

NOTE

UNIVERSAL CRIMINAL JURISDICTION V.
UNIVERSAL CIVIL JURISDICTION:

WHY IT MATTERS

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* Notes and Articles Editor, Volume 47. Recipient of the William M. O'Connor Award for Outstanding Writing, JD Candidate, May 2024. First and foremost, I would like to thank my mom for all the sacrifices she has made. Moving to a new country is never easy and her perseverance has inspired me and helped me along my journey to law school. I would next like to thank Frankie who provided me support during the entire writing process. I would also like to thank Dr. Karen Greenberg who helped inspire the subject of this note which was originally a seminar paper from her Department of Justice and National Security class. Next, I would like to thank Sarah Buschmann LLM '24 who helped me better understand German law. I was also helped by Ms. Jenny Dahlström who coordinated my questions with the European Center for Constitutional and Human Rights. I would like to thank Mr. Wolfgang Kaleck's team who answered these questions. Next I would like to thank Jacqueline Hayes, Class of 2023 who is the former Senior Notes Editor who provided suggestions for how to expand the seminar paper into a note. Thank you to Volume 47 for publishing this note. Specifically, I would like to thank the senior notes editors Talia and Grady, the T3- Tasha, Hope and Julia, my fellow Notes and Articles Editors and the staffers for their edits. Finally, I would like to thank my friends, family and mentors who helped make me who I am today especially my legal mentor David Grassmick who has encouraged me to constantly seek out new challenges which will help make me a better lawyer.

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I. INTRODUCTION

“National security”¹: that was the reason given by the United States to dismiss the cases against the government and officials involved in the Central Intelligence Agency’s (CIA’s) Rendition, Detention, and Interrogation program (CIA Torture Program).² This program involved the CIA sweeping up terror suspects “. . . in the months and years after 9/11, with capture operations taking place across Europe, Africa, the Caucasus, the Middle East, and Central, South, and Southeast Asia.”³ The CIA brought the suspects to facilities where the CIA tortured them beyond the reach of the law. The CIA built at least ten facilities, referred to as “black sites.”⁴ These sites were in Thailand, Afghanistan, Poland, Romania, Lithuania, and Guantanamo. The CIA sites on Guantanamo had their own facilities, separate from the Department of Defense prison located there.⁵ Eventually, the CIA closed all overseas black sites and transferred “high value detainees” to the military prison on Guantanamo.⁶ But, even in

1. *See generally* Mohamed v. Jeppesen Dataplan, Inc., 614 F. 3d 1070 (9th Cir. 2010); Arar v. Ashcroft, 585 F. 3d 559 (2d Cir. 2009) (en banc) (finding that judicial review of extraordinary rendition would affect diplomacy, foreign policy, and national security interests); Peter Weiss, *The Future of Universal Jurisdiction*, in *INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES* 30 (Wolfgang Kaleck, Michael Ratner, Tobias Singelnstein & Peter Weiss eds., Springer, 2007) (“The United States Supreme Court . . . normally defers to the administration in matters of national security . . .”).

2. SAM RAPHAEL ET AL., *CIA TORTURE UNREDACTED* 17 (2019).

3. *Id.*

4. *Id.* at 18.

5. *Id.* at 115.

6. *Id.* at 135.

the military prison, suspects were tortured.⁷ Officials from both the CIA and Department of Defense were responsible for or supervised human rights violations⁸ and yet, they have largely been held unaccountable.⁹

Part of the reason for the lack of accountability is the Department of Justice's complicity. The Office of Legal Counsel, specifically its former officials Jay Bybee and John Yoo, was responsible for the "Torture Memos,"¹⁰ which endorsed the usage of enhanced interrogation techniques.¹¹ The Department of Justice, effectively sanctioning torture, refused to prosecute high-ranking government officials. It was therefore up to other countries to seek justice for victims.¹² Using the principle of universal jurisdiction, human rights lawyers sought criminal charges in Europe against various US government officials.¹³ These lawsuits were unsuccessful because, similar to prosecutorial discretion by the Department of Justice, the United States has the discretion over whether to engage in international trials,¹⁴ and often exerts pressure over host countries not to prosecute.¹⁵

7. See generally Review of Department of Defense Detention and Interrogation Policy and Operations in the Global War on Terrorism: Hearing Before Comm. on Armed Services and Subcomm. on Personnel, 109 Cong. 187 (2005).

8. RAPHAEL ET AL, *supra* note 2, at 17.

9. *Aide: Obama Won't Prosecute Bush Officials*, CBS, Apr. 20, 2009, <https://www.cbsnews.com/news/aide-obama-wont-prosecute-bush-officials/> [<https://perma.cc/XDT5-62DH>].

10. *The Torture Documents*, THE RENDITION PROJECT, <https://www.therenditionproject.org.uk/documents/torture-docs.html#> [<https://perma.cc/8DRH-7V8W>] (last visited May 19, 2024) ("From late 2001 onwards, numerous memos were exchanged between the Department of Justice's Office of Legal Counsel and the White House, the Counsel to the CIA, and the Department of Defense regarding the detention and treatment of detainees in the 'War on Terror'. Of these, the Bybee and Bradbury memos provide important insights into the evolution of torture practices for use against so-called High Value Detainees by the CIA.").

11. See Memorandum from Jay S. Bybee, the Dep't of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A*, at 46, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf> [<https://perma.cc/8DRH-7V8W>].

12. See *infra* Part III.

13. *Id.*

14. *Id.*

15. Asif Efrat, *Facing US Extraterritorial Pressure: American Troops in Foreign Courts during the Cold War*, 84 J. POL. 242-257 (2022).

Victims have turned to private action, but also with little success.¹⁶ These results show the failure of both the United States and the international community in addressing human rights violations.

The purpose of this Note is to address these failures in the context of universal criminal jurisdiction and universal civil jurisdiction. The former, although more globally accepted, has proven to be less successful in practice when addressing US actions during the War on Terror.¹⁷ Part II of this Note begins with a general introduction of universal jurisdiction and how it is typically applied to crimes. The history of universal jurisdiction shows its transformation from a means of prosecuting pirates to one of prosecuting human rights violators. Part III of this Note discusses the use of universal criminal jurisdiction in Europe in the aftermath of the War on Terror, with specific focus on lawsuits filed in Germany, France, and Spain.

Part IV of this Note discusses universal civil jurisdiction, a principle practiced almost exclusively in the United States. Unlike Europe, “. . . the United States has rarely if ever exercised universal criminal jurisdiction.”¹⁸ One reason for the country’s reluctance to exercise universal criminal jurisdiction is constitutional concerns, as “. . . there are numerous evidentiary challenges associated with investigating and prosecuting criminal cases under universal jurisdiction.”¹⁹ Such challenges include crime scenes being thousands of miles away and difficulty obtaining witnesses and recovering physical evidence.²⁰ Instead, the United States has provided a civil means for noncitizens to recover for human rights violations in the form of the Alien Tort Statute.²¹ Although universal civil jurisdiction has proven

16. *See infra* Part IV.

17. Following the terrorist attacks that occurred on September 11, 2001, America and its allies began a global campaign to fight terrorism. *The Global War on Terrorism: The First Hundred Days*, U.S. STATE DEP’T, <https://2001-2009.state.gov/s/ct/rls/wh/6947.htm> [<https://perma.cc/CC67-6R3J>].

18. Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL FORUM 323, 347 (2001).

19. Steve Szymanski and Peter C. Combe, *The Siren Song of Universal Jurisdiction: A Cautionary Note*, LIEBER INSTITUTE (Apr. 1, 2022), <https://lieber.westpoint.edu/siren-song-universal-jurisdiction-cautionary-note> [<https://perma.cc/525M-HG5S>].

20. *Id.*

21. 28 U.S.C. § 1350.

successful in the United States, European countries have been reluctant to adopt this form of universal jurisdiction. Part V of this Note analyzes the distinctions between universal criminal jurisdiction and universal civil jurisdiction. With these distinctions in mind, this Note argues that countries that have adopted universal criminal jurisdiction should more openly embrace universal civil jurisdiction. Had these countries done so, victims of the CIA Torture Program²² may have gotten the relief they deserved.

II. *THE ORIGINS OF UNIVERSAL JURISDICTION*

Universal jurisdiction is an ancient concept going back at least to the time of the Roman Republic, where it was first used against pirates. Because pirates were not subjects to one nation, universal jurisdiction allowed “the national authorities of any state to investigate and prosecute people for serious international crimes even if they were committed in another country.”²³ The similarities between pirates and the slave traders led to the application of universal jurisdiction to the slave trade as well. Universal jurisdiction was seen as a remedy for attacks against a state. It was not until the Nuremberg Trials that the principle was used against state actors for human rights violations. This Section of the Note follows the history of universal jurisdiction: starting with its application to piracy, then the slave trade, and ending with its usage in trials against war crimes.

A. *Piracy*

The principle of universal jurisdiction was first used against pirates because they were the *hostis humani generis* (“enemy of all mankind”).²⁴ The term was first coined in 1600s,²⁵ but pirates

22. As mentioned previously, terror suspects suffered at the hands of both the CIA and Department of Defense, but for the sake of simplicity, I will refer to these acts as part of the CIA torture program.

23. Factsheet: Universal Jurisdiction, CENTER FOR CONSTITUTIONAL RIGHTS (Dec. 7, 2015), <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/factsheet-universal-jurisdiction> [https://perma.cc/66PM-9WD6].

24. MARK CHADWICK, *PIRACY AND THE ORIGINS OF UNIVERSAL JURISDICTION: ON STRANGER TIDES?* 1 (Malgosia Fitzmaurice & Sarah Singer eds., 2019).

25. *Id.* at 76.

have a long history of international prosecution dating back to the Roman Republic. Cicero stated that a pirate:

. . . is not included in the number of lawful enemies, but is the common foe of all the world; and with him there ought not to be any pledged word nor any oath mutually binding.²⁶

Pirates violated the custom of freedom on the high seas by plundering the goods of ships they captured.²⁷ Freedom on the sea is universally recognized, which allowed states to address these violations despite “. . . the ability of pirates to flee territorial waters . . . ,”²⁸ because any state would be able to prosecute them.

The condemnation of piracy continues into modern times. For example, the principle of universal jurisdiction appears in the British case *Attorney General of Hong Kong v. Kwok-a-Sing*.²⁹ Here, a Chinese national took over a French ship by killing its captain and some of its crew.³⁰ The Chinese national was charged with both murder and piracy, but the court distinguished between the two charges.³¹ It found that it could not rule on the murder charge because “. . . the law as to what constitutes murder differs in different places.”³² However, the piracy charge was “. . . punishable . . . because [the pirate] committed an act of piracy, which *jure gentium* is justiciable everywhere.”³³ The universality of piracy led to its codification in the 1958 Convention on the High Seas and the 1982 Convention on the Law of Sea. This universal recognition of piracy as a crime prosecutable anywhere

26. *Id.* at 47.

27. See *United States v. Smith*, 18 U.S. 153, 162 (1820) (“So that, whether we advert to writers on common law, or the *mar timo* law, or the law of nations, we shall find that they universally treat of piracy as an offence against the law of nations, and that its true definition by that law is robbery upon the sea.”); CHADWICK, *supra* note 24, at 34 (“Today the principle of the freedom of the high seas, as an enabler of inter-State commerce is well established... Republican Rome placed a great emphasis on ensuring free trade across the Mediterranean... at the expense of the plunderous communities of *peiratēs*...”).

28. Yana Shy Kraytman, *Universal Jurisdiction-Historical Roots and Modern Implications*, 2 BRUSSELS J. INT’L STUD. 94, 98 (2005).

29. *Attorney General of Hong Kong v. Kwok-a-Sing*, (1873) 5 L.R.P.C. 179 (P.C.).

30. *Id.* at 180.

31. *Id.* at 191.

32. *Id.* at 199.

33. *Id.* at 180 (emphasis added).

set the stage for universal jurisdiction to expand to the slave trade and war crimes.

B. Slave Trade and Slavery

Universal jurisdiction subsequently expanded from its origins in combating piracy to combating the slave trade and slavery. In 1815, “. . . the Declaration of the Congress of Vienna equated traffic in slavery to piracy.”³⁴ This comparison can be seen by the inclusion of the Declaration of Powers on the Abolition of the Slave Trade (Declaration of Powers).³⁵ The Declaration of Powers, annexed to the final act of Declaration of the Congress of Vienna,³⁶ found the slave trade to be “repugnant to the principles of humanity and universal morality.”³⁷ This treaty was significant because it represented the first international condemnation of the slave trade.³⁸ The slave trade was established under universal jurisdiction because, like piracy, it involved the high seas.³⁹ Indeed, “no one state can, on its own, adequately monitor . . . over any significant portion of the high seas, [making] it . . . difficult actually to capture offenders and bring them to trial.”⁴⁰ Universal jurisdiction, therefore, was a response to this enforcement gap.⁴¹

Unlike the slave trade, slavery was a purely domestic issue. Therefore, it was up to individual states to outlaw slavery without

34. M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspective and Contemporary Practice*, 42 VA. J. INT'L L. 81, 112 (2001).

35. See generally Déclaration des Puissances sur l'abolition de la traite des Nègres (Austria, France, Great Britain, Portugal, Prussia, Russia, Spain, Sweden-Norway), signed at Vienne on 8 February 1815, 3 BFSP 971.

36. Thomas Weller, *Vienna, 1815: First International Condemnation of the Slave Trade*, ONLINE ATLAS ON THE HIST. OF HUMANITARIANISM AND HUM. RTS. (Dec. 2015), <https://hr-atlas.ieg-mainz.de/articles/weller-vienna#:~:text=In%20this%20Vienna%20declaration%20they,and%20afflicted%20humanity.%E2%80%9D%20The%20language> [https://perma.cc/TD4Q-YRMS].

37. Déclaration des Puissances sur l'abolition de la traite des Nègres (Austria, France, Great Britain, Portugal, Prussia, Russia, Spain, Sweden-Norway), signed at Vienne on 8 February 1815, 3 BFSP 971.

38. Weller, *supra* note 36.

39. Bassiouni, *supra* note 34, at 113. *But see* The Antelope, 23 U.S. 66, 115 (1825) (“That trade could not be considered as contrary to the law of nations . . .”).

40. Jiewuh Song, *Pirates and Torturers: Universal Jurisdiction as Enforcement Gap-Filling* 23 J. POL. PHIL. 471, 482 (2014).

41. *Id.*

the involvement of the international community.⁴² This made slavery distinctive in that, “. . . it has almost been totally eradicated since the beginning of the 1900s without reliance on an international enforcement machinery.”⁴³ This unique trait of traditional slavery, however, presents a problem for modern slavery. While

. . . the near extinction of traditional form of slavery may be the reason why the application of universality is now uncontroversial . . . universal jurisdiction has been withheld from the modern forms of slavery.⁴⁴

The Third Restatement of the Foreign Relations of the United States sheds light on the reason universal jurisdiction is withheld in modern slavery cases. The Restatement states that slavery is only actionable against state actors.⁴⁵ Modern forms of slavery, like debt bondage and human trafficking,⁴⁶ are usually committed by private persons.⁴⁷ It is therefore up to individual states to address modern slavery just as they did with traditional slavery.⁴⁸

42. Bassiouni, *supra* note 34, at 114. This helps explain why countries like the United States were not internationally prosecuted for continuing to practice slavery into the 1860s.

43. M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL. 445, 453 (1991).

44. Kraytman, *supra* note 28, at 101.

45. *Restatement (Third) Foreign Relations Law* §702 (1987).

46. Office to Monitor and Combat Trafficking in Persons, *What is Modern Slavery?* U.S. DEP'T OF STATE, <https://www.state.gov/what-is-modern-slavery/#:~:text=exploited%20as%20well-,Bonded%20Labor%20or%20Debt%20Bondage,pay%20off%20their%20ancestors'%20debts> [https://perma.cc/G2RC-S58F]. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery leaves it up to “each state to take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices.” One of those practices is debt bondage which is defined as “the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt of the length and nature of those services are not respectively limited and defined.” See Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1, Sept. 7, 1956, 266 U.N.T.S. 3.

47. For an example, see *Swarna v. Al-Awadi*, No. 06-CV-4880 PKC, 2011 LEXIS 51908 (S.D.N.Y. May, 12 2011).

48. Recent efforts have been made to address human trafficking internationally, but only after a dramatic increase in the traffic of women and children for sexual exploitation. Bassiouni, *supra* note 34, at 115.

As one scholar noted, “Nor does the fact that conduct that is universally condemned necessarily imply that universal jurisdiction is applicable to such conduct.”⁴⁹ Other laws, in fact, may prohibit the use of universal jurisdiction.⁵⁰ This limitation demonstrates why European countries failed to hold the United States accountable for its actions during the War on Terror.

C. *War Crimes*

The Hague Conventions of 1899 and 1907 set out the rules of war. Yet, actions in both World War I and World War II violated those rules, making the conventions a failure.⁵¹ World War I showed the “advance to barbarism,” and World War II only “confirmed humanity’s capacity for barbarity.”⁵² Barbarism, as distinguished from atrocity, “is the *systematic* harm of non-combatants for a specific military or political objective.”⁵³ The barbaric acts of the Germans, in particular the use of chemical weapons⁵⁴ and the sinking of the *Lusitania*,⁵⁵ caused the Americans to join the war in 1917 “. . . because the American

49. *Id.* at 94.

50. The law of sovereign immunity is an example of one of these laws. See Mary Robinson, *Foreword* to STEPHEN MACEDO ET. AL, *THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION* 17 (2001) (“Obstacles to the exercise of universal jurisdiction include the question of sovereign immunity defenses.”); see also *infra* notes 183–189.

51. Adam Roberts, *Land Warfare: From Hague to Nuremberg*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 116 (Michael Howard et. al eds., 1994).

52. Maartje Abbenhuis, ‘*This is an Account of Failure*’: *The Contested Histography of the Hague Peace Conferences of 1899, 1907, and 1915*, 32 *DIPL. & STATECRAFT* 1, 2 (2021).

53. Ivan Arreguin-Toft, *The Futility of Barbarism: Assessing the Impact of Systematic Harm of Non-Combatants of War* (paper presented at the annual convention of the American Political Science Association, Philadelphia, Pennsylvania, August 2003) (emphasis in original), https://www.belfercenter.org/sites/default/files/legacy/files/Arreguin_Toft_APSA_2003.pdf [<https://perma.cc/H67Q-H2BK>].

54. The Germans introduced mustard gas in 1917 which blistered the skin, eyes, and lungs and killed thousands. *Germans Introduce Poison Gas*, *HISTORY* (Feb. 9, 2010), <https://www.history.com/this-day-in-history/germans-introduce-poison-gas> [<https://perma.cc/QST8-WJB8>].

55. Frank Trommler, *The Lusitania Effect: America’s Mobilization against Germany in World War I*, 32 *GERMAN STUDIES REV.* 241, 241 (2009) (“Just mentioning the *Lusitania* conjured a whole world of brutality, barbarism, and betrayal that tainted everything connected with the German cause.”).

people believed that Germany had repeatedly violated the norms of ‘civilised’ behaviour”⁵⁶ It was only after the use of chemical warfare in World War I and the Holocaust in World War II that international law began to live up to its essential purpose: *si vi pacem, cole justitiam*.⁵⁷

The catalyst for this transition was the Nuremburg Trials, which lit “. . . the way for a growth of attempts to apply duly postulated norms of international law to the actions of men who bear the ultimate responsibility for state action.”⁵⁸ During his opening statement for the trials, United States Supreme Court Associate Justice Robert Jackson, in his role as Chief United States Prosecutor, stated that “the real complaining party at your bar is Civilization.”⁵⁹ Jackson emphasized how important the trials were for civilization to ensure that such atrocities would not be repeated.⁶⁰ To overcome the issue of state sovereignty, Jackson compared Nazi war crimes to piracy.⁶¹ This parallel has drawn criticism because “. . . piracy cannot truly be described as a form of warfare at sea any more than a serial killer can be said to engage in warfare by committing a string of murders.”⁶² However, Jackson’s comparison has become widely accepted due to the difficulty of prosecution. The difficulties of prosecuting piracy stem from the fact that such crimes occur on the high seas. With war crimes, prosecutorial issues arise because the State with jurisdiction over the individuals responsible likely sanctioned the crimes.⁶³ Consequently, the Geneva Conventions of 1949 gave

56. Abbenhuis, *supra* note 52, at 6.

57. Si vi pacem, cole justitiam means if you want peace, seek justice. *Id.* at 3.

58. Thomas H. Sponsler, *The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen*, 15 *LOY. L. REV.* 43, 67 (1968-1969).

59. Justice Robert Jackson, *Opening Statements at Nuremburg Trials*, reprinted in TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBURG TRIALS* 171 (1992).

60. *Id.* at 167.

61. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946 149 (1947) (“The principle of individual responsibility for piracy and brigandage, which have long been recognized as crimes punishable under international law, is old and well established. That is what illegal warfare is.”).

62. See Kravtman, *supra* note 28, at 104; CHADWICK, *supra* note 24, at 2 (“Even the most infamous of pirates . . . could not compare to this [Nazi war crimes] level of depravity.”).

63. Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 *CALIF. L. REV.* 177, 194 (1945).

credence to the application of universal jurisdiction to war crimes. The Conventions established the *aut dedere aut judicare* (“either extradite or prosecute”) clauses,⁶⁴ which obligate parties to either extradite violators of the Conventions or prosecute the individuals in their own courts.⁶⁵

Despite the Nuremberg Trials and Geneva Conventions, the use of universal jurisdiction to prosecute war crimes has produced mixed results. On the one hand, the Supreme Court of Israel successfully used universal jurisdiction to prosecute Adolf Eichmann.⁶⁶ Adolf Eichmann was a member of the Schutzstaffel (SS) and instrumental in the Holocaust as he was commonly recognized as Hitler’s chief adviser on the “Jewish problem” and in direct charge of the killing of Jews of Germany, Austria, Czechoslovakia, Poland, and Hungary.⁶⁷ While his fellow Nazis were tried at Nuremberg in 1945 and 1946, Eichmann went into hiding.⁶⁸ In 1960, Israeli officials found Eichmann in Argentina and brought him to be tried in Israel without the knowledge or consent of the Argentinian government.⁶⁹ In addition to Eichmann’s questionable transfer to Israel, problems arose from the fact that Israel was not a country at the time of Eichmann’s offense.⁷⁰ To justify an inherently political trial,⁷¹ the Supreme

64. Kravtman, *supra* note 28, at 109.

65. *Id.*

66. See CrimC (DC Jer) 336/61 Att. Gen. of Israel v. Eichmann, 45 PM 3(1961) (Isr.), *reprinted in* 36 I.L.R. 18 (1968); CrimA 336/61 Att. Gen. of Israel v. Eichmann, 16 PD 2033, (1962) (Isr.), *reprinted in* 36 I.L.R. 277 (1968).

67. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 36 (Penguin Books 2006) (1963); Sidney Liskofsky, *The Eichmann Case*, 62 THE AM. JEWISH Y.B. 199, 199 (1961).

68. Hans W. Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 DUKE L.J. 400, 400 (1961).

69. *Id.*

70. Henry T. King Jr., *Universal Jurisdiction: Myths, Realities, Prospects, War Crimes and Crimes Against Humanity: The Nuremberg Precedent*, 35 NEW ENG. L. REV. 281, 284-85 (2001).

71. See ARENDT, *supra* note 67, at 4-5 (“Clearly, this courtroom is not a bad place for the show trial David Ben-Gurion, Prime Minister of Israel, had in mind when he decided to have Eichmann kidnapped in Argentina and brought to the District Court of Jerusalem to stand trial for his role in the “final solution to the Jewish question.” And Ben-Gurion, rightly called the ‘architect of the state,’ remains the invisible stage manager of the proceedings.”).

Court of Israel referred to Eichmann as a pirate.⁷² The reference to Eichmann being a pirate, in part, was justified because the Vatican issued him a stateless person's identity card.⁷³ Although universal condemnation does not equate to universal jurisdiction,⁷⁴ the universal condemnation of pirates helped provide the Supreme Court of Israel with jurisdiction to hear Eichmann's case instead of requiring an international tribunal.⁷⁵

On the other hand, universal jurisdiction produced mixed results in the case against former Chilean President Augusto Pinochet. The case against Pinochet began when the Spanish courts were investigating the Argentine military junta for genocide, terrorism, and crimes regarding the detention and disappearance of Spanish citizens living in Argentina.⁷⁶ Because the investigation centered on Spanish citizens, Spanish courts had jurisdiction. The lead investigator in the case, Baltasar Garzón, issued an international arrest warrant for a retired Argentine general and nine other officers.⁷⁷

Garzón also "began looking into Operation Condor, a coordinated effort by the South American militaries to assassinate and disappear opponents across borders in Latin America, Europe, and the United States."⁷⁸ This expanded the scope of Garzón's investigation to include Chile, specifically Pinochet. Pinochet could not be prosecuted while in Chile because he had

72. CHADWICK, *supra* note 24, at 1 ("[T]he Court (Supreme Court) redefined their suspect as a "pirate," an "enemy of all mankind" against whose punishment none could object."); see *CrimA 336/61 Att. Gen. of Israel v. Eichmann*, 16 PD 2033, (1962) (Isr.), *reprinted in* 36 I.L.R. 277, para. 12 (1968)).

73. Baade, *supra* note 68, at 409.

74. Bassiouni, *supra* note 34, at 94.

75. There were a number of critics of Israel's handling of the Eichmann case. See Liskofsky, *supra* note 67, at 205:

It was also urged that it was in the interest of Israel itself and of Jews everywhere to make clear that it was against humanity as a whole, and not simply against Jews, that Eichmann's crimes had been directed. A trial before a German court or an international tribunal would have this significance in a way that a trial in Israel would not.

76. Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 *NEW ENG. L. REV.* 311, 311 (2001).

77. *Id.* at 312 (noting that Garzón later expanded indictments and warrants to include more than 100 officers).

78. *Id.*

legal immunity.⁷⁹ According to the 1980 Chilean Constitution, any president that served more than six years may then serve as senator for life.⁸⁰ With this senatorial immunity, Pinochet was an “untouchable *caudillo*” (military leader).⁸¹ It took Pinochet’s arrival in London for medical treatment to initiate legal action. From there, Judge Garzón issued an arrest warrant and a request for extradition.⁸² The British House of Lords allowed the extradition to go forward, using the principle of universal jurisdiction to reason that there was no former head-of-state immunity for torture.⁸³ However, politics ultimately prevented the successful use of universal jurisdiction. The British government succumbed to pressure from the Chilean government, which argued that Pinochet’s detention challenged its state sovereignty, and released Pinochet.⁸⁴

Politics also prevented the prosecution of war crimes committed during the Korean and Vietnam Wars. During the Korean War, United States Army Colonel James Hanley was assigned to collect evidence of war crimes.⁸⁵ He found 936 prisoners of war who could have been tried for war crimes; over two-thirds of these prisoners were North Koreans.⁸⁶ However, the prisoners were never tried because “if the Americans retained suspected Chinese and North Korean war criminals for trial, then the Chinese and North Koreans would ‘hold back their own self-defined Allied “war criminals,” principally air crewmen and intelligence agents.’”⁸⁷

79. LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* 202 n. 64 (2007).

80. *Id.*; Constitución Política de la República de Chile [C.P.] art. 45. (1980).

81. HILBINK, *supra* note 79, at 187.

82. Roht-Arriaza, *supra* note 76, at 311-12.

83. *Id.*

84. Amnesty International, *How General Pinochet’s Detention Changed the Meaning of Justice*, AMNESTY.ORG (Oct. 16, 2013), <https://www.amnesty.org/en/latest/news/2013/10/how-general-pinochets-detention-changed-meaning-justice> [https://perma.cc/288T-YHDJ]; See NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* 59 (2005).

85. Fred L. Borsch, *Investigating War Crimes: The Experiences of Colonel James M. Hanley during the Korean War*, 2014 ARMY LAW. 19 (2014).

86. *Id.* at 20.

87. *Id.* at 21 (citing ALLAN R. MILLET, *THEIR WAR FOR KOREA* 231 (2002)).

The international community was also unsuccessful in holding members of the US military accountable for their actions during the Vietnam War. The single greatest human rights violation committed by the United States in Vietnam took place on March 16, 1968.⁸⁸ An infantry of soldiers attacked the village of My Lai resulting in the deaths of 347 to 504 unarmed Vietnamese women, children, and old men by the end of the day.⁸⁹ Although the United States did prosecute United States Army Lieutenant William Calley for his role in the My Lai massacre, public and political support for Calley led to a commutation of his sentence.⁹⁰ US Army General Albert O. Connor reduced Calley's sentence from life to twenty years with eligibility of parole in six or seven years.⁹¹ United States Secretary of the Army Howard Calloway then further reduced the sentence to ten years total⁹² with Calley, in the end, spending "less time in a cell than many people convicted of minor misdemeanors."⁹³

While My Lai was the greatest human rights violation that occurred over the course of one day during the Vietnam War, the actions of the Tiger Force are "believed to be the longest series of atrocities by a platoon in the war."⁹⁴ The Tiger Force was an elite US military unit of the Vietnam War responsible for the deaths of

88. Christopher J. Levesque, Opinion, *The Truth Behind My Lai*, N.Y. TIMES, Mar. 16, 2018, <https://www.nytimes.com/2018/03/16/opinion/the-truth-behind-my-lai.html> [https://perma.cc/8SCR-5YE7].

89. *Id.*

90. MICHAL R. BELKNAP, *THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY* 235 (2002); See Stephan Leshner, *The Calley Case Re-Examined* N.Y. TIMES (Jul. 11, 1971), at 6, <https://www.nytimes.com/1971/07/11/archives/the-calley-case-reexamined-the-calley-case-reexamined.html> [https://perma.cc/HZ2P-VVZ9] (Eight out of ten Americans objected to the jury finding in Calley's case and twenty percent of those objecting maintained that what Calley did in My Lai was not a crime).

91. *Only Calley Convicted*, N.Y. TIMES (Sept. 23, 1971), <https://www.nytimes.com/1971/09/23/archives/only-calley-convicted.html> [https://perma.cc/LX5R-JPPZ].

92. Linda Charlton, *Calley Sentence is Cut to 10 Years by Head of Army*, N.Y. TIMES (Apr. 17, 1974), <https://www.nytimes.com/1974/04/17/archives/calley-sentence-is-cut-to-10-years-by-head-of-army-secretary-cites.html> [https://perma.cc/9WC3-PNPZ].

93. BELKNAP, *supra* note 90, at 235.

94. Michael Sallah, *The Tiger Atrocities*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/opinion/vietnam-tiger-force-atrocities.html> [https://perma.cc/Q7YJ-E755].

several hundred civilians over seven months.⁹⁵ This unit intentionally blew up underground bunkers, shot elderly farmers, and tortured prisoners.⁹⁶ A US Army investigation that lasted four and a half years found eighteen soldiers had committed war crimes, but no one was charged.⁹⁷

Many critics of the Vietnam War suggested that the United States was clearly guilty of war crimes, crimes for which top German leaders, after World War Two, were either imprisoned or executed.⁹⁸ However, the United States was never punished, internationally nor domestically, for its actions. Scholars convened once to condemn the United States during the Russell Tribunal.⁹⁹ The tribunal held that the United States committed war crimes in Vietnam, but unlike the Nuremberg Trials, this tribunal had no authority to punish.¹⁰⁰ The reason for this lack of accountability, in part, was the complexity over which side was the aggressor in the Vietnam War.¹⁰¹ Moreover, the United States has a history of not allowing international law to undermine national policies.¹⁰² American recognition of international law is “effective only in the absence of a ‘contrary [treaty,] executive or legislative act or judicial decision.’”¹⁰³ For example, some US courts during the Vietnam War found that existing domestic law made an individual’s responsibility under international law irrelevant.¹⁰⁴ This subjugation of international law comes from the United States’ fear of reducing itself into a helpless condition,¹⁰⁵ a position further demonstrated by its refusal to join the

95. *The Series: Elite unit savaged civilians in Vietnam*, THE BLADE, Oct. 22, 2003, <https://www.toledoblade.com/special-tiger-force/2003/10/19/the-series-elite-unit-savaged-civilians-in-vietnam.html>.

96. *Id.*

97. *Id.*

98. TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 96 (1970).

99. Cody J. Foster, Opinion, *Did America Commit War Crimes in Vietnam?*, N.Y. TIMES (Dec. 1, 2017), <https://www.nytimes.com/2017/12/01/opinion/did-america-commit-war-crimes-in-vietnam.html> [https://perma.cc/CUM4-NMNP].

100. *Id.*

101. TAYLOR, *supra* note 98, at 103.

102. Jonathan M. Friedman, *American Courts, International Law, and the War in Vietnam* 18 COLUM. J. L. & SOC. PROBS. 295, 307 (1984).

103. *Id.* (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

104. TAYLOR, *supra* note 98, at 116.

105. *Taylor v. Morton*, 23 F. Cas. 784, 786 (C.C.D. Mass. 1855).

International Criminal Court (ICC). The ICC only has authority over its member states.¹⁰⁶ With no authority over the United States, the ICC and the international community overall require cooperation from the United States to combat crimes on an international scale—a task that has proven to be especially difficult in the prosecution of US officials.

III. UNIVERSAL CRIMINAL JURISDICTION IN MODERN TIMES: WAR ON TERROR

As the history of universal jurisdiction shows, the principle arises primarily in criminal cases.¹⁰⁷ The Nuremburg Trials, however, saw the application of universal jurisdiction to human rights violations.¹⁰⁸ This trend has continued to the present day, at least in theory. David J. Scheffer, US Ambassador-at-Large for War Crimes during the Clinton administration, aptly noted that

Universal jurisdiction is not a broadly adhered-to standard. Everyone talks about universal jurisdiction, but almost no one practices it. It has been a mostly rhetorical exercise since World War Two.¹⁰⁹

Indeed, the absence of war crime prosecution during the Korean and Vietnam Wars demonstrates universal jurisdiction's role as merely a rhetorical exercise. The aftermath of the War on Terror reaffirmed the notion that universal jurisdiction is rarely practiced. Despite being a signatory state of the Convention Against Torture,¹¹⁰ the United States decided not to pursue criminal charges against high-ranking government officials

106. *How the Court Works*, ICC, <https://www.icc-cpi.int/about/how-the-court-works#:~:text=may%20be%20released,-jurisdiction,jurisdiction%20of%20the%20Court%3B%20or> [https://perma.cc/WS3W-9QWU] (last visited Aug. 18, 2023).

107. *See supra* Part I.

108. *See supra* Section II.C.

109. David J. Scheffer, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Opening Address*, 35 *NEW ENG. L. REV.* 233, 233 (2001).

110. Convention against Torture and Other Cruel, Inhumane or Degrading Punishment or Treatment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

involved in the CIA Torture Program.¹¹¹ Instead, charges were brought in European countries such as Germany, France, and Spain under the principle of universal jurisdiction.¹¹² The results in these countries were the same, largely because of the unwillingness of the United States to cooperate.

This Part begins with the cases brought in Germany against US officials for their actions during the War on Terror. First, a criminal complaint was filed in Germany against top US officials for sanctioning the torture of four Iraqis. Human rights lawyers filed their next case in Germany after the United States adopted the Military Commissions Act, which confirmed that the United States would not prosecute US officials. Both actions were dismissed because the German Court claimed lack of jurisdiction to prosecute the cases. This Part next discusses cases brought in France and compares how France and Germany dealt with cases claiming universal jurisdiction. Both countries declared that they did not have jurisdiction over US officials; in France, the courts even held that certain officials had immunity. The Part ends with an analysis of Spain and its War on Terror cases. In all three countries, most notably Spain, politics influenced the decision whether to prosecute US officials. Spain had a long history of encouraging claims of universal jurisdiction,¹¹³ but amendments to its law resulted in the dismissal of many cases—including cases against US officials.

A. *Germany*

Following the Holocaust, Germany became more conscious of human rights violations, as evidenced by its adoption of the Code of Crimes against International Law (CCAIL).¹¹⁴ This code internalized the Rome Statute of the International Criminal

111. *Aide: Obama Won't Prosecute Bush Officials*, CBS, Apr. 20, 2009, <https://www.cbsnews.com/news/aide-obama-wont-prosecute-bush-officials> [<https://perma.cc/BJ68-BBU9>].

112. Katherine Gallagher, *Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture*, 7 J. INT'L CRIM. JUST. 1087, 1100-14 (2009).

113. Roht-Arriaza, *supra* note 76, at 311.

114. See *Völkerstrafgesetzbuch [VSTGB]* [Code of Crimes against International Law], https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html [<https://perma.cc/94A9-BUVN>].

Court (Rome Statute).¹¹⁵ Section 1 of the CCAIL establishes universal jurisdiction through its application “. . . to all criminal offences against international law designated under this Act . . . even when the offence was committed abroad and bears no relation to Germany.”¹¹⁶ The CCAIL includes crimes like torture¹¹⁷ and applies to both those who commit them and their superiors.¹¹⁸ However, there are major differences between the CCAIL and the Rome Statute. For example, Section 4 of the CCAIL only applies to military commanders who knowingly allowed their subordinates to commit an offense.¹¹⁹ Conversely, the Rome Statute extends liability to a commander who acts negligently.¹²⁰ The CCAIL punishes negligent commanders pursuant to Section 14.¹²¹ However, according to Section 14, the duty of supervision, is a *Vergehen*¹²² subject to the statute of limitations.¹²³ The Rome Statute does not make this distinction, but rather bans the statute of limitations on all crimes.¹²⁴

Applying Section 4 and what is now Section 14 of the CCAIL, the Center for Constitutional Rights (CCR), European Center for Constitutional and Human Rights (ECCHR), along with four Iraqis, filed a criminal complaint on November 30, 2004, with the German Federal Prosecutor’s office.¹²⁵ The complaint listed top

115. OPEN SOCIETY JUSTICE INITIATIVE, UNIVERSAL JURISDICTION LAW AND PRACTICE IN GERMANY 4 (2019).

116. VStGB, §1.

117. VStGB, §7, ¶ (1)5.

118. VStGB, §4, ¶ (1).

119. Helmut Satzger, *German Criminal Law and the Rome Statute- A Critical Analysis of the New German Code of Crimes Against International Law*, 2 INT’L CRIM. L. REV. 261, 273 (2002).

120. *Id.*

121. *Id.* (The article refers to the duty of supervision as Section 13, but the CCAIL has since been revised to create a new Section 13: crime of aggression); VStGB, §14.

122. The German word *Vergehen* refers to less serious criminal offenses. *Vergehen*, LEO GmBH, <https://dict.leo.org/german-english/Vergehen> [<https://perma.cc/PWV8-LYU9>].

123. Satzger, *supra* note 119, at 272.

124. *Id.*

125. See Gallagher, *supra* note 112, at 1101; *The Rumsfeld Torture Cases*, ECCHR, <https://www.ecchr.eu/en/case/rumsfeld-torture-cases> [<https://perma.cc/GP32-QZCR>] (last visited May 19, 2024); Tom Gede, *Universal Jurisdiction: The German Case Against Donald Rumsfeld*, 8 ENGAGE 41, 43 (2007); OPEN SOCIETY JUSTICE INITIATIVE, UNIVERSAL JURISDICTION LAW AND PRACTICE IN GERMANY 19 (2019) (“Anybody—including victims and NGOs—can report an offence orally or in

US officials, including Secretary of Defense Donald Rumsfeld and former CIA director George Tenet, as defendants.¹²⁶ Rumsfeld, Tenet, and other officials were accused of committing or sanctioning the torture of the four Iraqis while they were detained in US-run facilities.¹²⁷ At these facilities, the Iraqis were beaten, stripped naked, and deprived of food and sleep.¹²⁸ Rumsfeld approved of these actions, including the recommendation of fifteen interrogation techniques such as stress positions, removal of clothing, use of phobias, and deprivation of light and sound.¹²⁹ On the topic of stress positions, Rumsfeld wrote “I stand for eight to ten hours a day. Why is standing limited to four hours?”¹³⁰ Rumsfeld also authorized these techniques without providing any written guidance as to how they should be administered.¹³¹ With this evidence, the criminal complaint was submitted to the federal prosecutor in Germany to launch an investigation.¹³²

German prosecutors have discretion whether to launch an investigation where there are no ties to Germany.¹³³ As a result, lawyers at the CCR and the ECCHR tried to establish a German

writing to any public prosecution office, the police or to local courts.”). *See also* Strafprozeßordnung [StPO] [Code of Criminal Procedure], §374, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html [<https://perma.cc/QQ9T-R6WC>] (Germany allows private prosecutions, where the aggrieved party does not first have to reach out to the public prosecutor’s office, in limited circumstances which does not include crimes under international law).

126. *See* Gallagher, *supra* note 112, at 1101; Tom Gede, *Universal Jurisdiction: The German Case Against Donald Rumsfeld*, 8 *ENGAGE* 41, 43 (2007).

127. Michael Ratner & Peter Weiss, *Litigating Against Torture: The German Criminal Prosecution*, in *THE TORTURE DEBATE IN AMERICA* 261 (Karen J. Greenberg ed., 2006); Gallagher, *supra* note 112, at 1101.

128. Gallagher, *supra* note 112, at 1101.

129. Memorandum from William J. Haynes II, Gen. Counsel, to the Secretary of Defense (Nov. 27, 2002), available at <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.12.02.pdf> [<https://perma.cc/L37B-UKQT>].

130. Richard Lei, *The Reliable Source*, *WASH. POST*, June 24, 2004, <https://www.washingtonpost.com/archive/lifestyle/2004/06/24/the-reliable-source/e94bfa19-57ca-42e3-8042-500a809680bd> [<https://perma.cc/5XDP-4WCF>].

131. S. COMM. ON THE ARMED SERVICES, 110TH CONG., *INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY* xxviii (Comm. Print 2008) (“Donald Rumsfeld’s authorization of aggressive interrogation techniques for use at Guantanamo Bay was a direct cause of detainee abuse there.”).

132. Gallagher, *supra* note 112, at 1101; *see also id.* at 1090-91.

133. StPO, §153f.

connection,¹³⁴ arguing that Germany had an interest in pursuing this case because the US military has bases in Germany where some of the perpetrators were stationed.¹³⁵ The US Army 205th Intelligence Brigade, stationed at Wiesbaden, was responsible for torture and abuse at the Abu Ghraib “black site.”¹³⁶ The head of the brigade, US Army Colonel Thomas Pappas, was stationed there as well.¹³⁷ Meanwhile, the leaders of the Army V Corps, Lieutenant General Ricardo Sanchez and Major General Walter Wojdakowski, were stationed in Heidelberg.¹³⁸ The Army V Corps had operated out of Iraq during apparently the worst of the Abu Ghraib scandal.¹³⁹ These ties to Germany would require a German prosecutor to investigate, as “under the German code it is obligatory to investigate and prosecute alleged war criminals living on German soil.”¹⁴⁰

To mandate that a German prosecutor pursue the case, the CCR and the ECCHR emphasized the United States’ unwillingness to prosecute high-ranking officials like Rumsfeld.¹⁴¹ CCR lawyers, in particular, accused the US Government of covering up the acts of its top officials and only pursuing actions against lower level officials who followed orders.¹⁴² According to one international law expert, former Attorney General Ashcroft was “complicit in a scheme for the commission of war crimes” and then current Attorney General Gonzales was the “principal author of a scheme to undertake war crimes.”¹⁴³ As heads of the Department of Justice, neither Ashcroft nor Gonzales conducted an investigation that could have implicated themselves.¹⁴⁴ With a German connection and no prosecution in the United States, CCR and ECCHR lawyers believed they had a good argument that

134. Gallagher, *supra* note 112, at 1104.

135. Ratner & Weiss, *supra* note 127, at 263–64.

136. *Id.*

137. *Id.* at 264.

138. *Id.*

139. *Id.*

140. *Id.*

141. This lack of accountability persisted into the Obama administration. *See Aide: Obama Won’t Prosecute Bush Officials*, *supra* note 9.

142. Ratner & Weiss, *supra* note 127, at 264–65.

143. *Id.* at 265.

144. Ratner & Weiss, *supra* note 127, at 265.

universal jurisdiction would be the only means for torture victims to receive justice.¹⁴⁵

Ultimately, the German prosecutor decided not to pursue a case against US officials.¹⁴⁶ The prosecutor justified his decision under §153(f) of the German Code of Criminal Procedure.¹⁴⁷ This section states that a prosecutor has discretion not to prosecute crimes under CCAIL when no German national is involved, no suspect is or will be staying in Germany, and the offense is being prosecuted by an international court or another court with proper jurisdiction.¹⁴⁸ Here, no German national was party to the suit.¹⁴⁹ As for the requirement of staying in the country, the prosecutor noted that United States has jurisdiction over US military personnel on German soil.¹⁵⁰ The NATO Status of Forces Agreement states that the United States has primary jurisdiction over its military personnel in “offenses rising out of any act or omission done in the performance of official duty.”¹⁵¹ Official duties are solely defined by the United States.¹⁵² To extend its jurisdiction further, the United States has also negotiated supplemental agreements to give it primary jurisdiction even when the victim is from the host nation.¹⁵³ Finally, the German prosecutor invoked the principle of subsidiarity to argue that US courts had a superior claim of jurisdiction.¹⁵⁴ In his decision, the prosecutor states, “[i]n what order and with what means the state of primary jurisdiction carries out an investigation of the overall series of events must be

145. Ratner & Weiss, *supra* note 127, at 262.

146. Decision of the General Prosecutor at the Federal Court of Justice: Center for Constitutional Rights et al. v. Donald Rumsfeld et al., 45 ILM 119, 120 (2006).

147. *Id.*

148. StPO, § 153f; *see also* OPEN SOCIETY JUSTICE INITIATIVE, *UNIVERSAL JURISDICTION LAW AND PRACTICE IN GERMANY* 18 (2019).

149. Decision of the General Prosecutor at the Federal Court of Justice: Center for Constitutional Rights et al. v. Donald Rumsfeld et al., 45 ILM 119, 121 (2006).

150. Gallagher, *supra* note 112, at 1105.

151. AMERICAN FORCES INFORMATION SERVICES, *YOU AND THE LAW OVERSEAS* 12 (1989)

152. Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, 2000 ARMY LAW. 23, 23-24 (2000).

153. *Id.*; *See generally*, Reid v. Covert, 354 U.S. 1 (1956).

154. Decision of the General Prosecutor at the Federal Court of Justice: Center for Constitutional Rights et al. v. Donald Rumsfeld et al., 45 ILM 119, 121 (2006).

left up to this state”¹⁵⁵ Satisfying §153(f), the prosecutor dismissed the criminal complaint.¹⁵⁶

Although seemingly sound, the prosecutor’s decision had political undertones. CCR and ECCHR lawyers were aware of this possibility because of the “. . . power of the Bush administration to bludgeon countries into dropping such prosecutions.”¹⁵⁷ In response to the lawsuit against him, Rumsfeld and the Pentagon announced that he would not be attending the upcoming Munich conference.¹⁵⁸ In a decision made a day before the conference, however, the German prosecutor made it clear that no one visiting Germany and associated with the case would be subject to prosecution.¹⁵⁹ This decision, welcomed by the German Federal Defense Minister Peter Struck, resulted in Rumsfeld reversing course to attend the conference.¹⁶⁰ With the United States refusing to prosecute, and a lack of international criminal court with jurisdiction over the United States,¹⁶¹ the dismissal of the 2004 case reinforced the idea that universal jurisdiction was merely a rhetorical exercise.¹⁶²

155. *Id.*

156. OPEN SOCIETY JUSTICE INITIATIVE, UNIVERSAL JURISDICTION LAW AND PRACTICE IN GERMANY, 19-20 (2019) (Because of prosecutorial discretion, the prosecutor here could dismiss the complaint before conducting an investigation. Ordinarily, prosecutors once they obtain notice of a possible crime are required to investigate and the conclusion of the investigation either results in an indictment or termination order. The indictment order is then sent to the court and the court, upon review, will either open a trial or issue a dismissal.).

157. Ratner & Weiss, *supra* note 127, at 265.

158. *Id.*; The Munich Security Conference is an annual conference on international security. See *Munich Security Conference*, DW NEWS <https://www.dw.com/en/munich-security-conference/t-18236595> [<https://perma.cc/4A6H-9RAX>] (last visited Dec. 22, 2023).

159. Ratner & Weiss, *supra* note 127, at 265; Decision of the General Prosecutor at the Federal Court of Justice: Center for Constitutional Rights et al. v. Donald Rumsfeld et al., 45 ILM 119, 121 (2006) (“in the case of an expected, temporally limited sojourn in the territory of application of the CCAIL . . . the accused would still be subject to criminal prosecution by the judiciary of the United States.”).

160. *Rumsfeld to attend 41st Munich Conference on Security Policy*, KUWAIT NEWS AGENCY (Feb. 11, 2005), <https://www.kuna.net.kw/ArticleDetails.aspx?id=1554505&language=en> [<https://perma.cc/KT39-ZT6P>].

161. The United States is not a member of the International Criminal Court. See *supra* note 103.

162. Scheffer, *supra* note 109, at 233.

The refusal of the United States to prosecute its high ranking officials was codified by the passage of the Military Commissions Act of 2006 (MCA).¹⁶³ The MCA was enacted partially in response to *Hamdan v. Rumsfeld*, which held that military commissions violated the Geneva Conventions and the 5th and 14th Amendments of the United States Constitution by allowing the use of evidence obtained through torture.¹⁶⁴ In addressing these concerns, however, the MCA narrowed the definition of what constituted torture.¹⁶⁵ The MCA also provided retroactive immunity to officials who acted at the behest of the President in interrogating alleged terrorists.¹⁶⁶ This immunity prevents prosecution in US courts, thereby eliminating access to courts with primary jurisdiction on US torture cases.¹⁶⁷

With the passage of the MCA, CCR and ECCHR, lawyers renewed their efforts to bring another case in Germany. In addition to the defendants from the previous complaint, this new complaint added Attorney General Gonzales, former Assistant Attorney General Jay Bybee, and former Deputy Assistant Attorney General John Yoo, among others, as defendants for their role in creating the interrogation policies at Abu Ghraib and Guantanamo.¹⁶⁸ While the CCR and the ECCHR did not have more evidence to bolster the German connection, the lawyers argued that no domestic links were required by law.¹⁶⁹ The MCA ensured that defendants would not be tried in US courts, which

163. Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S.C.).

164. CENTER FOR CONSTITUTIONAL RIGHTS, MILITARY COMMISSIONS ACT OF 2006 (2006).

165. *Id.* at 6.

166. *Id.* at 2.

167. See Scott Lyons, *German Criminal Complaint Against Donald Rumsfeld and Others*, ASIL INSIGHTS (Dec. 14, 2006), <https://www.asil.org/insights/volume/10/issue/33/german-criminal-complaint-against-donald-rumsfeld-and-others> [<https://perma.cc/NH4C-2TEH>].

168. Gallagher, *supra* note 112, at 1107.

169. Strafanzeige gegen den noch amtierenden Verteidigungsminister der Vereinigten Staaten von Amerika, Donald H. Rumsfeld, den ehemaligen CIA-Direktor George Tenet, die ehemaligen Regierungsjuristen John Yoo und Jay S. Bybee, den Generalleutnant Ricardo Sanchez und andere Mitglieder der Regierung und der Streitkräfte der Vereinigten Staaten von Amerika wegen Kriegsverbrechen und Folter zum Nachteil irakischer Internierter im Gefängnis Abu Ghraib/Irak (2003/2004), 1505/2006 WKA, §3.2 (Nov. 14, 2006) (Ger.).

left foreign domestic courts—such as German courts—as the courts of last resort.¹⁷⁰ Despite this new information, the German prosecutor still dismissed the complaint, citing the absence of links to Germany which, contrary to the view of CCR and the ECCHR lawyers, were necessary for jurisdictional matters.¹⁷¹ Rejecting the case on the basis of jurisdiction allowed the prosecutor to avoid addressing the issue of immunity, as “it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction.”¹⁷² The prosecutor’s decision was affirmed on appeal.¹⁷³

B. France

France, like Germany, exercises universal jurisdiction. Initially, France only had jurisdiction over war crimes and other crimes where an international treaty obligated France to prosecute, such as the Convention against Torture.¹⁷⁴ Article 689-2 of the French Criminal Code of Procedure provides universal jurisdiction for crimes of torture by allowing the prosecution of anyone who committed an act of torture overseas, where that person happens to physically be in France.¹⁷⁵ In 2010, France incorporated the Rome Statute which expanded the jurisdiction of French courts to include genocide and crimes against humanity.¹⁷⁶ However, French prosecutors still have discretion over whether to prosecute these crimes, presenting a similar problem as the one in Germany.¹⁷⁷ France provides an alternative means of pursuing a complaint by allowing individuals to file a

170. *Id.* at §2.8.

171. Gallagher, *supra* note 112, at 1108.

172. Ingrid Wuerth, *Pinochet’s Legacy Reassessed* 106 AM. J. INT’L L. 731, 752 (2012); Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. 182, ¶ 46 (Feb. 14).

173. Gallagher, *supra* note 112, at 1108.

174. HUMAN RIGHTS WATCH, THE LEGAL FRAMEWORK FOR UNIVERSAL JURISDICTION IN FRANCE 1 (2014).

175. Code de Procédure Pénale [C. PR. PEN.] [Criminal Procedure Code] art. 689 (Fr.).

176. HUMAN RIGHTS WATCH, *supra* note 174, at 1.

177. OPEN SOCIETY JUSTICE INITIATIVE, UNIVERSAL JURISDICTION LAW AND PRACTICE IN FRANCE, 32 (2019).

partie civile (civil party petition) with an investigating judge.¹⁷⁸ The judge, unlike the prosecutor, has an obligation to conduct an investigation.¹⁷⁹

CCR lawyers, ECCHR lawyers, and other interested parties filed a criminal complaint with a French prosecutor against Rumsfeld.¹⁸⁰ At the time of the filing, Rumsfeld was on a personal trip in France.¹⁸¹ According to some authorities, that gave France jurisdiction to pursue the case.¹⁸² On the other hand, French prosecutors argue that France does not have jurisdiction unless the person is present at the time the investigations are opened after receipt of a complaint.¹⁸³ In fact, this was one of the reasons provided by the Public Prosecutor to the Paris Court of Appeal to affirm the dismissal of the case against Rumsfeld.¹⁸⁴ The prosecutor wrote that the requirements of Article 689-2 had not been met “ . . . since Mr. Rumsfeld left France before any proceedings were able to arouse public action during his brief stay.”¹⁸⁵

The other reason the prosecutor gave for dismissing the Rumsfeld case was that Rumsfeld was protected by immunity. Unlike in the German cases, in this case, the United States could have sought immunity for Rumsfeld using diplomatic channels.¹⁸⁶ The prosecutor granted this immunity, citing the International Court of Justice in *Democratic Republic of the Congo v. Belgium*, which determined that “no distinction can be drawn between acts performed . . . in an ‘official’ capacity and those claimed to have

178. *Id.* at 21.

179. *Id.*

180. Gallagher, *supra* note 112, at 1109.

181. *Id.*

182. Authorities include L’Office central de lutte contre les crimes contre l’humanité (OCLCH), a special unit of the French police, believes French authorities have jurisdiction if the accused is present on the territory at the time of the filing of the complaint with the prosecutor. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 177, at 14.

183. *Id.*

184. Case of Donald Rumsfeld- triggering contesting the decision of the Paris District Prosecutor (Procureur de la République) to dismiss the case, 16 November 2007, letter from Procureur general of the Paris Court of Appeal to Patrick Baudouin, Feb. 27, 2008.

185. *Id.*

186. Wuerth, *supra* note 172, at 748.

been performed in a ‘private capacity’ . . .”¹⁸⁷ There is no distinction because immunity is meant to protect an official from any hindrance in his or her performance of official duties.¹⁸⁸ Using this reasoning, the French prosecutor stated that any actions associated with Rumsfeld were conducted as part of his role as Secretary of Defense.¹⁸⁹ Immunity ceases upon termination of this role:

. . . but only for acts accomplished before or after the period during which the protected person was occupying his/her post or for acts that, although accomplished during this period, are not related to the functions being carried out.¹⁹⁰

The prosecutor argued that Rumsfeld’s alleged acts were consistent with his role as Secretary of Defense. The prosecutor also contrasted Rumsfeld’s actions with Augusto Pinochet’s alleged kidnappings and assassinations, as Pinochet’s acts “ . . . did not fall under the exercise of his functions of President [of Chile],” but Rumsfeld’s acts did fall under his function as Secretary of Defense.¹⁹¹ This logic astonished CCR and ECCHR lawyers: as one lawyer wrote, “[t]his reasoning is stunning, in so far as it squarely places acts of torture within the scope of official functions.”¹⁹²

Given the international influence of the United States, the French prosecutor, like the prosecutor in the German cases, dismissed the case for political reasons.¹⁹³ As a potential way to avoid these political challenges, torture victims can bring a petition directly to an investigating judge in a procedure known as *partie civile*.¹⁹⁴ This direct petition helps victims “avoid

187. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. 182, ¶ 55 (Feb. 14).

188. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. 182, ¶ 54 (Feb. 14).

189. Case of Donald Rumsfeld- triggering contesting the decision of the Paris District Prosecutor (Procureur de la République) to dismiss the case, 16 November 2007, letter from Procureur general of the Paris Court of Appeal to Patrick Baudouin, Feb. 27, 2008.

190. *Id.*

191. *Id.*

192. Gallagher, *supra* note 112, at 1111.

193. See *supra* Section III.A.

194. Unlike France, Germany has no procedure providing for *partie civile*. See AMNESTY INTERNATIONAL, GERMANY: END IMPUNITY THROUGH UNIVERSAL JURISDICTION,

overcautious prosecutors.”¹⁹⁵ *Partie civile* procedure also avoids the issue of presence that comes from filing a complaint with a prosecutor.¹⁹⁶ The Cour de Cassation, the French Supreme Court, had determined that the presence of the accused is required at the time of the opening of an investigation.¹⁹⁷ In *partie civile* cases, filing the complaint is seen as the opening of an investigation.¹⁹⁸ Filing complaints, furthermore, is not limited to victims, and extends to nongovernmental organizations (NGOs), as well.¹⁹⁹ With this in mind, CCR and the ECCHR could have filed a direct petition at the time Rumsfeld was in France. However, there may be several reasons the organizations did not use this option. For one, cases initiated by prosecutors have been viewed more favorably than *partie civile* cases.²⁰⁰ This might be

46 (2008); *See also* EUROPEAN CRIMINAL PROCEDURES 36 (Mireille Delmas-Marty & J.R. Spencer eds. 2002) (“In France . . . the victim can make himself a *partie civile*, and as such either institute proceedings or make himself a party to them if the public prosecutor has started them already. In . . . Germany, the victim has the second of these rights but not the first.”).

195. Jeanne Sulzer, *Implementing the Principle of Universal Jurisdiction in France*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 136 (Wolfgang Kaleck, Michael Ratner, Tobias Singelstein & Peter Weiss eds., Springer, 2007).

196. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 177.

197. Cour de cassation [Cass.][supreme court for judicial matters] crim., Jan. 10, 2007, No. 04-87.245 (Fr.).

198. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 177, at 14.

199. *Id.* at 19; *See* C. PR. PÉN art. 2-4 :

Any association that has been duly registered for at least five years and that proposes, through its articles of association, to combat crimes against humanity or war crimes or to defend the moral interests and honor of the Resistance or deportees may exercise the rights recognized to civil parties in respect of war crimes and crimes against humanity. A foundation recognized for being in the public interest may exercise the rights recognized to civil parties under the same conditions and subject to the same reservations as the association mentioned in this article.

See also *Historic Victory Before French Supreme Court on the Indictment of Multinational LaFarge for Complicity in Crimes Against Humanity in Syria*, ECCHR (Sept. 7, 2021), <https://www.ecchr.eu/en/press-release/historic-victory-before-french-supreme-court-on-the-indictment-of-multinational-lafarge-for-complicity-in-crimes-against-humanity-in-syria/> [<https://perma.cc/SY8M-8X8S>] (“The Supreme Court maintained ECCHR’s admissibility in relation to crimes against humanity.”).

200. *See* Sulzer, *supra* note 195, at 135-36 (citing MAGENDIE, *infra* note 202); *see also* Morris Ploscowe, *The Administration of Criminal Justice in France*, 24 J. CRIM. L. & CRIMINOLOGY 712, 717 (1933) (“However, the small percentages of cases brought by the *partie civile* may be in part due to a tendency in France to discourage this type of action.”).

best explained by the 2004 report by Jean-Claude Magendie, who at the time was President of the Tribunal of Grande Instance of Paris²⁰¹, which recommended “. . . reaffirming the subsidiary nature of proceedings initiated by an injured party . . .”²⁰² This view explains why parties cannot initiate *partie civile* proceedings in cases of genocide, crimes against humanity, and war crimes.²⁰³ The prosecution of these cases can only be carried out at the request of the public prosecutor.²⁰⁴ The parties, in these cases, can lodge a complaint directly with an investigating judge, but the judge can only open an investigation on the request of the prosecutor.²⁰⁵ Therefore, *partie civile* proceedings are limited to torture cases, and the CCR and the ECCHR may have been seeking charges in addition to torture.²⁰⁶ Even where *partie civile* proceedings are possible, parties may seek to file complaints with prosecutors when there is no adequate evidence to support their allegations.²⁰⁷ Finally, where a party seeks immediate action, such as the arrest of the accused, prosecutors can act more swiftly than investigative judges.²⁰⁸

Even where a *partie civile* petition is successful and an investigation is initiated by the judge, issues can still arise. That is exactly what happened in a case brought before the French courts involving US torture of French nationals at Guantanamo. Nizar

201. The Tribunal of Grande Instance, now called the Tribunal de Paris, was France’s biggest civil and criminal court hearing cases of national and international import. See Andrew Ayers, *Stack Effect: Tribunal de Paris in France by Renzo Piano Building Workshop*, ARCHITECTURAL REVIEW (Jun. 4, 2018), <https://www.architectural-review.com/buildings/stack-effect-tribunal-de-paris-in-france-by-renzo-piano-building-workshop> [<https://perma.cc/48UF-4HB9>]. The President of the Tribunal de Paris is the head of the court. See *L’organisation du Tribunal de Paris*, TRIBUNAL DE PARIS (Oct. 24, 2023), <https://www.tribunal-de-paris.justice.fr/75/lorganisation-du-tribunal-de-paris> [<https://perma.cc/F9EQ-B6EF>].

202. Sulzer, *supra* note 195, at 135-136; JEAN CLAUDE MAGENDIE, MISSION MAGENDIE- CELERITE ET QUALITE DE LA JUSTICE - RAPPORT AU GARDE DES SCEAUX (2004), https://www.justice.gouv.fr/sites/default/files/migrations/presse/art_pix/rapport-magendie.pdf [<https://perma.cc/M44B-KUTF>].

203. HUMAN RIGHTS WATCH, *supra* note 174, at 5

204 SARAH FINNIN, BREAKING DOWN BARRIERS: ACCESS TO JUSTICE IN EUROPE FOR VICTIMS OF INTERNATIONAL CRIMES 50 (2020).

205 This is what happened in the Lafarge case. See Cour de cassation [Cass.][supreme court for judicial matters] crim., Sept. 7, 2021, No 19-87.367 (Fr.).

206. HUMAN RIGHTS WATCH, *supra* note 174, at 5

207. *Id.* at 6.

208. *Id.*

Sassi and Mourad Benchellali were captured by Pakistani forces and eventually transferred to Guantanamo.²⁰⁹ At Guantanamo, the men were placed in cages where they were subjected to beatings.²¹⁰ While in custody, the families of Sassi and Benchellali filed a *partie civile* petition in French courts.²¹¹ It was not until 2005, however, when the Cour de Cassation found that French courts had jurisdiction because both Sassi and Benchellali were French nationals, that an investigation was opened.²¹² In 2012, the investigating magistrate, Sophie Clement issued a formal request for information from the United States about the detention of these men.²¹³ Unsurprisingly, the United States did not comply with this request.²¹⁴ This lack of cooperation stymied the investigation: for instance, the Chambre de l’instruction de la Cour d’appel de Paris, the French appeals court, ordered US Major General Miller, former commander of Guantanamo detention camp, to appear before court, but he refused.²¹⁵ As a result, the Cour de Cassation dismissed the case by citing immunity.²¹⁶ Like the case against Rumsfeld, the court decided the alleged perpetrators acted “within the exercise of sovereignty of the State concerned.”²¹⁷ The court also determined that it was up to the international community to address this issue, thereby

209. Brief of Amici Curiae Torture Survivors Maher Arar et al., in Support of Respondents Abu Zubaydah et al. at 2-3,6, *United States v. Zubaydah*, 595 U.S. ____ (2022).

210. *Id.*

211. Cour de cassation [Cass.] [supreme court for judicial matters] crim., Jan 4, 2005, No. 03-84652 (Fr.).

212. *Id.* Khaled Ben Mustapha’s case was later joined to Sassi’s and Benchellali’s case. See *Universal Jurisdiction: Accountability for U.S. Torture*, CTR. CONST. RTS. (Oct. 26, 2007), <https://ccrjustice.org/universal-jurisdiction-accountability-us-torture> [https://perma.cc/9SAY-7WDJ].

213. Lauren Carasik, *France Should Fully Investigate Guantánamo Torture Claims*, ALJAZEERA AMERICA (Mar. 23, 2015), <http://america.aljazeera.com/opinions/2015/3/france-should-fully-investigate-guantnamo-torture-claims.html> [https://perma.cc/9JCY-GZYF].

214. *Id.*

215. See *Universal Jurisdiction: Accountability for U.S. Torture*, CTR. CONST. RTS. (Oct. 26, 2007), <https://ccrjustice.org/universal-jurisdiction-accountability-us-torture> [https://perma.cc/YAF4-7V9Q].

216. Cour de cassation [Cass.] [supreme court for judicial matters] crim., Jan. 13, 2021, No. 20-80.511 (Fr.).

217. *Id.*

shrugging the responsibility off of French courts.²¹⁸ This action contradicts the resolution made by the Council of Europe that member states, like France, would take all “. . . possible measures to persuade United States authorities to respect fully the rights under international law of all Guantanamo Bay detainees.”²¹⁹

C. Spain

With the Pinochet investigation, Spain developed a reputation for having one of the greatest commitments to the principle of universal jurisdiction. Spanish courts handled “. . . a significant share of the universal jurisdiction complaints filed between 1996 and 2008.”²²⁰ The basis for these lawsuits was the 1985 Organic Law of the Judicial Power.²²¹ In its original form, the law stated that Spain has jurisdiction over acts committed by foreigners outside of the country and considered crimes under international treaties.²²² The only limitation was that the alleged perpetrator had not been acquitted, pardoned, or convicted abroad.²²³ This allowed plaintiffs to bring cases against the United States, China, and Israel in Spanish courts.²²⁴ Pressure from these countries led to the passage of amendments to Spanish law.²²⁵ The first of these amendments, passed in 2009, stated that Spanish courts could only hear cases that had a link to Spain and adopted the subsidiarity principle.²²⁶ The next amendment, passed in

218. *Id.*

219. EUR. PARL. ASS. DEB. 10th Sess. 10497 (Apr. 26, 2005), <https://pace.coe.int/en/files/17318/html> [<https://perma.cc/B2KY-AJTR>] (last visited May 19, 2024).

220. Maximo Langer and Mackenzie Edison, *The Quiet Expansion of Universal Jurisdiction*, 30 EUR. J. INT'L L. 779, 787 (2019).

221. Ley Orgánica del Poder Judicial [L.O.P.J.], art. 23 para. 4, No. 6/1985.

222. Ministry of Foreign Affairs and Cooperation (Spain), “Contribution of Spain on the topic “The scope and application of the principle of universal jurisdiction” in response to General Assembly’s Request in its Resolution 70/119 of 14 December 2015,” ¶ 4(g), 16-05499 (E), 22 Feb. 2016.

223. *Id.* ¶ 2(c)

224. Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 37-39 (2011).

225. LUC REYDAMS, *THE APPLICATION OF UNIVERSAL JURISDICTION IN THE FIGHT AGAINST IMPUNITY* 18 (2016).

226. L.O.P.J., art. 23 para. 4, No. 1/2009.

2014, clarified that Spanish courts have jurisdiction over torture claims where the proceeding is brought against a Spanish national or the victim had Spanish nationality at the time of the crime and the person accused of the crime is present in Spanish territory.²²⁷ These amendments transformed Spanish law into a law similar to its counterparts in Germany and France.²²⁸

In 2009, prior to the passage of the first amendment to Article 23, Spanish attorneys filed a criminal complaint, through a process known as *acusación popular*,²²⁹ against the “Bush Six”—David Addington, Jay Bybee, Douglas Feith, Alberto R. Gonzales, William J. Haynes, and John Yoo.²³⁰ These men allegedly aided and abetted the torture of detainees in US-run facilities.²³¹ Judge Garzon, the judge who admitted the criminal complaint, encouraged Spanish prosecutors to examine the case.²³² Spain’s Attorney General disapproved of this action stating that “to accept it would amount to transforming universal jurisdiction into a toy in the hands of persons looking for personal protagonism.”²³³ This reaction led to the case’s referral to another judge.²³⁴ The new judge sent a letter to the United States asking whether the government was investigating the claims.²³⁵ It took years for the United States to respond to the letter and in

227. L.O.P.J., art. 23 para. 4(b), No. 1/2014.

228. See *supra* Section III.A. and Section III.B.

229. Similar to *partie civile* in that it allows third parties to file suit directly. See Antonio Esteban, *Private Prosecutions in Spain*, MALAGA LEGAL BLOG (July 2, 2020), <https://malagalegal.com/blog-1/f/private-prosecutions-in-spain?blogcategory=Today%27s+hot+topics> [https://perma.cc/4CFS-9ZJX]; LEY DE ENJUICIAMIENTO CRIMINAL [L.E. CRIM] art. 101 (“Criminal proceedings are public. All Spanish citizens may exercise it in accordance with the requirements of the Law.”).

230. *Accountability for U.S. Torture: Spain*, CTR. CONST. RTS. (Nov. 13, 2019), <https://ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-spain> [https://perma.cc/C3YR-CJ6B].

231. *Id.*

232. Ignacio de la Rasilla del Moral, *The Swan Song of Universal Jurisdiction in Spain*, 9 INT’L CRIM. L. REV. 777, 788 (2009).

233. *Id.*

234. *Id.*

235. See Letter from Kenneth Harris, Assoc. Dir. of Dep’t of Just., Crim. Div., Off. of Int’l Affs., to Paula Mongé Royo, Sub-Directorate Gen. of Int’l Jud. Cooperation (Mar. 1, 2011) (on file with the Center for Constitutional Rights) (“We write in response to the July 22, 2009, letter from the Ministry of Justice enclosing the request of Judge Eloy Velasco Nuñez, signed May 6, 2009, relating to his inquiries into allegations of crimes against protected persons during an armed conflict.”).

the interim, the Spanish government passed the first amendment to the Organic Law.²³⁶ Plaintiffs were ordered to show that, with this new amendment, the Spanish court still had jurisdiction over the case.²³⁷ Plaintiffs argued that the case had a link to Spain in that one of the torture victims was a Spanish citizen.²³⁸ The plaintiffs further argued that the United States was not conducting any investigations, which satisfied the amendment's subsidiarity element.²³⁹ In fact, the United States confirmed the latter argument when they finally answered the judge's letter in 2011.²⁴⁰ Despite satisfying both elements of the amendment, the judge transferred the case to the United States, holding that Spanish law ". . . does not require that a judicial procedure have been undertaken but . . . that a procedure have been initiated . . ." ²⁴¹ The judge reasoned that the United States, by refusing to prosecute the "Bush Six," had taken steps to investigate the allegations.²⁴²

Although Judge Garzón was removed from the "Bush Six" case, he initiated a related investigation into the torture of specific individuals at Guantanamo, including Spanish citizen Hamed Abderraman Ahmed and Spanish resident Lahcen Ikassrein.²⁴³ Judge Garzón ruled that even with the 2009

236. *See id.* (The case timeline shows that the letters rogatory were sent to the United States on May 4, 2009, and the United States only responded on March 1, 2011 following the passage of the amendment).

237. *See id.* (The case timeline shows that on April 7, 2010, the parties were asked to brief the effect of the Spanish amendment to the case).

238. Michael Ratner et. al, Joint Expert Opinion: Liability of the Six Defendants, Central Court for Preliminary Criminal Proceeding No. 6, Summary Procedure 134/09, at 6 (Apr. 26 2010), https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Expert_opinion_US_Accountability_Bush_Six_Obligation_to_prosecute_en_2010-04.pdf [<https://perma.cc/A8X4JK3G>].

239. *Id.* at 2.

240. Letter from Kenneth Harris to Paula Mongé Royo, *supra* note 235.

241. Juzgado de Instrucción (Court for Preliminary Criminal Proceedings) No. 6, Diligencias Previas (Preliminary Report), Proc. Abreviado (Summary Proceedings) 0000134/2009, at 3 (Apr. 13, 2011), <https://ccrjustice.org/sites/default/files/assets/13%20April%202011%20Order%20ENG.pdf> [<https://perma.cc/J5BX-HU9S>].

242. *Id.* at 3-4.

243. Kai Ambos, *Prosecuting Guantánamo in Europe: Can and Shall the Masterminds of the "Torture Memos" be held Criminally Responsible on the Basis of Universal Jurisdiction?*, 42 CASE W. RES. J. INT'L L. 405, 433 (2009); Juzgado Central de

amendment, Spain had jurisdiction over the case because Ahmed was a Spanish citizen and Ikassrein, as a resident for more than thirteen years, was a “de facto Spanish victim.”²⁴⁴ He also concluded that the defendants had to prove that another country or international tribunal had begun proceedings, and held that they failed to do so.²⁴⁵ The fact that, like pirates, “Guantanamo is a true limbo in the Legal Community . . .” suggested that universal jurisdiction was the only answer.²⁴⁶

However, as one scholar noted, “[t]he greatest impediment to a successful investigation and prosecution of U.S. officials for torture in Spain might be from within Spain itself.”²⁴⁷ Those words proved prophetic because Judge Garzón was taken off the Guantanamo case as well.²⁴⁸ Then, with the passage of the 2014 amendment, lawyers had to prove that the court still had jurisdiction over the torture claims by showing either that the perpetrator was a Spanish citizen or present in Spanish territory.²⁴⁹ Although Judge Garzón’s replacement allowed the case to proceed, Spain’s National Court, on appeal, dismissed this case for lack of jurisdiction as the alleged perpetrators were not

Instrucción No. 5, Audiencia Nacional, Madrid (National Court) auto (decision) Diligencias Previas (Preliminary Report) 150-09 3-4 (Apr. 27, 2009) .

244. Juzgado Central de Instrucción No. 5, Audiencia Nacional, Madrid (National Court), Auto (Decision), Diligencias Previas (Preliminary Report) 150-09 3-4 (Apr. 27, 2009).

245. Juzgado Central de Instrucción No. 5, Audiencia Nacional, Madrid (National Court), Auto (Decision), Diligencias Previas (Preliminary Report) 150-09 14 (Jan. 2, 2010).

246. S.T.S., July 20, 2006 (J.T.S., No. 829) (Spain), <https://www.poderjudicial.es/search/TS/openDocument/e46e05cecc29ab6d9/20060810> [<https://perma.cc/T2ZZ-TT8U>].

247. Gallagher, *supra* note 112, at 1113.

248. *Accountability for U.S. Torture: Spain*, CTR. CONST. RTS. (Nov. 13, 2019), <https://ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-spain>; Giles Tremlett and Justin Webster, *Judge Baltasar Garzon suspended over Franco Investigation*, THE GUARDIAN (May 14, 2010), <https://www.theguardian.com/world/2010/may/14/garzon-suspended-franco-investigation> [<https://perma.cc/HN9U-ZBMU>] (“The decision to suspend him (Garzon), although expected, nevertheless shocked leftwing Spaniards, who see it as the latest stage in a political and professional vendetta against the controversial magistrate.”).

249. L.O.P.J., art. 23 para. 4(b), No. 1/2014.

Spanish citizens and were not on Spanish soil.²⁵⁰ This heightened standard for jurisdiction allowed the court to avoid making a determination on immunity.²⁵¹ The National Court further held that no other section of the new Organic Law applied and dismissed the case.²⁵²

The cases in Germany, France, and Spain are all indicative of the international community's failure to hold US officials accountable for their roles in the CIA torture program. These cases were criminal prosecutions whose potentially serious consequences required intervention by prosecutors or legislators. Prosecutors in both Germany and France had discretion over whether to pursue their respective cases. This discretion "has led to significant criticism because the prosecutor is part of the executive branch and there is a risk that the exercise of universal jurisdiction could be abused by the nation's highest officials."²⁵³ German and French prosecutors chose not to proceed with cases against US officials citing immunity or lack of jurisdiction. In reality, however, prosecutors were motivated by the effect these cases would have on US relations with their own countries. Spain was similarly concerned with its relationship with the United States, leading legislators to pass laws limiting universal jurisdiction.

IV. AN ALTERNATIVE ROUTE: UNIVERSAL CIVIL JURISDICTION

Up to this point, the discussion has centered on universal criminal jurisdiction. Universal jurisdiction has historically been used in criminal cases to prosecute those who might otherwise be difficult to punish. However, as the previous Part of this Note demonstrates, high standards and political agendas have prevented US officials from being held accountable for the CIA torture program. Due to the lack of accountability under

250. Juzgado Central de Instrucción No. 5, Audiencia Nacional, Madrid (National Court), Auto (Decision), Sumario (Summary Proceeding) 2/2014 (July 17, 2015).

251. Wuerth, *supra* note 172, at 752.

252. Juzgado Central de Instrucción No. 5, Audiencia Nacional, Madrid (National Court), Auto (Decision), Sumario (Summary Proceeding) 2/2014 (July 17, 2015).

253. Lena Fleischmann, *FALQs: The Exercise of Universal Jurisdiction in Germany*, LIBR. CONG. BLOG (June 30, 2022), <https://blogs.loc.gov/law/2022/06/falqs-the-exercise-of-universal-jurisdiction-in-germany> [<https://perma.cc/W2R6-BMFW>].

universal criminal jurisdiction, this Part examines universal civil jurisdiction as used in the United States and Europe as an alternative. First, the Part provides an overview of the history of universal civil jurisdiction in the United States. The concept of universal civil jurisdiction originated with the Alien Tort Statute, a statute that laid dormant for many years until 1980. *Filartiga v. Pena-Irala*, a case where the Alien Tort Statute was used to successfully receive damages for torture, was the turning point in the use of the statute. However, since then, apart from *Salim v. Mitchell*, case law has made it difficult to receive damages. The Part then discusses universal civil jurisdiction in Europe and why it never gained the same level of popularity in Europe as it did in the United States.

A. United States and Universal Civil Jurisdiction

In the Judiciary Act of 1789, Congress created the Alien Tort Statute,²⁵⁴ which gives federal district courts “original jurisdiction of 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.”²⁵⁵ The purpose of the statute was to provide foreign plaintiffs with a remedy for international law violations in circumstances where the absence of a remedy might provoke foreign nations to hold the United States accountable.²⁵⁶ In particular, the statute was intended for use against violations of safe conducts, infringement of the rights of ambassadors, and piracy.²⁵⁷ It was not until *Filartiga v. Pena-Irala* that the Alien Tort Statute made its shift to international human rights litigation.²⁵⁸ This expansion of universal civil jurisdiction aligns with the litigious nature of the United States and the ease with which one can file a lawsuit.²⁵⁹

In *Filartiga*, Dr. Filartiga’s son was tortured to death by Pena-Irala, the Inspector General of the Police in Paraguay.²⁶⁰ Years

254. Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-Kiobel*, 102 CALIF. L. REV. 1495, 1497 (2014).

255. 28 U.S.C. §1350.

256. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1390 (2018).

257. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

258. 630 F.2d 876, 878 (2d Cir. 1980).

259. See Fed. R. Civ. P. 1-4.

260. *Filartiga*, 630 F. 2d at 878.

later, Pena-Irala was found living in New York on an expired visa.²⁶¹ Dr. Filartiga's daughter, who lived in the United States, filed suit against Pena-Irala for wrongfully causing the death of her brother by torture.²⁶² The Second Circuit held that the district court had jurisdiction to hear the case under the Alien Tort Statute. The court also found that the law of nations had evolved since 1789.²⁶³ The law of nations refers to customary international law, or in other words, "a general and consistent practice of States followed by them from a sense of legal obligation."²⁶⁴ The United States, in its amicus brief to the Second Circuit, stated that there was a consensus in the international community that a right against torture is protected and that refusing to recognize this right "might seriously damage the credibility of our nation's commitment to the protection of human rights."²⁶⁵ With this information, the court determined that the Alien Tort Statute was not limited to violations of safe conducts, infringement of the rights of ambassadors, and piracy.²⁶⁶ Instead, the court expanded the scope of the Alien Tort Statute by holding that ". . . an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."²⁶⁷

Filartiga is a classic case of universal jurisdiction where a wrongful act is committed in a foreign country by one of its officials against one of its citizens with no repercussions for the state official. Despite the wrongful act not occurring in the United States, the Second Circuit allowed a civil suit for damages to proceed because of the universal condemnation of torture. By referring to torturers as *hostis humani generis*, the Second Circuit invoked the same language used against pirates and slave traders to justify the use of universal jurisdiction.²⁶⁸ *Filartiga* enabled the Alien Tort Statute to become ". . . one of the most

261. *Id.* at 879.

262. *Id.*

263. *Id.* at 881.

264. *Restatement (Third) Foreign Relations Law* § 102(2) (1987).

265. Brief for the United States as Amicus Curiae at 22-23, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (No. 79-6090) (2d Cir. 1980).

266. *Filartiga*, 630 F.2d at 881.

267. *Id.* at 880.

268. *Id.* at 889.

successful instruments for exposing torture, disappearance and other grave human rights violations committed outside the United States, through civil suits brought in America.”²⁶⁹

The Supreme Court has since reassessed the use of the Alien Tort Statute in torture cases. In *Sosa v. Alvarez-Machain*, the Supreme Court held that:

. . . federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted.²⁷⁰

The Supreme Court in *Sosa* found that the *Filartiga* court did not abuse its power in finding that torture was a cause of action under the Alien Tort Statute.²⁷¹ However, the cause of action in *Sosa* was not torture, but rather arbitrary detention. In *Sosa*, US authorities hired Mexican nationals to capture Alvarez and bring him to the United States to stand trial for the alleged torture and murder of a Drug Enforcement Administration agent.²⁷² Alvarez argued that the law of nations prohibits arbitrary detention, but the Supreme Court was not convinced that Alvarez provided sufficient evidence that arbitrary detention, especially if its brief, receives the same universal condemnation as acts like torture.²⁷³ Without proof that custom prohibited arbitrary detention, the Supreme Court was unwilling to expand the law of nations.²⁷⁴ Ruling otherwise would have “breathtaking implications” and be contrary to federal courts’ inability to derive “general” common law.²⁷⁵

Despite universal recognition of torture, in 2013 the Supreme Court limited claims that could be brought under the

269. Weiss, *supra* note 1, at 35.

270. 542 U.S. at 732.

271. *Id.* at 737.

272. *Id.* at 697-98.

273. *Id.* at 737.

274. *Id.*; See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to custom and usages of civilized nations.”); *Restatement (Third) Foreign Relations Law* § 702 (1987) (referring only to prolonged arbitrary detention).

275. *Sosa*, 542 U.S. at 729, 736. For more information on the lack of authority federal courts have to derive general common law, see *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

Alien Tort Statute.²⁷⁶ Several have argued that *Kiobel v. Royal Dutch Petroleum Co.* was the beginning of the end of US human rights litigation.²⁷⁷ *Kiobel*, like *Filartiga*, is a torture case, but with different results. In *Kiobel*, residents of Ogoniland, Nigeria protested the oil exploration and production taking place in the area.²⁷⁸ The defendant corporations in this case had the Nigerian government intervene, and the government's tactics included beating, raping and arresting residents.²⁷⁹ Plaintiffs, after moving to the United States, filed a lawsuit claiming that the defendants aided and abetted the Nigerian government in their violent tactics.²⁸⁰ There was no allegation here, unlike in *Sosa*, that the claim fell under the Alien Tort Statute.²⁸¹ However, the Supreme Court still found that the plaintiffs could not recover for damages.²⁸² The reasoning followed the same logic European courts have given to reject universal jurisdiction.²⁸³ As the Supreme Court stated, "nothing in the text of the [Alien Tort] statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach."²⁸⁴

While this decision seemed to fly in the face of *Filartiga*, the Court established a test: to succeed under the Alien Tort Statute, claims must touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritorial application.²⁸⁵ The meaning of touch and concern is somewhat fluid. Arguments have been made in subsequent lawsuits that the fact that perpetrators were US citizens made the claim touch and concern the United States.²⁸⁶ This argument might help explain why *Filartiga*, but not the plaintiffs in *Kiobel*, succeeded in their claims. The defendant in *Filartiga*, Pena-Irala,

276. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 125 (2013).

277. Altholz, *supra* note 254, at 1497; See Alida Solileau, Comment, *A Call for Congressional Action: Revisiting Universal Jurisdiction in the United States*, 50 *DENV. J. INT'L L. & POL'Y* 209, 221 (2022).

278. *Kiobel*, 569 U.S. at 113.

279. *Id.*

280. *Id.*

281. *Id.* at 115.

282. *Id.* at 114.

283. See *supra* Part III.

284. *Kiobel*, 569 U.S. at 118.

285. *Id.* at 125.

286. *Salim v. Mitchell*, 268 F. Supp. 3d 1132, 1152 (E.D. Wash. 2017).

was a resident of the United States who overstayed his visa. On the other hand, defendant corporations in *Kiobel* were incorporated in the Netherlands, England, and Nigeria.²⁸⁷ The corporations' mere presence in the United States was not enough to rebut the presumption against extraterritoriality.²⁸⁸ Despite not explicitly overruling *Filartiga*, the Supreme Court in *Kiobel* did appear to reject the pirate analogy made in *Filartiga* and implicitly accepted in *Sosa*.²⁸⁹

With the touch and concern test, success under the Alien Tort Statute has become more difficult. However, even before this test, there was additional difficulty in cases involving state secrets. There are two applications of state secrets. The first was recognized in *Totten v. United States*, where the Supreme Court found that litigating a case about espionage contracts would inevitably lead to the disclosure of matters the law regards as confidential.²⁹⁰ The second application of state secrets is an evidentiary privilege that excludes privileged information from the case and may result in the dismissal of the claim.²⁹¹ Both applications have been used to justify dismissing CIA torture cases, such as *Mohamed v. Jeppesen Dataplan, Inc.*²⁹² In *Mohamed*, plaintiffs sued a corporation responsible for providing flight planning and other support in transporting CIA detainees with the knowledge that these detainees would be tortured.²⁹³ The plaintiffs sued under the Alien Tort Statute, but the case was dismissed because even if the subject matter of the case did not involve state secrets, further litigation would require the defendant to disclose how the United States does or does not conduct covert operations.²⁹⁴

With this background, the result in *Salim* was unprecedented. The *Salim* case was the first CIA torture case where “. . . the Justice Department did not try to derail the

287. *Kiobel*, 569 U.S. at 112.

288. *Id.* at 125.

289. Compare *Kiobel*, 569 U.S. at 121, with *Filartiga*, 630 F.2d at 890, and *Sosa*, 542 U.S. at 732.

290. 92 U.S. 105, 107 (1876).

291. *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

292. 614 F. 3d 1070, 1077 (9th Cir. 2010).

293. *Id.* at 1075.

294. *Id.* at 1089.

lawsuit, and the court did not dismiss the case on state secrecy grounds . . .”²⁹⁵ In *Salim*, the plaintiffs were victims of the CIA Torture Program who sought damages against James Mitchell and John Jessen,²⁹⁶ psychologists contracted by the CIA to design the interrogation tactics used to gather information from detainees.²⁹⁷ These tactics, which included sleep deprivation, waterboarding, cramped confinement, and use of insects,²⁹⁸ were intended to induce a state of learned helplessness and to encourage the detainees to talk.²⁹⁹ Without the US government’s involvement, the state secrets defense was unavailable. Instead, the defendants attempted to dismiss the lawsuit by claiming derivative sovereign immunity and that the plaintiffs did not satisfy the *Kiobel* test.³⁰⁰ Defendants argued that they were entitled to derivative sovereign immunity because they were private contractors acting on the government’s behalf.³⁰¹ They argued that ruling otherwise would leave them “holding the bag-facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity.”³⁰² The District Court held that defendants played a significant role in developing the program and that a jury could infer they were not acting merely and solely as directed by the government.³⁰³

The more substantial claim in *Salim* concerned the *Kiobel* test. The court found that the plaintiffs satisfied the Alien Tort Statute’s touch and concern test because defendants were US citizens, were domiciled in the United States, devised the torture plan in the United States, and supervised the plan’s implementation from the United States.³⁰⁴ With enough connections to the United States, the court concluded that the

295. Camilla Amato, *Salim v. Mitchell: A First in Accountability for Victims of the United States Torture Program*, 18 SANTA CLARA J. INT’L L. 214, 217 (2020).

296. *Salim*, 268 F. Supp. 3d at 1132.

297. Amato, *supra* note 295, at 225.

298. *Id.*

299. *Id.* at 222.

300. *Salim*, 268 F. Supp. 3d at 1144.

301. *Id.* at 1148.

302. *Filarsky v. Delia*, 566 U.S. 377, 391 (2012).

303. *Salim*, 268 F. Supp. 3d at 1148.

304. *Id.* at 1152–53.

cause of action touched and concerned the United States enough to overcome the presumption against extraterritoriality.³⁰⁵ The importance of this case cannot be understated. First, the result counters the assumption made that *Kiobel* would undermine human rights litigation.³⁰⁶ Second, with the case ending in settlement, *Salim* became the first victory for torture victims of the CIA program.³⁰⁷ As the plaintiffs' attorney stated after the result, "this outcome shows that there are consequences for torture and that survivors can and will hold those responsible for torture accountable."³⁰⁸

The success of the *Salim* case could have been replicated had the cases in Germany, France, and Spain been heard by federal courts in the United States under the Alien Tort Statute. In each of those cases, the defendants were US citizens or resided in the United States. Fulfilling the *Kiobel* test, the plaintiffs could have sought damages against US officials for their actions in the CIA Torture Program. Although criminal charges against these officials would not have been possible,³⁰⁹ civil suits would have allowed victims to seek justice without facing the jurisdictional issues present in Germany, France, and Spain. The major impediments to such civil cases in the United States are immunity and state secrets. The MCA, as mentioned previously, attempted to retroactively immunize US officials for their roles in the CIA Torture Program by denying claims based on the Geneva Conventions.³¹⁰ The MCA, however, did not deny the use of the Alien Tort Statute.³¹¹ The bigger cause for concern for civil cases

305. *Id.*

306. Alholz, *supra* note 254, at 1497; See Alida Solileau, Comment, *A Call for Congressional Action: Revisiting Universal Jurisdiction in the United States*, 50 DENV. J. INT'L L. & POL'Y 209, 221 (2022).

307. Amato, *supra* note 295, at 219.

308. ACLU, *CIA Torture Psychologists Settle Lawsuit*, ACLU.ORG (Aug. 17, 2017), <https://www.aclu.org/cases/salim-v-mitchell-lawsuit-against-psychologists-behind-cia-torture-program> [<https://perma.cc/WGC8-WTAG>].

309. *Aide: Obama Won't Prosecute Bush Officials*, CBS, Apr. 20, 2009, <https://www.cbsnews.com/news/aide-obama-wont-prosecute-bush-officials> [<https://perma.cc/Z5S6-6DMH>].

310. Jordan J. Paust, *Civil Liability of Bush, Cheney, et al., for Torture, Cruel, Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT'L L. 359, 380 (2009).

311. *Id.*

on the CIA Torture Program continues to be the states secret doctrine.³¹² The *Salim* case was unique in that the United States government did not interfere with the case.³¹³ However, as recently as 2022, in the case of *United States v. Zubaydah*, the state secrets doctrine was used to prevent disclosure of information related to the CIA Torture Program.³¹⁴ With the Supreme Court failing its duty “to the rule of law and the search for truth,”³¹⁵ civil suits must also be tried in other countries to ensure justice for victims of human rights violations.

B. Europe and Universal Civil Jurisdiction

Unlike in the United States, universal civil jurisdiction is not as popular in Europe. In fact, when the Supreme Court was deciding *Kiobel*, several European governments, including Germany, provided amicus briefs opposing the exercise of universal civil jurisdiction under the Alien Tort Statute.³¹⁶

The case of *Nait-Liman v. Switzerland* helps explain the hesitation by Germany, and other European countries, in adopting civil remedies like the Alien Tort Statute. Nait-Liman, a Tunisian national, was tortured at the orders of the Tunisian Minister of Interior.³¹⁷ After his release, Nait-Liman moved to Switzerland where he obtained refugee status. Nait-Liman proceeded to file a civil lawsuit against Tunisia and the Minister of Interior, which was dismissed by the Swiss courts.³¹⁸ Both the Court of First Instance of the Republic and Canton of Geneva and the Federal Supreme Court found that there was a lack of

312. See James Vicini, *Top Court won't hear appeal in CIA torture case*, REUTERS (Oct. 9, 2007), <https://www.reuters.com/article/us-usa-torture-masri/top-court-wont-hear-appeal-in-cia-torture-case-idUSWAT00823120071009> [https://perma.cc/XT58-V8YT] (“If Khaled el-Masri’s case is a state secret, then virtually every case of executive misconduct can be swept under the rug,’ he said. ‘This case is not about secrecy. It’s about immunity for crimes against humanity.’”).

313. Amato, *supra* note 295, at 217.

314. 142 S. Ct. 959, 968 (2022).

315. *Id.* at 1001 (Gorsuch, J., dissenting)

316. Brief of the Federal Republic of Germany as Amicus Curiae in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491).

317. *Nait-Liman v. Switzerland*, App. No. 51357/07, ¶ 15 (Mar. 15, 2018), <https://hudoc.echr.coe.int/eng?i=001-181789>.

318. *Nait-Liman v. Switzerland*, App. No. 51357/07, ¶ 23-30.

connection between the act and Switzerland.³¹⁹ This holding was upheld by the European Court of Human Rights, which reasoned that there was no international rule obliging states to exercise universal civil jurisdiction with respect to international crimes.³²⁰ The court looked in particular at the Convention against Torture, which did not mandate reparations to victims,³²¹ and concluded that states do not have an obligation but a faculty to exercise universal civil jurisdiction.³²² The court further found no international custom of universal civil jurisdiction. In a study of 39 European countries, only the Netherlands recognized, though with limitations, universal civil jurisdiction for acts of torture.³²³ With no law or custom mandating universal civil jurisdiction, the principle has not been universally recognized.

V. UNIVERSAL CIVIL JURISDICTION SHOULD BE UNIVERSALLY RECOGNIZED

As the previous Part showed, universal civil jurisdiction has had some success in CIA torture cases. These cases would have been even more successful if Europe officially adopted universal civil jurisdiction. Adopting universal civil jurisdiction would increase the likelihood that cases would proceed and avoid the political pressures that come with universal criminal jurisdiction. Furthermore, unlike in US courts, the state secrets doctrine would not likely be a barrier to these cases.³²⁴ In 2016, the European Court of Human Rights ruled that

resort to the state secret privilege is unlawful both when it is claimed in relation to evidence already in the public domain and when it is used to help national and foreign officials who

319. *Id.*

320. *Nait-Liman v. Switzerland*, App. No. 51357/07, ¶ 129.

321. *Nait-Liman v. Switzerland*, App. No. 51357/07, ¶ 63.

322. Andrea Saccucci, *The Case of Nait-Liman v. Switzerland before the European Court of Human Rights*, in *UNIVERSAL JURISDICTION: WHICH WAY FORWARD?* 11 (Serena Forlati and Pietro Franzina eds., 2021).

323. *Nait-Liman v. Switzerland*, App. No. 51357/07, ¶ 69.

324. Arianna Vidaschi, *State Secrets versus Human Rights: Lessons from the European Court of Human Rights Ruling on the Abu Omar Case*, 13 *EUCONST* 166, 167 (2017) (“Member States are duty bound to provide prompt and effective investigation of all violations, ensure that convictions are handed down when appropriate, and that those sentences are served.”).

have committed gross violations of human rights avoid prosecution.³²⁵

This ruling is contrary to the Supreme Court's holding in *United States v. Zubaydah*.³²⁶ With the commitment European countries have to ensuring human rights, European countries should adopt universal civil jurisdiction not only as a supplement, but also an alternative to universal criminal jurisdiction.

Skepticism of universal civil jurisdiction exists because "the difference between civil and criminal sanctions . . . begs the question of whether civil sanctions can effectively be used to remedy criminal behavior."³²⁷ The fact that criminal and civil charges are often brought together has been used to support the claim that universal civil jurisdiction does not, and cannot, exist independently.³²⁸ Instances of universal civil jurisdiction have also been discredited and instead held to be based on criminal jurisdiction or other principles like *forum necessitas*.³²⁹ This skepticism, however is unwarranted. There are two reasons for universal jurisdiction: to show the abhorrence with which the international community views the wrongs, and to prevent the danger that the perpetrator will escape by remaining outside the jurisdiction of any state.³³⁰ Civil remedies address both of these concerns by "impos[ing] sanctions on the wrongdoer and galvaniz[ing] international condemnation of the wrongs, as well as depriv[ing] the perpetrator of the benefit of the offense and mak[ing] the victim whole."³³¹ Civil remedies include monetary damages, declaratory judgment, and injunctions. For human rights cases, the most common remedy is damages, which include compensation to make the victim whole and punitive damages to

325. *Id.*

326. *See Zubaydah*, 142 S. Ct. at 1001 (Gorsuch, J., dissenting) ("Really it seems that the government wants this suit dismissed because it hopes to impede Polish criminal investigation and avoid (or at least delay) further embarrassment for past misdeeds.").

327. Abhimanyu George Jain, *Universal Civil Jurisdiction in International Law* 55 *INDIAN J. INT'L L.* 209, 219 (2015).

328. *Id.* at 223.

329. *Id.* at 217.

330. 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, 51 (2002).

331. *Id.*

deter future abuses. Hesitation to adopt universal civil jurisdiction largely comes from the belief that awarding damages belittles human rights abuses.³³² This belief underestimates the deterrent value of enforcing damages.³³³ As an alternative to damages, injunctive relief, if enforceable, can work to halt abuses. Finally, a court can issue a declaratory judgment finding that the defendants violated international or domestic law.³³⁴ The flexibility of civil remedies “serve multiple goals, including retribution and punishment, truth-telling, norm-development, and the impact on policy debates.”³³⁵

Regardless of its flexibility, universal civil jurisdiction has limitations, but these limitations equally apply to universal criminal jurisdiction. Both principles require connections with the forum state, and both pose a potential threat to national sovereignty. However, as Justice Breyer pointed out in his concurring opinion in *Sosa*:

... allowing every nation’s courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening.³³⁶

Indeed, the Grand Chamber of the European Court of Human Rights has stated that “the universal exercise of civil jurisdiction is lawful- and, indeed, desirable- from the perspective of the European Convention.”³³⁷

Universal civil jurisdiction can work not only in theory, but in practice. Although the judicial system in the United States is better suited for private litigation, private parties in Europe can

332. *Id.* at 26.

333. BETH STEPHENS ET AL., *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 536-37 (2008) (“In addition, the very process of seeking to enforce a judgment is a means of holding the defendant accountable and is likely to serve as a deterrent to other potential human rights violators.”).

334. *Id.* at 523.

335. Stephens, *supra* note 330, at 51.

336. *Sosa*, 542 U.S. at 762 (Breyer, J., concurring)

337. Serena Forlati and Pietro Franzina, *Introduction, in* *UNIVERSAL JURISDICTION: WHICH WAY FORWARD?* 2 (Serena Forlati and Pietro Franzina eds., 2021).

bring a civil suit in conjunction with a criminal one. This suggests that it is feasible for a party to bring a civil suit alone. Not only is it feasible, but it can also be preferable. As one scholar noted,

a point often overlooked is that financial compensation usually only forms one aspect of a range of goals pursued through civil suits. From the perspective of survivors, civil suits offer an important reparative process through the opportunity to participate in the initiation and progress of a case and the transformation of survivors from faceless witnesses into substantively involved parties.³³⁸

Universal civil jurisdiction also benefits from being victim initiated in that it takes politics out of the quest for justice. Without politics, victims and their families do not have to persuade a prosecutor to take on their case, can control litigation through the lawyers of their choice, can introduce all admissible evidence, and can receive compensation.³³⁹ Furthermore, concern over the wide reach of universal civil jurisdiction is tempered by other features of civil litigation.³⁴⁰

With these benefits to universal civil jurisdiction, the victims of CIA torture in the German, French, and Spanish cases³⁴¹ would have been more likely to receive justice. Although Germany, France, and Spain allow torture victims to receive compensation, the proceedings are more limited. First, civil actions for compensation are filed in connection with a criminal proceeding which means, “there is more scope for State control of the main action than in independent tort claims.”³⁴² Second, the criminal proceeding must succeed for civil action to be successful.³⁴³ This means that there is a higher burden of proof to receive compensation.³⁴⁴ The hurdles the victims faced to hold US officials criminally responsible for the CIA Torture Program

338. Lorna McGregor, *The Need to Solve the Paradoxes of the Civil Dimension of Universal Jurisdiction*, 99 AM. SOC'Y INT'L L. PROC. 125, 126 (2005).

339. Cedric Ryngaert, *Universal Tort Jurisdiction Over Gross Human Rights Violations*, 38 NETHERLANDS YEARBOOK INT'L. L. 3, 6–7 (2008).

340. Beth Van Schaack, *Justice Without Borders: Universal Civil Jurisdiction*, 99 AM. SOC'Y INT'L L. PROC. 120, 120 (2005).

341. *See supra* Part III.

342. Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law* 60 INT'L & COMPAR. L. Q. 57, 78 (2011).

343. *Id.*

344. *Id.*

suggests any attached civil action would have failed. A better alternative instead would have been for each European country to adopt a version of the Alien Tort Statute to allow victims another means to seek justice. Even with the *Kiobel* limitations, these victims could have succeeded because the actions “touched and concerned” Germany, France, and Spain. In the German case, the perpetrators were stationed in the country. The French and Spanish cases present even stronger arguments for “touch and concern” because the victims were nationals or citizens of these countries. Even though the results of such cases would have equated only to damages and not the imprisonment of the responsible individuals, the result would still provide a victory. The damages would act as a deterrent and prompt state officials to rethink their actions.

VI. CONCLUSION

Universal jurisdiction began as a method for prosecuting pirates to ensure they would be held accountable despite their actions not taking place within the confines of a single country. The same line of reasoning was used to extend the scope of universal jurisdiction to the slave trade. It was not until the Nuremberg Trials that followed World War II that universal jurisdiction was used to prosecute war criminals. In each of these cases, prosecution worked because the defendants were politically undesirable. Pirates were referred to as *hostis humani generis* (“enemy of mankind”). Similarly, the slave trade was universally condemned by the Declaration of the Congress of Vienna. Meanwhile, the actions of the Nazis were worse than the worst pirates. It therefore followed logically that any nation would prosecute them. Since the Nuremberg Trials, however, politics has made it more difficult to prosecute under universal jurisdiction. Even former Chilean president Augusto Pinochet, who was universally recognized as a war criminal, was allowed to return to Chile instead of facing judgment in Spain. Unsurprisingly, European courts failed to prosecute US officials involved in the CIA Torture Program. The United States exerted more political pressure than Chile and succeeded in getting cases dismissed, whether for immunity or lack of jurisdiction. The United States also failed to prosecute its own officials and intervened when private parties tried to file civil suits. The power

imbalance between the United States and the rest of the world has prevented high-ranking US officials from being held accountable for their actions. To shift the balance, European courts should adopt universal civil jurisdiction and allow private parties to sue these officials for civil remedies. Only then will universal jurisdiction truly be universal.