

# FROM PINOCHET TO RUMSFELD: UNIVERSAL JURISDICTION IN EUROPE 1998–2008

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*“But something very dramatic happened in that Belmarsh courthouse. Not something merely symbolic. For some people at least, the world had suddenly been turned upside down. For some people, life would never be the same.”*<sup>1</sup>

—Chilean writer Ariel Dorfman

The arrest of former Chilean dictator Augusto Pinochet Ugarte on October 16, 1998 was undoubtedly a historic date in Chilean history. But it was not only for Chile that “the world had suddenly been turned upside down.”<sup>2</sup> Pinochet’s capture was the first arrest of a former head of State based on the principle of universal jurisdiction,<sup>3</sup> leaving a legacy of global dimension. In the early 1990s, criminal accountability for individuals, including military and political leaders, was introduced in the statutes creating the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>4</sup> and the International Criminal Tribunal for Rwanda

1. ARIEL DORFMAN, EXORCISING TERROR: THE INCREDIBLE UNENDING TRIAL OF GENERAL AUGUSTO PINOCHET 81 (2002) (emphasis added).

2. *Id.*

3. See the recent discussion report of the Council Secretariat, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, ¶¶ 8–9, delivered to the Council of the European Union and the Delegations, U.N. Doc. 8672/1/09 (Apr. 16, 2009) [hereinafter *AU-EU Expert Report*] (“Universal criminal jurisdiction is the assertion by one State of its jurisdiction over crimes allegedly committed in the territory of another State by nationals of another State against nationals of another State where the crime alleged poses no direct threat to the vital interests of the State asserting jurisdiction. International law, both customary and conventional, regulates a State’s assertion of universal criminal jurisdiction. States by and large accept that customary international law permits the exercise of universal jurisdiction over the international crimes of genocide, crimes against humanity, war crimes and torture, as well as over piracy.”). The inclusion of piracy illustrates that the principle of universal jurisdiction is not at all a new legal concept but has a long tradition as the principle *aut dedere aut iudicare*.

4. S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993) (establishing an international tribunal for Yugoslavia); see also International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, *Updated Statute of the International Criminal*

(ICTR)<sup>5</sup>. Later, the work on the draft statutes for the creation of the International Criminal Court (ICC)—work that had started over four decades earlier—resulted in the conference in Rome in 1998, where a statute for the ICC was elaborated, adopted, and finally put into force in 2002.<sup>6</sup> Thus the concept of prosecuting individuals for the core crimes described in the aforementioned statutes was already emerging when Pinochet was arrested. But the events of 1998 were not only a culmination of this development—they also motivated and empowered human rights organizations, lawyers, prosecutors, and judges all over the world to prosecute human rights violations in domestic and international fora and to apply transnational strategies of using criminal law to bring dozens of war criminals and perpetrators of crimes against humanity to justice. However, the role of universal jurisdiction remains debated, such as in the debate in 2001 between Henry Kissinger, who defends the concept of *Realpolitik*, and Kenneth Roth, who advocates human rights protection.<sup>7</sup> Others stress its utility for prosecuting gross human rights violations.<sup>8</sup> Some consider its exercise as one tool among others in the transnational human rights movement.<sup>9</sup>

It is obvious that a coherent international criminal justice system is not yet in place. In November 1945, Robert Jackson, the chief prosecutor at the Nuremberg Tribunal, argued in his opening statement that,

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*Tribunal for the Former Yugoslavia* (Sept. 2008), [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept08\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf).

5. S.C. Res. 955, at 3–4, U.N. Doc. S/Res/955/Annex (Nov. 8, 1994) (describing how the jurisdiction of the ICTR extends over genocide, crimes against humanity, and violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II).

6. Rome Statute of the International Criminal Court, at 3–10, U.N. Doc. A/CONF.183/9 (July 17, 1998) (providing for ICC jurisdiction over the crime of genocide, crimes against humanity, the crime of aggression, and war crimes (including grave breaches of the Geneva Conventions)).

7. See Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, 80 FOREIGN AFF. 86 (2001); Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FOREIGN AFF. 150 (2001); see also Andreas Fischer-Lescano, *Global Constitutional Struggles: Human Rights Between Colère Publique and Colère Politique*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 13, 13–28 (Wolfgang Kaleck et al. eds., 2007).

8. See, e.g., Peter Weiss, *Epilogue to MICHAEL RATNER & THE CTR. FOR CONSTITUTIONAL RIGHTS, THE TRIAL OF DONALD RUMSFELD: A PROSECUTION BY BOOK 214, 218* (2008) [hereinafter RATNER, THE TRIAL] (highlighting that the “creativity of the lawyers who maintained their determination to bring Pinochet to justice . . . will serve as an inspiring example to those who say ‘no’ to torture . . . and other methods of ‘public policy’ that have no place in a decent world”).

9. See, e.g., NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* 211 (2005) (describing the actors behind the Pinochet cases and noting that a “loose alliance of lawyers, human rights activists, social service providers, family members of the disappeared, journalists, and academics on three continents that began to shape around pushing for trials had many of the attributes of a transnational advocacy network”).

while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law.<sup>10</sup>

This promise has never been kept. Throughout the Cold War, crimes against humanity were blatantly committed, yet those responsible have never been criminally prosecuted, or the idea considered. Above all, this applies to the Western allies at Nuremberg and their crimes in the Algerian War, the Vietnam War, and the “dirty wars” in Central and South America during the 1970s and 1980s. This selectiveness and lack of universality in prosecution continues to some extent.<sup>11</sup> International criminal justice and universal jurisdiction are criticized as being biased, neo-colonial, and neo-imperialistic.<sup>12</sup>

This deficit is being remedied somewhat through the practice of universal jurisdiction itself. Over the last ten years, prosecutors and judges have initiated dozens of cases *ex proprio motu*, resulting in the conviction of perpetrators from Serbia, Argentina, Afghanistan, and African countries.<sup>13</sup> Even more cases have been launched by victims, lawyers, and human rights organizations.<sup>14</sup> Those criminal complaints stand for a

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10. I OFFICE OF THE U.S. CHIEF PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 173 (1946).

11. See, e.g., Lama Abu Odeh, *A Radical Rejection of Universal Jurisdiction*, 116 YALE L.J. 393 (Supp. 2007), available at [http://yalelawjournal.org/2007/05/10/abu\\_odeh.html](http://yalelawjournal.org/2007/05/10/abu_odeh.html) (last visited June 21, 2009).

12. See, e.g., Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167, 180 (1997); Makau Mutua, *From Nuremberg to the Rwanda Tribunal: Justice or Retribution*, 6 BUFF. HUM. RTS. L. REV. 77, 81 (1997). The AU-EU Expert Group, which was established in 2008 due to criticism by African States directed against universal jurisdiction proceedings in (among others) France and Spain, has a similar criticism. See *AU-EU Expert Report*, *supra* note 3, at 33–34 (“African [S]tates take the view that they have been singularly targeted in the indictment and arrest of their officials and that the exercise of universal jurisdiction by European [S]tates is politically selective against them. This raises a concern over double standards . . .”).

13. Examples of cases initiated *ex proprio motu* include the Yugoslavian cases in Germany and the universal jurisdiction cases in the Netherlands. See NEHAL BHUTA & JÜRGEN SCHURR, HUMAN RIGHTS WATCH, UNIVERSAL JURISDICTION IN EUROPE: THE STATE OF THE ART 66, 74–76 (2006), available at <http://www.hrw.org/en/reports/2006/06/27/universal-jurisdiction-europe> (last visited June 21, 2009).

14. Some outstanding examples are the Chilean and Argentinean cases in Spain, the Congolese and the Rwandan cases in France, and *The Butare Four* case in Belgium. See BHUTA & SCHURR, *supra* note 13, at 55–61 (discussing the French cases); Naomi Roht-Arriaza, *The Pinochet Effect and the Spanish Contribution to Universal Jurisdiction*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 113, 115–23 (Wolfgang Kaleck et al. eds., 2007) [hereinafter Roht-Arriaza, *The Pinochet Effect*] (discussing the Spanish cases);

far higher level of universality than the cases initiated by state authorities, as many have been launched against acting and former government officials and military officers of powerful States that have not signed the Rome Statute.<sup>15</sup>

This Essay provides a survey of more than fifty universal jurisdiction proceedings in European courts and illustrates that universal jurisdiction is no longer a seldom-used theoretical concept, but a widespread practice. However, it is a practice that faces a number legal and practical obstacles identified here. Similar difficulties are encountered in other mechanisms used to combat impunity, including territorial and personality jurisdiction, state accountability at the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR), and civil litigation in the United States. The Essay then begins an evaluation of the last ten years of universal jurisdiction practice and proposes a transnational, interdisciplinary, and strategic legal approach for punishing gross human rights violations, considering universal jurisdiction as one legal tool amongst others.

## I. UNIVERSAL JURISDICTION IN EUROPEAN PRACTICE

An overview of the practice of universal jurisdiction in Europe reveals more than fifty relevant court proceedings and investigations, as well as more than a dozen convictions in several European countries. In

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Luc Reydam, *Belgium's First Application of Universal Jurisdiction: The Butare Four Case*, 1 J. INT'L CRIM. JUST. 428, 433 (2003) [hereinafter Reydam, *Belgium's First*] (discussing the Belgian cases); Vanessa Thalmann, *French Justice Endeavours to Substitute for the ICTR*, 6 J. INT'L CRIM. JUST. 995, 995 (2008).

15. Examples of such cases include the Chechnyan cases in Germany and Austria, the Falun Gong and Tibet cases in Spain, Germany, and other countries, the U.S. cases in Belgium and Spain, and the Rumsfeld cases in Germany and France. See BHUTA & SCHURR, *supra* note 13, at 27, 37, 47, 86–87 (discussing Falun Gong related cases in Germany, Belgium, and Denmark and Tibet-related cases in Spain); see also *infra* Part I.I and accompanying text; Wolfgang Kaleck, *German International Criminal Law in Practice: From Leipzig to Karlsruhe*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES, *supra* note 7, at 93, 102–08 (discussing the Rumsfeld and Falun Gong related cases in Germany); Online interviews: The Case Against Rumsfeld (Center for Constitutional Rights), <http://ccrjustice.org/case-against-rumsfeld> (last visited May 29, 2009) (providing synopses of the French and German cases against Rumsfeld); ECCHR, *The Case Against Rumsfeld, Gonzales and Others*, <http://ecchr.eu/rumsfeld.html> (last visited May 29, 2009) (providing a synopsis of the complaint against Rumsfeld and links to memoranda and press releases by the ECCHR); ECCHR, Background Information in Relation to ECCHR's Criminal Complaint Against Chechen President Ramzan Kadyrov on the Charge of Torture in Austria in June 2008, <http://ecchr.eu/kadyrov.html> (last visited May 29, 2009) [hereinafter ECCHR, *Kadyrov*] (providing information and resources regarding the criminal complaint against Chechen President Ramzan Kadyrov in Austria). For further information, see the list of cases provided by the AU-EU Expert Group, *AU-EU Expert Report*, *supra* note 3, at 24–26.

the aftermath of the indictment and arrest of Augusto Pinochet, universal jurisdiction became far more than a theoretical concept; it became actionable law in Europe—primarily in the northern and western States.<sup>16</sup> This Section describes some of the most relevant universal jurisdiction experiences in Europe.

### A. Belgium

Belgium is one of the first countries that enacted authorizing legislation and then exercised universal jurisdiction under national law. The legal and political experience that ensued—and led to the reduced scope of universal jurisdiction laws in Belgium—is crucial to understanding the climate in which universal justice in Europe is practiced today.

In implementing its obligations under Protocols I and II of the Geneva Conventions, Belgium enacted the “Act Concerning Punishment for Grave Breaches of International Humanitarian Law” in June 1993.<sup>17</sup> The legislation was amended in 1999 to include genocide and crimes against humanity in order to implement the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) and the Rome Statute of the International Criminal Court, respectively.<sup>18</sup> The provisions of the Act granted Belgian courts a sweeping scope of authority to exercise their jurisdiction. A special investigative unit was established to deal exclusively with international crimes, particularly in response to cases dealing with the Rwandan genocide.<sup>19</sup> Additionally, and most important for international human rights organizations involved, Belgium’s Code of Criminal Procedure at the time of the Act’s enactment allowed criminal investigations to be initiated at the request of victims through a procedure of *parties civiles*.<sup>20</sup>

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16. Eastern and southeastern European States incorporated international crimes only relatively recently into their criminal codes; some countries in the region, namely Poland and Hungary, Estonia, Latvia, and Lithuania, can be considered advanced in their implementation of the Rome Statute of the ICC. See MATTHIAS NEUNER, FINAL REPORT: ICC: IMPLEMENTATION IN CENTRAL AND EASTERN EUROPE (2003), available at <http://www.iccnw.org/documents/BucharestICLSReport11May03.pdf> (last visited June 21, 2009).

17. Loi relative à la répression des violations graves de droit international humanitaire [Act Concerning the Punishment of Grave Breaches of International Humanitarian Law], Mar. 23, 1999, Moniteur Belge 9286–87 (Belg.), available at <http://www.unhcr.org/refworld/docid/3ae6b5934.html> (last visited June 21, 2009) (unofficial translation).

18. *Id.*

19. See REDRESS & AFRICAN RIGHTS, EXTRADITING GENOCIDE SUSPECTS FROM EUROPE TO RWANDA 4, 38 (2008), available at [http://www.redress.org/documents/Extradition\\_Report\\_Final\\_Version\\_Sept\\_08.pdf](http://www.redress.org/documents/Extradition_Report_Final_Version_Sept_08.pdf) (last visited June 21, 2009).

20. CODE D’INSTRUCTION CRIMINELLE [Criminal Code], art. 63 (Belg.), available at [http://www.juridat.be/cgi\\_loi/loi\\_F.pl?cn=1808111730](http://www.juridat.be/cgi_loi/loi_F.pl?cn=1808111730) (last visited June 21, 2009). Some legal systems provide procedures by which victims—i.e., anyone who has directly suffered damages caused by a violation—may bring a case to the courts and participate in the criminal investigations and proceedings. See, e.g., CODE DE PROCÉDURE PÉNALE [C. PÉN.] [Code of

The first trial under the legislation was the case known as *The Butare Four* in 2001, which charged and ultimately prosecuted four defendants with crimes of murder and assassination during the Rwandan war in 1994.<sup>21</sup> The defendants were all residing in Belgium and did not challenge Belgium's jurisdiction to try the case, nor did the Rwandan government or the ICTR request their transfer or release. The success of the case blazed the way for a number of suits that followed.

The public prosecutor soon came under political pressure after opening an investigation against then-Israeli Prime Minister Ariel Sharon and several other Israeli and Lebanese suspects for massacres at the Sabra and Shatila Palestinian refugee camps in 1982.<sup>22</sup> The investigation led to their prosecution in the Belgian courts; ultimately the Court of Appeals narrowed the broad scope of Belgium's universal jurisdiction laws by interpreting the statute as permitting jurisdiction to be exercised only in cases where the accused were present in Belgium.<sup>23</sup>

Intense lobbying ensued as non-governmental organizations (NGOs) urged Belgian lawmakers to establish a clear interpretation of the legislation and to close the gap of impunity left after the Court of Appeals' decision.<sup>24</sup> Diplomatic pressure from Israel and the United States claimed that use of the legislation threatened state sovereignty.<sup>25</sup> In an attempt to broker a compromise, two pieces of legislation were proposed in January 2003 adding restrictions to future cases.<sup>26</sup> Several cases remained pending, including those against high-ranking officials such as former Chinese President Jiang Zemin (for crimes against Falun Gong practitioners) and former U.S. President George H.W. Bush, then-Secretary of

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Criminal Procedure], arts. 1, 2 (Fr.), available at [http://www.legifrance.gouv.fr/html/codes\\_traduits/cpptextA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/cpptextA.htm) (official translation) (last visited June 21, 2009).

21. For a summary of the case, see Reydams, *Belgium's First*, *supra* note 14, at 433.

22. Complaint Lodged by Survivors Against Israeli Prime Minister Ariel Sharon, Director General of the Defense Ministry Amos Yaron and Other Israelis and Lebanese Responsible for the Sabra and Shatila Massacre (June 18, 2001), 2002-03 PALESTINE Y.B. INT'L. L. 219; see also Naomi Roht-Arriaza, *Universal Jurisdiction: Steps Forward, Steps Back*, 17 LEIDEN J. INT'L L. 375, 385 (2004).

23. See LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 117 (2003) [hereinafter REYDAMS, UNIVERSAL JURISDICTION]; see also Anthony Dworkin, *Belgium Court Rules that Sharon Cannot Be Tried in Absentia*, CRIMES OF WAR PROJECT, July 11, 2002, <http://www.crimesofwar.org/print/onnews/sharon-print.html> (last visited June 21, 2009).

24. Luc Walley, *The Sabra and Shatila Massacre Under the Belgian Universal Jurisdiction* 8, SOCIAL SCIENCE RESEARCH COUNCIL, PROGRAM ON GLOBAL SECURITY & COOPERATION, [http://programs.ssrc.org/gsc/publications/ICA\\_memos/Panel3.Walley.doc](http://programs.ssrc.org/gsc/publications/ICA_memos/Panel3.Walley.doc) (last visited June 13, 2009).

25. Universal Jurisdiction Rejection Act of 2003, H.R. 2050, 108th Cong. § 2 (2003). This bill was based in part on the position that "[i]mplicit within the very concept of universal jurisdiction is a threat to the sovereignty of the United States." *Id.* § 2(14).

26. Michael Verhaeghe, *The Political Funeral Procession for the Belgian UJ Statute*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES, *supra* note 7, at 139-41.

Defense Richard Cheney, (now retired) General Norman Schwarzkopf, and then-Chairman of the Joint Chiefs of Staff Colin Powell (for crimes committed in the 1991 Gulf War).<sup>27</sup>

In February 2003, the Belgian Supreme Court reversed the Court of Appeals' decision in a landmark judgment that held Sharon's and others' indictments valid despite the fact that the defendants had not been present in Belgium.<sup>28</sup> This decision gave authority to Belgian courts to exercise universal jurisdiction in its broadest terms. A sequence of court battles and mounting political struggles eventually led to amending the legislation in April 2003. The amended legislation narrowed victims' access to *partie civile* procedures in universal jurisdiction cases by requiring a writ from the Federal Prosecutor.<sup>29</sup>

The legislative revision was quickly viewed as insufficient when a complaint was filed in May 2003 against General Tommy Franks for war crimes in Iraq.<sup>30</sup> Pressure from the United States came to a head with economic threats echoing in press reports that the United States had "warned that Belgium's status as an international hub could be affected unless the 'universal competence' law [was] restricted."<sup>31</sup> A new working group of the Belgian government was convened, and the legislation was ultimately repealed in favor of a policy that incorporated international crimes into the Belgian Criminal Code.<sup>32</sup> Under the reconfigured legislative scheme, Belgium exercises jurisdiction on the basis of active and passive personality principles.<sup>33</sup> Universal jurisdiction is authorized in the case of criminal offenses that Belgium is under a treaty obligation to prosecute, such as the Convention Against Torture.<sup>34</sup> In cases where the accused is not present in Belgium, Article 7 provides for prosecutorial discretion to dismiss a case if it is not in the interest of justice to pursue the case.<sup>35</sup> On September 24, 2003 the Belgian Supreme Court ruled to

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27. BHUTA & SCHURR, *supra* note 13, at 37 n.141.

28. Cour de Cassation [Court of Cassation] Feb. 12, 2003, Pasirisie Belge 2003, vol. 1, 307, 317–18 (Belg.).

29. Eric David, Commentary, *A Guide to State Practice Concerning International Humanitarian Law: Belgium*, 2003 Y.B. INT'L HUMANITARIAN L. 464, 465 (2003).

30. BHUTA & SCHURR, *supra* note 13, at 37.

31. *U.S. General 'War Crimes' Case Filed*, BBC NEWS, Jan. 9, 2008, <http://news.bbc.co.uk/2/hi/europe/3026371.stm> (last visited June 21, 2009).

32. See CODE PÉNAL [C. PÉN.] art. 136 bis–octies (Belg.).

33. LOI CONTENANT LE TITRE PRÉLIMINAIRE DU CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] arts. 6(1), 7(1), 10(5) (Belg.).

34. C. PR. PÉN. art. 12bis (Belg.).

35. See Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire [Act Amending the Law of June 16, 1993, Concerning the Prohibition of Grave Breaches of International Humanitarian Law and Article 144ter of the Judicial Code], Apr. 23, 2003 *Moniteur Belge* 24846, 24853 art. 7 (Belg.), translated in 42 I.L.M. 740, 755 (2003).

close the case against Ariel Sharon, finding that under Article 4 of the Geneva Conventions prosecutions against heads of State are prohibited unless the State concerned is bound by the treaty obligation providing for such prosecution.<sup>36</sup>

A special unit remains staffed by six professional investigators and the team has continued to carry out investigations in Rwanda, Chad, and Guatemala.<sup>37</sup> Despite increasingly restrictive policies, the cases against former Chadian dictator Hissène Habré,<sup>38</sup> the conviction of Rwandan army major Bernard Ntuyahaga,<sup>39</sup> and other proceedings primarily related to Rwandan war crimes<sup>40</sup> demonstrate that Belgium is still one of the most active jurisdictions in pursuing international crimes. Habré, accused of killing 40,000 and torturing his political opponents, fled from Chad to Senegal in 1990.<sup>41</sup> When Senegal's courts failed to convict Habré, victims filed a complaint in Belgium, where he was investigated for four years before Belgium issued an international arrest warrant in 2005.<sup>42</sup> The Belgian prosecutorial activities caused a reaction by the African Union that called on Senegal to prosecute Habré "in the name of Africa" rather than let him stand trial in Europe.<sup>43</sup> Senegal changed its legislation in order to try Habré but, as of the time this Essay was published, had failed to start the trial against him.<sup>44</sup> Due to this delay,

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36. BHUTA & SCHURR, *supra* note 13, at 39.

37. *Id.* at 40.

38. See *The Trial of Hissène Habré: Time Is Running Out for the Victims*, HUM. RTS. WATCH, Jan. 2007, <http://www.hrw.org/en/reports/2007/01/26/trial-hiss-ne-habr> (last visited June 21, 2009) [hereinafter *The Trial of Hissène Habré*].

39. Julien Ponthus, *Rwandan Gets 20 Years in Genocide Trial*, REUTERS, July 5, 2007, <http://www.reuters.com/article/worldNews/idUSL051276320070705>.

40. See, e.g., *Belgian Court to Rule on Rwandans*, BBC NEWS, Feb. 10, 2009, <http://news.bbc.co.uk/2/hi/africa/7881384.stm> (last visited June 21, 2009); *Brussels Can Effect Arrest Warrants Against RPF Suspects*, HIRONDELLE NEWS AGENCY, July 18, 2008, <http://www.hirondellenews.com/content/view/2290/332/> (last visited June 21, 2009); *Eventuel procès d'un présumé financier du génocide rwandais*, BBC NEWS, Jan. 18, 2008, [http://www.bbc.co.uk/french/news/story/2008/01/080128\\_belgiqueproces.shtml](http://www.bbc.co.uk/french/news/story/2008/01/080128_belgiqueproces.shtml) (last visited June 21, 2009).

41. See *The Trial of Hissène Habré*, *supra* note 38, at 4.

42. *Id.* at 6–7.

43. African Union, *Décision sur le Procès d'Hissène Habré et l'Union Africaine* [Decision on the Hissène Habré Case and the African Union], DOC. Assembly/AU/3 (VII) (June 25–July 2, 2006), available at [http://www.africa-union.org/Official\\_documents/Assemblee%20fr/ASS06b.pdf](http://www.africa-union.org/Official_documents/Assemblee%20fr/ASS06b.pdf) (last visited June 21, 2009), translation available at <http://www.hrw.org/en/news/2006/08/02/decision-hissene-habre-case-and-african-union-doc-assemblyau3-vii> (last visited June 21, 2009).

44. See Press Release, Int'l Court of Justice, *Belgium Institutes Proceedings Against Senegal and Requests the Court to Indicate Provisional Measures*, at 1 (Feb. 19, 2009), available at <http://www.icj-cij.org/docket/files/144/15052.pdf> ("Belgium contends that under conventional international law, 'Senegal's failure to prosecute Mr. H. Habré, if he is not extradited to Belgium to answer for the acts of torture that are alleged against him, violates the [United Nations] Convention against Torture [of 10 December 1984], in particular Article 5,

Belgium filed a request in February 2009 with the International Court of Justice (ICJ) in The Hague to order Senegal either to prosecute or extradite Habré.<sup>45</sup>

### B. France

While the French Constitution of 1958 treats international treaties as superior to national law, universal jurisdiction has not been available for crimes considered violations of *jus cogens* norms, such as crimes against humanity or genocide.<sup>46</sup> Under Articles 113-6 and 113-7 of the French Criminal Code, jurisdiction over genocide cases is limited to cases where active or passive personality principles are present.<sup>47</sup> In a 1994 case brought on behalf of Bosnian nationals based on Article 6 of the Genocide Convention, the supremacy of national law was confirmed and the case was dismissed after active or passive personality principles could not be demonstrated.<sup>48</sup> France later became the first European State to implement legislation allowing French courts to exercise universal jurisdiction over crimes falling under the jurisdictional scope of the ICTY and ICTR.<sup>49</sup> Under this expansive legislation, investigations may be initiated when an accused is present in French territory and may continue to trial *in absentia* should the accused leave French territory after an investigation has begun.<sup>50</sup>

French courts are entitled under Article 689 of the French Code of Criminal Procedure to exercise universal jurisdiction over crimes defined as torture under the Convention Against Torture (CAT).<sup>51</sup> Numerous cases have been opened in France pursuant to the prohibition against torture. In a 2002 case involving the alleged massacre of 350 Congolese refugees in 1999 (the *Disappeared of Brazzaville Beach* case), a criminal procedure was initiated against two suspects living in France and against other suspects, including Jean Francois Ndengue, the Chief of the national police, who was arrested during a personal visit in France.<sup>52</sup> An

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paragraph 2, Article 7, paragraph 1, Article 8, paragraph 2, and Article 9, paragraph 1.”) (bracketed alterations in original).

45. *Id.*

46. Jeanne Sulzer, *Implementing the Principle of Universal Jurisdiction in France*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES, *supra* note 7, at 125, 125.

47. CODE PÉNALE [C. PÉN.] [CRIMINAL CODE] art. 113-6 to -7 (Fr.).

48. Sulzer, *supra* note 46, at 128.

49. *Id.* at 131.

50. *Id.* at 132.

51. U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT]; CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CODE OF CRIMINAL PROCEDURE] art. 689 (Fr.).

52. BHUTA & SCHURR, *supra* note 13, at 57.

arrest warrant was also issued in 2003 by a Parisian magistrate against Zimbabwean President Robert Mugabe for torture, although the court ultimately ruled that Mugabe enjoyed immunity from prosecution as a sitting head of State.<sup>53</sup>

An example of a successful exercise of universal jurisdiction in French courts was the conviction of Mauritanian General Ely Ould Dah. The trial, which was held *in absentia* in 2005, led to Ely Ould Dah's sentence of ten years imprisonment for the torture of African members of the Mauritanian military from 1990 to 1991 in the Jreïda Death Camp.<sup>54</sup> The Cour de Cassation upheld the lower court's exercise of jurisdiction pursuant to obligations under the CAT.<sup>55</sup> Furthermore, the French court determined that amnesty awarded in a territorial State did not hinder the French court's exercise of jurisdiction.<sup>56</sup> Although human rights organizations continue to advocate for Ely Ould Dah's extradition to France, the French authorities have not taken any further measures against him.

A complaint alleging crimes of torture was filed in French courts on October 26, 2007 against Donald Rumsfeld while he was in Paris on a personal visit.<sup>57</sup> The complaint was dismissed in November and the appeal to the General Prosecutor was dismissed in February 2008 on the grounds of immunity for acts done while in office,<sup>58</sup> a decision contrary to the CAT.<sup>59</sup> Later that year, a Tunisian ex-diplomat was convicted and sentenced to eight years imprisonment for crimes of torture committed while acting as police chief in Tunisia in the 1990s.<sup>60</sup>

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53. See *Regional Updates on Universal Jurisdiction*, UJ UPDATE (REDRESS, London, United Kingdom), Apr. 2003, at 11, available at <http://www.redress.org/publications/UJ%20Update%20-%20Apr03%20-%20final.pdf> (last visited June 21, 2009).

54. See Sulzer, *supra* note 46, at 127.

55. *Id.*

56. *Id.* Notably, just before this issue went to press, the ECHR declared that Ely Ould Dah's complaint was inadmissible before it, and that the French trial and application of French law was justified. See Press Release, Registrar of the European Court of Human Rights, Decision on the Admissibility in the Case of Ould Dah v. France (No. 13113/03) (Mar. 30, 2009), available at <http://www.adh-geneva.ch/RULAC/news/OuldDah-France-ECHR.pdf> (last visited June 21, 2009).

57. Complaint Against Mr. Rumsfeld, Tribunal de Grande Instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Oct. 25, 2007, available at [http://ccrjustice.org/files/rumsfeld\\_0.pdf](http://ccrjustice.org/files/rumsfeld_0.pdf) (filed by author, among others) (last visited June 21, 2009).

58. Letter from Public Prosecutor (Procureur général), Paris Court of Appeal, to Mr. Patrick Baudouin (Feb. 27, 2008), available at [http://ccrjustice.org/files/Rumsfeld\\_FrenchCase\\_%20Prosecutors%20Decision\\_02\\_08.pdf](http://ccrjustice.org/files/Rumsfeld_FrenchCase_%20Prosecutors%20Decision_02_08.pdf) (last visited June 21, 2009).

59. CAT, *supra* note 51, art. 2.

60. *France Jails Tunisian Diplomat for Torture*, AFP, Dec. 15, 2008, available at <http://www.google.com/hostednews/afp/article/ALeqM5gTIWQI7cr9uGHdU-0zW5gfr0mjxA> (last visited June 21, 2009); *France to Try 17 Pinochet Associates Linked to Disappearances of French Nationals*, JURIST, Feb 21, 2007, available at <http://jurist.law.pitt.edu/paperchase/2007/02/france-to-try-17-pinochet-associates.php> (last visited June 21, 2009).

The arguably most-disputed French universal jurisdiction case<sup>61</sup> was initiated in November 2006, when the investigating judge, Jean-Louis Bruguière, issued nine arrest warrants against Rwandan politicians close to Rwandan President Paul Kagame, alleging their involvement in the assassination of the former Rwandan President Juvénal Habyarimana on April 6, 1994.<sup>62</sup> The Rwandan government heavily protested the arrest warrants, broke diplomatic relations with France, and released a report in 2008 strongly alleging complicity by French politicians in the 1994 genocide.<sup>63</sup> Ultimately, the arrest warrants led to the arrest of Rwandan Chief of Protocol, Rose Kabuye, in Frankfurt, Germany on November 11, 2008.<sup>64</sup> Kabuye was extradited to France and then released on November 21, 2008.<sup>65</sup> While authorities have arrested other Rwandan suspects, French courts have ruled against extradition requests in several cases.<sup>66</sup> Prosecution remains pending against two suspects, Wenceslas Munyeshyaka and Laurent Bucyibaruta, whose cases were transferred to French courts by the ICTR.<sup>67</sup>

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61. Some observers stress that the case is ultimately not a universal jurisdiction case but rather a case based on the principle of passive personality, because French citizens were killed in the plane crash which led to the death of Habyarimana. See, e.g., Letter from Carla Ferstman, Executive Director, Redress & Souhayr Belhassen, President, FIDH, to Head of Delegation to the Council Africa Working Group (Feb. 10, 2009), available at [http://www.redress.org/documents/Letter%20to%20COAFR\\_10%20February%202009.pdf](http://www.redress.org/documents/Letter%20to%20COAFR_10%20February%202009.pdf) (last visited June 21, 2009).

62. See Peter Robinson & Golriz Ghahraman, *Can Rwandan President Kagame Be Held Responsible at the ICTR for the Killing of President Habyarimana*, 6 J. INT'L CRIM. JUST. 981, 982 (2008); Vanessa Thalmann, *French Justice Endeavours to Substitute for the ICTR*, 6 J. INT'L CRIM. JUST. 995, 995 (2008) (describing the background of the case).

63. Thalmann, *supra* note 62, at 995; see also Government of Rwanda Communiqué on the Arrest of Mrs. Rose Kabuye, Ministry of Foreign Affairs and Cooperation, Republic of Rwanda, <http://www.minaffet.gov.rw/content/view/148/176/lang.english/> (last visited June 21, 2009).

64. See *Senior Rwandan Official Arrested*, BBC NEWS, Nov. 10, 2008, <http://news.bbc.co.uk/2/hi/africa/7718879.stm> (last visited June 21, 2009).

65. See *Rwandan Returns for French Trial*, BBC NEWS, Jan. 9, 2009, <http://news.bbc.co.uk/2/hi/africa/7819679.stm> (last visited June 21, 2009).

66. See, e.g., *France Blocks Rwanda Extradition*, BBC NEWS, Dec. 11, 2008, <http://news.bbc.co.uk/2/hi/africa/7777129.stm> (last visited June 13, 2009) (discussing this case of Isaac Kamali); *French Court Blocks Extradition of Rwanda Genocide Suspect*, DOW JONES NEWS, Oct. 28 2008, <http://www.lloyds.com/CmsPhoenix/DowJonesArticle.aspx?id=409668> (last visited June 13, 2009) (discussing the case of Marcel Bivugabagabo); *French Court Overturns Extradition of Rwandan Genocide Suspect*, AFP, July 9, 2008, [http://afp.google.com/article/ALeqM5hIQ8t\\_IIfGt8JUgKAUwHPedhxVOHQ](http://afp.google.com/article/ALeqM5hIQ8t_IIfGt8JUgKAUwHPedhxVOHQ) (last visited June 13, 2009) (discussing the case of Clavere Kamana).

67. See *Wenceslas Munyeshyaka et Laurent Bucyibaruta devant la justice française—Dominique Ntawukulyayo transféré au TPIR*, FIDH, Feb. 21, 2008, <http://www.fidh.org/Wenceslas-MUNYESHYAKA-et-Laurent> (last visited June 21, 2009).

## C. Switzerland

In Switzerland, the Military Penal Code specifically authorizes universal jurisdiction over grave breaches of the Geneva Conventions<sup>68</sup> and includes a clause generally providing jurisdiction over violations of international humanitarian law and the laws and customs of war.<sup>69</sup> Under Article 6bis (6a) of the Swiss Criminal Code, Swiss courts are obligated to exercise jurisdiction over crimes prohibited by international treaties.<sup>70</sup> Universal jurisdiction is authorized only if the act is punishable in the territorial State where the act was committed and if the perpetrator is present in Switzerland and cannot be extradited.<sup>71</sup> The Swiss government has asserted that this provision confers jurisdiction over cases of torture committed abroad.<sup>72</sup>

Several Swiss investigations based on universal jurisdiction have been conducted, primarily of crimes related to the genocide in Rwanda, which have resulted in the transfer of suspects to the ICTR.<sup>73</sup> The *Niyonteze* case marked the first conviction in a Swiss court exercising universal jurisdiction.<sup>74</sup> Swiss authorities undertook an extensive two-year investigation of crimes against humanity, war crimes, and genocide before prosecuting Rwandan asylum-seeker Fulgence Niyonteze in what would become the first conviction outside Rwanda for crimes committed during the genocide in 1994.<sup>75</sup> Swiss courts rejected the counts of genocide brought against Niyonteze because Switzerland is not a party to the Genocide Convention, but upheld the counts of war crimes based on obligations under the terms of the Geneva Conventions.<sup>76</sup>

Other Swiss proceedings include a 2001 complaint filed against former head of the Iraqi secret service, Barzan al Tikriti,<sup>77</sup> for torture and

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68. MILITÄRSTRAFPROZESS [MSTP], [MILITARY PENAL PROCEDURE CODE] Mar. 23, 1979, Systematische Sammlung des Bundesrechts [SR] 322.1, art. 2.9 (Switz.), available at [http://www.admin.ch/ch/d/sr/c322\\_1.html](http://www.admin.ch/ch/d/sr/c322_1.html) (last visited June 21, 2009).

69. Andreas Ziegler, *In re G.*, 92 AM. J. INT'L L. 78, 79 (1998).

70. MILITÄRSTRAFGESETZ [MSTG] [MILITARY PENAL CODE], June 13, 1927, SR 321.0, art. 6bis (Switz.), available at [http://www.admin.ch/ch/d/sr/c321\\_0.html](http://www.admin.ch/ch/d/sr/c321_0.html).

71. *Id.*; see also REYDAMS, UNIVERSAL JURISDICTION, *supra* note 23, at 194.

72. Switz., *Initial Report to the U.N. Committee Against Torture*, ¶ 52, U.N. Doc. CAT/C/5/Add.17 (June 30, 1989).

73. See, e.g., Trial Watch, Alfred Musema, [http://www.trial-ch.org/en/trial-watch/profil/db/facts/alfred\\_musema\\_46.html](http://www.trial-ch.org/en/trial-watch/profil/db/facts/alfred_musema_46.html) (last visited June 21, 2009) (providing a synopsis of the ICTR case against Musema).

74. Luc Reydam, *Niyonteze v. Public Prosecutor*, 96 AM. J. INT'L L. 231, 231 (2002).

75. See Trial Watch, Fulgence Niyonteze, [http://www.trial-ch.org/en/trial-watch/profil/db/legal-procedures/fulgence\\_niyonteze\\_115.html](http://www.trial-ch.org/en/trial-watch/profil/db/legal-procedures/fulgence_niyonteze_115.html) (last visited June 21, 2009) (providing a synopsis of the Swiss case against Niyonteze).

76. See *id.*

77. Barzan al Tikriti was later charged and sentenced to death for a massacre against Shiites at the Iraq Special Tribunal in the Al-Dujail trial. He was executed on January 15, 2007. John F. Burns, *Confusion in Baghdad After Reports 2 Hussein Allies Were Hanged*, N.Y.

genocide in 1983.<sup>78</sup> The Swiss Public Prosecutor and Military Prosecutor rejected the complaint on several grounds, including that al Tikriti was not present in Switzerland<sup>79</sup> (although he had been in the country until October 2002).<sup>80</sup> The Minister of Defense upheld this decision, finding that universal jurisdiction could not be exercised when the accused was no longer on Swiss territory.<sup>81</sup> In March 2003, a complaint was submitted to the Swiss Public Prosecutor alleging crimes against humanity, genocide, and war crimes perpetrated by then-U.S. President George W. Bush and a number of other high-ranking U.S. officials.<sup>82</sup> The complaint was dismissed on a number of grounds, including that the accused enjoyed immunity under international law.<sup>83</sup> Although the case against President Bush was ultimately dismissed, it nonetheless established that Swiss courts are able to exercise universal jurisdiction over the crime of genocide.

A reform process is currently underway in order to incorporate the Rome Statute into Swiss law.<sup>84</sup>

#### D. United Kingdom

Optimism about the practical use of universal jurisdiction flourished in the United Kingdom following Pinochet's London arrest. The first and only conviction did not follow until the 2005 case against Fayaradi Zardad, a militia leader charged with committing torture in Afghanistan in the 1990s.<sup>85</sup> The unprecedented investigation against Zardad included

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TIMES, Jan. 15, 2007, available at <http://www.nytimes.com/2007/01/15/world/middleeast/15iraq.html?scp=1&sq=hanged%202007&st=cse> (last visited June 21, 2009).

78. Jon Swain, *Saddam's Brother Slips Through Net*, SUNDAY TIMES, Dec. 15, 2002, at 22, available at <http://www.timesonline.co.uk/tol/news/world/article802217.ece> (last visited June 21, 2009).

79. Letter from Dieter Weber, Auditeur en chef, Office de l'auditeur en chef (Apr. 4, 2003), available at [http://www.trial-ch.org/fileadmin/user\\_upload/documents/al-tikriti-auditeur.pdf](http://www.trial-ch.org/fileadmin/user_upload/documents/al-tikriti-auditeur.pdf) (last visited June 21, 2009).

80. Swain, *supra* note 78.

81. Département fédéral de la défense, de la protection de la population et des sports [DDPS] [Federal Department of Defense, Civil Protection and Sports], Dec. 22, 2003, Jurisprudence des autorités administratives de la Confédération [JAAC] No. 68.50 ¶¶ 1–8 (2003) (Switz.), available at <http://www.vpb.admin.ch/franz/doc/68/68.50.html> (last visited June 21, 2009).

82. Trial Watch, Iraq, <http://www.trial-ch.org/en/swiss/cases-in-switzerland/iraq.html> (last visited June 21, 2009).

83. *Id.*

84. See HUMAN RIGHTS WATCH, IMPLEMENTING THE ROME STATUTE, tbl. 3 (2002), available at <http://www.iccnw.org/documents/HRWchart3.pdf> (last visited June 21, 2009).

85. R v. Zardad (Cent. Crim. Ct. July 18, 2005) (Eng.); see also R v. Zardad, [2007] EWCA (Crim) 279 (Eng.).

successful coordination between the U.S. military and intelligence authorities in the Netherlands and Denmark.<sup>86</sup>

Zarzarad was charged under Section 134 of the Criminal Justice Act of 1988, which incorporates the CAT into U.K. law.<sup>87</sup> In 2001, the International Criminal Court Act (ICCA) extended jurisdiction over war crimes, genocide, and crimes against humanity when committed by a person residing in the United Kingdom either at the time of the criminal act or when proceedings are initiated.<sup>88</sup>

Despite exacting legislative authority and the demonstrated investigative success in the *Zardad* case, attempts to prosecute international crimes in the United Kingdom have been relatively sparse. The Crown Prosecution Service (CPS) exercises wide discretion over which cases to prosecute and may dismiss or change charges against an accused at any time.<sup>89</sup> In exercising its discretion in cases of core crimes, the CPS must seek approval to prosecute from the Attorney General, a government-appointed position.<sup>90</sup> The Attorney General accordingly exercises discretion in deciding whether sufficient and reliable evidence exists and if the case is in the “public interest.”<sup>91</sup> Under these broad discretionary powers, prosecution under the ICCA has appeared to be intractably linked to the political will of the State.<sup>92</sup>

The Criminal Justice Act (CJA) of 1988 does not provide for such discretion in prosecuting crimes of torture and thus it remains the most promising authority for the exercise of universal jurisdiction after the passage of the ICCA.<sup>93</sup> In an exercise of the legislation, a warrant was issued for the arrest of Israeli Major General Doron Almog in anticipation of his arrival in London in September 2005.<sup>94</sup> Receiving warning in advance, Almog refused to disembark from his plane at Heathrow airport

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86. BHUTA & SCHURR, *supra* note 13, at 14, 99.

87. Criminal Justice Act, 1988, c. 33, § 134 (U.K.).

88. International Criminal Court Act, 2001, c. 17, § 50 (Eng., Wales, & N. Ir.).

89. See CROWN PROSECUTION SERVICE, THE CODE FOR CROWN PROSECUTORS 3 (2004), available at <http://www.cps.gov.uk/publications/docs/code2004english.pdf> (last visited June 21, 2009). Note that two prosecutors in the Crown Prosecution Service Counter-Terrorism Department work with the Anti-Terrorist Branch of the Metropolitan Police on any investigation. See BHUTA & SCHURR, *supra* note 13, at 95.

90. International Criminal Court Act, 2001, c. 17, § 53(3) (Eng., Wales, & N. Ir.); Criminal Justice Act, 1988, c. 33, § 135 (U.K.); Geneva Conventions Act 1957, 5 & 6 Eliz., ch. 52, § 1(3) (U.K.).

91. See BHUTA & SCHURR, *supra* note 13, at 97.

92. See *id.* at 96–98.

93. Criminal Justice Act, 1988, c. 33, § 134 (U.K.).

94. Hickman and Rose Solicitors, UK Court Issues Warrant Against Israeli General (Sept. 11, 2005), <http://www.hickmanandrose.co.uk/news05.html> (last visited June 21, 2009).

and was later permitted to depart by London's Metro Police.<sup>95</sup> Almog claimed the case to be a political act against the Israeli State.<sup>96</sup>

Despite a number of other complaints of torture made under the authority of the CJA, there have been few arrests and only one conviction.<sup>97</sup> Civil compensation claims for victims have also had limited outcomes, with courts seeming to favor immunity approaches, as was exemplified by the civil case of *Ron Jones v. Saudi Arabia*, where state immunity was extended to individuals.<sup>98</sup> Complaints against former U.S. President George W. Bush and Zimbabwean President Robert Mugabe have also been dismissed pursuant to Section 14(1) of the State Immunity Act of 1978, which extends immunity to heads of State and every sitting minister of a foreign government.<sup>99</sup>

### E. The Netherlands

Like other European States in the late 1990s, the Netherlands established a specialized investigative international crime team (NOVO), which was later integrated into the national Prosecution Service.<sup>100</sup> The Dutch team has undertaken significant investigations abroad, including investigations in Afghanistan, Iraq, the Democratic Republic of the Congo, Liberia, and Sierra Leone.<sup>101</sup>

The Netherlands was the first nation to exercise universal jurisdiction over crimes of torture pursuant to obligations under the CAT. In 2004, Dutch courts convicted Congolese national Sebastian Nzapali for torture in Kinshasa between 1990 and 1995.<sup>102</sup> The conviction came after the earlier case against former Surinam leader Desiré Bouterse, where Dutch courts held that an accused could not be tried *in absentia* and that the prohibition against torture could not be applied retroactively to situations from before the CAT came into force.<sup>103</sup> In an even earlier complaint lodged against Pinochet during his 1994 visit to Amsterdam,

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95. See Carla Ferstman, *The Approach of the United Kingdom to Crimes Under International Law: The Application of Extraterritorial Jurisdiction*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES, *supra* note 7, at 149, 153.

96. Ksenia Svetlova, *Israel Battles Spanish Arrest Warrants*, JERUSALEM POST, Aug. 8, 2008, <http://www.jpost.com/servlet/Satellite?pagename=JPArticle/ShowFull&cid=1218104239557> (last visited May 29, 2009).

97. Ferstman, *supra* note 95, at 151.

98. *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (The Kingdom of Saudi Arabia)*, [2006] UKHL 26, [2007] 1 A.C. 270 (appeal taken from Eng.) (U.K.).

99. State Immunity Act, 1978, c. 33, § 14(1) (U.K.).

100. See BHUTA & SCHURR, *supra* note 13, at 73.

101. See *id.* at 76.

102. See *id.* at 71; see also *Netherlands: Congolese Torturer Convicted*, HUMAN RIGHTS WATCH, Apr. 7, 2004, <http://www.hrw.org/en/news/2004/04/07/netherlands-congolese-torturer-convicted> (last visited May 29, 2009).

103. Liesbeth Zegveld, *The Bouterse Case*, 2001 NETH. Y.B. INT'L L. 97, 98–100.

the Public Prosecutor declined to prosecute based on several grounds, including recognition of head of state immunity.<sup>104</sup>

The Supreme Court of the Netherlands upheld universal jurisdiction over grave breaches of the Geneva Conventions as incorporated into Dutch law under the Dutch War Crimes Act of 1997 in the case against Darko Knezevi.<sup>105</sup> The Dutch Supreme Court held that investigations into Knezevi's alleged commission of war crimes in Bosnia in 1992 were permissible despite the fact that Knezevi's whereabouts were unknown.<sup>106</sup>

The Netherlands implemented obligations under the Rome Statute with the International Crimes Act (ICA) in June 2003.<sup>107</sup> This expansive legislation establishes the authority to exercise universal jurisdiction over the crimes of genocide, war crimes, crimes against humanity, and torture.<sup>108</sup> While trial *in absentia* is permissible under Dutch criminal procedure, the voluntary presence of the accused is a pre-condition to carrying out an investigation on universal jurisdiction grounds.<sup>109</sup> The introduction of the presence requirement was strongly influenced by the Belgian experience.<sup>110</sup> The requirement restricts the potential for state actors to gather information and evidence when the suspect does not live in the Netherlands.<sup>111</sup> The Act entrenches the principle of complementarity, creating a preference for proceedings at the ICC or in fora having territorial or personality (active or passive) jurisdiction over the matter.<sup>112</sup> Further, the ICA grants immunity for heads of State and ministers of foreign affairs while in office.<sup>113</sup>

In October 2005, a Dutch court convicted two Afghan nationals living in the Netherlands for crimes against Afghani prisoners in the 1980s

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104. LUC REYDAMS, UNIVERSAL JURISDICTION, *supra* note 23, at 169.

105. Prosecutor/Knezevic, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 11 november 1997, NJ 1998, 463 (Neth.), *translated in* 1998 Y.B. INT'L HUMANITARIAN L. 600.

106. *Id.*

107. Dutch Ministry of Foreign Affairs, Introduction to the International Crimes Act, <http://www.minbuza.nl/en/themes,international-legal-order/international-criminal-court/background-information/Introduction-to-the-International-Crimes-Act.html> (last visited May 29, 2009).

108. INT'L COMM. OF THE RED CROSS, NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW: BIENNIAL UPDATE ON NATIONAL LEGISLATION AND CASE LAW 281–82 (2003), [http://icrc.org/Web/eng/siteeng0.nsf/htmlall/5ZBJ74/\\$File/IRRC\\_853\\_FD\\_Nat\\_Impl\\_IHL.pdf](http://icrc.org/Web/eng/siteeng0.nsf/htmlall/5ZBJ74/$File/IRRC_853_FD_Nat_Impl_IHL.pdf) (last visited June 21, 2009).

109. M. Boot-Matthijssen & R. van Elst, *Key Provisions of the International Crimes Act 2003*, 2004 NETH. Y.B. INT'L L. 251, 281.

110. *Id.*

111. *Id.* at 284.

112. Gerard-René de Groot & Carlos Bollen, *Dutch Legislation with Respect to International Crimes*, 2004 NETH. Y.B. INT'L L. 233, 235.

113. INT'L COMM. OF THE RED CROSS, *supra* note 108, at 282.

and sentenced them for war crimes and torture committed in Afghanistan.<sup>114</sup> The accused appealed, but the Supreme Court of the Netherlands rejected the appeal in 2008, holding that the Dutch Criminal Law in Wartime Act remained applicable to crimes committed before the enactment of the ICA.<sup>115</sup> In an expansive reading of the Geneva Conventions, the Supreme Court held that the State's express obligation to prosecute grave breaches did not therefore exclude the exercise of jurisdiction over other breaches of the conventions.<sup>116</sup>

In 2006, the Dutch Public Prosecutor summoned Rwandan asylum seeker Joseph Mpambara on counts of war crimes, and later genocide, based on a special request from the ICTR.<sup>117</sup> However in 2008, the Supreme Court upheld a lower court's finding that Dutch courts did not have universal jurisdiction over crimes of genocide committed before the enactment of the ICA.<sup>118</sup> In late 2008, a trial against Mpambara for war crimes and torture moved forward in district courts.<sup>119</sup>

In May 2008, during a visit of the then-Israeli Minister Ami Ayalon, the former Director of Shin Bet, the Israeli General Security Service, a torture victim submitted a complaint to the Dutch authorities that referred to the CAT and a request for Ayalon's arrest.<sup>120</sup> The public prosecutor failed to initiate an investigation while Ayalon was in the Netherlands.<sup>121</sup> The official explanation was that the College of Procurator-General

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114. Elies van Sliedregt, *International Crimes Before Dutch Courts: Recent Developments*, 20 LEIDEN J. INT'L L. 895, 895–908 (2007).

115. The Dutch Constitution provides *nulla poena sine lege* ("no penalty without law"), preventing the ICA from being applied retroactively to crimes in the ICA that were not already part of Dutch law through some other instrument. Grondwet voor het Koninkrijk der Nederlanden [Gw.] [Constitution] art. 16 (Neth.).

116. *Dutch Supreme Court Rejects Appeals of Afghan Intelligence Officers*, HAGUE JUSTICE PORTAL, July 8, 2008, <http://www.haguejusticeportal.net/eCache/DEF/9/475.html> (last visited June 21, 2009).

117. *Mpambara Will Not Be Tried in the Netherlands*, HAGUE JUSTICE PORTAL, Oct. 21, 2008, <http://www.haguejusticeportal.net/eCache/DEF/9/915.html> (last visited June 21, 2009) (providing a summary of the case and some verdicts).

118. Ruling in the Case of J.M., Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 21 oktober 2008, LJN BD6568 (Neth.), available at [http://www.haguejusticeportal.net/Docs/Court%20Documents/Dutch%20Courts%20in%20The%20Hague/NLSupremeCourt\\_JM\\_21-10-2008\\_NL.pdf](http://www.haguejusticeportal.net/Docs/Court%20Documents/Dutch%20Courts%20in%20The%20Hague/NLSupremeCourt_JM_21-10-2008_NL.pdf) (last visited June 21, 2009), *aff'g* Tussenbeslissing in de strafzaak tegen de 39-jarige Rwandees J.M. [Intermediary Decision in the Case of J.M.], Arrondissementsrechtbank [Rb.Gravenhage] [District Court of Gravenhage], 24 juli 2007, LJN BB0494 (Neth.), translation available at <http://www.haguejusticeportal.net/eCache/DEF/9/661.html> (last visited June 21, 2009).

119. *Mpambara Will Not Be Tried in the Netherlands*, *supra* note 117. In a very recent development, Mpambara was sentenced to twenty years for torture and murder (not constituting war crimes). *Rwandan Found Guilty of Murders*, BBC NEWS, Mar. 24, 2009, <http://news.bbc.co.uk/2/hi/africa/7960456.stm> (last visited June 21, 2009).

120. Press Release, Palestinian Centre for Human Rights [PCHR], Torture Victim Seeks Prosecution of Former Head of Israeli General Security Services (Oct. 6, 2008), available at <http://www.pchrgaza.org/files/PressR/English/2008/92-2008.html> (last visited June 21, 2009).

121. *Id.*

needed to consider whether the suspect was immune from prosecution,<sup>122</sup> and by the time the College finally concluded that Ayalon could be prosecuted in the Netherlands, he had left Dutch territory.<sup>123</sup>

The Dutch Public Prosecutor has the sole authority to initiate criminal proceedings and some discretion in determining whether or not to prosecute on the basis of public interest.<sup>124</sup> The Netherlands has demonstrated a proactive stance and has reserved resources to conduct extensive international investigations.<sup>125</sup> Several thorough investigations have been carried out, including those against Dutch businessman Frans van Anraat, who was sentenced in 2006 to nineteen years of imprisonment for supplying basic material for chemical weapons to Iraq during the regime of Saddam Hussein (deployed against the Kurdish population in Iraq),<sup>126</sup> and Guus van Kouwenhoven, who is pending trial for charges of having delivered arms to Liberia between 2001 and 2003.<sup>127</sup>

#### F. Scandinavia

Universal jurisdiction was first exercised in Denmark, Sweden, and Norway in response to complaints filed against asylum seekers from the former Yugoslavia.<sup>128</sup> Denmark,<sup>129</sup> Norway,<sup>130</sup> Finland, and

122. *Id.*

123. *Id.*

124. REDRESS, UNIVERSAL JURISDICTION IN THE EUROPEAN UNION: COUNTRY STUDIES 28 (2003), available at <http://www.redress.org/conferences/country%20studies.pdf> (last visited May 19, 2009).

125. MARJAN WIJERS ET AL., VERWEY-JONKER INSTITUUT, PLAN OF ACTION ON THE APPROACH OF WAR CRIMES IN THE NETHERLANDS: SUMMARY (2005), available at [http://www.wodc.nl/images/1205\\_summary\\_tcm44-58755.pdf](http://www.wodc.nl/images/1205_summary_tcm44-58755.pdf) (last visited June 21, 2009).

126. See Harman van der Wilt, *Genocide v. War Crimes in the Van Anraat Appeal*, J. INT'L CRIM. JUST. 557, 557–67 (2008) (providing a narrative of the case).

127. See Trial Watch, Guus van Kouwenhoven, <http://www.trial-ch.org/en/trial-watch.html> (search “Search” for “Guus van Kouwenhoven”; then follow “Guus van Kouwenhoven” hyperlink) (last visited June 3, 2009) (providing a short narrative of the case).

128. The first conviction in Denmark was against Refic Saric in 1994. See Paul Magnarella, *The Conflicts of the Former Yugoslavia in the Courts*, 14 ANTHROPOLOGY E. EUR. REV. 44 (1996). The first conviction in Sweden was against Jackie Arklöv in 2006. See Trial Watch, Jackie Arklöv, <http://www.trial-ch.org/de/trial-watch.html> (search “Suchen” for “Jackie Arklöv”; then follow “Jackie Arkloev” [sic] hyperlink) (last visited May 19, 2009) (providing a short narrative of the case in German). The first conviction in Norway was against Misrad Repak in 2008 for crimes in Bosnia in the early 1990s. See Summary of the Judgment for the Case of Pub. Prosecuting Auth. v. Misrad Repak, (Dec. 2, 2008), [http://www.icrc.org/IHL-NAT.NSF/46707c419d6bdfa24125673e00508145/45061a413067e31cc125755c004a5773/\\$FILE/Public%20Prosecutor%20v.%20Misrad%20Repak.PDF](http://www.icrc.org/IHL-NAT.NSF/46707c419d6bdfa24125673e00508145/45061a413067e31cc125755c004a5773/$FILE/Public%20Prosecutor%20v.%20Misrad%20Repak.PDF) (last visited June 21, 2009).

129. Lov om Den Internationale Straffedomstol, 15 maj 2001 [Law on the International Criminal Court, No. 342 of May 15, 2001] (Den.), available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=22925> (last visited June 21, 2009).

130. Lov om gjennomføring i norsk rett av Den internasjonale straffedomstols vedtekter 17. juli 1998 (Roma-vedtektene) [Act No. 65 of 15 June 2001 Relating to the Implementation

Iceland<sup>131</sup> have enacted legislation incorporating the Rome Statute into domestic law. While draft legislation was created in Sweden in 2002, it has not yet been presented to Parliament.<sup>132</sup>

In Denmark, under new rules enacted in July 2008, Danish courts are authorized to exercise universal jurisdiction over all crimes defined in the Rome Statute if, at the time of prosecution, the accused is a Danish citizen, domiciliary, or is present in the country.<sup>133</sup> Prior to the enactment of the statute, universal jurisdiction was authorized under Section 8(5) of Denmark's Penal Code for crimes the State is obliged to prosecute under international conventions, namely the CAT and the Geneva Conventions.<sup>134</sup>

In 1994, Danish courts convicted asylum seeker Refik Sarić, a Bosnian Muslim, of war crimes as defined under the Geneva Conventions and authorized for prosecution under Section 8(5).<sup>135</sup> Another asylum seeker, former Chief of Staff of the Iraqi army, Nizar al-Kharzraji, similarly was charged with war crimes but fled before trial.<sup>136</sup> In response to a number of complaints received, particularly with regard to Rwandan suspects, Denmark established an international crimes office in 2002 to investigate serious crimes committed abroad.<sup>137</sup> In September 2006, Danish authorities arrested the former head of the Rwandan Civil Aviation Authority, Sylvaire Ahorugeze, who had been living in Denmark since the end of the genocide. After holding Ahorugeze in custody for eleven months, however, prosecutors dropped the

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of the Statute of the International Criminal Court of 17 July 1998 (The Rome Statute) in Norwegian Law] (Norsk Lovtidend [NL] 2005:26) (Nor.).

131. Laki Kansainvälisen rikostuomioistuimen Rooman perussäännön lainsäädännön alaan kuuluvien määräysten voimaansaattamisesta ja perussäännön soveltamisesta [Act on Amendment of the Penal Code ICC Crimes Act], no. 1285/2000, Dec. 28, 2000 (Fin.) (implementing legislation in Finland); Lög um framkvæmd Rómarsamþykktar um Alþjóðlega sakamáladómstólinn [The Application of the Rome Statute of the International Criminal Court], no. 43/2001, July 1, 2002 (Ice.) (implementing legislation in Iceland).

132. Peter Vinthagen Simpson, *Amnesty: 'Sweden [L]ax on [W]ar [C]riminals'*, LOCAL, Feb. 3, 2009, <http://www.thelocal.se/17336/20090203/>; see also Lag om samarbete med Internationella brottmålsdomstolen [Cooperation with the International Criminal Court Act] (Svensk författningssamling [SFS] 2002:329) (Swed.), translation available at <http://www.sweden.gov.se/content/1/c6/03/07/72/eb01326c.pdf> (Sweden's proposed legislation).

133. Lov om ændring af straffeloven og forskellige andre love, 17 juni 2008 [Law Amending the Criminal Code and Various Other Laws, No. 490 of June 17, 2008] (Den.), available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=117482> (last visited June 21, 2009).

134. BHUTA & SCHURR, *supra* note 13, at 46.

135. REDRESS, *supra* note 124, at 14.

136. *Id.*

137. See, e.g., Statsadvokaten—THE ASSIGNMENT, <http://www.sico.ankl.dk/page26.aspx> (last visited May 19, 2009).

case due to a lack of evidence.<sup>138</sup> Although not required by the relevant provisions of the Penal Code, the voluntary presence of a suspect in Denmark has been considered a procedural prerequisite for investigation and several investigations have been discontinued once the suspect left the State.<sup>139</sup>

As many suspects fleeing investigation in Denmark relocated to Norway, the Norwegian authorities responded by establishing an international criminal investigation unit within their national investigation service in September 2005.<sup>140</sup> Prior to the enactment of legislation incorporating the Rome Statute in 2008,<sup>141</sup> jurisdiction over international crimes by non-nationals overseas was authorized only under the terms of analogous domestic crimes such as murder,<sup>142</sup> and was limited to situations in which the accused was present in the State.<sup>143</sup> Under the former statute, the general prosecutor maintained discretion to indict only in cases where prosecution was in the public interest.<sup>144</sup> In an unprecedented move in 2006, Norway requested that the ICTR transfer the case of Michel Bagargaza to Norwegian courts.<sup>145</sup> The ICTR declined, deciding that Norway's limited jurisdiction over crimes of genocide was inadequate because genocide is characterized as an ordinary crime under Norwegian law.<sup>146</sup>

In the first case brought under the new legislation, an Oslo District Court convicted Misrad Repak, a Norwegian citizen who came to Norway in 1993 as an asylum seeker from the former Yugoslavia. In maintaining jurisdiction over crimes occurring before the new legislation was enacted, the court convicted Repak on eleven counts of "unlawful deprivation of liberty" for crimes against Serb civilians and

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138. *Genocide Suspects Held in Denmark*, EU UPDATE ON INT'L CRIMES, REDRESS & FIDH, July 2007, at 8, available at <http://www.redress.org/publications/EU%20Report%20Vol%203%20July%202007.pdf> (last visited June 21, 2009).

139. N.Y. CITY BAR (NYCBAR), LIABILITY FOR VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW 20 (2006) available at [www.nycbar.org/VanceCenter/PDF/CELS\\_sample2.DOC](http://www.nycbar.org/VanceCenter/PDF/CELS_sample2.DOC) (last visited June 21, 2009) ("Universal jurisdiction over treaty offences is not dependent on any request by another State because it is sufficient that the foreign suspect is voluntarily present in Denmark.").

140. BHUTA & SCHURR, *supra* note 13, at 80.

141. § 5 LOV OM STRAFF (STRAFFELOVEN) [PENAL CODE] (NL 2005:28) (Nor.).

142. § 12.4 ALMINDELIG BORGERLIG STRAFFELOV [CIVIL PENAL CODE] (NL 1902:286) (Nor.), available at <http://www.lovdato.no/all/hl-19020522-010.html>; see also BHUTA & SCHURR, *supra* note 13, at 80.

143. § 5(4) LOV OM STRAFF (STRAFFELOVEN) [PENAL CODE] (NL 2005:28) (Nor.).

144. *Id.* § 5(6).

145. AMNESTY INT'L, NO SAFE HAVEN SERIES NO. 1, SWEDEN: END IMPUNITY THROUGH UNIVERSAL JURISDICTION 43 (2009) [hereinafter AMNESTY INT'L, SWEDEN: END IMPUNITY], available at <http://www.amnesty.org/en/library/asset/EUR42/001/2009/en/35c14013-ec8-11dd-b1bd-6368f1b61c3f/eur420012009en.pdf> (last visited June 21, 2009).

146. *Id.*

sentenced him to five years imprisonment.<sup>147</sup> At least two other individuals have been detained in Norwegian custody for war crimes committed in the former Yugoslavia.<sup>148</sup> A number of suspects have been identified in Norway and, as of 2006, there were ongoing investigations in more than seventy cases involving crimes in Iraq, Afghanistan, Rwanda, and the former Yugoslavia.<sup>149</sup>

With Sweden's legislation to implement the Rome Statute still pending, universal jurisdiction is authorized under current Swedish legislation exclusively for an enumerated list of crimes, including war crimes.<sup>150</sup> Jurisdiction under the Swedish law is expansive and does not require the presence of the accused in Sweden. Genocide and crimes against humanity are punishable under another section in the Swedish Penal Code,<sup>151</sup> which, in contrast, does require the presence of the accused in Sweden.<sup>152</sup>

In January 2006, a complaint charging Russian Lieutenant General Vjatjeslav Sucharev with war crimes was filed while Sucharev was in Sweden for joint Swedish and Russian military training.<sup>153</sup> Despite the apparent authority to invoke universal jurisdiction when the accused was not present in Sweden, the case was dismissed based on diplomatic immunity during Sucharev's visit.<sup>154</sup> The prosecutor also predicted that the government would not grant permission to move forward with the case based on foreign policy considerations.<sup>155</sup>

The first successful war crimes trial in Sweden was that of Swedish citizen Jackie Arklöv, who was convicted for wrongful imprisonment, torture, and assault of Bosnian Muslim prisoners of war and civilians.<sup>156</sup>

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147. Summary of the Judgment for the Case of Pub. Prosecuting Auth. v. Misrad Repak ¶¶ 258, 269 (Dec. 2, 2008), [http://www.icrc.org/IHL-NAT.NSF/46707c419d6bdfa24125673e00508145/45061a413067e31cc125755c004a5773/\\$FILE/Public%20Prosecutor%20ov.%20Misrad%20Repak.PDF](http://www.icrc.org/IHL-NAT.NSF/46707c419d6bdfa24125673e00508145/45061a413067e31cc125755c004a5773/$FILE/Public%20Prosecutor%20ov.%20Misrad%20Repak.PDF) (last visited June 21, 2009).

148. *Id.*

149. BHUTA & SCHURR, *supra* note 13, at 80.

150. BROTTSBALKEN [BRB] [CRIMINAL CODE] 2:3 (Swed.).

151. *Id.* 2:2.3.

152. *Id.* 2:2.

153. *Developments in Europe in the Field of International Criminal Justice*, EU UPDATE ON INT'L CRIMES, REDRESS, June 2006, at 8 (2006), available at <http://www.redress.org/publications/EU%20Report%20vol%201%20June%202006%201%20.pdf> (last visited June 21, 2009).

154. *Id.*

155. Bilaga till beslut att inte inleda förundersökning [Annex to the Decision Not to Initiate an Investigation] (Jan. 1, 2006), available at <http://www.ostgruppen.se/Dokument/Sucharev/forundersokning.pdf> (last visited June 21, 2009) (explaining that deciding whether to prosecute was a matter of serious assessment of international law and foreign policy, and that the government had yet to make a preliminary ruling whether prosecution could go ahead).

156. *Sweden Convicts Ex-Mercenary for Bosnian War Crimes*, REUTERS, Dec. 18, 2006, <http://www.alertnet.org/thenews/newsdesk/L18142920.htm> (last visited June 21, 2009); see also *Prosecutor v. Jackie Arklöv*, Tingsrätt [TR] [District Court] 2006-12-18 (Swed.), avail-

The court articulated that jurisdiction was based on both active personality principles over Arklöv as a citizen and the accusation of crimes subject to universal jurisdiction.<sup>157</sup> Sweden has been criticized as a “safe haven” for war criminals;<sup>158</sup> however Sweden’s National Investigation Department and the newly formed War Crimes Commission claim to have recently intensified investigative efforts.<sup>159</sup>

### G. Germany

The German Code of Crimes against International Law (CCIL) came into force on June 30, 2002 and prohibits the core crimes of the Rome Statute under domestic law.<sup>160</sup> Prior to the new legislation, the German Criminal Code authorized universal jurisdiction over the crime of genocide<sup>161</sup> and those international crimes that Germany had treaty obligations to prosecute. Courts interpreted these provisions, however, to limit jurisdiction to situations in which a suspect was present in Germany or where there is another “legitimizing link” between the crime and Germany.<sup>162</sup>

As a result of a large number of refugees from the former Yugoslavia landing in Germany, approximately 100 cases against Bosnian Serbs were investigated and prosecuted between 1993 and 2003.<sup>163</sup> The most important case resulted in the sentencing of Nikola Jorgić, a Bosnian Serb, to life imprisonment on many counts, including eleven counts of genocide, by the Dusseldorf High District Court on September 26, 1997. The ruling was affirmed by the Federal Court of

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able at [http://www2.amnesty.se/icc.nsf/ffc3926fc473d909c12570b90033f05f7225d6ef3d85f9acc12572bc0051cd1c/\\$FILE/Stockholms%20tingsr%C3%A4tt%20dom%20den%2018%20december%202006%20Jackie%20Arkl%C3%B6v.pdf](http://www2.amnesty.se/icc.nsf/ffc3926fc473d909c12570b90033f05f7225d6ef3d85f9acc12572bc0051cd1c/$FILE/Stockholms%20tingsr%C3%A4tt%20dom%20den%2018%20december%202006%20Jackie%20Arkl%C3%B6v.pdf) (last visited May 29, 2009).

157. AMNESTY INT’L, SWEDEN: END IMPUNITY, *supra* note 145, at 3.

158. *Id.* at 7.

159. *War Criminals Face Fresh Swedish Probes*, LOCAL, July 4, 2008, <http://www.thelocal.se/12834/20080704/> (last visited June 21, 2009).

160. VÖLKERSTRAFGESETZBUCH [VStGB] [THE CODE OF CRIMES AGAINST INTERNATIONAL LAW (CCIL)], June 26, 2002, BGBl. I 2254, *translation available at* <http://www.bmj.bund.de/media/archive/408.pdf#search=“vstgb”> (last visited June 21, 2009); *see also* AMNESTY INT’L, NO SAFE HAVEN SERIES NO. 3, GERMANY: END IMPUNITY THROUGH UNIVERSAL JURISDICTION (2008), *available at* <http://www.amnesty.org/en/library/info/EUR23/003/2008/en> (last visited June 21, 2009).

161. The former Section 6(1) of the German Criminal Code authorized universal jurisdiction over genocide, which is defined in Section 220a. STRAFGESETZBUCH [StGB] [PENAL CODE] Nov. 13, 1998, Bundesgesetzblatt, Teil I [BGBl. I] at 945, § 6(1) (repealed), *translation available at* Criminal Code (Strafgesetzbuch, StGB), <http://www.iuscomp.org/gla/statutes/StGB.htm> (last visited May 29, 2009); *id.* § 220a. Section 6(9) of the German Criminal Code authorizes universal jurisdiction over crimes identified in treaties providing for or requiring universal jurisdiction, which would include crimes such as piracy, torture, and grave breaches of the Geneva Conventions. *Id.* § 6(9).

162. *See, e.g.*, Kaleck, *supra* note 15, at 99.

163. BHUTA & SCHURR, *supra* note 13, at 66.

Justice,<sup>164</sup> the Constitutional Court,<sup>165</sup> and the European Court of Human Rights.<sup>166</sup>

A collaboration of NGOs called the “Coalition Against Impunity” has advocated for German criminal investigation into and prosecution of the victimization Germans (and those of German origin) during the 1976–1983 dictatorship in Argentina.<sup>167</sup> Since 1998, the prosecutor in Nürnberg has brought a number of cases based on passive personality principles against former members of the Argentinean military for crimes committed against German citizens during the dictatorship, and based on active peronality principles against a manager at Mercedes Benz based on allegations against the corporation for their involvement in the disappearances of trade unionists.<sup>168</sup> The case of German student Elisabeth Käsemann, murdered by the Argentine military in 1977, drew particular media attention and raised public awareness of the prosecutions in Germany.<sup>169</sup>

In November 2003, the district court issued arrest warrants for five suspects, including former Argentinean State President Rafael Videla, for creating a terror organization.<sup>170</sup> Although Spain, France and Italy had all initiated investigations of Videla and others, the German government was the only one to demand that Videla be extradited, despite ongoing trials in Argentina. The decision to demand extradition was based on the idea that ongoing European attempts to try the Argentinean military offi-

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164. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 30, 1999, 1999 *Neue Zeitschrift fuer Strafrecht* 396 (F.R.G.).

165. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 12, 2000, 2001 *JURISTENZEITUNG* 975, 980 (discussing that genocide, as the most serious violation of human rights, is the classic case for application of universal jurisdiction).

166. *Jorgic v. Germany*, App. No. 74613/01 (ECtHR, July 12, 2007), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=jorgic%20%7C%20germany&sessionid=23675151&skin=hudoc-en>.

167. Kaleck, *supra* note 15, at 100; see also Coalition Against Impunity, [www.menschenrechte.org/koalition](http://www.menschenrechte.org/koalition) (last visited June 21, 2009).

168. Kaleck, *supra* note 15, at 100–01; see Gaby Weber, *Industry and Human Rights*, LE MONDE DIPLOMATIQUE, SOUTHERN CONE EDITION, Dec. 2000, *unofficial translation available at* <http://www.labournet.de/branchen/auto/dc/ar/english.html> (last visited June 21, 2009); Gaby Weber, *Argentina under the dictatorship: The “disappeared” of Mercedes Benz*, BRECHA, Sept. 11 1999, *unofficial translation available at* <http://www.labournet.net/world/9911/benz1.html> (last visited June 21, 2009); see also David Kravetes, *The suit is presented in the USA. Victims say Mercedes-Benz complicit in Argentine dirty war*, ASSOCIATED PRESS, Jan. 14, 2004, available at <http://www.labournet.de/branchen/auto/dc/ar/suit.html> (last visited June 21, 009).

169. See Koalition gegen Straflosigkeit, <http://www.menschenrechte.org/Menschenrechte/Koalition.htm> (last visited June 21, 2009) (providing information and documents related to the case of Käsemann’s murder).

170. Kaleck, *supra* note 15, at 101; see also Koalition gegen Straflosigkeit, *supra* note 169 (providing information about the Nuremberg District Court (Amtsgericht Nürnberg) Arrest Warrant against Jorge Rafael Videla and others from November 28, 2003, 57 Gs 13320-13322/03).

cers would support similar efforts in Argentina.<sup>171</sup> German authorities made a different decision in the case of Pinochet where, after a brief investigation following Pinochet's arrest in London, they determined that the criminal prosecutions underway in Chile were sufficient.<sup>172</sup>

Under the CCIL, German courts are authorized to exercise universal jurisdiction over crimes against humanity, genocide, and war crimes.<sup>173</sup> Nevertheless, the legislation reserves the full discretion of the office of the federal prosecutor over investigations and prosecutions.<sup>174</sup> Complaints seeking to challenge this discretion must be made through an appeal procedure before the higher district courts.<sup>175</sup>

Many complaints have been declined through the exercise of prosecutorial discretion, including cases against former Chinese President Jiang Zemin (2003), former Uzbek Minister of Interior Zokirjon Almatov (2005), and the infamous cases against U.S. Secretary of Defense Donald Rumsfeld and others (2004 and 2006).<sup>176</sup> While the CCIL does not expressly require the presence of the accused or a legitimizing link, when the CCIL is read in conjunction with Section 153f of the Criminal Procedural Code, the prosecutor can refrain from investigating when the suspect's presence cannot be confirmed or anticipated. The suspect's presence or anticipated presence, however,

171. See Kaleck, *supra* note 15, at 101–02.

172. *Id.* at 102.

173. VStGB [CCIL], June 26, 2002, Bundesgesetzblatt [BGBl] 2254, § 1, translation available at: [http://www.bmj.bund.de/media/archive/408.pdf#search="vstgb"](http://www.bmj.bund.de/media/archive/408.pdf#search=) (last visited June 21, 2009) (“This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and there exists no relation to Germany.”). The offenses designated under the CCIL are genocide, *id.* § 6, crimes against humanity, *id.* § 7, and war crimes, *id.* §§ 8–12.

174. See STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE] Sept. 12, 1950, Bundesgesetzblatt [BGBl] 1074, § 153f; see also Kai Ambos, *Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES, *supra* note 7, at 55, 67.

175. See Oberlandesgericht Stuttgart [OLG] [High District Court Stuttgart] Sept. 13, 2005, 2006 Neue Zeitschrift für Strafrecht 117 (F.R.G.), available at <http://www.diefirma.net/index.php?id=84,171,0,0,1,0> (last visited June 21, 2009) (follow “OLG\_Stuttgart\_Bv13092005.pdf” hyperlink); see also Denis Basak, *Abu Ghreib, das Pentagon und die deutsche Justiz. Zur Zuständigkeit der deutschen Strafverfolgungsbehörden für Kriegsverbrechen im Irak nach dem Inkrafttreten des VStGB*, 18 HUMANITÄRES VÖLKERRECHT-INFORMATIONSSCHRIFTEN [J. INT'L PEACE & ARMED CONFLICT] 85 (2005); Andreas Fischer-Lescano, *Introductory Note to Decision of the General Federal Prosecutor: Center for Constitutional Rights v. Rumsfeld*, 45 I.L.M. 115 (2006); Florian Jessberger, *Universality, Complementarity, and the Duty to Prosecute Under International Law in Germany*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES, *supra* note 7, at 214.

176. See Kaleck, *supra* note 15, at 103–10 (discussing the Rumsfeld, Falun Gong, and Almatov cases).

makes investigation permissible and more probable, provided that no other jurisdiction is carrying out a genuine investigation of the crimes.<sup>177</sup>

In the 2004 complaint by Iraqi torture victims against Donald Rumsfeld, the prosecutor, who was under immense pressure from the U.S. government, dismissed the case on the basis of the principle of subsidiarity.<sup>178</sup> Under this principle, the prosecutor asserted, Germany had no jurisdiction once investigation had begun in a more appropriate venue, such as a State having territorial or active or passive personality jurisdiction, the ICC, or another competent international tribunal.<sup>179</sup> Despite evidence that Rumsfeld was not under U.S. investigation, the prosecutor found that U.S. authorities were investigating the “complex” as a whole and the Higher Regional Court in Stuttgart dismissed the complainants’ appeal as inadmissible.<sup>180</sup>

In exercising discretion in the 2003 complaints against former Chinese President Jiang Zemin for crimes against Falun Gong practitioners, the Federal Prosecutor made an expansive application of state immunity by applying it to former, as well as current, heads of state and foreign ministers.<sup>181</sup>

Complaints charging Uzbekistan’s Minister of Interior, Zokirjon Almatov, with crimes against humanity and torture (relating to the 2005 massacre in the city of Andijan) were similarly dismissed in 2005; and further complaints against the head of the Uzbek secret service, Rustan Inojatov, were dismissed in 2008.<sup>182</sup> Although Almatov initially was present in Germany, prosecutors failed to begin proceedings before he left the country then argued that an investigation would be unsuccessful since he was not expected to return. The Federal Prosecutor’s exercise of discretion with respect to Inojatov was justified on the grounds of Section 20 of the Judicial Service Act, which states that judicial proceedings

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177. Ambos, *supra* note 174, at 67.

178. See Letter and Memorandum from the Federal Prosecutor to Author (Feb. 10, 2005) reprinted in 2005 JURISTENZEITUNG 311 (regarding the decision of the Federal Prosecutor in the case against Donald Rumsfeld and others), translation available at <http://www.brusselstribunal.org/pdf/RumsfeldGermany.pdf> (last visited May 29, 2009).

179. *Id.*

180. *Id.*

181. See BHUTA & SCHURR, *supra* note 13, at 64 (“The prosecutor adopted an expansive reading of the ruling of the International Court of Justice in the case of the Democratic Republic of the Congo v. Belgium (“Arrest Warrant” case) as conferring immunity on former as well as current heads of state/government and foreign ministers.”); see also Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14), available at <http://www.icj-cij.org/docket/files/121/8126.pdf> (last visited June 21, 2009).

182. See Kaleck, *supra* note 15, at 109; see also ECCHR, *Criminal Complaint Against Zakir Almatov*, [http://ecchr.eu/altmatov\\_en.html](http://ecchr.eu/altmatov_en.html) (last visited May 29, 2009). *unofficial translation*

against state representatives and their delegates are prohibited when such delegates are invited by state authorities.<sup>183</sup>

In a second case brought against Rumsfeld in 2006, complainants added U.S. Attorney General Alberto Gonzales, John Yoo, and other attorneys to the list of the accused as the alleged legal “architects” of the torture program.<sup>184</sup> The new case detailed new key witness testimony and additional victims and further demonstrated the lack of investigations underway in the United States or elsewhere.<sup>185</sup> The German prosecutor dismissed the case in 2007, this time claiming, *inter alia*, that there was not a reasonable likelihood of convicting the suspect in Germany.<sup>186</sup>

Although the German CCIL is often regarded as a model code for the implementation of the Rome Statute, Germany’s approach towards international investigations and the possibility of interviewing known witnesses in neighboring European countries is limited when compared to some neighboring European States.

#### H. Austria

In 2008, the Chechnyan Vice President Ramzan Kadyrov planned to attend matches of the Russian football team during the European Championships in Austria.<sup>187</sup> Based on the testimony of a torture victim who was granted political refugee status in Austria, a complaint alleging violation of the CAT, which has been incorporated into Austrian criminal law,<sup>188</sup> was submitted to Austrian prosecutors.<sup>189</sup> The prosecutors first refused to receive the complaint, then refused to open an investigation on a weekend and later, without hearing the witness or conducting further investigation, refused to issue an arrest warrant against Kadyrov. The

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183. See *id.* (providing notes on the Inojatow case).

184. See RATNER, *THE TRIAL*, *supra* note 8, at 21–39 (providing a short summary of the allegations); ECCHR, *The Case Against Rumsfeld, Gonzales and Others*, *supra* note 15 (providing an unofficial translation of parts of the complaint against Rumsfeld); see also Scott Horton, *Military Necessity, Torture, and the Criminality of Lawyers*, in *INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES*, *supra* note 7, at 169, 176–83; Michael Ratner, *Litigating Guantanamo*, in *INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES*, *supra* note 7, at 201, 203–11.

185. See sources cited *supra* note 184.

186. See The Decision of the Federal Prosecutor’s Office to Dismiss the Complaint Against Rumsfeld et al. (Apr. 5, 2007), available at <http://ecchr.eu/rumsfeld.html> (follow “prosecutordecision.pdf” hyperlink) (unofficial translation) (last visited June 21, 2009).

187. See ECCHR, *Kadyrov*, *supra* note 15.

188. STRAFGESETZBUCH [STGB] [PENAL CODE] Dokumentation zum Strafgesetzbuch 1974, as amended, arts. 64, 64.6 (Austria) (providing for prosecution of punishable actions that Austria is obligated—independently of the penal code—to prosecute). Such an independent obligation arises, for example, under the CAT and the Genocide Conventions.

189. See ECCHR, *Kadyrov*, *supra* note 15.

official explanation given was lack of evidence.<sup>190</sup> The case is still pending although the plaintiff was murdered in Vienna in January 2009.<sup>191</sup>

### I. Spain

Many of the past and present exercises of universal jurisdiction in Europe have occurred in Spain—from Pinochet to ongoing and hugely complex investigations of more than a dozen human rights violations in different countries. Universal jurisdiction practice in Spain derives from a combination of international treaty obligations,<sup>192</sup> as well as national substantive and procedural rules. Article 23.4 of the Organic Law for the Judiciary 6/1985 (LOPJ) authorizes universal jurisdiction for enumerated crimes, including genocide, terrorism, and any offense under international treaty that Spain is obligated to prosecute.<sup>193</sup> The LOPJ treats these crimes as judiciable regardless of any connection to the Spanish State.<sup>194</sup> Universal jurisdiction is authorized for crimes against humanity under the Spanish Criminal Code.<sup>195</sup> Spanish courts have developed significant and complex case law related to universal jurisdiction practice. With its expansive legislation and independent judiciary, Spain has perhaps become the most welcoming forum for those seeking accountability for international crimes.

The LOPJ does not require a suspect's voluntary presence in Spain,<sup>196</sup> although trials *in absentia* are generally prohibited.<sup>197</sup> The Spanish judicial authorities have issued several international arrest warrants but only a few extradition requests, because the Spanish government sometimes objects to issuance of such a request.<sup>198</sup> In any case, a trial may start only if the suspect comes voluntarily or is successfully extradited to Spain.<sup>199</sup> While judicial police are authorized to investigate international crimes under the direction of an investigative judge, their

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190. *Id.*

191. *Id.*

192. Spain is a party to the Geneva Conventions and its First Additional Protocols, the CAT, the Genocide Convention, and the Rome Statute.

193. LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] [ORGANIC LAW OF THE JUDICIAL POWER] 6/1985, de 1 de julio, as amended by LEY ORGÁNICA 111/1999, art. 23.4 (a), (g) (Spain).

194. *Id.*

195. CÓDIGO PENAL [C.P.] [PENAL CODE] 10/1995, de 23 de noviembre, art. 607(2) (Spain).

196. A Spanish case concerning genocide in Guatemala upheld the rule that Spain does not require the presence of the accused in order to investigate allegations. STC, Sept. 26, 2005 (S.T.C. No. 237) (Spain).

197. See BHUTA & SCHURR, *supra* note 13, at 87.

198. *Id.*

199. *Id.*

role has been limited.<sup>200</sup> Unlike some European counterparts, no significant investigations have been undertaken abroad and, in most cases, NGOs have driven the efforts to locate evidence and witnesses.

The national prosecution office, headed by the government-appointed Attorney General, exercises discretion over which cases are prosecuted, and as such its decisions are ultimately tied to the will of the national government.<sup>201</sup> However, proceedings before Spanish courts may also be initiated by an investigating judge *ex officio* after a preliminary analysis of the reported facts, regardless of whether criminal notice was first obtained from the police, prosecutor, or by a formal complaint filed by a private individual.<sup>202</sup> Private complaints can be made by victims or by any Spanish citizen acting by way of popular accusation.<sup>203</sup> The practice of popular accusation has played a critical role bringing human rights cases to court, although the national prosecution office commonly opposes these cases.<sup>204</sup>

The Pinochet case marked the beginning of an unprecedented exercise of jurisdiction in Spain. The case was opened in the context of other investigations focused on members of the Argentine military junta for crimes of genocide, terrorism, and other acts against Spanish victims in the “dirty war” between 1976–1983.<sup>205</sup> The case was assigned to Judge Baltazar Garzón in the National Court, who eventually ordered indictments of nearly 100 officers.<sup>206</sup> Garzón’s investigations led him to examine the U.S.-led Operation Condor, in which Pinochet was implicated and for which Garzón issued the famous arrest warrant in 1998.<sup>207</sup>

Spanish procedural law requires that an accused be present for the oral phase of any criminal trial.<sup>208</sup> Thus, while numerous indictments were issued, only two trials were ever opened in these cases. The trial against former Argentine marine officer Adolfo Scilingo, who was detained while traveling in Madrid, ultimately ended in his conviction by the National Court for crimes against humanity and torture.<sup>209</sup> The

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200. *Id.*

201. *See id.*

202. *See id.* at 89.

203. Only Spanish citizens are entitled to file a popular accusation. *See* LEY DE ENJUICIAMIENTO CRIMINAL [L.E. CRIM.] [LAW OF CRIMINAL PROSECUTION] arts. 101, 270 (Spain).

204. *See, e.g.,* BHUTA & SCHURR, *supra* note 13, at 89.

205. *See Profile: Spain’s Most Famous Investigator*, BBC NEWS, Aug. 23 2002, <http://news.bbc.co.uk/2/hi/europe/2211769.stm> (last visited June 21, 2009).

206. *Argentine Charged With Genocide*, BBC NEWS, Sept. 1, 2000, <http://news.bbc.co.uk/2/hi/americas/907017.stm> (last visited June 21, 2009).

207. *Profile: Spain’s Most Famous Investigator*, *supra* note 205.

208. *See* BHUTA & SCHURR, *supra* note 13, at 87.

209. *See ‘Dirty War’ Officer Found Guilty*, BBC NEWS, Aug. 19, 2005, <http://news.bbc.co.uk/2/hi/europe/4460871.stm> (last visited June 21, 2009).

second was the trial against another former Argentine marine officer, Ricardo Cavallo, which began after his successful extradition from Mexico in 2003; however, in light of a request from Argentina and approval by Mexican authorities, Cavallo was ultimately extradited from Spain in 2008 to stand trial in Argentina.<sup>210</sup>

Following Pinochet's arrest, a complaint initiated by Nobel Peace Prize winner Rigoberta Menchú was filed in 1999 alleging genocide, torture, terrorism, summary execution, and unlawful detention perpetrated against Guatemala's Mayan Indians and their supporters by a number of high-ranking officials.<sup>211</sup> Although a number of victims were Spanish or had died in Spanish territory, Trial Judge Guillermo Ruíz Polanco held that an investigation could be opened based on the nature of the crimes alone.<sup>212</sup> On appeal, the full National Court held that, at least for the time being, the Spanish courts had no jurisdiction due to the principle of subsidiarity.<sup>213</sup> Next, the Supreme Court determined that a "connecting nexus" between Spain and the crimes was required as a result of the subsidiarity principle.<sup>214</sup> However, in 2005, the Spanish Constitutional Court reversed this decision in a groundbreaking decision, holding that it was "debatable" whether a connecting nexus requirement could be found in "customary international law."<sup>215</sup> In finding that the exercise of universal jurisdiction in this case did not require any link to Spain, the Constitutional Court asserted that the nature of the crimes themselves—viewed as crimes against the international community—authorize the application of universal jurisdiction.<sup>216</sup> In reversing the subsidiarity principle, the court held that the nature of universal jurisdiction was "concurrent" and, as such, was limited only by the principle of *res judicata*.<sup>217</sup> Furthermore, the Constitutional Court held that extradition to countries applying universal jurisdiction could properly be used to hold human rights violators accountable.<sup>218</sup> Based on this decision and further investigations in 2006, Judge Santiago Pedraz issued arrest warrants

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210. See Trial Watch, Ricardo Miguel Cavallo, [http://www.trial-ch.org/en/trial-watch/profile/db/facts/ricardo-miguel\\_cavallo\\_48.html](http://www.trial-ch.org/en/trial-watch/profile/db/facts/ricardo-miguel_cavallo_48.html) (last visited June 2, 2009).

211. Roht-Arriaza, *The Pinochet Effect*, *supra* note 14, at 117.

212. *Id.*; see also Audiencia Nacional, Madrid, Diligencias Previas 331/99, Mar. 27, 2000 (Spain), available at [www.apdhe.org/InformacionDestacada/documentos/AutoAN27marzo00Guatemala.pdf](http://www.apdhe.org/InformacionDestacada/documentos/AutoAN27marzo00Guatemala.pdf) (last visited June 21, 2009).

213. See Roht-Arriaza, *The Pinochet Effect*, *supra* note 14, at 117.

214. See *id.* at 120–21.

215. Naomi Roht-Arriaza, *Guatemala Genocide Case, Judgment No. STC 237/2005*, 100 AM. J. INT'L L. 207, 207 (2006); see also STC, Sept. 26, 2005 (S.T.C. No. 237) (Spain), available at <http://www.tribunalconstitucional.es/jurisprudencia/Stc2005/STC2005-237.html> (last visited June 21, 2009) [hereinafter Naomi Roht-Arriaza, *Guatemala Genocide Case*].

216. Roht-Arriaza, *Guatemala Genocide Case*, *supra* note 215, at 211.

217. *Id.* at 210.

218. Roht-Arriaza, *The Pinochet Effect*, *supra* note 14, at 121.

against several suspects, including former Presidents Rios Montt and Oscar Mejía Victores and former Minister of Defense Aníbal Guevara.<sup>219</sup> Though subsequent extradition requests prompted Guatemalan authorities to arrest Mejía and others, the charges against them were ultimately dismissed by the Guatemalan Constitutional Court in December 2007.<sup>220</sup> The court stated that Spain's exercise of universal jurisdiction was unacceptable and an attack on Guatemala's sovereignty. Despite this highly disputed ruling, Spanish and Guatemalan judges heard a great deal of testimony and undertook thorough investigations before the dismissal.<sup>221</sup>

A number of investigations are currently ongoing, including into allegations of genocide by the CIA extraordinary rendition program, genocide in Tibet,<sup>222</sup> massacres in El Salvador, terrorism and ethnic cleansing in Rwanda and the Democratic Republic of the Congo, and the 2002 bombing in Gaza City, for which Israeli military officials have been indicted.<sup>223</sup> Many other cases have been dismissed and a review of judgments shows the lack of consistency in the Spanish courts.<sup>224</sup>

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219. Audencia Nacional, Diligencias Pevias 331/1999-10, (July 7, 2006) (Spain).

220. *Documento–Guatemala : Fallo Inconsistente de la Corte de Constitucionalidad Rechaza Extradiciones Solicitadas por España*, AMNESTY INT'L, Dec. 21 2007, [www.amnesty.org/es/library/asset/AMR34/026/2007/es/0800e0d0-afec-11dc-b001-5f9481a8353e/amr340262007spa.html](http://www.amnesty.org/es/library/asset/AMR34/026/2007/es/0800e0d0-afec-11dc-b001-5f9481a8353e/amr340262007spa.html) (last visited June 21, 2009).

221. For a narrative of the cases, see Naomi Roht-Arriaza, *Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala*, 9 CHI. J. INT'L L. 79–106 (2008).

222. On May 5, 2009, shortly before this Essay was to go to print, Spanish investigative judge Santiago Pedraz formally requested permission from the Chinese authorities to travel to China and question eight suspects, including the present ministers for defense and state security. See *Spanish Judge to Quiz China Officials over Tibet*, AFP, May 5, 2009, <http://www.google.com/hostednews/afp/article/ALeqM5gZMBwNMUTGCOok-ZJMtRbHJ4QEsA>.

223. See BHUTA & SCHURR, *supra* note 13, at 86–87; Al Goodman, *Spain Court in 2002 Israel 'War Crime' Probe*, CNN, Jan. 29, 2009, <http://www.cnn.com/2009/WORLD/europe/01/29/spain.israel.gaza.lawsuit/index.html>; David Rennie, *Spain Investigates CIA 'Ghost Flights'*, TELEGRAPH, Nov. 16, 2005, <http://www.telegraph.co.uk/news/worldnews/europe/spain/1503137/Spain-investigates-CIA-ghost-flights.html>. On April 29, 2009, shortly before this Essay went to print, an investigative judge opened an investigation into the administration of former U.S. President George W. Bush over alleged torture of terror suspects at Guantanamo Bay. See Audencia Nacional, Madrid, Diligencias Previas 150/09--N, (Apr. 17, 2009) (Spain).

224. See Roht-Arriaza, *The Pinochet Effect*, *supra* note 14, at 122–23. Just before this article went to print, the investigations in the Gaza case and others generated harsh criticism within and outside Spain, and appeared to have started a discussion about revising universal jurisdiction laws, which has the potential to limit the scope of their use. See, e.g., *Dívar, sobre la jurisdicción universal: 'No somos los gendarmes del mundo'*, EL MUNDO, May 4, 2009, <http://www.elmundo.es/elmundo/2009/05/04/espana/1241452393.html> (last visited June 21, 2009); Herb Keinon, *Israel: Spanish Legal System Hijacked*, JERUSALEM POST, May 4, 2009, <http://www.jpost.com/servlet/Satellite?cid=1239710859460&pagename=JPost/JPostArticle/ShowFull> (last visited June 21, 2009).

### J. Summary

This survey illustrates that in more than a dozen cases, perpetrators from Serbia, Bosnia, Argentina, Rwanda, Mauretania, Afghanistan, Uganda, and the Democratic Republic of the Congo had been convicted based on the principle of universal jurisdiction in Norway, Denmark, Germany, the United Kingdom, Belgium, the Netherlands, France, and Spain. Many more investigations have been undertaken or are pending against suspects from China, Russia, the United States, Uzbekistan, and Israel. None of the procedures against citizens of these latter countries have led to an arrest warrant, indictment, or conviction.<sup>225</sup>

## II. PROBLEMS AND OBSTACLES

European exercise of universal jurisdiction over the past ten years reveals a number of problems and obstacles in its implementation, some inherent to universal jurisdiction cases, some not. First, there is a lack of appropriate implementing legislation in domestic European and European Union (E.U.) legislation outlining when universal jurisdiction may be exercised and defining which crimes should be prosecuted. Second, the legal regulations themselves, and the interpretation of the presence requirement and the principle of complementarity by law enforcement authorities,<sup>226</sup> may still inhibit universal jurisdiction prosecutions. Third, technical and organizational problems may also set back universal jurisdiction prosecutions. Fourth, the exercise of prosecutorial discretion and a broad interpretation of the principle of immunity for political actors prevent some of these prosecutions from going forward.

### A. *Lack of Appropriate International, European Union, and Domestic Legislation*

Any exercise of universal jurisdiction that is consistent with the rule of law is dependent on the existence of appropriate legislation that incorporates international customary law and treaty law (such as the CPPCG, the Geneva Conventions, the CAT, and the Rome Statute) into domestic law.<sup>227</sup> As described in the previous Section, European countries have implemented international legal obligations to investigate and prosecute international crimes in different manners.<sup>228</sup> Whereas some

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225. See the list in *AU-EU Expert Report*, *supra* note 3, at 24–27.

226. See *infra* Part III.

227. See *AU-EU Expert Report*, *supra* note 3, at 9.

228. See *id.* at 19–20; see also REDRESS & FIDH, LEGAL REMEDIES FOR VICTIMS OF “INTERNATIONAL CRIMES”: FOSTERING AN EU APPROACH TO EXTRATERRITORIAL JURISDIC-

countries apply ordinary criminal law, others refer directly to international law provisions in their domestic legislation. These different methods have led to criminalization gaps and to problems with the principles of legality and *nulla poena sine lege*. Therefore, while specific codes of crimes and/or legislation containing specific definitions of international crimes that track the Rome Statute and corresponding procedural provisions are desirable, they remain the exception rather than the rule.<sup>229</sup>

A coherent, transnational strategy for ending impunity and eliminating safe havens on European soil has yet to be developed. As criminal justice falls within the third pillar of justice and home affairs of the European Union, the Member States are still competent to promulgate domestic criminal justice legislation.<sup>230</sup> The most promising opportunity to standardize laws governing prosecution of international crimes is through framework decisions, which were used to standardize post-9/11 European terrorism legislation.<sup>231</sup> But there have not yet been similar decisions by the Council of the European Union defining the core crimes prosecutable under universal jurisdiction. E.U. and domestic legislation should provide standardized definitions of the crimes, statutes of limitation, and procedural provisions, and should address jurisdictional problems, including double jeopardy. Such harmonized legislation could prevent potential conflicts in Europe and between European States, and would promote procedural fairness.<sup>232</sup>

### B. Presence Requirement and Principle of Complementarity

In various jurisdictions, a crucial problem arises from the legislative or judicial requirement that a suspect or accused be present in the territory of the forum State. This presence requirement exists in different forms. In Germany and the Netherlands, for example, an investigation may begin without the suspect being present but a resulting trial cannot be held *in absentia*.<sup>233</sup> Other countries, such as Belgium, require that a

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TION 3–5 (2004), available at <http://www.fidh.org/Legal-Remedies-for-Victims-of> (last visited June 21, 2009) [hereinafter LEGAL REMEDIES].

229. Germany's CCIL is one such exception, and a number of other countries are in the process of enacting such legislation. See LEGAL REMEDIES, *supra* note 228, at 3–5. Human Rights Watch therefore demands that the E.U. Member States and other national governments ensure (1) domestic implementation of international crimes, as defined in treaties to which the Member States are parties, and (2) non-application of statutes of limitations to international crimes. See BHUTA & SCHURR, *supra* note 13, at 35.

230. LEGAL REMEDIES, *supra* note 228, at 11–12.

231. See *id.* at 13–14.

232. *Id.* at 24–27; see also the “Elements of a possible Framework Decision on breaches of international human rights and international humanitarian law,” *id.* at 31–35.

233. See discussion *supra* Parts I.E, I.G.

suspect must be a resident of the country in order to investigate.<sup>234</sup> In such countries, the strict presence requirement limits the exercise of universal jurisdiction, as demonstrated by the discussion of Belgium in Part I.A.<sup>235</sup>

When either legislation or a prosecutor requires a suspect's presence to begin investigation, successful prosecution of absent persons is very unlikely for several reasons. First, the permanent or temporary presence of a suspect is seldom investigated by law enforcement authorities<sup>236</sup> and, in some cases, only brought to the attention of the authorities by investigating NGOs, victims, or victims' communities, who lack the resources to conduct their own investigations. Second, when international or national bodies do not know or officially acknowledge the criminal acts, specific allegations, and factual substance of a criminal allegation against a suspect, prosecutorial authorities are unlikely to take action against a temporarily present, high-profile suspect before he leaves the country. Even when these two obstacles are overcome, in several cases authorities have obstructed promising investigations by delaying the decision to investigate or by basing this decision on false arguments.<sup>237</sup>

The principle of complementarity creates another crucial problem in universal jurisdiction proceedings. In general, the merit of the principle is not in doubt; however, the danger of an overly broad application of the principle becomes apparent when a forum State declines to exercise universal jurisdiction over one suspect based on the fact that the home State has shown itself (or has pretended to be) willing and able to prosecute

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234. See discussion *supra* Part I.A.

235. See *id.*

236. A recent trend shows an increasing role of specialized units and task forces. See Jürgen Schurr, *Ending the Culture of Impunity: The Establishment of Specialized 'War Crimes Units'*, in AEGIS TRUST, *THE ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW* 35, 37–38 (2009), available at [http://www.aegistrust.org/index2.php?option=com\\_content&do\\_pdf=1&id=803](http://www.aegistrust.org/index2.php?option=com_content&do_pdf=1&id=803) (last visited June 21, 2009).

237. For example, in the German case against U.S. Defense Secretary Donald Rumsfeld in 2004, the federal prosecutor ignored the presence of some suspects who were stationed in Germany with their mother units while acting in Abu Ghraib, Iraq. See Letter from General Prosecuting Attorney, German Federal Court, to author (Feb. 10, 2005), available at <http://www.legal-tools.org/en/access-to-the-tools/record/file.html?fileNum=24025&hash=2a61f8a16bf689dacce46b9d9a3ee8d00a0ff194a201cd3c3f9eeb655a7cc8ea> (last visited June 21, 2009). In the German case against the Uzbek Minister of Interior, Almatov, the federal prosecutor denied having had knowledge of Almatov's presence in Germany and failed to initiate proceedings even though the suspect had been permitted to enter Germany with the exceptional permission of the German foreign office (on humanitarian grounds) and had been staying in Germany for several weeks. See Kaleck, *supra* note 15, at 109. In the French case against former U.S. Defense Secretary Rumsfeld, the French prosecutor failed to take any action during Rumsfeld's two-day private visit to Paris in 2007. See Letter from Public Prosecutor, *supra* note 58. In Austria, police and prosecutors failed to investigate when Chechen President Ramzan Kadyrov was in the country, even after the NGO in whose name the case was filed had announced his upcoming visit. ECCHR, *Kadyrov*, *supra* note 15.

lower-ranked human rights violators. Thus, overbroad application of the principle of complementarity allows a home State effectively to block investigations against other, involved suspects. For example, the principle was invoked by the German Federal Prosecutor when he declined to open a case against Donald Rumsfeld and other high ranking officers allegedly responsible for the U.S. torture program, based on the fact that the United States was trying twelve low-ranking soldiers involved in the Abu Ghraib scandal.<sup>238</sup> The German Federal Prosecutor invoked an analogy to Article 14 of the Rome Statute, under which a State party may refer “a situation” to the ICC once one or more crimes within the jurisdiction of the ICC appear to have been committed; he also generally referred to trials against low-ranking soldiers without any further investigation of the procedural situation in the U.S.<sup>239</sup> This practice ultimately leaves the decision of whether to prosecute to the perpetrator State and undermines the well-structured principle of subsidiarity.<sup>240</sup>

### *C. Practical Problems of Prosecuting International Crimes*

Prosecuting universal jurisdiction cases presents challenges that are inherent to the prosecution of crimes committed abroad. Putting the legal question of jurisdiction aside, there are many practical, procedural, criminological, political, and social reasons that crimes should be investigated and prosecuted where they were committed. The most significant problem in a criminal proceeding that complies with fair trial standards, as expressed in most European domestic legislation and required by the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>241</sup> is the gathering of evidence from abroad.<sup>242</sup>

The practical and procedural problems in universal jurisdiction cases are characteristic of all kinds of complex investigations abroad, such as drug trafficking or terrorism allegations. Like in many intensive and time-consuming proceedings, it is difficult for victims of universal jurisdiction crimes and their communities to understand the challenging task of evidence collection and oral trial procedures. In cases of gross human rights violations, the challenges are greater. A particular challenge occurs when evidence is required from a State whose government officials are somehow involved in the alleged crimes. Government involvement not only complicates access to victims, witnesses, and

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238. Letter from General Prosecuting Attorney, *supra* note 237; *see also* discussion *supra* Part I.G.

239. Jessberger, *supra* note 175, at 218.

240. *Id.*

241. Convention for the Protection of Human Rights and Fundamental Freedoms art. 6., Nov. 4, 1950, E.T.S. No. 005 (as amended by Protocol No. 11).

242. See BHUTA & SCHURR, *supra* note 13, at 17–19.

documentary evidence, but also impedes examination of the State actors and agencies responsible for the crimes.

Further, the practical exercise of prosecutorial activities requires political will at both a domestic and pan-European level. Although regional political and prosecutorial coordination in Europe has improved as the E.U. Council has established a “network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes”<sup>243</sup> and after the E.U. Council decided “to increase cooperation between national units in order to maximize the ability of law enforcement authorities in different Member States to cooperate effectively” in the same field,<sup>244</sup> these measures can only be regarded as first steps. In many countries national units are underdeveloped and a clear program to investigate and prosecute international crimes is still lacking. As previously described, the Netherlands can, to some extent, serve as a positive example because it has a clear framework—an established war crimes unit with thirty-one experts—and has taken a proactive stance and reserved resources for conducting extensive international investigations.<sup>245</sup> Human Rights Watch, FIDH, and Redress therefore advocate for “the creation of adequately resourced and staffed ‘specialized units’ within police and prosecutorial authorities, with principal responsibility for investigating and prosecuting universal jurisdiction cases,” as a prerequisite to the practice of universal jurisdiction.<sup>246</sup>

#### D. *Prosecutorial Discretion and Immunity*

In most European countries, judicial authorities (and especially prosecutors) have broad discretion to decide whether to launch or continue a criminal investigation.<sup>247</sup> Broad statutory terms that limit prosecutorial discretion to the “public interest” (such as in the United Kingdom)<sup>248</sup> invite prosecutors to exercise this discretion quite broadly. Moreover, many countries do not allow for judicial review of prosecutorial decisions. The lack of coherent and written criteria guiding the exercise of such discretion and the lack of judicial review of prosecutorial decisions lead to political selectivity in the exercise of universal jurisdiction and an “element of arbitrariness that calls the admissibility of universal jurisdiction into question.”<sup>249</sup>

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243. Council Decision 2002/494/JHA, 2002 O.J. (L 167) 1, 2 (EU).

244. Council Decision 2003/335/JHA, 2003 O.J. (L 118) 12–14 (EU).

245. See Schurr, *supra* note 236, at 36.

246. BHUTA & SCHURR, *supra* note 13, at 35; see also Schurr, *supra* note 236, at 36.

247. See the examples in *AU-EU Expert Report*, *supra* note 3, at 21–22.

248. CROWN PROSECUTION SERVICE, *supra* note 89, § 5.

249. Rainer Keller, *Grenzen, Unabhängigkeit und Subsidiarität der Weltrechtspflege*, 153 *GOLTDAMMER’S ARCHIV FÜR STRAFRECHT* 25 (2006).

Also, many cases are complicated by the question of immunity. Since the 2002 ICJ decision in the *Yerodia-Arrest Warrant* case,<sup>250</sup> it has been largely acknowledged that acting heads of State and ministers for foreign affairs are protected by immunity *rationae personae*.<sup>251</sup> Several criminal complaints against acting heads of State have been launched by lawyers and human rights organizations and have been subsequently rejected by prosecutorial authorities. The case against Robert Mugabe in France is a ripe example.<sup>252</sup>

While the ICJ ruled with regard to *acting* officials, and referred *only* to heads of State and ministers for foreign affairs,<sup>253</sup> there remains certain confusion among police officers, prosecutors, and judges about the interpretation and scope of the decision. This confusion often leads to delayed decisionmaking when suspects are present in a country and the case is otherwise ready to be investigated and prosecuted.<sup>254</sup> In several decisions, prosecutors have misinterpreted the ICJ ruling and extended it to immunize former heads of State;<sup>255</sup> other authorities have extended immunity further, applying it to other acting and former official and semi-official positions.

Another form of immunity is extended to suspects visiting a potential forum State as part of an official delegation or by invitation, that is, procedural diplomatic immunity. For example, in 2008, the Uzbek Chief of Intelligence Service, Rustan Injatow avoided investigation on this basis.<sup>256</sup>

Some of the limitations of the exercise of universal jurisdiction are inherent to complex criminal investigations and prosecutions of

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250. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14), available at <http://www.icj-cij.org/docket/files/121/8126.pdf> (last visited June 21, 2009).

251. See Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407 (2004).

252. See *supra* Part I.B.

253. Akande, *supra* note 251, at 412 (criticizing the ICJ holding that absolute immunity *rationae personae* also applies for foreign ministers but asserting that “the current state of international affairs requires a very wide range of officials . . . to travel in the exercise of their functions” and that “it has not been recognized that the mere fact that an official acts in the conduct of international relations suffices to confer immunity *rationae personae*”; according to Akande, the status of “any officials sent abroad on a special mission by a State is inviolable, with the result [being] that he or she may not be arrested or detained.”).

254. Some examples include the case involving al Tikriti in Switzerland, see Swain, *supra* note 78, and the case involving Almatov in Germany, see *supra* note 182 and accompanying text.

255. Consider, for example, the case involving former U.S. Secretary of Defense Donald Rumsfeld in France. See Letter from Public Prosecutor, *supra* note 58.

256. For a short summary of the communication between the author and the Federal Prosecutor's Office, in which the latter declined to open an investigation against Injatow and claimed that he was officially invited to Germany by the German government, see ECCHR, *Criminal Complaint Against Zakir Almatov*, *supra* note 182.

extraterritorial crimes. But even if some of these problems might be solved by upcoming legislative and technical changes, an overall program to investigate and prosecute international crimes is still missing on a European level. Moreover, many universal jurisdiction cases involve open political struggle. Political barriers are especially problematic when criminal proceedings are brought against suspects and perpetrators from friendly nations with whom the forum State is connected politically, economically, and militarily.<sup>257</sup>

### III. ALTERNATIVE AND COMPLEMENTARY MECHANISMS TO COMBAT IMPUNITY

Taking other legal tools that might not be as controversial as universal jurisdiction into consideration, the following Part describes three alternative accountability mechanisms that are not specifically designed to combat impunity of international crimes yet are often used as alternative or complementary instruments to address gross human rights violations. First, parties may rely on alternative theories to establish jurisdiction over alleged wrongdoers, including the principles of territoriality, active personality, and passive personality. Second, aggrieved parties may turn to regional mechanisms like the European and the Inter-American Courts for Human Rights to hold States accountable and trigger domestic criminal investigations and enforcement procedures. Third, parties lacking access to criminal justice may opt to bring civil suits, using statutes like the U.S. Alien Torts Claims Act (ATCA) to obtain justice and reparation. Similar problems to those described above hinder use of these alternative and complementary mechanisms, although these mechanisms typically are not as controversial as universal jurisdiction.

#### A. Territorial and Personality Jurisdiction: The Case of the CIA Rendition Flights in Europe

The most common basis for jurisdiction is territorial, that is, a State's competence to judge crimes committed on its soil.<sup>258</sup> Another common basis for jurisdiction is the active personality principle, which refers to a State's competence to judge crimes committed by its nationals.<sup>259</sup> International law also recognizes passive personality jurisdiction, meaning the power of the State to judge crimes committed against its

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257. See, e.g., Abu Odeh, *supra* note 11; Keller, *supra* note 249.

258. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW* 227 (2d ed. 1999).

259. *Id.*

nationals on another State's territory.<sup>260</sup> Thus, universal jurisdiction appears as a newer legal basis for establishing jurisdiction in cases where traditional domestic forms do not apply.

The CIA extraordinary rendition flights—which enabled the outsourcing of torture to countries that support its use—are described as part of a “global spider's web”<sup>261</sup> of secret detention facilities and torture chambers in which fifteen European countries were involved. The rendition flights therefore provide good examples of the political barriers to prosecuting international crime cases, even when jurisdiction is not disputed. While criticisms of extraordinary rendition are largely directed toward the U.S. government, others assert the co-responsibility of European governments,<sup>262</sup> as the program involves international crimes (particularly forced disappearances and torture).<sup>263</sup>

Criminal proceedings regarding the CIA “extraordinary rendition” program have been initiated based on territorial jurisdiction in several countries, including Italy, Spain, Germany, France, and Sweden, and, more recently, in Bosnia-Herzegovina, Macedonia, and Poland.<sup>264</sup> The active personality principle also has been invoked in Italy, Poland, the United Kingdom, and Bosnia-Herzegovina to establish jurisdiction in extraordinary renditions cases.<sup>265</sup> The many preliminary results have often been contradictory. The investigations in France and Sweden were closed soon after the complaints were filed by NGOs<sup>266</sup> whereas in Italy, Spain, and Germany, long and thorough investigations are ongoing.<sup>267</sup> The procedures in Bosnia-Herzegovina, Macedonia, and Poland began in

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260. *Id.*

261. Manfred Nowak, *Preface to CIA-EXTRAORDINARY RENDITION FLIGHTS, TORTURE AND ACCOUNTABILITY: A EUROPEAN APPROACH* 9, 9 (ECCHR ed., 2d ed. 2009) [hereinafter *CIA-EXTRAORDINARY RENDITION FLIGHTS*], available at [www.ecchr.eu/index.php?file=tl\\_files/Dokumente/ECCHR\\_Rendition\\_SecondEdition\\_online.pdf](http://www.ecchr.eu/index.php?file=tl_files/Dokumente/ECCHR_Rendition_SecondEdition_online.pdf) (last visited June 21, 2009).

262. EUR. PARL. ASS., *Reply of the Committee on Legal Affairs and Human Rights*, at 2–3, Doc. No. 10957 (2006):

This collusion with the United States of America by some Council of Europe [M]ember [S]tates has taken several different forms. Having carried out legal and factual analysis on a range of cases of alleged secret detentions and unlawful interstate transfers, the Assembly has identified instances in which Council of Europe [M]ember [S]tates have acted in one or several of the following ways, wilfully or at least recklessly in violation of their international human rights obligations as explained in the explanatory memorandum.

263. *See* Nowak, *supra* note 261, at 10–11.

264. The relevant cases are still pending. For detailed information about these cases, see Denise Bentele et al., *Pending Investigation and Court Cases: The Criminal Cases*, in *CIA-EXTRAORDINARY RENDITION FLIGHTS*, *supra* note 261, at 68, 28–126.

265. *Id.* at 84, 93, 98, 125.

266. *Id.* at 72, 116.

267. *Id.* at 80, 101, 118.

2008 and are ongoing.<sup>268</sup> An intermediate legal success has been achieved in Italy, where CIA agents now face trial for the first time *in absentia* in Milan.<sup>269</sup> Further, arrest warrants against allegedly involved CIA agents have been issued by Italian and German courts.<sup>270</sup>

The first and most significant problem in the rendition cases is the lack of information. Although European Council, European Parliament, and national parliaments have conducted inquiries and NGOs have filed Freedom of Information requests, much important information is still missing,<sup>271</sup> which has limited domestic investigations and prosecutions. A second problem is that no case has yet been brought against the architects and leaders of the CIA extraordinary rendition program. Only low ranking CIA agents who acted in Europe are being held responsible.<sup>272</sup> A third problem is that some governments—including Germany and Italy—have failed to enforce the arrest warrants issued by their courts or to issue extradition requests to the United States for political reasons.<sup>273</sup> Ultimately, one must conclude that the problems in these cases resemble the problems in universal jurisdiction cases discussed above.

#### B. State Accountability: Applying Regional Mechanisms

The scope and influence of jurisdiction exercised by regional mechanisms is integral to the mosaic of legal and political avenues for combating impunity.<sup>274</sup> Applications arising from conditions of endemic

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268. Wolfgang Kaleck, *Justice and Accountability in Europe: Discussing Strategies*, in CIA-EXTRAORDINARY RENDITION FLIGHTS, *supra* note 261, at 13, 21.

269. *Id.*

270. *Id.*

271. Bentele et al., *supra* note 264, at 59.

272. Only the complaints brought against Donald Rumsfeld and others, brought in 2004 and 2006 in Germany and based on universal jurisdiction, have included charges against former CIA Director George Tenet for conducting the CIA extraordinary rendition program; however, these cases were dismissed as discussed above. *See id.* at 127.

273. *Id.* at 84, 111.

274. When the Council of Europe established the European Court of Human Rights (ECtHR) in Strasbourg, France in 1959, it envisioned a collective mechanism for the enforcement of the obligations and guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Signatory States are bound by the treaty to “undertake to abide by the final judgment” once a case is deemed admissible by the Court. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 46(1), Nov. 11, 1950, E.T.S. No. 005 (as amended by Protocol No. 11). Nevertheless, this jurisdiction is underpinned by the principle of subsidiarity and applicants must demonstrate they have exhausted the effective remedies in the domestic sphere. The number of applications before the ECtHR has swelled in the last decade with more than 95,000 applications pending near the end of 2008. *See THE EUROPEAN COURT OF HUMAN RIGHTS: SOME FACTS AND FIGURES 1998–2008* (2008), available at <http://www.echr.coe.int/NR/rdonlyres/65172EB7-DE1C-4BB8-93B1-B28676C2C844/0/FactsAndFiguresENG10ansNov.pdf> (last visited June 21, 2009).

and systematic human rights violation, particularly in Turkey<sup>275</sup> and Russia,<sup>276</sup> for example, were brought in large numbers to the ECtHR in Strasbourg.<sup>277</sup>

Despite many judgments against Turkey at the ECtHR, the domestic judiciary is not yet independent (despite reforms) and compliance has been sporadic. Turkey has provided millions of dollars in victim compensation and has improved its practices in a number of areas,<sup>278</sup> but the fight against impunity at the domestic level is far from over. In 2008, the ECtHR issued 210 judgments against Turkey in cases involving torture, extrajudicial execution, unfair trial, and other violations.<sup>279</sup> In September 2008, the Council of Europe closed several examinations, having found that Turkey had met many of the requirements imposed by the Court, but also called on the country “ ‘to ensure effective investigations into members of security forces alleged to have committed violations.’ ”<sup>280</sup>

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275. Turkey accepted the binding jurisdiction of the ECtHR in 1989. Thomas W. Smith, *Leveraging Norms: The ECHR and Turkey's Human Rights Reforms*, in HUMAN RIGHTS IN TURKEY 262, 262 (Zehra F. Kabasakal Arat ed., 2007). Nevertheless, endemic violations of human rights, particularly those by security forces against the Kurdish population in Turkey's southeastern regions, have led numerous applicants from ineffective domestic courts to the ECtHR to seek relief. See, e.g., EUR. PARL. ASS. DEB., *Res. 1381*, 37th Sess. (June 22, 2004), available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta04/eres1381.htm> (last visited June 21, 2009). Despite Turkey's arguments that the Court lacked jurisdiction over applicants who had failed to exhaust domestic remedies, the ECtHR disagreed and began accepting cases in the first instance. Smith, *supra*, at 266; see also Aslan Gündüz, *Human Rights and Turkey's Future in Europe*, 45 ORBIS 15 (2001).

276. Russia accepted the binding jurisdiction of the ECtHR in 1998. See Press Release, Council of Europe, Russia Ratifies the Human Rights Convention, the Anti-Torture Convention and the Charter of Local Self-Government (May 5, 1998), available at <http://www.cpt.coe.int/documents/rus/1998-05-05-eng.htm> (last visited June 21, 2009). Complaints of endemic and systematic abuse in Chechnya began to flood the ECtHR from applicants claiming lack of effective domestic remedies. EUR. PARL. ASS. DEB., *Res. 1323*, 36th Sess. (Apr. 1, 2003), available at <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta03/ERES1323.htm>. Applicants to the court have faced retaliatory political targeting, including alleged murders and disappearances. See, e.g., EUROPEAN HUMAN RIGHTS ADVOCACY CTR., ANNUAL REPORT (2006); EUROPEAN HUMAN RIGHTS ADVOCACY CTR., ANNUAL REPORT (2007), available at <http://www.londonmet.ac.uk/research-units/hrsj/affiliated-centres/ehrac/ehrac-bulletin/annual-reports.cfm>.

277. Cases from these countries made up over more than a third of the ECtHR's pending cases. THE EUROPEAN COURT OF HUMAN RIGHTS: SOME FACTS AND FIGURES 1998–2008, *supra* note 274 at 4.

278. See, e.g., U.S. DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: TURKEY (2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119109.htm> (last visited June 21, 2009).

279. HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH COUNTRY REPORT: TURKEY 5 (2009), available at [http://www.hrw.org/sites/default/files/related\\_material/turkey.pdf](http://www.hrw.org/sites/default/files/related_material/turkey.pdf) (last visited June 21, 2009).

280. *Id.*

In a 2006 Resolution, the Council of Europe called on Russia's law enforcement authorities to ameliorate the situation and "effectively investigate numerous specific and well-documented allegations of enforced disappearances, murder and torture" in Chechnya.<sup>281</sup> Submissions made to the Committee of Ministers of the Parliamentary Assembly of the Council of Europe (PACE) on behalf of the applicants argued that "in the light of the experience in the Turkish cases, the Committee of Ministers should, as a priority from the outset, adopt a very rigorous and comprehensive approach to the question of compliance in respect of Chechnya."<sup>282</sup>

After failing to meet the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Council of Europe condemned Russia's lack of cooperation in 2007.<sup>283</sup> The Assembly stated in a 2007 evaluation of monitoring procedures that they deplored "that the CPT has had to resort, for the third time, to the exceptional measure of issuing a public statement about the situation in the Chechen Republic, given the Russian Federation's failure to co-operate or refusal to improve the situation in the light of the CPT's recommendations."<sup>284</sup>

While some victims have received compensation through judgments, rampant abuses persist, demonstrating an apparent lack of commitment on behalf of Russian officials to meet the obligations stemming from their membership to the court.<sup>285</sup> Although the ECtHR has been successful in filling the impunity gap in some instances, its backlog of cases and its procedural requirements make the forum less opportune for victims deserving of prompt and local access to justice.

The Inter-American Court of Human Rights' (IACtHR's) role in challenging impunity for the systematic human rights violations committed in Peru during Alberto Fujimori's presidency demonstrates a different regional enforcement body's capacity to close the impunity gap. The interplay between domestic and regional systems in the cases

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281. See EUR. PARL. ASS., *Human Rights Violations in the Chechen Republic: The Committee of Ministers' Responsibility Vis-à-Vis the Assembly's Concerns*, Doc. No. 1479 (2006).

282. See Applicant's Submissions Regarding Compliance with the Judgments of the European Court of Human Rights, at ¶ 14, Eur. Ct. H.R. (Oct. 4, 2005), <http://www.londonmet.ac.uk/research-units/hrsj/affiliated-centres/ehrac/ehrac-litigation/chechnya---ehcr-litigation-and-enforcement/enforcement-of-chechen-judgments.cfm> (last visited June 21, 2009).

283. Eur. Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Public Statement Concerning the Chechen Republic of the Russian Federation*, Doc. No. CPT/Inf 33, at 17 (2003), available at <http://www.cpt.coe.int/documents/rus/2007-17-inf-eng.htm> (last visited June 21, 2009).

284. EUR. PARL. ASS., *Progress of the Assembly's Monitoring Procedure*, Res. No. 1548 (2007).

285. See *id.* para. 13.

concerning the “death squad” massacres in the Barrios Altos district in Lima in 1991 and at Cantuta University in 1992 provide examples for other countries and regions.<sup>286</sup> Domestic investigations first brought to light the role of the paramilitary Grupo Colina in the *Cantuta* case, leading to successful military prosecutions and prison sentences for ten military members.<sup>287</sup> The IACtHR rendered several decisions against Peruvian officials<sup>288</sup> and articulated the impact of the regional mechanisms, saying, “(t)he Inter-American system has played a fundamental role in achieving democracy in Peru. The Inter-American Commission and the Inter-American Court of Human Rights led the international community in condemning the practices of horror, injustice and impunity that occurred under the Fujimori Government.”<sup>289</sup> In 2006, the IACtHR determined that the Peruvian government was complicit in the Cantuta killings.<sup>290</sup> Judgments at the IACtHR directly implicated Fujimori and aided Peru in seeking extradition of Fujimori after his capture in Chile in 2005.<sup>291</sup> The Chilean Supreme Court authorized extradition in 2007 and returned Fujimori to Peru to stand trial.<sup>292</sup> This cooperation

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286. See James Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT’L L. 768, 820 (2008).

287. *La Cantuta v. Peru*, Case 11.045, Inter-Am. C.H.R., Report No. 42/99, ¶ 23, *available at* <http://www.cidh.oas.org/annualrep/98eng/Admissibility/Peru%2011045.htm> (last visited June 21, 2009).

288. Nevertheless, after being re-elected in 1995, Fujimori instituted amnesty laws that provided for the release of those involved and protected from prosecution those involved with Barrios Altos. *Barrios Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, at 13 (Mar. 14, 2001). In response, a petition was submitted to the IACtHR in 1995 to challenge the validity of the amnesty laws. *La Cantuta v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006).

289. *Barrios Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, at 13 (Mar. 14, 2001).

290. *La Cantuta v. Peru Case*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006). Hearings were held in 1997 regarding the Barrios Altos murders and in 1999 the Inter-American Commission on Human Rights (IACHR) offered assistance in settling the case. In March 2000, the IACHR called on Peru to annul amnesty laws, reopen investigations, and grant reparations for the crimes. When Peru refused, claiming that the amnesty laws were exceptional measures required against terrorist violence, the case was referred to the IACtHR. See *Barrios Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, at 1 (Mar. 14, 2001). By the time the IACtHR rendered judgment in March 2001, Fujimori had fled Peru for Japan. However, he was subsequently removed from office. In its submissions to the Court, the new Peruvian government assumed international responsibility and ultimately reversed the amnesty laws and compensated the victims. *Id.* at 10–12.

291. *La Cantuta v. Peru Case*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006).

292. *Questions and Answers: Trial of Former President Alberto Fujimori of Peru*, HUMAN RIGHTS WATCH, Feb. 20, 2009, <http://www.hrw.org/en/news/2009/02/20/q-trial-former-president-alberto-fujimori-peru> (last visited June 21, 2009). In a very recent development, after a sixteen-month trial, Fujimori was convicted in April 2009 as an indirect perpetrator of at least twenty-five murders and sentenced to twenty-five years imprisonment. See Tim Padgett & Lucien Chauvin, *Fujimori’s Last Stand: Peru’s Ex-President Found Guilty*, TIME,

between domestic and regional or international efforts has the strongest effects on a successful outcome of a case.

This survey of state accountability mechanisms at the ECtHR and the IACTHR demonstrates the advantages of their professional and strategic use by victims and highly specialized human rights organizations to prompt serious domestic investigations and prosecutions, and to obtain reparations for some individual victims. But there often exists “a vast gap between what regional courts order and what actually happens in a country,”<sup>293</sup> and decisions are not automatically effectuated.<sup>294</sup> This lack of political will to engage in serious investigations and prosecutions, as shown in the cases of systematic and endemic human rights violations in Chechnya and Kurdistan, is the same as encountered in several of the universal jurisdiction cases discussed above.

### C. Alien Tort Claims Act (ATCA) and Other Civil Remedies

Nearly two decades prior to the development of universal jurisdiction practice in Europe, the human rights movement in the United States initiated civil litigation reviving the Alien Tort Claims Act (ATCA) of 1789.<sup>295</sup> Several cases arising from human rights violations around the world were filed after the successful litigation of *Filartiga v. Pena-Irala* in 1979,<sup>296</sup> with some settling successfully out of court.<sup>297</sup> The next landmark decision was *Doe v. Unocal*, where a U.S. court rejected a corporate defendant’s motion to dismiss litigation under the ATCA, thus establishing the applicability of the ATCA to corporate entities.<sup>298</sup> After these very promising developments, the U.S. Supreme Court, in its 2004 decision in *Sosa v. Álvarez-Machain*, limited the applicability of the ATCA to violations of international customary law.<sup>299</sup> Since plaintiffs have to meet the *Sosa* standard, the types of human rights claims that can be brought under the ATCA are limited.<sup>300</sup> The

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Apr. 7, 2009, available at <http://www.time.com/time/world/article/0,8599,1889946,00.html> (last visited June 21, 2009).

293. Cavallaro & Brewer, *supra* note 286, at 769.

294. *Id.* at 770.

295. Alien Tort Claims Act (Alien Tort Statute), 28 U.S.C. § 1350 (2006) (corresponding to the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77) (providing for jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

296. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

297. See Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT’L L. 773, 810–12 (2008).

298. *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997); see also Stephens, *supra* note 297, at 5.

299. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

300. For example, *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated*, 932 F.3d 978 (9th Cir. 2003), successfully settled out of court, while two other actions filed against

outcome of an ongoing case of *Wiwa v. Royal Dutch Petroleum* will have an effect on the future of ATCA cases brought against corporations.<sup>301</sup> Some are skeptical about the future viability of such claims in the face of some lost cases, as described above. It seems that U.S. courts and juries are unwilling to accept many human rights claims based on the ATCA. For example, the Bush administration submitted statements of interest and the courts rendered decisions based on grounds of state secrecy against the victims of CIA extraordinary rendition flights, Khaled El Masri<sup>302</sup> and Maher Arar;<sup>303</sup> this special treatment is comparable to the arguments made of foreign sovereign immunity and diplomatic immunity, which are used to interrupt, without arguing on the merits, universal jurisdiction cases in Europe. Despite the narrowing of the application of the ATCA, the Act remains a viable, albeit limited, legal tool for attaining justice for some victims.

As stated earlier, the U.S. ATCA is a unique phenomenon. No European jurisdiction offers a civil remedy that is specifically designed to compensate victims of human rights violations committed abroad. Universal jurisdiction has not been codified in European civil law—that is, outside of the criminal context—and it can be said that European civil legislation is not yet designed to handle cases of transnational human rights crimes.<sup>304</sup>

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Chevron Corporation and Drummond Company resulted in the plaintiffs losing in both cases, see *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004); *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

301. The case of *Wiwa v. Royal Dutch Petroleum* is pending jury trial. See *Wiwa v. Royal Dutch Petroleum*, No. 96 Civ. 8386, 2009 U.S. Dist. LEXIS 14883 (S.D.N.Y. Feb. 23, 2009).

302. *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006).

303. *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

304. See Cedric Ryngaert, *Universal Tort Jurisdiction over Gross Human Rights Violations*, 2007 NETH. Y.B. INT'L L. 3, 42. Ryngaert sees the commitment of European States to universal criminal jurisdiction as one explanation for this situation. *Id.* at 57; see also Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002); ECCHR, European Cases Database, <http://www.ecchr.eu/casesdatabase.html> (last visited June 21, 2009) (providing information about approximately sixty-nine civil and criminal proceedings against European corporations).

Nevertheless, some countries have successfully provided other civil remedies for human rights violations, including the United Kingdom,<sup>305</sup> the Netherlands,<sup>306</sup> France,<sup>307</sup> and Germany.<sup>308</sup> In the United Kingdom, the High Court of Justice held in *Bici/Bici v. Ministry of Defense* that civilian individuals from Kosovo who suffered injuries committed by British peacekeeping forces could bring civil damage claims;<sup>309</sup> however, other civil actions against state officials, brought on behalf of torture victims in the United Kingdom, were dismissed on an immunity basis.<sup>310</sup> The ICJ is expected to decide soon on Germany's claim for civil immunity<sup>311</sup> filed after civil courts in Greece and Italy found Germany liable for damages from its occupation of these two States in World War II.<sup>312</sup>

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305. Ryngaert, *supra* note 304, at 48; *see also* Ferstman, *supra* note 95.

306. In the fall of 2008, a civil action by the survivors of the Srebrenica massacre against the Dutch Government was dismissed. Prosecutor/H.N., Arrondissementsrechtbank [Rb.] [District Court], Gravenhage, Sept. 10, 2008, 265615/HA ZA 06-1671 (Neth.), *available at* [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BF0181&u\\_ljn=BF0181](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BF0181&u_ljn=BF0181) (last visited June 21, 2009). Plaintiffs claimed damages for the failure of the U.N. force's Dutch battalion (Dutchbat) to protect the Muslim population of Srebrenica from the attacks of Serbian forces. *Id.* The court held that that the Dutch soldiers had acted under the U.N. flag and the Dutch State therefore could not be held accountable, since the actions must be attributed exclusively to the United Nations, which is immune. *Id.*

307. La Chronique reported that the Association France Palestine Solidarité (AFPS) and the Palestinian Liberation Organization (PLO) took European corporations Veolia Transport and Alstom to court in October 2007. The plaintiffs challenged the building of a tramway through the occupied territories as violating international law. Aurine Crémieu, *Rubrique "En Mouvement" Israël et Territoires Occupés*, LA CHRONIQUE, Mar. 1, 2006, *available at* [http://www.amnesty.fr/index.php/amnesty/s\\_informer/la\\_chronique/mars\\_2006\\_sommaire/israel\\_et\\_territoires\\_occupes](http://www.amnesty.fr/index.php/amnesty/s_informer/la_chronique/mars_2006_sommaire/israel_et_territoires_occupes).

308. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 2, 2006, docket No. III ZR 190/05 (F.R.G.), *available at* <http://www.bundesgerichtshof.de> (last visited June 21, 2009) (dismissing claims for damages brought by Serbian victims of a NATO bombing against the German government as a member of NATO; the case is pending appeal at the Constitutional Court).

309. *Bici v. Ministry of Defence*, [2004] EWHC 786 (QB) 786 (Eng.). In *Connelly v. RTZ* [1997] 3 W.L.R. 373 (Eng.), the English-based Rio Tinto Zinc companies were held liable for health damages caused by work in the companies' Namibian mines. In *Lubbe v. Cape plc* [2000] 4 All E.R. 268 (Eng.), approximately 3,000 plaintiffs claimed damages for personal injuries allegedly caused by exposure to asbestos and other related products around the companies' mines in South Africa; the case was settled out of court.

310. *Al-Adsani v. Government of Kuwait*, 107 I.L.R. 536 (1996) (Kuwait); *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* (The Kingdom of Saudi Arabia), [2006] UKHL 26, [2007] 1 A.C. 270 (appeal taken from Eng.) (Eng.); *Al-Skeini v. Secretary of State for Defence*, [2007] UKHL 26 (Eng.).

311. *Jurisdictional Immunities* (F.R.G. v. Italy), (Dec. 22, 2008), *available at* <http://www.icj-cij.org/docket/files/143/14923.pdf>; Press Release, ICJ, Germany Institutes Proceedings Against Italy for Failing to Respect its Jurisdictional Immunity as a Sovereign State (Dec. 23, 2008), *available at* <http://www.icj-cij.org/docket/files/143/14925.pdf> (last visited June 21, 2009).

312. *See* Maria Gavouneli & Ilias Bantekas, *International Decisions: Prefecture of Voiotia v. Federal Republic of Germany*, 95 AM. J. INT'L L. 198 (2001); Corte Suprema di

None of the cases cited in this Part were cases brought under universal criminal jurisdiction; rather all had a link to the jurisdiction in which they were brought. The paucity of civil cases shows that European jurisdictions are not yet equipped to handle transnational civil human rights cases. The European Coalition of Corporate Justice, a wide coalition of civil society organizations and trade unions, is therefore working together with legal scholars to improve legislation on a European level.<sup>313</sup> They do not advocate for a “European” ATCA, but rather for (1) the enhancement of direct liability of parent companies; (2) the establishment of a duty to care; and (3) the establishment of mandatory environmental and social reporting.<sup>314</sup> Though the U.S. ATCA might provide an alternative accountability mechanism to victims of international crimes in some cases (although with limitations similar to those observed in European universal jurisdiction cases), in the majority of European cases, no appropriate civil procedure mechanisms are available.

#### IV. ELEMENTS OF A TRANSNATIONAL, INTERDISCIPLINARY, AND STRATEGIC APPROACH TOWARD UNIVERSAL JURISDICTION

The developments described thus support Ariel Dorfman’s observation that Augusto Pinochet’s arrest in 1998 signified a tidal shift in the history of human rights, particularly in terms of efforts to hold human rights perpetrators accountable. Since the mid-1990s, the practice of universal jurisdiction has been established in many European countries. An analysis of the cases illustrates the inherent practical and technical obstacles faced in extraterritorial cases and the political challenges associated with the exercise of universal jurisdiction, especially when citizens of allied and/or powerful nations are involved. On the other hand, similar problems and challenges also arise in other, more established or traditional accountability proceedings, as evidenced by the CIA extraordinary rendition cases (where jurisdiction was based on the territoriality principle).

But does the current form of universal jurisdiction practice (or an even more universal use of this tool) help to protect human rights and how can the described technical or political problems be solved? What

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Cassazione (Cass.), 11 mar. 2004, n.5044, 87 *Rivista di diritto internazionale* 540 (2004) (Italy).

313. See European Coalition for Corporate Justice, <http://www.corporatejustice.org/> (last visited Mar. 23, 2009).

314. FILIP GREGOR & HANNAH ELLIS, *FAIR LAW: LEGAL PROPOSALS TO IMPROVE CORPORATE ACCOUNTABILITY FOR ENVIRONMENTAL AND HUMAN RIGHTS VIOLATIONS*, (European Coalition for Corporate Justice), [http://www.corporatejustice.org/IMG/pdf/ECCJ\\_FairLaw.pdf](http://www.corporatejustice.org/IMG/pdf/ECCJ_FairLaw.pdf) (last visited June 21, 2009).

role should human rights organizations and lawyers play and how should they move forward?

These critical issues cannot be exhaustively answered at the moment for several reasons. The first is that many of the most interesting universal jurisdiction cases remain pending (e.g. Habrè, many Spanish cases), and there is not yet sufficient data to draw definitive conclusions. Second is that an empirical academic evaluation of the past ten years of universal jurisdiction is lacking, and opinions differ about the effects of even the most prominent cases (for example, the Pinochet case).<sup>315</sup> A final barrier to evaluation is that the various crimes are or have been committed under dramatically different conditions, in various time periods, and in diverse regions of the world. Considering the diversity of the situations,<sup>316</sup> any generalization runs the danger of oversimplifying the outcomes and obstacles.

Nonetheless, some preliminary observations can be made.

#### A. A First Step: Improving the Efficiency of the Institutions

It is obvious that the self-proclaimed goals of closing the impunity gap and eliminating safe havens for war criminals in Europe will not be achieved through the current practice of universal jurisdiction. But, what might be a more effective way to prosecute gross human rights violations committed outside the forum State?

Part II discussed some proposals, including standardizing legislation through framework decisions of the Council of the European Union, increasing technical and infrastructural resources by setting up specialized investigation units, and developing political programs to deal with the prosecution of international crimes on both the European and domestic levels. Raising awareness and sensitivity by establishing a sufficient level of knowledge about prosecuting international crimes among jurists in domestic legal systems is essential to the fight against impunity. Cases initiated *sua sponte* by the police, prosecutors, or judges are, as Part II illustrated, often are directed against low- to mid-rank perpetrators from African States or weak States such as Afghanistan and the former Yugoslavia. Prosecutors and judges—often inexperienced in international

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315. See the interesting controversy on Naomi Roht-Arriaza's description of the Pinochet Effect, *supra* note 9, in the report of a conference held in Santiago, Chile on October 8–10, 2008, in SEBASTIAN BRETT, THE PINOCHET EFFECT: TEN YEARS ON FROM LONDON 1998 (2008), available at <http://www.icsj.cl/archivos/the-pinochet-effect-english.pdf> (last visited June 21, 2009).

316. For example, these diverse situations include the dirty wars in Latin America in the 1970s and 1980s, the Balkan wars of the 1990s, the ongoing Central African wars, and torture allegations against the world's most powerful States, including Russia, China, and the United States.

prosecution—tend to reject cases that would not have a promising prognosis of conviction in their domestic jurisdictions.<sup>317</sup> Thus, they often ignore the international division of labor in such transnational procedures, which may start in one State, continue or end in another forum, and for which evidence may be obtained in one country yet used in another.<sup>318</sup> There are many reasons for prosecutors and judges to be selective about which cases to take forward. Decisions to prosecute only “predictable” criminal cases often stem from a lack of training in and knowledge of international law. This problem is exacerbated by (often) conservative attitudes in the juridical apparatus and unwillingness to confront powerful political actors. Therefore, it is important for jurists and human rights organizations who are interested in the use of universal jurisdiction to work to overcome these obstacles and establish precedents that improve the general expertise, skills, and willingness of the European jurist community to deal with mass atrocities in other parts of the world.

Enhancing the technical and organizational capacity and efficiency of law enforcement entities is key to the investigation and prosecution of serious international crimes. However, this can be regarded as a necessary first step in dealing with the complex legal, political, economic, and social contexts in which the crimes occurred.

#### *B. Victims' Participation in the Proceedings: A Necessary Task*

Many of the aforementioned universal jurisdiction cases were initiated and accompanied by victims' groups, human rights organizations, and their respective lawyers. The role of these non-state actors in the legal development of the cases, such as those in Spain, France, Belgium, and Germany, cannot be underestimated. These groups investigate international crimes often earlier than institutional actors and, due to privileged access to victims' communities, are able to gather information and evidence more efficiently than are state actors. They are often linked to transnational networks and are often better connected to international experts and lawyers than are local prosecutors and judges. For example, in several instances, these groups have notified law enforcement authorities about the current or expected presence of an accused in the forum State.

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317. See *supra* Part II.D and accompanying discussion.

318. See Claus Krieb, *Nationale Umsetzung des Völkerstrafgesetzbuches*, ZEITSCHRIFT FÜR INTERNATIONALES STRAFRECHT [Journal for International Criminal Law], 515–25 (2007). Krieb, in an expert hearing of the Human Rights Commission of the German Parliament demands consideration of this aspect of anticipated legal cooperation. *Id.* at 517, 519.

They also publicly denounce the crimes committed and, when domestic legislation allows, participate in the proceedings. In doing so, they give voice to people and communities who have suffered severe and often long-lasting physical, mental, and economic suffering and powerlessness. Even in the early stages of a criminal proceeding, public denouncement of the crimes, naming and shaming of the perpetrators, and individual testimonies of the harms suffered may provide first steps towards justice, restoration, transparency, and (re-)empowerment of traumatized individuals, communities, and societies.

To achieve these goals, victims' participation in criminal proceedings must be ensured. In some countries, the victims' status must be improved, especially in the investigation phase; further, there should be better access to legal and psychological aid throughout the process. Moreover, to achieve simply the technical goals in a criminal proceeding, sufficient communication and translation services must be provided to victims' communities. The development of relationships and trust is a prerequisite to a successful investigation and to guaranteeing that victims are present, participate, and testify in the legal proceedings. This trust would enable a degree of democratization of legal proceedings that take place in distant places under unfamiliar rules.

Further, the presence of strong local communities and local political and legal representation enhances the professional legal work and increases the likelihood of achieving more ambitious goals. Due to the variety of circumstances in which the human rights violations occur, this task is more easily realized in some cases than it is in others.

### *C. The Future: Strategic Litigation, Limitations, and Opportunities*

Strategic litigation is a fairly new concept in continental Europe, where most universal jurisdiction cases take place. The goals discussed in the context of strategic human rights litigation extend beyond the potential outcomes in a given juridical procedure. They include discussion about how to change the social and political situations that lead to human rights violations, law reform, the creative use of law, increasing expertise and public awareness regarding specific legislation or complicity of actors in forum (or violating) States, and last but not least, the participation of victims and affected communities.<sup>319</sup> Whereas ATCA cases in the United States are conducted by well-established organiza-

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319. See, e.g., Mission and History: Center for Constitutional Rights, <http://www.ccrjustice.org/missionhistory?phpMyAdmin=563c49a5adf3t4ddb89b> (last visited June 21, 2009).

tions like the Center for Constitutional Rights (founded in 1966)<sup>320</sup> and the American Civil Liberties Union (founded in 1920)<sup>321</sup> European organizations involved in strategic litigation are far less experienced. While some of the work conducted throughout Europe can be considered strategic (such as in the Argentinean, Chilean, and Guatemalan cases), resources and concepts are still far less developed than in the United States. Nevertheless, the work of organizations such as Madrid-based Asociación Pro Derechos Humanos de España (APDHE), Paris-based Ligue des Droits de L'Homme (FIDH) and Berlin-based European Center for Constitutional and Human Rights (ECCHR), and the globally active Human Rights Watch and Amnesty International contribute enormously to a strategic approach towards universal jurisdiction.<sup>322</sup>

The call for strategic litigation to strengthen the application of universal jurisdiction through careful and thorough selection of cases is underpinned by a theoretical construction that looks beyond individual interests in punishing a perpetrator in a particular case. Therefore, strategic litigation can cause conflicts with individual lawyers and victims who want to file their individual lawsuits without considering other public interests. Christopher Hall from Amnesty International calls for the development of a global strategy that would strengthen rather than weaken the legal framework of universal jurisdiction.<sup>323</sup> He notes that many victims and lawyers file complaints only in the small number of States where universal jurisdiction cases have been successfully opened and investigated;<sup>324</sup> this limitation to a few State fora can overburden the domestic legal systems of individual States and risks further restricting the application of universal jurisdiction laws.<sup>325</sup> There should be no hierarchy of interests, however, and victims and their lawyers need not necessarily have broader public interests such as law reform or social change in mind when bringing universal jurisdiction cases to court. Victims should have access to the legal system and be represented by

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320. See The Center for Constitutional Rights <http://www.ccrjustice.org> (providing descriptions of past and current cases of corporate human rights abuses) (last visited June 21, 2009).

321. See American Civil Liberties Union, <http://www.aclu.org> (last visited June 21, 2009).

322. See, for example, BHUTA & SCHURR, *supra* note 13, and the series of country reports ("No Safe Haven" series) by Amnesty International, <http://www.amnesty.org/en/library> (search "Keywords" for "End Impunity Through Universal Jurisdiction"; then select a hyperlink to any of the published reports) (last visited June 21, 2009).

323. See Christopher Keith Hall, *Universal Jurisdiction: Developing and Implementing an Effective Global Strategy*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES, *supra* note 7, at 85.

324. *Id.* at 90.

325. See, for example, the descriptions of the practical experiences in Belgium and Spain, *supra* Parts I.A, I.I.

lawyers who comply with high professional standards and proffer legal argumentation that reflects a high level of expert knowledge. Ideally, the lawyers should be able and willing to discuss with their clients the use of alternative legal instruments in alternative fora and the potential public interests at stake. Further, public interest organizations with broader interests in the careful and strategic development of universal jurisdiction law and practice should train, discuss, communicate with, and advise all involved actors in order to avoid the undermining effect of bad precedents on the viability of universal jurisdiction.

A thorough consideration of strategic litigation demands that we look beyond the mere tool of universal jurisdiction and the strategy of selecting and bringing universal jurisdiction cases in the most professional and effective way. First, we must acknowledge the restrictions and ambiguities of the criminal justice system. “If society in general resorts to criminal law to regulate behavior, there is no justification for limiting interventions to petty and middle-range criminality while exempting especially grave infringements.”<sup>326</sup> In evaluating criminal justice approaches, we must bear in mind that even in a democratic State under the rule of law, the judging and incarcerating of individuals is still an exercise of power that may violate the rights of the accused (even when the allegations regard international crimes).<sup>327</sup> Even in the domestic context, criminology is hardly able to monitor the effects of individual judgments and punishments, or to evaluate whether the legal purposes for punishment—such as deterrence, general and specific prevention, and vindication of the rule of law—are actually being achieved.<sup>328</sup> Recent studies on the impact of international criminal tribunals create doubt around the continued, unremarked use of criminal justice; a contradiction exists in criminal justice between the need to focus on individual accountability and the many aspects of human rights violations that expand beyond the scope of criminal justice.<sup>329</sup> Julian Ku and Jide Nzelibe suggest “that the high incidence of humanitarian atrocities in weak States might have more to do with the offenders’ opportunities to commit atrocities rather than their willingness to do so,” and that “developing an effective framework for addressing [those crimes] might have less to do with initiating international prosecutions and more to do with building robust domestic institutions in weak States that can successfully channel

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326. Peer Stolle & Tobias Singelstein, *On the Aims and Actual Consequences of International Protection of Human Rights Crimes*, in *INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES*, *supra* note 7, at 37, 38.

327. *Id.* at 39.

328. *Id.* at 45.

329. *Id.* at 40.

political participation and dispute resolution.”<sup>330</sup> As Mark Drumbl aptly points out, “the choice is not between safeguarding extant institutions . . . or living lawlessly in a world of impunity . . .”<sup>331</sup> Drumbl calls that choice “a false dichotomy,” and proposes instead an option of “critique and growth” that “recognizes the potential (and limits) of law to enhance human welfare.”<sup>332</sup>

These fundamental thoughts have yet to be included in discussions about a strategic litigation approach to universal jurisdiction. The challenge is to balance the job of convincing (partly) unwilling and unable prosecutors and judges to investigate and prosecute international crimes with engaging in a thoughtful critique of criminal justice; but this is not an insurmountable obstacle. The technocratic jurist perspective focused narrowly on juridical issues must be overcome, and a wide variety of cultural, social, political, and legal responses towards serious human rights crimes must be developed. A purely legal discourse is often too self-referential and does not reflect the complexity of the problems faced. As a result, any legal approach must be embedded in, accompanied by, commented on, and corrected in broader interdisciplinary strategies that react to international crimes. The technical legal discourse should open itself more to discussions about which legal tools should be used in specific situations of gross human rights violations. In addition to needing to integrate meaningful restorative initiatives, indigenous values and practices, and distributive justice,<sup>333</sup> the accountability process needs to consider an increasing number of issues in domestic, transnational, and international fora. In most of the situations, the interests and specific demands of victims, their communities, and the affected societies should have priority. Thus, domestic efforts in the countries where the crimes were committed, including civil and criminal complaints, always must be considered first. This is necessary to respect the legal principle of exhaustion of remedies, subsidiarity, and complementarity, but also to develop broader strategies to address past and sometimes even ongoing crimes. Other legal tools, such as reparation cases, U.N. special procedures, and complaints addressing state accountability should be part of the discussion, along with any possible territorial and personality principle based cases which are sometimes much easier to defend.

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330. Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?* 47 (2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=931567#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931567#) (last visited June 21, 2009).

331. MARK DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* 209 (2007).

332. *Id.*

333. *See id.* at 147.

Nonetheless, criminal justice in general, and universal jurisdiction practice specifically, must continue to play its role in the complex process of investigating, which is an important process unto itself, and sanctioning of human rights crimes and promote healing among individual victims and society. The concept should always be considered as nothing more and nothing less than a last resort in cases of serious international crimes.

#### CONCLUSION

The summary of European practice shows that universal jurisdiction is a legal and social fact that can no longer be denied but due to its difficulties should only be used as a last resort in cases of impunity. The author proposes to regard universal jurisdiction as a sometimes overestimated but still important tool that should be considered and used alongside other local, regional, and international remedies. Legal efforts should be embedded in broader interdisciplinary strategies. Legal successes might not be achieved, but a professionally conducted, transnational, and interdisciplinary universal jurisdiction case might be an important element in the struggle to end impunity and protect human rights.