OFPPRA has made a final decision on a person's asylum application, and it is not clear what information is disclosed to prosecutors.<sup>265</sup> This change in procedure is a positive development, but it is imperative that cooperation be formalized and made systematic in all 1F cases. It would also be useful for the procedure to be transparent and for asylum seekers to be notified that information they provide may be shared with other government agencies, including the prosecutor's office. Regular meetings between the two offices would also be beneficial.

Just as the screening process at OFPPRA is not designed to identify potential suspects, it is also not designed to look for potential victims and witnesses of grave international crimes. OFPPRA officials opposed the idea of making inquiries into whether persons have been victims or witnesses to such crimes and might be willing to testify and also to passing relevant information to prosecutors. Officials were nonetheless receptive to the idea of having a pamphlet that explains victims' rights to report these crimes and to be involved in the judicial process so long as the documentation is available in a public space, such as in the OFPPRA lobby, where interested persons can pick it up on their own initiative.<sup>266</sup>

Practitioners noted that gathering information on potential victims and witnesses and processing the information, within both OFPPRA and the specialized prosecution unit, could prove challenging on a practical level given the limited resources of both offices.<sup>267</sup>

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<sup>264</sup> Human Rights Watch interview with French official, December 10, 2013, and telephone interview, April 24, 2014; Human Rights Watch interview with French officials, May 13, 2014. See also OFPPRA, Activity Report 2013, p. 46.

<sup>265</sup> Human Rights Watch telephone interview with French official, April 24, 2014; Human Rights Watch interview with French officials, May 13, 2014.

<sup>266</sup> Human Rights Watch interview with French official, December 10, 2013.

<sup>267</sup> Human Rights Watch interview with former French official, November 26, 2013; Human Rights Watch telephone interview with French lawyer, November 22, 2013; Human Rights Watch telephone interview with NGO, November 27, 2013.

## Investigations

French judicial authorities have a large number of ongoing investigations but only limited experience in conducting investigations abroad. The first two universal jurisdiction cases in France, involving events in Tunisia and Mauritania, were handled without any extraterritorial investigation as sufficient evidence was available in France. Police, prosecutors, and investigating judges now regularly travel to Rwanda for their investigations and have gained valuable experience there. However, this is the only territorial state where they have conducted investigations. While authorities expect to conduct other investigations abroad in the near future, it may prove challenging since other countries pertinent to their investigations include Morocco, Libya, Syria, the Republic of Congo (Brazzaville), and the Central African Republic—countries where there are significant security concerns or where national authorities may be unwilling to cooperate.

### *Phases of a Criminal Investigation*

Preliminary investigations may be started at the initiative of prosecutors or after a private party has filed a complaint with them.<sup>268</sup> These investigations, which usually last less than a year, are not generally known to the public and typically entail limited investigation through open sources and other readily available means in France.<sup>269</sup> Preliminary investigations can take place even where a suspect is not yet on French soil, but in practice this rarely happens.<sup>270</sup> As of June 2014, prosecutors had approximately 10 preliminary investigations open.<sup>271</sup> Once the prosecutor has sufficient evidence to merit further, in-depth investigation, it transmits the file to the investigative judges for the opening of a formal judicial investigation.

Judicial investigations may be triggered by prosecutors or through the filing of a civil party complaint with investigative judges.<sup>272</sup> A judicial investigation is a more prolonged, formal investigation which is handled by investigative judges with the assistance of police

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<sup>268</sup> The filing of a complaint with the prosecutor's office is known as a *plainte simple*.

<sup>269</sup> Investigation includes confirming the presence of the suspect on French soil and a search of the Interpol and European databases to determine whether the person is wanted on criminal charges in any other country. Investigators do not generally travel abroad to investigate at this preliminary stage. Human Rights Watch interview with French official, December 11, 2013; Human Rights Watch interview with French officials, May 13, 2014.

<sup>270</sup> Human Rights Watch interview with French officials, May 13, 2014.

<sup>271</sup> Human Rights Watch interview with French official, June 3, 2014.

<sup>272</sup> Where the prosecutor's office needs an invasive measure, like phone tapping or a search and seizure, or wants to place a person in detention for a prolonged period, it must open a judicial investigation and obtain judicial consent. Human Rights Watch interview with French officials, May 13, 2014.

investigators.<sup>273</sup> It normally involves the questioning of the accused and other relevant witnesses. Increasingly, it also entails extraterritorial investigations in the country where the crimes occurred and sometimes other countries where relevant evidence is located.<sup>274</sup> Once the case reaches the stage of a judicial investigation, the suspect is formally made aware of the allegations against him or her and has access to the judicial file, which is maintained by the investigative judges.<sup>275</sup> Any civil parties to the case also have access to the file.<sup>276</sup> Once the judicial investigation is completed, the investigative judges make a ruling either dismissing the case or sending it to trial.<sup>277</sup> If a suspect is in detention, the judicial investigation must be completed within four years.<sup>278</sup>

### Civil Party Complaints

The civil party complaint procedure, which allows victims and other affected parties to trigger the opening of a formal judicial investigation, is a deeply enshrined right under French law. However, when implementing the Rome Statute into French law in 2010, legislators removed this right from victims of genocide, crimes against humanity, and war crimes due to concerns over the filing of politically motivated or ill-founded complaints. Fearing problems in diplomatic relations, they instead vested sole authority to initiate criminal proceedings with prosecutors.<sup>279</sup> In light of France's international legal obligations to prosecute certain crimes unless a person is extradited for trial elsewhere, complaints

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<sup>273</sup> Once the case enters the judicial investigation phase, the prosecutor no longer conducts the investigation or directs the police. Any further investigative steps that the prosecutor might seek must be suggested to and approved by the investigative judges. Human Rights Watch interview with French officials, May 13, 2014.

<sup>274</sup> Human Rights Watch interview with French official, December 11, 2013.

<sup>275</sup> Human Rights Watch interview with French lawyers, December 9, 2013.

<sup>276</sup> Human Rights Watch interview with French lawyer, May 14, 2014.

<sup>277</sup> This person is said to be *mis en examen*. French Code of Criminal Procedure, art. 80-1; Human Rights Watch interview with French official, December 11, 2013.

<sup>278</sup> French Code of Criminal Procedure, art. 145-2; Human Rights Watch interview with French officials, May 13, 2014.

<sup>279</sup> Legislators pointed to high-profile cases in Belgium and Spain, which led to a narrowing of the scope of universal jurisdiction laws in both countries, in support of their position and argued that having the prosecutor's office serve as gatekeeper to decide which cases should be brought before French courts would avoid similar problems in France. French Code of Criminal Procedure, art. 689-11; Human Rights Watch interview with French officials, May 13, 2014; Human Rights Watch interview with French official, December 11, 2013. See also French Senate, "Compte rendu analytique officiel du 26 février 2013," February 26, 2013, [http://www.senat.fr/cra/s20130226/s20130226\\_mono.html](http://www.senat.fr/cra/s20130226/s20130226_mono.html) (accessed September 9, 2014, 2014); and Coalition Française pour la Cour Pénale Internationale (CFCPI), "Actualités nationales CFCPI: Proposition Sueur votée à l'unanimité mais les sénateurs ne lèvent que 3 verrous sur 4 maintenant le monopole du Parquet," February 26, 2013, <http://www.cfcpi.fr/spip.php?article722> (accessed September 9, 2014).

may still be filed directly with investigative judges for torture, enforced disappearance, and crimes related to the former Yugoslavia and Rwanda.<sup>280</sup>

There is a legislative proposal to reinstate the civil party procedure for genocide, crimes against humanity, and war crimes, and which would harmonize jurisdictional requirements for all grave international crimes, but at the time of writing the proposal has stalled.<sup>281</sup> Reinstating the civil party procedure has proven to be the most controversial part of the bill, and it is unclear whether legislators will agree to remove the gatekeeping function of prosecutors.<sup>282</sup> Given that nearly all but three grave international crimes cases to date have originated from the filing of civil party complaints and might not have occurred if prosecutors had sole authority to initiate criminal proceedings, a strong argument can be made for reinstating full civil party rights.<sup>283</sup>

### *Cooperation with Foreign Authorities*

Police investigators take the lead in extraterritorial investigations, working for both prosecutors and investigative judges depending on the stage of the case. To date, nearly

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<sup>280</sup> These crimes were exempted from the new requirement due to the *aut dedere, aut judicare* principle. French Code of Criminal Procedure, arts. 689-2 and 689-13; ICTY Statute, art. 2; ICTR Statute, art. 2.

<sup>281</sup> The legislative proposal would harmonize jurisdictional requirements so that an accused need only be present on French soil (as opposed to being a resident), civil parties could institute criminal proceedings directly before an investigative judge, crimes need not be punishable in the territorial country at the time they were committed in order to be prosecuted in France, and French prosecutors need not ask the ICC to expressly decline jurisdiction before initiating criminal proceedings. In February 2013, the Senate adopted an amended version of the bill dropping three of the requirements but maintaining the prosecutor's exclusive authority to institute criminal proceedings. The bill was sent to the National Assembly for approval, but consideration of the bill has been delayed due to a government reshuffle and the need to appoint a new representative of the national law commission to analyze the legislative proposal which is the first step in the legislative process. Proposition de loi tendant à modifier l'article 689-11 du code de procédure pénale relatif à la compétence territoriale du juge français concernant les infractions visées par le statut de la Cour pénale internationale, n°753 ("Amendment proposal, article 689-11"), French Senate, September 6, 2012, <http://www.senat.fr/leg/ppl11-753.html> (accessed September 8, 2014); Proposition de loi adoptée, n° 101 ("Law amendment article 101 adopted by Senate"), French Senate, February 26, 2013, <http://www.senat.fr/leg/tas12-101.html> (accessed September 8, 2014).

<sup>282</sup> Practitioners told Human Rights Watch that the strongest resistance to the removal of the gatekeeping function of the prosecutor comes from the Ministry of Foreign Affairs, but foreign affairs officials did not confirm these concerns in an interview with Human Rights Watch. Human Rights Watch interview with NGO, June 25, 2013; Human Rights Watch telephone interview with French lawyer, November 22, 2013; Human Rights Watch telephone interview with NGO, November 27, 2013; Human Rights Watch interview with French lawyer, May 14, 2014; Human Rights Watch interview with French officials, May 14, 2014; Human Rights Watch interview with French official, December 11, 2013; Human Rights Watch interview with French officials, May 13, 2014. See also French Senate, "Compte rendu analytique officiel du 26 février 2013: Cour Pénale Internationale," February 26, 2013, [http://www.senat.fr/cra/s20130226/s20130226\\_4.html](http://www.senat.fr/cra/s20130226/s20130226_4.html) (accessed September 9, 2014) and CFCPI, "Actualités nationales CFCPI: Proposition Sueur votée à l'unanimité mais les sénateurs ne lèvent que 3 verrous sur 4 maintenant le monopole du Parquet," February 26, 2013.

<sup>283</sup> In fact, all but three cases have been initiated by victims or NGOs acting on behalf of victims. Of the three cases initiated by prosecutors, one—that of Pascal Simbikangwa—was undertaken just days before an NGO complaint was expected to be filed with the court. Human Rights Watch interview with French officials, May 13, 2014; Human Rights Watch interview with French officials, May 13, 2014; Human Rights Watch interview with French lawyer, May 14, 2014.

all of the investigative work has taken place in Rwanda.<sup>284</sup> Recent investigations in Rwanda have involved teams of 10 police investigators staying in the country for two week periods in order to work on multiple cases.<sup>285</sup> In the *Simbikangwa* case, police made 12 separate trips to Rwanda over a three-year period and questioned a total of 115 witnesses.<sup>286</sup>

Police often rely on the French embassy and Rwandan authorities for assistance. They had hoped to have a permanent liaison officer appointed to the French embassy in Kigali given the volume of Rwandan cases, but it appears unlikely that this will happen due to budget constraints.<sup>287</sup> The French embassy often suggests interpreters and provides other logistical assistance, while Rwandan authorities are usually asked to locate witnesses on the basis of lists prepared by French investigators. A Rwandan police officer accompanies French police investigators at all times while they are in Rwanda except during the actual witness interviews.<sup>288</sup> These interviews usually take place in the local courthouse and end with a formal written statement signed by each witness.<sup>289</sup>

Prosecutors may also travel abroad during the investigation, either with the police or the investigative judges, but generally do not. During the preliminary investigation stage, they nonetheless closely supervise the work of the police.<sup>290</sup> The investigative judges travel to Rwanda several times a year to conduct investigations, staying approximately two weeks on each trip to question relevant witnesses. They too are accompanied by a Rwandan police officer and rely on Rwandan authorities for assistance, including transporting witnesses to Kigali. The investigative judges usually question witnesses at the Rwandan Supreme Court but insist that no Rwandan officials be present during the questioning.<sup>291</sup>

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<sup>284</sup> Investigators have not traveled to any other territorial states for their investigations, but they have traveled within Europe to find relevant witnesses. Human Rights Watch interview with French officials, May 13, 2014.

<sup>285</sup> The investigative office has the resources to send a team of 10 investigators to Rwanda four times per year, each time for a two-week period. They are able to work on half a dozen cases on each trip. Human Rights Watch interview with French officials, May 13, 2014.

<sup>286</sup> *Ibid.*

<sup>287</sup> *Ibid.*; Human Rights Watch interview with French official, December 11, 2013.

<sup>288</sup> Human Rights Watch interview with French officials, May 13, 2014; Human Rights Watch interview with French official, June 3, 2014.

<sup>289</sup> Interviews are not recorded by audio or visual means, although French authorities are considering whether it would be useful to do this in the future. Human Rights Watch interview with French officials, May 13, 2014.

<sup>290</sup> Human Rights Watch interview with French official, June 3, 2014.

<sup>291</sup> Human Rights Watch interview with French officials, December 9, 2013.

In theory, prosecutors, defense counsel, and civil parties can accompany the investigative judges to Rwanda to participate in the formal questioning of witnesses. In practice, however, only the prosecutor has ever traveled with the investigative judges. Increasingly, the prosecutor and other parties to the case participate via video conference from France.<sup>292</sup> Usually one investigative judge travels to Rwanda to hear the witnesses in person while another stays in France to oversee the video conference and questioning of witnesses by all parties.<sup>293</sup> The investigative judges decide which witnesses to question, usually on the basis of the police investigation, but parties to the case can make requests or suggest particular witnesses.<sup>294</sup> Practitioners in the war crimes units said that they were unaware of any instances where Rwandan authorities have interfered with their investigation.<sup>295</sup>

### *Challenges and Lessons Learned*

The war crimes units have only existed for a few years, and their experience conducting investigations abroad is almost exclusively limited to Rwanda. While they have become more efficient in carrying out investigations there, it may be too soon to draw any meaningful lessons from these investigations or to apply them to other contexts.

Practitioners in the war crimes units did not readily acknowledge mistakes made in past investigations or offer any lessons learned. Police said the most significant challenge to grave international crimes cases is understanding the country's history and cultural context in order to prepare for witness interviews. Unlike their Dutch counterparts, they did not believe that evaluating the credibility of witnesses was any more difficult than in regular criminal cases, even where interpreters are needed.<sup>296</sup> At least one defense lawyer took issue with this assessment and noted that false testimony and inconsistencies by witnesses have been a major issue in Rwandan cases.<sup>297</sup>

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<sup>292</sup> Human Rights Watch interview with French official, December 11, 2013; Human Rights Watch interview with French lawyer, May 14, 2014; Human Rights Watch interview with French officials, December 9, 2013.

<sup>293</sup> Civil parties only occasionally participate in the questioning of witnesses during the judicial investigation. Human Rights Watch interview with French officials, December 9, 2013; Human Rights Watch interview with French lawyer, May 14, 2014; Human Rights Watch interview with French lawyer, December 11, 2013.

<sup>294</sup> Human Rights Watch interview with French lawyer, May 14, 2014; Human Rights Watch interview with French officials, December 9, 2013.

<sup>295</sup> Human Rights Watch interview with French officials, May 13, 2014; Human Rights Watch interview with French officials, December 9, 2013.

<sup>296</sup> Human Rights Watch interview with French officials, May 13, 2014.

<sup>297</sup> Human Rights Watch interview with French lawyer, December 11, 2013.

Problems have occasionally arisen with interpreters, who are usually found in the territorial state.<sup>298</sup> These problems have included the leaking of information from an investigation, the use of an interpreter who was related to a particular suspect, and errors in the manner in which information is translated.<sup>299</sup> Thorough vetting of interpreters is of critical importance, as these examples illustrate, and where possible interpreters should be found in France and travel to the territorial state with French law enforcement or judicial authorities in order to minimize potential problems or interference with the investigation.

Two other challenges cited by practitioners were a need for additional investigative capacity and more language skills.<sup>300</sup>

### *Defense Investigations*

Similar to German and Dutch law, French law does not expressly provide for independent defense investigations.<sup>301</sup> No provision actually bars the defense from carrying out its own investigation but the practice is not generally accepted in French legal culture and judges do not look favorably on it.<sup>302</sup> The defense is instead left to rely on prosecutors and investigative judges, who have a duty to look for incriminating and exculpatory evidence.

Unlike in Germany and the Netherlands, defense counsel in France have never tried to seek court authorization to conduct their own independent investigations in grave international crimes cases and have instead tended to rely on their own clients or the judicial case file to identify witnesses favorable to the defense. Several lawyers said that the specialized investigative judges are more committed to finding exculpatory evidence than ordinary investigative judges in past cases, who often had little interest in these cases, and noted that the overall quality of investigations has therefore improved. Traveling to the territorial state to investigate and question witnesses, more

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<sup>298</sup> For investigations related to Rwanda, interpreters have been found through the International Criminal Tribunal for Rwanda or the French embassy. Human Rights Watch interview with French officials, December 9, 2013.

<sup>299</sup> Human Rights Watch interview with French officials, May 13, 2014; Human Rights Watch interview with French lawyer, May 14, 2014; Human Rights Watch interview with French officials, December 9, 2013.

<sup>300</sup> Practitioners said they needed more English and Arabic language skills among investigators. Human Rights Watch interview with French official, December 11, 2013.

<sup>301</sup> Human Rights Watch interview with French lawyer, December 10, 2013; Human Rights Watch interview with French lawyers, December 9, 2013.

<sup>302</sup> It is also unlikely that state-appointed lawyers could obtain funding. Human Rights Watch telephone interview with French lawyer, July 7, 2014.

carefully scrutinizing witness testimony and other evidence, and following-up on leads provided by the defense were among the improvements cited by these lawyers.<sup>303</sup> All still argued that there is no equality of arms between the prosecution and the defense.<sup>304</sup>

The specialized investigative judges' use of video conferencing for the formal questioning of witnesses has enhanced the defense's ability to challenge evidence. In most cases, prosecutors and defense counsel have not traveled to the territorial state to participate in witness questioning but have instead participated through video conference from France.<sup>305</sup> Parties in the recent *Simbikangwa* case seemed satisfied by this process.<sup>306</sup>

## Witness Protection

French law offers more limited witness protection measures than do Germany or the Netherlands, and most practitioners said significant improvements were needed.<sup>307</sup> According to practitioners in the specialized war crimes units, the key is to identify persons who may be at risk at an early stage and to put protective measures in place before the witness provides any testimony.<sup>308</sup> Authorities have almost no way to protect witnesses once they have testified and no witness protection services exist in France.<sup>309</sup> This is extremely problematic since witnesses may not face problems until after they have spoken to French law enforcement or judicial authorities.

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<sup>303</sup> While the vast majority of witnesses found by investigative judges testify against the accused, at least one lawyer was able to identify instances where the specialized investigative judges had found witnesses favorable to the defense. Human Rights Watch interview with French lawyer, December 11, 2013.

<sup>304</sup> *Ibid.*; Human Rights Watch interview with French lawyer, December 11, 2013; Human Rights Watch interview with French lawyers, December 9, 2013; Human Rights Watch telephone interview with French lawyer, November 26, 2013.

<sup>305</sup> Where the witness has been suggested by a civil party in the case, counsel for that civil party may also request to be present. Human Rights Watch telephone interview with French lawyer, July 7, 2014.

<sup>306</sup> Human Rights Watch interview with French lawyers, December 9, 2013; Human Rights Watch interview with French officials, December 9, 2013; Human Rights Watch interview with French officials, May 13, 2014.

<sup>307</sup> Human Rights Watch telephone interview with French lawyer, November 22, 2013; Human Rights Watch interview with French officials, December 9, 2013; Human Rights Watch interview with French officials, May 13, 2014; Human Rights Watch interview with additional French officials, May 13, 2014.

<sup>308</sup> At the request of the prosecutor or an investigative judge, French law allows individuals to testify anonymously where their testimony might seriously endanger their own life or physical safety or that of a relative. This procedure, known as testimony *sous x*, must be put in place before a person gives testimony for the first time because his or her statement—and identifying information—becomes part of the judicial file at that moment and cannot later be redacted or removed from the file. Persons who testify openly at the investigative phase of a case cannot later testify anonymously at trial and cannot be civil parties in the case. French Code of Criminal Procedure, art. 706-58; Human Rights Watch telephone interview with French lawyer, November 22, 2013 and May 14, 2014; Human Rights Watch interview with French officials, December 9, 2013; Human Rights Watch interview with French official, June 3, 2014.

<sup>309</sup> Human Rights Watch telephone interview with French lawyer, November 22, 2013; Human Rights Watch interview with French officials, December 9, 2013; Human Rights Watch interview with French officials, May 13, 2014.



Closed session hearings during trial are permitted only where the court finds that the hearing may be dangerous to public order or morals.<sup>310</sup> In the *Simbikangwa* case, war crimes unit practitioners said that several witnesses living in Rwanda declined to testify when they learned that they could not testify anonymously or in closed session.<sup>311</sup>

Where victims and witnesses face problems in their home country after giving testimony before French courts, practitioners in the specialized war crimes units have almost no means of assisting them.<sup>312</sup> Police do not remain in contact with witnesses once investigations are completed and are therefore unlikely to become aware of any consequences suffered by witnesses after giving testimony.<sup>313</sup> French embassies are also not in a position to assist.<sup>314</sup> At least one NGO assisting victims expressed frustration at authorities' unwillingness to consider even small practical measures, such as giving persons telephones or the number of a local contact who can assist in case of a problem. The organization said it no longer contacts police or prosecutors in the specialized war crimes units when victims or witnesses are threatened since they will not intervene.<sup>315</sup> If serious witness protection issues arise for witnesses located in the territorial state or other countries, the French embassy in the relevant country should be authorized to assist.

As in other countries, most evidence in grave international crimes cases in France consists of testimony from victims and witnesses. French authorities should therefore make witness protection a priority. Legislators should amend French procedural rules to broaden the scope of formal legal protections that may be offered to witnesses. Temporary or permanent relocation to France should be possible in the most extreme cases. Practitioners in the specialized war crimes units should also take practical steps to ensure witness safety, drawing inspiration from the experiences of their Dutch colleagues.

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<sup>310</sup> Victims of rape and other forms of sexual violence as well as torture and other barbaric acts also have the right to request testimony in closed session. French Code of Criminal Procedure, art. 306. In cases where closed session is authorized by the court, the public is excluded from the courtroom but the defense is still permitted to see and hear the witness. Human Rights Watch interview with French official, June 3, 2014.

<sup>311</sup> The witnesses may have been fearful of potential repercussions following their testimony but did not appear to meet the stringent criteria set by French law in order to obtain witness protection measures. Human Rights Watch interview with French officials, May 13, 2014.

<sup>312</sup> Human Rights Watch interview with French officials, May 13, 2014; Human Rights Watch telephone interview with French lawyer, November 22, 2013.

<sup>313</sup> Human Rights Watch interview with French officials, May 13, 2014.

<sup>314</sup> Ibid.

<sup>315</sup> Human Rights Watch telephone interview with French lawyer, November 22, 2013.

# International Cooperation

The work of specialized war crimes units can be significantly enhanced by contact and cooperation with counterparts in other countries. These exchanges enable war crimes unit practitioners and other relevant actors to share their knowledge and experiences, to learn from colleagues in other countries, and to work together when cases transcend national borders. The European Union has undertaken a useful initiative that demonstrates the value of such cooperation and may be a useful model for other regional organizations including the African Union. Other EU and international initiatives are also underway and should be supported to ensure broader and more effective application of universal jurisdiction laws.

## The European Union

The European Union has a strong commitment to fighting impunity for grave international crimes around the world. It has been a staunch supporter of the ICC and other international criminal tribunals and has made promoting the universality of the Rome Statute a priority.<sup>316</sup> It has also devoted significant resources to rule of law reform in post-conflict countries and to empowering national courts in those countries to investigate and prosecute perpetrators of the most serious crimes under the principle of “complementarity.”<sup>317</sup> Some of its 28 member states have also taken strides to encourage the investigation and prosecution of grave international crimes before their national courts on the basis of universal jurisdiction, including through the establishment of specialized war crimes units within some combination of the police, prosecution, and immigration services of eight member states.<sup>318</sup>

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<sup>316</sup> All 28 EU member states are parties to the Rome Statute. See External Relations, European Commission, “The International Criminal Court & the fight against impunity,” undated, [http://ec.europa.eu/external\\_relations/human\\_rights/icc/](http://ec.europa.eu/external_relations/human_rights/icc/) (accessed September 9, 2014). In addition the EU Council adopted a Common Position (2003), which was updated in 2011, and an EU Action Plan (2004), which was similarly updated in 2011. See “Council Common Position of 16 June 2003 on the International Criminal Court,” *Official Journal L 150*, 2003/444/CFSP, June 18, 2003, [http://consilium.europa.eu/uedocs/cmsUpload/L\\_15020030618en00670069.pdf](http://consilium.europa.eu/uedocs/cmsUpload/L_15020030618en00670069.pdf) (accessed September 9, 2014); “Council Decision of 21 March 2011 on the International Criminal Court and repealing Common Position,” *Official Journal L 076*, 2003/444/CFSP, March 22, 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:076:0056:0058:EN:PDF> (accessed September 9, 2014); and Council of the European Union, “Action Plan to follow-up on the Decision on the International Criminal Court,” July 12, 2011, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2012080%202011%20INIT> (accessed September 9, 2014).

<sup>317</sup> European Commission, “Joint Staff Working Document on Advancing the Principle of Complementarity: Toolkit for Bridging the Gap Between International and National Justice,” January 31, 2013, [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/droi/dv/702\\_1854\\_/702\\_1854\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/702_1854_/702_1854_en.pdf) (accessed September 9, 2014).

<sup>318</sup> These countries include Belgium, Croatia, Denmark, France, Germany, the Netherlands, Sweden, and the United Kingdom.

EU institutions, however, have paid less attention to improving internal mechanisms for fighting impunity for grave international crimes than to bolstering judicial efforts by other states or international criminal tribunals. The EU has taken several important initial steps, which are described below, but it should do more to combat impunity for the world's most serious crimes on the basis of universal jurisdiction. Key priorities should include encouraging member states to create specialized war crimes units and to exercise universal jurisdiction, and facilitating cooperation among member states.

### *EU Genocide Network*

In June 2002, the EU Justice and Home Affairs (JHA) Council adopted a framework decision establishing a network of contact points from each member state to facilitate judicial cooperation in grave international crimes cases.<sup>319</sup> A year later, in May 2003, it went further and called for regular meetings of the network so that participants could exchange information and share their experiences and methods for investigating and prosecuting these cases.<sup>320</sup> The JHA Council also recommended that member states set up specialized war crimes units and emphasized the importance of collaboration between immigration and law enforcement authorities.<sup>321</sup>

The EU Genocide Network, as it has become known, met for the first time in November 2004 but then only once a year for the next few years.<sup>322</sup> In December 2008, the JHA Council placed the network within Eurojust, the EU agency responsible for overall judicial cooperation in criminal matters, and approved the establishment of a secretariat.<sup>323</sup> The

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<sup>319</sup> The Netherlands and Denmark made the proposal for a network of contact points. "Council Decision setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes," *Official Journal L 167*, 2002/494/JHA, June 26, 2002, <http://eurojust.europa.eu/doclibrary/Eurojust-framework/genocidenetworksecretariat/Council%20Decision%202002-494-JHA%200n%20setting%20up%20a%20European%20network%20of%20contact%20points/Council-Decision-2002-494-JHA-EN%200n%20setting%20up%20a%20European%20network%20of%20contact%20points.pdf> (accessed September 9, 2014).

<sup>320</sup> "Council Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes," *Official Journal L 118*, 2003/335/JHA, May 14, 2003, <http://eurojust.europa.eu/doclibrary/Eurojust-framework/genocidenetworksecretariat/Council%20Decision%202003-335-JHA%200n%20the%20investigation%20and%20prosecution%20of%20genocide,%20crimes%20against%20humanity%20and%20war%20crimes/Council-Decision-2003-335-JHA-EN.pdf> (accessed September 9, 2014).

<sup>321</sup> *Ibid.*, paras. 3-4.

<sup>322</sup> Biannual meetings began in 2009.

<sup>323</sup> "Council Decision on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime," *Official Journal L 138*, 2009/426/JHA, June 4, 2009, [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejdecision/New%20Eurojust%20Decision%20\(Council%20Decision%202009-426-JHA\)/Eurojust-Council-Decision-2009-426-JHA-EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejdecision/New%20Eurojust%20Decision%20(Council%20Decision%202009-426-JHA)/Eurojust-Council-Decision-2009-426-JHA-EN.pdf) (accessed September 9, 2014).

secretariat became operational in 2011 and as of 2014 the network meets twice yearly at Eurojust's headquarters in The Hague. Representatives of most of the 28 EU member states attend, together with Norway, Switzerland, Canada, and the United States as observer states.

Each meeting is dedicated to a new topic of relevance to practitioners, with recent topics including immunity as a bar to prosecution, corporate responsibility for grave international crimes, and the investigation and prosecution of sexual and gender-based violence. The network has become a valuable forum for national practitioners, in particular prosecutors, to develop additional expertise, discuss their experiences, share best practices, and exchange information on specific cases.<sup>324</sup> Beyond the actual meetings, the network has fostered important bilateral relationships between national practitioners. These relationships are frequently drawn on for follow-up in individual cases or in relation to the handling of cases from a particular country.<sup>325</sup> For example, when faced with Rwandan genocide cases, prosecutors in France, Norway, and Finland reached out to their Belgian counterparts who had prior experience in taking similar cases to trial.<sup>326</sup>

In the early years, network meeting participants were almost exclusively prosecutors and justice ministry officials but now also include police investigators and sometimes immigration officials. Representatives of other European institutions (including the Council Secretariat and the Commission), the ICC and sometimes other international criminal tribunals, and Interpol are also invited to attend. Civil society is allowed to participate for part of the meeting, and the remainder is conducted in closed session so that practitioners can exchange information on specific cases in a confidential setting.

In a positive move, the network and country contact points have begun organizing separate country and issue-specific meetings alongside the larger network meetings,

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<sup>324</sup> Human Rights Watch interview with Dutch official, March 28, 2014; written response from the German Federal Criminal Police Office to questions from Human Rights Watch and Redress, June 3, 2014; Human Rights Watch interview with German officials, March 13, 2014. See also Conclusions of the 16<sup>th</sup> Meeting of the European Network of Contact Points for investigation and prosecution of genocide, crimes against humanity and war crimes, May 21-22, 2014, on file with Human Rights Watch.

<sup>325</sup> Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch interview with additional Dutch official, January 28, 2014; written response from the German Federal Criminal Police Office to questions from Human Rights Watch and Redress, June 3, 2014.

<sup>326</sup> Redress and FIDH, "Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union," p. 62; Human Rights Watch interview with French official, June 3, 2014.

including on Rwanda, Syria, and the ICC.<sup>327</sup> It may be useful to organize other *ad hoc* meetings specifically for police investigators, immigration officers, or other actors involved in judicial cooperation so that these practitioners may come together and discuss specific issues relevant to their work.

Another positive move has been the development of an action plan which is expected to be released in late 2014.<sup>328</sup> Aimed at strengthening European institutions' engagement toward the network and their commitment to supporting member states in the exercise of universal jurisdiction, the action plan is expected to highlight certain key best practices; identify gaps in the relevant legal framework of certain member states; provide statistics on staffing within relevant police, prosecution, and other services of each member state; and give an overview of the number of investigations and prosecutions that have been completed or are pending in each member state. The action plan will be a reference tool, both within the EU and beyond, and will hopefully spur more EU member states to set up specialized war crimes units and draw on the experiences of those countries that already have such entities.

While the secretariat has enabled the network to make important strides, it could do more to enhance cooperation among member states and bolster member states' practice in investigating and prosecuting grave international crimes. However, this is a difficult task with its current resources—a single coordinator and a modest annual budget of €80,000 (approximately US\$104,000), most of which goes toward covering travel expenses for contact points to attend network meetings.<sup>329</sup> The EU should provide additional financial support to the network to enable it to expand its activities.

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<sup>327</sup> This move came at the initiative of the Netherlands and has been widely supported by national practitioners. See Conclusions of the 16<sup>th</sup> Meeting of the European Network of Contact Points for investigation and prosecution of genocide, crimes against humanity and war crimes, May 21-22, 2014, on file with Human Rights Watch; Human Rights Watch interview with Dutch official, March 28, 2014; Human Rights Watch telephone interview with Dutch official, June 16, 2014.

<sup>328</sup> Human Rights Watch interview with EU official, March 28, 2014; Conclusions of the 16<sup>th</sup> Meeting of the European Network of Contact Points for investigation and prosecution of genocide, crimes against humanity and war crimes, May 21-22, 2014, on file with Human Rights Watch. See also Letter from Civil Society to the Delegations of the Working Party on General Affairs and Evaluations (GENVAL), "Re: Strengthening efforts to combat impunity within the EU and its Member States for grave international crimes – renewed engagement in the field of Justice and Home Affairs," November 25, 2013, [http://www.hrw.org/sites/default/files/related\\_material/Civil%20society%20letter%20to%20GENVAL.pdf](http://www.hrw.org/sites/default/files/related_material/Civil%20society%20letter%20to%20GENVAL.pdf).

<sup>329</sup> "Council Statement of revenue and expenditure of Eurojust for the financial year 2014," *Official Journal C 090*, 2014/C 90/17, March 28, 2014, <http://eurojust.europa.eu/doclibrary/budget-finance/budgets/Eurojust%20budget%202014/Eurojust-budget-2014-EN.pdf> (accessed September 9, 2014). Human Rights Watch interview with EU official, March 28, 2014.

A handful of examples may guide the network as it expands its activities and tries to maximize its potential value to member states. In 2011 and 2012, the network carried out two surveys, the first on witness protection measures available in each member state and the second on investigation and prosecution services' access to immigration files in each member state, compiling the responses and sharing the results at its next meeting.<sup>330</sup> The surveys, which identified a wide variance of state practices, led to a fruitful discussion and could be the basis for follow-up at future meetings. The secretariat should conduct similar surveys of legislative provisions and practice on other relevant issues, such as offering psychological and other support for victims, informing victims of their right to participate in criminal trials and handling their participation, cooperation with national authorities during extraterritorial investigations, translation and interpretation during investigations and at trial, enabling defense counsel to prepare an effective defense, and outreach around trials. These surveys have the potential to enrich practitioners' discussions at future network meetings and to lead to reflections about changes that may be appropriate in each country.

The secretariat should also try to identify best practices and new legal developments to assist practitioners in learning from others' experiences. For example, at its April 2013 meeting, the network circulated a Dutch advisory committee opinion on immunity which participants agreed was a useful model for clear and transparent guidelines on the issue.<sup>331</sup> Other valuable initiatives might include compiling a list of ongoing and completed cases in each country, together with links to relevant judicial decisions and translations

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<sup>330</sup> The 2012 survey revealed that only a handful of countries require immigration officials to report suspects of grave international crimes to police or prosecutors and have formalized procedures allowing access to immigration files. In some countries, the exchange of information requires a judicial order whereas in others it does not. Human Rights Watch interview with EU official, March 28, 2014.

<sup>331</sup> The Dutch Advisory Committee on Issues of Public International Law (CAVV) issued a report on the immunity of foreign state officials following a request from the Dutch Ministry of Foreign Affairs for guidance on the issue of immunity. The advisory report recommended that full immunity be granted to the troika of most senior state officials as recognized by the International Court of Justice in the *Arrest Warrant* case but that it not be extended to other high-ranking government officials. The report also endorsed the granting of special mission immunity under certain clearly defined conditions. In April 2012, the ministry formally endorsed the report. Letter from Uri Rosenthal, Minister of Foreign Affairs, Dutch Ministry of Foreign Affairs, to Dutch Senate, April 26, 2012, <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2012/04/26/kamerbrief-over-immuniteit-van-leden-van-buitenlandse-officiële-missies/kamerbrief-over-immuniteit-van-leden-van-buitenlandse-officiële-missies.pdf> (accessed September 9, 2014); CAVV, Dutch Ministry of Foreign Affairs, "Advisory Report on the Immunity of Foreign State Officials," sections 5.1 and 5.2, <http://www.rijksoverheid.nl/ministeries/bz/documenten-en-publicaties/rapporten/2011/05/01/cavv-advies-nr.-20-immuniteit-buitenlandse-ambtsdragers-en.html> or [http://cms.webbeat.net/ContentSuite/upload/cav/doc/cavv-report-nr-20-immunity\\_foreign\\_officials.pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/cavv-report-nr-20-immunity_foreign_officials.pdf) (accessed September 9, 2014). See also Conclusions of the 14th meeting of the European Network of Contact Points for the investigation and prosecution of genocide, crimes against humanity and war crimes, April 17-18, 2013, on file with Human Rights Watch.

where available, and alerting practitioners to new judgments and decisions in real-time or shortly after they are released.

With the input of national contact points, the network should consider compiling a briefing paper that provides a short summary of how cooperation works among relevant national authorities within each country that has specialized war crimes units. This could help encourage other EU member states to establish war crimes units and mechanisms to improve cooperation among relevant authorities in those countries. Through its restricted access website, the network should also consider centralizing certain information that contact points could draw on, including information on countries where investigations have taken or are taking place, security concerns and other practical information for those countries (such as recommended salaries to pay drivers or local contacts, appropriate witness compensation, and names of suitable hotels). In addition, it might be beneficial to establish an internal calendar that national contact points could use to share the dates of their investigative missions. A few specialized practitioners said they have run into each other in the field in Rwanda without having any prior knowledge that other investigative teams were in the country and noted it would have been helpful to know this information prior to their trip.<sup>332</sup>

The secretariat should also take more steps to promote its own activities and disseminate relevant information. These steps might include publication of an annual report, participation in debates and meetings of EU institutions where relevant issues are being discussed, and bilateral meetings with EU policymakers to ensure fighting impunity within EU borders is given sufficient priority. In addition, the secretariat should improve its own website and place more documentation there, including but not limited to the agenda, preparatory documents, and conclusions from each meeting. Links to other relevant websites, judicial decisions, and documentation would also be useful.

### *Other European Initiatives*

Two other initiatives are underway seeking to bolster cooperation among EU member states. The first aims to increase cooperation among immigration officials and the second among law enforcement authorities. These initiatives are significant given the role that both actors play in the identification of suspects and the investigation of their alleged crimes. They are all the more important given the lack of borders within the EU, with

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<sup>332</sup> Human Rights Watch telephone interview with EU official, July 25, 2014.

suspects able to travel freely and victims and witnesses to international crimes dispersed throughout member states.

### Creation of an EU Immigration Network

As already discussed, immigration authorities can play a key role in identifying potential suspects of grave international crimes.<sup>333</sup> One suggestion has been to include immigration officials as part of the EU Genocide Network.<sup>334</sup> However, some practitioners fear that their inclusion in the EU Genocide Network might make meetings unwieldy and have instead suggested that a separate network be established for immigration officers, with periodic meetings arranged between the new network and the EU Genocide Network.<sup>335</sup> The new network might require the adoption of a new framework decision by the EU Council but could alternatively be created under the auspices of the European Asylum Support Office (EASO), the EU agency responsible for developing a common European asylum system and promoting cooperation on asylum issues among member states, or the Intergovernmental Consultations on Migration, Asylum, and Refugees (IGC).<sup>336</sup>

The network would ensure that each member state has a designated focal point within its immigration service for exclusion cases, including those related to article 1F,<sup>337</sup> and would go a long way toward improving cooperation among immigration authorities in the EU.<sup>338</sup> Like the EU Genocide Network, the immigration network could organize regular meetings to discuss topics of relevance, including best practices for screening individual asylum seekers and gathering relevant information on countries of origin. Meetings would allow

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<sup>333</sup> Council Decision 2003/335/JHA, preamble.

<sup>334</sup> Human Rights Watch interview with Dutch official, January 27, 2014; Human Rights Watch phone interview with Dutch official, February 24, 2014.

<sup>335</sup> Human Rights Watch interview with Dutch official, March 28, 2014; Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch telephone interview with former French official, November 26, 2013.

<sup>336</sup> EASO already runs a training program on exclusion for practitioners in member states. Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>337</sup> In addition to article 1F of the Refugee Convention, the network would also focus on application of articles 12 and 17 of the Qualification Directive. “Council Directive of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted,” *Official Journal L 304*, 2004/83/EC, September 30, 2004, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML> (accessed September 9, 2014).

<sup>338</sup> The immigration network could be established within the European Asylum Support Office (EASO) or EU’s intergovernmental conference (IGC). Human Rights Watch interview with Dutch official, January 27, 2014.



practitioners to share their experiences, develop common tools for use in these cases, and provide a forum for the exchange of information on specific cases.<sup>339</sup>

### **Creation of a Focal Point within Europol**

The specialized war crimes unit within the Dutch police department is leading an initiative to establish a central “focal point” for genocide, crimes against humanity, and war crimes within Europol, the EU’s law enforcement agency,<sup>340</sup> in order to assist national law enforcement authorities in investigating grave international crimes.<sup>341</sup> Plans include the establishment of a shared database that police investigators from member states could use to share relevant information confidentially—either by directly inputting the actual information into the database or by listing certain data material in the database, which alerts countries to the fact that another member state may have pertinent information and directs them to their counterparts in that country who may agree to share the information on a bilateral basis.<sup>342</sup> The database may be particularly useful where police investigators are trying to identify victims and witnesses to crimes who may be dispersed across the EU, as in the case of refugees fleeing the current crisis in Syria.<sup>343</sup>

### **International Initiatives**

Several other initiatives strive to enhance international cooperation in the investigation and prosecution of grave international crimes before domestic courts. Two of these initiatives, relating to the creation of a network of African prosecutors and the adoption of a mutual legal assistance treaty, are still at the preliminary stage but appear to be gaining momentum. The initiatives have the potential to encourage more countries to apply

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<sup>339</sup> EASO already has a database that allows immigration services from member states to exchange general country of origin information and has facilitated certain country-specific meetings. However, practitioners are prohibited from sharing information on actual cases. Human Rights Watch telephone interview with former French official, November 26, 2013.

<sup>340</sup> Europol is not currently mandated to facilitate cooperation and information sharing on genocide, crimes against humanity, and war crimes, but a draft regulation is likely to be adopted and to extend its competence to these crimes. Human Rights Watch telephone interview with EU official, July 25, 2014; Human Rights Watch telephone interview with Dutch official, August 19, 2014.

<sup>341</sup> The proposal, which is led by the Netherlands and supported by Germany, calls for the creation of a “focal point” within Europol to centralize information related to grave international crimes. This would entail appointing at least one person to be responsible for the gathering and sharing of information on these cases between law enforcement authorities in each country, including a shared database in which national law enforcement authorities in each member state could input relevant information. There is precedent for the proposal with respect to other crimes, including terrorism and arms trafficking. Human Rights Watch interview with Dutch official, January 28, 2014, and telephone interview, August 19, 2014.

<sup>342</sup> The “hit”/“no hit” system, which assigns handling codes depending on the sensitivity of the information, is similar to that used by Interpol. Human Rights Watch interview with Dutch official, January 28, 2014, and telephone interview, August 19, 2014.

<sup>343</sup> *Ibid.*

universal jurisdiction and may move universal jurisdiction beyond a Western phenomenon.<sup>344</sup> This is vital to effectively fighting impunity for the world's worst crimes and to ensuring that the principle of universal jurisdiction is more generally accepted worldwide and is not viewed as an attempt by Western countries to impose their authority over less powerful countries in the global South. Interpol has also undertaken measures to deepen international cooperation, including through periodic thematic meetings for member states, investigative training courses, and a shared database which countries can use to share relevant information.

### *African Union Network of Prosecutors*

The EU Genocide Network's success has inspired the African Union (AU) to begin efforts to establish a similar network of African prosecutors. Under discussion since 2009, plans moved forward in 2014 with the Assembly of Heads of State and Government, which is the AU governing body, approving the creation of the network. A technical group within the AU Commission has been appointed to study the proposal and develop terms of reference. The network could be operational as soon as late 2015.<sup>345</sup>

### *Mutual Legal Assistance Treaty*

Belgium, the Netherlands, Slovenia, and Argentina are leading an initiative to establish an international mutual legal assistance treaty to facilitate judicial cooperation in grave international crimes cases. The treaty would provide a uniform legal framework for authorities in one country to seek and obtain judicial cooperation from another country, such as authorization to carry out extraterritorial investigations or the undertaking of specific investigative steps (*e.g.*, formal questioning of witnesses, search of premises, seizure of evidence). The treaty would significantly reduce the amount of time needed to obtain mutual legal assistance as countries would no longer need to negotiate bilateral mutual legal assistance treaties.<sup>346</sup> A number of regional mutual legal assistance treaties

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<sup>344</sup> This is already beginning to happen with several important cases being investigated and prosecuted on the basis of universal jurisdiction in Senegal, South Africa, and Argentina.

<sup>345</sup> Fafre Camara, Legal Officer, Office of Legal Counsel, African Union Commission, presentation at "16<sup>th</sup> Meeting of the Network for Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes," EU Genocide Network Meeting, The Hague, May 21, 2014, attended by Human Rights Watch researcher.

<sup>346</sup> Plans for the treaty first emerged in 2011, following a meeting of experts that concluded that the international framework for mutual legal assistance was limited and rather outdated. See Parliamentarians for Global Action, "Background information: Towards a Multilateral Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Grave International Crimes," undated, <http://www.pgaction.org/pdf/Background-Information-MLA-Initiative.pdf> (accessed September 9, 2014).

already exist, and several international conventions on specific crimes contain specific provisions on mutual legal existence.<sup>347</sup>

Current discussions suggest that the treaty would also include basic rules for extradition of suspects of grave international crimes. These rules would be intended to streamline extradition proceedings and dispose of the need to negotiate bilateral extradition treaties. While Human Rights Watch supports enhanced mutual legal assistance in the investigation of crimes, no treaty provisions should seek to, or have the effect of, undercutting the procedural safeguards that should exist to guarantee a person can only be extradited if they will receive a fair trial in accordance with international standards in the country where the person is to be extradited and that they will not be subject to the death penalty if extradited. Therefore, the treaty should safeguard suspects' rights to a fair trial and not seek to compromise any legal recourse they have to challenge an extradition request.

The initiative has faced strong resistance from certain countries and has not moved forward as quickly as had been hoped. <sup>348</sup> The four countries sponsoring the initiative have continued efforts to raise awareness around the proposal and, in November 2013 during the ICC Assembly of State Parties, secured the support of 39 states.<sup>349</sup>

### *Interpol*

Interpol, an intergovernmental police organization with 190 member states, has played an important role in promoting relevant authorities to investigate and prosecute grave international crimes cases on the basis of universal jurisdiction.<sup>350</sup> In 2004, it began

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<sup>347</sup> These include the Arab League Convention on Mutual Assistance in Criminal Matters, the Inter-American Convention on Mutual Legal Assistance in Criminal Matters, the Economic Community of West African States Convention on Mutual Assistance in Criminal Matters, and the European Convention on Mutual Assistance in Criminal Matters as well as the International Convention for the Protection of All Persons from Enforced Disappearance, the UN Convention against Transnational Organized Crime, and the UN Convention against Corruption.

<sup>348</sup> The three countries had hoped to formally present the initiative at a meeting of the UN Commission on Crime Prevention and Criminal Justice in Vienna in April 2013 but faced strong opposition from several states, including but not limited to African states. They were only able to hold a side-event to discuss the proposal. Human Rights Watch email correspondence with NGO, October 10, 2013.

<sup>349</sup> Assembly of State Parties, "International Initiative for Opening Negotiations on a Multilateral Treaty for Mutual Legal Assistance and Extradition in Domestic Prosecution of Atrocity Crimes (crimes of genocide, crimes against humanity and war crimes)," ICC/ASP/12, November 20-28, 2013, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Netherlands-Joint-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Netherlands-Joint-ENG.pdf) (accessed September 9, 2014).

<sup>350</sup> One area of Interpol's work has been the issuance of "red notices" to alert national law enforcement authorities to the fact that a suspect is wanted by a member government. While these notices are valuable to the fight against impunity, they currently lack adequate safeguards against misuse for political motivated purposes and merit reform. Fair Trials International,

organizing expert meetings to discuss practical issues around cooperation and information sharing in these cases.<sup>351</sup> The meetings take place every two years and bring together delegates from around the world.<sup>352</sup> Interpol also conducts investigative training courses focused on grave international crimes.<sup>353</sup> In 2012, Interpol set up a database containing information on past and ongoing investigations of grave international crimes in countries around the world which enables police and other investigators to know which countries have experience in handling investigations of particular crimes or in particular countries and to learn from each other's experiences.<sup>354</sup> The database has proven to be useful for countries investigating cases in connection with the Rwandan genocide.<sup>355</sup> In 2014, Interpol established a new "War Crimes and Genocide Sub-directorate," which will enable the organization to increase its capacity and deepen its support for member countries.<sup>356</sup>

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"Strengthening respect for human rights, strengthening INTERPOL," November 2013, <http://www.fairtrials.org/wp-content/uploads/Strengthening-respect-for-human-rights-strengthening-INTERPOL4.pdf> (accessed September 9, 2014).

<sup>351</sup> Interpol, Resolution AG-2004-RES-17, <http://www.interpol.int/Media/Files/General-Assembly/Resolutions/2004/AG-2004-RES-17-Increased-ICPO-INTERPOL-support-for-the-investigation-and-prosecution-of-genocide,-war-crimes-and-crimes-against-humanity> (accessed September 9, 2014).

<sup>352</sup> Six meetings have taken place to date, with the most recent meeting in Kigali in April 2014.

<sup>353</sup> Human Rights Watch email correspondence with Interpol official, July 29, 2014; Interpol, "Training," undated, <http://www.interpol.int/Crime-areas/War-crimes/Training> (accessed September 9, 2014).

<sup>354</sup> Human Rights Watch email correspondence with Interpol official, July 29, 2014.

<sup>355</sup> In April 2013, Interpol also hosted a special operational meeting on Rwanda that enabled investigators and prosecutors from 11 countries to share information in connection with ongoing investigations in their respective countries. "Interpol Meeting Intensifies Efforts to Bring Rwandan Genocide Fugitives to Justice," Interpol news release, April 16, 2013, <http://www.interpol.int/News-and-media/News/2013/N20130416> (accessed September 9, 2014).

<sup>356</sup> Human Rights Watch email correspondence with Interpol official, July 29, 2014.

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## Annex I: Cases in the Netherlands

There have been eight grave international crimes cases tried by Dutch courts since 2003, involving crimes committed in the Democratic Republic of Congo, Afghanistan, Iraq, Liberia, Rwanda, and Sri Lanka.<sup>357</sup>

The first universal jurisdiction case to be tried before Dutch courts was that of former Congolese army officer Sébastien Nzapali. In April 2004, Nzapali was convicted of torture and sentenced to two-years-and-six-months' imprisonment for his role in leading death squads in Kinshasa between 1990 and 1995.<sup>358</sup>

In December 2005, a court convicted Dutch businessman Frans van Anraat for complicity in war crimes for his role in supplying Saddam Hussein with chemicals that were used in attacks on the Kurds in the late 1980s. The court acquitted him of complicity in genocide.<sup>359</sup> In May 2007, the court of appeals increased his sentence from 15 to 17 years' imprisonment on the grounds that he had repeatedly sold the chemicals despite knowing that they would be used to create poisonous gas.<sup>360</sup>

Another Dutch businessman, Guus van Kouwenhoven, was convicted in 2006 for having facilitated the importation of arms into Liberia which were used in the country's civil war. The court acquitted him of war crimes but convicted him of violating the UN arms embargo against

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<sup>357</sup> Only one of these cases was initiated under the Dutch International Crimes Act (ICA), which incorporated grave international crimes as defined by the Rome Statute into Dutch law. The other cases were initiated under the 1952 Wartime Offenses Act, the 1989 Torture Convention Implementation Act, and the 1970 Genocide Convention Implementation Act. Prosecutors dropped two additional cases, one of which was based on the ICA.

<sup>358</sup> *Prosecutor v. Sébastien N.*, Rotterdam District Court, Case No. 20-003852-06, Judgment (Trial), April 7, 2004, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3ARBROT%3A2004%3AAO7287> (accessed September 9, 2014). See also "Netherlands: Congolese Torturer Convicted," Human Rights Watch news release, April 8, 2004, <http://www.hrw.org/news/2004/04/07/netherlands-congolese-torturer-convicted>; Marlise Simons, "The Netherlands: Congo Man Convicted of Torture," *New York Times*, April 8, 2004, <http://www.nytimes.com/2004/04/08/world/world-briefing-europe-the-netherlands-congo-man-convicted-of-torture.html> (accessed September 9, 2014).

<sup>359</sup> *Prosecutor v. Frans van A.*, The Hague District Court, Case No. 09/751003-04, Judgment (Trial), December 23, 2005, <http://www.haguejusticeportal.net/index.php?id=6332> (accessed September 9, 2014). See also "Saddam's 'Dutch Link,'" *BBC News Online*, undated, [http://news.bbc.co.uk/2/hi/middle\\_east/4358741.stm](http://news.bbc.co.uk/2/hi/middle_east/4358741.stm) (accessed September 9, 2014).

<sup>360</sup> *Prosecutor v. Frans van A.*, The Hague Court of Appeals, Case No. 22-000509-06, Judgment (Appeal), May 9, 2007, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AGHSGR%3A2007%3ABA6734> (accessed September 9, 2014). The Supreme Court upheld the conviction. *Prosecutor v. Frans van A.*, Supreme Court of the Netherlands, Case No. 07/10742, Judgment (Appeal), June 30, 2009, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AHR%3A2009%3ABG4822> (accessed September 9, 2014).

Liberia.<sup>361</sup> The court of appeals overturned his conviction,<sup>362</sup> but in April 2010 the Supreme Court quashed that decision and ordered a retrial.<sup>363</sup> The new trial has not yet begun.<sup>364</sup>

Prosecutors have initiated three separate cases related to Afghanistan, two of which went to trial. All three cases involved former senior officers in the military intelligence service (the KhAD) in the 1970s and 80s who were alleged to have been involved in torture. The first case involved Hesamuddin Hesam and Habibullah Jalalzoy, who had come to the attention of Dutch authorities through the 1F screening process, and resulted in a conviction for war crimes and torture and prison sentences of twelve and nine years, respectively.<sup>365</sup> The second case, that of Abdullah Faqirzada, led to an acquittal.<sup>366</sup> The third Afghan case involved Amanullah Osman who was chief of the interrogation department in Afghan Security Service (AGSA, which preceded the KhAD) in the late 1970s.

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<sup>361</sup> *Prosecutor v. Guus van K.*, The Hague District Court, Case No. 09/750001-05, Judgment (Trial), June 7, 2006, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3ARBSGR%3A2006%3AAAY5160> (accessed September 9, 2014).

<sup>362</sup> *Prosecutor v. Guus van K.*, The Hague Court of Appeals, Case No. 22-004337-06, Judgment (Appeal), March 10, 2008, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AGHSGR%3A2008%3ABC7373> (accessed September 9, 2014). See also “Profile: Guus van Kouwenhoven,” *BBC News Online*, March 10, 2008, <http://news.bbc.co.uk/2/hi/africa/5055442.stm> (accessed September 9, 2014).

<sup>363</sup> *Prosecutor v. Guus van K.*, Supreme Court of the Netherlands, Case No. 08/01322, Judgment (Trial), April 20, 2010, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3APHR%3A2010%3ABK8132>. See also Thijs Bouwknegt, “Supreme Court Orders Retrial of Liberian Arms Dealer,” *Radio Netherlands Worldwide*, April 20, 2010, <http://www.mw.nl/international-justice/article/dutch-supreme-court-upholds-van-anraat-judgement> (accessed September 9, 2014).

<sup>364</sup> The case will be tried before the court of appeals in Den Bosch, not in The Hague. Human Rights Watch interview with Dutch official, March 28, 2014.

<sup>365</sup> Hesam was head of the KhAD from 1983 until 1991 and later became deputy minister of the Ministry of State Security. Jalalzoy was head of the interrogation department in the KhAD from 1979 until 1992. *Prosecutor v. Hesamuddin H.*, The Hague District Court, Case No. 09/751004-04, Judgment (Trial), October 14, 2005, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3ARBSGR%3A2005%3AAV1163> (accessed September 9, 2014). *Prosecutor v. Habibullah J.*, The Hague District Court, Case No. 09/751004-04, Judgment (Trial), October 14, 2005, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3ARBSGR%3A2005%3AAV1489> (accessed September 9, 2014). Hesam and Jalalzoy appealed their convictions to the Court of Appeals in The Hague and the Supreme Court, but both appeals were unsuccessful. *Prosecutor v. Hesamuddin H.*, The Hague Court of Appeals, Case No. 22-006131-05, Judgment (Appeal), January 29, 2007, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AGHSGR%3A2007%3AAZ9365> (accessed September 9, 2014); *Prosecutor v. Habibullah J.*, The Hague Court of Appeals, Case No. 22-006132-05, Judgment (Appeal), January 29, 2007, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AGHSGR%3A2007%3AAZ9366> (accessed September 9, 2014); *Prosecutor v. Hesamuddin H. and Habibullah J.*, Supreme Court of the Netherlands, Case No. 07/10064, Judgment (Appeal), July 8, 2008, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AHR%3A2008%3ABG1477> (accessed September 9, 2014).

<sup>366</sup> Faqirzada was a senior officer in the KhAD in the 1980s. *Prosecutor v. Abdullah F.*, The Hague District Court, Case No. 09/750001-6, Judgment (Trial), June 25, 2007, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3ARBSGR%3A2007%3ABA9575> (accessed September 9, 2014). The prosecutor appealed the decision, but the acquittal was affirmed by the Court of Appeals in The Hague and the Supreme Court. *Prosecutor v. Abdullah F.*, The Hague Court of Appeals, Case No. 22-004581-07, Judgment (Appeal), July 16, 2009, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AGHSGR%3A2009%3ABK8758> (accessed September 9, 2014); *Prosecutor v. Abdullah F.*, Supreme Court of the Netherlands, Case No. 09/03090, Judgment (Appeal), November 8, 2011, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AHR%3A2011%3ABR6598> (accessed September 9, 2014).

He admitted to involvement in torture in his asylum application, leading him to be denied refugee status and subsequently to become the subject of a criminal investigation. The investigation uncovered death lists and transport orders naming nearly 5,000 victims who had been arrested, tortured, and killed by the Afghan Communist government in 1978 and 1979. Osman died in 2012 shortly before he could be arrested and formally charged, but the prosecutor's office decided to publish the documents on its website.<sup>367</sup> Their publication resulted in widespread demonstrations in Afghanistan and led former Afghan president Hamid Karzai to declare two days of national mourning.<sup>368</sup>

The only case tried under the International Crimes Act, which implemented the Rome Statute into Dutch law, was that of five Sri Lankans accused of heading illegal Tamil organizations in the Netherlands and raising funds to support the activities of the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka. In October 2011, a court found them guilty of extorting enforced payments and violating several Dutch laws relating to terrorism and money laundering.<sup>369</sup> The case is currently on appeal.

Dutch courts have tried and convicted two Rwandans for their involvement in the genocide. The first case, involving Joseph Mpambara, was significant in that Dutch courts did not have jurisdiction over the crime of genocide in 1994 at the time the case was prosecuted. Prosecutors attempted to obtain jurisdiction from the International Criminal Tribunal for Rwanda (ICTR), but a Dutch court ruled that only countries (and not international criminal

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<sup>367</sup> The prosecutor's office believed it had an obligation to make the names public in light of article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance. Certain persons named in the documents as having been responsible for the transfer and death of individual Afghans were in former president Karzai's cabinet and were candidates for the April 2014 presidential elections. "Connecting Victims and Witnesses of International Crimes to National Criminal Justice Authorities: Cooperation and Assistance to Support Investigations and Prosecutions in National Courts," Thijs Berger, Prosecutor, Dutch National Prosecutor's Office, contribution to panel discussion, Redress seminar, The Hague, October 28, 2013, agenda at <http://www.redress.org/downloads/final-agenda---redress---connecting-with-victims-and-witnesses-of-international-crimes.pdf> (accessed September 9, 2014).

<sup>368</sup> Rod Nordland, "Old Atrocities, Now Official, Galvanize Afghanistan," *New York Times*, September 30, 2013, [http://www.nytimes.com/2013/10/01/world/middleeast/release-of-decades-old-death-lists-stirs-anger-and-grief-in-afghanistan.html?\\_r=0](http://www.nytimes.com/2013/10/01/world/middleeast/release-of-decades-old-death-lists-stirs-anger-and-grief-in-afghanistan.html?_r=0) (accessed September 9, 2014); "Outrage in Afghanistan: Afghans demand justice for old atrocities," *CNN*, October 1, 2013, <http://edition.cnn.com/video/data/2.0/video/world/2013/10/02/afghanistan-atrocities-vassileva-pkg.cnn.html> (accessed September 9, 2014).

<sup>369</sup> *Prosecutor v. Thiruna F., Joseph M.J., Srilangan R., Ramachandran S., and Lingaratnam T.*, The Hague District Court, Case No. 09/748801-09, Judgment (Trial), October 21, 2011, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3ARBSGR%3A2011%3ABU7200> (accessed September 9, 2014). See also "Dutch Court Convicts Five for Tamil Tiger Fundraising," *BBC News Online*, October 21, 2011, <http://www.bbc.co.uk/news/world-europe-15408378> (accessed September 9, 2014); Mike Corder, "Court Convicts 5 Tamils of Fundraising for Tigers," *The Guardian*, October 21, 2011, <http://www.theguardian.com/world/feedarticle/9907483> (accessed September 10, 2014).



tribunals) can transfer jurisdiction.<sup>370</sup> Therefore, Mpambara was prosecuted for torture and war crimes, and initially was found guilty only of torture.<sup>371</sup> He was sentenced to 20 years' imprisonment by the trial court, but in July 2011, the court of appeals found him guilty of war crimes too and increased his sentence to life imprisonment.<sup>372</sup> Dutch law was subsequently amended to extend temporal jurisdiction for the crime of genocide to October 24, 1970, the date upon which the Netherlands ratified the Genocide Convention.

The *Mpambara* case is also significant in that it is the only universal jurisdiction case in the Netherlands to have involved allegations of sexual violence. Mpambara was accused of having personally committed several rapes, but all of the victims died during the genocide. Since there was only a single indirect witness for each rape, the court found insufficient evidence to convict him of these crimes.<sup>373</sup>

The second case involved Yvonne Ntacyobatabara Basebya whose name came to the attention of Dutch authorities during the Mpambara investigation. She had come to the Netherlands as a family member of a recognized refugee and she herself obtained Dutch citizenship in 2004. Basebya was charged with three counts of genocide and one count of war crimes but, in March 2013, the court convicted her only of incitement to genocide and sentenced her to just under seven years' imprisonment.<sup>374</sup>

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<sup>370</sup> *Prosecutor v. Joseph M.*, Supreme Court of the Netherlands, Case No. 09-750007-07, Judgment (Appeal), October 21, 2008, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2008:BD6568> (September 9, 2014). See also "Summary Judgment on Jurisdiction in Genocide Case in Rwanda," Supreme Court of the Netherlands, <http://www.rechtspraak.nl/Organisatie/Hoge-Raad/Supreme-court/Summaries-of-some-important-rulings-of-the-Supreme-Court/Pages/Summary-judgment-on-jurisdiction-in-genocide-case-Rwanda.aspx> (accessed September 9, 2014).

<sup>371</sup> *Prosecutor v. Joseph M.*, The Hague District Court, Case No. 09/750009-06, Judgment (Trial), March 23, 2009, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:ARBSGR:2009:ABK0520> (accessed September 9, 2014).

<sup>372</sup> *Prosecutor v. Joseph M.*, The Hague Court of Appeals, Case No. 22-002613-09, Judgment (Appeal), July 7, 2011, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:AGHSGR:2011:ABR0686> (accessed September 9, 2014). See also Svebor Kranjc, "Dutch Court Convicts Rwandan of War Crimes," *Reuters*, July 7, 2011, <http://af.reuters.com/article/idAFTRE7665YH20110707> (accessed September 9, 2014). Mpambara appealed the decision to the Supreme Court, but the appeal was unsuccessful. *Prosecutor v. Joseph M.*, Supreme Court of the Netherlands, Case No. 12/04592, Judgment (Appeal), November 26, 2013, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:AHR:2013:A1420> (accessed September 9, 2014).

<sup>373</sup> Dutch law requires corroboration to prove a crime. *Prosecutor v. Joseph M.*, The Hague District Court, Case No. 09/750009-06, Judgment (Trial), March 23, 2009, ch. 11, para. 11; ch. 12, para. 6; ch. 13, paras. 19-20. See also Human Rights Watch interview with Dutch official, May 21, 2014.

<sup>374</sup> Seven years' imprisonment was the maximum punishment for incitement to genocide in Rwanda at the time. The crime now carries a maximum penalty of 30 years in Rwanda, but Dutch courts had to use the legal framework at the time of the alleged crime for sentencing purposes. *Prosecutor v. Yvonne N.*, The Hague District Court, Case No. 09/748004-09, Judgment (Trial), March 1, 2013, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:ARBDHA:2013:A8710> (accessed September 9, 2014).

In May 2013, the prosecutor's office dropped charges against the Dutch company Riwal and its managing directors following an investigation into whether the company had been complicit in war crimes by having provided machinery used in the construction of the Israeli wall and settlements in the West Bank.<sup>375</sup> The prosecutor's office justified the dismissal on the grounds that Riwal's contribution to the alleged crimes was limited and that Riwal had ceased all involvement in Israel as a result of the case.<sup>376</sup> Four other Dutch companies have withdrawn from similar projects in the West Bank as a result of the Riwal investigation.<sup>377</sup>

Five individuals are currently awaiting extradition on charges of grave international crimes.<sup>378</sup> Two Rwandans, Jean-Claude Iyamuremye and Jean-Baptiste Mugimba, were being investigated by Dutch authorities when Rwanda sought their extradition. In June 2014, the Supreme Court ruled that Iyamuremye could be extradited so it now falls to the State Secretary of Security and Justice to decide whether he should be sent back to Rwanda to face trial there.<sup>379</sup> His extradition would likely lead to other Rwandan genocide suspects currently under investigation in the Netherlands being returned to Rwanda.

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<sup>375</sup> Jurisdiction for the investigation was based on the ICA.

<sup>376</sup> Public Prosecutor, "Q&A concerning investigation into involvement in construction of Israeli barrier and settlement," undated, <http://www.om.nl/onderwerpen/internationale/map/concerning> (accessed September 9, 2014).

<sup>377</sup> Human Rights Watch interview with Dutch official, March 28, 2014.

<sup>378</sup> Human Rights Watch email correspondence with Dutch official, September 8, 2014.

<sup>379</sup> *Prosecutor v. Jean-Claude I.*, The Hague Supreme Court, Case No. 14/00090, Judgment (Appeal), June 17, 2014, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2014:1441> (accessed September 9, 2014). See also "Dutch Supreme Court allows extradition of Genocide suspect to Rwanda," The Public Prosecution Service press release, June 20, 2014, <http://www.om.nl/onderwerpen/internationale/uitspraken-judgments/map/dutch-supreme-court/> (accessed September 9, 2014).

## Annex II: Cases in Germany

In 1997, Germany became the first country to convict a person for genocide on the basis of universal jurisdiction: Bosnian Serb Nikola Jorgić.<sup>380</sup> Police investigated over 150 other individuals for their involvement in the former Yugoslav conflict, but only four persons were ultimately prosecuted before German courts.<sup>381</sup>

The specialized war crimes units have brought two cases to trial. The first completed trial, that of Onesphore Rwabukombe, was prosecuted on the basis of the ordinary criminal code rather than the Code of Crimes against International Law (CCAIL), which implemented the Rome Statute into German law, since the crimes predated the CCAIL's enactment in 2002 and were therefore barred by the principle of non-retroactivity. In February 2014, the Higher Regional Court in Frankfurt found Rwabukombe guilty of complicity in genocide and sentenced him to 14 years' imprisonment.<sup>382</sup> An appeal is currently pending.<sup>383</sup>

The second case, involving Ignace Murwanashyaka and Straton Musoni, is the first case to be prosecuted on the basis of the CCAIL. It began on May 4, 2011 and has been ongoing in Stuttgart for more than three years. It is expected to finish by the end of 2014 or early 2015.<sup>384</sup>

Another case involving three other suspected FDLR members is ongoing in Dusseldorf, but the charges only relate to membership in a criminal or terrorist organization and not grave

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<sup>380</sup> Jorgić made several appeals of his conviction, including to the European Court of Human Rights, but all were unsuccessful. See Amnesty International, "Germany: End Impunity through Universal Jurisdiction," October 1, 2008, <http://www.amnesty.org/en/library/asset/EUR23/003/2008/en/73077b6c-9c5b-11dd-b0c5-35f205e84deo/eur230032008en.pdf>, pp. 93-97.

<sup>381</sup> These included Nikola Jorgić, Novislav Djalić, Maksim Sokolović, and Djuradj Kušljčić. For information on these cases, see Amnesty International, "Germany: End Impunity through Universal Jurisdiction," October 1, 2008, pp. 91-98.

<sup>382</sup> Hilke Fischer, "14 Year Jail Term in Germany's First Rwandan Genocide Trial," *Deutsche Welle*.

<sup>383</sup> Human Rights Watch email correspondence with German official, June 18, 2014; Human Rights Watch email correspondence with German lawyer, June 16, 2014.

<sup>384</sup> The European Center for Constitutional and Human Rights (ECCHR) has produced several status reports on the trial. See ECCHR, "[First] Status Report February 2012: FDLR-Leadership Trial in Stuttgart," February 2012, [http://www.ecchr.de/kongo-war-crimes-trial.html?file=tl\\_files/Dokumente/Gender/FDLR%2C%20Status%20report%202012%2C%202012-02.pdf](http://www.ecchr.de/kongo-war-crimes-trial.html?file=tl_files/Dokumente/Gender/FDLR%2C%20Status%20report%202012%2C%202012-02.pdf) (accessed September 9, 2014); ECCHR, "[Second] Status Report November 2012: FDLR-Leadership Trial in Stuttgart," November 2012, [http://www.ecchr.de/kongo-war-crimes-trial.html?file=tl\\_files/Dokumente/Gender/FDLR,%20Second%20status%20report%202012-11.pdf](http://www.ecchr.de/kongo-war-crimes-trial.html?file=tl_files/Dokumente/Gender/FDLR,%20Second%20status%20report%202012-11.pdf) (accessed September 9, 2014, 2014); ECCHR, "[Third] Status Report February 2014: FDLR-Leadership Trial in Stuttgart."

international crimes.<sup>385</sup> If the FDLR is found to be a terrorist group, a number of other persons living in Germany may face similar charges.<sup>386</sup>

Structural investigations are also ongoing in connection with Libya, Syria, and several other countries which are not publicly known. Criminal prosecutions targeting specific individuals from these countries are not expected in the near future but may emerge.

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<sup>385</sup> The role of the three accused persons in the actual commission of crimes is said to be too tenuous to have sustained charges of grave international crimes. Human Rights Watch interview with German officials, March 18, 2014.

<sup>386</sup> Human Rights Watch telephone interview with German lawyer, June 5, 2014.

## Annex III: Cases in France

There have been three grave international crimes cases tried before French courts on the basis of universal jurisdiction, involving crimes in Mauritania, Tunisia, and Rwanda. The specialized war crimes units are currently handling more than three dozen judicial investigations, the vast majority of which relate to the Rwandan genocide, and several trials are on the horizon in the next few years.

Ely Ould Dah, a captain in the Mauritanian intelligence service, was the first person to be tried on the basis of universal jurisdiction.<sup>387</sup> In June 1999, two victims with the assistance of NGOs filed a complaint against him alleging torture in Mauritania between 1990 and 1991.<sup>388</sup> In France on a military training course at the time, Ould Dah was arrested but later released and placed under judicial supervision. In April 2000, he fled to Mauritania, but the case continued in his absence. Five years later, on July 1, 2005, a court convicted him of all charges and sentenced him to 10 years' imprisonment.<sup>389</sup> In March 2009, the European Court of Human Rights held that France had not violated the prohibition on retroactivity and that the Mauritanian amnesty law did not bar his prosecution before French courts.<sup>390</sup>

The second case was that of Khaled Ben Saïd, a former police chief in Djendouba, Tunisia, who went on to become a diplomat and was posted to the Tunisian consulate in Strasbourg. In May 2001, two NGOs assisted a victim to file a complaint against him for torture.<sup>391</sup> He left

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<sup>387</sup> The Supreme Court found that a Mauritanian amnesty law did not prevent his prosecution in France. *Prosecutor v. Ely O*, Supreme Court, Criminal Chamber, Case No. 02-85379, Judgment (Appeal), October 23, 2002, <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007070167> (accessed September 9, 2014).

<sup>388</sup> The case was initiated by the International Federation for Human Rights (FIDH) and its French member organization, the Human Rights League (LDH). For more information on the case, see FIDH, "Mauritanie: Affaire Ely Ould Dah – Ely Ould Dah Condamné," November 2005, [http://www.fidh.org/IMG/pdf/GAJ\\_Ely\\_Ould\\_Dah\\_nov2005\\_OK.pdf/](http://www.fidh.org/IMG/pdf/GAJ_Ely_Ould_Dah_nov2005_OK.pdf/) (accessed September 9, 2014). See also *International Crimes Database*, "Ely Ould Dah," undated, <http://www.internationalcrimesdatabase.org/Case/998> (accessed September 9, 2014).

<sup>389</sup> "Ely Ould Dah Convicted After Six Years of Proceedings. Our Perseverance Paid Off!" FIDH news release, July 2, 2005, <http://www.fidh.org/en/africa/Mauritania/Ely-Ould-Dah-Case/Ely-Ould-Dah-convicted-after-six> (accessed September 9, 2014). See also "Un Tribunal Français Condamne un Officier Mauritanien à 10 Ans de Réclusion," *Le Monde*, July 2, 2005, [http://www.lemonde.fr/afrique/article/2005/07/02/un-tribunal-francais-condamne-un-officier-mauritanien-a-10-ans-de-reclusion\\_668634\\_3212.html](http://www.lemonde.fr/afrique/article/2005/07/02/un-tribunal-francais-condamne-un-officier-mauritanien-a-10-ans-de-reclusion_668634_3212.html) (accessed September 9, 2014).

<sup>390</sup> It held that the prohibition against torture is a peremptory norm under international law and provided France with a legal basis to prosecute him. *Ely Ould Dah v. France*, European Court of Human Rights, Case No. 13113/03, Decision, March 17, 2009, [http://competenceuniverselle.files.wordpress.com/2011/07/ould\\_dah\\_c-france.pdf](http://competenceuniverselle.files.wordpress.com/2011/07/ould_dah_c-france.pdf) (accessed September 9, 2014).

<sup>391</sup> This case was also initiated by the FIDH and the LDH. For more information on the case, see FIDH, "The Conviction of Khaled Ben Saïd: A Victory against Impunity in Tunisia," November 2010, <http://www.fidh.org/IMG/pdf/Bensaid55oang2010.pdf/> (accessed September 9, 2014).

France after the opening of a judicial investigation, but the case continued in his absence. In December 2008, a French court convicted him of complicity in torture and sentenced him to eight years' imprisonment.<sup>392</sup> The prosecutor in the case had actually requested the judicial investigation be closed without a trial, and later even took the extraordinary step of appealing the conviction—the first and only time that has happened in France.<sup>393</sup> In 2010, a court of appeals rejected the prosecution's request, affirmed the conviction, and increased Ben Saïd's prison sentence to 12 years.<sup>394</sup>

More recently, on March 14, 2014, a French court convicted Pascal Simbikangwa, a former senior intelligence chief from Rwanda, of genocide and complicity in crimes against humanity and sentenced him to 25 years in prison.<sup>395</sup> It was the first case brought to trial by the new war crimes unit and the first universal jurisdiction case where the accused was present and played an active role in the trial. It was also the first genocide trial to be completed in France. The *Simbikangwa* trial marked a significant moment as France had backed the former Habyarimana government in Rwanda prior to 1994 and supported and trained some of the forces which went on to commit genocide.<sup>396</sup> It was also noteworthy in that the prosecutor brought charges for complicity in genocide but later asked to have the mode of liability re-characterized to direct perpetration, a more serious form of responsibility.<sup>397</sup>

There are more than two dozen other Rwandan cases pending in France,<sup>398</sup> and it is expected that their trials will take place in France due to a ruling by the country's highest

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<sup>392</sup> "French Court Condemns Tunisian for Torture," *Radio France Internationale*, December 16, 2008, [http://www1.rfi.fr/actuen/articles/108/article\\_2429.asp](http://www1.rfi.fr/actuen/articles/108/article_2429.asp) (accessed September 9, 2014).

<sup>393</sup> Human Rights Watch telephone interview with NGO, November 27, 2013.

<sup>394</sup> "Tunisian Diplomat and Torturer Sentenced in Appeal Trial," FIDH news release, September 10, 2010, <http://www.fidh.org/en/north-africa-middle-east/tunisia/Ben-Said-Case/Tunisian-diplomat-and-torturer> (accessed September 9, 2014).

<sup>395</sup> *Prosecutor v. Pascal S.*, Paris Cour d'Assises, Case No. 13/0033, Judgment (Trial), March 14, 2014, <http://proces-genocide-rwanda.fr/wp-content/uploads/2014/04/scano05.pdf> (accessed September 9, 2014) and Motivation of Judgment, March 14, 2014, <http://proces-genocide-rwanda.fr/wp-content/uploads/2014/03/Motivation-Simbikangwa.pdf> (accessed September 9, 2014). See also "Rwanda Ex-Spy Chief Pascal Simbikangwa Jailed in France," *BBC News Online*, March 14, 2014, <http://www.bbc.com/news/world-africa-26587816> (accessed September 9, 2014).

<sup>396</sup> Human Rights Watch, *Rwanda: Justice After the Genocide*, March 28, 2014, <http://www.hrw.org/node/124218>.

<sup>397</sup> The prosecutor requested the heightened mode of liability on the basis of the definition of genocide in the French Penal Code, which states that anyone who "commits or causes the commission" ("de commettre ou de faire commettre") of one of the acts constituting genocide may be held responsible as a direct perpetrator. Code Pénal ("French Penal Code"), entered into force on March 1, 1994, art. 211-1, <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719> (accessed September 8, 2014), official English translation, 2005, [http://www.legifrance.gouv.fr/content/download/1957/13715/version/4/file/Code\\_33.pdf](http://www.legifrance.gouv.fr/content/download/1957/13715/version/4/file/Code_33.pdf) (accessed September 8, 2014).

<sup>398</sup> Suspects include Tito Barahira, Felicien Barigira, Manassé Bigwenzare, Marcel Bivugabagabo, Laurent Bucyibaruta, Paul Camy, Joseph Habyarimana, Agathe Kanziga Habyarimana, Cyprien Kayumba, Isaac Kamali, Claver Kamana, Enoch Kanyondo,

court that extradition to Rwanda would violate the principle of non-retroactive application of criminal laws.<sup>399</sup> Octavien Ngenzi and Tita Barahirwa, both former mayors from eastern Rwanda, are the next suspects to be tried before French courts—likely in 2015.<sup>400</sup>

Two other Rwandan cases were transferred to France from the International Criminal Tribunal for Rwanda (ICTR) in November 2007: that of Catholic priest Wenceslas Munyeshyaka<sup>401</sup> and that of former high-ranking local official (“préfet”) Laurent Bucyibaruta.<sup>402</sup> Both cases are still being investigated by French authorities, although the Munyeshyaka case is said to be near completion.<sup>403</sup> Victims had submitted a complaint against Munyeshyaka with French judicial authorities as far back as 1995 and later took the matter before the European Court of Human Rights after French authorities failed to make progress in investigating and prosecuting him. In June 2004, the European Court of Human Rights criticized France for the slow pace of proceedings in violation of articles 6 and 13 of the European Convention on Human Rights.<sup>404</sup>

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Callixte Mbarushimana, Stanislas Mnonampeka, Claude Muhayimana, Sosthène Munyemana, Wenceslas Munyeshyaka, Octavien Ngenzi, Hyacinthe Rafiki Nsengiyumva, Alphonse Ntilivamunda, Vénuste Nyombayire, Eugène Rwamucyo, Laurent Serubuga, Pierre Tegera, and Charles Twagira.

<sup>399</sup> There was no legal basis for prosecuting genocide and crimes against humanity in Rwanda in 1994, at the time of the genocide. *Prosecutor v. Laurent S.* (Decision no. 808), Supreme Court, Criminal Chamber, Case No. 13-86.631, February 26, 2014, [http://www.courdecassation.fr/jurisprudence\\_2/chambre\\_criminelle\\_578/808\\_26\\_28552.html](http://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/808_26_28552.html) (accessed September 9, 2014); *Prosecutor v. Innocent M.* (Decision no. 809), Supreme Court, Criminal Chamber, Case No. 13-87.846, February 26, 2014, <http://www.juritravail.com/jurisprudence/JURITEXT000028669655.html> (accessed September 9, 2014); *Prosecutor v. Claude M.* (Decision no. 810), Supreme Court, Criminal Chamber, Case No. 13-87.888, February 26, 2014, [http://www.courdecassation.fr/jurisprudence\\_2/chambre\\_criminelle\\_578/810\\_26\\_28535.html](http://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/810_26_28535.html) (accessed September 9, 2014). See also “Rwanda Genocide: France Blocks Extradition,” *BBC News Online*, February 26, 2014, <http://www.bbc.com/news/world-africa-26356286> (accessed September 9, 2014); “Genocide Rwandais: La Justice Française Bloque Trois Nouvelles Extraditions,” *Le Monde*, February 26, 2014, [http://www.lemonde.fr/afrique/article/2014/02/26/genocide-rwandais-la-justice-francaise-bloque-trois-nouvelles-extraditions\\_4373816\\_3212.html](http://www.lemonde.fr/afrique/article/2014/02/26/genocide-rwandais-la-justice-francaise-bloque-trois-nouvelles-extraditions_4373816_3212.html) (accessed September 9, 2014).

<sup>400</sup> In May 2014, prosecutors in the specialized war crimes unit concluded their investigation into the two accused and asked the court to send their cases to trial. The accused, both of whom were mayors in the town of Kabarondo before and during the genocide, are in detention. “Two to Face Trial in France over Rwandan Genocide,” *Radio France Internationale*, May 31, 2014, <http://www.english.rfi.fr/afrique/20140531-two-face-trial-france-over-rwandan-genocide> (accessed September 9, 2014).

<sup>401</sup> UN Mechanism for the International Criminal Tribunals (UNMICT), Fifth Monitoring Report, Case No. MICT-13-45, July 25, 2014, <http://www.unmict.org/sites/default/files/casedocuments/mict-13-45/reports/en/140725.pdf> (accessed September 9, 2014).

<sup>402</sup> UN Mechanism for the International Criminal Tribunals (UNMICT), Fifth Monitoring Report, Case No. MICT-13-44, July 25, 2014, <http://www.unmict.org/sites/default/files/casedocuments/mict-13-44/reports/en/140725.pdf> (accessed September 9, 2014).

<sup>403</sup> French authorities arrested Munyeshyaka and Bucyibaruta in July 2007 on the basis of ICTR indictments issued one month earlier. In September 2007, both men were released and placed under court supervision pending the outcome of judicial investigations against them. See also “French Inquiry into Suspected Genocidal Priest ‘in its Final Phase,’” *Hirondelle News Agency*, August 19, 2014, <http://www.hirondellenews.com/ict-rwanda/406-collaboration-with-states/collaboration-with-states-france/34777-190814-rwandafrance-french-inquiry-into-suspected-genocidal-priest-in-its-final-phase> (accessed September 11, 2014).

<sup>404</sup> *Mutumura v. France*, European Court of Human Rights, Case No. 46621/99, Decision, June 8, 2004, <http://www.asser.nl/upload/documents/20120612T111655-Munyeshyaka%20-%20Judgement%20-%208-9-2004%20-%20European%20Court%20Human%20Rights.pdf> (accessed September 9, 2014).

Former Rwandan rebel leader Callixte Mbarushimana will also face trial before French courts for his role in the 1994 genocide. Mbarushimana was indicted by the International Criminal Court (ICC) for alleged crimes committed in the eastern part of the Democratic Republic of Congo, but his case was dismissed in December 2011 due to insufficient evidence.<sup>405</sup> Mbarushimana had been arrested in France in October 2010 on the basis of the ICC arrest warrant and was later handed over to the ICC.<sup>406</sup> However, an unrelated judicial investigation had already been opened by French judicial authorities over his alleged role in the Rwandan genocide and resulted in an indictment just over a month prior to his transfer to the ICC.<sup>407</sup> Following the dismissal of the ICC case, Mbarushimana returned to France and will now face trial there although no court date has been set.

Another imminent trial may be that of two Algerian brothers, Hocine and Abdelkader Mohamed, who are alleged to have been members of a local militia in Algeria that killed and disappeared hundreds of persons between 1994 and 1998.<sup>408</sup> A formal judicial investigation on charges of torture was opened by an investigative judge in the southern French town of Nîmes in 2004.<sup>409</sup> Ten years later, in April 2014, local prosecutors requested that the case be sent to trial.<sup>410</sup> It is now up to the investigative judge to decide whether adequate evidence exists to try them before French courts. It is one of the few cases that has not been transferred to the specialized war crimes unit in Paris as the investigation was already underway by the time the specialized war crimes unit in Paris was created.

A case known as the Disappeared of the Beach (“*Disparus du Beach*”) case began in 2001 after a group of NGOs and victims filed a complaint against five high-ranking government

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<sup>405</sup> *Prosecutor v. Callixte Mbarushimana*, International Criminal Court, Case No. ICC-01/04-01/10, December 16, 2011, Decision on Confirmation of Charges, <http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf> (accessed September 9, 2014). See also “ICC Frees Rwandan Rebel Callixte Mbarushimana,” *BBC News Online*, December 23, 2011, <http://www.bbc.com/news/world-africa-16319059> (accessed September 9, 2014).

<sup>406</sup> “France: Rwandan Rebel’s Arrest Sends Strong Message,” Human Rights Watch news release, October 11, 2010, <http://www.hrw.org/news/2010/10/11/france-rwanda-rebel-s-arrest-sends-strong-message>.

<sup>407</sup> “Génocide Rwandais: M. Mbarushimana mis en examen en France,” *Le Monde*, December 22, 2010, [http://www.lemonde.fr/afrique/article/2010/12/22/genocide-rwandais-m-mbarushimana-mis-en-examen-en-france\\_1456827\\_3212.html](http://www.lemonde.fr/afrique/article/2010/12/22/genocide-rwandais-m-mbarushimana-mis-en-examen-en-france_1456827_3212.html) (accessed September 9, 2014).

<sup>408</sup> The case was initiated by the FIDH.

<sup>409</sup> “Two Algerian Torturers Indicted by French Justice: A Hope for the Victims in the Fight against Impunity in Algeria,” FIDH news release, March 31, 2004, <http://www.fidh.org/en/north-africa-middle-east/algeria/Two-Algerian-torturers-indicted-by> (accessed September 9, 2014).

<sup>410</sup> It is now for the investigative judges to decide whether to send the case to trial or dismiss the case. “La Justice Exhume les Charniers de la Guerre Civile Algérienne,” *Le Parisien*, April 16, 2014, <http://www.leparisien.fr/international/la-justice-exhume-les-charniers-de-la-guerre-civile-algerienne-16-04-2014-3772937.php> (accessed September 9, 2014).



officials from the Republic of Congo (Brazzaville), including the president, alleging their involvement in the disappearance of hundreds of refugees returning to Congo in May 1999.<sup>411</sup> The case has seen a number of legal twists and turns, including a case before the International Court of Justice.<sup>412</sup> Two Congolese officials were finally indicted in 2004 but one of the two accused—former police chief Jean-François Ndengue—had his case dismissed on the grounds that he had immunity from prosecution.<sup>413</sup> The remaining accused, inspector-general of the armed forces Norbert Dabira, is still in legal proceedings to challenge whether he can be tried before French courts.<sup>414</sup>

Several complaints have been filed in France against the head of the Moroccan intelligence service, Abdellatif Hammouchi, for complicity in torture.<sup>415</sup> Two of the complaints were filed

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<sup>411</sup> The case was initiated by the FIDH and two member organizations, the LDH and the Congolese Observatory of Human Rights (OCDH). The accused included Denis Sassou Nguesso, president of the Republic of the Congo; General Pierre Oba, minister of the interior; General Norbert Dabira, inspector-general of the Congolese armed forces; Jean-François Ndengue, head of the Congolese police; and General Blaise Adoua, commander of the presidential guard. For more information on the case, see FIDH, “République du Congo: Affaire des ‘Disparus du Beach’ de Brazzaville,” November 2007, <http://www.fidh.org/IMG/pdf/GAIRepCongoBeach40ofr2007.pdf> (accessed September 9, 2014).

<sup>412</sup> The Republic of Congo filed a case against France at the International Court of Justice (ICJ) in December 2002, alleging that France had violated the Congo’s sovereignty by initiating criminal proceedings and had failed to recognize the immunity of Congo’s president in violation of customary international law. The ICJ rejected Congo’s request that the case be suspended. *Case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, International Court of Justice, Summary of the Order of 17 June 2003, <http://www.icj-cij.org/docket/files/129/8206.pdf> (accessed September 9, 2014). See also “The Beach Massacre before the International Court of Justice,” FIDH news release, June 17, 2003, <http://www.fidh.org/en/africa/Congo,296/The-Disappeared-of-the-Beach-Case/The-Beach-Massacre-before-the> (accessed September 9, 2014).

<sup>413</sup> Ndengue was indicted and temporarily detained in April 2004 while visiting France. It was disputed whether he was visiting France in a private capacity at the time. The Ministry of Foreign Affairs had no advance notice of the visit, suggesting Ndengue was there in a personal capacity, but it later asserted that he was there on official visit. The national prosecutor’s office appealed the decision placing him in detention and swiftly secured a court order to release him on the grounds that he was on an official visit and had immunity from prosecution. He immediately left the country. International Federation for Human Rights (FIDH), “Release of Jean-François Ndengue – Paris: Complicity in Crimes against Humanity?” April 7, 2004, <http://www.fidh.org/en/africa/congo/The-Disappeared-of-the-Beach-Case/Release-of-Jean-Francois-Ndengue>; FIDH, “France/Compétence Universelle: État des Lieux de la Mise en Œuvre du Principe de la Compétence Universelle,” October 2005, [http://www.fidh.org/IMG/pdf/gaj\\_compuniverselle2005f.pdf](http://www.fidh.org/IMG/pdf/gaj_compuniverselle2005f.pdf), pp. 14-15. See also *In the Appeal of Norbert Dabira et al.*, Supreme Court (Criminal Chamber), Case No. W 07-86.412 FS-D, Judgment, April 9, 2008, [http://www.fidh.org/IMG/pdf/ArretCCBeachgavriolo8\\_exp.pdf](http://www.fidh.org/IMG/pdf/ArretCCBeachgavriolo8_exp.pdf) (accessed September 9, 2014).

<sup>414</sup> In July 2014, the Paris Court of Appeals heard arguments on whether Dabira had already been prosecuted and acquitted of the same crimes in a domestic trial in Brazzaville in 2005. See “Affaire des Disparus du Beach de Brazzaville: La défense de Norbert Dabira invoque à Nouveau le Procès Mascarade de Brazzaville de 2005 pour Tenter d’Échapper à la Justice Française,” FIDH news release, July 2, 2014, <http://www.fidh.org/fr/afrique/congo/Affaire-des-disparus-du-Beach,689/15694-affaire-des-disparus-du-beach-de-brazzaville-la-defense-de-norbert-dabira> (accessed September 9, 2014); Human Rights Watch email correspondence with French lawyer, July 15, 2014.

<sup>415</sup> Three of the complaints were filed by the organization ACAT, with the first two complaints filed before investigative judges in May 2013 and February 2014. When ACAT learned of Hammouchi’s presence in France, they filed a third complaint with prosecutors in the specialized war crimes unit on February 20, 2014 (the same day that their second complaint had been filed with investigative judges). A fourth complaint was filed by another torture victim, with the assistance of two French lawyers, on February 21, 2014. Human Rights Watch interview with French officials, May 13, 2014; Human Rights Watch email

in February 2014 while Hammouchi was supposedly in France on business, although his presence on French soil was never confirmed by French judicial authorities.<sup>416</sup> The case sparked a diplomatic row between France and Morocco, with Morocco threatening to suspend broader judicial cooperation with France.<sup>417</sup>

Two noteworthy cases are pending in France relating to corporate responsibility for grave international crimes committed abroad. NGOs filed complaints against the French companies Amesys and Qosmos and their management alleging that they were complicit in torture for having sold surveillance equipment to the Libyan and Syrian regimes that was used to monitor government opponents in both countries, leading to arrests and torture in detention.<sup>418</sup> Both cases have potentially far-reaching implications. Prosecutors opposed the opening of a judicial investigation in the *Amesys* case, but investigative judges found adequate evidence to support the opening of an investigation. The prosecutor's office appealed that decision, but the Paris court of appeals affirmed the investigative judges' decision to open an investigation, which has paved the way for the case to proceed.<sup>419</sup>

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correspondence with French lawyer, July 21, 2014. See also H  l  ne Legeay, "L'ACAT au Coeur de la Crise Diplomatique Franco-Marocaine," ACAT news release, June 30, 2014, <http://www.acatfrance.fr/actualite/lacat-au-coeur-de-la-crise-diplomatique-franco-marocaine> (accessed September 9, 2014).

<sup>416</sup> Human Rights Watch interview with French officials, May 13, 2014; Human Rights Watch email correspondence with French lawyer, July 21, 2014.

<sup>417</sup> "Morocco-France row over Hammouchi torture claims," *BBC News Online*. See also "Une ONG demande l'audition du patron du contre-espionnage marocain en visite en France," *Huffington Post Quebec*, February 20, 2014, [http://quebec.huffingtonpost.ca/2014/02/20/une-ong-demande-lauditio\\_n\\_4825660.html?utm\\_hp\\_ref=canada-quebec&ir=Canada+Quebec](http://quebec.huffingtonpost.ca/2014/02/20/une-ong-demande-lauditio_n_4825660.html?utm_hp_ref=canada-quebec&ir=Canada+Quebec) (accessed September 9, 2014).

<sup>418</sup> Both cases were brought by the FIDH and the LDH. The cases could have been initiated on the basis of active personality jurisdiction, which is to say when the alleged perpetrator is a French national. However, French law restricts accomplice liability for French nationals of crimes committed abroad to instances where the crime is punishable by French law and the law of the territorial state *and* the existence of the crime has been established by a definitive judicial decision in the territorial state. Since no criminal prosecutions for these crimes have taken place in Libya or Syria, the NGOs filing the cases opted to file them on the basis of universal jurisdiction. French Penal Code, art. 113-5. For information on the *Qosmos* case, see "FIDH and LDH Ask French Judiciary to Investigate on the Involvement of French Companies in Syria," FIDH news release, July 25, 2012, <http://www.fidh.org/en/north-africa-middle-east/syria/FIDH-and-LDH-ask-French-judicial> (accessed September 9, 2014); "France: Opening of a Judicial Investigation Targeting Qosmos for Complicity in Acts of Torture in Syria," FIDH news release, April 11, 2014, <http://www.fidh.org/en/europe/france/15116-france-opening-of-a-judicial-investigation-targeting-qosmos-for-complicity> (accessed September 9, 2014). For information on the *Amesys* case, see "FIDH and LDH File a Complaint Concerning the Responsibility of the Company Amesys in Relation to Acts of Torture," FIDH news release, October 19, 2011, <http://www.fidh.org/en/north-africa-middle-east/libya/FIDH-and-LDH-file-a-complaint> (accessed September 9, 2014). See also "French Firm Amesys Probed Over 'Complicity in Torture,'" *France 24 Online*, May 22, 2012, <http://www.france24.com/en/20120522-libya-france-gaddafi-amesys-war-crimes-technology-firm-court-justice/> (accessed September 9, 2014).

<sup>419</sup> "Amesys Case: The Investigation Chamber Green Lights the Investigative Proceedings on the Sale of Surveillance Equipment by Amesys to the Khadafi Regime," FIDH news release, January 15, 2013, <http://www.fidh.org/en/north-africa-middle-east/libya/Amesys-Case-The-Investigation-12752> (accessed September 9, 2014); Human Rights Watch interview with French lawyer, May 14, 2014.

# THE LONG ARM OF JUSTICE

## Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands

Justice is often elusive in countries where genocide, crimes against humanity, war crimes, and torture have occurred, and so national courts in other countries are increasingly stepping in to ensure accountability. “Universal jurisdiction” laws empower prosecutors to pursue individuals believed to be responsible for certain grave international crimes even if neither the victims nor the accused are nationals of the country where trials occur. Such prosecutions are an essential tool to secure justice for victims who have nowhere else to turn and they help ensure that other countries do not become safe havens for war criminals.

Investigating and prosecuting universal jurisdiction crimes is a formidable task. Important evidence is located abroad and may be scattered across several countries. Finding victims and witnesses—many of whom still live in the country where the crimes occurred—can be particularly difficult, especially where national authorities in that country are implicated in the crimes.

A growing number of states have responded to these challenges by establishing specialized war crimes units composed of police, prosecutors, and immigration officials. These units facilitate development of necessary experience and expertise, help coordinate efforts across different agencies, and are often accompanied by increased political will and resources. They are a driving force for successful universal jurisdiction prosecutions.

*The Long Arm of Justice* examines the inner workings of war crimes units in France, Germany, and the Netherlands and highlights key lessons learned. Based on extensive research in each country, the report evaluates the units’ successes and continued challenges and identifies areas where improvements are needed. Underlining the critical role that national war crimes units play in fighting impunity through universal jurisdiction, it urges other governments to establish similar units and calls for increased international cooperation among them to extend the reach of justice.



*Protesters, with photos of victims killed in chemical attacks in Iraq, gather outside the district courthouse in The Hague on November 21, 2005, as the trial opens against Dutch businessman Frans van Anraat. The court convicted Van Anraat of complicity in war crimes for having supplied Saddam Hussein with chemicals that were used in attacks on the Kurds in the late 1980s, and sentenced him to 17 years in prison.*

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