



RUSSIAN IRREGULAR FORCES: PURSUING ACCOUNTABILITY

July 2024



WAR CRIMES
RESEARCH OFFICE



ACKNOWLEDGEMENTS

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	3
DISCUSSION	8
I. Tier One Countries	8
A. Universal Jurisdiction and Other Forms of Extraterritorial Jurisdiction Over International Crimes	8
i. Germany	9
ii. Sweden	10
iii. Finland	13
iv. France	14
v. Norway	18
vi. The Netherlands	20
B. Crimes Subject to Universal Jurisdiction	22
i. Contextual Elements	22
ii. Enumerated Acts as Crimes Against Humanity	24
iii. Enumerated Acts as War Crimes	26
C. Modes of Liability	28
i. Individual Liability	29
ii. Corporate Liability	39
D. Rules of Criminal Procedure and Evidence	42
i. Trials in Absentia	42
ii. Statute of Limitations	43
iii. General Approach to Evidence	44
iii. Illegally Obtained Evidence	45
iv. Experts	48
v. Child Witnesses	50
vi. Video-Link Testimony	51
vi. Digital Evidence	52
vii. Non-Governmental Organization (NGO) Evidence	54
viii. Sexual and Gender-Based Crimes (“SGBC”)	55
E. Immunities	57
F. Penal Sanctions for Atrocity Crimes	60
G. Interest in and Institutional Capacity for Prosecuting Crimes	67
II. Other Countries	71

EXECUTIVE SUMMARY

New accounts in recent years have raised the profile of irregular armed groups operating in conflict areas. Few have garnered more attention than the Wagner Group. Founded in 2014 by Yevgeny Prigozhin¹ and supported by a web of private and public entities in Russia and throughout the globe, the Group's reach has been extensive.² In addition to Ukraine, Wagner Group members have been involved in conflicts in Syria, Mozambique, Libya, the Central African Republic, Sudan, and Mali.³ The Wagner Group is notorious for using extreme violence in areas where they operate.⁴ In addition to violent techniques such as torture and arbitrary detention,⁵ reports indicate they are responsible for brutal murder of prisoners as well as attacks on civilians.⁶

Efforts to pursue accountability for atrocities committed by irregular armed groups like the Wagner Group have been stymied in part by a shortage of viable judicial venues. Given the limited number of cases that the ICC can pursue in any given situation (including Ukraine) and the limitations both on resources and options under Ukrainian law for pursuing orchestrators of crimes, there is an increasing recognition that neither is enough to address the unprecedented scale or complexity of atrocity crimes committed in the conflict.

This memo examines the prospects of pursuing criminal charges against individuals involved in such groups through universal or other forms of jurisdiction that permit the prosecution of grave crimes committed abroad. Specifically, it seeks to identify opportunities to bring to account members of irregular armed groups, as well as public and private actors directing or supporting their criminal activity, particularly in Ukraine, by determining which jurisdictions would be most disposed to pursuing an investigation and, if warranted, a prosecution of their crimes.⁷

For this project, the WCRO studied the following fourteen countries identified as potential candidates: Germany, Sweden, Finland, France, Norway, the Netherlands, Spain, Canada, Switzerland, Belgium, the United Kingdom, Romania, Poland, and Lithuania. Research

¹ Joaquin Sapien & Joshua Kaplan, *How the U.S. Has Struggled to Stop the Growth of a Shadowy Russian Private Army*, PROPUBLICA (May 27, 2022), <https://www.propublica.org/article/wagner-group-russia-putin-private-army> [hereinafter Sapien & Kaplan, *How the U.S. Has Struggled*].

² In particular, members have participated in disinformation campaigns and election interference, provided military and security services to several governments, and signed contracts to exploit natural resources. Frederica Fasanotti, *Russia's Wagner Group in Africa; Influence, Commercial Concessions, Rights Violations, and Counterinsurgency Failure*, BROOKINGS (Feb. 8, 2022), <https://www.brookings.edu/articles/russias-wagner-group-in-africa-influence-commercial-concessions-rights-violations-and-counterinsurgency-failure/>.

³ *Id.*

⁴ Sapien & Kaplan, *How the U.S. Has Struggled*, *supra* note 1.

⁵ It also is known for its "human waves," which refers to having its men rush fortified positions to overwhelm those inside. Andreas Kluth, *Russia's 'Human Wave Attacks' Are Another Step Into Hell*, BLOOMBERG (Feb. 14, 2023), <https://www.bloomberg.com/opinion/articles/2023-02-14/russia-s-human-wave-tactics-in-ukraine-reflect-vladimir-putin-s-values>.

⁶ Sapien & Kaplan, *How the U.S. Has Struggled*, *supra* note 1; Saskya Vandoorne, *et al.*, *Morale is Plummeting in Putin's Private Army as Russia's War in Ukraine Falts*, CNN (Oct. 7, 2022), <https://www.cnn.com/2022/10/06/europe/wagner-ukraine-struggles-marat-gabidullin-cmd-intl/index.html>.

⁷ Some of these jurisdictions may also be interested in Wagner Group activities in other countries, but this memo focuses on prospects for prosecution of atrocity crimes in Ukraine in particular.

within each of these jurisdictions focused on a variety of topics, including universal and other forms of extraterritorial jurisdiction⁸ over atrocity crimes as well as conditions attached to the exercise of such jurisdiction, modes of liability, criminal procedure and evidentiary standards, immunity rules, penal sanctions, as well as each country's interest and institutional capacity to prosecute atrocity crimes committed by irregular armed groups.

Based on this review, this memo approaches these countries by tiers based on an assessment of their relative amenability to such a prosecution. Those falling in Tier One present the most promising set of conditions for such a prosecution and include Germany, Sweden, Finland, France, Norway, and the Netherlands. Countries that were viewed as less likely to use their laws to prosecute criminal activity by irregular armed groups – due to practical or legal constraints – are grouped in Tier Two and include Switzerland, Canada, Spain, and Belgium. Tier Three, consisting of the United Kingdom, Romania, Lithuania, and Poland, includes countries that have chosen to channel their support directly to the International Criminal Court (ICC) and/or Eurojust's Joint Investigation Team (JIT),⁹ or helping Ukraine prosecute atrocity crimes internally, rather than pursuing investigations within their own domestic systems.

In the sections below, this memo highlights distinctions among the countries with respect to the topics identified above, focusing in particular on Tier One countries.¹⁰ An assessment of these topics indicates that of all the Tier One countries reviewed, Germany provides the most amenable context for atrocity crime charges against members of irregular armed groups like the Wagner Group and their supporters. Prosecutors face few restraints with respect to the use of universal jurisdiction¹¹ or with respect to evidentiary rules, which grant judges the ability to review all evidence freely. Moreover, German law recognizes a wide variety of forms of criminal liability, including forms of liability that reach those involved in collective criminal conduct or who use others as tools in committing crimes, as well as command responsibility, facilitating the ability to reach actors with different contributions to the crimes. Notably, while it does not recognize corporate liability, membership in a criminal organization can also give rise to criminal liability. In addition, Germany dedicates significant resources to war crimes investigations; an estimated eighteen prosecutors are dedicated exclusively to war crimes prosecutions. Moreover, Germany has adopted a national policy aimed at managing conflicts and

⁸ This memo will also discuss other forms of jurisdiction over crimes committed abroad, such as active and passive personality jurisdiction.

⁹ The JIT is a network of European judicial and police officials that coordinate efforts to document war crimes in Ukraine. It has signed a cooperation agreement with the ICC. See *Joint Investigation Team into Alleged Crimes Committed in Ukraine*, EUROJUST, <https://www.eurojust.europa.eu/joint-investigation-team-alleged-crimes-committed-ukraine#:~:text=The%20JITs%20Network%20is%20supported,logistical%2C%20administrative%20and%20operational%20support>. In addition to Eurojust, the European Union Advisory Mission for Civilian Security Sector Reform in Ukraine (EUAM Ukraine) assists Ukrainian authorities with the goal of facilitating the domestic prosecution of international crimes. See *EUAM Ukraine: Council extends the mandate of the EU Advisory Mission for Civilian Security Sector Reform until 2027*, COUNCIL OF THE EU (May 14, 2024), <https://www.consilium.europa.eu/en/press/press-releases/2024/05/14/euam-ukraine-council-extends-the-mandate-of-the-eu-advisory-mission-for-civilian-security-sector-reform-until-2027/>.

¹⁰ While the memo summarizes our findings regarding some of these topics with respect to Tier Two countries, it does not go into much detail on these topics with respect to Tier Three countries as they present the least likelihood of prosecution.

¹¹ In this respect, it has the “purest” form of universal jurisdiction. Lars Otte, Dep. Fed. Pub. Pros. Gen. (Ger.), Interview (Feb. 16, 2024) (notes on file with author) [hereinafter Otte Interview].

preventing atrocities across the globe, a key element of which is improving accountability.¹² With respect to Ukraine, that policy has been implemented through the use of a structural investigation, which allows prosecutors to initiate an investigation into criminal conduct even before potential perpetrators have been identified.¹³ Significantly, the implementation plan is not merely to assist Ukraine and the ICC, but to identify suspects for domestic prosecutions when possible.¹⁴

The other Tier One countries likewise present promising venues. For instance, Sweden also places few restrictions on its universal jurisdiction laws. While a recent change in the law now requires evidence of a State interest to pursue such an investigation, the Swedish Supreme Court has implied that ensuring accountability for international crimes meets this test. Moreover, its criminal liability provisions allow for the prosecution of different forms and levels of contribution to the crimes. As in Germany, courts in Sweden use the free evaluation of evidence approach. Sweden also boasts an experienced war crimes team with ten prosecutors and eighteen police officers and has likewise commenced a structural investigation into Ukraine atrocities, although their prosecutors tend to be cautious and will not likely pursue a case unless both the perpetrator and witnesses are in country or otherwise within reach.

Finland may not have a war crimes prosecution track record on par with either Germany or Sweden, but it shares with them a universal jurisdiction law with few constraints, as well as broad evidentiary standards. Notably, Finnish law requires a public interest assessment to determine if, “due to the seriousness of the suspected crime, not prosecuting would be in conflict with the requirements of [a] general sense of justice,”¹⁵ suggesting even if a case requires significant resources, prosecutors may nevertheless pursue it. Like Germany, it recognizes several modes of criminal liability, allowing different kinds of perpetrators to be held liable. Its criminal code recognizes aggravated crimes against humanity and war crimes when certain factors are manifest, triggering heightened sanctions. Although Finland’s efforts to investigate atrocity crimes were originally oriented towards assisting investigations by other nations, recent events – including the arrest of Yan Petrovsky, a member of another irregular armed group involved in the fighting in Ukraine – suggest the possibility of domestic prosecutions.¹⁶

¹² Robin Hering *et al.*, *Preventing Mass Atrocities: Germany Finally Needs a Strategy*, PEACELAB (May 26, 2021), <https://peacelab.blog/2021/05/preventing-mass-atrocities-germany-finally-needs-a-strategy> [hereinafter Hering, *Germany Finally Needs a Strategy*].

¹³ See generally *Structural Investigation*, ECCHR, <https://www.ecchr.eu/en/glossary/structural-investigation/#:~:text=In%20Germany%2C%20a%20structural%20investigation.and%20groupings%20of%20potential%20perpetrators> (last visited 6/18/24).

¹⁴ Press Release, Pres. of Ukraine, Agreement on Security Cooperation and Long-Term Support between Ukraine and the Federal Republic of Germany (Feb. 16, 2024), <https://www.president.gov.ua/en/news/ugoda-pro-spivrobitnictvo-u-sferi-bezpeki-ta-dovgostrokovu-p-88985> [hereinafter Pres. Of Ukraine, *Agreement on Security Cooperation*]. See also *Germany Identifies Russians Suspected of War Crimes in Hostomel, Kyiv Oblast*, EUR. PRAVDA (Dec. 27, 2023), <https://www.eurointegration.com.ua/eng/news/2023/12/27/7176288/> (quoting Germany’s Federal Minister of Justice as saying that “[i]f we catch the perpetrators, we will press charges.”)

¹⁵ Sampsa Hakala, Prosecutor (Finn.), Written Response to Questions (Feb. 16, 2024) (on file with author) [hereinafter Hakala 2/16/24 Written Response].

¹⁶ *Finland Starts Preliminary War Crimes Investigation Targeting Russian Suspect: Torden is Suspected of Committing War Crimes in Ukraine*, YLE (Dec. 15, 2023), <https://yle.fi/a/74-20065354>; *Finland seeks jailing probe of Russian man wanted in Ukraine over alleged war crimes in 2014-2015*, AP NEWS (Dec. 17, 2023), <https://apnews.com/article/finland-russia-ukraine-yan-petrovsky-war-crimes-d53bc2dc1332a2c561be2f4edf39a2e5>.

Significantly, this is the very kind of case that might benefit from the kind of information New America is gathering and analyzing.¹⁷

While France attaches certain conditions to the exercise of universal jurisdiction, recent jurisprudence and changes to its law have eased those restrictions. For instance, a residency requirement has been interpreted flexibly to allow consideration of various factors that can prove a sufficient tie to France. In addition, a previous requirement that the crime be criminalized in both France and the country where it occurred has been repealed. France is also one of only two Tier One countries willing to pursue a trial *in absentia* for serious crimes. In addition to similarly broad evidence rules as other Tier One countries, France has seen the most advances with respect to corporate criminal liability, which would be useful to hold accountable corporate entities implicated in activities of irregular armed groups. Moreover, among Tier One countries, France imposes perhaps the toughest sanctions on perpetrators. Like Germany and Sweden, France has a specialized prosecution unit with a dedicated budget and experienced personnel to conduct atrocity crime investigations. Finally, France has been actively attempting to counter Russian influence in franco-phone Africa, and in doing so, has focused on the role of the Wagner Group in particular.

Norway also presents a combination of favorable factors. Although its universal jurisdiction law requires that a perpetrator be residing or domiciled in Norway at the time an investigation begins and limits universal jurisdiction to cases that are in the “public interest,” its law also permits authorities to pursue a structural investigation into a situation as long as the atrocity crimes were directed at Norwegian victims. In fact, it has, like Germany and Sweden, commenced a structural investigation into atrocities committed during the conflict in Ukraine, based on interviews with refugees. As in other Tier One countries, most forms of evidence are admissible in Norway, so long as the prosecutor establishes their relevance and probative value. In addition, Norway has a simplified but broad approach to accessorial liability that captures various forms of contributions to criminal conduct. Norwegian law also permits a company to be held criminally accountable for the actions of individuals who are fundamentally connected to it, even when the individuals cannot be punished under Norwegian law. At the same time, while open to a potential domestic prosecution, only two police prosecutors handle the nation’s entire war crimes portfolio, making resource allocation a potential challenge.¹⁸

The Netherlands’ universal jurisdiction law also requires, among other things, that a perpetrator be present in the country before an investigation can be opened and that such an investigation be in the “public interest.” Yet, we include it in the Tier One list for a number of reasons. Its law includes broad accessorial liability as well as liability for membership in criminal organizations and allows for trials *in absentia*. Importantly, it also has a dedicated war crimes unit and prosecutors with significant experience litigating such cases. Thus far, it has been focused on supporting the current investigation into atrocity crimes committed in Ukraine

¹⁷ Norwegian officials have already provided their counterparts with New America research. Anette Berger, Police Prosecutor (Nor.), Interview (Feb. 15, 2024) (notes on file with author) [hereinafter Berger Interview].

¹⁸ *Id.*

by the ICC.¹⁹ Yet, the recent arrival of Wagner Group defector Igor Salikov might enable prosecutors to identify other suspects in the country and pursue their own prosecutions.²⁰

Thus, each Tier One country presents a combination of legal and practical factors that render them well-suited to investigate and potentially prosecute atrocities committed in Ukraine, including those committed by irregular armed groups as well as public and private actors directing or supporting their criminal activity.

¹⁹ Tess Castelij, Prosecutor (Neth.), Written Response to Questions (Feb. 15, 2024) (on file with author) [hereinafter Castelij 2/15/24 Written Response].

²⁰ *Russian Occupier Seeks Asylum in Netherlands, Offers Testimony on Putin's Allies to ICC*, THE NEW VOICE OF UKRAINE (Dec. 18, 2023), <https://english.nv.ua/nation/high-ranking-occupier-flees-to-netherlands-ready-to-surrender-to-the-international-criminal-court-50377463.html> (identifying him as a senior instructor for the Wagner Group); *Former Russian Intelligence Colonel Comes to Netherlands to Testify in ICC*, EUR. PRAVDA (Dec. 18, 2023), <https://www.pravda.com.ua/eng/news/2023/12/18/7433602/>.

DISCUSSION

I. Tier One Countries

With their flexible universal jurisdiction principles, broad standards for criminal procedure and evidence, extensive modes of liability, significant penalties, institutional capacity and interest in Ukraine, Germany, Sweden, Finland, France, Norway, and the Netherlands are best positioned to investigate and prosecute irregular armed groups, such as the Wagner Group, for core international crimes committed in Ukraine. Below, we discuss the following factors with respect to these countries: universal and other forms of extraterritorial jurisdiction over atrocity crimes as well as conditions attached to the exercise of such jurisdiction; modes of liability; criminal procedure and evidentiary standards; immunity rules; penal sanctions; as well as interest and institutional capacity to prosecute atrocity crimes committed by irregular armed groups in Ukraine.

A. Universal Jurisdiction and Other Forms of Extraterritorial Jurisdiction Over International Crimes

The countries in Tier One have all adopted legislation that provides for universal jurisdiction against atrocity crimes. As a general matter, such provisions permit these countries to prosecute genocide, crimes against humanity, and war crimes, regardless of where they were committed, and irrespective of the nationality of the victims or perpetrators.²¹ However, most countries require certain conditions be met before an investigation can be initiated under universal jurisdiction. While the conditions among the Tier One countries vary, they generally fall within the following categories: the requirement that both countries' legislation criminalize the conduct (known as double criminality); the presence or domicile of the suspect in the jurisdiction in question; the absence of an investigation or prosecution of the same accused in another country (known as subsidiarity); and government approval. In addition, each country gives prosecutors discretion not to proceed with an investigation even if all conditions are met, particularly if there is no reasonable prospect of securing access to the perpetrator or the necessary evidence to prosecute the case.

In addition to universal jurisdiction, all Tier One countries can employ active and passive personality jurisdiction where applicable to pursue atrocity crimes. Under the principle of active personality jurisdiction, a State has the authority to prosecute its nationals for crimes they

²¹ VÖLKERSTRAFGESETZBUCH [Code of Crimes against Int'l L.] (Ger.) § 1, https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html [hereinafter VSTGB (Ger.)]; BROTTSBALKEN [Crim. Code] (Swed.) SFS 1962:700 2:3, <https://www.government.se/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf> [hereinafter BRB (Crim. Code) (Swed.)]; RIKOSLAKI [Pen. Code] (Finn.) Ch. 11, § 1, <https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> (unofficial trans.) [hereinafter RL (Pen. Code) (Finn.)]; CODE DE PROCÉDURE PÉNALE [Crim. Proc. Code] (Fr.) arts. 689, 689-11, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154/2024-03-01/ [hereinafter C. PR. PÉN. (Crim. Proc. Code) (Fr.)]; Lov om Straff (straffeloven) [Pen. Code] (Nor.) art. 5, <https://lovdata.no/dokument/NLE/lov/2005-05-20-28> [hereinafter Strl. (Pen. Code) (Nor.)]; Wet Internationale Misdrifven [Int'l Crimes Act] (Neth.) art. 1, <https://wetten.overheid.nl/BWBR0015252/2020-01-01/0> [hereinafter ICA (Neth.)].

commit abroad.²² The passive personality principle allows a State to exercise extraterritorial jurisdiction over foreign nationals for crimes committed abroad when the victim is a national of that State.²³ This section will focus on the conditions attached to universal jurisdiction and examine these additional forms of jurisdiction, while the subsequent section will focus on the crimes subject to universal jurisdiction in Tier One countries.

i. Germany

Germany does not attach restrictions on its exercise of universal jurisdiction over atrocity crimes.²⁴ While the German Criminal Code (“StGB”) requires a nexus to Germany for the prosecution of regular crimes committed abroad,²⁵ the Code of Crimes against International Law (“VStGB”) expressly states that international crimes need not bear a connection to Germany.²⁶ However, German law provides prosecutors with significant discretion, including the option not to proceed with an atrocity crime investigation.²⁷ For instance, while there is no requirement to defer to an international or foreign prosecution, the prosecutor may choose to do so.²⁸ Prosecutors may also decline to pursue an investigation if the perpetrator is not present in or easily transferred to Germany.²⁹

In practice, German prosecutors have prioritized cases where witnesses or victims are present in Germany or prosecutors have a reasonable prospect of securing the perpetrator and necessary evidence for the case.³⁰ Importantly, such investigations might be “structural” – meaning focused on a particular conflict or situation rather than an individual suspect.³¹ Much

²² CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 1 (2d ed. 2015); Oxford Public International Law, *The Principles of Extraterritorial Jurisdiction*, <https://opil.ouplaw.com/display/10.1093/law/9780199688517.001.0001/law-9780199688517-chapter-4>.

²³ *Id.*

²⁴ Under § 1, the VStGB applies “to all criminal offences against international law,” not merely those arising under international treaty obligations or domestic law, as is the case in other countries. VStGB (Ger.) § 1. On June 6, 2024, the German Parliament passed legislation to strengthen the framework for prosecuting international crimes. Relevant changes will be discussed below. *See* Gesetz zur Fortentwicklung des Völkerstrafrechts [Act on the Further Development of International Criminal Law] (Ger.), BT Drs. 20/9471, <https://dserver.bundestag.de/btd/20/094/2009471.pdf> (as amended); *see also* Isabelle Hassfurter, *The Reform of the International Law Framework in Germany - Successful Changes and Missed Opportunities: Part 1*, OPINIO JURIS (June 13, 2024), [https://opiniojuris.org/2024/06/13/reform-of-the-international-criminal-law-framework-in-germany-successful-changes-and-missed-opportunities-part-1/#:~:text=On%20June%202024%2C%20the.of%20international%20crimes%20\(BT%20Drs](https://opiniojuris.org/2024/06/13/reform-of-the-international-criminal-law-framework-in-germany-successful-changes-and-missed-opportunities-part-1/#:~:text=On%20June%202024%2C%20the.of%20international%20crimes%20(BT%20Drs) [hereinafter Hassfurter, *The Reform of the International Law Framework in Germany*].

²⁵ For a regular crime, the criminal code also requires that the act be recognized as a crime in the jurisdiction in which it occurred. STRAFGESETZBUCH [Pen. Code] (Ger.) § 7, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0015 [hereinafter STGB (Crim. Code) (Ger.)].

²⁶ VStGB (Ger.) § 1.

²⁷ STRAFPROZESSORDNUNG [Crim. Proc. Code] (Ger.) § 153f, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1958 [hereinafter STPO (Crim. Proc. Code) (Ger.)].

²⁸ *Id.* § 153f (1)-(2).

²⁹ *Universal Jurisdiction Law and Practice in Germany*. OPEN SOC’Y. JUST. INITIATIVE (Mar. 2019), at 17, <https://www.justiceinitiative.org/uploads/0b3c66af-68e0-4fd3-a8e0-d938a6e2b43b/universal-jurisdiction-law-and-practice-germany.pdf> [hereinafter *UJ Law and Practice in Germany*].

³⁰ *Id.* at 19. *See, e.g., German Police Arrest Iraqi Couple Suspected of Genocide for Enslaving Yazidi Girls* REUTERS (Apr. 10, 2024), <https://www.reuters.com/world/german-police-arrest-iraqi-couple-suspected-genocide-enslaving-yazidi-girls-2024-04-10/>.

³¹ *UJ Law and Practice in Germany*, *supra* note 29, at 17.

like the investigation of situations at the ICC, this allows atrocity crimes prosecutors to gather evidence from different sources and conduct a general investigation regarding crimes committed in a conflict before identifying any particular suspect. No trial can begin without a suspect, however.³²

In addition to universal jurisdiction, Section 7 of the StGB provides that any crime committed abroad against or by a German national can be prosecuted in Germany with certain restrictions.³³ With both passive and active personality jurisdiction, the act must be criminal both in Germany and where the act occurred (double criminality requirement).³⁴ With respect to active personality, the perpetrator of the criminal act must either be a national at the time of the offense or have become one after its commission.³⁵ Active personality can also be invoked against a foreign national who “was found to be staying in Germany and, although extradition legislation would permit extradition for such an offense, is not extradited because no request for extradition is made within a reasonable period, is rejected or the extradition is not feasible.”³⁶

ii. Sweden

Sweden identifies crimes punishable under universal jurisdiction in the Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes (“ACR”).³⁷ There is no provision either in the ACR nor in the Swedish Criminal Code that requires the physical presence of the accused during the investigatory stage.³⁸ In practice, however, the investigation is unlikely to proceed if a suspect is not present or cannot be transferred to Sweden.³⁹ Moreover, the accused must be present in Sweden for a trial to occur.⁴⁰

In addition, the Prosecutor General has discretion in determining whether to proceed with an investigation, and in doing so must consider the following criteria: “(1) whether prosecution in Sweden is compatible with its obligations under public international law; (2) the extent to which the offences or the suspect are linked to Sweden; (3) whether measures for legal

³² *Id.*

³³ “German criminal law applies to offences committed abroad against a German national if the act is a criminal offence at the place of its commission or if that place is not subject to any criminal law jurisdiction.” Crimes on German-flagged ships likewise fall within the court’s jurisdiction.” STGB (Crim. Code) (Ger.) §§ 4, 7(1).

³⁴ *Id.* § 7(1)-(2).

³⁵ *Id.* § 7(2).

³⁶ *Id.*

³⁷ LAG OM STRAFFRÄTTSLIGT ANSVAR FÖR FOLKMORD, BROTT MOT MÄNSKLIGHETEN OCH KRIGSFÖRBRYTELSE [Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes] (Swed.), SFS 2014:406 (June 11, 2014), as amended,

https://www.government.se/contentassets/6e0e65c994124235a39387e2dcf5ad48/2014_406-act-on-criminal-responsibility-for-genocide-crimes-against-humanity-and-war-crimes-.pdf [hereinafter ACR (Swed.)]; Mark Klamberg, *Sweden*, in *Universality without Uniformity: States' Exercise of Universal Jurisdiction over Core International Crimes*, at 8 (L. Yanev & H.G. van der Wilt, eds., forthcoming) (manuscript on file with author) [hereinafter Klamberg, *Sweden Manuscript*].

³⁸ Dual criminality does not apply to acts under the ACR. BRB (Swed.) 2:3 (providing jurisdiction to the courts for acts that arise under the ACR); 2:5 (regarding dual criminality); *see generally* ACR (Swed.).

³⁹ If the perpetrator is not present, the prosecutor will assess the likelihood that he will be. Mark Klamberg, Prof., Stockholm U. (Swed.), Interview (Feb. 15, 2024) (notes on file with author) [hereinafter Klamberg Interview].

⁴⁰ *Universal Jurisdiction Law and Practice in Sweden*, OPEN SOC’Y. JUST. INITIATIVE (Apr. 2020), at 13, <https://www.justiceinitiative.org/uploads/550b6548-a951-425f-84b3-d75e5d78688c/universal-jurisdiction-law-and-practice-sweden.pdf> [hereinafter *UJ Law and Practice in Sweden*].

proceedings have been or will be initiated in another state or before an international court; and (4) the possibilities of investigating the offence and bringing legal proceedings against the suspect in Sweden.”⁴¹ Importantly, not all criteria need be met.⁴² Thus, while subsidiarity would be considered, a foreign proceeding would not automatically block a Swedish investigation. In addition to these criteria, the Code of Judicial Procedure also provides that the Prosecutor General can opt out of any case if “continued inquiry would incur costs not in reasonable proportion to the importance of the matter and the offense.”⁴³

Recent amendments to the Swedish Criminal Code (*Brottsbalken* or “BrB”) set forth certain factors that the Prosecutor General should consider prior to issuing an indictment, including whether there is a Swedish interest in pursuing the case, which in turn requires consideration of whether the suspect or the crime is linked to the country.⁴⁴ The Supreme Court addressed this issue in its *Lundin* decision in 2022.⁴⁵ There, Lundin Energy officials faced war crimes charges for company activities in Southern Sudan.⁴⁶ The Court opined that the Prosecutor General could not proceed with such a case without a showing of a State interest.⁴⁷ Second, it specified that the decision on whether such an interest exists must be subject to judicial review.⁴⁸ As the case involved a Swedish corporate group and with a Swedish defendant, the state interest requirement was easily met.⁴⁹ However, in the discussion of universal jurisdiction, the Court observed that it was the character of the offense that determines such jurisdiction: “The principle builds on the notion that there are certain protected interests which are so fundamental that every

⁴¹ The 2022 amendment to the code represented a codification of existing practice. BRB (Swed.) 2:8, https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/brottsbalk-1962700_sfs-1962-700/#K2; Mark Klamberg, Written Response to Questions (Feb. 15, 2024) (on file with author) [hereinafter Klamberg 2/15/24 Written Response]; Klamberg, *Sweden Manuscript*, *supra* note 37, at 3.

⁴² Klamberg Interview, *supra* note 39.

⁴³ RÄTTEGÅNGSBALKEN [Code of Jud. Proc.] (Swed.) 23:4, https://www.government.se/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf [hereinafter RB (Code of Jud. Proc.) (Swed.)].

⁴⁴ Under the amendment, the Prosecutor General is instructed to particularly consider: (i) whether prosecution in Sweden is compatible with its obligations under public international law; (ii) the extent to which the crime or the suspect are linked to Sweden; (iii) whether measures for legal proceedings have been or will be initiated in another state or before an international court; and (iv) the possibilities of investigating the crime and bringing legal proceedings against the suspect in Sweden.” BRB (Crim. Code) (Swed.) 2:8 (as amended 2022). The concept of a Swedish interest in the prosecution was also discussed in the preparatory works for the ACR. Mark Klamberg, Written Response (Mar. 4, 2024) (citing Proposition 2020/2021:204, Beskattnig av utomlands bosatta [Government Bill] (Swed.), <https://www.regeringen.se/contentassets/ccbe3851ccaa40d78a08c08f67ed16c6/aggressionsbrottet-i-svensk-ratt-och-svensk-straftattslig-domsratt-prop-2020-21-204.pdf>, at 154) (on file with author) [hereinafter Klamberg 3/4/24 Written Response].

⁴⁵ Högsta Domstolen [HD] [Supreme Court] (Swed.), Ö 1314-22, Decision (Nov. 10, 2022), <https://www.domstol.se/globalassets/filer/domstol/hogstodomstolen/avgoranden/engelska-oversattningar/o-1314-22-eng.pdf> [hereinafter S. Ct. (Swed.)]. Begun in September 2023, the trial is expected to continue all year. Olivier Truc, *Lundin Trial: Defence Attacks Prosecution Probe*, JUSTICEINFO.NET (Feb. 27, 2024), <https://www.justiceinfo.net/en/128865-lundin-trial-defence-attacks-prosecution-probe.html>.

⁴⁶ Press Release, S. Ct. (Swed.), Swedish Court Has Jurisdiction to Hear a Case of Alleged War Crimes in Sudan (Nov. 10, 2022), <https://www.domstol.se/en/supreme-court/news-archive/swedish-court-has-jurisdiction-to-hear-a-case-of-alleged-war-crimes-in-sudan/>.

⁴⁷ “[E]xtra-territorial jurisdiction shall be exercised only where there is a tangible and legitimate interest that legal proceedings take place in Sweden.” S. Ct. (Swed.), Ö 1314-22, at ¶ 24. *See also* Klamberg, *Sweden Manuscript*, *supra* note 37, at 3-5.

⁴⁸ S. Ct. (Swed.), Ö 1314-22, at ¶ 26.

⁴⁹ *Id.* at ¶ 41.

state has a right and, sometimes, an obligation to protect them. Common to the offences covered by universal jurisdiction is that they are of concern to the international community as a whole and, thus, there is an overall international interest in punishing them.”⁵⁰ Thus, the Court appears to suggest that all such cases, by their very nature, meet the State interest requirement. A subsequent case involving an Iranian accused of involvement in the execution of political prisoners in 1988, decided by the Svea Court of Appeals likewise addressed the State interest issue.⁵¹ While not commenting on the State’s inherent interest in pursuing accountability for all atrocities, the Court set a low bar, concluding that a suspect’s mere presence in the country was a sufficient link to Sweden to establish a State interest.⁵² These cases suggest that neither the state interest requirement nor judicial review will likely be difficult hurdles to overcome.

Moreover, like Germany, Sweden can undertake structural investigations,⁵³ which avoids the practical hurdle posed by an absent perpetrator. Finally, while in the past, the Government Cabinet, a political entity, had to approve a prosecution for crimes against humanity committed abroad,⁵⁴ recent revisions to the Code have eliminated that requirement except in cases that raise serious foreign or security policy considerations.⁵⁵

In practice, Swedish prosecutors historically have been cautious in the use of universal jurisdiction.⁵⁶ Generally, they do not want to proceed without the presence of witnesses and/or evidence in Sweden or the ability to secure them.⁵⁷ However, if the prosecutor decides not to move forward on the grounds that the evidence is lacking, the Code of Judicial Procedure provides that an aggrieved person may take over the prosecution.⁵⁸ Within one month of being informed of the prosecutor’s decision, the victim would need to file an application to summon the accused.⁵⁹ If the court determines the claim has merit, it can issue the summons, and commence trial hearings.⁶⁰ However, a private prosecution of an atrocity crime committed outside the country would still need the approval of the prosecutor.⁶¹

⁵⁰ *Id.* at ¶ 22.

⁵¹ Hamid Noury was charged with crimes related to 1988 executions in Iran. The facts are set forth in the district court opinion: Tingsrätt [TR] [D. Ct.], Stockholm (Swed.), B 15255-19 (Jul. 14, 2022), at 1, <https://www.eurojust.europa.eu/sites/default/files/assets/national-jurisprudence-case-b-15255-19-2022-en.pdf> [hereinafter D. Ct. (Swed.)].

⁵² Klamberg, *Sweden Manuscript*, *supra* note 37, at 5 (citing Rättsfall från Hovrätterna [RH] [Cases from the Ct. App.] (Swed.), B 9704-22, Decision (Dec. 13, 2022)).

⁵³ That has occurred with respect to Syria and Iraq as well as the Ukraine. Klamberg Interview, *supra* note 39.

⁵⁴ *UJ Law and Practice in Sweden*, *supra* note 40, at 16-17.

⁵⁵ BRB (Crim. Code) (Swed.) 2:8 (as amended, 2022); Klamberg, *Sweden Manuscript*, *supra* note 37, at 2-3.

⁵⁶ Klamberg Interview, *supra* note 39.

⁵⁷ *Id.*

⁵⁸ RB (Code of Jud. Proc.) (Swed.) 20:9. “When a public prosecution is withdrawn on the ground that there is insufficient reason to believe that the suspect is guilty of the offence, the aggrieved person may take over the prosecution; he must, however, notify the court of this within the time, at most one month, determined by the court, after he became aware of the discontinuance.”

⁵⁹ *Id.* 20:9, 47:1. “An aggrieved person who wants to institute a prosecution shall file with the court a written application for a summons against the person to be charged. The prosecution shall be deemed instituted when the summons application is filed with the court.”

⁶⁰ *Id.* 47:5, 22, 24.

⁶¹ BRB (Crim. Code) (Swed.) 2:7 (referring to 2:3 crimes).

The Swedish Criminal Code also provides for active and passive personality jurisdiction,⁶² as long as the dual criminality requirement is met.⁶³ Like most countries, Sweden's form of active personality jurisdiction also activates when someone becomes a Swedish citizen or resident subsequent to committing the crime.⁶⁴ Prosecutors can also impose jurisdiction if the person enters the country and has citizenship in another Nordic country, or if the offense in question could result in at least a six-month prison term.⁶⁵

iii. Finland

Finland's exercise of universal jurisdiction is likewise broad, allowing for prosecution of core international crimes.⁶⁶ Under the Finnish Penal Code, the *Rikoslaki*, the accused need not be present at the commencement of an investigation.⁶⁷ In practice, however, the presence of the accused would be factored into the decision to open a case.⁶⁸ The relevant provisions, however, do not require the prosecutor to defer to a foreign or international court.⁶⁹

The Prosecutor-General enjoys significant discretion on whether to pursue charges for crimes committed abroad by foreigners.⁷⁰ Unlike a domestic crime, the Prosecutor-General must affirmatively issue an order to authorize line prosecutors to pursue a case regarding a crime committed overseas.⁷¹ But any investigation into crimes overseas would also depend on consideration of factors such as the availability of the evidence, the severity of the crime, and legal precedents.⁷²

The Finnish Criminal Procedure Act further provides that the prosecutor can waive any prosecution if the expenses incurred would be manifestly disproportionate “to the nature of the case and to the sanction possibly to be expected in it.”⁷³ The exception to that rule arises when an

⁶² *Id.* 2:3.

⁶³ *Id.* 2:5.

⁶⁴ Dennis Martinsson & Mark Klamberg, *Jurisdiction and Immunities in Sweden When Investigating and Prosecuting International Crimes*, 66 SCANDINAVIAN STUD. L. 51, 58 (2020), <https://www.diva-portal.org/smash/get/diva2:1471998/FULLTEXT01.pdf> (referencing the *Tabaro* case where a Rwandan man was convicted of genocide when his crimes were committed four years before he became a Swedish resident).

⁶⁵ BRB (Crim. Code) (Swed.) 2:3 See also Per Hedvall, *The Swedish Report on the Prosecuting Corporations (sic) for Violations of International Criminal Law* (2018), https://www.penal.org/sites/default/files/SWEDEN_Report.pdf

⁶⁶ This provision also applies to other crimes such as nuclear device offenses, human trafficking, terrorist offences, robbery, and forgery. RL (Pen. Code) (Finn.) Ch. 1, § 7, ¶ 3.

⁶⁷ There is also no requirement that the crime be outlawed in the foreign country. Such a constraint applies to regular crimes committed by or against a Finnish person or entity. RL (Pen. Code) (Finn.) Ch. 1, §§ 7, 11.

⁶⁸ *Universal Jurisdiction Law and Practice in Finland*, OPEN SOC'Y. JUST. INITIATIVE (Feb. 2020), at 12, <https://www.justiceinitiative.org/uploads/760be0d9-1e8c-4b43-b4ac-192d9d194060/universal-jurisdiction-law-and-practice-finland.pdf> [hereinafter *UJ Law and Practice in Finland*].

⁶⁹ The law, however, does require a consideration of international obligations. *Id.* at 13 (citing Finnish academic).

⁷⁰ In cases involving a Finnish suspect and Finnish victim, the Prosecutor-General's approval is not required. RL (Pen. Code) (Finn.) Ch. 1, § 12(1).

⁷¹ *Id.* Ch. 2, §§ 7 (referring to crimes under §§ 3. 8).

⁷² The Finnish Criminal Procedure Act also identifies general criteria that the Prosecutor-General must consider before proceeding with any criminal investigation, such as whether the alleged act is punishable under Finnish law and whether probable cause exists. RIKOSPROSESSILAKI [Crim. Proc. Act] (Finn.) § 6(a)(1), https://www.finlex.fi/en/laki/kaannokset/1997/en19970689_20230205.pdf (unofficial trans.) [hereinafter RPL (Crim. Proc. Act) (Finn.)]; Hakala 2/16/ 24 Written Response, *supra* note 15.

⁷³ *Id.* § 8(1)(3) (translated by author).

“important public or private interest” requires prosecution.⁷⁴ Public interest may require charges to be filed “in situations where, due to the seriousness of the suspected crime, not prosecuting would be in conflict with the requirements of [a] general sense of justice.”⁷⁵ Such an assessment would consider the gravity of the harms inflicted on the victims.⁷⁶ Consistent with many civil law jurisdictions, where victims have a right to participate in the criminal proceedings, the Act provides that an injured party can bring a charge herself if the prosecutor decides not to investigate or prosecute a case.⁷⁷ The victim can also lodge an appeal, even when they have not testified in the case.⁷⁸

In Finland, passive personality jurisdiction can be invoked by both resident aliens and citizens, but in both cases, only if “a sentence of imprisonment of more than six months may be imposed for the act under Finnish law.”⁷⁹ Active personality applies against someone who is a Finnish citizen or “deemed to be a Finnish citizen” at the time of the offense or the beginning of proceedings.⁸⁰ A person is so considered if they are a permanent resident or if they are caught in Finland and “at the beginning of judicial proceedings is a citizen of Denmark, Iceland, Norway or Sweden or permanently residing in one of these countries at that time.”⁸¹ For both active and passive personality, double criminality applies.⁸² Moreover, a Finnish court cannot impose a sanction more severe than that imposed in the place of commission.⁸³

Finally, the *Rikoslaki* states that its law applies to any crime that is committed overseas that could potentially lead to a prison sentence of more than six months, but only if “the state in whose territory the offence was committed has requested that charges be brought in a Finnish court or that the perpetrator be extradited because of the offence, but the request has not been granted.”⁸⁴

iv. France

In France, the prosecutor is granted the option to prosecute international crimes.⁸⁵ However, France has imposed the most restrictive regime for the use of universal jurisdiction among Tier One countries. Under the French Criminal Procedure Code, courts have jurisdiction to prosecute atrocity crimes committed abroad only when the following conditions are met: (1) the accused’s habitual residence is in France⁸⁶; (2) there is no ongoing investigation or

⁷⁴ *Id.* § 8(1).

⁷⁵ Hakala 2/16/24 Written Response, *supra* note 15.

⁷⁶ *Id.*

⁷⁷ RPL (Crim. Proc. Act) (Finn.) § 14(1).

⁷⁸ *Id.* § 14(3).

⁷⁹ RL (Pen. Code) (Finn.) Ch. 1, § 5.

⁸⁰ *Id.* Ch. 1, § 6.

⁸¹ *Id.* Ch. 1, § 6(2).

⁸² *Id.* Ch. 1, § 11.

⁸³ *Id.*

⁸⁴ *Id.* Ch. 1, § 8.

⁸⁵ Both §§ 689 and 689-11 of the French Criminal Procedure Code clearly indicate that the prosecutor is granted the option to prosecute these crimes but has no obligation to do so. C. PR. PEN. (Crim. Proc. Code) (Fr.) arts. 689, 689-11.

⁸⁶ *Id.* § 689-11, ¶ 2.

prosecution of the suspect at the ICC or in another jurisdiction;⁸⁷ and the prosecutor decides to proceed.⁸⁸

Nevertheless, with respect to the residence requirement, a recent court decision and the resulting legislative revision provide prosecutors with flexibility in how to interpret this requirement.⁸⁹ In *Nema*, the Court of Cassation, France’s highest court, noted that while habitual residence “requires more than a simple transit or a passage of a few hours on French territory,” it can be assessed by considering “a range of indicators, such as the actual or foreseeable duration [of the accused’s residence in France], the conditions and reasons for the presence of the person concerned on French territory, the desire shown by the individual to settle or remain [in France], or his family, social, material, or professional ties [to France].”⁹⁰ Moreover, trials may be conducted in the absence of the accused if the suspect leaves France after an investigation begins.⁹¹ In November, the French Parliament codified the approach adopted in *Nema*. Rather than attempting to determine if the suspect usually resides in France, the prosecutor can now assess if the suspect has “a sufficient connection with France.”⁹² In reaching this determination, the Code now instructs prosecutors to employ the more flexible *Nema* factors noted above.⁹³

Recent legislation has also eliminated one of the prior constraints on the use of universal jurisdiction. In November, a dual criminality provision contained in the Code was repealed.⁹⁴ The prior language conditioned its use on whether “the facts are punishable by the legislation of the State in which they were committed or if that State or the State whose person suspected of

⁸⁷ *Id.* § 689-11, ¶ 3.

⁸⁸ In contrast to common crimes where the injured party may initiate proceedings, here the prosecutor must decide to proceed. *Id.* At §§ 1, 689-11, ¶ 3 (“These crimes can only be prosecuted at the request of the anti-terrorist public prosecutor and if no international or national court requests the surrender or extradition of the person concerned.”). See generally Juliette Rémond Tiedrez, *France’s Highest Court Confirms Universal Jurisdiction*, EJIL: TALK! (June 1, 2023), <https://www.ejiltalk.org/france-is-back-on-the-universal-jurisdiction-track/#:~:text=The%20French%20universal%20jurisdiction%20framework&text=When%20it%20comes%20to%20other.%E2%80%9D%20>.

⁸⁹ *Cour de cassation* [Court of Cassation] (Fr.), Bull. Crim. No. 22-82.468 (May 12, 2023), <https://www.courdecassation.fr/decision/645dd86cd1cd71d0f828667b>] [hereinafter Ct. of Cass. (Fr.)].

⁹⁰ *Id.*

⁹¹ *Universal Jurisdiction Law and Practice in France*, OPEN SOC’Y. JUST. INITIATIVE (Feb. 2019), at 14-15, <https://www.justiceinitiative.org/uploads/b264bc4f-053f-4e52-9bb8-fccc0a52816a/universal-jurisdiction-law-and-practice-france.pdf> [hereinafter *UJ Law and Practice in France*].

⁹² C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 689-11 (translated by author).

⁹³ The code identifies the following factors: “the actual or foreseeable duration of the person's presence on French territory, the conditions and reasons for this presence, the desire expressed by the person concerned [whether] to settle or remain there, or his or her family, social, material or professional ties.” *Id.* (translated by author).

⁹⁴ See C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 689-11; LOI n° 2023-1059 du 20 novembre 2023 d'orientation et de programmation du ministère de la justice 2023-2027 [Fr. Law No. 2023-1059 of Nov. 20, 2023, on Orientation and Programming of the Ministry of Justice, 2023-2027], art. 22, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France] (Nov. 20, 2023), <https://www.legifrance.gouv.fr/jorf/id/JORFARTI000048430588> [hereinafter Fr. Law No. 2023-1059].

nationality is a party [to the Rome Statute]”.⁹⁵ The legislation came in the wake of the Court of Cassation issuing an opinion indicating greater flexibility towards the requirement.⁹⁶

A more restrictive condition is the subsidiarity requirement. The French Code clearly states that for genocide, war crimes, or crimes against humanity cases, the prosecutor must ensure that the ICC is not prosecuting the case.⁹⁷ Thus, if the ICC is already investigating the case, French authorities will withdraw their jurisdiction.⁹⁸ Practice suggests that the specialized war crime police unit will not investigate a case if the ICC has jurisdiction.⁹⁹ In addition, the prosecutor needs to verify that “no other international court competent to try the person has requested his surrender and that no other State has requested his extradition.”¹⁰⁰ The provision implies that the French prosecutor can proceed in the absence of a formal request to surrender or extradite.¹⁰¹ Prosecutors will have greater ease when pursuing cases of torture, enforced

⁹⁵ Fr. Law. No. 2023-1059; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90; 37 I.L.M. 1002 (1998), art. 6-8*bis*,

<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> [hereinafter Rome Statute].

⁹⁶ See also Ct. of Cass. (Fr.), Bull Crim No. 21-81.344 (Nov. 24, 2021),

https://www.courdecassation.fr/files/files/Arrêts%20traduits/Traduction_AP_22%2080.057.pdf; see generally Alice Autin, *France Delivers Mixed Messages on Justice for Victims of Grave Crimes*, HUM. RTS. WATCH (Oct. 11, 2023), <https://www.hrw.org/news/2023/10/11/france-delivers-mixed-messages-justice-victims-grave-crimes#:~:text=By%20voting%20to%20set%20aside,However%2C%20some%20hurdles%20remain> (noting the removal of the dual criminality requirement).

⁹⁷ C. PR. PÉN. (Code of Crim. Proc.) (Fr.) art. 689-11, ¶ 3.

⁹⁸ *Id.* They must also withdraw at the request of the residual mechanism for the International Tribunals for the former Yugoslavia and Rwanda.

Loi 95-1 du 2 janvier 1995 portant adaptation de la législation française aux dispositions de la résolution 827 du Conseil de sécurité des Nations Unies instituant un tribunal international en vue de juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991 [Law no. 95-1 of 2 January 1995 on adapting French law to the provisions of United Nations Security Council resolution 827 establishing an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Jan. 2, 1995, art. 3,

https://www.icty.org/x/file/Legal%20Library/Member_States_Cooperation/implementation_legislation_france_1995_en.pdf;

Loi 96-432 du 22 mai 1996 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis en 1994 sur le territoire du Rwanda et, s'agissant des citoyens rwandais, sur le territoire d'états voisins [Law No. 96-432 of May 22, 1996 adapting French legislation to the provisions of Resolution 955 of the United Nations Security Council establishing an international tribunal to judge persons presumed responsible for acts of genocide or other acts serious violations of international humanitarian law committed in 1994 on the territory of Rwanda and, with regard to Rwandan citizens, on the territory of neighboring States], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], May 22, 1996, art. 1, ¶ 2,

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Motions/NotIndexable/ICTR-05-87/MS43388R0000553788.PDF>.

⁹⁹ *UJ Law and Practice in France*, *supra* note 91, at 17 (citing a member of the police unit's team).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

disappearance, and crimes against cultural property when they are tried as stand-alone offenses.¹⁰² Then, the principle of subsidiarity does not apply whatsoever.¹⁰³

Even if these conditions are met, prosecutorial discretion may prevent investigations from moving forward.¹⁰⁴ The Code provides that these crimes can only be prosecuted “at the request of the anti-terrorist public prosecutor,”¹⁰⁵ who has responsibility for atrocity cases in France.¹⁰⁶ However, a victim complainant does have a right to appeal to the Attorney General who can overturn the public prosecutor’s opinion.¹⁰⁷ If the Attorney General agrees with the complaint, she can order the prosecutor to begin or to continue proceedings.¹⁰⁸ Alternatively, she can refer the matter to an appropriate court.¹⁰⁹ An exception may also occur when a civil party files a request with an investigating judge to proceed with an investigation, in which case the judge may open an investigation even if the prosecutor refuses to investigate.¹¹⁰ Finally, while there is no express political approval needed to proceed in France, the Ministry of Foreign Affairs may provide an opinion in cases involving a diplomatic officer.¹¹¹ Nevertheless, the prosecutor or investigating judge ultimately determines the outcome.¹¹²

France also has active and passive personality jurisdiction over extraterritorial criminal conduct. Art. 113-6 of the Penal Code, however, makes a distinction between misdemeanor and felony offenses.¹¹³ In the case of the misdemeanors committed by French nationals, dual criminality applies.¹¹⁴ While there is no such dual criminality requirement for the use of passive personality jurisdiction, the law does provide that the misdemeanor must be punishable by imprisonment.¹¹⁵ For both active and passive personality, jurisdiction does apply to someone who acquires French nationality after the commission of the crime.¹¹⁶

¹⁰² Stand-alone provisions will be discussed in greater detail below.

¹⁰³ See C. PR. PÉN. (Crim. Proc. Code) (Fr.) arts. 689-1, 689-13 (providing jurisdiction for those guilty of or complicit in enforced disappearances); 689-2 (providing for the prosecution of those guilty of torture); 689-14 (enabling prosecution for infringing cultural property).

¹⁰⁴ See *id.* art. 689 (providing that “perpetrators or accomplices of offences committed outside [of France] **may** be prosecuted and tried”) (emphasis added).

¹⁰⁵ *Id.* art. 689-11 (These crimes can only be prosecuted at the request of the anti-terrorist public prosecutor.)

¹⁰⁶ See, e.g. Wilhelmine Preussen, *France’s TotalEnergies Accused of ‘Complicity in War Crimes’ by Ukrainian Groups*, POLITICO (Oct. 14, 2022), <https://www.politico.eu/article/ngo-accuse-france-totalenergies-complicity-war-crime-ukraine-russia/>.

¹⁰⁷ *Id.* art. 689-11 (“When, in application of article 40-3 of the present code, the Public Prosecutor at the Paris Court of Appeal receives an appeal against a decision by the Anti-Terrorist Public Prosecutor to discontinue proceedings, he or she hears the person who reported the facts, if that person so requests. If the appeal is deemed to be unfounded, the person concerned is informed in a reasoned written decision.”).

¹⁰⁸ *Id.* art. 40-3 (citing art. 36).

¹⁰⁹ *Id.* art. 36.

¹¹⁰ *UJ Law and Practice in France*, *supra* note 91, at 16.

¹¹¹ *Id.*

¹¹² *Id.* A bilateral convention, however, might affect the prosecutor’s ability to open an investigation. *Id.*

¹¹³ CODE PÉNAL [Pen. Code] (C. PÉN.) (Fr.) art. 113-6.

¹¹⁴ *Id.*

¹¹⁵ *Id.* § 113-7.

¹¹⁶ *Id.* French law also requires the prosecution or extradition of those responsible for crimes within the purview of the former Yugoslavian and Rwandan tribunals. See Law No. 95-1 (Jan. 1, 1995) (Fr.); Simone Pathe, *Rwandan Genocide Trial a Symbolic Step for France*, PBS NEWS HOUR (Feb. 6, 2014), <https://www.pbs.org/newshour/world/rwandan-genocide-trial-symbolic-step-france/>.

In the case of passive personality, the victim must have been a French national at the time of the crime.¹¹⁷ Misdemeanor cases under either active or passive personality jurisdiction must be initiated by the public prosecutor after a victim's complaint.¹¹⁸ In addition, if a foreign extradition request for an alien is refused due to public policy reasons, then the prosecutor might proceed, provided that the penalty for the felony or misdemeanor is at least five years.¹¹⁹ To the extent that some irregular armed group members hold French citizens, active personality jurisdiction might provide another avenue for prosecution.¹²⁰

v. Norway

Norway's approach to universal jurisdiction cases resembles that of other Tier One countries. The Norwegian Penal Code ("*Straffeloven*") requires that the alleged perpetrator be residing or domiciled in Norway at the time an investigation is opened.¹²¹ This can include a situation in which the alleged perpetrator becomes domiciled in Norway after the crime was committed abroad.¹²² Moreover, Norway retains jurisdiction even if the suspect leaves the country so long as the prosecutor has initiated the criminal investigation.¹²³ Ongoing investigations in another country or before the ICC against the same alleged perpetrator do not prevent the Norwegian authorities from pursuing its own prosecutions.¹²⁴

In addition, the Code permits police authorities to pursue a general, or structural investigation into "acts that Norway has a right or an obligation to prosecute pursuant to agreements with foreign states or otherwise pursuant to international law."¹²⁵ In such cases, neither a potential perpetrator nor a Norwegian victim need be identified at the outset.¹²⁶ The referenced acts, however, must carry a maximum penalty of at least six years and were directed at a Norwegian national or resident.¹²⁷ For that reason, the police prosecutors focus their

¹¹⁷ C. PÉN. (Pen. Code) (Fr.) art. 113-7.

¹¹⁸ *Id.* § 113-8.

¹¹⁹ *Id.* § 113-8-1. In cases involving passive or active personality, line prosecutors would proceed with the case. In contrast, cases involving universal jurisdiction are handled by the Anti-Terrorism Unit within the Paris district court. *UJ Law and Practice in France*, *supra* note 91, at 19, 25.

¹²⁰ In addition to these jurisdictions, France recognizes jurisdiction under *aut dedere aut judicare*, but only for torture and enforced disappearance. *See, e.g.* C. PR. PÉN. (Crim. Proc. Code) (Fr.) arts. 689-2, 689-13. *See also International Law Commission: The Obligation to Extradite or Prosecute*, AMNESTY INT'L (2009), <https://www.amnesty.org/en/wp-content/uploads/2021/07/ior400012009en.pdf>; *The Legal Framework for Universal Justice in France*, HUM. RTS. WATCH (2014), https://www.hrw.org/sites/default/files/related_material/IJ0914France_0.pdf.

¹²¹ Strl. (Pen. Code) (Nor.) § 5, ¶ 2(2); Berger Interview, *supra* note 17.

¹²² Such a situation arose, in 2020, when the Norwegian Supreme Court upheld the conviction under universal jurisdiction of a stateless Palestinian for war crimes and terrorism committed prior to his arrival in Norway. Strl. (Pen. Code) (Nor.) §§ 5-6; *Norway: Supreme Court Rules It Has Universal Jurisdiction over Foreigners' Prior Terrorist Acts Abroad*, LIBRARY OF CONGRESS (Jul. 16, 2020), <https://www.loc.gov/item/global-legal-monitor/2020-07-16/norway-supreme-court-rules-it-has-universal-jurisdiction-over-foreigners-prior-terrorist-acts-abroad/>.

¹²³ *Universal Jurisdiction Law and Practice in Norway*, OPEN SOC'Y. JUST. INITIATIVE (Dec. 16, 2023), at 21, <https://www.justiceinitiative.org/uploads/aa5925fb-0c95-4f5f-a1b9-3e56da17c7b3/universal-jurisdiction-law-and-practice-norway.pdf> [hereinafter *UJ Law and Practice in Norway*].

¹²⁴ Prosecutors must determine, however, whether opening a separate investigation alongside an active prosecution in another country or before the ICC is in Norway's public interest. *Id.*

¹²⁵ Strl. (Pen. Code) (Nor.) § 6, ¶ 1; Berger Interview, *supra* note 17

¹²⁶ Berger Interview, *supra* note 17.

¹²⁷ Strl. (Pen. Code) (Nor.) §§ 5, ¶ 7; 6, ¶ 2.

investigation on interviewing asylum seekers currently in Norway.¹²⁸ Given that only two police prosecutors handle war crimes for the entire nation, they coordinate heavily with other European entities to ensure they are not duplicating efforts.¹²⁹

As in other countries, prosecutorial discretion is a factor in Norway. Even though prosecutors have a general duty to investigate crimes, relevant codes and guidance grant him the ability to waive prosecution, including the prospects at the outset of bringing someone to trial and the opportunity cost of the investigation.¹³⁰ They could consider whether an aggrieved party has been identified.¹³¹ The question of access to evidence is also key consideration.¹³² For a case of this nature, the prosecutors will also consider whether the required information is available in Norway, or can be secured.¹³³

Norway's exercise of universal jurisdiction is also limited to cases that are in the public interest.¹³⁴ When determining whether a particular case is in the public interest, prosecutors consider the following factors: seriousness of the act; any connections of the crime, perpetrator, and victim(s) to Norway, including whether the crime affects Norwegian interests; the extent of these effects on Norwegian interests; jurisdiction of other countries with well-functioning justice systems, in particular, countries neighboring Norway; and the possibility of extraditing alleged perpetrators to such countries.¹³⁵

In practice, the exercise of prosecutorial discretion, officials must balance the availability of evidence with the gravity of the crime and the connection to Norway while considering the nation's international obligations.¹³⁶ Norway's universal jurisdiction over atrocity crimes is not predicated, however, on any form of political approval.¹³⁷

The law in Norway also permits the exercise of both active and passive personality jurisdiction. The requirement of double criminality applies to active personality, except in cases of atrocity crimes, "breach of the laws of war," child or forced marriage, genital mutilation, terrorism and other specific contexts.¹³⁸ Moreover, active personality applies not just to nationals and those domiciled there, but also to those who subsequently become nationals or residents.¹³⁹

¹²⁸ Berger Interview, *supra* note 17.

¹²⁹ *Id.*

¹³⁰ Such practical considerations weight heavily in the guidance. Attorney General (Nor.), Rundskriv fra Riksadvokaten (Guidance Circular), Part II, No. 3/1999, Ch. 3, <https://www.riksadvokaten.no/wp-content/uploads/2017/09/Rundskriv-1999-3-Etterforskning.pdf>.

¹³¹ *Id.*

¹³² Berger Interview, *supra* note 17.

¹³³ *Id.*

¹³⁴ *UJ Law and Practice in Norway*, *supra* note 123, at 23.

¹³⁵ United Nations General Assembly (UNGA), Seventieth Sess., Sixth Com., *The Scope and Application and of the Principle of Universal Jurisdiction* (Oct. 20, 2015), https://www.un.org/en/ga/sixth/70/pdfs/statements/universal_jurisdiction/norway.pdf.

¹³⁶ *Id.* In a statement before the UNGA in 2015, the first secretary of Norway emphasized the importance of prosecutorial discretion in the application of the principle of universal jurisdiction, noting that "the prosecutor shall make his or her independent determination, taking into account the gravity of the crime in question and the connection between the alleged offender and Norway." *Id.*

¹³⁷ *Id.*

¹³⁸ Strl. (Pen. Code) (Nor.) § 5, ¶ (1).

¹³⁹ *Id.* § 5, ¶ (1) (a)-(b).

Interestingly, it also applies to someone who becomes “a national of or domiciled in another Nordic country and is present in Norway.”¹⁴⁰ If the crime involves a maximum imprisonment of more than one year, then it suffices for them to just be present in Norway.¹⁴¹ With respect to corporations, courts may only prosecute an enterprise for crimes committed abroad if that enterprise is registered in Norway.¹⁴² The Code also establishes passive personality jurisdiction when the victim is a Norwegian national or is domiciled in Norway, provided that a prison term of at least six years is required for the crime.¹⁴³ In the event that the public authorities opt not to prosecute a case, as in Sweden, an aggrieved party may commence their own private action¹⁴⁴ She must seek the issuance of a summons, however, within one month of being notified of the prosecutor’s decision not to pursue charges.¹⁴⁵

vi. The Netherlands

The Netherlands, too, has universal jurisdiction over certain atrocity crimes, although these prosecutions face similar restrictions to the French cases.¹⁴⁶ Under the Dutch International Crimes Act (“ICA”), the accused must be present in the country before an investigation can be open.¹⁴⁷ Moreover, he must remain there for the investigation to continue.¹⁴⁸ Another factor is subsidiarity; prosecutorial guidance indicates a preference for deferring to international courts.¹⁴⁹ In addition, the Netherlands requires public prosecutors to undertake a public interest assessment prior to undertaking any prosecution.¹⁵⁰ With respect to universal jurisdiction cases, the prosecutor must consider factors such as: the chance of success; the ability to travel to the country where the crime was committed to find evidence; the availability of documentary

¹⁴⁰ *Id.* § 5, ¶ 2(b).

¹⁴¹ *Id.* § 5, ¶ 3.

¹⁴² *Id.* § 5 (“Outside the area of application pursuant to section 4, the criminal legislation also applies to acts committed ... on behalf of an enterprise registered in Norway...”). In 2007, Norway opened an investigation into the corporate liability of Aker Kvaerner, a Norwegian company that allegedly supplied construction and maintenance services to the military base in Guantanamo Bay. However, the investigations were dropped because the prosecuting authority believed the services were provided by a subsidiary of Aker Kvaerner that was not under the full control of the parent company. *Norway Rejects Guantanamo Probe of Aker Kvaerner*, REUTERS (Sept. 20, 2007), <https://uk.reuters.com/article/akerkvaerner-guantanamo/norway-rejects-guantanamo-probe-of-aker-kvaerneridUKL2086557220070920> [hereinafter *Norway Rejects Guantanamo Probe*, REUTERS]

¹⁴³ *Id.* § 5, ¶ 5.

¹⁴⁴ Straffeprocessloven [Crim. Proc. Act] (Nor.) Ch 28, § 402, ¶ 1(1), https://legislationline.org/sites/default/files/documents/30/Norway_Criminal_Procedure_Act_1981_am2013_en.pdf [hereinafter Strpl. (Crim. Proc. Act) (Nor.)].

¹⁴⁵ *Id.* Ch. 28, § 403.

¹⁴⁶ Dual criminality is also not an impediment to the exercise of universal jurisdiction in The Netherlands. ICA (Neth.) art. 1; see also *Universal Jurisdiction Law and Practice in the Netherlands*, OPEN SOC’Y. JUST. INITIATIVE (Dec. 16, 2023), at 12, <https://trialinternational.org/wp-content/uploads/2022/05/UJ-Netherlands.pdf> [hereinafter *UJ Law and Practice in the Netherlands*].

¹⁴⁷ ICA (Neth.), art. 2(a).

¹⁴⁸ *UJ Law and Practice in the Netherlands*, supra note 146, at 11.

¹⁴⁹ Public Prosecutor’s Office (Neth.), Designation of Dismissal and Use of Grounds for Dismissal (2022A004), <https://www.om.nl/onderwerpen/beleidsregels/aanwijzingen/executie/aanwijzing-sepot-en-gebruik-sepotgronden-2022a004> (noting that “insufficient national interest” as a possible reason for dismissal) [hereinafter Public Prosecutor’s Office Guidance].

¹⁵⁰ “Prosecution may be waived on grounds of public interest.” Wetboek van Strafvordering [Code of Crim. Proc.] (Neth.) § 167 (as amended 2023), <https://wetten.overheid.nl/BWBR0001903/2024-01-01> [hereinafter SV (Code of Crim. Proc.) (Neth.)].

evidence; and the availability of witnesses and their location, including the possibility to travel to where the witnesses live.¹⁵¹ However, an interested party can challenge a prosecutor's decision not to proceed.¹⁵²

Like other Tier One countries, Dutch law also permits the exercise of both active¹⁵³ and passive personality¹⁵⁴ jurisdiction. Active personality jurisdiction in the Netherlands applies in cases where the suspect obtains Dutch nationality after the alleged crime was committed.¹⁵⁵ However, the Dutch Criminal Code ("*Wetboek van Strafrecht*") requires dual criminality as a precondition for the prosecution of Dutch nationals who have committed crimes outside the Netherlands.¹⁵⁶

In sum, the Tier One countries vary with respect to the conditions imposed on the exercise of universal jurisdiction. The presence of the suspect often amounts to a legal or practical hurdle for either the investigation or the trial. While this is a barrier to a case-specific prosecution, it would not impede a structural investigation. In Germany, Norway, and Sweden, such investigations have enabled the gathering of evidence without having to identify a potential suspect. Subsidiarity is a definite concern in France, and a potential issue in the Netherlands. Moreover, while all have some form of prosecutorial discretion, Norway and the Netherlands require the prosecutor to undertake a form of "public interest" assessment prior to proceeding. Similarly, in Sweden, the criteria call for a consideration of Swedish interests, though this is apparently easily satisfied with respect to atrocity crimes. On the other hand, Finland's prosecutor is prevented from dismissing a case if "public interest" so requires. Government approval will be required in Sweden if the case raises a foreign policy or security issue. It is also possible that the French prosecutors would consult with the Foreign Ministry on whether to proceed with a case.

All Tier One countries utilize active and passive personality jurisdiction. In the case of Germany, Finland, and Sweden, dual criminality applies under either type. For the Netherlands and Norway, it applies to just active personality jurisdiction. In France, dual criminality applies only for active personality jurisdiction when misdemeanors are charged. In all countries, active

¹⁵¹ Public Prosecutor's Office Guidance (Neth.), *supra* note 149 (noting reasons such as the suspect resides abroad and cannot be reached or the costs of prosecution do not outweigh the interest to be protected); *see also UJ Law and Practice in the Netherlands*, *supra* note 146, at 12.

¹⁵² ICA (Neth.) § 2(3).

¹⁵³ *Id.* art. 2(1)(c).

¹⁵⁴ *Id.* art. 2(1)(b). For application of passive personality jurisdiction, see discussion of case of downing of Malaysian Flight 17 (MH17) in Lachezar Yanev, *The MH17 Judgment: An Interesting Take on the Nature of the Armed Conflict in Eastern Ukraine*, EJIL: TALK! (Dec. 7, 2022), https://www.ejiltalk.org/the-mh17-judgment-an-interesting-take-on-the-nature-of-the-armed-conflict-in-eastern-ukraine/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2on. To exercise jurisdiction over the murder of non-Dutch victims, the Court utilized a provision of their code allowing the delegated transfer of authority in addition to an agreement with Ukraine. *Id.*

¹⁵⁵ ICA (Neth.) § 2(3); *The Legal Framework for Universal Jurisdiction in the Netherlands*, HUM. RTS. WATCH (2014), https://www.hrw.org/sites/default/files/related_material/IJ0914Netherlands_0.pdf.

¹⁵⁶ *Wetboek van Strafrecht* [Crim. Code] (Neth.) § 5(1)(3), <https://wetten.overheid.nl/BWBR0001854/2024-01-01> [hereinafter SR (Crim. Code) (Neth.)]; *see also* Andre Klip & Harmen Van Der Wilt, *The Netherlands Non Bis in Idem*, 73 REVUE INTERNATIONALE DE DROIT PÉNAL 1091 (2002), <https://www.cairn.info/revue-internationale-de-droit-penal-2002-3-page-1091.htm>.

personality applies to those who become citizens after the offense was committed. In the case of the Nordic countries, this requirement is fulfilled merely by being present in the country pursuing the case and holding citizenship in another Nordic country.

B. Crimes Subject to Universal Jurisdiction

This memo focuses on crimes against humanity and war crimes. It will not discuss genocide¹⁵⁷ or aggression¹⁵⁸ in detail, given the unlikelihood that such a charge could be raised against irregular armed groups such as the Wagner Group. The definition of these crimes within the legislation of the Tier One countries examined in this memo generally mirrors analogous provisions in the Rome Statute establishing the International Criminal Court (ICC).¹⁵⁹ However, there are some differences with respect to both the contextual elements and substantive law. The section below will discuss these similarities and distinctions.¹⁶⁰

i. Contextual Elements

Under the ICC's Elements of Crimes, all crimes against humanity must meet the following contextual elements:

- a. The conduct was committed as part of a widespread and systematic attack directed against a civilian population; and
- b. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.¹⁶¹

Under the ICC's Elements of Crimes, an attack is defined as “a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant or in furtherance of a State or organizational policy to commit such attack.”¹⁶²

¹⁵⁷ Certain Tier One countries have adopted language that broadens the definition of genocide. For instance, the French definition permits prosecutions of the destruction of “a group determined by any other arbitrary criterion” in addition to national, ethnical, racial, and religious ones. The Finnish language also adds in “other comparable groups”. In addition, the Swedish and the German codes specifically adopted the singular when referencing victims (“a member of the group” vs. “members of the group”). See VSTGB (Ger.) § 6; ACR (Swed.) § 1; RL (Pen. Code) (Finn.) Ch. 11, § 1; C. PÉN. (Pen. Code) (Fr.) art. 211-1; Strl. (Pen. Code) (Nor.) § 5; ICA (Neth.) § 3. Compare Rome Statute art. 6.

¹⁵⁸ All Tier One countries have outlawed aggression. In the case of Germany and the Netherlands, universal jurisdiction does not apply to this crime. Sweden's legislation, the Act on Criminal Responsibility for Genocide, Crimes Against Humanity, and War Crimes (ACR), codified in 2014, did not originally include the crime of aggression. That was added in a 2022 amendment. VSTGB (Ger.) §§ 1, 13; Otte Interview, *supra* note 11. See generally *The Crime of Aggression in the National Laws of EU Member States, Genocide Network Observer States and Ukraine*, EUROJUST (2023), <https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-crime-of-aggression-national-laws.pdf>; ACR (Swed.); Klamberg, *Sweden Manuscript*, *supra* note 37, at 8.

¹⁵⁹ *Rome Statute*, arts. 6-8bis.

¹⁶⁰ Compare Official Records of the Assembly of States Parties, Elements of Crimes (*Sept. 3-10, 2022*) art. 7, Intro., ¶ 3, <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf> [hereinafter, ICC Elements of Crimes] with VSTGB (Ger.) § 7; Strl. (Pen. Code) (Nor.) § 102.

¹⁶¹ VSTGB (Ger.) art. 7(1)(a); ICC Elements of Crimes art. 7, ¶¶ 2-3.

¹⁶² ICC Elements of Crimes art. 7, Intro., ¶ 3.

Consistent with this definition, both the French¹⁶³ and Dutch penal codes¹⁶⁴ expressly state that the attack must be conducted in furtherance of a plan or policy. Although neither the Swedish Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes or Universal Crimes Act (“ACR”)¹⁶⁵ nor the Finnish Penal Code refer to a plan or policy, their preparatory works do so.¹⁶⁶ Swedish and Finnish courts routinely rely on such documents to interpret the law.¹⁶⁷ Thus, prosecutors must demonstrate such a plan or policy to prove a crime against humanity case.¹⁶⁸ With respect to Germany and Norway, the relevant codes make no mention of a plan or policy.¹⁶⁹

With respect to the contextual elements for war crimes, the Rome Statute requires that:

- a. The conduct has taken place in the context of and was associated with an armed conflict; and
- b. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.¹⁷⁰

Moreover, the Rome Statute’s war crimes provisions clearly delineate between acts committed in IACs and NIACs.¹⁷¹ Certain provisions apply solely to IACs.¹⁷² Yet, while Tier One countries still require the connection to the armed conflict,¹⁷³ they have largely dispensed with this distinction. The Finnish code, for instance, criminalizes acts that occur “in connection with a war or another international or domestic armed conflict or occupation.”¹⁷⁴ The enumerated acts draw from Article 8 of the Rome Statute and include killing, wounding, torturing, raping, destroying property, pillages, and recruiting children, among other crimes.¹⁷⁵ The Finnish code then

¹⁶³ C. PÉN. (Pen. Code) (Fr.) art. 212-1 (“Any of the following acts committed in execution of a concerted plan against a civilian group as part of a widespread or systematic attack also constitutes a crime against humanity and is punishable by life imprisonment, widespread or systematic attack”).

¹⁶⁴ ICA (Neth.) § 2(4)(2)(a) (“pursuant to or in further of a State or organizational policy to commit such attack); see also VSTGB (Ger.) § 7.

¹⁶⁵ Prior to the passage of the ACR, Swedish prosecutors pursued charges based on treaties and customary international law. Since this lacked specificity, some argued it violated the principle of legality. This concern, among others, led to the passage of the 2014 legislation. ACR (Swed.) § 2; Mark Klamberg, *International Criminal Law in Swedish Courts: The Principle of Legality in the Arklöv Case*, INT’L CRIM. LAW. REV. 395, 397 (2009), <https://www.diva-portal.org/smash/get/diva2:218794/FULLTEXT01.pdf>.

¹⁶⁶ RL (Pen. Code) (Finn.) Ch. 11, § 3; Klamberg Interview, *supra* note 39; Sampsa Hakala, State Prosecutor (Finn.), Written Response to Question (Feb. 26, 2024) [hereinafter Hakala, 2/26/24 Written Response].

¹⁶⁷ Klamberg Interview, *supra* note 39; Hakala, 2/26/24 Written Response, *supra* note 166.

¹⁶⁸ Klamberg Interview *supra* note 39; Hakala 2/26/24 Written Response *supra* note 166.

¹⁶⁹ In the case of Finland, while a plan or policy is not a required element, a crime against humanity would be considered aggravated when it is “committed in a particularly premeditated or systematic manner,” thereby implying that evidence of a plan or policy would lead to an increased sentence for the perpetrator. RL (Pen. Code) (Finn.) Ch. 11, §§ 3, 4(3); Strl. (Pen. Code) (Nor.) § 102 (only referring to “a broad or systematic attack on a civilian population”); VSTGB (Ger.) § 7 (referring to “widespread or systematic attack against a civilian population”).

¹⁷⁰ See, e.g. ICC Elements of Crimes § 8(2)(a)(i) (3)-(4).

¹⁷¹ Compare Rome Statute art. 8(2)(b) with art 8(2)(c).

¹⁷² Rome Statute, art. 8(2)(c).

¹⁷³ See, e.g., VSTGB (Ger.) § 8(1); STGB (Crim. Code) (Ger.) Ch. 1, § 15 (intent); ACR (Swed.) § 4; RL (Pen. Code) (Finn.) Ch. 11 § 5; C. PÉN. (Pen. Code) (Fr.) art. 461-1; Strl. (Pen. Code) (Nor.) § 103; ICA (Neth.) §§ 5, 6.

¹⁷⁴ RL (Pen. Code) (Finn.) Ch. 11, § 5.

¹⁷⁵ Under the Finnish Penal Code, recruiting children is prohibited for all those under the age of eighteen. The Rome Statute, in contrast, places the age at fifteen. Other crimes include compelling a prisoner or protected person to serve in an armed force, depriving a protected person to a fair trial, launching an attack that leads to “loss of human life or

includes a catch-all provision that penalizes other actions recognized as war crimes under Article 8 or “generally recognized and established [under the] laws and customs of war” without specifying a context.¹⁷⁶

Sweden,¹⁷⁷ Norway,¹⁷⁸ Germany,¹⁷⁹ and France¹⁸⁰ have all eliminated the distinction between IAC and NIACs, except for the war crimes of transferring civilians, compelling nationals to fight their own state, and forcing enlistment of a protected person, which only apply to IACs. In addition, Sweden¹⁸¹ and Germany¹⁸² have added unlawful detention to the crimes applicable only to IACs. Germany¹⁸³ and France¹⁸⁴ have included depriving members of the opposing party of judicial guarantees to the list of crimes applicable only to IACs, while France¹⁸⁵ also limits the prohibitions on utilizing protected people as shields in military operations to IACs.

Only the Netherlands identifies significant distinctions between crimes committed in an IACs and those during NIACs.¹⁸⁶ In this respect, its ICA is unique among Tier One legislation in closely tracking the Rome Statute.¹⁸⁷

ii. Enumerated Acts as Crimes Against Humanity

The legislation of Tier One countries generally reflects the specific enumerated acts set forth in the crimes against humanity provision of the Rome Statute. However, differences remain. The law of some jurisdictions subsumes one crime into another rather than explicitly laying out both or regroups crimes under a different category. In a few jurisdictions, the law expands the list or definition of enumerated acts recognized as crimes against humanity.

For instance, Article 7(1)(g) of the Rome Statute explicitly identifies rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization as crimes against humanity.¹⁸⁸ Yet, Sweden’s analogous provision refers merely to “grave sexual abuse through rape, enforced prostitution or [any] other comparably serious act,”¹⁸⁹ leaving out sexual slavery, enforced sterilization and forced pregnancy. It instead places sexual slavery with forced labor under

injuries” or severe environmental damage, attacking a civilian population or undefended civilian objects, making improper use of flags, unlawfully confining, or transferring and taking hostages. *Compare* RL (Pen. Code) (Finn.) Ch. 11, § 5 with Rome Statute art. 8(2)(b)(xxvi).

¹⁷⁶ RL (Pen. Code) (Finn.) Ch. 11, § 5. *See also discussion UJ Law and Practice in Finland, supra* note 68, at 7.

¹⁷⁷ ACR (Swed.) § 5.

¹⁷⁸ Strl. (Pen. Code) (Nor.) § 103, ¶ 2.

¹⁷⁹ VStGB (Ger.) § 8(3).

¹⁸⁰ C. PÉN. (Pen. Code) (Fr.) arts. 461-20, 461-26.

¹⁸¹ ACR (Swed.) § 5.

¹⁸² VStGB (Ger.) § 8(3).

¹⁸³ VStGB (Ger.) § 9(2).

¹⁸⁴ C. PÉN. (Pen. Code) (Fr.) arts. 461-21.

¹⁸⁵ *Id.* §§ 461-19.

¹⁸⁶ ICA (Neth.) §§ 5, 6.

¹⁸⁷ *Compare* ICA art. 6 with Rome Statute art. 8(c)-(d). However, the ICA’s Section 7 does include a catch-all clause that criminalizes “a violation of the laws and customs of war” not already covered in the provisions related to IACs and NIACs. ICA (Neth.) § 7.

¹⁸⁸ Rome Statute art. 7(1)(g).

¹⁸⁹ ACR (Swe.) § 2(3)

Section 2(5) of its ACR.¹⁹⁰ With respect to enforced sterilization and forced pregnancy, the preparatory works indicate that the drafters thought that these crimes might not include sexual abuse, and therefore should not be grouped with other crimes of sexual violence.¹⁹¹ While the ACR treats enforced pregnancy as a distinct crime against humanity,¹⁹² enforced sterilization, according to the preparatory works, is presumed to be a form of “torture or other inhumane treatment,” covered under ACR Section 2(2).¹⁹³

In France, the code likewise does not expressly include sexual slavery amongst its list of sexual violence crimes against humanity.¹⁹⁴ Yet, the catch-all phrase, “any other forms of sexual violence of comparable severity” would likely cover this crime.¹⁹⁵ June 2024 amendments to Germany’s VStGB replaced outdated language about “sexual coercion” with “sexual assault” and added sexual slavery to the list of prohibited crimes.¹⁹⁶ It also eliminated the previous requirement that forced pregnancy must be undertaken with the intent of affecting the ethnic composition of a population.¹⁹⁷

With respect to other enumerated acts, Finland and Sweden do not include a reference to apartheid in their relevant code.¹⁹⁸ In the case of Sweden, its preparatory documents indicate that drafters viewed this crime as subsumed within the crime of persecution.¹⁹⁹ Evidence of apartheid can be considered an aggravating circumstance for purposes of sentencing.²⁰⁰ In Germany, the VStGB includes apartheid, but requires it to be linked to another crime against humanity.²⁰¹

In several cases, the deviations from the Rome Statute broaden the scope of crimes against humanity. For instance, Germany defines the crime of deportation more broadly than does the Rome Statute.²⁰² While the Rome Statute refers to the deportation of “persons”, the VStGB refers to the deportation of a single person.²⁰³ This divergence occurs not only with respect to deportation as a crime against humanity but also, to deportation as a war crime.²⁰⁴

¹⁹⁰ *Id.* § 2(5). While the Rome Statute includes trafficking under art.7(2)(c), the preparatory works indicate that the ACR drafters considered trafficking too broad a concept to fall in this category. *UJ Law and Practice in Sweden*, *supra* note 40, at 7.

¹⁹¹ *UJ Law and Practice in Sweden*, *supra* note 40, at 5-6.

¹⁹² ACR (Swed.) § 2(4). Like the Rome Statute, the ACR criminalizes forced pregnancy to the extent it is intended to alter the ethnic composition of a population. *Id.*

¹⁹³ *UJ Law and Practice in Sweden*, *supra* note 40, at 5-6.

¹⁹⁴ C. PÉN. (Pen. Code) (Fr.) art. 212-1 (referring to rape, forced prostitution, forced pregnancy, forced sterilization or any other form of sexual violence of comparable severity”).

¹⁹⁵ C. PÉN. (Pen. Code) (Fr.) art. 212-1.

¹⁹⁶ Hassfurter, *The Reform of the International Law Framework in Germany*, *supra* note 24.

¹⁹⁷ The law also clarifies the inclusion of persecution on grounds of sexual orientation as a crime against humanity. *Id.*

¹⁹⁸ See RL (Pen. Code) (Finn.) Ch. 11, § 5; ACR Ch. 11, § 2.

¹⁹⁹ ACR § 2(8); Klamberg Interview, *supra* note 39; Klamberg 2/15/24 Written Response, *supra* note 41.

²⁰⁰ Based on the list of aggravating factors that will be discussed further below, Finland would likely follow suit. Finland lists among its aggravating factors for crimes against humanity whether it is “committed in a particularly premeditated and systemic manner.” RL (Pen. Code) (Finn.) Ch. 11, § 4(3). *UJ Law and Practice in Sweden*, *supra* note 40, at 7 (citing interview with academic).

²⁰¹ VStGB (Ger.) § 7(5). When present, it results in an augmented penalty. *Id.*

²⁰² *Id.* § 7(1)(4).

²⁰³ Compare VStGB (Ger.) § 8(6) (prohibiting the deportation of “a person”) with art. § 8(2)(b)(viii) (defining deportation as the “transfer [. . .] of parts of its civilian population”).

²⁰⁴ *Id.*

With respect to the crime of persecution, the deviations from the Rome Statute are consistent across multiple Tier One countries. The Rome Statute requires that, for an act to constitute persecution, it must have been committed “in connection with” another crime within the ICC’s jurisdiction.²⁰⁵ Yet, Finland,²⁰⁶ Germany,²⁰⁷ Sweden,²⁰⁸ Norway,²⁰⁹ and France²¹⁰ have all eliminated this requirement. The Netherlands alone among this group adheres to the Rome Statute in this regard.²¹¹

While most deviations from the Rome Statute either result in no substantive change or a broadening of the scope of CAH, one distinction increases the difficulty in proving a crime. Germany’s VStGB requires that there be an “intent of destroying a population in whole or in part” to prove extermination, a requirement not included in the Rome Statute.²¹²

iii. Enumerated Acts as War Crimes

The Rome Statute first sets forth war crimes that are considered grave breaches under the Geneva Convention, then identifies other serious violations of law application to IACs before listing war crimes committed in NIACs.²¹³ Yet, as mentioned above, most Tier One countries have largely dispensed with the IAC/NIAC distinction.

Several countries instead organize their legislation with respect to prohibited targets or prohibited means or conduct of war. For instance, both the German VStGB and the Norwegian Penal Code group war crimes into five categories: (1) war crimes against persons, (2) war crimes against property and rights; (3) crimes aimed at humanitarian operations; (4) prohibited methods of war and (5) prohibited means of war.²¹⁴ While this approach differs from that of the Rome Statute, it covers substantially the same crimes. Thus, prosecutors have not felt constrained by the VStGB, with respect to charging.²¹⁵ Sweden has adopted a similar approach, but further separates war crimes against property from war crimes that infringe a right to court access.²¹⁶

France opted to divide war crimes into nine categories, at times still reflecting a NIAC/IAC distinction: (1) assaults on life as well as physical or psychological integrity in all conflicts; (2) assaults on individual liberty in all conflicts; (3) infringements on the rights of minors in all conflicts; (4) prohibited means and methods of warfare in all conflicts; (5) assaults on goods in all conflicts; (6) groups formed or agreements established to prepare war crimes in

²⁰⁵ Rome Statute art. 7(1)(h); ICC Elements of Crimes art. 7(1)(h).

²⁰⁶ RL (Pen. Code) (Finn.) Ch. 11, § 3(5).

²⁰⁷ VStGB (Ger.) at § 7(10).

²⁰⁸ ACR § 2(8)

²⁰⁹ Strl. (Pen. Code) (Nor.) § 102. Norway’s preparatory works indicate the act of persecution is as serious as other crimes. *UJ Law and Practice in Norway*, *supra* note 123, at 7.

²¹⁰ C. PÉN. (Pen. Code) (Fr.) art. 212-1(8).

²¹¹ ICA (Neth.) § 4(h).

²¹² Compare VStGB (Ger.) § 7(1)(2) with ICC Elements of Crimes art. 7(1)(b).

²¹³ Rome Statute art. 8.

²¹⁴ Strl. (Pen. Code) (Nor.) §§ 103-7; VStGB (Ger.) §§ 8-12.

²¹⁵ Compare VStGB (Ger.) §§ 8-12 with Rome Statute art. 8; Otte Interview, *supra* note 11.

²¹⁶ ACR (Swed.) §§ 6-7. It also includes a provision defining gross war crimes. *See id.* § 11.

all conflicts; (7) violations of the freedom and rights of persons in IACs; (8) prohibited means and methods in IACs and (9) other war crimes in NIACs.²¹⁷

In some cases, the laws diverge from the Rome Statute in substance as well as organization. For instance, the Norwegian Penal Code lists enslavement as both a crime against humanity and a war crime, whereas the Rome Statute only enumerates it as a crime against humanity.²¹⁸

Norway also does not require torture as a war crime to be conducted for a certain purpose; in contrast, the ICC Elements of Crimes specifies that the pain or suffering inflicted on the victim must have been intended to gain a confession, punish, intimidate, coerce or for any reason based on discrimination of any kind.²¹⁹ In addition, the Norwegian code defines pillaging,²²⁰ attack on protected signs,²²¹ environmental damage,²²² and cultural monuments²²³ all slightly more expansively than does the Rome Statute.

One deviation from the Rome Statute that is consistent across several countries pertains to the treatment of child soldiers. Under the Rome Statute, conscription is criminalized for those under the age of fifteen.²²⁴ In contrast, Finland, France, and Norway have all expanded that prohibition to those under the age of eighteen.²²⁵

As with crimes against humanity, some states subsume one war crime into another rather than explicitly laying out both. For instance, whereas the Rome Statute prohibits subjecting persons to physical mutilation or to medical or scientific experiments, Sweden's ACR drafters considered the crime covered by Article 4(2), which prohibits causing harm and pain through torture and inhuman treatment.²²⁶

iv. Other Crimes Subject to Universal Jurisdiction

²¹⁷ C. PÉN. (Pen. Code) (Fr.) Libre IV bis: *Des crimes et des délits de guerre*.

²¹⁸ Compare Strl. (Pen. Code) (Nor.) §§ 102(1)(c), 103(1)(c) with Rome Statute art. 7(1)(c). The Rome Statute does include sexual slavery as a war crime. Rome Statute art. 8(2)(b)(xxii).

²¹⁹ Compare Strl. (Pen. Code) (Nor.) § 103(1)(b) (prohibiting the infliction of “great suffering or considerable harm to the body or health of a protected person, particularly through torture or other cruel or inhuman treatment”) with ICC Elements of Crimes art. 8(2)(c)(i)-4 (noting that the infliction of pain or suffering is “for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind”).

²²⁰ The Rome Statute prohibits “pillaging a town or place,” but the Norwegian code does not indicate the pillaging has to be in a specific location. Compare Rome Statute art. 8(2)(b)(xvi) with Strl. (Pen. Code) (Nor.) § 104(a).

²²¹ The Rome Statute requires the sign be carried by the target, but the Norwegian penal code only notes that the target was entitled to use it and the accused was aware of that fact. Compare Rome Statute art. 8(2)(b)(xxiv) with Strl. (Pen. Code) (Nor.) § 105(b).

²²² The Rome Statute requires environmental damage to be widespread, long-term and result in severe damage whereas the code only requires the damage to be excessive in relation to the military aim achieved. Compare Rome Statute art. 8(2)(b)(iv) with Strl. (Pen. Code) (Nor.) § 106(c).

²²³ The Norwegian penal code adds “cultural monuments” to the list of protected non-military targets; it is not listed in the Rome Statute. Compare Rome Statute art. 8(2)(b)(ix) with Strl. (Pen. Code) (Nor.) § 106 (f).

²²⁴ Rome Statute art. 8(2)(b)(xxvi).

²²⁵ Strl. (Pen. Code) (Nor.) § 103(1)(f); C. PÉN. (Pen. Code) (Fr.) art. 461-7; RL (Pen. Code) (Finn.) Ch. 11, § 5(5).

²²⁶ ACR (Swed.) § 4(2); Klamborg 2/15/24 Written Response, *supra* note 41 (citing Government Bill Prop. 2013/14:146, at 133, 137-8).

Some countries add several crimes that are subject to universal jurisdiction that do not appear in the Rome Statute. For instance, France and the Netherlands add a stand-alone crime of enforced disappearance that requires no findings of contextual elements.²²⁷ Similarly, these two countries join Sweden in having a stand-alone offense of torture.²²⁸

v. Conclusion

In sum, the contextual elements and the substantive crimes set forth in Tier One legislation diverge at times from the Rome Statute. Germany, Norway, and Finland do not require proof of a policy as part of the contextual elements of a crime against humanity. In addition, all but the Netherlands have largely eliminated the distinctions between crimes arising in the context of IACs and those pertaining to NIACs. While certain crimes might not have been expressly included in each Tier One country's legislation, preparatory works or commentary indicate that the specific crimes were viewed as covered by other enumerated crimes. In several cases, Tier One countries have adopted language that broadens the scope established by the Rome Statute, thereby expanding the reach of universal jurisdiction. For instance, four countries now prohibit conscription of those under the age of eighteen.

C. Modes of Liability

Modes of liability refer to theories which can be used to hold individuals responsible for criminal conduct. This section will review three general categories of responsibility: 1) individual (principal and/or accessorial); 2) command or superior; and 3) corporate. While not all countries embrace a distinction between principal and accessorial liability,²²⁹ as a general matter principal liability is used to hold responsible individuals who had a "decisive influence" on the commission of the crime, including those without whom the crime would not have been committed even if they did not physically commit the crime.²³⁰ Accessorial liability, on the other hand, has been used to hold responsible those who in some way contribute to a crime committed by a third person, for instance, by aiding and abetting the principal author of the crime, and which often implies a lesser form of culpability.²³¹ Further, command or superior responsibility is used to hold responsible military commanders or senior leaders for failing to prevent or punish criminal behavior committed by their subordinates. Finally, corporate liability refers to the extent

²²⁷ C. PÉN. (Pen. Code) (Fr.) art. 221-12; ICA art. 8a.

²²⁸ Consistent with the Convention on Torture, all three require that the act be performed for a specific purpose and by a public servant or other person operating under instruction from authorities. ICA arts. 1(e), 8, 8a; BRB (Crim. Code) (Swed.) 2:3(6)(h); 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988); 23 I.L.M. 1027 (1984), art 1, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>.

²²⁹ Héctor Olásolo, *Developments in the Distinction Between Principal and Accessorial Liability in Light of the First Case Law of the International Criminal Court*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 339 (Carsten Stahn & Göran Sluiter eds., 2009).

²³⁰ Héctor Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes*, 15 (Adrian Fulford, Ekaterina Trendafilova, Kai Ambos eds., 2009); J. D. Ohlin *et al.*, *Assessing the Control Theory*, 26 LEIDEN J. INT'L L. 740-743 (2013).

²³¹ WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 431 (2010); H. Alonso, *Current Trends on Modes of Liability for Genocide, Crimes Against Humanity and War Crimes*, in FUTURE PERSPECTIVE ON INTERNATIONAL CRIMINAL JUSTICE 522-24 (Carsten Stahn & Larissa van den Herik, eds., 2010).

to which a company as a legal person can be held liable for the conduct of natural persons associated with that company.²³²

All Tier One countries recognize some form of individual liability, included for attempted crimes,²³³ in their codes or jurisprudence. While most Tier One countries distinguish between principal and accessory liability, Norway exhibits little interest in drawing the distinction except for purposes of sentencing.²³⁴ All recognize command responsibility for both military and civilian leaders. All but Germany and Sweden also recognize corporate liability for international crimes. In addition to these modes, Germany, France, and the Netherlands penalize participation in a criminal organization whereas Norway does so only with respect to terrorist groups.

i. Individual Liability

Germany

In Germany, the StGB includes various forms of liability, including direct perpetration, co-perpetration and indirect perpetration.²³⁵ The StGB clearly reflects the German reliance on the control over the crime theory under which liability is analyzed based on the control an individual exercises over the criminal endeavor.²³⁶ The theory creates a clear distinction between principal perpetrators, whose actions control the criminal act, and accessory perpetrators, who do not directly cause a criminal act but are still liable for their contribution to the crime.²³⁷

All three forms of liability under the StGB reflect principal liability. Direct perpetrators have direct control over the commission of a criminal act.²³⁸ Co-perpetration addresses group or collective criminality and is used when individuals, who, acting in groups of two or more persons pursuant to a common plan,²³⁹ make an essential contribution to the crime such that they

²³² Jaya Elise Bordeleau-Cass, *The 'Accountability Gap': Holding Corporations Liable for International Crimes*, GLOBAL JUSTICE J. QUEEN'S LAW, <https://globaljustice.queenslaw.ca/news/the-accountability-gap-holding-corporations-liable-for-international-crimes>.

²³³ STGB (Crim. Code) (Ger.) § 23; BRB (Crim. Code) (Swed.) 23:1; RL (Pen. Code) (Finn.) Ch. 5, § 1; C. PÉN. (Pen. Code) (Fr.) art. 121-4; Norges Høyesterett [Supreme Court], Judgment, HR-2019-714-A, https://lovdata-no.translate.google/dokument/HRENG/avgjorelse/hr-2019-714-a-eng?q=attempt&x_tr_sl=la&x_tr_tl=en&x_tr_hl=en&x_tr_pto=wapp (conviction for attempted murder under murder provision) [hereinafter S. Ct. (Nor.)]; SR (Crim. Code) (Neth.) § 47(1)(1).

²³⁴ Anette Berger, Written Response (Feb. 28, 2024) (on file with author).

²³⁵ VSTGB (Ger.) §§ 4, 6-15; STGB (Crim. Code) (Ger.) §§ 25-27.

²³⁶ The theory was first articulated in detail by Claus Roxin. STGB (Crim. Code) (Ger.) §§ 25-27; Neha Jain, *The Control Theory of Perpetration in International Criminal Law*, 12(1) CHICAGO J. INT'L L. 159, 166 (2011), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1619&context=cjil> [hereinafter Jain, *The Control Theory*].

²³⁷ Jain, *The Control Theory*, *supra* note 236, at 165.

²³⁸ *Id.*; STGB (Crim. Code) (Ger.) § 25. Co-perpetration liability refers to those with “functional domination of the participating joint actor.” Jain, *The Control Theory*, *supra* note 236, at 165.

²³⁹ STGB (Crim. Code) (Ger.) § 25; Jain, *The Control Theory*, *supra* note 236, at 167, 169-70. In cases of joint commission of a crime, which the judges dubbed ‘co-perpetration’, the indicator of the accused’s ‘control’ over the collective crime was considered their ‘essential contribution’ to the joint criminal effort and their power ‘to frustrate the commission of the crime by not performing their tasks’ Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Decision on the Confirmation of Charges, at ¶¶ 346-347, (Jan. 29, 2007), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2007_02360.PDF [hereinafter ICC, Lubanga Confirmation of Charges

have the ability “to frustrate the commission of the crime by not performing their tasks.”²⁴⁰ Under this mode of liability, each perpetrator who makes an essential contribution to a crime within the common plan is held liable as a principal.²⁴¹ Further, indirect perpetration liability applies when someone exercises “control over the will of the direct perpetrator or domination arising out of the superior knowledge.”²⁴² Like the co-perpetrator, the indirect perpetrator is seen as controlling crime and therefore liable as the principal actor, even though he operates “through” another and does not directly perform the act himself.²⁴³

In addition to penalizing those engaged in criminal acts, German law also penalizes mere membership in “an organisation the objectives or activities of which are directed at the commission of [criminal] offences.”²⁴⁴ The provision does not apply if the offense is only one of its objectives, or a subordinate objective.²⁴⁵ In addition, the offense in question must be liable to incur a penalty of two years.²⁴⁶ Merely attempting to form such an organization could result in a prison sentence.²⁴⁷ Those who are considered the ringleaders are subjected to heavier sentences than a mere member.²⁴⁸ Under German law, organizations that aim to commit atrocity crimes are deemed to be terrorist groups and subject to this law.²⁴⁹ Such a provision recently enabled authorities to prosecute ISIL perpetrators not just for atrocity crimes in Syria, but also, for membership in a terrorist organization.²⁵⁰

Germany’s accessorial forms of liability include aiding and abetting, inciting, and inducing,²⁵¹ resembling analogous provisions under the Rome Statute.²⁵² Someone who induces another to commit an unlawful act is viewed as equally culpable as the one he induced,²⁵³ while

Decision]. The ‘essential contribution’ requirement under Article 25(3)(a) was differentiated from accessory liability under subparagraph (d), which merely required ‘any other’ type of contribution Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, at ¶ 999 (March 14, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_03942.PDF.

²⁴⁰ ICC, Lubanga Confirmation of Charges, *supra* note 239, at ¶¶346-347. *See generally* Liana Minkova, *A New Approach to Criminal Responsibility? Discussing the Separate Opinions on Indirect Co-Perpetration in the Ntaganda Appeals Judgment*, OPINION JURIS (Aug. 4, 2021), <http://opiniojuris.org/2021/04/08/a-new-approach-to-criminal-responsibility-discussing-the-separate-opinions-on-indirect-co-perpetration-in-the-ntaganda-appeals-judgment/>.

²⁴¹ STGB (Crim. Code) (Ger.) § 25(2).

²⁴² Jain, *The Control Theory*, *supra* note 236, at 165.

²⁴³ STGB (Crim. Code) (Ger.) § 25(1); Jain, *The Control Theory*, *supra* note 236, at 171.

²⁴⁴ STGB (Crim. Code) (Ger.) § 129(1).

²⁴⁵ *Id.* § 129(3)(2) The provision also does not apply to political parties.

²⁴⁶ *Id.*

²⁴⁷ STGB (Crim. Code) (Ger.) § 129(4).

²⁴⁸ *Id.* § 129(5).

²⁴⁹ Julia Geneuss, *On the Relationship Between German International Criminal Law and Counter-terrorism Criminal Law*, 21 J. INT’L CRIM. JUST. 839, 839 (Sep. 2023), <https://academic.oup.com/jicj/advance-article/doi/10.1093/jicj/mqad051/7513530>.

²⁵⁰ *See, e.g.* Oberlandesgericht [OLGST] [Higher Reg. Ct.], Düsseldorf (Ger.), 7 StS 3/19 (June 16, 2021), <https://openjur.de/u/2381871.html>. *See also* Higher Reg. Ct., Frankfurt, 5-3 StE 1/20 - 4 - 1/20 (Nov. 30, 2021), <https://www.eurojust.europa.eu/document/higher-regional-court-frankfurt-am-main-germany-30-november-2021-case-number-5-3-ste-120-4> [hereinafter Higher Reg. Ct. (Ger.)].

²⁵¹ STGB(Crim. Code) (Ger.) §§ 26, 27, 30.

²⁵² Rome Statute art. 25(b)- (c).

²⁵³ STGB (Crim. Code) (Ger.) § 26.

those who assist another in the commission of a crime are penalized as aiders and abettors.²⁵⁴ The StGB likewise provides criminal liability for attempt.²⁵⁵

Finally, the VStGB resembles the Rome Statute²⁵⁶ in holding both military and civilian superiors accountable for criminal actions committed by their subordinates if they failed to prevent them.²⁵⁷ In a military context, commanders are characterized as persons who exercise actual command or control in a force.²⁵⁸ A civilian superior is someone whose ability to effectively give orders and “exercise command and control” of a civil organization or enterprise is equivalent to his military counterpart.²⁵⁹ Germany has three provisions that pertain to command responsibility that each address a distinct aspect of this mode of liability: the failure to prevent, the failure to supervise, and the failure to report.²⁶⁰ Notably, unlike the other two provisions, Section 14 sanctions a military or civilian superior who “intentionally or negligently omits properly to supervise a subordinate” who commits a crime, suggesting that if he should have known his subordinates were acting improperly, the superior would be liable even without actual knowledge.²⁶¹ At the same time, while the Rome Statute requires a higher standard of knowledge for civilian superiors than for military commanders,²⁶² the VStGB makes no such distinction between civilian and military.²⁶³ Nevertheless, given the difficulty of establishing the line of command as well as the knowledge requirement, these provisions are rarely invoked.²⁶⁴

²⁵⁴ *Id.* § 27(1).

²⁵⁵ *Id.* § 23.

²⁵⁶ The Rome Statute states: “In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court, a military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control, as the case may be, as a result of his or her failure to exercise control properly over such forces, where (i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.” Rome Statute art. 28.

²⁵⁷ Section 4 of the VStGB provides that “(1) A military commander or civilian superior who omits to prevent his or her subordinate from committing an act pursuant to this Act shall be punished like a perpetrator of the offence committed by the subordinate; (2) Any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to a military commander. Any person effectively exercising command and control in a civil organisation or in an enterprise shall be deemed equivalent to a civilian superior.” VStGB (Ger.) § 4.

²⁵⁸ *Id.* § 4(2).

²⁵⁹ *Id.*

²⁶⁰ *Id.* §§ 4, 14, 15. Section 15(1) provides that “A military commander or a civilian superior who fails to immediately bring an act under this Act committed by a subordinate to the attention of the body responsible for the investigation or prosecution of such acts shall be liable to imprisonment for up to five years punished (sic).” *Id.* § 15(1).

²⁶¹ Section 14(1) provides that “A military commander who intentionally or negligently omits properly to supervise a subordinate under his or her command or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Act, where the imminent commission of such an offence was discernible to the commander and he or she could have prevented it.” Section 14(2) applies the civilian superiors who also fail “to properly supervise a subordinate who is subject to his authority or actual control.” The provision further states that an intentional violation is punishable by up to five years. *Id.*

²⁶² Compare Rome Statute art. 28(a)(1) with art. 28(b)(1).

²⁶³ VStGB (Ger.) § 14.

²⁶⁴ Otte Interview, *supra* note 11.

Sweden

The Swedish Criminal Code (“BrB”) assigns principal “to the person who committed the [criminal] act.”²⁶⁵ Other forms of principal perpetration include attempts, preparations and conspiracy which are covered by the BrB as well as the ACR, specifically with respect to atrocity crimes.²⁶⁶ In contrast to Germany, the BrB does not define co-perpetration or include a provision on the indirect perpetration of crimes “through” another.²⁶⁷ However, the Stockholm District Court’s opinion, *Haisam Sakhanh*, appears to reflect the application of at least the co-perpetration theory of liability.²⁶⁸ There, the perpetrator was held responsible for seven murders, even though he himself only killed one, and his associates murdered the others.²⁶⁹ The Court noted that Sakhanh acted “in concert with the other perpetrators” in purposefully forcing the captives to kneel, and shooting them together at close range.²⁷⁰

Sweden’s accessorial forms of liability are not set forth in distinct provisions of the code as is the case with Germany. Rather, one provision levies culpability on “anyone who promoted [the crime] by advice or deed,” and includes aiding, abetting, inducing, and instigating.²⁷¹ Notably, Swedish courts have a reputation for an expansive view of accessorial liability.²⁷² For instance, it suffices for the accused to have merely supported the perpetrator’s intention to commit the crime without taking any step to facilitate it.²⁷³ As one Swedish scholar has observed, “To aid means to exert influence on the course of events in the direction of promoting the crime, if only by supporting the perpetrator in his intent.”²⁷⁴ This contrasts with the aiding and abetting provision in the Rome Statute, which requires the accomplice to act *for the purpose of facilitating* the crime’s completion.²⁷⁵ Liability accrues as well when a person fails to report an imminent crime or when “a person who has a dominant influence in an association” fails to prevent the crime.²⁷⁶ Interestingly, the aiding and abetting provision has recently been applied in a case against a commander in the context of the Syrian conflict. There, the National Prosecution Office issued a subpoena on January 2, 2024, against a former high level Syrian

²⁶⁵ BRB (Crim. Code) (Swed.) 23:4.

²⁶⁶ *Id.* 23:1, 23:2; ACR § 16.

²⁶⁷ BRB (Crim. Code) (Swed.) 23:1, 12:2, 12:4. BRB 23:5 does provide that those who are induced “through coercion, deceit or abuse of their youth, lack of understanding or position of dependence,” would be sentenced at a lower level or not at all. *Id.* 23:5.

²⁶⁸ D. Ct., Stockholm (Swed.), B 3787-16, Decision (Feb. 16, 2017), <https://documents.manchester.ac.uk/display.aspx?DocID=49966>, upheld on appeal, Hovrätt [Ct. App.] Svea, B 2259-17, Decision (May 31, 2017) [hereinafter Ct. App. (Swed.)].

²⁶⁹ D. Ct. (Swed.) B 3787-16, Part iv.

²⁷⁰ *Id.* Part iv, ¶ 24.

²⁷¹ Responsibility is assigned “to anyone who promoted it by advice or deed [. . .] A person who is not considered a perpetrator is, if they induced another person to commit the offense, guilty of instigating the offence and otherwise of aiding the offence.” BRB (Crim. Code) (Swed.) 23:4.

²⁷² Erik Svensson, *Participation in International Crime Pursuant to Swedish and International Criminal Law - Perpetration and Accomplice Liability*, SCANDINAVIAN STUD. IN L. (2020), 79, 93 [hereinafter Svensson, *Participation in International Crime*].

²⁷³ *Id.*

²⁷⁴ Mark Klamberg, Prof., Stockholm U., Written Response to Questions (Feb. 28, 2024) (quoting Josef Zila, professor emeritus, Örebro University) (on file with author).

²⁷⁵ Compare Rome Statute art. 25(3)(c) with BRB (Crim. Code) (Swed.) 23: 4; see also Svensson, *Participation in International Crime*, *supra* note 272, at 94.

²⁷⁶ BRB (Crim. Code) (Swed.) 23:6.

military commander, as an accessory to war crimes.²⁷⁷ The subpoena alleges he held the position of brigadier general, assisting military leadership to “make strategic decisions and carry out planned military operations,”²⁷⁸ and that in this role, he contributed to his divisions’ indiscriminate attacks on civilian populations, particularly through the provision of arms.²⁷⁹

In Sweden, three provisions of the ACR address superior responsibility.²⁸⁰ Like German law, the ACR states that either a military or a civilian superior can be punished for failing to prevent²⁸¹ or report a crime.²⁸² Under Section 14, a superior who “deliberately or by gross negligence fails to exercise particular supervision” of a subordinate can be charged.²⁸³ However, the law’s preparatory works indicate that, like the Rome Statute, the standard of “gross negligence” will likely apply more strictly to military commanders than civilian superiors given the distinct hierarchical structures in military and civilian organizations.²⁸⁴

Finland

While Finnish law more generally resembles that of its Nordic neighbors, it has been influenced by German thinking with respect to analyzing criminal acts.²⁸⁵ Like Germany, Finland law distinguishes between a direct perpetrator, co-perpetrator and indirect perpetrator,²⁸⁶ relying on preparatory works to delineate the distinctions.²⁸⁷ To prove co-perpetration, prosecutors must show an agreement between two or more persons that involves criminal

²⁷⁷ National Prosecutor’s Office, National Unit Against International and Organized Crime, Application for Subpoena for Mohammed Hamo (Jan. 2, 2024).

²⁷⁸ *Id.* at 2 (translated by author).

²⁷⁹ *Id.* at 3 (translated by author). On June 20, 2024, the defendant was acquitted of war crimes charges. Malaika Grafe, *Syrian Former General Cleared of War Crimes in Swedish Court*, JURIST (June 20, 2024), <https://www.jurist.org/news/2024/06/syrian-former-general-cleared-of-war-crimes-in-swedish-court/>.

²⁸⁰ ACR (Swed.) §§ 13-15.

²⁸¹ “A military or civilian superior who fails to take measures that he or she could possibly have taken and that were necessary and reasonable to prevent a subordinate answerable to the superior and under the superior’s effective control from committing genocide, a crime against humanity or a war crime shall be regarded as a perpetrator of the crime.” ACR (Swed.) § 13.

²⁸² *Id.* § 15.

²⁸³ *Id.* § 14.

²⁸⁴ “Regarding the requirement of negligence, the Rome Statute, Article 28, states that civilian superiors must have deliberately disregarded data that clearly indicated that the subordinates were in the process of committing crimes. For military commanders on the other hand, it is sufficient that the superiors knew or, with regard to the circumstances at the time, should have known what was going on. The Yugoslavia Tribunal has stated that this lower requirement of negligence is based on the premise that military leaders must not remain ignorant about what their subordinates are doing. They are also, to a greater extent, obliged to investigate information.” Klamberg 3/4/24 Written Response, *supra* note 44 (citing Swedish Government Bill Prop. 2013/14:146, at 206-7).

²⁸⁵ Raimo Lahti, *Multilayered Criminal Policy: The Finnish Experience Regarding the Development of Europeanized Criminal Justice*, 11 NEW J. OF EUR. CRIM. L. 7 (Jan. 10, 2020), <https://doi.org/10.1177/2032284419898527> (noting that while generally reflects the Nordic legal model, Finland more closely resembles the German approach with respect to analyzing criminal acts). *But see* Tapio Lappi-Seppälä, *Penal Policy in Scandinavia* 36(1), *Punishment, and Politics in a Comparative Perspective* 217, 222 (2007) <https://www.jstor.org/stable/10.1086/592812> (noting that Finland was part of the ‘Nordic family in law’ which “includes written laws and systematic approaches (but with less abstract conceptualization compared to German legal thinking) combined with pragmatic solutions.”).

²⁸⁶ RL (Pen. Code) (Finn.) Ch. 5, §§ 3, 4, 5, 6.

²⁸⁷ Sampsa Hakala, State Prosecutor (Finn.), Written Response (Mar. 4, 2024) (on file with author) [hereinafter Hakala 3/4/24 Written Response].

conduct as well as a contribution by each to the crime.²⁸⁸ The agreement must be such that each perpetrator is aware that his actions will contribute to the execution of the crime.²⁸⁹ The contribution must be considered significant, or it will be viewed as aiding and abetting.²⁹⁰

Finland recognizes accessorial liability in the form of aiding and abetting and instigation.²⁹¹ Its accessory provision covers “a person who, before or during the commission of the offence, intentionally assists another person in committing an intentional offence or a punishable attempt at such an offence through advice, action or otherwise.”²⁹² Under the code, anyone who “intentionally persuades another person to commit an intentional offence or to make a punishable attempt” is likewise culpable.²⁹³

Finland’s Criminal Code resembles the Rome Statute in setting forth the same three requirements for superior responsibility: the superior had effective authority and control over the subordinates, knew or should have known the subordinates had committed or were about to commit the crimes, and failed to prevent them.²⁹⁴ In contrast to the Rome Statute, it maintains the same knowledge requirement for civilian superiors.²⁹⁵

France

Although France’s penal code does not explicitly distinguish between principal and accessory liability,²⁹⁶ French prosecutors may pursue charges at the outset based on one mode of liability but reclassify them later if the evidence warrants.²⁹⁷ In addition, courts may assess the level of the accused’s involvement in the crime to determine if the accused merits treatment as a principal or accomplice.²⁹⁸ While the Code does not refer to co-perpetrator or indirect

²⁸⁸ “Co-perpetrators are aware that the act carried out together fulfills the constituent elements of an offence (subjective element of complicity) and also participates in a meaningful way to the commission of the crime as a whole (objective element of complicity)” *Id.*

²⁸⁹ *UJ Law and Practice in Finland, supra* note 68, at 8.

²⁹⁰ *Id.* at 8.

²⁹¹ RL (Pen. Code) (Finn.) Ch. 5, §§ 5, 6

²⁹² *Id.* § 6

²⁹³ *Id.* § 5.

²⁹⁴ Compare Rome Statute art. 28 with RL (Pen. Code) (Finn.) Ch. 11, § 12. (“A military or other superior shall be sentenced for [atrocities] or for an attempt at such an act in the same way as the perpetrator or an accomplice, if forces or subordinates that are under the effective authority and control of the superior have committed such an act as a consequence of the failure of the superior to properly supervise the actions of the forces or subordinates, and if 1) the superior knew or, on the basis of the circumstances, he or she should have known that the forces or subordinates were committing or about to commit the said offences, and 2) the superior failed to take the necessary and reasonable measures within his or her power to prevent the commission of the offences.”)

²⁹⁵ *Id.*

²⁹⁶ C. PÉN. (Pen. Code) (Fr.) art. 121-4.

²⁹⁷ See, e.g. Ct. of Cass., Crim. Chamber 17-82.388 (May 7, 2018), (unpub.), https://www-legifrance-gouv-fr.translate.goog/juri/id/JURITEXT000036930215?init=true&page=1&query=coaction+de+1%27auteur&searchField=ALL&tab_selection=all&x_tr_sl=auto&x_tr_tl=en&x_tr_hl=en&x_tr_pto=wapp (discussing reclassification for person convicted of discriminatory hiring practices).

²⁹⁸ For instance, in the *Pascal Simbikangwa* case, the Criminal Court of Paris classified the accused as a principal perpetrator and not an accomplice because “[h]e made others commit willful attacks on life and serious injury to the physical or psychological integrity in execution of a concerted plan aimed at the total destruction of the Tutsi ethnic group, which constitutes, in relation to Article 211-1 of the Penal Code, the crime of genocide, and not complicity in genocide.” Cour d’Assises [Crim. Ct.], Seine Saint Denis (Fr.), 51/2016 (Dec. 3, 2016) [hereinafter Crim. Ct. (Fr.)]. In *Ely Ould Dah*, the French court found the defendant guilty as a perpetrator for torture but as an accomplice when

perpetrator,²⁹⁹ case law reflects recognition of both concepts.³⁰⁰ A co-perpetrator must be actively engaged in “facilitating the offense.”³⁰¹ Passively allowing them to occur will not suffice.³⁰² Knowledge of the crime must also specifically proven.³⁰³ The Code also recognizes the joint criminal enterprise,³⁰⁴ which is defined as a group acting pursuant to an agreement to commit crimes.³⁰⁵ Under this mode of liability, participants can be held culpable for a crime committed by the group.³⁰⁶ In contrast to co-perpetration, the existence of an organization or enterprise must be established for this mode of liability to be employed.³⁰⁷ France also punishes participation in a group when it is formed “with a view to the preparation” of atrocity crimes.³⁰⁸

All accessory assistance is criminalized under Article 121-7 of the Penal Code.³⁰⁹ It describes two types of accomplices: a person who “knowingly, by aid or assistance, facilitates [the crime’s] preparation” or commission,³¹⁰ and second, a person who “by means of a gift, promise, threat, order, or an abuse of authority or powers.”³¹¹ The action taken by the accomplice must be “positive and intentional,” meaning that without active engagement, they will not be held culpable.³¹²

he instructed others on criminal activity. Crim. Ct., Paris (Fr.), 13/0033 (Mar. 14, 2014), <https://ihl-databases.icrc.org/en/national-practice/case-no-130033-14-march-2014-pascal-senyamuhara-safari-alias-pascal-simbikangwa>; Crim. Ct., du Gard (Fr.), 70/05 (July 1, 2005). Both cases are cited in *UJ Law and Practice in France*, *supra* note 91, at 8-9.; *see generally* Eur. Ct. H.R., Ould Dah v. France (Mar. 17, 2009), 13113/03, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-113014%22%5D%7D>).

²⁹⁹ C. PÉN. (Pen. Code) (Fr.) arts. 121-1 - 121-7.

³⁰⁰ ELIES VAN SLIEDREGT, *INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW* 90 (2012) (noting that the concept of ‘*auteur médiat*’ is not codified in France but recognized in case law). *See, e.g.* Ct. of Cass., Crim. Chamber, 21-81.738 (Nov. 30, 2021) (unpub.), https://www.legifrance.gouv.fr/juri/id/JURITEXT000044440879?init=true&page=1&query=auteur+indirect&searchField=ALL&tab_selection=all (a ship owner who sent a crew out to see without a valid permit is responsible when one dies in a storm).

³⁰¹ JOHN BELL, ET AL., *CRIMINAL LAW, PRINCIPLES OF FRENCH LAW* 233 (2008), <https://doi.org/10.1093/acprof:oso/9780199541393.003.0008> [hereinafter BELL, *PRINCIPLES OF FRENCH LAW*]. In a case where the court cannot identify the actual assailant amongst a group involved in the crime, then all will be charged as accomplices. There is no need to identify the perpetrator. *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ C. PÉN. (Pen. Code) (Fr.) art. 450-1.

³⁰⁵ *UJ Law and Practice in France*, *supra* note 91, at 10-11.

³⁰⁶ C. PÉN. (Pen. Code) (Fr.) art 450-1 (“Where the offences contemplated are felonies or misdemeanors punished by ten years’ imprisonment, the participation in a criminal association is punished by ten years’ imprisonment and a fine of €150,000.”)

³⁰⁷ *UJ Law and Practice in France*, *supra* note 91, at 10-11.

³⁰⁸ C. PÉN. (Pen. Code) (Fr.) arts. 212-3, 461-18. Article 212-3 addresses genocide and, crimes against humanity, and crimes against humanity when part of a concerted plan during war. Article 461-18 deals with war crimes and reads: “The fact of participating in a group formed or in an agreement established with a view for the preparation, characterized by one or more material facts, of one of the war crimes or offenses defined in this chapter is punishable by ten years of imprisonment” as well as a fine. *Id.* arts. 212-3, 461-18.

³⁰⁹ *Id.* art.121-7.

³¹⁰ *Id.*

³¹¹ *Id.* In contrast, the Rome Statute asserts jurisdiction over persons who “(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted [and] (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.” Rome Statute art. 25(3)(b), (c).

³¹² BELL, *PRINCIPLES OF FRENCH LAW*, *supra* note 301, at 230.

French law also provides that a military or civilian commander can be held responsible for a crime committed by a subordinate.³¹³ In determining culpability, France requires the same three elements as do other Tier One countries with respect to the military leaders: effective control, knowledge, and failure to prevent.³¹⁴ The knowledge standard for the civilian leader is similar to the Rome Statute, requiring that she knew or “deliberately neglected” to take information into account.³¹⁵

Norway

In Norway there is little interest in distinguishing principal and accessorial liability.³¹⁶ Prosecutors charge perpetrators under the provision for the applicable substantive offense,³¹⁷ but if the facts cast doubt as to the centrality of a particular person’s role, they also add reference to Section 15, which provides that “[a] penal provision also applies to any person who contributes to the violation, unless otherwise provided.”³¹⁸ To be considered a contributor under Section 15, the following elements must be met: (1) the accused must have performed the contributing act before or during the time the crime was committed, but not after the completion of the crime; (2) he must have physically contributed to the actual execution of the principal crime, positively encouraged the action, or strengthened the principal perpetrator’s intention; (3) his action must have a connection with the principal crime; and (4) he must know that the principal perpetrator will commit the crime.³¹⁹ This provision has been employed to cover the roles played by indirect and co-perpetrators, as well as those who order, instigate, or aid and abet a crime.³²⁰

The knowledge requirement provided for above appears to be met with general knowledge of criminal activity, rather than evidence of intent related to the specific.³²¹ For instance, in a 2020 decision, the Norwegian Supreme Court assessed the culpability of a

³¹³ C. PÉN. (Pen. Code) (Fr.) art. 213-4-1 (“Without prejudice to the application of the provisions of art. 121-7, [he] is considered to be complicit in a crime covered by this subtitle committed by subordinates placed under his effective authority and control the military chief or the person who was in office, who knew or, due to the circumstances, should have known that these subordinates were committing or were going to commit this crime and who did not take all the necessary and reasonable measures that were in his power to prevent or suppress its execution or to refer it to the competent authorities for investigation and prosecution.”) (translated by author).

³¹⁴ *Id.*

³¹⁵ Compare C. PÉN. (Pen. Code) (Fr.) art. 213-4-1, ¶ 2 (“The hierarchical superior “is also culpable when she knew or “deliberately neglected to take [information] into account.”) with Rome Statute art. 28(b) (referring to a superior who “knew, or consciously disregarded information which clearly indicated” a crime was occurring or about to occur.)

³¹⁶ Berger Interview, *supra* note 17; Compare James G. Stewart, *The Strategy Familiar History of the Unitary Theory of Perpetration*, in VISIONS OF JUSTICE, ESSAYS IN HONOR OF PROFESSOR MIRJAN DAMAŠKA (Bruce Ackerman *et al.* eds., 2016), at 1, 8, 10, <https://www.legal-tools.org/doc/23a652/pdf/> (opining that Norway ascribes to a “unitary theory of perpetration,” which dispenses with a differentiated legal standard for distinct forms of participation).

³¹⁷ Strl. (Pen. Code) (Nor.) § 14, entitled, “Legal authority requirement,” provides that “[c]riminal sanctions [. . .] may only be imposed if authorised by law.”

³¹⁸ This provides that “any person who contributions to the violation” can be subject to criminal sanctions. Strl. (Pen. Code) (Nor.) § 15; Berger Interview, *supra* note 17.

³¹⁹ *UJ Law and Practice in Norway*, *supra* note 123, at 15.

³²⁰ Berger Interview, *supra* note 17.

³²¹ S. Ct. (Nor.), Crim. Case, HR-2020-1681-A (Aug. 27, 2020), Case Sum. (En.)

<https://www.domstol.no/en/supremecourt/rulings/2020/supreme-court-criminal-cases/hr-2020-1681-a/>.

defendant who helped set up a cannabis plant prior to his arrest.³²² The Court found that it was irrelevant if a defendant had intended his aid to a cannabis plant to continue after he was jailed “as long as what he had actually accomplished in itself qualified as complicity.”³²³ Thus, he can be convicted for the production that occurred after he was incarcerated.³²⁴

In addition, Section 108 of the Norwegian Penal Code permits charges of conspiracy and incitement, but only with respect to atrocity crimes.³²⁵ Norway also criminalizes membership in a group, but only if that group is deemed to be a terrorist organization.³²⁶ Finally, Norway’s superior responsibility covers both civilian and military leaders and sets forth the same requirements as the Rome Statute, although like Finland it makes no difference between the two with respect to the knowledge requirement.³²⁷

The Netherlands

Netherlands law provides that “those who commit, cause to be committed, or co-perpetrate the offense” can all be punished, meaning its code recognizes direct perpetration, co-perpetration and indirect perpetration.³²⁸ In addition, it penalizes preparation and inducement.³²⁹ While the definitions of these modes of liability are similar to those under German law, the nature and the “intensity” of a person’s contribution to the crime determines whether he or she is viewed as a principal or accessory.³³⁰ With respect to co-perpetration in particular, the Dutch Supreme Court has laid out the following requirements: conscious and close collaboration among a group of persons (“*bewuste en nauwe samenwerking*”), a substantial contribution to the crime

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.* The Court has also convicted a woman of “passive contribution” for not doing enough to prevent her husband’s abuse of his stepson. S. Ct. (Nor.), Crim. Case, HR-2019-561-A (Mar. 21, 2019), <https://www.domstol.no/en/supremecourt/rulings/2019/supreme-court-criminal-cases/hr-2019-561-a/>.

³²⁵ Sofie Høgestøl, *A Norwegian Perspective on the Prosecution of International Crimes*, SCANDINAVIAN STUD. OF L. 408, 419 (2020), <https://scandinavianlaw.se/pdf/66-19.pdf> [hereinafter Høgestøl, *A Norwegian Perspective*]. Since Norwegian law does not generally criminalize preparatory acts, this Section provides an exception. In addition to atrocity crimes, it criminalizes preparatory acts for terrorism. *Id.* at 419.

³²⁶ A person could be sentenced for up to six years if they form, participate, recruit, or give funds or other material support to such a group, provided the organization “has taken steps to achieve the purpose by unlawful means.” Strl. (Pen. Code) (Nor.) § 136a.

³²⁷ Strl. (Pen. Code) (Nor.) § 109 (“A military or civilian leader, or any person effectively acting as such, shall be subject to punishment for breach of superior responsibility if persons under his/her effective authority and control commit a crime specified in sections 101 to 107, provided that the crime is a result of the leader’s failure to exercise due control over them, and the leader (a) knew or should have known that the subordinates had embarked on such a crime or that the crime was imminent, and (b) failed to implement necessary and reasonable measures in his/her power to prevent or stop the crime, or to report the offence to a competent authority for prosecution.”)

³²⁸ SR (Crim. Code) (Neth.) § 47(1). See also *UJ Law and Practice in the Netherlands*, *supra* note 146, at 7.

³²⁹ SR (Crim. Code) (Neth.) §§ 46, 46(a).

³³⁰ Sjoukje van Deuren *et al.*, *The Dutch Judicial Approach to Various Types of Co-offending Among Members of Outlaw Motorcycle Gangs*, TRENDS IN ORGANIZED CRIMES 5 (July 8, 2022), <https://link.springer.com/article/10.1007/s12117-022-09461-2> [hereinafter van Deuren, *Motorcycle Gangs*] (“The difference between accessoryship and (co-) principalship to crime can be found in the nature and intensity of one’s contribution to the crime under scrutiny.”).

by each (“*wezenlijke bijdrage*”) and the intent of the accused (“*opzet*”).³³¹ Among the factors used to determine whether an accused meets these requirements, the Supreme Court has identified: “the intensity of the cooperation, the mutual division of tasks, the role in the preparation, implementation or handling of the crime and the importance of the role of the suspect, his presence at important moments and the failure to withdraw at an appropriate time.”³³² Indirect perpetration is rarely used, as prosecutors utilize other forms of liability such as instigation.³³³

The Netherlands identifies two distinct categories of accomplices (“*medeplichtigen*”).³³⁴ First, Article 48(1) refers to a person who “deliberately assist[s] in the commission of the crime” and, Article 48(2) refers to someone who “deliberately provide[s] opportunity, means or information to commit the crime.”³³⁵ The distinction between the two is largely temporal; whereas Art.48(1) is meant to apply to aid provided during the crime, Article 48(2) attaches liability to acts undertaken prior to the crime’s commission.³³⁶ In 2017, the Court of Appeals held that a Dutch citizen was an accomplice in war crimes after he supplied AK-47s and other arms to Charles Taylor and his forces in Liberia despite an arms embargo in the early 2000s.³³⁷ Moreover, the Dutch code resembles its German counterpart in sanctioning membership in an criminal organization.³³⁸ The law has been used against youth and drug gangs, as well as terrorist groups.³³⁹

Like other Tier One countries, the Dutch Code applies superior responsibility to both the military and civilian leader.³⁴⁰ It requires the exercise of actual authority over subordinates as well as a showing that the superior intentionally allowed the subordinate to act or failed to

³³¹ Castelijin 2/15/24 Written Response *supra* note 19; Hoge Raad [S. Ct.] (Neth.) (S. Ct.), ECLI:NL:HR:2014:3474, 3.2.1 (Dec. 2, 2014), <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:HR:2014:3474> [hereinafter S. Ct. (Neth.)].

³³² S. Ct. (Neth.), ECLI:NL:HR:2014:3474 (2014), at 3.2.2.

³³³ Tess Castelijin, Prosecutor (Neth.). Written Response (Mar. 12, 2024) (on file with author) [hereinafter Castelijin 3/12/24 Written Response]. It was employed, however, in a recent case involving a man who was convicted of tax fraud, through others at his company. Gerechtshof [Ct. App.] Amsterdam (Neth.), ECLI:NL:GHAMS:2022:3249 (Nov. 15, 2022), <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHAMS:2022:3249> [hereinafter Ct. App. (Neth.)].

³³⁴ SR (Crim. Code) (Neth.) § 48(1)-(2).

³³⁵ *Id.*

³³⁶ Castelijin 3/12/24 Written Response, *supra* note 333.

³³⁷ Ct. App., Hertogenbosch (Neth.), ECLI:NL:GHSHE:2017:1760, Statement of proof, § 3A, 4 (Apr. 21, 2017), <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHSHE:2017:1760&showbutton=true&keyword=ECLI%253aNL%253aGHSHE%253a%2B2017%253a1760&idx=1>. Neglecting to prevent a crime can also give rise to accessorial culpability. van Deuren, *Motorcycle Gangs*, *supra* note 330, at 5.

³³⁸ SR (Crim. Code) (Neth.) § 140(1).

³³⁹ *See generally* van Deuren *Motorcycle Games*, *supra* note 330.

³⁴⁰ ICA (Neth.) § 9 (“1. The superior who (a) deliberately allows a subordinate to him to commit such an act; (b) deliberately fails to take measures, insofar as these are necessary and can be required of him, if a subordinate to him has committed or intends to commit such an act. 2. Any person who, through his own fault, fails to take measures to the extent necessary and can be expected of him if a subordinate to him has, as he reasonably suspects, committed or intends to commit such an act.”).

prevent it.³⁴¹ The standard, including the knowledge requirement, applies equally to civilian and military leaders.³⁴²

ii. Corporate Liability

Four of the Tier One countries permit the criminal sanctioning of companies for violating the law.³⁴³ France is unique in explicitly permitting a company to be charged with an atrocity crime and having recognized that a parent company can be held complicit for crimes committed abroad through its subsidiary. While Sweden and Germany do not recognize criminal liability for corporations, they do recognize civil liability of corporations and permit the levying of administrative fines on companies found to be in violation of the law.³⁴⁴

Finland defines an enterprise broadly to include not-for-profit entities and foundations.³⁴⁵ Its criminal code requires the prosecutor to demonstrate that the target of the investigation “acted on behalf of or for the benefit of the corporation and belongs to its management or is in a service or employment relationship with it or has acted on assignment by a representative of the corporation.”³⁴⁶ The code also sets forth criteria the prosecutor must file in exercising her discretion in charging a corporation, including the consideration of the damage resulting from the criminal act.³⁴⁷

In France, not only can corporations be held culpable,³⁴⁸ but the Penal Code expressly states that a legal entity could be held responsible for war crimes and crimes against humanity.³⁴⁹ The *Lafarge* case demonstrates France’s willingness to employ this provision.³⁵⁰ In 2016, former Syrian employees and two NGOs filed a criminal complaint against Lafarge for crimes

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ Penalties can range from fines to confiscation of assets and dissolution of the company. C. PÉN. (Pen. Code) (Fr.) art. 212-3(2) (noting confiscation of assets).

³⁴⁴ Act on Regulatory Offense, § 30, https://www.gesetze-im-internet.de/englisch_owig/englisch_owig.html. In Germany, prosecutions may proceed against individuals acting on behalf of companies in criminal proceedings. However, they cannot be launched against the entities themselves. However, administrative fines can be issued. Section 30 of the Administrative Law provides that when someone acting on behalf of a legal entity commits a criminal or regulatory offense, a “regulatory fine may be imposed.” Sweden resembles Germany in that corporations cannot be subjected to criminal charges but can be fined. *Id.*; Mattias Hedwall, *Corporate Liability in Sweden*, GLOBAL COMPLIANCE NEWS, <https://www.globalcompliancencnews.com/white-collar-crime/corporate-liability-in-sweden/>; Constantin Lauterwein & Friedrich Steinert, *Is There No Corporate Criminal Liability in Germany? Not Exactly*, HENGELER MUELLER (Jan. 13, 2023), <https://hengeler-news.com/en/articles/is-there-no-corporate-criminal-liability-in-germany-not-exactly#:~:text=Under%20German%20law%2C%20companies%20cannot,corporate%20criminal%20liability%20in%20Germany> (noting that administrative law applies).

³⁴⁵ RL (Pen. Code) (Finn.) Ch. 9, § 1(1).

³⁴⁶ *Id.* §§ 1, 3.

³⁴⁷ *Id.* § 7.

³⁴⁸ C. PÉN. (Pen. Code) (Fr.) art. 121-2 (“Legal entities, with the exception of the State, are criminally liable . . . for offenses.”)

³⁴⁹ *Id.* art. 462-5 (referring to “penalties incurred by legal entities declared criminally responsible [. . .] for war crimes.”)

³⁵⁰ *Lafarge Lawsuit (re. Complicity in Crimes Against Humanity in Syria)*, BUS. & HUM. RTS. RES. CTR. (2024), <https://www.business-humanrights.org/en/latest-news/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria/> [hereinafter *Lafarge Lawsuit*, BUS. & HUM. RTS. RES. CTR].

committed by its subsidiary, Lafarge Cement Syria (LCS).³⁵¹ Here, the subsidiary continued to operate in Syria during the armed conflict by making arrangements with the Islamic State of Iraq and the Levant (“ISIL”) for its employees to continue operations in an area under ISIL control.³⁵² Lafarge’s Syrian employees were then pressured to continue working throughout the conflict, even when they faced kidnappings.³⁵³ When ISIL seized the LaFarge facility in 2014, the Syrian workers were “left to fend for themselves.”³⁵⁴ In 2018, Lafarge was charged with complicity in crimes against humanity, as well as endangering employees under domestic labor law, financing terrorism, and violating an embargo.³⁵⁵ Since then, the company has been fighting the charges, with appeals reaching the Supreme Court twice.³⁵⁶ In 2019, an Appeals Court rejected the complicity charge based on Lafarge’s lack of intent to contribute to IS crimes.³⁵⁷ The Court ruled that, under the Penal Code, an accomplice must share the intent required of the main perpetrator committing the crime.³⁵⁸ In 2021, the French Supreme Court then reversed that ruling, finding that “it is sufficient that [the accomplice] has knowledge that the principal perpetrators are committing or are going to commit such a crime against humanity and that by his aid or assistance, he facilitates its preparation or commission.”³⁵⁹ In other words, it would be sufficient to show a company knew the principal perpetrators were committing or planning to commit crimes, even if they did not share their intention to commit the crimes. Moreover, the Supreme Court clarified that whether the company acts with a view to pursuing a commercial activity is irrelevant to this assessment, as that relates to motive not intent or knowledge.³⁶⁰ This landmark decision means a parent company can be held complicit in France for crimes committed abroad through its subsidiary.³⁶¹

In Norway, a company can be held criminally accountable for the actions of individuals who are fundamentally connected to it, even when the individuals cannot be punished under

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.* See also *Lafarge in Syria: Accusations of complicity in grave human rights violations*, ECCHR (2024), <https://www.ecchr.eu/en/case/lafarge-in-syria-accusations-of-complicity-in-grave-human-rights-violations/>.

³⁵⁶ This Appeals Court decision is cited in a subsequent decision by the Supreme Court that overturned it. Ct. of Cass. (Fr.), Crim. Bull. No. 19-87.367, (Sep. 7, 2021), [21.09.07. cour de cassation decision.pdf \(europa.eu\)](https://www.courdecassation.fr.translate.goog/decision/65a629db448a370008a71fa6?_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=wapp). Ct. of Cass. (Fr.), Crim. Bull. No. 22-83, 631 (Jan. 16, 2024), [https://www.courdecassation-](https://www.courdecassation-fr.translate.goog/decision/65a629db448a370008a71fa6?_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=wapp)

[fr.translate.goog/decision/65a629db448a370008a71fa6?_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=wapp](https://www.courdecassation-fr.translate.goog/decision/65a629db448a370008a71fa6?_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=wapp)
³⁵⁷ Ct. of Cass. (Fr.), 19-87.367 (Sep. 7, 2021) (referencing the Court of Appeals ruling). See also Sherpa, *French Court Narrows Charges Against Lafarge* (Nov. 7, 2019), <https://www.asso-sherpa.org/french-court-narrows-charges-against-lafarge>.

³⁵⁸ Lena Bjurström, *Lafarge and the Judicial Twists and Turns of Corporate Liability in France*, JUSTICEINFO.NET (Jul. 5, 2022), <https://www.justiceinfo.net/en/103141-lafarge-judicial-twists-and-turns-corporate-liability-france.html>.

³⁵⁹ *Lafarge Lawsuit*, BUS. & HUM. RTS. RES. CTR., *supra* note 350.

³⁶⁰ *Id.*

³⁶¹ *Id.* The 2024 *Lafarge* ruling by the Court of Cassation did not affect the complicity charge. The court did drop the domestic charge of endangering labor. Ct. of Cass. (Fr.), Crim. Bull. No. 22-83, 681 (Jan. 16, 2024), [https://www.courdecassation-](https://www.courdecassation-fr.translate.goog/decision/65a629db448a370008a71fa6?_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=wapp)
[fr.translate.goog/decision/65a629db448a370008a71fa6?_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=wapp](https://www.courdecassation-fr.translate.goog/decision/65a629db448a370008a71fa6?_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=wapp)
See also *Lafarge in Syria: French Supreme Court Issues Decisive Ruling on Charges Faced by the Multinational* (Jan. 16, 2024), SHERPA, <https://www.asso-sherpa.org/lafarge-in-syria-french-supreme-court-issues-decisive-ruling-on-charges-faced-by-the-multinational>.

Norwegian law.³⁶² Prosecutors must consider certain factors in determining whether to pursue charges against an enterprise: whether a sanction would prevent further crimes; whether the crime was serious and the person(s) involved culpable; whether the crime could have been prevented with appropriate measures; whether the company gained something of value with the crime; and whether other sanctions were imposed.³⁶³ In assessing criminal liability and imposing punitive sanctions, courts generally consider the extent of the company's cooperation with the authorities, including whether the company has conducted its own internal investigation.³⁶⁴

Norwegian case law has indicated the need for a fundamental connection between the enterprise and individuals acting on its behalf. In the 2013 *Norconsult* case, the Norwegian Supreme Court found that the defendant acted on behalf of his company when he committed bribery while serving as the company's representative.³⁶⁵ The Court emphasized the importance of examining an employee's "actual responsibility," rather than his "formal position" within the company.³⁶⁶ As such, the Court determined that the employee represented the company even though he was not working for it at the time.³⁶⁷

In the Netherlands, the Code provides that "[c]riminal offenses can be committed by natural persons and legal entities" and creates liability for both the company and those who ordered or conducted the criminal offense on behalf of the company.³⁶⁸ Courts determine liability for legal entities based on the circumstances surrounding a particular case, including whether the criminal act is conducted within the scope of its legal identity.³⁶⁹ An act falls within this scope if one or more of the following circumstances occurs: (1) the individual works for the legal entity, through employment or otherwise; (2) the conduct occurred within the normal course of business; (3) the conduct was useful or beneficial to the business of the legal entity; or (4) the legal entity had control over the occurrence of the conduct and such conduct was, in fact, accepted by the legal person.³⁷⁰

³⁶² Strl. (Pen. Code) (Nor.) § 27 ("When a penal provision is violated by a person who has acted on behalf of an enterprise, the enterprise is liable to punishment. This applies even if no single person meets the culpability or the accountability requirement."). As noted previously, Courts may only prosecute an enterprise for crimes committed abroad if that enterprise is registered in Norway. Strl. (Pen. Code) (Nor.) § 5 ("Outside the area of application pursuant to section 4, the criminal legislation also applies to acts committed (c) on behalf of an enterprise registered in Norway..."). In 2007, Norway opened an investigation into the corporate liability of Aker Kvaerner, a Norwegian company that allegedly supplied construction and maintenance services to the military base in Guantanamo Bay. However, the investigations were dropped because the prosecuting authority believed the services were provided by a subsidiary of Aker Kvaerner that was not under the full control of the parent company. *Norway Rejects Guantanamo Probe*, REUTERS, *supra* note 142.

³⁶³ Strl. (Pen. Code) (Nor.) § 28. The prosecutor must also consider whether a treaty prevents such sanctions. *Id.*

³⁶⁴ Elisabeth Roscher *et al.*, *Corporate Investigations Laws and Regulations Norway*, ICLG, <https://iclg.com/practice-areas/corporate-investigations-laws-and-regulations/norway>.

³⁶⁵ S. Ct. (Nor.), RT 2013-125 (June 28, 2013), *cited in* OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention, Phase 4 report: Norway* 46 (2016), <https://www.oecd.org/corruption/anti-bribery/Norway-Phase-4-Report-ENG.pdf>.

³⁶⁶ *Id.* at 49.

³⁶⁷ *Id.*

³⁶⁸ SR (Crim. Code) (Neth.) § 51(1)-(2).

³⁶⁹ S. Ct. (Neth.), ECLI:NL:PHR:2015:2638 (Apr. 26, 2016), https://uitspraken-rechtspraak-nl.translate.google/details?id=ECLI%3ANL%3AHR%3A2016%3A733&x_tr_sl=auto&x_tr_tl=en&x_tr_hl=en&x_tr_pto=wapp&x_tr_hist=true; *UJ Law and Practice in the Netherlands*, *supra* note 146, at 8.

³⁷⁰ *Id.*

To summarize, Tier One countries all recognize individual modes of liability, and Germany, Sweden, Finland, France, and the Netherlands make a distinction between principal and accessory modes of liability. Germany, France, Norway, and the Netherlands recognize some form of group or collective forms of liability.³⁷¹ All also recognize both the responsibility of military commanders and civilian superiors for the acts of their subordinates. All but Sweden and Germany also recognize corporate liability. As the *Lafarge* case illustrates, France is unique in explicitly permitting a company to be charged with an atrocity crime and having recognized that a parent company can be held complicit for crimes committed abroad through its subsidiary.

D. Rules of Criminal Procedure and Evidence

With their civil law traditions, the Tier One countries share a similar approach to criminal procedure and evidence. Nevertheless, differences remain, particularly with respect to trials *in absentia*, child testimony and treatment of evidence related to sexual and gender-based crimes (SGBC). This section reviews their applicable rules with respect to the following factors: trials *in absentia*, general approach to evidence, illegally obtained information, experts, child witnesses, video-link testimony, digital evidence, evidence provided by non-governmental organizations (NGOs), and evidence related to SGBCs.

i. Trials in Absentia

The question of whether a court can proceed against an absent defendant is distinct from the requirements related to the exercise of universal jurisdiction. While similar considerations might factor into an analysis of presence for purposes of initiating an investigation under universal jurisdiction and presence for purposes of proceedings against individual accused, trials *in absentia* are often subject to separate regulations from the conditions attaching to universal jurisdiction.

For instance Germany, Sweden, Finland, and Norway generally do not permit trials *in absentia*.³⁷² An exception to this rule applies for sentences that are relatively short.³⁷³

³⁷¹ Sweden does not recognize group liability. Neither does the Finnish penal code; however, it does permit increased sanctions for those who commit crimes as part of an organized criminal group. RL (Pen. Code) (Finn.) Ch. 6, § 5(2); Ch. 51, § 8; Baker McKenzie, *Global Compliance News, Corporate Liability in Sweden*, <https://www.globalcompliance.com/white-collar-crime/corporate-liability-in-sweden/> (last accessed 6/25/2024) (“In Swedish law, every legal entity or person is judged individually. To the best of our knowledge, there is no legal basis for applying liability to a group.”).

³⁷² STPO (Crim. Proc. Code) (Ger.) § 230 (“No main hearing is held against a defendant who fails to appear.”); RB (Code of Jud. Proc.) (Swed.) Ch. 43:2(1) (hearing will be cancelled if the defendant does not show up or is only represented by his attorney); RL (Pen. Code) (Finn.) Ch. 1, § 7(1) (no one can be brought to trial without first receiving a summons and appearing in court); Strpl. (Crim. Proc. Act) (Nor.) § 280 (“The person indicted shall be present during the hearing until judgment is delivered.”).

³⁷³ In Germany, not only must the penalty be less than six months, but the defendant must also request to be “released from the obligation to appear.” STPO (Crim. Proc. Code) (Ger.) § 233; RB (Code of Jud. Proc.) (Swed.) 4:15 (case can be adjudicated without defendant if maximum of three months sought); Strpl. (Crim. Proc. Act) (Nor.) § 281 (permitting trial if under one year sentence sought). *See also*

Specifically, trials can go forward in Germany, Finland, and Norway where the maximum penalty is six months, three months, and one year, respectively.³⁷⁴ In addition, Norway adds that one of the following criteria must apply: the accused is not needed, he consented, he had an unexcused absence, or he absconded.³⁷⁵ Sweden will only make an exception “if the case is one that can be disposed of even if he does not appear and his presence at the hearing may be presumed to be without importance to the inquiry.”³⁷⁶

In contrast, France and the Netherlands permit trials to be conducted *in absentia*.³⁷⁷ In France, summons that are delivered to the accused’s address are deemed served even if he never received it.³⁷⁸ Similarly, a trial may continue if the suspect leaves France after an investigation begins.³⁷⁹ A *default criminel* (trial by default) is “a trial of an accused who is absent without a valid excuse at the opening of the hearing or whose absence is noted during the proceedings when it is not possible to suspend them until his return.”³⁸⁰ Such a judgment can be appealed.³⁸¹

Similarly, proceedings can occur in the Netherlands *in absentia*.³⁸² If a writ of summons is served, the accused will have fourteen days after the judgment to appeal before it becomes final.³⁸³ If the writ is not served and it is not otherwise evident that the accused was informed about the hearing, the court must inform him in person that a notice of judgment has been filed against him. Once he has been so informed, he has fourteen days to respond before a default judgment is entered.³⁸⁴

In sum, France and the Netherlands will permit trials *in absentia*. Germany, Finland, and Norway will only permit proceedings if the maximum sentence is a year or less and Sweden will only do so when the presence of the accused is unnecessary.

ii. Statute of Limitations

In Germany, the VStGB provides that no statute of limitations applies to genocide, crimes against humanity, and war crimes.³⁸⁵ In Sweden, while the BrB sets no statute of limitations for genocide, crimes against humanity and gross war crimes, ordinary or “non-gross”

Eur. Comm. on Crime Problems, Council of Europe, PC-PC (2013) 01 Rev. 3 Bill, *Questionnaire concerning judgments in absentia and the possibility of retrial, Summary and Complication of Replies* (Apr. 28, 2014), at 24, 27, 32, <https://rm.coe.int/168008a6ab> [hereinafter COE Questionnaire].

³⁷⁴ STPO (Crim. Proc. Code) (Ger.) § 233; RB (Code of Jud. Proc.) (Swed.) 4:15; Strpl. (Crim. Proc. Act) (Nor.) § 281.

³⁷⁵ Strpl. (Crim. Proc. Act) (Nor.) § 281.

³⁷⁶ RB (Code of Jud. Proc.) (Swed.) 21: 2.

³⁷⁷ COE Questionnaire, *supra* note 373, at 24, 32. *UJ Law and Practice in France*, *supra* note 91, at 15.

³⁷⁸ *Id.* at 36.

³⁷⁹ C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 379-2 (“The accused absent without a valid excuse at the opening of the hearing shall be judged by default.”).

³⁸⁰ *Id.*

³⁸¹ COE Questionnaire, *supra* note 373, at 134-5.

³⁸² Sv (Code of Crim. Proc.) (Neth.) § 280 (“In the event that the accused fails to appear at the hearing and the court sees no reason to [set aside the summons or grant an order to restrain the accused], it shall order that the defendant be declared in absentia and the hearing of the case be continued outside his presence.”); COE Questionnaire, *supra* note 373, at 32.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ VStGB (Ger.) § 5.

war crimes have a limit of ten years.³⁸⁶ While Finland has no statute of limitations for genocide, crimes against humanity, or war crimes, a stand-alone provision on torture is subject to a twenty-year limitation.³⁸⁷ France likewise imposes no statute of limitation on genocide or crimes against humanity,³⁸⁸ but is unique amongst the Tier One nations in imposing a thirty-year statute of limitations on war crimes, although this limitation does not apply when the crimes occur in connection with a crime against humanity.³⁸⁹ Norway sets no statute of limitations for atrocity crimes that carry a sentence of fifteen years or more.³⁹⁰ War crimes against property or others that only carry a maximum sentence of ten years are subject to a ten-year statute of limitation.³⁹¹ In The Netherlands, while most crimes identified in the ICA are not subject to a statute of limitation, any crime that falls under its “catch all provision” would need to be pursued within twelve years.³⁹²

iii. General Approach to Evidence

All Tier One countries abide by the principle of “Free Judicial Assessment of Evidence.”³⁹³ Under this principle, judges have broad discretion over the admissibility of evidence during criminal proceedings.³⁹⁴ In Germany, for instance, even when courts accept evidence into the record, they are free to ignore it.³⁹⁵ A court determines the weight accorded to evidence, and will not give great deference to evidence that cannot be independently verified.³⁹⁶ For instance, the recent Syrian-related decision, *Eyad A.*, referenced Human Rights Watch and Amnesty International reports, noting that the former non-governmental organization (NGO) had interviewed many survivors.³⁹⁷ Yet, as the Court could not independently verify the what was said in the interviews, it opined that “the evidence therefore had to be assessed cautiously.”³⁹⁸

³⁸⁶ If the perpetrator is under twenty-one, however, a twenty-five-year statute of limitation would apply. BRB (Crim. Code) (Swed.) 35:1-2.

³⁸⁷ RL (Pen. Code) (Finn.) Ch. 8 §§ 1(2) (no time limit if the maximum offense is a life sentence); *UJ Law and Practice in Finland*, *supra* note 68, at 11.

³⁸⁸ C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 7.

³⁸⁹ *Id.*

³⁹⁰ Strl. (Pen. Code) (Nor.) § 91.

³⁹¹ *Id.* § 86.

³⁹² ICA (Neth.) § 7(1).

³⁹³ STPO (Crim. Proc. Code) (Ger.) § 261.

³⁹⁴ *Id.*

³⁹⁵ Otte Interview, *supra* note 11.

³⁹⁶ Higher Reg. Ct. Koblenz (Ger.), 1 StE 3/21 (Feb. 24, 2021), 320. The Ukraine conflict has presented German prosecutors with a new challenge of needing to authenticate digital evidence obtained from military sources, such as photos and satellite imagery. Here, the means of obtaining the data may at times be classified. Nor can prosecutors confirm with the specific serviceman when and where he took a photo. Yet, courts need to be assured that the documents can be relied upon. To address this issue, they are building awareness among military personnel on how to document contextual elements that help authenticate this material in a court of law. Claudia Gorf, Federal Prosecutor (Ger.), Statement, Min. of Just. Conf., “Atone for International Law Crimes – hold War Criminals Accountable” (Feb. 23, 2024), <https://www.bmj.de/SharedDocs/Veranstaltungen/DE/2024/0223-Internationale-Konferenz-Voelkerstrafrecht.html> (notes on file with author) [hereinafter Golf Statement, Ger. War Crimes Conf.].

³⁹⁷ *Id.*

³⁹⁸ *Id.*

Courts in the other Tier One countries approach evidence similarly.³⁹⁹ Most forms of evidence are admissible, so long as the prosecutor establishes their relevance and probative value.⁴⁰⁰ The Netherlands is unique in identifying specific categories of lawful evidence in their Code of Criminal Procedure : (1) the judge’s own observations; (2) statements of the suspect; (3) statements of a witness; (4) statements from an expert; and (5) written statements.⁴⁰¹ It also provides that facts or circumstances of general awareness do not need to be admitted into evidence.⁴⁰² These categories have been interpreted to be “so broad that hardly any evidence can be indicated that the law does not consider admissible.”⁴⁰³ For instance, written evidence can include police reports; cell phone user data; computer records; or automatic vehicle plate recognition.⁴⁰⁴ In addition, Dutch case law provides a frame of reference for evaluating the reliability of witness statements.⁴⁰⁵ Under this guidance, traumatized witnesses are not deemed as less reliable, nor does the passage of time undermine their credibility.⁴⁰⁶

iii. Illegally Obtained Evidence

Some Tier One countries have express provisions in their code prohibiting the use of evidence obtained through torture⁴⁰⁷ or other serious human rights violations.⁴⁰⁸ In addition, the UN Convention Against Torture, to which all Tier One countries have ascribed, prohibits the use of evidence obtained from torture in court proceedings.⁴⁰⁹ Nevertheless, all Tier One judges

³⁹⁹ See, e.g. Åklagarmyndigheten [Appeals Authority](Swed.), <https://www.aklagare.se/ordlista/f/fri-bevisprovning/>; OIKEUDENKÄYMIKÄÄRI [Code of Jud. Proc.] (Finn.) Ch. 17 § 1, https://www.finlex.fi/en/laki/kaannokset/1734/en17340004_20190812.pdf [hereinafter OK (Code of Jud. Proc.) (Finn.)]; C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 80-1, <https://finlex.fi/en/laki/kaannokset/1734/en17340004.pdf>; Strpl. (Crim. Proc. Act.) (Nor.) § 339; Sv (Code of Crim. Proc.) (Neth.) art. 326, <https://wetten.overheid.nl/BWBR0001903/2024-01-01>. Upcoming changes to the Dutch criminal procedure code will not affect jurisdiction for international crimes. Castelijin 3/12/24 Written Response.

⁴⁰⁰ For example, the Norwegian Criminal Procedure Act specifically states that “the production of available evidence may only be denied when such evidence (1) relates to matters that are of no significance for the substance of the judgment; (2) relates to matters that have already been adequately proved; or (3) obviously has no probative force.” Strpl. (Crim. Proc. Act) (Nor.) § 292.

⁴⁰¹ Sv (Code of Crim. Proc.) (Neth.) § 339.

⁴⁰² *Id.* § 326.

⁴⁰³ Bart Custers and Lonneke Stevens, *The Use of Data as Evidence in Dutch Criminal Courts*, 29 EUR. J OF CRIME, CRIM. L. & CRIM. J. 25 (2021), 25, 36, n. 30, https://brill.com/view/journals/eccl/29/1/article-p25_25.xml?language=en [hereinafter, Custers & Stevens, *The Use of Data as Evidence*]. Sv (Code of Crim. Proc.) (Neth.) § 326.

⁴⁰⁴ Custers & Stevens, *The Use of Data as Evidence*, *supra* note 403, at 37.

⁴⁰⁵ Rechtbank [D. Ct.] Hague (Neth.), Crim. Judgment (ECLI:NL:RBDHA:2017:16383 (Dec. 15, 2017), § 8.4.1 <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2017:16383&showbutton=true&keyword=War%2Bcrimes%2BETHIOPIA&idx=1> [hereinafter D. Ct. (Neth.)].

⁴⁰⁶ *Id.* §§ 8.4.1, 8.4.2.

⁴⁰⁷ See, e.g. OK (Code of Jud. Proc.) (Finn.) Ch. 17, § 25(3) (The court may not use evidence that has been obtained through torture.”). In addition, the UN Convention Against Torture, to which all Tier One countries have ascribed, prohibits the use of evidence obtained from torture in court proceedings.

⁴⁰⁸ German law requires the rejection of evidence obtained from “[m]easures that impair the memory or insight of the accused.” STPO (Crim. Proc. Code) (Ger.) § 136a. Similarly, an investigate judge in France is prohibited from using ploys to get information. *UJ Law and Practice in France*, *supra* note 91, at 35.

⁴⁰⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Office of the High Commissioner of Human Rights, UNGA (Dec. 10, 1984), art. 15.

generally have the discretion to use otherwise illegally obtained evidence⁴¹⁰ if the probative value of the evidence or interest in its admission outweighs the violation of defendant's rights that may be compromised through the acquisition of such evidence.⁴¹¹ For instance, in a 2008 case, a German court considered whether the use of DNA evidence obtained unlawfully, without a court order, could be admitted into evidence.⁴¹² The Court noted, "a ban on the use of evidence is an exception, which is only to be recognized in individual cases if there is an express legal order or for overriding important reasons. The latter must be considered in particular after serious, conscious or objectively arbitrary violations of the law, in which fundamental rights safeguards are systematically or systematically disregarded."⁴¹³ Under this balancing discretion, information might be considered even if it violates constitutionally-protected privacy rights.⁴¹⁴ In a more recent case, for instance, the Federal Court of Justice, Germany's highest court, approved the use of information shared by French authorities after they accessed encrypted phones from the provider EncroChat.⁴¹⁵ The communications revealed significant drug transactions in Germany.⁴¹⁶ While acknowledging that the data was obtained in direct violation of a constitutional protection on telecommunications, the court found that, for particularly serious crimes "the most intrusive investigative measures" are permissible.⁴¹⁷

⁴¹⁰ STPO (Crim. Proc. Code) (Ger.) § 261 (cited in Bundesgerichtshof [BGH] [Fed. Ct. of Just.] (Ger.), 5 StR 475/21 (Mar. 2, 2022), <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2022/2022038.html> [hereinafter Fed. Ct. of Just. (Ger.)]; Appeals Authority, *supra* note 399; OK (Code of Jud. Proc.) (Finn.) Ch. 17 § 1; C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 427; Strpl. (Crim. Proc. Act) (Nor.) § 292; Sv (Code of Crim. Proc.) (Neth.) §§ 339, 395a; *see also UJ Law and Practice in France*, *supra* note 91, at 35; *UJ Law and Practice in Norway*, *supra* note 123, at 38; *UJ Law and Practice in the Netherlands*, *supra* note 146, at 25.

⁴¹¹ Fed. Ct. of Just. (Ger.) 4 StR 555/14 (May 20, 2015), Part II(1)(bb), HRR-Strafrecht [HRRS] ¶ 17, <https://www.hrr-strafrecht.de/hrr/4/14/4-555-14.php>; S. Ct. (Swed.), B2150-11 (Oct. 20, 2011), NJA 2011, p. 638, ¶18, <https://www.domstol.se/globalassets/filer/domstol/hogstodomstolen/avgoranden/2011/b-2150-11.pdf>; C. PR. PÉN. (Crim. Proc. Code) (Fr.) Ch. 17, § 25; Ct. of Cass. (Fr.), Crim. Bull. No. 11-88.118 (Mar. 7, 2012), https://www.legifrance.gouv.fr/juri/id/JURITEXT000025470795?page=1&query=11-88118Id&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT; *UJ Law and Practice in Norway*, *supra* note 123, at 38 (citing S. Ct. (Nor.), 30/1999, Rt-1999-1269 (Sep. 7, 1999), p. 1272); S. Ct. (Neth.), AE9038, 02494/01 (Jan. 14, 2003), https://inzicht.sdu.nl/content/ECLI_NL_HR_2003_AE9038.

⁴¹² Under the Code of Criminal Procedure, the defendant's consent or a court order is required to undertake molecular genetic testing. STPO (Crim. Proc. Code) (Ger.) § 81g(3). Fed. Ct. of Just. (Ger.), 4 StR 555/14 (May 20, 2015, Part II(1)(bb)).

⁴¹² Higher Reg. Ct., Karlsruhe (Ger.), 4 U 86/07 (Dec. 4, 2008).

⁴¹³ *Id.*

⁴¹⁴ Thomas Weigend, *The Potential to Secure a Fair Trial Through Evidence Exclusion*, in DO EXCLUSIONARY RULES ENSURE A FAIR TRIAL? (S. Gless & T. Richter, eds. 2019), 61, 66, https://lgcl.csl.mpg.de/attachments/Weigend_2019_The_potential_to_secure_a_fair_trial_through_evidence_exclusion.pdf.

⁴¹⁵ Press Release, Fed. Ct. of Just. (Ger.), EncroChat Data Can Be Used to Solve Serious Crimes (Mar. 25, 2022), <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2022/2022038.html>.

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* In an earlier 2016 case, the Federal Court of Justice considered the admissibility of evidence obtained from U.S. forces after the U.S. had conducted a raid on Osama Bin Laden's compound. There, documents were found that linked the suspect to crimes after the US had entered the country without permission and killed Osama bin Laden. In a brief ruling, the Federal Court of Justice nevertheless permitted the use of the evidence. Ct. of Justice (Ger.), 3 StR 466/15 (May 3, 2016); Gorf Statement, Ger. War Crimes Conf., *supra* note 396. Since German authorities were not involved in the raid, the court sidestepped the domestic prohibition on use of force. Moreover, the raid's violation of public international law raised a claim for Pakistan, as the country whose territory was violated, but not the defendant in the action before the court. Lars Otte, Dep. Fed. Pub. Pros. Gen. (Ger.), Written Response to Questions (Mar. 12, 2023) (on file with author).

The Swedish Supreme Court has likewise indicated that, while the general rule is to permit all relevant data, courts should consider the circumstances surrounding the attainment of the data.⁴¹⁸ In 2011, it heard an appeal in a case where the police enticed the defendant to reveal the location of the murdered victim by impersonating criminals and threatening him.⁴¹⁹ There, the Court cautioned that evidence which comes as a result of “undue pressure” being placed on the defendant, could not only render the information suspect, but also weaken “the protection against unfair measures that is a central part of the European Convention [on Human Right’s] rules on the right to a fair trial.”⁴²⁰ Nevertheless, the Court found that the Convention did not prevent the use of the evidence, even when it was obtained “in a way that is not compatible” with it,⁴²¹ and therefore permitted the use of the evidence.⁴²²

Finnish courts approach the matter similarly. While setting a firm ban on torture and evidence taken in violation of the right to remain silent, the Finnish Code of Judicial Procedure states that “the court may use also evidence that has been obtained unlawfully unless such use would endanger the conduct of fair proceedings, taking into consideration the nature of the matter, the seriousness of the violation of law in obtaining the evidence, the significance of the method of obtaining the evidence in relation to its credibility, the significance of the evidence for deciding the matter, and the other circumstances.”⁴²³ Last year, the Finnish Supreme Court issued a precedent setting ruling permitting evidence obtained from the FBI and Australian police through the use of wiretapping a messaging app.⁴²⁴ While acknowledging that the wiretap was illegal, as it constituted a violation of privacy, the court rejected claims that the evidence compromised the fairness of the trial.⁴²⁵

French courts will likewise consider the value of the evidence in relation to the defendant’s rights.⁴²⁶ However, they generally draw a distinction between admitting illegal evidence obtained by the police and such evidence when it is obtained by a defendant or a civil party.⁴²⁷ While the Supreme Court has prevented the police’s use of evidence obtained without warrant from a visitor’s room at a prison, it has accepted illegally obtained evidence submitted by a defendant or a civil party, even evidence obtained through wiretapping of a conversation between a lawyer and his client.⁴²⁸ When accepting unauthorized recordings submitted by a

⁴¹⁸ S. Ct. (Swed.), B2150-11 (Oct. 20, 2011), NJA 2011, at ¶ 18, <https://www.domstol.se/globalassets/filer/domstol/hogstodomstolen/avgoranden/2011/b-2150-11.pdf>; *see also UJ Law and Practice in Sweden*, *supra* note 40, at 23.

⁴¹⁹ S. Ct. (Swed.), B2150-11, at ¶¶ 4-6.

⁴²⁰ *Id.* at ¶ 21 (translated by author).

⁴²¹ *Id.* at ¶ 17.

⁴²² *Id.* at ¶ 29.

⁴²³ Code of Crim. Proc. (Finn.) Ch. 17, § 25, ¶3.

⁴²⁴ Press Release, Korkein oikeus [S. Ct.] (Finn.), Supreme Court Admitted ANOM Messages into Evidence (Feb. 23, 2023),

<https://korkeinoikeus.fi/en/index/supremecourt/news/supremecourtadmittedanommessagesintoevidence.html>.

⁴²⁵ *Id.*

⁴²⁶ Ct. of Cass. (Fr.), Crim. Bull. No. 11-88.118 (Mar. 7, 2012),

https://www.legifrance.gouv.fr/juri/id/JURITEXT000025470795?page=1&query=11-88118Id&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT.

⁴²⁷ *Id.*; *UJ Law and Practice in France*, *supra* note 91, at 35.

⁴²⁸ *Compare* Ct. of Cass. (Fr.), Crim. Bull. No. 00-83.852 (Dec. 12, 2000),

<https://www.legifrance.gouv.fr/juri/id/JURITEXT000007071347/> with Ct. of Cass. (Fr.), Crim. Bull. No. 11-85.464

private party,⁴²⁹ the Court has noted that “no legal provision allows criminal courts to exclude evidence produced by the parties on the sole ground that it has been obtained unlawfully or unfairly.”⁴³⁰ It stated, however, that had the evidence emanated from a magistrate rather than a private party, its ruling would be different.⁴³¹

In Norway as well, courts must weigh the seriousness of the violations of the defendant’s rights against the evidentiary value of the material.⁴³² Case law there suggests that illegally obtained evidence can be admitted if there are mechanisms in place designed to protect defendants’ rights.⁴³³ In a 2022 Norwegian case, its Supreme Court overruled a Court of Appeal’s decision to prohibit evidence of cannabis after an illegal home search.⁴³⁴ The Court rejected the lower court’s argument that the evidence had to be disallowed to punish the police,⁴³⁵ opining that administrative measures had improved police practice, and therefore, the exclusion was unwarranted.⁴³⁶

The Dutch courts likewise will exclude evidence only if it leads to “a breach of the principles of due process or disregard of the rights of the defense in criminal proceedings *to such an extent* that it must lead to the exclusion of evidence obtain as a result of the unlawful conduct.”⁴³⁷ For instance, in a case involving an illegal search of a house that resulted in the discovery of drugs, the Court allowed the evidence.⁴³⁸ There, the Court noted that, while the defendant was found in the house, he himself did not live there.⁴³⁹ As a result, his rights were not violated by the illegal search and the evidence was permitted.⁴⁴⁰ This case suggests that the Dutch courts not exclude illegally obtained evidence unless there is a serious infringement of the defendant’s rights.

iv. Experts

The role played by experts in civil law courts differs from that of their common law counterparts. In all Tier One countries, experts do not serve as witnesses for one party; rather,

(Jan 31, 2012), <https://www.legifrance.gouv.fr/juri/id/JURITEXT000025293872/>; *UJ Law and Practice in France*, *supra* note 91, at 35.

⁴²⁹ Under the Penal Code, it is illegal in France to tape someone without their permission. C. PÉN. (Pen. Code) (Fr.) art. 226-1.

⁴³⁰ Ct. of Cass. (Fr.), Crim. Bull. No. 11-88.118 (Mar. 7. 2012), at 1.

⁴³¹ *Id.*

⁴³² *UJ Law and Practice in Norway*, *supra* note 123, at 38 (citing S. Ct. (Nor.), 30/1999, Rt-1999-1269 (Sep. 7, 1999), at 1272).

⁴³³ S. Ct. (Nor.) HR-2022-2420-A (Dec. 20, 2022) (En. Sum.),

<https://www.domstol.no/globalassets/upload/hret/avgjorelser/2022/desember-2022/hr-2022-2420-a.pdf>.

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.* (emphasis added).

⁴³⁷ S. Ct. (Neth.), AE9038, 02494/01 (Jan. 14, 2003), at § 3.5,

https://inzicht.sdu.nl/content/ECLI_NL_HR_2003_AE9038.

⁴³⁸ S. Ct. (Neth.), ECLI:NL:HR:2004:AM2533 (Nov. 10, 2015),

<https://www.hetrechtstudentje.nl/jurisprudentie/eclinlhr2004am2533-afvoerpilploze-hasjpijp/>.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

they are hired by the court to provide an impartial, specialized opinion on a particular topic.⁴⁴¹ The topics in question can vary significantly. For instance, while German courts may rely heavily on government-affiliated forensic experts,⁴⁴² they can also avail themselves of certified experts on more obscure topics such as gambling machines, hand-knotted carpets, and animal pedigree.⁴⁴³

The countries diverge in the mechanisms by which they obtain experts. There are no lists of registered experts in Sweden, Finland, or Norway.⁴⁴⁴ The courts there can presumably choose someone they deem appropriate. In contrast, Germany, France, and the Netherlands, experts must obtain a certification or otherwise be approved for court use.⁴⁴⁵ In Germany, private professional associations maintain lists on behalf of the courts.⁴⁴⁶ In France, court officials determine who can be certified as an expert and maintain lists.⁴⁴⁷ In the Netherlands, the government created an entity for the sole purpose of providing qualified expert advice to the court.⁴⁴⁸

Even in Germany, France, and the Netherlands, if the certified lists do not have the appropriate specialist, the court can obtain an opinion from another source.⁴⁴⁹ For instance, German authorities commissioned two reports from the civil society organization, the Commission for International Justice and Accountability (CIJA), to confirm details about the Syrian conflict.⁴⁵⁰

⁴⁴¹ STPO (Crim. Proc. Code) (Ger.) § 73; RB (Code of Jud. Proc.) (Swed.) 40:1; RL (Pen. Code) (Finn.) Ch. 17, § 7; C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 156; Strpl. (Crim. Proc. Act.) (Nor.) § 139; SV (Code of Crim. Proc.) (Neth.) § 51i.

⁴⁴² *Bundeskriminalamt* (BKA) [Fed. Crim. Pol. Office] (Ger.), *Partners and Clients*, Forensic Science Inst. (KTI), https://www.bka.de/EN/OurTasks/SupportOfInvestigationAndPrevention/ForensicScience/PartnersAndClients/partnersandclients_node.html. Courts can commission reports directly from the KTI.

⁴⁴³ *der Bundesverband öffentlich bestellter und vereidigter sowie qualifizierter Sachverständiger e.V.* [Ger. Fed. Assn. of Publicly Appointed, Sworn and Qualified Experts, Professional Associations], <https://www.bvs-ev.de/mitgliedsverbaende-kooperationen/fachverbaende> [hereinafter Ger. Fed. Assn. of Experts].

⁴⁴⁴ *Justice Portal, Find an Expert [Sweden]*, EUR. COMM., https://e-justice.europa.eu/37146/EN/find_an_expert?SWEDEN&member=1 (“In Sweden, there are no registers or records of experts, and there are no plans to introduce such records.”); *Finding an Expert in the EU [Finland]*, EUROEXPERT, <https://euroexpert.org/find-an-expert/eu> (noting that “[t]here are no official lists of experts” in Finland); *Expert Witnesses*, THOMMESSEN, <https://pubs.thommessen.no/litigation-and-arbitration-in-norway/evidentiary-matters#block-7da7b5fd-8726-4c6e-923e-4fc8e424661d>.

⁴⁴⁵ STPO (Crim. Proc. Code) (Ger.) § 73; C. PR. PÉN. (Crim. Proc. Code) (Fr.) § 156; Strpl. (Crim. Proc. Act) (Nor.) § 151; SV (Code of Crim. Proc.) (Neth.) §§ 51k; 150.

⁴⁴⁶ Ger. Fed. Assn. of Experts, *supra* note 443.

⁴⁴⁷ *See, e.g.* Ct. Of Cass., *Experts agréés par les cours d’appel*, <https://www.courdecassation.fr/experts-agrees-par-les-cours-dappel>.

⁴⁴⁸ *See Netherlands Register Gerechtig Deskundigen* [Dutch Register of Court Experts], <https://english.nrgd.nl/>.

⁴⁴⁹ SV (Code of Crim. Proc.) (Neth.) § 51k (noting that the court needs to give the reasons when not appointing an expert listed on the national public register of judicial experts).

⁴⁵⁰ *Inside the Raslan Trial Monitoring Report #18: The Czech and the Journalist; “the Corpse’s Head Knocked Against Each Step,”* SYRIA JUSTICE AND ACCOUNTABILITY CENTER (SJAC) (Nov 17-19, 2020), <https://syriaaccountability.org/inside-the-raslan-trial-the-czech-and-a-journalist-the-corpses-head-knocked-against-each-step/> [hereinafter SJAC].

While courts appoint the experts in Tier One countries, there are no prohibitions on a party requesting one.⁴⁵¹ In Norway and Sweden, if the parties cannot agree on one expert, the court can appoint another.⁴⁵² In the Netherlands, the criminal procedure code provides that if an expert carried out an investigation at the request of a suspect which “has been shown to be in the interest of the investigation,” he will be accepted by the court and paid.⁴⁵³ However, when a party brings in experts on their own volition, and not through the court’s approval, their statements are generally accorded lower credibility due to perceived impartiality.⁴⁵⁴ Moreover, but for the Dutch example discussed here, they will generally not be paid by court funds.⁴⁵⁵ The Norwegian court system’s use of lay judges may increase the reliance on experts.⁴⁵⁶ In a 2019 opinion, the Supreme Court overturned a Court of Appeals decision after that court refused a request from the four lay judges for an expert on biological tracing in a sexual assault case.⁴⁵⁷ There the Court emphasized the importance of an expert to “fully clarify” the issue before the judges, consistent with the code on criminal procedure.⁴⁵⁸

v. Child Witnesses

Slight variations exist in the special provisions applicable to child witnesses utilized by Tier One countries. In Germany, a witness under the age of eighteen may testify without taking an oath.⁴⁵⁹ The code provides that, with minor victims, court proceedings “must be conducted in a particularly expedited manner.”⁴⁶⁰ The examination of child witnesses usually occur in the presence of only the judge.⁴⁶¹ Children may also be interviewed and/or questioned by the judge through a video-link or video recording.⁴⁶²

The Swedish Code of Judicial Procedure provides that examining anyone under the age of fifteen has to be made behind “closed doors” and a recording can be made of it.⁴⁶³ In Finland, the code of criminal procedure permits a video-link statement of a person under the age of fifteen

⁴⁵¹ STPO (Crim. Proc. Code) (Ger.) § 73; RB (Code of Jud. Proc.) (Swed.) 40:3; RL (Pen. Code) (Finn.) Ch. 17, § 16; C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 156 (Any investigating or trial court may order an expert opinion where a technical question arises, either upon the application of the public prosecutor, or of its own motion, or upon the application of the parties. The public prosecutor or the party who requests this expert opinion may specify the questions that he wants to put to the expert in his application.”); Strpl. (Crim. Proc. Act) (Nor.) § 141; SV (Code of Crim. Proc.) (Neth.) § 51(m).

⁴⁵² RB (Code of Jud. Proc.) (Swed.) 40:3; Strpl. (Crim. Proc. Act) (Nor.) § 141.

⁴⁵³ SV (Code of Crim. Proc.) (Neth.) § 51j(4).

⁴⁵⁴ See, e.g., Eva Friis and Karsten Astrom, *The Use of Court- and Party-Appointed Experts in Legal Proceedings in Sweden: Judges’ Experiences and Attitudes*, 4(2) OSLO L. REV. 63, Introduction, <https://www.idunn.no/doi/10.18261/issn.2387-3299-2017-02-01> (citing large study).

⁴⁵⁵ SV (Code of Crim. Proc.) (Neth.) § 51j(4).

⁴⁵⁶ Strpl. (Crim. Proc. Act) (Nor.) § 40, n. 5 (explaining that the reference to a composite court refers to “one or more professional judges and two or more lay judges who all adjudicate cases on an equal footing, with one of the professional judges acting as president of the court.”).

⁴⁵⁷ S. Ct. (Nor.), Judgment HR-2019-1967-A, Crim. Case (Oct. 24, 2019) (En. Sum.),

<https://www.domstol.no/en/supremecourt/rulings/2019/supreme-court-criminal-cases/hr-2019-1967-a/>.

⁴⁵⁸ *Id.* (citing Strpl. (Crim. Proc. Act) (Nor.) § 294, which provides that “[t]he court shall in its official capacity ensure that the case is fully clarified.”).

⁴⁵⁹ STPO (Crim. Proc. Code) (Ger.) § 58a,

⁴⁶⁰ *Id.* § 48a.

⁴⁶¹ *Id.* § 241a.

⁴⁶² *Id.* § 58a.

⁴⁶³ RB (Code of Jud. Proc.) (Swed.) 5:1.

to be used in evidence.⁴⁶⁴ The code also provides that such a witness can testify without being under oath.⁴⁶⁵

France, Norway, and the Netherlands do not require that children take an oath prior to testifying. However, in France, the examination of child witnesses under oath will still be admitted where “neither the public prosecutor nor any other party opposed the taking of the oath.”⁴⁶⁶ In Norway and the Netherlands, pre-trial interviews of child victims or witnesses are admitted as evidence in lieu of testimony at trial, provided that the interviews are video-recorded, and the defendants have the ability to contradict the victim’s assertions.⁴⁶⁷

vi. Video-Link Testimony

In addition to using video-link testimony for child witnesses, Tier One countries will permit its use when a witness is not going to be available for a hearing. Countries accept different reasons to justify unavailability. Finland and the Netherlands appear to set the fewest restrictions on its use. Post-COVID, Sweden, France, and Norway have expanded their use of video-link testimony.⁴⁶⁸

The relevant codes of Germany and Sweden permit such testimony when the witness cannot come in person due to cost or inconvenience.⁴⁶⁹ Finnish law not only recognizes that reason, but also refers to situations where a witness may need protection from a threat to life from a domestic partner or in other circumstances.⁴⁷⁰ In addition, it allows its use simply when the court determines that it can “reliably assess” the witness without having him present.⁴⁷¹ While video-link testimony was common before Covid-19, it is more so now.⁴⁷²

In France, it can be employed “where the needs of the inquiry or investigation justify it.”⁴⁷³ The same standard applies when determining the admissibility of video-link testimony

⁴⁶⁴ OK (Code of Jud. Proc.) (Finn.) Ch. 17, § 44.

⁴⁶⁵ *Id.* § 24.

⁴⁶⁶ C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 706-52, (“In the course of an inquiry or judicial investigation, the questioning of a minor who is a victim of one of the offenses considered in Article 706-47 is recorded by audio-visual means with his consent or, if he is incapable of giving it, with that of his legal representative.”). *Id.* art. 336.

⁴⁶⁷ Strpl. (Crim. Proc. Act) (Nor.) § 298; Sv (Code of Crim. Proc.) (Neth.) § 488ac; Trond Myklebust, *The Nordic Model of Handling Children’s Testimonies*, in COLLABORATING AGAINST CHILD ABUSE 97, 100-101 (S. Johansson, et al., eds. 2017), https://doi.org/10.1007/978-3-319-58388-4_5.

⁴⁶⁸ Anne Sanders, *Video-Hearings in Europe Before, During and After the COVID-19 Pandemic*, 12(2) INT’L J. CT. ADMIN. (2021), §§ 2.1.2; 2.2.2, <https://iacajournal.org/articles/10.36745/ijca.379>, [hereinafter Sanders, *Video-Hearings in Europe*].

⁴⁶⁹ STPO (Crim. Proc. Code) (Ger.) § 58a(1); RB (Code of Jud. Proc.) (Swed.) 35:14, 5:1.

⁴⁷⁰ OK (Code of Jud. Proc.) (Finn.) § 52.

⁴⁷¹ *Id.*

⁴⁷² Sanders, *Video-Hearings in Europe*, *supra* note 468, at § 2.1.2; see also Magnusson Law, *Taking of Evidence in Sweden, Finland and Denmark by UK Courts vid Video-Link Post-Brexit, The Finnish Perspective*, <https://www.magnussonlaw.com/news/taking-of-evidence-via-video-link-post-brexit/#:~:text=The%20Finnish%20perspective&text=the%20witness%20is%20summoned%20to,video%20link%20or%20by%20phone> (noting that since the outbreak of Covid-19, video-link evidence has become very common.)

⁴⁷³ C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 706-71 (“Where the needs of the inquiry or investigation justify it, the hearing or the interrogation of a person, and also any confrontation between one or more persons, may be carried out in or more different parts of the French national territory which are linked by means of telecommunication which

during a hearing or interrogation.⁴⁷⁴ While the provision allows the criminal defendant to refuse its use in certain circumstances, that right was waived in regulations passed during the pandemic.⁴⁷⁵ However, a 2021 ruling from the Constitutional Council declared that regulation unconstitutional.⁴⁷⁶ As a result, defendants were able to object to proceedings occurring online.⁴⁷⁷

In Norway, a witness may testify remotely through a video-link if geographical restrictions or special circumstances make distant examination desirable.⁴⁷⁸ While the code does not specify the circumstances that would apply, clearly the pandemic met the requirement as the court conducted remote hearings then.⁴⁷⁹ The code identifies a specific distance (800 kilometers) where this option can be employed, unless the witness can demonstrate it would cause “disproportionate inconvenience” to attend in person.⁴⁸⁰

The Netherlands grants the judge full autonomy to determine whether and under what conditions to employ video conferencing.⁴⁸¹ The code provides no limitations. While the person testifying as well as the prosecutor has a right to express their opinion on its use, the decision rests with the court.⁴⁸²

vi. Digital Evidence

Tier One courts have all utilized digital evidence of some kind.⁴⁸³ German courts have permitted such use, even when it originates from unidentified sources. For instance, in the *Raslan* case, the Higher Regional Court of Koblenz relied on the infamous “Caesar files” while prosecuting crimes against humanity in Syria.⁴⁸⁴ The digital photographs, taken by an unidentified Syrian military defector, code-named Caesar, depicted the abused corpses of

guarantee the confidentiality of the transmission...[A]n official record is drawn up of the processes which have been carried out there. These processes may be the subject of video or audio recording.”).

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*; see also Sanders, *Video Hearings in Europe*, *supra* note 468, at § 2.2.3.

⁴⁷⁶ *Conseil Constitutionnel* [Const. Council] (Fr.), Decision, 2020-872 QPC (Jan. 15, 2021), <https://www.conseil-constitutionnel.fr/decision/2021/2020872QPC.htm>.

⁴⁷⁷ *Id.*

⁴⁷⁸ Strpl. (Crim. Proc. Act) (Nor.) § 109a (“Witnesses may be heard by the court by distant examination if the witness does not have a duty to attend due to geographic limitations or other special circumstances that make remote examination desirable. Distant examination should not be used if the evidence may be of particular importance, or if other circumstances cause concern... Distant examination takes place by video examination. If equipment for video examination is not available, audio examination may be used...”). *Id.*

⁴⁷⁹ *Norway: Supreme Court Holds First Web-Based Court Hearing*, LIBRARY OF CONGRESS (Apr. 17, 2020), <https://www.loc.gov/item/global-legal-monitor/2020-04-22/norway-supreme-court-holds-first-web-based-court-hearing/>.

⁴⁸⁰ *Id.*

⁴⁸¹ Sv (Code of Crim. Proc.) (Neth.) § 131a(2).

⁴⁸² *Id.* With respect to those endangered by testifying, the Code has special provisions to shield witnesses. *Id.* § 226m.

⁴⁸³ At the recent conference held in Germany, the Eurojust President, Ladislav Hamram discussed the unprecedented amount of digital evidence provided to them. They have been utilizing artificial intelligence to enable them to analyze it. Ladislav Hamram, Eurojust Pres., Statement at the Ger. Fed. Min. of Just. Conf. “Responding to Crimes under International Law: Holding War Criminals to Account” (Feb. 23, 2024) (notes on file with author).

⁴⁸⁴ *Inside the Raslan Trial #17: A Forensic Analysis of the Caesar Photos*, SJAC (Feb. 18, 2021), <https://syriaaccountability.org/inside-the-raslan-trial-a-forensic-analysis-of-the-caesar-photos/>.

thousands of regime victims.⁴⁸⁵ The Court authenticated the images through the testimony of a French journalist who had met in person with the defector as well the testimony of a forensics expert who verified the photos were not doctored.⁴⁸⁶ The Court relied on the photos in convicting the defendants.⁴⁸⁷

Case law from Sweden, Finland, and France likewise illustrate the reliance of courts in those countries on digital evidence in atrocity cases. In *Droubi*, Swedish officials convicted a man of war crimes based on his Facebook posts.⁴⁸⁸ There, a man admitted that the photos on his own Facebook account were genuine so no further authentication was needed.⁴⁸⁹ In *Jebber Salman Ammar*, a Finnish District Court convicted an Iraqi man of a war crime also because of his Facebook posts.⁴⁹⁰ The defendant posted a photo of himself with the severed head of an enemy soldier.⁴⁹¹ There as well, the defendant acknowledged posting the image.⁴⁹² In *Chaban*, a French Court referred to the same Caesar files used in Germany to convict the accused of complicity in crimes against humanity.⁴⁹³ Human Rights Watch had undertaken a nine-month study to authenticate these photos so they could be relied on in decisions such as this.⁴⁹⁴

Norway's approach to authentication of digital evidence resembles that of Germany. In Norwegian courts, a party must demonstrate its authenticity by introducing information regarding its production, the sources of its upload, and the location where it was recorded.⁴⁹⁵ The

⁴⁸⁵ *Id.*; *Syria: Stories Behind Photos of Killed Detainees* (Dec. 13, 2023), HUM. RTS. WATCH, <https://www.hrw.org/news/2015/12/16/syria-stories-behind-photos-killed-detainees> [hereinafter *Syria: Stories Behind Photos*, HUM. RTS. WATCH].

⁴⁸⁶ Trial monitoring by an NGO provided a report on the proceedings describing how the court authenticated the images. *Inside the Raslan Trial #16: How the Syrian Government Documented Torture and How "Caesar" Leaked the Photos*, SJAC (Oct. 27-29, 2020), <https://syriaaccountability.org/inside-the-raslan-trial-how-the-syrian-government-documented-torture-and-how-caesar-leaked-the-photos/>.

⁴⁸⁷ Higher Reg. Ct., Koblenz (Ger.), 1 StE 3/21; *Inside the Raslan Trial #58; The Raslan Verdict in Detail*, SJAC (Jan. 13, 2022), <https://syriaaccountability.org/inside-the-raslan-trial-the-raslan-verdict-in-detail/>. The Ukraine conflict has presented German prosecutors with a similar challenge, this time related to digital evidence obtained from military sources, such as photos and satellite imagery. To address potential authentication challenges, prosecutors are raising awareness among military personnel on how to document the context in which such evidence is obtained in a manner that would help authenticate this type of material in a court of law. Gorf Statement, German War Crimes Conference, *supra* note 396.

⁴⁸⁸ He posted a video of a group torturing a soldier. Ct. of App. (Swed.) B 4770-16, Judgment, (Aug. 5, 2016), <https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/Anonymised-SE-case-B939-19.pdf>; *Facebook 'torture' video leads to Sweden arrest*, THE LOCAL (Fed. 2, 2015), <https://www.thelocal.se/20150202/syria-fighter-charged-in-sweden-over-war-crime>.

⁴⁸⁹ Ct. of App. (Swed.) B 4770-16, at 9 (attached district court opinion).

⁴⁹⁰ Kärjäläoikeus [D. Ct.], Kanta-Häme (Finn.), R 16/214 (Mar. 22, 2016), at 1, <https://www.legal-tools.org/doc/546cd9/pdf/>; Rome Statute art. 8(2)(c)(ii).

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ Ct. of Cass. (Fr.), Crim. Bull No.22-80-057 (May 12, 2023), https://www.courdecassation.fr/files/files/Arrêts%20traduits/Traduction_AP_22%2080.057.pdf.

⁴⁹⁴ *Syria Conflict: 'Caesar' Torture Photos Authentic – Human Rights Watch*, BBC NEWS (Dec. 16, 2015), <https://www.bbc.com/news/world-middle-east-35110877>; *If the Dead Could Speak; Mass Deaths and Torture in Syria's Detention Facilities*, HUM. RTS. WATCH (Dec. 16, 2015), <https://www.hrw.org/report/2015/12/16/if-dead-could-speak/mass-deaths-and-torture-syrias-detention-facilities>.

⁴⁹⁵ *UJ Law and Practice in Norway*, *supra* note 123, at 38 (citing interview with a public prosecutor).

degree of authenticity required for a particular piece of digital evidence depends on the extent to which the defendant challenges its admission.⁴⁹⁶

Finally, in a case reminiscent of the *Droubi* case from Sweden, a Dutch Court convicted a man of a war crime and participating in a terrorist group in part due to his Facebook postings on online chats.⁴⁹⁷ While the Court did not discuss authentication, additional evidence supplemented the record against the perpetrator.⁴⁹⁸

vii. Non-Governmental Organization (NGO) Evidence

All Tier One countries have relied on evidence obtained through NGOs either to assist in the investigation of atrocity crimes or in support of decisions issued by the courts related to such cases. Indeed, the German Justice Minister, Marco Buschmann, recently acknowledged the important role that NGOs have played with respect to investigating Ukrainian atrocities.⁴⁹⁹ They often cooperate with prosecutors in collecting and providing evidence.⁵⁰⁰ That was certainly the case in the previously mentioned case of *Eyad A.*⁵⁰¹ The Caesar files were provided to the police by Human Rights Watch (HRW).⁵⁰² Like their German counterparts, Finnish, Norwegian, and Dutch prosecutors have drawn from NGO work in preparing cases.⁵⁰³ In *Gabril Massaquoi*, the Finnish prosecutor relied heavily on evidence compiled by the NGO, Civitas Maxima.⁵⁰⁴ Similarly, in Norway, the police's war crimes unit has reached out to NGOs to request relevant materials as it builds cases.⁵⁰⁵

In addition, courts in some countries have relied on NGO material to establish the contextual elements of international crimes. For instance, in the previously cited case of the Facebook poster from the Netherlands, the Court relied on reports from Human Rights Watch and Amnesty International to determine if a non-international armed conflict (NIAC) existed at the time when the crimes occurred.⁵⁰⁶ On the other hand, courts have sometimes referred to

⁴⁹⁶ *Id.*

⁴⁹⁷ D. Ct., Hague (Neth.), ECLI:NL:RBDHA:2019:10647 (Jul. 23, 2019), <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2019:10647&showbutton=true&keyword=photo%20Beydence&idx=1>.

⁴⁹⁸ *Id.*

⁴⁹⁹ Marco Buschmann, Fed. Min. of Just., Statement, Fed. Min. of Just. Conf. "Responding to Crimes Under International Law: Holding War Criminals to Account" (Feb. 23, 2024), <https://www.bmj.de/SharedDocs/Veranstaltungen/DE/2024/0223-Internationale-Konferenz-Voelkerstrafrecht.html>.

⁵⁰⁰ *UJ Law and Practice in Germany*, *supra* note 29, at 28.

⁵⁰¹ Higher Reg. Ct., Koblenz (Ger.), 1 StE 3/21, at 51-62.

⁵⁰² *Syria: Stories Behind Photos*, *supra* note 485.

⁵⁰³ *UJ Law and Practice in the Netherlands*, *supra* note 146, at 23; *UJ Law and Practice in Norway*, *supra* note 123, at 27.

⁵⁰⁴ Massaquoi has been tried and acquitted twice. They found that the evidence did not connect Massaquoi, who had testified against Sierra Leone's Revolutionary United Front at an international court, to the commission of massacres with the very men he had betrayed. ; Thierry Cruvellier, *Acquittal of Massaquoi: Reality Check for Finnish Justice*, JUSTICEINFO (Apr. 29, 2022), <https://www.justiceinfo.net/en/91464-acquittal-massaquoi-reality-check-finnish-justice.html>; Thierry Cruvellier, *Massaquoi Affair: Epilogue to a Fiasco*, JUSTICEINFO (Feb. 2, 2024), <https://www.justiceinfo.net/en/128015-massaquoi-affair-epilogue-fiasco.html>.

⁵⁰⁵ *UJ Jurisdiction Law and Practice in Norway*, *supra* note 123, at 27.

⁵⁰⁶ The court noted that the NGO reports were part of the criminal dossier that also included other open source materials such as media reports, and documents and footage from jihadist organizations in Syria. The court cited

information provided by NGOs but given it only limited weight in its decision. For instance, the *Eyad* opinion referenced HRW and Amnesty International reports, but since it could not verify the information in the reports, the Court used it as only circumstantial evidence.⁵⁰⁷

Finally, in all Tier One jurisdictions except Germany, NGOs may initiate a case as a civil complainant.⁵⁰⁸ In France, for instance, the arrest warrant against Assad was a result of a civil complaint filed by NGOs representing multiple victims of the attack.⁵⁰⁹ While in Germany, NGOs representing victims cannot serve as parties in criminal cases or formally submit evidence directly to the court,⁵¹⁰ they can seek to join a criminal case as a private prosecutor after the trial begins.⁵¹¹ If their petition is granted, they can participate fully in the trial, including by questioning the defendant, submitting evidence and appealing any decision.⁵¹² In addition, recent amendments to the VStGB allow for joint representation of victims,⁵¹³ and a German court may opt to choose a lawyer affiliated with an NGO to represent victims.

viii. Sexual and Gender-Based Crimes (“SGBC”)

In Tier One countries, the standards of proof applied at the investigative stage to cases involving SGBC are not distinct from that applied to other crimes.⁵¹⁴ Indeed, despite some variation in the language, the standard is largely the same among those countries.⁵¹⁵ Moreover,

these sources for its history of the uprising in Syria. D. Ct. Hague (Neth.), ECLI:NL:RBDHA:2019:10647 (Jul. 23, 2019), § 5.3.3.2.

⁵⁰⁷ “[T]he Panel has used the circumstantial evidence contained in reports by the non-governmental organizations “Human Rights Watch” and “Amnesty International” which, according to their own accounts, stem from direct questioning of numerous victim witnesses of the international Syrian conflict. Here, too, it was not possible to verify the sources and the evidence was therefore assessed with caution.” Higher Reg. Ct., Koblenz (Ger.), 1 StE 3/21, at 83.

⁵⁰⁸ C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 2-2 through 2-24, RB (Code of Jud. Proc.) (Swed.) 20:5; OIKEUDENKÄYMISKAARI (Code of Jud. Proc.) (Finn.) Ch. 1 § 17, https://www.finlex.fi/en/laki/kaannokset/1734/en17340004_20190812.pdf [hereinafter OK (Code of Jud. Proc.) (Finn.)]; Strpl. (Crim. Proc. Act) (Nor.) § 223; SV (Code of Crim. Proc.) (Neth.) art. 161. The French code contains specific provisions authorizing NGOs to participate in proceedings as civil parties based on the purpose of the organization, including NGOs that combat “crimes against humanity or war crimes.” C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 2-4.

⁵⁰⁹ *French Magistrates Issue Arrest Warrants for Syria’s President Al-Assad and Three Associates for Chemical Weapons Attacks*, CIV. RTS. DEFENDERS (Nov. 15, 2023), <https://crd.org/wp-content/uploads/2023/11/Press-Release-in-English-on-Arrest-Warrants-Issued-for-Syrias-President-al-Assad-and-Three-of-His-Associates-for-Complicity-in-War-Crimes-and-Crimes-Against-Humanity.pdf>. An appeals court upheld the arrest warrant on June 26th. David Gritten, *French Court Confirms Bashar al-Assad Arrest Warrant over Syria Chemical Attack*, BBC NEWS (June 26, 2024), <https://www.bbc.com/news/articles/cn0090vrwgwo>.

⁵¹⁰ *UJ Law and Practice in Germany*, *supra* note 29, at 28.

⁵¹¹ STPO (Crim. Proc. Code) (Ger.) § 395.

⁵¹² *Id.* § 401.

⁵¹³ Isabelle Hassfurther, *The Reform of the International Law Framework in Germany - Successful Changes and Missed Opportunities: Part II*, OPINIO JURIS, <https://opiniojuris.org/2024/06/14/reform-of-the-international-criminal-law-framework-in-germany-successful-changes-and-missed-opportunities-part-ii/>.

⁵¹⁴ *Id.* § 152, ¶ 2; RB (Code of Jud. Proc.) (Swed.) 23:1; *UJ Law and Practice in Finland*, *supra* note 68, at 25; C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 40-1; Strpl. (Crim. Proc. Act) (Nor.) § 406(1); SV (Code of Crim. Proc.) (Neth.) art. 161.

⁵¹⁵ In France, the facts alleged by the victim must constitute a crime, whereas in Germany, authorities must have “cause to believe” that an offense has occurred and in Norway, the police must have “reasonable grounds” to believe

as with other crimes, SGBCs require some form of corroborating evidence. In Sweden and France, a victim's statement alone is not sufficient to support a conviction.⁵¹⁶ Similarly, in the Netherlands, no one can be convicted of a crime solely on the basis of one person's testimony.⁵¹⁷ Thus, although medical evidence is not required to corroborate a complaint involving SGBCs there, Dutch prosecutions require supporting evidence of some kind.⁵¹⁸ In practice, however, a minimal amount of supporting evidence is sufficient to sustain a conviction in sexual assault cases because Dutch courts acknowledge that these crimes frequently occur without witnesses.⁵¹⁹

In addition, some Tier One countries provide special assistance provisions for SGBC victims during the investigation. For instance, in cases involving sexual attacks on minors or a murder of a minor preceded by rape or torture,⁵²⁰ the French Criminal Procedure Code allows for the appointment of an *ad hoc* administrator to “ensure the protection of the interests of the minor” if the prosecutor or investigating judge does not believe that the interests of the minor are being adequately ensured by their legal representative.⁵²¹ Moreover, some countries permit special procedures to be employed in cases where the accused is charged with SGBC. For instance, Germany, Finland, and Norway allow pre-recorded statements from victims of SGBC to be played during the trial.⁵²² The defendant must, however, be granted an appropriate opportunity to ask the victims questions.⁵²³ In Sweden and Norway, the judge can exclude the accused when a victim of SGBC testifies, provided the defendant can subsequently ask questions⁵²⁴

there was a crime. C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 40-1; STPO (Crim. Proc. Code) (Ger.) Ch. 23, § 1; Strpl. (Crim. Proc. Act) (Nor.) § 224(1).

⁵¹⁶ Nytt Juridiskt Arkiv [NJA] [S. Ct. Reports] 2009, p. 447, B1867-09 (Swed.), https://lagen-nu.translate.google.com/nja/2009s447?x_tr_sl=sv&x_tr_tl=en&x_tr_hl=en&x_tr_pto=wapp; C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 706-62. There is no similar provision in the Norwegian code. Moreover, case law indicates that a conviction for sexual assault of a minor is possible with no corroborating evidence. S. Ct. (Nor.), HR-2009-02153-A, (2009/841) (Nov. 13, 2009), <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2009-2153-a.pdf>.

⁵¹⁷ Sv (Code of Crim. Proc.) (Neth.) § 342.

⁵¹⁸ *Id.* § 342 (“The court may not find there is evidence that the defendant committed [an] offense as charged in the indictment exclusively on the basis of the statement of one witness.”).

⁵¹⁹ In one case, a father of sexually abusing his children despite the only evidence being the victims' statements. The court concluded that the statement of one declarant “may serve as proof of support for that of the other.” Ct. App. Hertogenbosch (Neth.), Crim. Judgment, ECLI:NL:RBZWB:2019:197 (2019), at Evidence Considerations, B, <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHSHE:2019:4381>. See also *Criminalization and Prosecution of Rape in the Netherlands*, AMNESTY INT'L (2020), <https://www.amnesty.org/en/wp-content/uploads/2021/07/EUR3524552020ENGLISH.pdf>.

⁵²⁰ C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 706-47.

⁵²¹ *Id.* § 706-50.

⁵²² Under the Finnish Code of Judicial Procedure, a pre-recorded video from victims of sexual offenses is permitted to be used as evidence if the victim is between the age of 15-17 and does not wish to attend the hearing. In addition, those who are older can also send in such a video “if the hearing in (*sic*) the proceedings would endanger his or her health or cause other corresponding significant harm.” This provision also applies to those between the ages of 15-17 who are injured in any way and are “in need of special protection, especially taking into consideration his or her personal circumstances and the nature of the offense.” OK (Code of Jud. Proc.) (Finn.) Ch. 17, § 24, ¶ 3(3). In Norway, this rule applies to those under the age of sixteen. Strpl. (Crim. Proc. Act) (Nor.) § 298; STPO (Crim. Proc. Code) (Ger.) § 255a.

⁵²³ OK (Code of Jud. Proc.) (Finn.) Ch. 17, § 24, ¶ 3(3).

⁵²⁴ *UJ Law and Practice in Sweden*, *supra* note 40, at 24; *UJ Law and Practice in Norway*, *supra* note 123, at 33.

However, gender bias among police and court personnel poses a significant challenge in these cases. Despite the low threshold for filing a complaint in France,⁵²⁵ for instance, the vast majority of SGBC complaints remain unaddressed; one study reported that 60 percent of women who went to the French police seeking to file an SGBC report were refused due to bias.⁵²⁶ Similarly, NGOs have raised concerns about gender bias in the Norwegian judicial system.⁵²⁷

E. Immunities

Tier One nations rely on treaties and customary international law to deal with issues of immunity belonging to high state officials, diplomats, and military personnel, among others. For instance, the 1961 Vienna Convention on Diplomatic Relations,⁵²⁸ which is binding on all Tier One countries,⁵²⁹ requires that countries codify rules of international law on diplomatic privileges and immunities.⁵³⁰ In addition, as NATO members, all Tier One countries⁵³¹ sign status of force agreements that address treatment, including immunities, of military personnel accused of crimes.⁵³²

Beyond treaties, Tier One countries have generally abided by customary international law regulating immunities. Customary international law generally recognizes two distinct types of immunities:⁵³³ first, whether Heads of State and other high state officials enjoy immunity *ratione materiae*, an immunity associated with the nature of particular acts, and second, whether such persons enjoy immunity *ratione personae*, an immunity associated with their official status.

⁵²⁵ C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 40-1.

⁵²⁶ Juliette Maris, *The French State in the Face of Sexual and Gender-Based Violence*, GROWTHINKTANK (Nov. 21, 2022), <https://www.growthinktank.org/en/the-french-state-in-the-face-of-sexual-and-gender-based-violence/>.

⁵²⁷ A 2014 study showed that one in ten judges are gender biased. Ka Man Mak, *Part 3 – Gender-Based Violence: Norway Failed to Address Repeated Concerns from CEDAW, GREVIO, and Amnesty International*, OSLO DESK (Jul. 29, 2023), <https://oslodesk.com/part-3-gender-based-violence-norway-failed-to-address-repeated-concerns-from-cedaw-grevio-and-amnesty-international/>.

⁵²⁸ Vienna Convention on Diplomatic Relations (Apr. 18, 1961), 23 U.S.T. 3227, 500 U.N.T.S. 95, Signatories, httpstreaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf [hereinafter 1961 Vienna Convention].

⁵²⁹ See UN Immunities Convention Signatories, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&clang=en [and 1961 Vienna Convention Signatories, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&clang=en.

⁵³⁰ See, e.g. Gerichtsverfassungsgesetz (GVG) [Ct. Constitution Act] (Ger.) §§ 18-20, https://www.gesetze-im-internet.de/gvg/_18.html; Strpl. (Crim. Proc. Act) (Nor.) § 4 (noting that international law limits application of domestic law).

⁵³¹ Sweden joined NATO on March 7, 2024. Press Release, NATO, Sweden Officially Joins NATO (Mar. 7, 2024), https://www.nato.int/cps/en/natohq/news_223446.htm. Finland joined in 2023. Germany, France, Norway, and the Netherlands are longstanding members. *NATO Member Countries*, NATO (Mar. 11, 2024), https://www.nato.int/cps/en/natohq/topics_52044.htm.

⁵³² “Privileges and immunities are accorded to the representatives of Member States and their staffs not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the North Atlantic Treaty.” Agreement between the Parties to the North American Treaty regarding the Status of Their Forces (June 19, 1951) art. XV, https://www.nato.int/cps/en/natohq/official_texts_17265.htm.

⁵³³ Generally speaking, this section is concerned with the immunities one State owes Heads of State and other senior government officials from another State under international law and the immunities of such persons before international courts. Thus, with a few exceptions it does not address the particular immunities of such persons before an official’s own domestic courts under national law.

Immunity *ratione personae*, which attaches to the status of an incumbent official and operates as a procedural bar to the exercise of jurisdiction over them by the courts of another State,⁵³⁴ is often referred to as procedural or personal immunity. Immunity *ratione materiae*, which operates to shield the official conduct of Heads of State and other officials from the scrutiny of foreign national courts,⁵³⁵ is sometimes referred to as substantive or functional immunity. Customary international law has arguably evolved to the point where official status no longer immunizes individuals from criminal responsibility for certain international crimes, such as genocide, crimes against humanity and serious violations of international humanitarian law.⁵³⁶ However, incumbent high officials also enjoy the protections associated with immunity *ratione personae*, and it is well-settled that incumbent high officials cannot be tried by foreign national courts, even when they are suspected of having committed international crimes.⁵³⁷

Immunity-related decisions in Tier One countries are largely consistent with customary international law.⁵³⁸ For instance, in 2021, the German Federal Court of Justice relied on customary international law to conclude that the functional immunity of officials did not preclude prosecution of a former Afghan army lieutenant for war crimes.⁵³⁹ This case centered around a former Afghan official who mistreated Taliban fighters and disrespected the body of a Taliban commander.⁵⁴⁰ Although the defendant did not raise an immunity defense, the Court chose to address the issue and found, consistent with international law, that the official had no functional immunity for such crimes.⁵⁴¹ The recent amendments to German law confirm that foreign officials cannot rely on functional immunity when facing international crimes charges.⁵⁴²

⁵³⁴ See Antonio Cassese, *When May Senior Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 853, § 5 (2002), <http://www.ejil.org/pdfs/13/4/1564.pdf>.

⁵³⁵ See *id.*

⁵³⁶ See, e.g. Sir Arthur Watts, *The Legal Position in International Law of Heads of State, Heads of Governments and Foreign Ministers*, 247 RECUEIL DES COURS 35, 84 (1994); Paola Gaeta, *Official Capacity and Immunities*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 975, 982 (Cassese *et al.*, eds., 2002) [hereinafter Gaeta, *Official Capacity and Immunities*] (“[T]he contention can be made that a customary rule has evolved in the international community to the effect that all State officials, including those at the highest level, are not entitled to functional immunities in criminal proceedings—either of a national or international nature—if charged with such offences as war crimes and crimes against humanity.”). Significantly, *ex parte Pinochet*, the leading case in this area, which held that former Chilean President Augusto Pinochet was not immune from criminal process for charges relating to torture, supports the proposition that immunity *ratione materiae* for serious international crimes is incompatible with emerging or established principles of customary law. See *Regina v. Bow Street Stipendiary Magistrate & Others, ex parte Pinochet Ugarte* (No. 3), Judgment of 24 March 1999, [2000] 1 A.C. 147 (H.L. 1999), reprinted in 38 I.L.M. 581 (1999), <https://www.iclr.co.uk/wp-content/uploads/media/vote/1996-2014/ac2000-1-147.pdf>.

⁵³⁷ See *Concerning the Arrest Warrant of 11 April 2000* (D.R.C. v. Belg.), 2002 I.C.J. 121 ¶ 51 (Feb. 14).

⁵³⁸ *Immunity of State Officials from Foreign Criminal Jurisdiction*, INT'L L. COMM, https://legal.un.org/ilc/guide/4_2.shtml. In general, country statements agree with customary international law. See *id.* Statement of Germany (Nov. 2023); France (2024); Norway (2024) (on behalf of Sweden and Finland as well); the Netherlands (Jun. 30, 2023).

⁵³⁹ Fed. Ct. Just. (Ger.), 3rd Crim. Div., 3 StR 564/19 (Jan. 28, 2021), at ¶¶ 8-9, https://www.eurojust.europa.eu/sites/default/files/assets/21.01.28_de_federal_court_decision.pdf.

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.* at ¶¶ 23, 38. In addition, it opined that personal immunity “does not in principle extend to lower-ranking State officials.” *Id.* at ¶ 40.

⁵⁴² Hassfurter, *The Reform of the International Law Framework in Germany*, *supra* note 24.

Like in Germany, French courts have found that functional immunity does not apply to certain crimes. In the *Khaled Ben Said* case, an appellate court determined that a former Tunisian civil servant could not benefit from functional immunity for acts of torture.⁵⁴³ Significantly, the Supreme Court (Court of Cassation) opined generally on the status of such immunities in a subsequent decision related to a civil claim arising from a terrorist attack in Libya.⁵⁴⁴ There, the court noted that accountability for terrorism would take precedence over considerations of immunity.⁵⁴⁵

Dutch courts have come to a similar conclusion. In 2001, the Supreme Court of the Netherlands upheld a decision to allow proceedings to go forward against a Surinamese army commander for torture.⁵⁴⁶ While it did not examine the question of immunity, it upheld a lower court ruling that found that such crimes fall outside the legitimate duties of the defendant.⁵⁴⁷

Tier One countries have similarly relied on customary international law in addressing questions of personal immunity of high state officials. For instance, relying on customary international law, the German Court of Justice acknowledged the absolute immunity of Heads of State when considering a suit filed against the then head of the German Democratic Republic in 1984.⁵⁴⁸ There, it held that any criminal investigation was incompatible with personal immunity.⁵⁴⁹ Similarly, the French Court of Cassation ruled that the Zimbabwean President, who was arrested while visiting Paris for the Franco-African summit, held procedural immunity from prosecution for torture as he was still the sitting head of state at the time.⁵⁵⁰

⁵⁴³ *UJ Law and Practice in France*, *supra* note 91, at 39 (citing Cour d'Assises de la Meurthe et Moselle, 73/2010 (Sep. 24, 2010)). See also *Conviction of Khaled Ben Said: A Victory Against Impunity in Tunisia*, FIDH (Apr. 11, 2010), <https://www.fidh.org/en/issues/litigation/litigation-against-individuals/Ben-Said-Case/Conviction-of-Khaled-Ben-Said-A>.

⁵⁴⁴ Ct. of Cass. (Fr.), Civil Chamber, 09-14.743 (Mar. 9, 2011), at 1st plea, ¶ 3, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000023694014>. (“Assuming that the prohibition of acts of terrorism can be placed in the rank of a jus cogens standard of international law, which takes precedence over other rules of international law and may constitute a legitimate restriction on immunity from jurisdiction.”).

⁵⁴⁵ *Id.*

⁵⁴⁶ S. Ct. (Neth.), Judgment 749/01 CW 2323 (Sep. 18, 2001),

https://www.ndfr.nl/content/ECLI_NL_HR_2001_AB1471#uitspraak.

⁵⁴⁷ Ct. App. Amsterdam (Neth.), R 97/163/12 (Nov. 20, 2000), <https://ihl-databases.icrc.org/en/national-practice/bouterse-case-opinion-pr-dugard-amsterdam-court-appeal-20-november-2000>. The Federal Court of Justice cited this case in its own deliberations. Fed. Ct. Just. (Ger.), 3rd Crim. Div., 3 StR 564/19 (Jan. 28, 2021), at ¶ 28, https://www.eurojust.europa.eu/sites/default/files/assets/21.01.28._de_federal_court_decision.pdf.

⁵⁴⁸ Fed. Ct. Just. (Ger.), 2 Ars 252/84 (Dec. 14, 1984) (cited in Statement of Germany, Int'l L. Comm., *Practice Related to Immunity of State Officials from Foreign Criminal Jurisdiction* (2014), at 2-3,

https://legal.un.org/ilc/sessions/66/pdfs/english/iso_germany.pdf). Under the Germany Constitution, “[t]he general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.” GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (Basic Law of the Rep. of Germany) art. 25, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0133.

⁵⁴⁹ *Id.*

⁵⁵⁰ Ct. of Cass. (Fr.), Civ Chamber, 19-25.404 (Nov. 3, 2021),

https://www.courdecassation.fr/decision/618233ebbc6daf04fdc641d7?search_api_fulltext=Immunité+&sort=&items_per_page=&judilibre_chambre=civ1&judilibre_type=&judilibre_matiere=&judilibre_publication=&judilibre_solution=&op=&date_du=&date_au.. But see Gritten, *French Court Confirms Bashar al-Assad Arrest Warrant*, *supra* note 509.

Likewise, in a 2024 submission on behalf of the Nordic countries to the International Law Commission on the question of immunity, Norway cited approvingly the well-settled rule that incumbent high officials cannot be tried by foreign national courts, even when they are suspected of having committed international crimes.⁵⁵¹

The Netherlands has incorporated specific provisions related to procedural immunity into its legislation implementing the Rome Statute. Its ICA provides such immunity to foreign heads of state and government and ministers of foreign affairs.⁵⁵² Consistent with customary international law, it makes clear that this immunity is limited to the period when these officials hold office.⁵⁵³

F. Penal Sanctions for Atrocity Crimes

All Tier One countries save France grant courts guidance regarding penalties through the provision of sentencing ranges and set forth aggravating⁵⁵⁴ and mitigating⁵⁵⁵ factors for courts to consider. In the case of France, however, once the court determines if aggravating factors are present, the term is set. Having abolished life sentences and setting no minimums, Norway might represent the most lenient of Tier One countries. In contrast, the Netherlands is the only Tier One country where a life sentence means the duration of life. In Germany, Sweden, Finland, and France, parole is permitted after 12 to 18 years.⁵⁵⁶

For instance, in Germany, the penalty for crimes against humanity and war crimes will vary depending first on the crime involved, its severity, and the presence of specific factors with respect to the crime's execution.⁵⁵⁷ The VStGB sets specific penalties for some crimes and minimum sentences for others, noting at times the factors the court needs to consider when determining penalties.⁵⁵⁸ For instance, the crime against humanity of killing will result in imprisonment for life, but torturing receives a minimum sentence of five years (with no specified

⁵⁵¹ *Immunity of State Officials from Foreign Criminal Jurisdiction*, INT'L L. COMM., Statement of Norway (2014) (on behalf of Sweden and Finland as well), at IV, https://legal.un.org/ilc/guide/4_2.shtml.

⁵⁵² ICA, § 16. ("Criminal prosecution for one of the crimes referred to in this Act is excluded with respect to: (a) foreign heads of state, heads of government and ministers of foreign affairs, as long as they are in office, and other persons in so far as their immunity is recognised under customary international law; (b) persons who have immunity under any Convention applicable within the Kingdom of the Netherlands.").

⁵⁵³ *Id.*

⁵⁵⁴ *See, e.g.* STGB (Crim. Code) (Ger.) § 211; ACR (Swed.) § 11; RL (Pen. Code) (Finn.) Ch. 11, § 6; C. PÉN. (Pen. Code) (Fr.) art. 461-2; Strl. (Pen. Code) (Nor.) § 103, ¶4; ICA (Neth.) § 5(6).

⁵⁵⁵ STGB (Crim. Code) (Ger.) § 49(1).

⁵⁵⁶ *Id.* § 57a(1)(2); Swedish Prosecution Authority, Sanctions and sentences, <https://www.aklagare.se/en/from-crime-to-sentence/sanctions-and-sentences/>; RL (Pen. Code) (Finn.), Ch. 2c, § 10; C. PÉN. (Pen. Code) (Fr.) art. 729; Life sentences in Sweden and Finland often result in a sentence of fifteen years. Doris Schartmueller, *Life Imprisonment in Scandinavia: The Ultimate Punishment in the Penal Environments of Denmark, Finland, and Sweden* (Aug. 2015), at ii, 29, <https://www.epea.org/wp-content/uploads/LIFE-IMPRISONMENT-IN-SCANDINAVIA.pdf> [hereinafter Schartmueller, *Life Imprisonment in Scandinavia*].

⁵⁵⁷ *See, e.g.* VSTGB (Ger.) §§ 7(1), 8(1). The crime of genocide in Germany results in sentences ranging from five years to life imprisonment. *Id.* at §§ 2, 6(1).

⁵⁵⁸ *Id.* § 7(1), 8(1).

maximum), whereas persecution receives a minimum of three (again, with no maximum identified).⁵⁵⁹

In addition to the stated sentences, the VStGB also specifies distinct sentences when the crimes are “less serious”⁵⁶⁰ For instance, it envisions there is a less serious forms of extermination.⁵⁶¹ When such a case is identified, the sentence is five years or more, rather than life imprisonment.⁵⁶² Similarly, the VStGB indicates that there could be a less serious case of deprivation of liberty which would result in a sentence of at least one year.⁵⁶³

The VStGB identifies a specific factor that would render a crime more serious and give rise to a higher sentence for an accused convicted of crimes against humanity: death.⁵⁶⁴ If a usually non-lethal crime such as deprivation of liberty, results in death, the minimum sentence would rise from three years to five years.⁵⁶⁵ Death is likewise treated as an aggravating factor with respect to war crimes. Thus, if one conscripts a child under the age of 15, then the penalty would be a minimum of three years in jail.⁵⁶⁶ However, if death results, then the minimum penalty would be bumped up to five years.⁵⁶⁷

Given that general criminal law applies to the VStGB, the aggravating factors that the StGB sets for specific crimes such as murder also assist the court in determining if a crime is serious.⁵⁶⁸ For instance, aggravating factors for murder include killing out of lust, greed, or if done cruelly or to cover up another offense.⁵⁶⁹ Conversely, the StGB allows the court to substantially lower a when mitigating circumstances are present.⁵⁷⁰ For instance, if the offender has attempted to reconcile or compensate the victim, the sentence can be reduced.⁵⁷¹ In addition, the perpetrator can have a life sentence reduced to ten years if they provide information that prevents a serious crime.⁵⁷² However, if the offender’s information is about a crime in which he

⁵⁵⁹ *Id.* at 7(1) (noting that “in the cases referred to under numbers 8 to 10 [severe harm, deprivation of liberty, persecution, it will result in] imprisonment for not less than three years”).

⁵⁶⁰ *See, e.g.* VStGB (Ger.) §7(2) (“In less serious cases of paragraph 1 no. 2 [extermination], the sentence shall not be less than five years, in less serious cases of paragraph 1 no. 3 to 7 [forcible transfer, torture, rape, forced disappearance] imprisonment shall not be less than two years and in less serious cases of paragraph 1 no. 8 and 9 [severe harm and imprisonment] not less than one year.”). The general criminal code, the StGB, provides aggravating and mitigating that may help determine the level of “seriousness” of these crimes. In addition, the VStGB identifies its own aggravating factors. One such factor will be discussed below.

⁵⁶¹ *Id.*

⁵⁶² *Id.*

⁵⁶³ *Id.* § 7(2).

⁵⁶⁴ *Id.* § 7(3).

⁵⁶⁵ *Id.* § 7(1), (3), (5). Apartheid is not a separate crime under the VStGB. However, it is treated as an aggravating factor. When evidence of apartheid is accompanied by evidence of a recognized crime against humanity, it would lead to an increased sentence for the recognized crime. *Id.* § 7(5).

⁵⁶⁶ *Id.* § 8(1)(5).

⁵⁶⁷ *Id.* § 8(4).

⁵⁶⁸ *See, e.g.* StGB (Crim. Code) (Ger.) § 176c (aggravated sexual abuse of children), § 243 (aggravated theft).

⁵⁶⁹ VStGB (Ger.) § 2; StGB, § 211.

⁵⁷⁰ StGB (Crim. Code) (Ger.) § 49(1).

⁵⁷¹ *Id.* § 46.

⁵⁷² *Id.* § 46b(1),(2) (referencing crimes such as murder and treason noted in § 100a of the Ger. Code of Crim. Proc.).

played a role, then his contribution to the crime’s detection “must exceed the offender’s own contribution” to the crime before he can qualify for the sentence reduction.⁵⁷³

In addition, the criminal code allows for probation after the individual has served two-thirds of the sentence if public security is not an issue.⁵⁷⁴ A life sentence can be suspended after fifteen years if the court can ensure that (1) public security is not an issue, and (2) “the particular severity of the convicted person’s guilt does not require its continued enforcement.”⁵⁷⁵

Sweden differs from Germany in several respects. First, the ACR sets one range, albeit a large one, that applies to all crimes against humanity: “a fixed term of at least four and at most eighteen years or for life.”⁵⁷⁶ Eighteen years represents the longest fixed term available under Swedish law.⁵⁷⁷ After that, the sentence is life.⁵⁷⁸ Sweden recently imposed such a life sentence to the former Iranian official, Hamid Noury, for his role in the executions of political prisoners in the 1980s.⁵⁷⁹

With respect to the category of war crimes against persons, the sentence is capped at six years, even when it results in the death of a protected person.⁵⁸⁰ Yet, the ACR also establishes a new charge of “gross war crimes” for which the range is four years to 18 years or life, the same as the range identified for crimes against humanity.⁵⁸¹ When analyzing whether a particular act should be considered a gross war crime, Swedish courts must consider whether the crime was part of a plan or policy,⁵⁸² whether it was part of “extensive crimes;” or whether it caused death, severe pain or injury, severe suffering, or extensive property or environmental damage.⁵⁸³

⁵⁷³ *Id.* § 46(1).

⁵⁷⁴ *Id.* § 57. The prisoner must also agree to be released.

⁵⁷⁵ *Id.* § 57a(1)(2). Again, the prisoner must agree. In addition, aggregate sentencing requires an assessment of the severity of guilty. *Id.* § 57b.

⁵⁷⁶ ACR (Swed.) § 2.

⁵⁷⁷ *See, e.g.* BRB (Pen. Code) (Swed.) 13:3 (using same phrase as noted in ACR).

⁵⁷⁸ *Id.*

⁵⁷⁹ As the crimes occurred before the ACR was adopted, Noury faced murder charges. Mark Klamberg, *A Swedish Court Just Upheld the Conviction of a Former Iranian Official. It’s a Warning to all Perpetrators of Atrocity Crimes*, ATLANTIC COUNCIL (Dec. 20, 2023), <https://www.atlanticcouncil.org/blogs/new-atlanticist/a-swedish-court-just-upheld-the-conviction-of-a-former-iranian-official-its-a-warning-to-all-perpetrators-of-atrocity-crimes/>. Noury’s sentence was upheld on appeal. Malaika Grafe, *Sweden Supreme Court Upholds Life Sentence of Former Iran Official*, JURIST (Mar. 7, 2024), <https://www.jurist.org/news/2024/03/sweden-supreme-court-upholds-guilty-verdict-for-former-iran-official-convicted-of-human-rights-abuses/#:~:text=In%20a%20brief%20order%2C%20the,concern%20from%20the%20Iranian%20government.>

⁵⁸⁰ *Id.*

⁵⁸¹ ACR (Swed.) § 11. While the ACR creates a “gross war crimes”, there is no equivalent gross crimes against humanity, but given that crimes against humanity already had the severest range permissible under Swedish law, it most likely was deemed unnecessary.

⁵⁸² While the Rome Statute notes that the Court has jurisdiction over war crimes “in particular when committed as part of a plan or policy” it does not indicate that such a fact should be considered with respect to sentencing. Rome Statute, Art 8(1).

⁵⁸³ ACR (Swed.) § 11. In recent years, prosecutors have also been allowed to opine on the appropriate sentence.

Tapio Lappi-Seppälä, *Nordic Sentencing*, 45 CRIME & JUSTICE (2016) § 3, https://www.journals.uchicago.edu/doi/full/10.1086/686040#_i23 [hereinafter Lappi-Seppälä, *Nordic Sentencing*].

Like Germany, Sweden requires the court to consider if the accused provided any helpful information when sentencing.⁵⁸⁴ The BrB identifies the following additional mitigating factors: (1) whether the offense was occasioned by the manifestly insulting conduct of another person; (2) whether the accused, as a result of a serious mental disturbance, had a reduced capacity, and (3) whether there was a connection between the conduct of the accused and their lack of development, experience, or judgment; (4) whether sympathy motivated the offense or (5) whether it was taken in self-defense.⁵⁸⁵

Swedish criminal law also specifies aggravating factors such as: (1) whether the accused intended for the offence to have more serious consequence than it ultimately had; (2) whether the accused exhibited great ruthlessness; (3) whether the accused exploited another person's defenseless position or difficulty defending themselves; (4) whether he exploited their position or abused a special trust; (5) whether he induced another to be his accomplice; (6) whether the offense was conducted in an organized manner; (7) whether the motive involve racial animus; (8) whether the crime affected the relationship of a child with their family; (9) whether the victim was targeted because he held public office; (10) whether the motive was family honor.⁵⁸⁶ Likewise, the Court is instructed to consider other factors such as whether the accused is a repeat offender, whether he is in poor health, or would lose a job.⁵⁸⁷ Sweden also permits the commutation of a life sentence to the minimum of eighteen years based on consideration of factor such as the inmate's good behavior, participation in rehabilitative programs, risk of relapse, as well as the prosecutor's views⁵⁸⁸

For crimes against humanity and war crimes, Finland identifies minimum sentences without specifying a maximum.⁵⁸⁹ For instance, the Finnish Penal Code provides that both a crime of humanity and a war crime would result in a sentence of at least one year.⁵⁹⁰ However, the code also creates a new category of crime: "aggravated" crimes against humanity that apply when one of the following criteria are met:⁵⁹¹ (1) the act is directed against a large group; (2) it is especially brutal, cruel, or degrading; or (3) it is committed in an especially planned or systematic manner.⁵⁹² The Code likewise identifies new categories of aggravated war crimes and petty war crimes.⁵⁹³ War crimes are considered aggravated if one or more of the following conditions is met: (1) it is committed as part of a plan or policy; (2) it is directed against a large group of people; (3) it causes very serious and extensive damage; (4) it is particularly brutal, cruel, or humiliating; or (5) it is committed in a particularly premeditated or systematic manner.⁵⁹⁴ As previously noted, a person convicted of a non-aggravated crime against humanity will

⁵⁸⁴ BRB (Crim. Code) (Swed.) 29:5a, 29:7. Sweden also considers age. *Id.* 32:5.

⁵⁸⁵ *Id.* Ch. 29, § 3.

⁵⁸⁶ *Id.* § 2.

⁵⁸⁷ *Id.* § 5.

⁵⁸⁸ Åklagarmyndigheten [Pros. Auth.] (Swed.), *Sanctions and Sentences*, <https://www.aklagare.se/en/from-crime-to-sentence/sanctions-and-sentences/>; Schartmueller, *Life Imprisonment in Scandinavia*, *supra* note 556, at 230.

⁵⁸⁹ *See, e.g.* RL (Pen. Code) (Finn.), Ch. 11, §§ 3, 4. It does provide that the crime of aggression can be at least four months and at most four years. Genocide results in imprisonment of at least four years. *Id.* at Ch. 11, §§ 1, 4a.

⁵⁹⁰ While it criminalizes attempted crimes, it does not even specify a sentence for attempted crimes. *Id.*

⁵⁹¹ *Id.* §§ 4, 6, 7.

⁵⁹² *Id.* § 4.

⁵⁹³ A petty war crime is "considering the consequence caused or the other relevant circumstances, is petty when assessed as a whole." *Id.* §§ 6-7.

⁵⁹⁴ *Id.* § 6.

receive at least one year in prison; whereas an aggravated crime against humanity results in a minimum of eight years, in neither case is a maximum sentence identified.⁵⁹⁵ Similarly, an aggravating factor increases the minimum sentence for a war crime from one year to eight.⁵⁹⁶ No maximum is provided there as well.

The Code also sets forth mitigating factors, such as status as a minor, whether the act remained an attempt, or if the accused was less involved than others.⁵⁹⁷ In addition, the code allows for a decrease in sentence if the accused was operating under extenuating circumstances or sentence could “lead to an unreasonable or exceptionally detrimental outcome.”⁵⁹⁸ Finland allows those with life sentences to be paroled at twelve years.⁵⁹⁹

France generally sets higher penalties than other Tier One countries. Moreover, unlike other Tier One countries, the court appears to have little discretion with respect to some crimes, as the language of the French Penal Code indicates a set sentence. For instance, all crimes against humanity will result in life imprisonment.⁶⁰⁰ Punishments for war crimes can vary, but many are relatively severe. For instance, forcibly enlisting a minor under the age of 18 results will result in a 20-year sentence.⁶⁰¹ In contrast, the same crime in Germany can result in a prison sentence of three years.⁶⁰² In addition, France has created a new category for crimes against humanity that take place in the context of a war, a step that both removes them from the 30-year limit imposed on war crimes, and triggers life imprisonment as a sanction.⁶⁰³

France considers the following as aggravating factors for war crimes: “voluntary attacks on life, voluntary attacks on the physical or psychological integrity of the person as well as kidnapping and sequestration. . . committed against a person protected by the international law of armed conflict under the laws and customs of war and international humanitarian law.”⁶⁰⁴ When such factors are present, a thirty year prison term is raised to life imprisonment.⁶⁰⁵ Nevertheless,

⁵⁹⁵ *Id.* §§ 3, 4.

⁵⁹⁶ *Id.* §§ 5, 6. A life sentence was issued, however, in the genocide case against Francois Bazaramba in 2010. Int'l Crimes Database, *Summary: Prosecutor v. Francios Bazaramba*, <https://www.internationalcrimesdatabase.org/Case/973/Bazaramba/>.

⁵⁹⁷ The provision also identifies “special reasons” *Id.* Ch. 4, § 7; Ch. 6, § 8.

⁵⁹⁸ *Id.* Ch. 6, §§ 6-7.

⁵⁹⁹ *Id.* Ch. 2c, § 10. It has also introduced a form of plea bargaining to speed up its long criminal proceedings, but it is only applicable when the maximum authorized penalty is less than six years. Finland has been criticized by the European Court of Human Rights for overly long criminal proceedings. Tapio Lappi-Seppälä, *Nordic Sentencing*, *supra* note 583, § 2.

⁶⁰⁰ C. PÉN. (Pen. Code) (Fr.) art. 212-1.

⁶⁰¹ *Id.* at art. 461-7 (“The conscription or enlistment of eighteen-year-old minors in the armed forces or armed groups or engaging them actively in hostilities is punishable by twenty years of criminal imprisonment.”). This sentence, however, could be altered to the extent that aggravating or mitigating factors allow. *Id.*

⁶⁰² VSTGB (Ger.) § 8, ¶ 1(5). The German law only applies to those under the age of 15. Only if the crime results in death would the punishment be raised to “life imprisonment or a minimum of ten years. *Id.*

⁶⁰³ C. PÉN. (Pen. Code) (Fr.) art. 212-2 (“When committed in wartime in execution of a concerted plan against those fighting the ideological system in the name of which crimes against humanity are perpetrated, the acts referred to in article 212-1 are punishable by life imprisonment”). *See generally UJ Law and Practice in France*, *supra* note 91, at 6, 12.

⁶⁰⁴ C. PÉN. (Pen. Code) (Fr.) art. 461-2.

⁶⁰⁵ *Id.* art. 462-1.

a sentence could be cut in half with good behavior.⁶⁰⁶ Parole can also be granted after half the sentence is served.⁶⁰⁷ In the case of a life sentence, it could be reduced to 18 years.⁶⁰⁸

Norway sets the term for crimes against humanity at the maximum of 30 years, which surpasses its highest penalty for common crimes of twenty-one years.⁶⁰⁹ The Norwegian Penal Code provides no minimum sentences, however. It divided war crimes against persons into two categories. For the crimes of killing a protected person; inflicting suffering, or harm (particularly through torture); enslavement; sexual crimes; and hostage taking, the maximum sentence is also capped at 30 years.⁶¹⁰ Other war crimes against persons are capped at 15 years, unless they are aggravated, when the 30-year penalty cap would apply.⁶¹¹ The Code cites the following factors to consider when determining if a crime is aggravated: “the crime’s potential for harm and harmful effects and whether it was committed as part of a plan or objective or as part of large-scale commission of such crimes.”⁶¹² The Code also identifies mitigating factors such as (1) the aggrieved party had a role in causing the offense; (2) the offender had a mental disorder that caused an impaired perception; (3) the offence occurred a long time ago; (4) the offender has been severely affected by the crime or the sanction will impose a heavy burden due to old age; (5) prospects for rehabilitation are good; (6) the accused is a minor.⁶¹³ It also permits those who confess to receive a maximum penalty of ten years⁶¹⁴ and those who on their own accord reversed the harm they caused to receive a less severe penalty.⁶¹⁵ Probation is permitted after completing two-thirds of your sentence, but special circumstances may permit release halfway through.⁶¹⁶ Norway also has a form of preventative detention, if they believe someone who served their sentence is still a danger, the accused will not be released.⁶¹⁷

In the Netherlands, penalties are specifically prescribed in the code. The Dutch laws are unique among Tier One countries in that they also grant the court the option to issue a fine rather than impose a sentence. For instance, the penalty for war crimes such as destroying cultural property, looting a city or conscripting a child under the age of fifteen is a fifteen-year prison sentence or a fine.⁶¹⁸ In addition, judges are authorized to consider personal circumstances and

⁶⁰⁶ C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 721. (“Sufficient evidence of good conduct shall be assessed, taking into account, in particular, the absence of incidents in detention, compliance with the institution’s internal rules or service instructions.”) (translated by author). While those convicted of terrorism charges can only reduce their sentence by a quarter rather than half, no such provision applies to those convicted of atrocity crimes. *Id.* Apparently, this sentence reduction is automatic. Marcus Advocats, *Calculate Remission of Penalties in French Law*, <https://marcus-avocats.com/calculate-remission-of-penalties-in-french-law/>.

⁶⁰⁷ C. PR. PÉN. (Crim. Proc. Code) (Fr.) art. 729.

⁶⁰⁸ *Id.*

⁶⁰⁹ Norway abolished the death penalty in 1979. The same sanction applies to a conviction for genocide. In contrast, the penalty for a terrorist bombing is twenty-one years. Strl. (Pen. Code) (Nor.) §§ 101-102, 138. Parliamentarians for Global Action, *Norway and the Death Penalty*, <https://www.pgaction.org/ilhr/adp/nor.html> (last visited 6/18/24); Høgestol, *A Norwegian Perspective*, *supra* note 325, at 419.

⁶¹⁰ Strl. (Pen. Code) (Nor.) § 103, ¶¶ 1, 4.

⁶¹¹ *Id.*

⁶¹² *Id.* § 103, ¶ 4.

⁶¹³ Strl. (Pen. Code) (Nor.) § 78.

⁶¹⁴ Tapio Lappi-Seppälä, *Nordic Sentencing*, *supra* note 583, § 2.

⁶¹⁵ Strl. (Pen. Code) (Nor.) § 80(a)(1).

⁶¹⁶ Strpl. (Crim. Proc. Act) (Nor.) § 458; Act Relating to the Execution of Sentences, § 42.

⁶¹⁷ Schartmueller, *Life Imprisonment in Scandinavia*, *supra* note 556, at xii.

⁶¹⁸ ICA (Neth.) § 5(4-5).

other factors that can reduce or increase the sentence.⁶¹⁹ For instance, Section 5(6) of the ICA lists the following factors that could potentially double the minimum prison sentence for war crimes committed in the context of international armed conflicts⁶²⁰: whether the act (1) results in the death or serious bodily injury or involves rape; (2) amounts to communal violence; (3) results in the destruction or damage, to another's property; (4) involves forcing another person to do, not to do or to tolerate something; (5) involves plundering a city, even if it is captured in an attack; (6) constitutes a violation of a promise or agreement with another; or (7) involves the misuse of a flag or sign protected by law or of the military insignia or uniform of the opposing party.⁶²¹ Both crimes against humanity and aggravated war crimes can result in "life imprisonment or a term of imprisonment not exceeding thirty years or a fine of the sixth category,"⁶²² which presently amounts to 820,000 Euros.⁶²³ While the other Tier One countries permit the imposition of fines as a penalty for ordinary crimes, the Netherlands is unique in codifying the option to issue a fine for an atrocity crime

An attempted crime is punishable by one-third the perpetrator's sentence, except when the crime calls for a life sentence, then the attempt would result in a twenty-year term.⁶²⁴ In contrast to other Tier One countries, a life sentence will not ultimately get converted into a shorter sentence.⁶²⁵

Tier One countries have distinct ways to determine the sentence of the accomplice.⁶²⁶ In Germany, the accomplice will receive the same sentence, except the court has the discretion to mitigate it to reflect the role played by the accomplice.⁶²⁷ The French code also allows an accomplice to be sentenced as a perpetrator.⁶²⁸ In Sweden, "[e]ach accomplice is assessed according to the intent or the negligence attributable to them,"⁶²⁹ indicating that there is no requirement to refer to the perpetrator's sentence. In Finland, the code provides that the abettor is sentenced as the perpetrator, however he can receive a reduced sentence when his complicity is clearly less than that of others involved in the crime.⁶³⁰ In such a case, a life sentence will be

⁶¹⁹ For instance, assistance provided in the detection of crimes reduces the sentence. SR (Crim. Code) (Neth.) arts. 50; 44a.

⁶²⁰ The crimes in this section generally reflect war crimes identified in Article 8(2)(b) of the Rome Statute applicable to international armed conflict. *Compare* ICA arts. (4)-(5) with Rome Statute art. (2)(b).

⁶²¹ ICA (Neth.) § 5(6).

⁶²² ICA (Neth.) §§ 4(1), 5(1); A conviction for genocide would result in a sentence of up to thirty years "or a sixth category fine." *Id.* § 2(3).

⁶²³ Gov't of the Netherlands, *Fines and Damages*, <https://www.government.nl/topics/sentences-and-non-punitive-orders/fines-and-damages#:~:text=Category%206%3A%20€%20820%2C000>.

⁶²⁴ SR (Crim. Code) (Neth.) art. 45 (2)-(3).

⁶²⁵ Gov't of the Netherlands, *Custodial Sentences*, <https://www.government.nl/topics/sentences-and-non-punitive-orders/custodial-sentences>.

⁶²⁶ As noted previously, the Norwegian Penal Code does not distinguish between perpetrator and aider or abettor. Strl. (Pen. Code) (Nor.) § 15 (Contribution).

⁶²⁷ STGB (Crim. Code) (Ger.) § 27(2) (providing that the aider's penalty is "determined in accordance with the penalty threatened for the offender" except to the extent mitigations are permitted); Germany also outlaws the attempted incitement or declaration of willingness to induce or incite criminal activity. *Id.* at § 30.

⁶²⁸ C. PÉN. (Pen. Code) (Fr.) art. 121-6.

⁶²⁹ BRB (Crim. Code) (Swed.) 23:4.

⁶³⁰ RS (Crim. Code) (Finn.), Ch. 5, § 6, Ch. 6, § 8.

reduced to a maximum of twelve years.⁶³¹ In the Netherlands, accomplices receive one-third the sentence of the perpetrator.⁶³²

In sum, all Tier One countries identify factors to consider when assessing sentencing. Germany provides little guidance to distinguish between serious and non-serious forms of crimes. Finland recognizes aggravated war crimes and crimes against humanity as distinct crimes; Sweden treats gross war crimes distinctly as well. Germany, Sweden, and Finland identify minimum sentences. Sweden, Norway, and the Netherlands identify maximum penalties, whereas France sets specific sentences for each crime. The Netherlands that does not have a system of early release, thus ensuring that those who receive a life sentence will indeed serve one.

G. Interest in and Institutional Capacity for Prosecuting Crimes

These six Tier One countries are distinguished from other countries examined here in large measure due to their ability to prosecute atrocities crimes and their willingness to do so with respect to Ukraine. All have robust judicial systems and have previously prosecuted universal jurisdiction cases. Each country save Finland has a dedicated team for war crimes. Yet, Germany's commitment to pursuing atrocities has been unparalleled in recent years.

In 2017, Germany adopted a national policy aimed at managing conflicts and preventing atrocities across the globe,⁶³³ a key element of which is improving accountability.⁶³⁴ Its war crimes unit consists of fifteen to eighteen prosecutors assigned solely to war crimes.⁶³⁵ Those focused on counter-terrorism often prosecute war crimes as well when the case raises both terrorism and war crimes charges.⁶³⁶ Its staff has pursued over 100 investigations into international crimes in recent years.⁶³⁷ Importantly, its authorities have coordinated closely with Eurojust's Genocide Network in building its war crimes cases.⁶³⁸ Such collaboration supported Germany's efforts to bring Syrian war criminals to justice.⁶³⁹

⁶³¹ *Id.* Ch. 6, § 8(3).

⁶³² SR (Crim. Code) (Neth.) art. 49(1), 45(2).

⁶³³ Hering, *Germany Finally Needs a Strategy*, *supra* note 12.

⁶³⁴ *Id.* Recently, Germany hosted a conference on holding war criminals accountable, indicating the extent to which Germany is taking the lead on these kinds of investigations. Gorf Statement, Ge. War Crimes Conf., *supra* note 396.

⁶³⁵ Otte Interview, *supra* note 11.

⁶³⁶ *Id.*

⁶³⁷ Statement by the Federal Republic of Germany, *The Scope and Application of the Principle of Universal Jurisdiction*, United Nations, 6th Comm., Agenda item 85 (Oct. 12, 2022), https://www.un.org/en/ga/sixth/77/pdfs/statements/universal_jurisdiction/12mtg_germany.pdf.

⁶³⁸ *Supporting Judicial Authorities in the Fight Against Core International Crimes*, EUROJUST GENOCIDE NETWORK (2020), at 5, 7,

https://www.eurojust.europa.eu/sites/default/files/assets/2020_05_core_international_crimes_factsheet_en.pdf. [hereinafter *Supporting Judicial Authorities*, EUROJUST]. Notably, Ukraine's chief prosecutor has indicated his desire to promote prosecutions in other jurisdictions. *Russia Must Be Defeated in Court Too, Says Ukraine Chief Prosecutor*, AFP (Mar. 7, 2024), <https://www.msn.com/en-za/news/world/russia-must-be-defeated-in-court-too-says-ukraine-chief-prosecutor/ar-BB1jrbBv>.

⁶³⁹ *Supporting Judicial Authorities*, EUROJUST, *supra* note 638.

With respect to Ukraine,⁶⁴⁰ that policy has been implemented through a structural investigation, which allows them to initiate an investigation into criminal conduct even before potential perpetrators have been identified.⁶⁴¹ Its goal is not merely to assist Ukraine, but to identify suspects for domestic prosecutions when possible.⁶⁴² In addition, German authorities have opened a specific case involving a German individual who was shot by Russian forces in Hostomel, a city north-west of Kiev.⁶⁴³

Sweden rivals Germany, a country with eight times its population, with a war crimes unit consisting of eighteen police officers who work closely with ten prosecutors from the International Public Prosecution Authority in Stockholm.⁶⁴⁴ Sweden launched a structural investigation into “grave war crimes” committed in Ukraine in March 2022.⁶⁴⁵ One of the stated goal of this investigation includes providing support to Swedish courts.⁶⁴⁶ Thus, although Sweden has advocated for the creation of the international center focused on the crime of aggression at Eurojust and provided assistance to international accountability efforts,⁶⁴⁷ it also appears open to domestic prosecution.⁶⁴⁸ Like Germany, it has collaborated with Eurojust’s Genocide Network to enhance its effectiveness in investigating and prosecuting atrocity cases.⁶⁴⁹ Moreover, as noted earlier, a recent ruling by the national’s Supreme Court implies that the newly codified requirement that no universal jurisdiction case move forward without evidence of a State interest will not be a bar to an atrocity prosecution.⁶⁵⁰

Finland does not have a dedicated war crimes unit or prosecutorial team,⁶⁵¹ and its efforts to investigate war crimes appeared originally oriented towards assisting the ICC or other nations

⁶⁴⁰ Germany is also quite vested in the Ukrainian war, providing \$7.7 billion in security aide alone. Fed. Gov’t of Germany, Press & Info. Office, *The Arms and Military Equipment Germany is Sending to Ukraine* (Feb. 26, 2024), <https://www.bundesregierung.de/breg-en/news/military-support-ukraine-2054992>.

⁶⁴¹ *Germany Has Evidence of War Crimes in Ukraine ‘in three-digit range,’ prosecutor says*, REUTERS (February 4, 2023), <https://www.reuters.com/world/europe/germany-has-evidence-war-crimes-ukraine-in-three-digit-range-prosecutor-2023-02-04/>. See generally *Structural Investigation*, ECCHR, *supra* note 13.

⁶⁴² Press Release, Pres. of Ukraine, *Agreement on Security Cooperation*, *supra* note 14; *Germany Identifies Russians Suspected of War Crimes in Hostomel, Kyiv Oblast*, EUR. PRAVDA (Dec. 27, 2023), <https://www.eurointegration.com.ua/eng/news/2023/12/27/7176288/> (Germany Justice Minister noted that “If we catch the perpetrators, we will press charges.”).

⁶⁴³ *Germany Probing Possible War Crime in Ukraine*, BARRON’S (Sept. 27, 2023),

<https://www.barrons.com/news/germany-probing-possible-war-crime-in-ukraine-511420ac>.

⁶⁴⁴ Gov’t of Sweden, *War Crime - Swedish Police Efforts*, <https://polisen.se/en/victims-of-crime/war-crime---swedish-police-efforts/#:~:text=In%20Sweden%2C%20the%20War%20Crimes,against%20humanity%20and%20war%20crimes.>

⁶⁴⁵ *Sweden Launches Investigation into Ukraine War Crimes*, THE LOCAL (Apr. 5, 2022),

<https://polisen.se/en/victims-of-crime/war-crime---swedish-police-efforts/>. See also Press Release, Gov’t of Sweden, *How Sweden is Working to Hold Russia Accountable for Crimes in Ukraine* (Mar. 30, 2023),

[https://www.government.se/government-policy/swedens-support-to-ukraine/how-sweden-is-working-to-hold-russia-accountable-for-crimes-in-ukraine/#:~:text=Sweden%20has%20universal%20jurisdiction%20for,suspect%20is%20a%20foreign%20citizen%20\[hereinafter%20Gov%27t%20of%20Sweden,How%20Sweden%20is%20Working\]](https://www.government.se/government-policy/swedens-support-to-ukraine/how-sweden-is-working-to-hold-russia-accountable-for-crimes-in-ukraine/#:~:text=Sweden%20has%20universal%20jurisdiction%20for,suspect%20is%20a%20foreign%20citizen%20[hereinafter%20Gov%27t%20of%20Sweden,How%20Sweden%20is%20Working]).

⁶⁴⁶ Gov’t of Sweden, *How Sweden is Working*, *supra* note 645.

⁶⁴⁷ *Id.*

⁶⁴⁸ *Id.* (The evidence can then be used in legal proceedings in Sweden, in courts of other States or in the ICC.).

⁶⁴⁹ *Supporting Judicial Authorities*, *supra* note 638, at 3.

⁶⁵⁰ Klamberg Interview, *supra* note 39; Klamberg 2/15/24 Written Response, *supra* note 41..

⁶⁵¹ The Finnish National Bureau of Investigation’s Homicide/Serious Crimes Unit investigates atrocity crimes. Karolina Aksamitowska, *War Crimes Units: Legislative, Organisational and Technical Lessons*, ASSER INSTITUTE

in pursuing prosecutions.⁶⁵² However, recent events suggest a new orientation. Authorities have arrested Russian nationalist, Yan Petrovsky (also known as Voislav Torden), a member of the Rusich saboteur group that was involved in fighting against Ukraine.⁶⁵³ Petrovsky had been living there under an assumed name when he was taken into police custody.⁶⁵⁴ Notably, prosecutors recently requested his formal arrest for alleged war crimes committed in Ukraine.⁶⁵⁵ Although Ukraine requested his extradition, the Finnish Supreme Court ruled against the request due to prison conditions in Ukraine.⁶⁵⁶ Despite the investigation of Petrovsky, the lack of structural investigation or dedicated war crimes team may limit its ability to leverage this work into a broader inquiry into irregular forces such as the Wagner Group.

France has a specialized prosecution unit with a dedicated budget and experienced personnel to conduct investigations related to crimes against humanity and war crimes.⁶⁵⁷ It also has opened multiple investigations into the atrocity crimes committed in Ukraine.⁶⁵⁸ Moreover, France has not only been vocal in its support for Ukraine,⁶⁵⁹ but is actively attempting to counter Russian influence in Africa.⁶⁶⁰ In this struggle, French authorities have zeroed in on the role of the Wagner Group.⁶⁶¹ Nevertheless, in the Ukraine-related cases France has pursued thus far, the victims have been French nationals.⁶⁶²

(Sept. 2021), <https://www.asser.nl/media/795205/karolina-aksamitowska-war-crimes-units-legislative-organisational-and-technical-lessons-eng.pdf>.

⁶⁵² *Finland's NBI interviewing witnesses, victims of suspected war crimes in Ukraine*, YLE (July 18, 2023), <https://yle.fi/a/74-20041466>.

⁶⁵³ *Finland seeks jailing probe of Russian man*, AP NEWS, *supra* note 16.

⁶⁵⁴ *Id.*

⁶⁵⁵ *Finland starts preliminary war crimes investigation targeting Russian suspect: Torden is suspected of committing war crimes in Ukraine*, YL (Dec. 15, 2023), <https://yle.fi/a/74-20065354>.

⁶⁵⁶ *Id.*

⁶⁵⁷ Sénat (Fr.), *Projet de loi de finances pour 2022 [Finance Bill for 2022]*, https://www.senat.fr/rap/121-163-329-1/121-163-329-1_mono.html.

⁶⁵⁸ *Ukraine: Le parquet antiterroriste français ouvre trois nouvelles enquêtes pour "crimes de guerre"* REUTERS (April 5, 2022), <https://www.reuters.com/article/ukraine-crise-france-justice-idFRKCN2LX13W/>. *Mort du journaliste Arman Soldin en Ukraine: le parquet national antiterroriste ouvre une enquête en France pour crimes de guerre*, FRANCE TV INFO (May 10 2023), https://www.francetvinfo.fr/monde/europe/manifestations-en-ukraine/mort-du-journaliste-arman-soldin-en-ukraine-le-parquet-national-antiterroriste-ouvre-une-enquete-en-france-pour-crimes-de-guerre_5817581.html [hereinafter *Mort du journaliste Arman Soldin en Ukraine*, FRANCE TV INFO,]. *Guerre en Ukraine, le point sur la situation ce mercredi 16 mars*, LES ECHOS, (Mar. 16th, 2022), <https://www.lesechos.fr/monde/enjeux-internationaux/en-direct-guerre-en-ukraine-le-point-sur-la-situation-ce-mercredi-16-mars-1393847>.

⁶⁵⁹ *See, e.g. French Defence Chief Pledges Fresh Support for Ukraine in Visit to Kyiv*, EURONEWS (Dec. 29, 2022), <https://www.euronews.com/2022/12/29/french-defence-chief-pledges-fresh-support-for-ukraine-in-visit-to-kyiv>.

⁶⁶⁰ *Global Conflict Tracker: Violent Extremism in the Sahel*, COUNCIL ON FOR. RELATIONS (updated Feb. 14, 2024), <https://www.cfr.org/global-conflict-tracker/conflict/violent-extremism-sahel>; Mathieu Droin & Tina Dolbaia, *Russia is Still Progressing in Africa. What's the Limit?*, CTR. FOR STRATEGIC AND INT'L STUD. (CSIS) (Aug. 15, 2023), <https://www.csis.org/analysis/russia-still-progressing-africa-whats-limit>.

⁶⁶¹ *See, e.g., Justin Ling, Russian Mercenaries are Pushing France Out of Central Africa*, FOR. POL'Y (Mar. 18, 2023), <https://foreignpolicy.com/2023/03/18/russian-mercenaries-are-pushing-france-out-of-central-africa/>.

⁶⁶² On March 16, 2022, the French National Anti-Terrorism Prosecution ("PNAT") launched an investigation for "war crimes" following the death of Franco-Irish journalist, Pierre Zakrzweski, near Kyiv. On May 10, 2023, the PNAT began another investigation for "war crimes" after French journalist, Arman Soldin, who was killed in a Russian rocket attack near Bakhmut. *France Launches War Crime Investigation After Reporter Arman Soldin Killed in Ukraine*, CBS NEWS (May 10, 2023), <https://www.cbsnews.com/news/arman-soldin-reporter-killed-ukraine->

Norway created a special prosecutorial unit for serious crimes within the police's National Criminal Investigation Service ("NCIS") nineteen years ago.⁶⁶³ Nevertheless, its overall record on prosecuting atrocity crimes is rather limited.⁶⁶⁴ Partly, this reflects the fact that core international crimes were only criminalized in 2008 and the Supreme Court found that they could not be applied retroactively.⁶⁶⁵ It also is due to the limited resources dedicated to war crimes prosecutions. At present, only two police prosecutors are specifically assigned to war crimes.⁶⁶⁶ While there are others in the National Prosecutorial Authority and the General Prosecutor's office that may address war crimes as part of their portfolio, the structure of the system requires the investigation to be initially undertaken under the auspices of these two police prosecutors.⁶⁶⁷ While press reports indicate that ex-Wagner commander Andrey Medvedev⁶⁶⁸ has provided "digital" evidence to the police⁶⁶⁹ and that he witnessed the murder of prisoners of war by Russian military,⁶⁷⁰ it is unclear to what extent the information has enabled the police to build a case against him or any perpetrator located there.

The Netherlands has a lengthy history of investigating and prosecuting war crimes. The country's specialized prosecution unit, the Dutch Police's International Crimes Team, works in conjunction with the National Public Prosecutors' Office to prosecute genocide, war crimes, torture, and crimes against humanity.⁶⁷¹ Its staff includes historians, anthropologists, weapons, and financial experts as well as lawyers and police officers.⁶⁷² Moreover, the Netherlands has demonstrated the capacity to undertake an expansive investigation into unknown perpetrators with the downing of Malaysia Airlines Flight 17 (MH17) over Eastern Ukraine in 2014.⁶⁷³

france-war-crime-investigation/. See also *France Open Inquiries Over Possible War Crimes in Ukraine*, REUTERS (Apr. 5, 2022), <https://www.reuters.com/world/france-opens-inquiries-over-possible-war-crimes-ukraine-2022-04-05/> (noting that inquiries involved acts against French citizens).

⁶⁶² See, e.g. *Mort du journaliste Arman Soldin en Ukraine*, FRANCE TV INFO, *supra* note 658.

⁶⁶³ The ICC has asked for Norwegian assistance with the Ukraine investigation. Høgestol, *A Norwegian Perspective*, *supra* note 325, at 430. Press Release, Norwegian Gov't, The Norwegian Government is Tasking the National Criminal Investigation Service with Assisting in the Investigation of Possible War Crimes in Ukraine by the International Criminal Court, (Apr. 7, 2022), <https://www.regjeringen.no/en/aktuelt/the-norwegian-government-is-tasking-the-national-criminal-investigation-service-with-assisting-in-the-investigation-of-possible-war-crimes-in-ukraine-by-the-international-criminal-court/id2907846/>; see generally *Universal Jurisdiction in Europe: The State of the Art*, HUM. RTS. WATCH (June 27, 2006), <https://www.hrw.org/report/2006/06/27/universal-jurisdiction-europe/state-art>.

⁶⁶⁴ Høgestol, *A Norwegian Perspective*, *supra* note 325, at 420-21.

⁶⁶⁵ *Id.* at 421.

⁶⁶⁶ Berger Interview, *supra* note 17.

⁶⁶⁷ *Id.*

⁶⁶⁸ Gwladys Fouche & Nerijus Adomaitis, *Ex-Wagner Commander Arrested for Attempting Return to Russia*, REUTERS (Sept. 23, 2023), <https://www.reuters.com/world/europe/ex-wagner-commander-arrested-norway-attempting-return-russia-2023-09-23/>.

⁶⁶⁹ Terje Solsvik & Gwladys Fouche, *Norway Police to Continue Interrogation of Former Wagner Commander*, REUTERS (Feb. 3, 2023), <https://www.reuters.com/world/europe/norway-police-continue-interrogation-former-wagner-commander-2023-02-03/>.

⁶⁷⁰ *Id.*

⁶⁷¹ Public Prosecution Services (Neth.), *International Crimes Teams*, <https://www.prosecutionservice.nl/topics/international-crimes/what-does-the-international-crimes-team-do>.

⁶⁷² *Long Arm of Justice, Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*, HUM. RTS. WATCH (Sept. 16, 2024), at 24, <https://www.hrw.org/report/2014/09/17/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and>.

⁶⁷³ *Transcript of the MH17 Judgment Hearing* (Nov. 17, 2022), <https://www.courtmh17.com/en/insights/news/2022/transcript-of-the-mh17-judgment-hearing/>.

However, such a generalized investigation is only possible when Dutch victims are part of the case.⁶⁷⁴ In addition to its own investigation, the Netherlands has sent four forensic missions to Ukraine under ICC auspices and separately trained Ukrainian prosecutors and judges.⁶⁷⁵ It also just announced that it would be co-hosting an international conference with the EC and Ukraine on “Restoring Justice for Ukraine.”⁶⁷⁶ The goals of the conference include supporting Ukrainian and international efforts at achieving justice. While no mention is made of pursuing domestic prosecutions for atrocities committed in Ukraine, the recent arrival of former Wagner Group defector Igor Salikov might provide the Dutch with sufficient evidence to pursue domestic prosecutions.⁶⁷⁷

In sum, the Tier One countries all have the resources to pursue an investigation focused on irregular troops such as the Wagner Group. Germany and Sweden have generally demonstrated the greatest institutional capacity to bring atrocity perpetrators to justice. Germany, Sweden, and Norway all have structural investigations underway with respect to Ukraine. The Netherlands can only undertake such an investigation if a Dutch national is identified as a victim. Although France has a particular interest in the Wagner Group, its prosecutions to date have likewise been focused on crimes committed against nationals.

II. Other Countries

This memo has reviewed a variety of factors with respect to Tier One countries to determine their suitability for possible prosecution of irregular armed such as the Wagner Group. Germany, Sweden, Finland, France, Norway, and the Netherlands present the most compelling venues. As mentioned in the introduction, Switzerland, Canada, Spain, and Belgium, which we characterize as Tier Two countries, present possible options for prosecution as well. All recognize universal jurisdiction for atrocity crimes.⁶⁷⁸ However, each of these countries presents significant challenges. For instance, while Switzerland established a war crimes unit in 2012,⁶⁷⁹

⁶⁷⁴ ICA (Neth.), art. 2(1)(b); Mike Corder and Raf Casert, *Three convicted in 2014 downing of Malaysian jet over Ukraine*, AP NEWS (Nov. 18, 2022), https://apnews.com/article/russia-ukraine-business-kuala-lumpur-malaysia-netherlands-099084a82b49b77b116878e24fc63a18?utm_source=copy&utm_medium=share.

⁶⁷⁵ Press Release, Gov’t of the Netherlands, *Two Years of War in Ukraine: A Look Back on the Netherlands’ Aid Efforts* (Feb. 23, 2024), <https://www.government.nl/topics/russia-and-ukraine/news/2024/02/23/two-years-of-war-in-ukraine-the-netherlands-aid-efforts>.

⁶⁷⁶ Press Release, Gov’t of the Netherlands, *The Netherlands to Co-host International Conference ‘Restoring Justice for Ukraine’* (Feb. 19, 2024), <https://www.government.nl/latest/news/2024/02/19/the-netherlands-to-co-host-international-conference-restoring-justice-for-ukraine>.

⁶⁷⁷ *Former Russian Intelligence Colonel Comes to Netherlands to Testify in ICC*, EUR. PRAVDA (Dec. 18, 2023), <https://www.pravda.com.ua/eng/news/2023/12/18/7433602/>.

⁶⁷⁸ *Code pénal suisse* [Crim. Code] (Swiss) §§ 6(1), 7(1), https://www.fedlex.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/54/757_781_799/20220101/en/pdf-a/fedlex-data-admin-ch-eli-cc-54-757_781_799-20220101-en-pdf-a.pdf; Crimes Against Humanity and War Crimes Act [CAHWCA] (Can.), § 6, https://laws-lois.justice.gc.ca/eng/acts/c-45.9/https://fedlex.data.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/54/757_781_799/20230123/en/pdf-a/fedlex-data-admin-ch-eli-cc-54-757_781_799-20230123-en-pdf-a-1.pdf; Código Penal [Crim. Code] (Spain), art. 607-10, https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf; CODE PÉNAL/STRAFWETBOEK [Crim. Code] (Belg.), Title Ibis, art. 417bis, https://legislationline.org/sites/default/files/documents/6e/BELG_CC_fr.pdf.

⁶⁷⁹ Julia Crawford, *Why Switzerland’s War Crimes Office is Dragging its Feet*, SWISSINFO.CH (Jan. 31, 2019), https://www.swissinfo.ch/eng/politics/justice-delayed_why-switzerland-s-war-crimes-office-is-dragging-its-feet/44717782.

it consists of only two prosecutors, and in its first seven years, the unit had not yet prosecuted one case.⁶⁸⁰ Although the Attorney General's office reported thirteen ongoing international criminal law investigations as of 2019,⁶⁸¹ and more recently some cases have moved forward against officials from Algeria, Belarus, and Guatemala,⁶⁸² judicial officials in Switzerland have been criticized for "slow progress despite having solid legislation to address serious crimes."⁶⁸³ The criticism "has revolved around a lack of capacity and political will, undue delays, and allegations of political interference."⁶⁸⁴ Results in court have also been mixed. While a Swiss court sentenced a Gambian ex-minister to 20 years in jail for crimes against humanity in May, a former member of Belarus President Lukashenko's hit squad was acquitted for enforced disappearances, despite the defendant's public and repeated confessions.⁶⁸⁵

After the invasion of Ukraine, the Swiss Attorney General established a new task force to investigate war crimes committed in Ukraine, but indicated that his focus was to help the ICC.⁶⁸⁶ More recently, the Swiss indicated a willingness to consider domestic prosecutions.⁶⁸⁷ Prosecutors have also employed passive personality jurisdiction to investigate the attack on a Swiss journalist in March 2022 by an unknown Russian commando.⁶⁸⁸ Nevertheless, the practical and political will concerns regarding the history of Swiss efforts to prosecute atrocity crimes domestically makes them less well-suited to pursue the kind of complex investigation that such crimes require.

Canada likewise has a war crimes program that includes the police, border services, immigration officials and the Department of Justice.⁶⁸⁹ Moreover, like Germany and Sweden, Canada has launched a structural investigation into atrocity crimes arising out of the Ukrainian war.⁶⁹⁰ While authorities have indicated that one of the goals of the investigation is to see perpetrators brought to justice,⁶⁹¹ Canada has a long history of using immigration sanctions like

⁶⁸⁰ *Id.*

⁶⁸¹ *Q&A: Swiss Trial for Liberia Atrocities: Universal Jurisdiction Paves Path for Justice*, HUM. RTS. WATCH (Feb. 12, 2021), https://www.hrw.org/news/2021/02/12/qa-swiss-trial-liberia-atrocities-universal-jurisdiction-paves-path-justice#_How_many_cases_1.

⁶⁸² Reed Brody, *The 'Pinochet Precedent' at 25: Supporting Justice for Victims with 'Universal Jurisdiction'* JUST SECURITY (Oct. 16, 2023), <https://www.justsecurity.org/89474/the-pinochet-precedent-at-25-supporting-justice-for-victims-with-universal-jurisdiction/>.

⁶⁸³ *Id.*

⁶⁸⁴ *Id.*

⁶⁸⁵ Wedaeli Chibuleshi, *Swiss Court Jails Gambia Ex-Minister for 20 Years*, BBC (May 15, 2024), <https://www.bbc.com/news/articles/cjijl54n0z1o>; *Universal Jurisdiction Annual Review 2024*, TRIAL INT'L (Apr. 15, 2024), at 101, https://trialinternational.org/wp-content/uploads/2024/04/UJAR-2024_digital.pdf.

⁶⁸⁶ *Swiss Prosecutor Taskforce Sets Sights on Russian War Crimes*, SWISSINFO.CH (Mar. 22, 2022), <https://www.swissinfo.ch/eng/foreign-affairs/swiss-prosecutor-taskforce-sets-sights-on-russian-war-crimes/47454138>.

⁶⁸⁷ *Switzerland is Ready to Help Prosecute War Crimes in Ukraine*, SWISSINFO.CH (Jul. 21, 2023), <https://www.swissinfo.ch/eng/business/switzerland-is-ready-to-help-prosecute-war-crimes-in-ukraine/48678294..>

⁶⁸⁸ *Universal Jurisdiction Annual Review 2024*, TRIAL INT'L, *supra* note 685, at 107.

⁶⁸⁹ Press Release, Royal Can. Mounted Pol., *A Statement By the Partners of Canada's War Crimes Program on the Conflict in Ukraine* (Apr. 7, 2022), <https://www.rcmp-grc.gc.ca/en/news/2022/a-statement-the-partners-canadas-war-crimes-program-the-conflict-ukraine>.

⁶⁹⁰ *Id.*

⁶⁹¹ *Id.*

deportation against those suspected of committing atrocity crimes⁶⁹² rather than trying them at home.⁶⁹³ Thus, Canada too seems an unlikely venue for domestic prosecutions of irregular armed such as the Wagner Group.

Spain had previously developed a reputation for aggressively utilizing universal jurisdiction in pursuit of atrocity suspects.⁶⁹⁴ However, its attempted use against a number of high state officials from powerful states resulted in backlash against the law,⁶⁹⁵ leading the Spanish legislature to curtail the ability of the judicial branch to pursue such cases.⁶⁹⁶ While it expanded the lists of crimes to include torture and enforced disappearances, it also restricted universal jurisdiction in cases of war crimes, crimes against humanity and genocide to crimes to cases in which “the proceeding is directed against a Spanish national or against a foreign citizen who habitually resides in Spain, or against a foreigner who is in Spain and whose extradition has been denied by the Spanish authorities.”⁶⁹⁷ Under the reformed law, Spain also adheres to the principle of subsidiarity, meaning that it refrains from prosecuting cases that have already been initiated in international courts or in the country where the acts occurred.⁶⁹⁸ Thus, while Spain once had one of the strongest universal jurisdiction laws, the new changes have significantly curtailed its use. Although there was some hope that the amendments would be found unconstitutional, such challenges failed,⁶⁹⁹ and in 2019 the vast majority of cases pursuing international crimes were closed,⁷⁰⁰ leaving open only a few cases of terrorism.⁷⁰¹ One possible exception might be the recent

⁶⁹² *Rwanda War-Crimes Suspect Deported After Almost Two Decades in Canada*, GLOBAL NEWS (Jan. 23, 2012), <https://globalnews.ca/news/202915/rwanda-war-crimes-suspect-deported-after-almost-two-decades-in-canada-4/-:~:text=MONTREAL%20E%20%80%93%20A%20man%20accused%20of%20crimes%20related,on%20a%20plane%20bound%20for%20Kigali%2C%20Rwanda%20E%20%80%99s%20capital.>

⁶⁹³ Kiran Banerjee and Jamie Levin, *Canada’s War Crimes Investigation May Not Deter Russia, but it Matters to Ukrainians*, DAL NEWS (Sep. 22, 2023), <https://www.dal.ca/news/2023/09/22/ukraine-war-crimes-canada.html> (noting lack of likelihood of any domestic prosecutions).

⁶⁹⁴ See, e.g. *Insights, The Pinochet Arrest and Possible Extradition to Spain*, ASIL (Oct. 31, 1998), <https://www.asil.org/insights/volume/3/issue/12/pinochet-arrest-and-possible-extradition-spain#:~:text=It%20is%20anticipated%20that%20a%20request%20to%20extradite,does%20not%20conflict%20with%20the%20U.K.%27s%20international%20obligations.> (discussing arrest warrant issued by Spanish judge for Chilean Gen. Augusto Pinochet).

⁶⁹⁵ Ashifa Kassam, *Spain Regressing on Human Rights, Says Judge Who Pursued Pinochet*, THE GUARDIAN (Feb. 14, 2014), <https://www.theguardian.com/world/2014/feb/14/spain-human-rights-judge-baltasar-garzon>.

⁶⁹⁶ *The Reform of the Principle of Universal Jurisdiction in Spain: An Update*, THE GUERNICA GROUP (Nov. 13, 2018), <https://www.guernicagroup.org/post/the-reform-of-the-principle-of-universal-jurisdiction-in-spain-an-update> (discussing legislative amendments in 2009 and 2014).

⁶⁹⁷ 1/2014, B.O.E. (Organic Law 1/2014 Modifying the Organic Law 6/1985 of the Judicial Power, on Universal jurisdiction), IHL Databases (Mar. 13, 2014), at art. 1(4)(a) <https://ihl-databases.icrc.org/en/national-practice/organic-law-12014-modifying-organic-law-61985-judicial-power-universal> (translated by author). For the crimes of torture or enforced disappearance, the conditions are as follows: (i) a Spanish defendant or (ii) a victim who was a Spanish national at the time the events occurred and a defendant who is in Spain, *Id.* at art. 1(4)(b).

⁶⁹⁸ *Id.* Explanatory Memo (“The jurisdiction of the Spanish courts is also delimited in a negative manner, clearly defining the principle of subsidiarity. In this sense, Spanish courts are excluded when a proceeding has already been initiated in an international court or by the jurisdiction of the country in which the crimes were committed or of the nationality of the person to whom they were committed.”) (translated by author).

⁶⁹⁹ José Elías Esteve Moltó, *Requiem for Universal Jurisdiction in Spain*, QUEBEC J. INT’L L (Nov. 1, 2020), at 55, 66, <https://www.erudit.org/en/journals/rqdi/2020-v33-n1-rqdi06237/1079905ar.pdf>.

⁷⁰⁰ *Id.*

⁷⁰¹ *Id.* at 68.

murder by Russian agents of a defector who resided in Alicante, Spain.⁷⁰² However, news reports have not linked the army pilot to any irregular forces, so it is unlikely that an investigation, even if commenced, would reach such groups.⁷⁰³

Universal jurisdiction in Belgium resembles Spain in several respects. Like Spain, Belgium had one of the strongest universal jurisdiction laws in Europe.⁷⁰⁴ However, after similar attempts to use it to investigate high state officials from powerful states, the law faced serious backlash,⁷⁰⁵ including a threat by the United States to remove NATO headquarters from Belgium.⁷⁰⁶ In response, the government revised the legislation in 2003,⁷⁰⁷ and then repealed it entirely in August 2003.⁷⁰⁸ Under the new universal jurisdiction law, no prosecution can move forward without meeting certain criteria: (i) presence or residence of the suspect or a Belgian victim;⁷⁰⁹ (ii) double criminality;⁷¹⁰ (iii) prosecutorial discretion;⁷¹¹ (iv) political approval;⁷¹² and (v) subsidiarity.⁷¹³ In recent years, few universal jurisdiction cases have reportedly progressed within Belgium.⁷¹⁴ Thus, all four countries are less well-suited to pursue investigation into atrocity crimes than Tier One countries.

⁷⁰² Miguel González, Carlos Cué, *Gunmen Sent by Moscow Killed Defector Sheltering in Alicante, Spanish Intelligence Services Say*, EL PAÍS (Feb. 22, 2024), <https://english.elpais.com/international/2024-02-22/gunmen-sent-by-moscow-killed-defector-sheltering-in-alicante-spanish-intelligence-services-say.html>.

⁷⁰³ *Id.*

⁷⁰⁴ *Belgium: Universal Jurisdiction Law Repealed*, HUM. RTS. WATCH (Aug. 1, 2003), <https://www.hrw.org/news/2003/08/02/> (noting that its previous law “had made Belgium a leader in the struggle for international justice”).

⁷⁰⁵ Steven Ratner, *Belgium’s War Crimes Statute: A Postmortem*, 97 AMER. J. INT’L L. (Feb. 27, 2017), at 888, <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/belgiums-war-crimes-statute-a-postmortem/FE2E3C5E2DAC53AD1389DF5638CDDFB>.

⁷⁰⁶ *International Justice: The Challenges of Pursuing Universal Jurisdiction*, EIIR (Aug. 2, 2021), <https://www.eiir.eu/international-law/international-justice/international-justice-the-challenges-of-pursuing-universal-jurisdiction/>.

⁷⁰⁷ *Universal Jurisdiction in Europe: The State of the Art: VI Belgium*, HUM. RTS. WATCH (2006), https://www.hrw.org/reports/2006/ij0606/6.htm#_ftn143.

⁷⁰⁸ Loi relative aux violations graves du droit international humanitaire [Law on Serious Violations of International Humanitarian Law], No. 286, MONITEUR BELGE [Belg. Law Gazette] (August 7, 2003), <https://www.legal-tools.org/doc/e0b76d/>.

⁷⁰⁹ CODE D’INSTRUCTION CRIMINELLE/WETBOEK VAN STRAFVORDERING [Code of Crim. Proc.] (Belg.), Prelim. Title art. 6, 12, https://www.ejustice.just.fgov.be/img_1/pdf/1878/04/17/1878041750_F.pdf [hereinafter C.I.CR./SV. (Code of Crim. Proc.) (Belg.)]. See also *Universal Jurisdiction Law and Practice in Belgium*, OPEN SOC’Y. JUST. INITIATIVE (May 2022), at 15, <https://trialinternational.org/wp-content/uploads/2022/05/UJ-Belgium-EN.pdf> [hereinafter *UJ Law and Practice in Belgium*].

⁷¹⁰ *UJ Law and Practice in Belgium*, *supra* note 709, at 17 (citing interview with magistrate).

⁷¹¹ C.I.CR./SV. (Code of Crim. Proc.) (Belg.) Prelim. Title arts. 10bis & 12bis.

⁷¹² 1994 CONST. (Belg.) art. 151 (noting independence of public prosecutor), <https://ecnl.org/sites/default/files/files/2021/BelgiumConstitution.pdf>.

⁷¹³ Act of 29 March 2004 on cooperation with the International Criminal Court and the International Criminal Tribunal (Mar. 29, 2004), art. 8, https://cjad.nottingham.ac.uk/documents/implementations/pdf/Belgium_Cooperation_Act_2004.pdf.

⁷¹⁴ One exception involved the conviction on genocide-related charges of two Rwandans who resided in Belgium. Trial Int’l, *Universal Jurisdiction Annual Review 2024*, *supra* note 685, at 32. However, the Belgian Federal Prosecutor’s Office has 49 opened cases against alleged perpetrators from Rwanda. *30 Years After the Rwandan Genocide, Nearly 50 Cases Still Open in Belgium*, BRUSSELS TIMES (Mar. 31, 2024), <https://www.brusselstimes.com/986710/30-years-after-the-rwandan-genocide-almost-50-cases-still-open-in-belgium>.

Tier Three consists of the United Kingdom, Romania, Poland, and Lithuania. Although all also have some form of extraterritorial jurisdiction,⁷¹⁵ they are categorized as such because they have all indicated they will focus their efforts on supporting investigations conducted by others, such as the ICC or the Ukraine General Prosecutors Office, rather than prosecuting atrocity crimes internally.⁷¹⁶ For instance, the United Kingdom has been actively promoting the ICC Ukraine investigation.⁷¹⁷ Since convincing thirty-six other countries to support the initial state party referral to the Court,⁷¹⁸ the UK has seconded both lawyers and police to support the ICC's work.⁷¹⁹ It has also funded Ukraine's efforts to train prosecutors on the use of open-source intelligence.⁷²⁰ Similarly, Lithuania and Poland founded Eurojust's JIT with Ukraine in March 2022,⁷²¹ with Romania joining later that year,⁷²² and have since supported efforts of other countries to investigate and prosecute Ukraine atrocities.⁷²³ Thus, these states appear even less amenable than Tier Two countries to pursuing domestic prosecutions of atrocities committed in Ukraine.

⁷¹⁵ International Criminal Court Act [ICCA] § 50(1) (UK), [https://www.legislation.gov.uk/ukpga/2001/17/contents; Law #286/2009 \[Crim. Code\] \(Rom.\) art. 438-45,](https://www.legislation.gov.uk/ukpga/2001/17/contents;Law%20#286/2009%20[Crim.Code])

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2018\)042-e;](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2018)042-e;) KODEKS KARNY [KK] [Crim. Code] (Pol) art. 117-126b, <https://supertrans2014.files.wordpress.com/2014/06/the-criminal-code.pdf>; Law on the Approval and Entry into Force of the Criminal Code (Sept. 26, 2000, as amended on Apr. 23, 2015) (Lith.) art. 7, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/a84fa232877611e5bca4ce385a9b7048?jfwid=q8i88110w>.

⁷¹⁶ See, e.g. *London to Host International Meeting on Alleged War Crimes in Ukraine*, REUTERS (Jan. 7, 2023), <https://www.reuters.com/world/london-host-international-meeting-alleged-war-crimes-ukraine-2023-01-07/> [hereinafter *London Hosts Meeting on War Crimes*, REUTERS]; *Joint Investigation Team into Alleged Core International Crimes in Ukraine: One Year of International Collaboration*, EUROJUST (Mar. 24, 2023), <https://www.eurojust.europa.eu/news/joint-investigation-team-alleged-core-international-crimes-ukraine-one-year-international> [hereinafter *Joint Investigation Team*, EUROJUST]; *Romania Becomes Seventh Member of Joint Investigation Team on Alleged Core International Crimes Committed in Ukraine*, EUROJUST (Oct. 13, 2022), <https://www.eurojust.europa.eu/news/romania-becomes-seventh-member-joint-investigation-team-alleged-core-international-crimes> [hereinafter *Romania Becomes Seventh Member*, EUROJUST].

⁷¹⁷ *London Hosts Meeting on War Crimes*, REUTERS, *supra* note 716.

⁷¹⁸ Press Release, UK Min. of Just., UK Leads Call for ICC to Investigate Russia's War Crimes (Mar. 2, 2022), <https://www.gov.uk/government/news/uk-leads-call-for-icc-to-investigate-russias-war-crimes>.

⁷¹⁹ Press Release, UK Min. of Just., UK Provides Lawyers and Police to Support ICC War Crimes Investigation (June 6, 2022), <https://www.gov.uk/government/news/uk-provides-lawyers-and-police-to-support-icc-war-crimes-investigation>.

⁷²⁰ Press Release, UK Min. of Just., UK Announces Further Support for Ukraine's Efforts to Bring War Criminals to Justice (Dec. 10, 2023), <https://www.gov.uk/government/news/uk-announces-further-support-for-ukraines-efforts-to-bring-war-criminals-to-justice..>

⁷²¹ *Joint Investigation Team*, EUROJUST *supra* note 716.

⁷²² *Romania Becomes Seventh Member*, EUROJUST *supra* note 716.

⁷²³ *Id.*; *Joint Investigation Team*, EUROJUST *supra* note 716.