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THE DIPLOMACY OF UNIVERSAL JURISDICTION: THE POLITICAL BRANCHES AND THE TRANSNATIONAL PROSECUTION OF INTERNATIONAL CRIMES

*By Máximo Langer**

Under universal jurisdiction, any state in the world may prosecute and try the core international crimes—crimes against humanity, genocide, torture, and war crimes—without any territorial, personal, or national-interest link to the crime in question when it was committed.¹ The jurisdictional claim is predicated on the atrocious nature of the crime and legally based on treaties or customary international law. Unlike the regime of international criminal tribunals created by the United Nations Security Council and the enforcement regime of the International Criminal Court (ICC), the regime of universal jurisdiction is completely decentralized.

Defenders of universal jurisdiction claim that it is a crucial tool for bringing justice to victims, deterring state or quasi-state officials from committing international crimes, and establishing a minimum international rule of law by substantially closing the “impunity gap” for international crimes.² Critics argue that universal jurisdiction disrupts international relations, provokes judicial chaos, and interferes with political solutions to mass atrocities.³

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¹ See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§402 & cmts. c–g, 404 & cmts. a–b, 423 (1987). Though torture is sometimes not included among the core international crimes, I include it in this category for convenience of use and because its prosecution based on universal jurisdiction presents similar issues to that of the other three crimes. For an examination of a broader list of crimes, see Report of the Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, UN Doc. A/65/181 (July 29, 2010) [hereinafter S-G Report].

² See, e.g., UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed., 2003) [hereinafter PRINCETON PRINCIPLES]; Amnesty International, *Ending Impunity: Developing and Implementing a Global Action Plan Using Universal Jurisdiction*, AI Index IOR 53/005/2009, Sept. 30, 2009; Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF., Sept./Oct. 2001, at 150.

³ See, e.g., Eugene Kontorovich, *The Inefficiency of Universal Jurisdiction*, 2008 U. ILL. L. REV. 389; Jack Snyder & Leslie Vinjamuri, *Trial and Errors: Principles and Pragmatism in Strategies of International Justice*, INT’L SECURITY, Winter 2004, at 5; Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, DAEDALUS, Winter 2003,

One of the issues missing from this debate is the role of the political branches, specifically the executive and the legislature. By identifying the main incentives for political branches to bring universal jurisdiction cases and explaining the relationships between the incentives and disincentives, this article articulates a theoretical framework that (1) accounts for the current state of universal jurisdiction, (2) predicts how universal jurisdiction is likely to evolve in the future, and (3) provides what should be a starting point for any non-ideal-world normative assessment of universal jurisdiction, as well as for the institutional design of the universal jurisdiction regime.

This article argues that by passing universal jurisdiction statutes, opening formal proceedings, and bringing cases to trial, the political branches of a universal-jurisdiction-prosecuting state can gain the support of human rights groups and domestic constituencies sympathetic to foreign human rights. That being said, since international crimes are often committed by state officials, the political branches of the prosecuting states must be willing to pay the international relations costs that the defendant's state of nationality would impose if a prosecution and trial take place. As these costs can be substantial, universal-jurisdiction-prosecuting states have strong incentives to concentrate on defendants who impose low international relations costs because it is only in these cases that the political benefits of universal jurisdiction prosecutions and trials tend to outweigh the costs.

The political branches of individual states have acted consistently with this incentive structure (posited incentive structure) in two ways. First, on the basis of a survey aimed at covering all universal jurisdiction cases on the core international crimes brought since the trial of Adolf Eichmann in 1961, this article shows that universal jurisdiction defendants who have gone to trial are primarily Nazis, former Yugoslavs, and Rwandans. That is, they are the type of defendants that the international community has most clearly agreed should be prosecuted and punished and that their own states of nationality have not defended.

Second, on the basis of statutes, judicial decisions, and other materials, case studies of five states, Germany, England, France, Belgium, and Spain, reveal how these incentives explain state behavior. Each of these states has passed legislation giving universal jurisdiction to its courts, and in each one both victims and nongovernmental organizations (NGOs) have filed universal jurisdiction complaints. But these states have acted differently regarding similar complaints. As we move along the spectrum of greater to lesser executive branch control over criminal proceedings, the spectrum of expected costs to the prosecuting state of defendants against whom formal proceedings are opened moves in the opposite direction. This consequence supports the argument that, to the extent they are able, executive branches in these five states have responded to the incentives identified in this article.

By extension, those states with a low degree of executive control over universal jurisdiction prosecutions that have initiated formal proceedings against higher-cost defendants have had to face substantial international relations costs. This article argues that the resultant disincentives for their executive branch and legislature have led these states to restrict their universal jurisdiction statutes or to give more control to the executive branch over these prosecutions.

This article also explores some of the more significant normative and institutional design implications of its theoretical framework and empirical findings. Key among these is the fact that universal jurisdiction will never establish a minimum international rule of law—that is,

it will never substantially close the impunity gap regarding international crimes or be applied equally across defendants—since high-cost, most mid-cost, and many low-cost defendants are beyond the reach of the universal jurisdiction enforcement regime. This article's findings also suggest that several common criticisms of universal jurisdiction are unfounded, given that states have incentives to concentrate on defendants about whom there is broad agreement in the international community and whom their own state of nationality is not willing to defend. For these reasons, universal jurisdiction is unlikely to lead to unmanageable international tensions, judicial chaos, or interference with political solutions to mass atrocities. The article now turns to an analysis of the universal jurisdiction enforcement regime.

I. THE UNIVERSAL JURISDICTION ENFORCEMENT REGIME

Modern international criminal law starts with Nuremberg.⁴ The London Charter, the International Military Tribunal trial at Nuremberg, and the other post–World War II trials that followed relied on the idea that international law had established certain international crimes for which individuals could be held responsible.⁵ After the Nuremberg and Tokyo Tribunals finished their tasks and efforts to create a permanent international criminal court foundered with the Cold War, no supranational enforcement mechanism was left for these crimes.

It was thus up to individual states to prosecute and try international crimes by relying on traditional jurisdictional principles. After World War II, a few states gave their courts universal jurisdiction over certain international crimes.⁶ However, in the political context of the Cold War, there was little room for this type of prosecution.⁷ The situation started to change during the late 1970s and the 1980s as public opinion reacted to mass atrocities in Africa, Asia, and Latin America; as it became publicly known that Nazis and Nazi collaborators were living in Australia, Canada, England, France, and the United States; and as southern Europe and Latin America began moving from authoritarian to democratic rule.⁸ All these developments fostered human rights efforts around the world, and domestic and transnational constituencies sought legal tools—including prosecutions—to deal with the atrocities.⁹

The end of the Cold War and its bipolar framework further opened up the landscape for universal jurisdiction prosecutions. During the 1990s, various investigations and prosecutions

⁴ The idea of universal jurisdiction is older than most core international crimes. For instance, while crimes against humanity, genocide, and torture were created as international crimes at or after the Nuremberg trials, states have claimed universal jurisdiction over the crime of piracy for more than two hundred years. The framework articulated in this article provides an explanation of why universal jurisdiction over piracy has been less controversial than its application to the core international crimes, since pirates are generally low-cost defendants. For three recent studies on piracy and universal jurisdiction, see *Agora: Piracy Prosecutions*, 104 AJIL 397 (2010).

⁵ See, e.g., Report of the International Law Commission on Its Second Session 374–78, UN GAOR, 5th Sess., Supp. No. 12, UN Doc. A/1316 (1950).

⁶ See, e.g., STRAFGESETZBUCH [STGB] [PENAL CODE] §6.1 (genocide) (1955) (Ger.); Nazi and Nazi Collaborators (Punishment) Law, 5710–1950, SH No. 404 p. 140 (Isr.).

⁷ The *Eichmann* case was an exception. On this case, see, for example, HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963).

⁸ On the identification of Nazis in various states in the 1980s and the efforts to prosecute them, see, for example, Matthew Lippman, *The Pursuit of Nazi War Criminals in the United States and in Other Anglo-American Legal Systems*, 29 CAL. W. INT'L L.J. 1, 13–20 (1998–99).

⁹ For analyses of this broad trend, see, for example, MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

were conducted against Nazis, former Yugoslavs, Rwandans, and a few others.¹⁰ But universal jurisdiction took a more important place on the agenda of human rights groups in October 1998, when Augusto Pinochet Ugarte, the former head of state of Chile, was arrested in London on an international warrant and extradition request from Spain.

States have relied on two legal sources of authority to assert universal jurisdiction over the core international crimes. The first of these is treaties—specifically, the Convention Against Torture of 1984, the Geneva Conventions of 1949 and Additional Protocol I of 1977, the Genocide Convention, and the ICC Statute.¹¹ While none of these treaties explicitly establishes universal jurisdiction,¹² various states have interpreted them to authorize and even require that the municipal courts assert universal jurisdiction over one or more of the core international crimes.¹³ The second source of authority for universal jurisdiction is customary international law, which some states have argued authorizes, or at least does not prohibit, the exercise of universal jurisdiction over the core international crimes.¹⁴

Supporters of universal jurisdiction have claimed that it is a critically important tool for dealing with mass atrocities. They further argue that universal jurisdiction is needed despite the creation of other international criminal law regimes in the 1990s because the ad hoc international criminal tribunals created by the UN Security Council and the ICC can try only a handful of participants in international crimes owing to the expense of their proceedings and their limited territorial, personal, and temporal jurisdiction.¹⁵

Within the universal jurisdiction debate and literature, the role of the political branches has received little to no attention.¹⁶ Supporters of universal jurisdiction have tended to dismiss political considerations as improper obstacles in the fight against impunity. They have sought

¹⁰ For a survey of the main universal jurisdiction cases until the early 2000s, see LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* 86–219 (2003).

¹¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 UNTS 85 [hereinafter Convention Against Torture]; Convention [No. 1] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; Convention [No. 2] for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85; Convention [No. 3] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; Convention [No. 4] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3 [hereinafter Additional Protocol I]; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. EXEC. DOC. NO. 91-B (1970), 78 UNTS 277; Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 3 [hereinafter ICC Statute].

¹² See, e.g., M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in *PRINCETON PRINCIPLES*, *supra* note 2, at 39, 50, 55–56.

¹³ See, e.g., 18 U.S.C. §1091(e) (2006) (genocide); 18 U.S.C. §2340A(b) (2006) (torture). See also decisions and statutes cited in the sections on Germany, England and Wales, France, Belgium, and Spain *infra*.

¹⁴ See, e.g., Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ REP. 3 (Feb. 14) [hereinafter Arrest Warrant] (Higgins, Kooijmans, & Buergenthal, JJ., joint sep. op.).

¹⁵ See, e.g., Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. INT'L L.J. 927, 930–31 (2009).

¹⁶ For examples of analyses that have taken into account the role of political branches in universal jurisdiction prosecutions—though without articulating the theoretical framework, gathering the data, or exploring most of the issues that this article will present—see Richard A. Falk, *Assessing the Pinochet Litigation: Whither Universal Jurisdiction?* in *PRINCETON PRINCIPLES*, *supra* note 2, at 97; Steven R. Ratner, *Belgium's War Crimes Statute: A Post-mortem*, 97 AJIL 888 (2003); Eric Langland, *Decade of Descent: The Ever-Shrinking Scope and Application of Universal Jurisdiction*, INT'L L. NEWS (ABA Section of Int'l L.), Summer 2010, at 4.

to avoid the potential dangers of universal jurisdiction through legal means, relying on rulelike restrictions such as the requirement that the defendant be present in the prosecuting state's territory, the extension of immunity to foreign incumbent officials, the application of a principle of transnational complementarity, the prohibition of transnational double jeopardy, and the barring of double criminality.¹⁷ Critics of universal jurisdiction have tended to overlook the role of political branches in these prosecutions and—probably with the cases of Belgium and Spain in mind—have tended to assume that the proceedings are in the hands of prosecutors and judges who lack accountability.¹⁸

This article's central argument is that if we consider the incentives that influence the political branches in prosecutions and trials under universal jurisdiction, they tend to favor its assertion over low-cost defendants—those who can impose little or no international relations, political, economic, or other costs on potential prosecuting states—and especially over those low-cost defendants about whom the international community has reached broad agreement. If this is the case, universal jurisdiction will neither substantially reduce the impunity gap, as its supporters hope, nor lead to the dangers that its critics fear.

The main incentives for the political branches of states to pass universal jurisdiction statutes, open formal proceedings, and bring such prosecutions to trial are generated by domestic and transnational human rights groups, the media, and domestic constituencies that value foreign human rights. To the extent that human rights groups' actions and the media's exposure of atrocities or offenders resonate with local constituencies, domestic politicians have incentives to address these issues because such activities may boost their electoral fortunes and support their political legitimacy.

Conversely, a primary incentive for political branches of states not to pass universal jurisdiction legislation, open formal proceedings, or engage in trials is the fact that international crimes are often committed by state officials, which makes it likely that the defendant's state of nationality will have its diplomats lobby and threaten reprisals against the prosecuting state. Other disincentives include the economic costs of these prosecutions and trials, which can be quite substantial,¹⁹ and the challenges in proving guilt beyond a reasonable doubt in this type of case.²⁰ Moreover, local constituencies may oppose the use of their domestic legal system to deal with cases that lack a strong link with their state.

One would then predict that a state's political branches would pass universal jurisdiction statutes and engage in prosecutions and trials only if the expected benefits were higher than the

¹⁷ See, e.g., REYDAMS, *supra* note 10; Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 589 (2003).

¹⁸ See, e.g., Goldsmith & Krasner, *supra* note 3, at 51 ("Universal jurisdiction courts and prosecutors . . . are relatively unaccountable to their own government . . ."); Kissinger, *supra* note 3, at 86 ("The danger lies in . . . substituting the tyranny of judges for that of governments . . .").

¹⁹ For instance, the police investigation and two trials against Afghan warlord Faryadi Sarwar Zardad reportedly cost £3 million. Sandra Laville, *UK Court Convicts Afghan Warlord: Zardad Found Guilty of Torture After Landmark Old Bailey Retrial*, GUARDIAN, July 19, 2005, at 2. According to Belgium, its trials against Rwandan defendants were substantially cheaper and cost €233,496.59 (the *Butare Four* in 2001); €308,345.56 (Nzabonimana in 2005); and €219,117.90 (Ntuyahaga in 2007). International Court of Justice [ICJ], Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Application Instituting Proceedings, para. 6 (Feb. 19, 2009) [hereinafter Belg. v. Sen. ICJ Application].

²⁰ The difficulties that Australian, British, and Canadian authorities have had in different prosecutions brought since the 1980s in proving guilt beyond a reasonable doubt against Nazis accused of committing international crimes are examples of this phenomenon. On these prosecutions, see, for example, DAVID FRASER, LAW AFTER AUSCHWITZ (2005).

expected costs, expected costs and benefits varying on the basis of a considerable number of factors. The variation in expected benefits for political branches would depend on the identity of the potential defendants since societies take very different views of international crimes and their perpetrators. Moreover, the domestic level of interest favoring the prosecution and trial of certain defendants would vary in response to the seriousness of the crime and the strength of the evidence against the defendant; the type of international crime or mass atrocities and the type of social groups affected by them; and whether the states where the crimes took place have any historical, cultural, or linguistic links to the potentially prosecuting state. Differences in the domestic level of interest would also depend on the presence of victims of the alleged international crimes in the territory of the prosecuting state, the capacity of victims' groups and human rights NGOs to bring crimes and defendants to public attention and to generate sympathy and support among the state's citizens, the domestic media's extent and type of coverage of the case, and the presence or permanent residence of the defendant in the territory of the potential prosecuting state, to mention just a sample of the relevant factors.

As for the expected costs to the political branches of these prosecutions and trials, they, too, would vary according to the type of defendants. The economic costs may differ as a result of factors such as whether the prosecuting state may actually arrest the defendant; whether the state where the alleged international crimes took place cooperates with the investigation; and whether victims and NGOs are able to bring complaints against individual defendants, bring evidence to prosecutors and judges, and become formal parties to the criminal case. Opposition by domestic constituencies to the prosecution and trial of certain defendants would depend on factors such as those articulated in the previous paragraph, as the reverse side of domestic support for these prosecutions and trials. Finally, the diplomatic pressures and potential reprisals by foreign states would also rise or fall as a consequence of the nationality of the defendant, since foreign states have different degrees of leverage over their counterparts and may not be willing to exercise (all) their leverage over the prosecuting state to protect their nationals.

Yet even if the expected costs and benefits vary in accordance with the type of defendant, this article argues that, as we move upward along the spectrum of defendants' costs borne by potential prosecuting states, the expected costs quickly start to outweigh the expected benefits of universal jurisdiction prosecutions and trials, given the nature of the incentives and disincentives just described.

For several reasons, the advantages of acting on the incentives are limited. First, while a state's domestic constituencies may value human rights in foreign countries, they are unlikely to place these interests above their own economic well-being and security, the education of their children, or domestic human rights. Second, though domestic constituencies of a state may care about foreign human rights, the political branches command a range of ways other than universal jurisdiction to address or defuse these concerns. These include giving political asylum to victims, deporting international criminals, putting diplomatic pressure on authoritarian regimes, contributing to the reaching of peace agreements, adopting symbolic measures such as public recognition of the atrocities, and so on.

In comparison, the disincentives to the pursuit of universal jurisdiction prosecutions and trials can be compelling. Since potential defendants usually include officials or former officials of other states, the prosecuting state may be subject to pressures or sanctions from the world's most powerful states, including China, Russia, and the United States. As sanctions could impair domestic human rights and the economic well-being and security of the population of

the prosecuting state, its political branches would have strong incentives not to conduct the universal jurisdiction prosecution and trial. Even less powerful states can exercise substantial leverage to protect their officials or former officials by threatening individual reprisals—for example, companies of the prosecuting state may have investments in the defendant's state of nationality, creating a potential vulnerability—or by joining forces with other less powerful states that also fear prosecutions of their officials or former officials.

If this argument about the nature of the incentives operating on the political branches is correct, one would predict that only low-cost defendants would be brought to trial, for it is only in these cases that the incentives for political branches outweigh the disincentives. This prediction proves to be true. This article has attempted to identify every single universal jurisdiction criminal complaint presented by victims, human rights groups, or any other actor—or universal jurisdiction cases considered by public authorities on their own motion—for one or more of the four core international crimes presented around the world since the Eichmann trial in 1961.²¹

This survey has identified 1051 complaints or cases considered by public authorities on their own motion (with “Nazi” treated as a nationality in this context).²² Table 1 (p. 8) presents these cases and those that went to trial by the defendant's nationality. As the table indicates, the largest groups of complaints are against Nazi, former Yugoslav, Argentine, Rwandan, U.S., Chinese, and Israeli possible defendants. But the table also shows that out of these possible 1051 defendants, only 32 have actually been brought to trial.²³

²¹ For the purposes of this project, a criminal complaint was defined as a report by an individual or organization presented to state authorities against a physical person about the possible commission of a crime. The individual defendant was the unit of analysis. This means that if a complaint was presented or a trial was held against two defendants, two complaints or trials were coded—one per defendant. In the few cases where complaints were presented against unknown defendants, a single complaint was coded. Complaints (or cases considered by the authorities on their own motion) were coded that involved at least one of the core international crimes and were based fully or partially on universal jurisdiction. For coding purposes, a universal jurisdiction complaint or trial was defined as one in which the prosecuting state did not have any territorial, personal, or national-interest link to at least some of the core international crimes in question when the crimes were committed. The coding thus included cases of pure universal jurisdiction—in which there was no link between the prosecuting state and the crime or defendant even after the crime was committed; and subsidiary or custodial universal jurisdiction—in which there was a link between the prosecuting state and the crime or defendant after the crime was committed, such as presence of the defendant in that state's territory. The sources checked for coding included judicial decisions of actual cases; LEXIS-NEXIS and Westlaw; specialized journals like the *Journal of International Criminal Justice* and the *Yearbook of International Humanitarian Law*; key books on universal jurisdiction and international criminal law; the Web sites of the Center for Constitutional Rights, the Center for Justice and Accountability, the Hague Justice Portal, Human Rights Watch, the International Center for Transitional Justice, the International Federation of Human Rights and Trial Watch; reports on universal jurisdiction and international criminal law cases by Amnesty International, Human Rights Watch, and Redress; newspaper articles and other media documents; and the Google search engine. Every single case included in the database was documented. The coding was done between July 2009 and June 2010. Thus, for then-pending cases, the coding reflects the status of these cases during that time period. The same comment may apply to the case studies in part II as regards specific pending investigations, prosecutions, and trials, since most of the relevant research was carried out between June 2009 and February 2010.

²² Alleged perpetrators of international crimes committed during World War II in Germany and territories occupied by Germany have included people of several nationalities, including Belorussian, former Yugoslav, German, Hungarian, Latvian, Polish, and Ukrainian. Despite their different nationalities, they committed these crimes as Nazis or Nazi collaborators, which is why it makes sense to include them in this single category.

²³ The percentage of universal jurisdiction complaints brought to trial is likely to be even lower than the 3% indicated by the trials:complaints 32:1051 ratio, because the survey probably underrepresents the total number of universal jurisdiction complaints (or cases considered by authorities on their own motion) for two different reasons. First, authorities and complainants may not publicly announce that such a complaint has been lodged. Second, given the worldwide scope of the survey, it is possible that not all publicly known universal jurisdiction complaints

TABLE 1. UNIVERSAL JURISDICTION COMPLAINTS (OR CASES BROUGHT ON MOTION OF PUBLIC AUTHORITIES) AND TRIALS

Defendant's Nationality	Complaints	Percent	Trials	Percent
Afghan	4	0.38	4	12.50
Algerian	3	0.28		
Argentinean	121	11.51	1	3.13
British	2	0.19		
Cambodian	3	0.28		
Cameroonian	12	1.14		
Central African	1	0.09		
Chadian	2	0.19		
Chilean	16	1.52		
Chinese	44	4.19		
Colombian	1	0.09		
Congolese (Brazzaville)	5	0.48		
Congolese (Dem. Rep.)	8	0.76	1	3.13
Cuban	5	0.48		
Former Yugoslav	185	17.60	8	25.00
French	2	0.19		
Guatemalan	8	0.76		
Indian	1	0.09		
Indonesian	3	0.28		
Iranian	1	0.09		
Iraqi	5	0.48		
Israeli	44	4.19		
Ivoirian	2	0.19		
Libyan	1	0.09		
Mauritanian	2	0.19	1	3.13
Mexican	1	0.09		
Moroccan	15	1.43		
Nazi	359	34.16	5	15.63
Palestinian	4	0.38		
Peruvian	4	0.38		
Russian	3	0.28		
Rwandan	87	8.28	11	34.38
Salvadoran	15	1.43		
Somali	1	0.09		
Sri Lankan	1	0.09		
Sudanese	1	0.09		
Surinamese	1	0.09		
Tunisian	7	0.67	1	3.13
United States	55	5.23		
Uzbek	12	1.14		
Venezuelan	2	0.19		
Zimbabwean	2	0.19		
Total	1051	100.00	32	100.00

were identified. In contrast, the total number of universal jurisdiction trials is unlikely to be underrepresented since trials are public in most legal systems and much more likely to generate attention and coverage by human rights NGOs and the international criminal law literature. But if the percentage of universal jurisdiction complaints to

Of the 32 defendants who have been brought to trial, 24—amounting to three-quarters of all defendants tried under universal jurisdiction—have been Rwandans, former Yugoslavs, and Nazis. These are defendants about whom the international community has broadly agreed that they may be prosecuted and punished, and whose state of nationality has not defended them. This broad agreement creates incentives for political branches to concentrate on this type of defendants for two reasons. First, it creates incentives for the political branches of a wide range of states to concentrate on these defendants. Second, the broader the agreement against certain defendants, the harder it is for their state of nationality to exercise leverage over potential prosecuting states, since the latter states may be multiple and the state of nationality will find it more difficult to find allies in other states.

For 5 out of the 8 remaining defendants—4 Afghans and a Congolese—the accused's state of nationality did not protest the universal jurisdiction prosecution. Two of the three remaining cases included a Mauritanian and a Tunisian as defendants, and their state of nationality did protest. These are low-leverage states and, in any case, the defendants were tried in absentia and have not served any time. The one remaining case involved an Argentine defendant who was tried in Spain over the protests of Argentina, a mid-leverage state. However, as we will see below, how much of its leverage Argentina actually used in this case remains unclear.²⁴

The data on the universal jurisdiction cases that were actually tried thus conform with the results one would expect from the posited incentive structure for political branches.²⁵ In addition, the general pattern of these data cannot be explained by the three alternative hypotheses that have been proposed to account for decisions to undertake universal jurisdiction prosecutions.

The first alternative hypothesis would be that the weight of the evidence should explain which universal jurisdiction cases have been brought to trial.²⁶ If the data were consistent with this hypothesis, it would have to be shown that the tried cases were those that presented the fewest evidentiary challenges among the pool of universal jurisdiction complaints. But this explanation does not work for two reasons. First, many international crimes backed up by ample documentation and available evidence have not been tried on the basis of universal jurisdiction. Second, some of the cases that have actually been tried presented extraordinary evidentiary challenges—such as those against Nazi defendants in the 1980s and 1990s, given that the crimes had taken place many decades earlier. Since universal jurisdiction trials have tended to be true adjudicatory processes, this article does not suggest that evidentiary considerations have not played a role in the selection of cases. But the survey data and the case studies that are

trials were lower than the indicated 3%, this fact would not challenge this article's framework and hypotheses but would actually further confirm them.

²⁴ See *infra* notes 213–16 and corresponding text.

²⁵ The type of framework elaborated in this article can also help explain the low number of universal jurisdiction prosecutions for the crime of piracy. The costs of piracy tend to be lower than those for the core international crimes since most defendants are not protected by any state. The main cost of universal jurisdiction piracy prosecutions thus consists in the economic and logistical challenges of capturing and trying the defendants. But the incentives for political branches in this type of case are also low, in that piracy usually does not arouse as great a degree of concern in domestic constituencies as mass atrocities. For an analysis and findings consistent with these observations, see Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AJIL 436 (2010).

²⁶ See, e.g., Council of the European Union, AU-EU Technical ad hoc Expert Group, Report on the Principle of Universal Jurisdiction, para. 25, Doc. 8672/1/09 REV 1, annex at 26 (2009) [hereinafter AU-EU Expert Group].

analyzed in part II suggest that evidentiary considerations have come after, rather than instead of, political calculation.

A second alternative hypothesis would be that universal jurisdiction trials have concentrated on those cases or situations that have not been tried by the territorial state, or the state of nationality of the offender, or an international criminal tribunal.²⁷ But this hypothesis also does not stand scrutiny. First, no universal jurisdiction trials have taken place that involved alleged core international crimes committed in places that range from Cambodia to China, El Salvador, Guatemala, the Middle East, Russia, the United States, and Uzbekistan, among others. And governments in these places have tried few, if any, of the international crimes allegedly committed in their territory or by their nationals. Second, universal jurisdiction trials have actually concentrated mostly on situations—Nazi Germany, the former Yugoslavia, and Rwanda—for which the territorial state and international criminal tribunals have conducted a substantial number of prosecutions.

A third alternative hypothesis would be that the physical presence or absence of the defendant in the prosecuting state, or the possibility or impossibility of apprehending the defendant by that state, would explain which universal jurisdiction cases have been brought to trial because many states require the presence of the defendant in their territory as a precondition to opening formal proceedings based on universal jurisdiction and many states do not admit trials in absentia.²⁸ But this hypothesis gives rise to several problems. First, as the case studies in the next part make clear, in many cases possible defendants were present in the territory of a universal jurisdiction prosecuting state and were not put on trial. Second, at least four universal jurisdiction cases were brought to trial in which formal proceedings were commenced without the defendant's presence in the territory of the prosecuting state.²⁹ Third, some universal jurisdiction states—such as France—do admit trials in absentia. Finally, this is not truly a third alternative hypothesis since, as the case studies also indicate, the structure of political incentives described above has often been the very reason why many universal jurisdiction states require the presence of the alleged offender in their territory as a precondition to opening formal proceedings based on universal jurisdiction and why some universal jurisdiction states have not been able to apprehend certain defendants.

II. FIVE CASE STUDIES ON UNIVERSAL JURISDICTION

The experiences of five states can serve as a further test of the theoretical framework set forth in the previous part. These states were chosen because, while each has enacted universal jurisdiction statutes and has received universal jurisdiction complaints, they accord varying degrees of control to the executive branch over the resulting prosecutions and trials.

The analysis of these states' relevant case law proceeds from the perspective of comparative criminal procedure. Since the selected states are developed democracies, the independence of their judges is protected. Thus, the political branches do not have direct control over judges

²⁷ See Kontorovich & Art, *supra* note 25, at 447 (analyzing this hypothesis to explain patterns of universal jurisdiction prosecutions regarding the crime of piracy).

²⁸ See, e.g., *id.* at 449–50 (analyzing lack of apprehension as one of the hypotheses that would explain universal jurisdiction prosecution patterns in piracy cases).

²⁹ The *Ntuyahaga* case in Belgium, the *Eichmann* and *Demjanjuk* cases in Israel, and the *Scilingo* case in Spain fall into this category.

and judges do not respond to the posited incentive structure.³⁰ As a result, the degree of control by the executive branch over universal jurisdiction cases will depend on how each of these states structures its criminal processes—that is, on how easily a criminal case may move forward despite the opposition of prosecutors and the executive branch.

Germany

Legal and institutional framework. German law gives German criminal courts territorial jurisdiction,³¹ and, under certain conditions, extraterritorial jurisdiction based on the active personality, passive personality, protective, and universal jurisdiction principles.³² Until June 30, 2002, section 6.1 of the German Penal Code provided for universal jurisdiction over the crime of genocide,³³ and section 6.9 of that code still authorizes German courts to prosecute offenses committed abroad on the basis of an international agreement. This provision indirectly gives German courts universal jurisdiction over grave breaches of the Geneva Conventions committed before June 30, 2002.³⁴

In the second half of the 1990s, the German federal government, under a coalition led by Christian Democrat Helmut Kohl, developed an increasingly positive attitude toward international criminal law that found its clearest expression in the active role played by German representatives in the creation of the ICC.³⁵ A special statute—the Code of Crimes Against International Law (or VStGB)—which entered into force on June 30, 2002, was designed to ensure that Germany would comply with and support the framework of the ICC. This statute was passed in the Bundestag with the support not only of the Social Democrats and the Alliance90/The Greens, which formed the governing coalition, but also of the Union (which includes the Christian Democrats), the Free Democratic Party, and the Party of Democratic Socialism; it was also received positively by the individual states in the Bundesrat.³⁶

The VStGB provides for the universal jurisdiction of German courts over genocide, crimes against humanity, and war crimes, even without a link to Germany after the crime's commission.³⁷ Under German criminal procedure, the pretrial phase is controlled by the prosecutor.

³⁰ This article does not argue that judges do not respond to incentives. But judges do not respond to the same incentives and disincentives as political branches in universal jurisdiction cases since judges in our five case studies are not popularly elected, may get individual reputational gains from going ahead with universal jurisdiction cases, may not be pressured directly by foreign governments, and do not have the main responsibility for international relations costs. The literature on judges' incentives is extensive. A classic piece is Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

³¹ STGB §§3, 9. English translations by the German Ministry of Justice of some of the laws cited in this section are available online at http://www.gesetze-im-internet.de/Teilliste_translations.html.

³² *Id.* §§7(2)(1), 5 (subsections 3a, 5a, 8, 9, 11a, 12, 14a, 15) (active personality); *id.* §§7(1), 5 (subsections 6, 6a, 7, 8, 14) (passive personality); *id.* §5 (subsections 1–5, 7, 8, 10, 14a) (protective principle); *id.* §§6, 7(2)(2) (representation principle); Völkerstrafgesetzbuch [VStGB] [Code of Crimes Against International Law], June 26, 2002, §1, BUNDESGESETZBLATT, TEIL I at 2254 (universal jurisdiction).

³³ Sections 6.1 and 220a (criminalizing genocide) of the German Penal Code entered into effect in 1955 after Germany acceded to the Genocide Convention in November 1954.

³⁴ See *infra* note 53 on the *Djajić* and *Sokolović* cases.

³⁵ See Wolfgang Kaleck, *German International Criminal Law in Practice: From Leipzig to Karlsruhe*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 93, 102 (Wolfgang Kaleck et al. eds., 2007).

³⁶ See HELMUT GROPENGIESSER & HELMUT KREICKER, DEUTSCHLAND 59–60, 444, 1 NATIONALE STRAFVERFOLGUNG VÖLKERRECHTLICHER VERBRECHEN (Albin Eser & Helmut Kreicker eds., 2003).

³⁷ VStGB, §§1, 6, 7, 8–12.

As a general rule, German prosecutors must proceed against every offense they have knowledge of, provided that there is a factual basis for the prosecution.³⁸ However, various explicit exceptions to this general rule—the so-called opportunity principle—authorize the prosecutor not to pursue a case.³⁹

One of these exceptions can be made if the offense took place outside German territory.⁴⁰ In such cases, the prosecutor is authorized to dismiss the case even after formal proceedings have begun, if continuing would be seriously detrimental to Germany or to other important public interests.⁴¹ In addition, for offenses regulated by the VStGB, the German Criminal Procedure Code authorizes the prosecutor to refrain from prosecution if the alleged offender is not in or expected to be in Germany,⁴² if the offense is being prosecuted by an international court or by a state in whose territory the offense was committed, or if the offense was committed by or against one of the other state's nationals.⁴³ The Criminal Procedure Code establishes that the prosecutor may dismiss a case on these grounds at any stage, even after formal proceedings have been launched.⁴⁴

For alleged crimes regulated by the Criminal Code's section 6.9—and under section 6.1 before its repeal—and by the VStGB, the decision on whether to launch formal proceedings or to dismiss them once they have begun lies with the German federal prosecutor,⁴⁵ who is subject to the control and direction of the federal minister of justice.⁴⁶ The alleged victim of the offense can become a civil plaintiff and, in the case of certain offenses, a private prosecutor.⁴⁷ However, if the federal prosecutor opts to dismiss a case because the alleged offense was committed abroad, neither the civil plaintiff, the private prosecutor, nor the complaining victim may challenge this decision in court.⁴⁸

These regulations reflect a very high degree of control by the executive branch over universal jurisdiction prosecutorial decisions in Germany since the federal prosecutor, a high-level official who belongs to the executive branch, has unreviewable discretion over these decisions. Thus, according to the posited incentive structure, one would predict that Germany would open formal proceedings based on universal jurisdiction only against low-cost defendants. This is indeed the case, as demonstrated by the three categories of universal jurisdiction cases now to be considered.

³⁸ STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE] §152.

³⁹ *Id.* §§153–54.

⁴⁰ *Id.* §153c(1)(1).

⁴¹ *Id.* §153c(3).

⁴² *Id.* §153f(1) & (2)(3).

⁴³ *Id.* §153f(2)(4).

⁴⁴ *Id.* §153c(4), f(3). The German legislature adopted section 153f(3) as a result of the concerns the federal prosecutor expressed about the principle of universal jurisdiction. Kai Ambos, *International Core Crimes, Universal Jurisdiction and §153F of the German Criminal Procedure Code: A Commentary on the Decisions of the Federal Prosecutor General and the Stuttgart Higher Regional Court in the Abu Ghraib/Rumsfeld Case*, 18 CRIM. L.F. 43, 55 (2007).

⁴⁵ Gerichtsverfassungsgesetz [GVG] [Law on Constitution of the Courts] §§142a, 120(1)(8); STPO §153c(5).

⁴⁶ GVG §147(1).

⁴⁷ STPO §§403 (civil claim in the criminal process), 395 (private prosecutor regarding certain offenses).

⁴⁸ *Id.* §172(2); Oberlandesgericht [OLG] Stuttgart [Higher Regional Court] Sept. 13, 2005, No. 5 Ws109/05; OLG Stuttgart, Apr. 21, 2009, No. 5 Ws21/09. For the different views of German courts and commentators on this issue, see, for example, 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, 430–32 (2009).

Trials. The situation in the former Yugoslavia beginning in the early 1990s generated substantial attention in Germany because the atrocities took place in Europe and in an area that at different points in history had been under German influence. Germany admitted hundreds of thousands of Bosnian refugees, participated in peacekeeping operations in the region, and provided substantial support to the International Criminal Tribunal for the Former Yugoslavia (ICTY).⁴⁹

The federal prosecutor initiated 127 investigations against 177 defendants for atrocities in the former Yugoslavia.⁵⁰ One of the cases—Duško Tadić's—was transferred to the ICTY in April 1995.⁵¹ In four other cases, defendants were convicted of genocide, murder, or aiding and abetting murder, among other charges.⁵² These cases involved four Bosnian Serbs: Novislav Djajić, Nikola Jorgić, Maksim Sokolović, and Djuradj Kušljčić.⁵³

In several decisions, the German Federal Court of Justice held that universal jurisdiction pursuant to the Penal Code required a legitimizing link with Germany.⁵⁴ This was not an issue in these cases in part because the defendants were all in Germany, several having been longtime residents.

Pending cases. Since the promulgation of the VStGB on July 1, 2002, over sixty complaints have been presented, but formal proceedings were initiated against only three persons based on universal jurisdiction.⁵⁵ On its own initiative, the Office of the Federal Prosecutor opened an investigation against Ignace Murwanashyaka, a leader of a Hutu militia of Rwanda allegedly responsible for violations of international humanitarian law in the eastern part of the Democratic Republic of the Congo (DRC), but later dismissed the case for insufficient evidence.⁵⁶ However, on November 17, 2009, following pressure on German authorities by, among others, the Rwandan government and the United Nations, the Federal Criminal Police Office

⁴⁹ See, e.g., REYDAMS, *supra* note 10, at 149–50.

⁵⁰ Rolf Hannich, *Justice in the Name of All. Die praktische Anwendung des Völkerstrafgesetzbuchs aus der Sicht des Generalbundesanwalts beim Bundesgerichtshof*, 13 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 507, 510–11 (2007). There have also been prosecutions against Argentine military for human rights violations in Argentina, but since they have mostly relied on the passive personality principle, they are beyond the scope of this article. The same applies to the case of John Demjanjuk who is being tried on the basis of passive personality and crimes committed while holding a German position (a *sui generis* type of active nationality) under the 1943 version of the German Penal Code.

⁵¹ Prosecutor v. Tadić, Indictment, No. IT-94-1 (Feb. 13, 1995).

⁵² Der Generalbundesanwalt beim Bundesgerichtshof [Generalbundesanwalt], Straftaten nach dem Völkerstrafgesetzbuch (accessed on July 16, 2009, and on file with author).

⁵³ Bayerisches Oberstes Landesgericht [BayObLG] [Bavarian Higher Regional Court] May 23, 1997, 1998 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 392 (*Djajić*); Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 30, 1999, 1999 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NSTZ] 396, INT'L L. DOMESTIC CTS. [ILDC] 132 (Eng. trans.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 12, 2000, 2001 JURISTENZEITUNG [JZ] 975; Jorgić v. Germany, App. No. 74613/01 (Eur. Ct. H.R. July 12, 2007) (*Jorgić*); BGH, Revision Judgment, Feb. 21, 2001, NJW 2728, ILDC 564 (*Sokolović*); BGH, Revision Judgment, Feb. 21, 2001, NJW 2732 (*Kušljčić*).

⁵⁴ See, e.g., BGH Feb. 13, 1994, 1994 NSTZ 232 (*Tadić*); BGH Dec. 11, 1998, 1999 NSTZ 236 (*X v. SB & DB*); BGH Apr. 30, 1999, *supra* note 53 (*Jorgić*). In *Jorgić*, the Constitutional Court left open the issue of whether a legitimizing link is actually required. See BVerfG Dec. 12, 2000, *supra* note 53. In *Sokolović*, the Federal Court of Justice said that it was inclined to abandon the legitimizing-link requirement, at least for cases prosecuted under section 6.9 of the Penal Code. See BGH, NJW 2728, *supra* note 53.

⁵⁵ Amnesty International, *Germany: End Impunity Through Universal Jurisdiction* 60, 101–02, AI Index EUR 23/003/2008, 2008 (explaining that over sixty complaints have been presented).

⁵⁶ *Id.* at 102.

arrested Murwanashyaka and his deputy Straton Musoni. They stand accused of crimes against humanity and war crimes, among other offenses.⁵⁷

On July 29, 2010, in a separate case based on the repealed section 6.1 of the Criminal Code, Onesphore Rwabukombe, another Rwandan, was indicted by the federal prosecutor for, among other charges, genocide and incitement to commit genocide in Rwanda in 1994.⁵⁸

Dismissed cases. Among the over sixty complaints presented to the Office of the Federal Prosecutor since July 1, 2002, one was related to the minister of internal affairs of Uzbekistan; nineteen concerned the war in Iraq and acts of torture at Abu Ghraib and Guantánamo; sixteen involved the conflict in the Middle East; and ten pertained to the alleged persecution of Falun Gong practitioners in China.⁵⁹

The most common grounds for dismissal were the alleged perpetrator's absence from German territory.⁶⁰ Two of the dismissed cases deserve special mention. The first began on November 21, 2003, when the German Association Falun-Dafa, joined by forty complainants from various nations, presented a complaint against Jiang Zemin, the former president of China, and other members of the Chinese government for repression of the Falun Gong. The complaint alleged genocide, crimes against humanity, torture, and other crimes. On June 24, 2005, the federal prosecutor dismissed the complaint, arguing, *inter alia*, that Jiang had immunity under international law as a former head of state.⁶¹

The second case involved two complaints against Donald H. Rumsfeld, then U.S. secretary of defense, and other U.S. officials. The first of these, presented on November 29, 2004, and amended on February 10, 2005, was initiated by the Center for Constitutional Rights and four Iraqi citizens. The complaint cited forty-four alleged cases of mistreatment at Abu Ghraib prison in Iraq and four additional cases of alleged mistreatment during detention at other locations in Iraq. Rumsfeld was expected at a Munich Security Conference on February 13, 2005, and just two days before his anticipated arrival, the prosecutor dismissed the complaint, mainly on the basis of the principle of complementarity. According to the prosecutor, he had found no indications that the United States would not investigate and prosecute the alleged abuses.⁶²

On November 14, 2006, the Center for Constitutional Rights, joined by NGOs and twelve alleged torture victims, filed a new complaint against Rumsfeld and others for abuses at Abu

⁵⁷ See Horand Knaup, *Germany Arrests Rwandan War Crimes Suspects*, SPIEGEL ONLINE, Nov. 18, 2009, at <http://www.spiegel.de/international/world/0,1518,druck-661965,00.html>; BGH June 17, 2010, No. AK 3/10. This case has relied on the territorial and universal jurisdiction principles. I am grateful to Kai Ambos for discussing this point in detail with me.

⁵⁸ Generalbundesanwalt, *Anklage gegen einen ruandischen Staatsangehörigen wegen Völkermordes* (Aug. 18, 2010), at <http://www.generalbundesanwalt.de/de/showpress.php?themenid=12&newsid=369>.

⁵⁹ Salvatore Zappalà, *The German Federal Prosecutor's Decision Not to Prosecute a Former Uzbek Minister: Missed Opportunity or Prosecutorial Wisdom?* 4 J. INT'L CRIM. JUST. 602 (2006); Amnesty International, *supra* note 55, at 101.

⁶⁰ Amnesty International, *supra* note 55, at 60.

⁶¹ Hummel.Kaleck.Rechtsanwälte, *Einstellung Strafverfahren gegen chinesische Regierung*, at <http://www.die-firma.net/index.php?id=84,174,0,0,1,0>.

⁶² Decision of the Federal Prosecutor, Oct. 2, 2005, JZ 311. An appeal was rejected by the Stuttgart Higher Regional Court, OLG Stuttgart Sept. 13, 2005, *supra* note 48. See also Florian Jessberger, *Universality, Complementarity, and the Duty to Prosecute Crimes Under International Law in Germany*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES, *supra* note 35, at 213, 214.

Ghraib and Guantánamo. The new complaint was related to the old one but included new evidence, new defendants, and new plaintiffs, and it was filed after a new federal prosecutor's assumption of office and Rumsfeld's resignation.⁶³ The prosecutor dismissed the complaint, referring to the earlier prosecutor's dismissal and arguing that the alleged offenders were not then in Germany or expected to be there. The prosecutor further claimed that a successful investigation would require investigations in Iraq and the United States, and that trying to get foreign legal assistance, especially in Iraq, would prove to be futile.⁶⁴

England and Wales

Legal and institutional framework. England has traditionally based its criminal law jurisdiction on the territorial principle.⁶⁵ In recent decades, however, several statutes have authorized the courts of the United Kingdom to exercise universal jurisdiction over the international crimes that are the subject of this article. First, as part of the implementation of the Geneva Conventions of 1949, section 1 of the Geneva Conventions Act of 1957 established universal jurisdiction of the UK courts over grave breaches of these Conventions.⁶⁶ In addition, as part of the implementation of the Convention Against Torture of 1984, section 134(1) of the Criminal Justice Act of 1988 gives UK courts universal jurisdiction over the crime of torture.

Under section 1(1) of the War Crimes Act of 1991, UK courts are accorded jurisdiction over persons in the United Kingdom charged with the war crimes of murder, manslaughter, and culpable homicide committed between September 1, 1939, and June 5, 1945, in a place that was then part of Germany or under German occupation, but only if the alleged offender was on March 8, 1990, or has since become a British citizen or resident of the United Kingdom, the Isle of Man, or any of the Channel Islands.⁶⁷ Finally, sections 51 and 68 of the International Criminal Court Act of 2001 enable English and Welsh courts to exercise jurisdiction over genocide, crimes against humanity, and certain war crimes committed outside the United Kingdom by, among others, a person who has subsequently become a UK resident.

All of these statutes specify that in England and Wales proceedings for these crimes can be initiated only by or with the consent of the attorney general—the chief legal adviser to the Crown as well as a government minister who answers directly to Parliament.⁶⁸ The legal guidance of the Crown Prosecution Service explains that this rule aims both at preventing “abuse

⁶³ Center for Constitutional Rights, German War Crimes Complaint Against Donald Rumsfeld et al. (filed Nov. 14, 2006), at <http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld-et-al>.

⁶⁴ Prosecutor General, Federal Supreme Court, Criminal Complaint Against Donald Rumsfeld et al., No. 3 ARP 156/06-2 (Apr. 5, 2007) (Eng. trans. of prosecutor's decision), at <http://ccrjustice.org/files/ProsecutorsDecision.pdf>. An appeal was rejected by the Stuttgart Higher Regional Court, OLG Stuttgart Apr. 21, 2009, *supra* note 48.

⁶⁵ 11(3) HALSBURY'S LAWS OF ENGLAND, para. 1054 (4th ed. 2006 reissue). The main exception to this general rule has been that a British subject who commits murder or manslaughter abroad can be prosecuted in Britain. *Id.*, para. 1061 (citing Offences Against the Person Act, 1861, 24 & 25 Vict., c. 100, §9).

⁶⁶ The Geneva Conventions (Amendment) Act, 1995, c. 27, §1(2), added grave breaches to Additional Protocol I.

⁶⁷ On the political context and debate that led to the implementation of the 1991 War Crimes Act, see FRASER, *supra* note 20, at 275–88.

⁶⁸ Geneva Conventions Act, 1957, 5 & 6 Eliz. 2, c. 52, §1A(3); Criminal Justice Act, 1988, c. 33, §135; War Crimes Act, 1991, c. 13, §1(3); International Criminal Court Act, 2001, c. 17, §53(3).

or bringing the law into disrepute, because the offence is a kind which may result in vexatious private prosecutions,” and at ensuring “that prosecution decisions take account of important considerations of public policy or international nature.”⁶⁹

Nevertheless, section 25(2)(a) of the Prosecution of Offences Act of 1985 establishes that the prior consent provision does not prevent the arrest of an individual or the remand into custody or on bail of a person charged with any offense.⁷⁰ In England and Wales any person may institute criminal proceedings, so that private individuals may apply directly for arrest warrants to be issued.⁷¹ Thus, while a defendant’s case will not go to trial without the attorney general’s consent, private individuals can trigger arrest warrants as long as magistrates agree.

In accordance with this regime, the government has a monopoly over determining who can be prosecuted for international crimes under universal jurisdiction, and this decision rests in the hands of a single official, the attorney general. As a government minister, the attorney general can be expected to respond to the posited incentive structure by opening formal proceedings only against low-cost defendants. Yet the ability of private individuals to apply for and obtain arrest warrants from members of the judiciary lessens the government’s control over these proceedings, and suggests that arrest warrants would be issued against a wider range of potential defendants than are eventually prosecuted. In addition, should these arrest warrants provoke substantial international tensions for England and Wales, they would be expected to create incentives to reform the arrest warrant proceedings. These three predictions have all proved true.

Trials. Only two defendants have been prosecuted and tried in England and Wales pursuant to the universal jurisdiction provisions of the relevant statutes.

In the only case under the War Crimes Act to have reached a verdict, Anthony Sawoniuk was accused of the war crime of murder against Jews in Belarus (then Belorussia) while employed by German forces in the local police. Since 1946, Sawoniuk had been living in the United Kingdom, where he became a railroad worker. In 1988 his name appeared on a list of potential suspects provided to UK authorities by the Soviet Union. On April 1, 1999, a jury in the Central Criminal Court at the Old Bailey convicted Sawoniuk of two counts of murder in connection with the deaths in 1942 of two Jewish women in Belarus and sentenced him to life in prison.⁷²

The only universal jurisdiction case involving torture to have gone to trial under section 134(1) of the Criminal Justice Act was against Afghan warlord Faryadi Sarwar Zardad. After the Soviet Union withdrew from Afghanistan, Zardad, who controlled a checkpoint on the route between Kabul and Pakistan between 1992 and 1996, was said to have terrorized, tortured, imprisoned, and blackmailed civilians on this route.⁷³ In the wake of the Taliban’s 1996

⁶⁹ The Crown Prosecution Service, Consents to Prosecute (July 21, 2010), at http://www.cps.gov.uk/legal/a_to_c/consent_to_prosecute/.

⁷⁰ Prosecution of Offences Act, 1985, c. 23, §25(2)(a).

⁷¹ See *id.* §6(1).

⁷² For a summary of the trial, see *R. v. Sawoniuk* [2000] EWCA Crim 9 (Feb. 10, 2000) (denying Sawoniuk’s appeal).

⁷³ See, e.g., *Afghan Warlord Guilty of Torture*, BBC NEWS, July 18, 2005, at <http://news.bbc.co.uk/1/hi/uk/4693239.stm>; *Afghan Zardad Jailed for 20 Years*, BBC NEWS, July 19, 2005, at http://news.bbc.co.uk/2/hi/uk_news/4695353.stm.

rise to power in Afghanistan, Zardad fled to the United Kingdom, which he entered on a falsified passport, and sought asylum.⁷⁴ In 2003 the BBC's John Simpson caught Zardad on film living in south London, and shortly afterward he was arrested there.⁷⁵

After a first jury could not reach a verdict, Zardad was retried before the Old Bailey, convicted on July 18, 2005, of torture and hostage taking, and sentenced to twenty years' imprisonment.⁷⁶ Lord Goldsmith, attorney general during the administration of Tony Blair, went to court for the first time since his appointment to prosecute the first trial and explained that Britain had decided to pursue the case because Zardad's crimes were so heinous and such "an affront to justice" that they could be tried in any country.⁷⁷

Arrests. The prediction that arrest warrants might be issued against a broader range of defendants than those who have been prosecuted is borne out by the warrants against Israeli officials. Following an application by British lawyers acting for Palestinian victims, senior district judge Timothy Workman issued an arrest warrant against Maj. Gen. Doron Almog based on alleged war crimes under the Geneva Conventions, specifically for allegedly having ordered the demolition of fifty-nine civilian Palestinian homes. Almog managed to fly back to Israel when British police failed to board his plane in September 2005.⁷⁸ In December 2009, upon the request of Palestinians alleging that war crimes had been committed in Gaza during Operation Cast Lead, a British court issued an arrest warrant against Tzipi Livni, the former foreign minister of Israel, only to withdraw it when it was discovered she was not in the United Kingdom.⁷⁹

In addition, the chief minister of Gujarat State in India called off a visit to the United Kingdom, possibly owing to fears that an arrest warrant could be issued against him for his role in anti-Muslim riots in 2002.⁸⁰ On the basis of immunity arguments, magistrates have rejected arrest warrant requests against Gen. Shaul Mofaz, then defense minister of Israel; Robert Mugabe, president of Zimbabwe; Bo Xilai, then minister of commerce of China; and Ehud Barak, defense minister of Israel.⁸¹

Dismissed cases. The authorities have not moved forward with the prosecution of other possible cases they have considered, including those against additional Nazi defendants;⁸² Lt. Col. Tharcisse Muvunyi, a former official of the Rwandan army living in England who was arrested

⁷⁴ *Afghan Warlord Guilty of Torture*, *supra* note 73; *Afghan Zardad Jailed for 20 Years*, *supra* note 73.

⁷⁵ *See, e.g.*, Lavelle, *supra* note 19.

⁷⁶ *See, e.g.*, *Afghan Warlord Guilty of Torture*, *supra* note 73; Lavelle, *supra* note 19. Hostage taking is another crime over which UK courts have universal jurisdiction, but this study does not focus on it since it is not one of the four core international crimes.

⁷⁷ *Afghan Zardad Jailed for 20 Years*, *supra* note 73.

⁷⁸ Vikram Dodd, *Papers Reveal How Alleged War Criminal Escaped UK Arrest*, *GUARDIAN*, Feb. 20, 2008, at 8.

⁷⁹ Ian Black & Ian Cobain, *British Court Issued Arrest Warrant for Former Israeli Minister over 'War Crimes' in Gaza*, *GUARDIAN*, Dec. 15, 2009, at 4.

⁸⁰ *Gujarat Leader Calls off UK Visit*, *BBC NEWS*, Mar. 25, 2005, at http://news.bbc.co.uk/2/hi/south_asia/4381585.stm.

⁸¹ *Re Mofaz* (Bow St. Mag. Ct. Feb. 12, 2004), in *Immunity and International Crimes in English Law* (Colin Warbrick ed.), 53 *INT'L & COMP. L.Q.* 769, 771 (2004); *id.* at 770 (reproducing the *Mugabe* judgment, Bow St. Mag. Ct. Jan. 14, 2004); Application for Arrest Warrant Against Bo Xilai (Bow St. Mag. Ct. Nov. 8, 2005) (per Workman, J.), *cited in* 18 *HUM. RTS. WATCH*, No. 5(D), *Universal Jurisdiction in Europe* 94 n.431 (2006), available at <http://www.hrw.org/en/node/11297/section/15>; *e.g.*, *Goldstone Defends UN Gaza Report*, *BBC NEWS*, Sept. 30, 2009, at http://news.bbc.co.uk/2/hi/middle_east/8280181.stm (Barak).

⁸² For a description of the main cases against possible Nazi defendants, see FRASER, *supra* note 20, at 274, 290–92, 298–99.

for transfer to the International Criminal Tribunal for Rwanda (ICTR) on February 5, 2000;⁸³ Dr. Mohammed Mahgoub, a Sudanese physician living in Scotland who was accused of participating in the torture of another Sudanese citizen in Sudan;⁸⁴ Karuna Amman, a former commander of the Tamil Tigers in Sri Lanka, accused of participating in a number of massacres—including one against some four to six hundred unarmed police officers—and other human rights abuses;⁸⁵ and George W. Bush, the former U.S. president, who was not investigated on immunity grounds.⁸⁶

Finally, we come to the arrest of former Chilean dictator Pinochet, the most well-known contemporary universal jurisdiction case. Section 134 of the Criminal Justice Act could have provided England with grounds for prosecuting Pinochet, but during two earlier visits by Pinochet to England, Amnesty International had unsuccessfully attempted to have him arrested and prosecuted under that provision. In one of these attempts, the Bow Street magistrate did not grant the arrest warrant application. In the other, the attorney general declined to order the immediate arrest of Pinochet and instead initiated a police investigation, which gave him time to flee the country.⁸⁷

There are several possible explanations why England arrested Pinochet on the basis of Spain's international arrest warrant and extradition request despite its own reluctance to arrest and prosecute him. First, extradition "is a routine and normal process between the European states which are parties to the 1957 European Convention on Extradition . . . [and whose] administrative authorities are accustomed to the procedures and would not be influenced by political sensitivities or by lack of familiarity with international human rights law."⁸⁸ In addition, in extradition requests consent by the attorney general is not necessary. In these cases, it is the home secretary who plays the crucial role, but the home secretary of the Blair Labour government apparently was not consulted before Pinochet was arrested.⁸⁹ Moreover, as will be seen in the section on Spain, once Pinochet was arrested, his detention and prosecution received so much support that it was only after more than sixteen months that the home secretary decided not to grant the Spanish extradition request and allowed Pinochet to return to Chile.

Reform proposals. The issuance of arrest warrants against higher-cost defendants has created incentives to amend the applicable procedures. The Israeli government reportedly responded to the warrant against Major General Almog in 2005 by pressuring the Blair administration into considering barring individuals from seeking arrest warrants against people suspected of war crimes and torture.⁹⁰ While no reforms were passed, in the aftermath of the 2009 arrest warrant against former foreign minister Livni, both former prime minister Gordon Brown and

⁸³ Geoffrey Bindman, *UK Prosecutions for Crimes Under International Law*, in JUSTICE FOR CRIMES AGAINST HUMANITY 365, 370 (Mark Lattimer & Philippe Sands eds., 2003).

⁸⁴ NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT 33 (2005); Bindman, *supra* note 83, at 369–70. This case took place in Scotland and the decision on withdrawing the prosecution was made by the lord advocate.

⁸⁵ See, e.g., Trial Watch, *Karuna Amman*, at http://www.trial-ch.org/trialwatch/profil_print.php?ProfileID=733&Lang=en.

⁸⁶ *Universal Jurisdiction in Europe*, *supra* note 81, at 94.

⁸⁷ Bindman, *supra* note 83, at 366–67.

⁸⁸ *Id.* at 366.

⁸⁹ David Sugarman, *From Unimaginable to Possible: Spain, Pinochet and the Judicialization of Power*, 3 J. SPANISH CULTURAL STUD. 107, 114 (2002).

⁹⁰ Vikram Dodd, *UK Considers Curbing Citizens' Right to Arrest Alleged War Criminals*, GUARDIAN, Feb. 3, 2006, at 19.

the new coalition government of Conservatives and Liberal Democrats announced that they were considering changes to the procedures by which arrest warrants are issued on private applications. Section 151 of the Police Reform and Social Responsibility Bill, presented to Parliament on November 30, 2010, would restrict these procedures by requiring the prior consent of the director of public prosecutions before arrest warrants are issued for certain offenses alleged to have been committed outside the United Kingdom.⁹¹

France

Legal and institutional framework. Under French criminal law, jurisdiction of French courts is based on the territorial, active personality, passive personality, and protective principles;⁹² and under Article 689 of the French Code of Criminal Procedure, perpetrators of offenses committed outside French territory or their accomplices can be prosecuted and tried by French courts in cases where French law applies or an international convention confers jurisdiction on French courts.

Until the introduction of Article 689-11 of the Code of Criminal Procedure on August 9, 2010, which will be discussed below, torture was the only core international crime subject to universal jurisdiction in France that was not restricted to a certain geographical location. Article 689-2 of the code provides that any person guilty of torture may be prosecuted and tried if, as required by Article 689-1, that person is present in France. In addition, in implementation of UN Security Council resolutions, French courts may prosecute genocide, crimes against humanity, and war crimes under the jurisdiction of the ICTY and the ICTR, if the alleged offenders are found in France.⁹³

As for French criminal procedure, investigating judges are charged with the formal investigation of any serious offense.⁹⁴ Investigating judges are members of the judiciary and have life tenure.⁹⁵ To prevent arbitrary investigations, the investigating judge cannot initiate investigations on her own motion.

An investigating judge may be prompted to initiate a formal investigation in two ways. The first is by a prosecutor's request, and prosecutors make such requests at their own discretion.⁹⁶ Prosecutors answer to the Ministry of Justice—part of the French executive branch—which

⁹¹ Police Reform and Social Responsibility Bill 2010-11, H.C., pt. 4, §151; Afua Hirsch, *Hague Moves Quickly to Scrap International Crime Trials in UK*, GUARDIAN, May 31, 2010, at 12; Gordon Brown, *Britain Must Protect Foreign Leaders from Private Arrest Warrants*, TELEGRAPH, Mar. 3, 2010, at <http://www.telegraph.co.uk/news/newstopics/politics/gordon-brown/7361967/Britain-must-protect-foreign-leaders-from-arrest.html>.

⁹² CODE PÉNAL Art. 113-2 (territorial jurisdiction); Art. 113-6 (active personality); Art. 113-7 (passive personality); Art. 113-10 (protective principles).

⁹³ Loi 95-1 du 2 janvier 1995 portant adaptation de la législation française aux dispositions de la résolution 827 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991, J.O., Jan. 3, 1995, p. 71; Loi 96-432 du 22 mai 1996 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis en 1994 sur le territoire de Rwanda et, s'agissant des citoyens rwandais, sur le territoire d'États voisins, J.O., May 23, 1996, p. 7695.

⁹⁴ CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] Art. 79.

⁹⁵ CONST. Art. 64; CODE DE L'ORGANISATION JUDICIAIRE Art. L121-1.

⁹⁶ C. PR. PÉN. Art. 40.

holds the power to appoint, transfer, apply disciplinary measures against, or dismiss them.⁹⁷ This way of opening formal proceedings gives a high degree of control to the executive branch, though less so than in Germany and England. First, the decision to conduct an investigation is not centralized in a single high prosecuting official—such as the federal prosecutor in Germany and the attorney general in England and Wales. Second, the law establishes that although the Ministry of Justice can order prosecutors to open formal proceedings, it cannot order them to dismiss complaints.⁹⁸ Third, though prosecutors have discretion (unreviewable by the courts) to dismiss a complaint, once they decide to bring a case they cannot dismiss it without court approval.

The second way an investigating judge can initiate an investigation is if a crime victim or an NGO presents a complaint and asks to become a civil party to the criminal case.⁹⁹ When a victim or NGO seeks to become a civil party, there is no need for a prosecutor's request, and the prosecutor does not have discretion to dismiss the complaint.¹⁰⁰ While the prosecutor may still challenge the investigating judge's jurisdiction over the case, this challenge is ultimately decided by the investigating judge herself or by a higher court.¹⁰¹ All in all, the executive branch has little control over this procedure, which suggests that it is likely to be used to initiate cases against a broad range of defendants.

Nevertheless, two disincentives may persuade victims and NGOs not to seek to bring cases as civil parties. First, if the judge dismisses such a case, the prosecutor may request that the judge find the initiation of those proceedings abusive or dilatory, and fine the offending civil party accordingly.¹⁰² Second, if the case is dismissed, all the persons targeted in the complaint may sue the civil party for damages.¹⁰³ By contrast, if a victim or NGO delays seeking civil party status until after the prosecutor has formally requested a judicial investigation, neither one assumes either of these risks.¹⁰⁴

Together with its participation in criminal cases through the work of prosecutors, the French executive branch also influences universal jurisdiction through opinions issued by the Ministry of Foreign Affairs. This is a particularly significant capability in France since the president has a "reserved domain" in foreign affairs—a legacy of the de Gaulle era—with low levels of transparency and accountability vis-à-vis other branches of government and the public.¹⁰⁵

Yet the French executive branch's lesser degree of control over universal jurisdiction prosecutions than that of Germany or England suggests that the posited incentive structure would play a lesser role in France and that formal proceedings would be opened and move forward against a wider variety of defendants. A review of the French universal jurisdiction cases proves this prediction to be true. In addition and in accordance with the posited incentive structure,

⁹⁷ See, e.g., YVES BEIGBEDER, *JUDGING WAR CRIMES AND TORTURE: FRENCH JUSTICE AND INTERNATIONAL CRIMINAL TRIBUNALS AND COMMISSIONS (1940–2005)* at 12 (2006).

⁹⁸ C. PR. PÉN. Art. 30; JEAN PRADEL, *MANUEL DE PROCÉDURE PÉNALE* 131 (12th ed. 2004).

⁹⁹ C. PR. PÉN. Art. 1.

¹⁰⁰ *Id.*, Arts. 80, 86.

¹⁰¹ *Id.*, Art. 186.

¹⁰² See *id.*, Arts. 177-2, 177-3. The fine cannot currently exceed fifteen thousand euros. After receiving the complaint with the request to be admitted as a civil party, the investigating judge sets the amount that the civil party must deposit, based on the resources of the civil party, to ensure payment of the civil fine. *Id.*, Arts. 88, 88-1.

¹⁰³ *Id.*, Art. 91.

¹⁰⁴ *Id.*, Arts. 91, 177-2.

¹⁰⁵ BEIGBEDER, *supra* note 97, at 29–30, 301.

this review also shows that the French executive branch has invoked its foreign relations concerns or expertise to try to ensure that formal proceedings are not opened or accused brought to trial in higher-cost defendants' cases.¹⁰⁶

Trials. Only two defendants have been tried under France's universal jurisdiction provisions. The first, Ely Ould Dah, was an intelligence lieutenant from the former French colony of Mauritania. Ould Dah was prosecuted for the alleged torture in 1990–1991 of black African members of Mauritania's military suspected of inciting a coup d'état. In August 1998, Ould Dah, then a captain in the Mauritanian army, traveled to France for military training. The following June, the Fédération internationale des ligues des droits de l'homme (FIDH) and the Ligue des droits de l'homme (LDH) submitted a simple complaint against him (that is, a complaint presented without a simultaneous request to be considered a civil party), and the prosecutor requested a judicial investigation. Following interrogation by an investigating judge, Ould Dah was placed in pretrial detention.¹⁰⁷

Angered by the prosecution, Mauritania responded by expelling French citizens working there in lieu of military service, repatriating the Mauritanian military trainees in France, and reestablishing a visa requirement for French citizens entering the country.¹⁰⁸ The arrest also worried military or security service members of some former French colonies in Africa who feared a similar fate if they went to France, which disturbed military cooperation with those countries.¹⁰⁹

When the French minister of foreign affairs sent the prosecutor a note stressing the dangers of deterioration in French-Mauritanian relations, the court of appeal released the defendant under house arrest and confiscated his passport.¹¹⁰ The next April, the defendant fled—according to an NGO attorney, with the complicity of French authorities—returning to a hero's welcome in Mauritania.¹¹¹ But France does not prohibit trials in absentia, and the defendant was

¹⁰⁶ Some international criminal law cases have been based on the principles of active nationality, passive personality, and territoriality. They include cases on alleged crimes committed in Algeria (Aussaresses), Argentina (Astiz and others), Cambodia (Bilon Ung Boun Hor as complainant), Chile (Pinochet and others), Indochina (Boudarel), Nazis and Nazi collaborators (Barbie, Touvier, Papon), and Rwanda (against the French army and incumbent officials of the Rwandan government). But since they were not based on universal jurisdiction, they are beyond the scope of this article. For a recent review of some of these cases, see Leila Nadya Sadat, *The Nuremberg Paradox*, 58 AM. J. COMP. L. 151 (2010).

¹⁰⁷ Cour d'assises [court of original jurisdiction] Montpellier, Ordonnance et mise en accusation et de non-lieu partiel et ordonnance de prise de corps, No. 99/14445 (May 25, 2001) [hereinafter Ould Dah Ordonnance], reprinted in Groupe d'action judiciaire de la FIDH, *Mauritanie: Affaire ELY OULDAH* 32 (June 2005), at http://www.fidh.org/IMG/pdf/Elyouldahjuin2005_dpi200.pdf; Ould Dah v. France, App. No. 13112/03, Décision sur la Recevabilité 2, 12 (Eur. Ct. H.R. Mar. 17, 2009) [hereinafter Eur. Ct. Ould Dah Decision] (ruling Ould Dah's application inadmissible); Group d'action judiciaire de la FIDH, *Mauritanie: Affaire ELY OULDAH: Ely Ould Dah condamné* 8 (Nov. 2005) [hereinafter *Ould Dah condamné*], at http://www.fidh.org/IMG/pdf/GAJ_Ely_Ould_Dah_nov2005_OK.pdf; Renaud Lecadre, *Un mauritanien jugé en France pour tortures*, LIBÉRATION, June 30, 2005, at <http://www.liberation.fr/societe/0101534459-un-mauritanien-juge-en-france-pour-tortures>.

¹⁰⁸ Marie-Laure Colson, *Un officier mauritanien soupçonné de torture est arrêté en France*, LIBÉRATION, July 6, 1999, reprinted in *Ould Dah condamné*, supra note 107, at 14; Marie-Laure Colson, *Représailles de la Mauritanie pour laver l'affront français*, LIBÉRATION, July 7, 1999, reprinted in *id.* at 12.

¹⁰⁹ *Mise en liberté du capitaine mauritanien écroué en France pour "crimes de torture"*, LE MONDE, Sept. 30, 1999, reprinted in *Ould Dah condamné*, supra note 107, at 16.

¹¹⁰ Marie-Laure Colson, *Un présumé tortionnaire en liberté surveillée*, LIBÉRATION, Sept. 29, 1999, reprinted in *Ould Dah condamné*, supra note 107, at 15; Ould Dah Ordonnance, supra note 107; Eur. Ct. Ould Dah Decision, supra note 107, at 2; *Ould Dah condamné*, supra note 107, at 8.

¹¹¹ Jean Chatain, *Dix ans de prison pour un bourreau*, L'HUMANITÉ, July 2005, reprinted in *Ould Dah condamné*, supra note 107, at 27; *Un militaire mauritanien mis en examen pour tortures a réussi à fuir la France*, LE MONDE,

tried, convicted, and sentenced to ten years in prison by the trial court of Gard on July 1, 2005.¹¹²

The second universal jurisdiction case tried in France concerned Khaled Ben Saïd, chief of a Tunisian police station at the time of the alleged offense. According to complainant Zoulaikha Majouhbi, Ben Saïd had participated in her 1996 torture and interrogation at the station in connection with an investigation of her husband and the illegal religious group to which he was suspected of belonging. After the prosecutor ordered a police investigation, the police telephoned Ben Saïd—by then vice consul of Tunisia in Strasbourg, France—to summon him to appear, but he invoked his diplomatic status and refused the verbal summons. At some point in the following months, Ben Saïd fled France.¹¹³

In January 2002, the prosecutor initiated a formal investigation by an investigating judge.¹¹⁴ In December 2008, the trial court of Bas-Rhin convicted Ben Saïd in absentia for complicity in the crime of torture and other barbaric acts and sentenced him to eight years in prison.¹¹⁵ Tunisia responded by denouncing the decision as an invention of Islamists aimed at undermining the country.¹¹⁶ The prosecution—which in the end had requested an acquittal of the defendant at trial—challenged the conviction but, on appeal, a new court confirmed the conviction and increased the penalty to twelve years of imprisonment.¹¹⁷

Pending cases. Among pending cases are several against Rwandan defendants accused of playing a role in the mass atrocities against Tutsi and moderate Hutu in 1994.¹¹⁸ Complicating the situation is the fact that France provided the Hutu government with support and training. As a consequence, French officials have been accused of complicity in the genocide, a charge they have hotly denied.¹¹⁹

One noteworthy case involves Wenceslas Munyeshyaka, a Rwandan priest, and Laurent Bucyibaruta, who occupied various leadership positions in Rwanda—both accused of having played a role in organizing the 1994 genocide. Simple complaints against Munyeshyaka and Bucyibaruta were lodged in 1995 and 2000, respectively. In both cases, the prosecutor requested a judicial investigation and the defendants were interrogated, put in pretrial

Apr. 9, 2000, *reprinted in id.* at 16; *Un tribunal français condamne un officier mauritanien à 10 ans de réclusion*, LE MONDE, July 2, 2005, *reprinted in id.* at 26.

¹¹² C. PR. PÉN. Art. 379-2 to 379-6; Eur. Ct. *Ould Dab* Decision, *supra* note 107, at 3; Cour d'assises Gard, Arrêt de Condamnation de Ely Ould Dah, No. 70/05 (July 1, 2005), *reprinted in Ould Dab condamné*, *supra* note 107, at 49.

¹¹³ See Cour d'assises Bas-Rhin, Ordonnance de mise en accusation de Khaled Ben Saïd, No. J.20009/01 (Feb. 16, 2007), *reprinted in* Groupe d'action judiciaire de la FIDH, *L'affaire Khaled Ben Saïd: Le premier procès en France d'un fonctionnaire tunisien accusé de torture* 47 (2009), available at http://www.fidh.org/IMG/pdf/Bensaid512fr2008_FINAL.pdf [hereinafter *L'affaire Ben Saïd*].

¹¹⁴ *L'affaire Ben Saïd*, *supra* note 113, at 8.

¹¹⁵ Cour d'assises Bas-Rhin, Dec. 15, 2008, No. CA 08/36 (default judgment), *reprinted in L'affaire Ben Saïd*, *supra* note 113, at 63.

¹¹⁶ Christophe Ayad, *La France condamne un diplomate étranger*, LIBÉRATION, Dec. 17, 2008, *reprinted in L'affaire Ben Saïd*, *supra* note 113, at 24.

¹¹⁷ S-G Report, *supra* note 1, para. 100; FIDH, *Condamnation en appel d'un diplomate tortionnaire tunisien* (Sept. 25, 2010), at <http://www.fidh.org/Condamnation-en-appel-d-un-diplomate-tortionnaire>.

¹¹⁸ In addition to the cases against Rwandans mentioned in the text, as of December 13, 2010, complaints against fourteen additional Rwandans had been presented. On the status of each of these complaints, see Collectif des parties civiles pour le Rwanda, *Affaires*, at <http://www.collectifpartiescivilesrwanda.fr/affairesjudiciaire.html>. Furthermore, France handed over Jean de Dieu Kamuhanda and François-Xavier Nzuwonemeye to the ICTR.

¹¹⁹ See, e.g., BEIGBEDER, *supra* note 97, at 275–302.

detention, and later released. While the case against Munyeshyaka has been pending for almost fifteen years—ten years in Bucyibaruta’s case—and despite interventions by the French Court of Cassation, the European Court of Human Rights, and the ICTR, their cases are still open.¹²⁰

Another high-profile pending case is against Agathe Kanziga Habyarimana, the widow of Rwandan president Juvénal Habyarimana. On February 13, 2007, the Collective of Civil Parties for Rwanda submitted a complaint and asked to be made civil parties against Kanziga Habyarimana for her participation, organization, and direction of the genocide. A judicial investigation was opened on March 13, 2008.¹²¹

Despite the many complaints against Rwandans in France, none of these cases have reached trial. The situation has been attributed to various factors. First, victims’ groups and human rights NGOs have claimed that in the Rwandan cases—and in universal jurisdiction cases more generally—the French Office of the Prosecutor has not taken the initiative and it is up to the victims to become civil parties to break the prosecutor’s inertia. Second, human rights NGOs have claimed that investigating judges in Paris have neither the means nor the time to investigate these complex cases.¹²² Another inhibiting factor may be the diplomatic tensions between France and Rwanda that arose after a French investigating judge issued international arrest warrants against nine Rwandan officials in November 2006 in response to the 1994 downing of a plane carrying twelve people, including Presidents Habyarimana of Rwanda and Cyprien Ntaryamira of Burundi and three French crew members.¹²³

In another significant case, the so-called *Disappeared of Brazzaville Beach*, on December 7, 2001, several NGOs brought a complaint before the prosecutor of the Tribunal de grande instance of Paris against Denis Sassou N’Guesso, president of the Republic of the Congo (Congo), and three other Congolese officials, accusing them of arbitrary detentions, tortures and barbaric acts, and forced disappearances.¹²⁴ On January 23, 2002, the prosecutor of Meaux requested the initiation of a formal investigation.¹²⁵ On December 9 of that year, Congo sought to institute proceedings against France before the International Court of Justice (ICJ), claiming, among other things, that the unilateral exercise of universal jurisdiction was

¹²⁰ See *Mutumura v. France*, App. No. 46621/99 (Eur. Ct. H.R. June 8, 2004) (in which Mrs. Mutimura, a civil party in the criminal case, claimed that France had violated her right to a fair and public hearing by a tribunal within a reasonable time); *Prosecutor v. Munyeshyaka*, *Prosecutor v. Bucyibaruta*, Request for Referral to France, No. ICTR-05-87-I (Nov. 20, 2007).

¹²¹ See Collectif des parties civiles pour le Rwanda, *Plainte avec constitution de partie civile* (on file with author); Collectif des parties civiles pour le Rwanda, *Affaires*, *supra* note 118. In March 2010, Habyarimana was briefly arrested in France on the basis of an international arrest warrant issued by Rwanda—but not in the context of the French criminal proceedings based on universal jurisdiction just described. See, e.g., *Rwanda: Agathe Habyarimana interpellée dans l’Essonne puis remise en liberté*, LE MONDE, Mar. 2, 2010, at http://www.lemonde.fr/afrique/article/2010/03/02/agathe-habyarimana-veuve-du-president-rwandais-assyasine-en-avril-1994-interpellee-dans-l-essonne_1313193_3212.html.

¹²² See FIDH, *La répression des présumés génocidaires rwandais devant les juridictions françaises: État des lieux* 4 (Apr. 6, 2004), at <http://www.fidh.org/La-repression-des-presumes-genocidaires-rwandais>; FIDH, *15 ans après le génocide, la justice française doit juger les présumés génocidaires présents sur le territoire français* (Apr. 6, 2009), at <http://www.fidh.org/15-ANS-APRES-LE-GENOCIDE-LA-JUSTICE-FRANCAISE>. On current efforts to address this criticism, see Bernard Kouchner & Michèle Alliot-Marie, *Pour la création d’un pôle “génocides et crimes contre l’humanité” au TGI de Paris*, LE MONDE, Jan. 6, 2010, available at <http://www.cfcp.fr/spip.php?article415>.

¹²³ See Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, *Délivrance de mandats d’arrêt internationaux*, Ordonnance de soit-communié 6, No. 97.295.2303/0 (Nov. 17, 2006).

¹²⁴ See Cour de cassation [Cass.] [supreme court for judicial matters] crim., No. 04-87.245, Public hearing (Jan. 10, 2007); Cass. crim., No. 07-86.412, Public hearing (Apr. 9, 2008).

¹²⁵ Cass. crim. (Jan. 10, 2007), *supra* note 124; Cass. crim. (Apr. 9, 2008), *supra* note 124.

a violation of the principle of sovereign equality of all members of the United Nations (Article 2(1) of the UN Charter).¹²⁶ In April 2004, the prosecutor of Meaux requested that the investigation be limited to Gen. Norbert Dabira, the only participant in the alleged crimes whose habitual residence was in France when the investigation was opened. On June 20, 2007, the Court of Appeals of Versailles held that the investigation had been properly initiated regarding Dabira and Jean-François N'Dengue—director general of the Congolese police who resided in France in 2004—but that the procedural actions against N'Dengue were invalid because he enjoyed diplomatic immunity. For its part, the ICJ, acting on a discontinuance request by Congo, removed the case from its list on November 16, 2010.¹²⁷

A final case that bears mentioning is *Militias Relizane*. In October 2003, the FIDH and the LDH—supported by the Relizane section of the Algerian League for the Defense of Human Rights—presented a complaint before the prosecutor of the Nîmes Tribunal de grande instance against two Algerian members of the militias of Relizane for torture and crimes against humanity. After the filing of the case before the Nîmes investigating judge, the brothers Abdelkader and Hocine Mohamed were arrested at their home in March 2004, interrogated, confronted by two of the alleged witnesses, and released under judicial supervision.¹²⁸

Dismissed cases. One case involved a complaint and application to be considered a civil party before an investigating judge in Paris by Elvir Javor and four other Bosnian citizens living in France. They brought the complaint against unknown persons for the commission of war crimes, torture, genocide, and crimes against humanity allegedly committed in 1992 by members of the Serb forces as part of their policy of “ethnic cleansing.” After a long judicial battle, the Court of Cassation confirmed the dismissal by the court of appeal because the alleged offenders were not in France.¹²⁹

At least four universal jurisdiction complaints were dismissed by prosecutors before the initiation of formal judicial proceedings. First, on November 24, 1998, the FIDH and the LDH presented the prosecutor with a complaint for crimes of torture against DRC president Laurent-Désiré Kabila, who was then visiting France. The prosecutor dismissed the complaint, arguing that the direct responsibility of Kabila for the acts of torture could not be shown and, further, that it was unclear that the Convention Against Torture could be applied against current heads of state.¹³⁰

Second, on April 25, 2001, an Algerian family whose son was killed in detention and two former Algerian detainees filed a complaint against Algerian general Khaled Nezzar, the former minister of defense, for torture and cruel, inhumane, and degrading treatment. The prosecutor

¹²⁶ ICJ, *Certain Criminal Proceedings in France (Congo v. Fr.)*, Application Instituting Proceedings 3 (Dec. 9, 2002).

¹²⁷ On the French proceedings, see, for example, *Arrêt de la Chambre de l'Instruction de la Cour d'appel de Versailles du 20 juin 2007, extracted in FIDH, Affaire des “disparus du Beach”: Récapitulatif des procédures 24* (Nov. 9, 2007), at <http://www.fidh.org/Affaire-des-disparus-du-Beach-Recapitulatif-des,4872>; Cass. crim. No. 07-86412, Public hearing (Apr. 9, 2008). On the discontinuance of the ICJ case, see *Certain Criminal Proceedings in France (Congo v. Fr.)* (Int'l Ct. Justice Nov. 16, 2010); Dapo Akande, *More on Congo v. France Discontinued*, EJIL: TALK! (Nov. 19, 2010), at <http://www.ejiltalk.org/> (giving possible reasons for Congo's request).

¹²⁸ FIDH, *Deux tortionnaires algériens mis en examen en France* (Mar. 31, 2004), at http://www.fidh.org/DEUX-TORTIONNAIRES-ALGERIENS-MIS-EN-EXAMEN-EN#outil_sommaire_1; *L'affaire Ben Saïd*, *supra* note 113, at 42.

¹²⁹ Cass. crim. No. 95-81527, Public hearing (Mar. 26, 1996).

¹³⁰ *Ould Dah condamné*, *supra* note 107, at 30.

initiated an investigation, but General Nezzar fled the country before the police could interrogate him, allegedly with the assistance of the French political authorities. On June 14, 2001, the prosecutor dismissed the case on the grounds that General Nezzar was no longer in France.¹³¹

Third, in February 2003, President Mugabe traveled to Paris to meet President Jacques Chirac and attend the Franco-African summit. Gay human rights campaigner Peter Tatchell of the Zimbabwe Association in London filed a complaint against Mugabe with the deputy prosecutor of Paris and requested Mugabe's arrest on charges of torture. The deputy prosecutor said that the official French view was that Mugabe enjoyed immunity as a head of state.¹³²

Finally, when former U.S. secretary of defense Rumsfeld attended a 2007 breakfast meeting in France, the FIDH, the LDH, the U.S. Center for Constitutional Rights, and the European Center for Constitutional Rights of Germany presented a complaint to the prosecutor of Paris charging Rumsfeld with authorizing, ordering, and inciting the commission of crimes of torture in Guantánamo and Iraq.¹³³ On November 16, 2007, the prosecutor dismissed the complaint, noting that the Ministry of Foreign Affairs had indicated that heads of state and ministers of foreign affairs continue to have immunity from criminal prosecution in connection with official acts after they have left office, a policy that applied to Rumsfeld in this instance.¹³⁴

The ICC and universal jurisdiction in France. Though France ratified the Rome Statute of the ICC in June 2000, its implementation in the French legal system took more than ten years, partly because of disagreements between different political actors and human rights NGOs over whether universal jurisdiction should be extended to the crimes under the Court's jurisdiction—genocide, crimes against humanity, and war crimes—and, if so, under what conditions.¹³⁵ On August 9, 2010, a new Article 689-11 of the Code of Criminal Procedure finally became law.¹³⁶ This article includes a very narrow universal jurisdiction provision regarding these crimes, establishing four limitations to the exercise of universal jurisdiction by French courts. First, the alleged perpetrator must become a resident of France after the crime. Second, the crimes have to be established by the state where they took place (the double-criminality requirement) or the state in question must be a party to the ICC Statute. Third, only the prosecutor—not the victim or NGOs as civil parties—may launch formal criminal proceedings. Fourth, the prosecutor may initiate such proceedings only if no other international or national jurisdiction requests the rendition or extradition of the alleged offender.

The passing of this law is thus consistent with the posited incentive structure, as the French legislature was willing to expand French courts' universal jurisdiction over these crimes only

¹³¹ *Id.* at 31.

¹³² *Mugabe Trial Bid Launched in Paris*, BBC NEWS, Feb. 19, 2003, at <http://news.bbc.co.uk/2/hi/europe/2779313.stm>; Peter Tatchell, *Mugabe Escapes Arrest in Paris*, at <http://www.petertatchell.net/international/mugabefrance.htm>.

¹³³ Complaint Filed Against Former Defense Secretary for Torture, Abuse at Guantánamo and Abu Ghraib Before the TGI, Paris, at 19–25 (Oct. 25, 2007), at <http://www.fidh.org/IMG/pdf/plainteFINALE25oct07.pdf>.

¹³⁴ Letter from Jean-Claude Marin, prosecutor of the TGI, Paris, to Patrick Baudouin, FIDH attorney (Nov. 16, 2007) (on file with author).

¹³⁵ See, e.g., Jeanne Sulzer, *Implementing the Principle of Universal Jurisdiction in France*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES, *supra* note 35, at 125, 136–37.

¹³⁶ Loi 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale, Art. 8, J.O., Aug. 10, 2010, p. 14678.

under highly restrictive conditions and by giving the executive branch more control over such prosecutions.

Belgium

Belgium generally abides by the principle of territorial jurisdiction,¹³⁷ but depending on the situation, Belgian law recognizes the principles of active personality and passive personality, and the protective principle.¹³⁸ Since the regulation of universal jurisdiction over international crimes has changed over time in Belgium, this section first considers the years 1993–2003, and then the period from 2003 to the present.

The original legal and institutional framework (1993–2003). The end of the Cold War gave new impetus to Belgian efforts to implement the Geneva Conventions of 1949, and in April 1991, after guidance from the Conseil d'État, the Belgian government submitted a bill to that effect to the Parliament.¹³⁹ On June 16, 1993—only a few months after the Security Council created the International Criminal Tribunal for the Former Yugoslavia—the two chambers of the Belgian Parliament unanimously passed a law on the punishment of grave breaches of the Geneva Conventions of 1949 and Additional Protocols I and II.¹⁴⁰ Article 7 of the universal jurisdiction law established Belgian jurisdiction over these grave breaches, regardless of where or by whom they were committed.

In 1994 the genocide and the killing of Belgian peacekeepers in Rwanda—a former Belgian colony—shocked and horrified the Belgian public. Belgium sprang into action, supporting the creation of the ICTR by the Security Council and the rebuilding of the Rwandan judiciary.¹⁴¹ International humanitarian law became an even more important political issue when the Belgian Senate created a commission to investigate Belgium's involvement in the events in Rwanda, with future prime minister Guy Verhofstadt serving as secretary.¹⁴²

In February 1999, the Parliament unanimously amended the universal jurisdiction statute by extending the universal jurisdiction of Belgian courts to genocide and crimes against humanity.¹⁴³ In accordance with Article 27 of the ICC Statute, the amendment also abolished the immunity defense, establishing universal application of the law regardless of a person's official status.¹⁴⁴ These changes were made with the goal of adapting Belgian “positive law to the

¹³⁷ CODE PÉNAL Arts. 3, 4. The Belgian codes cited in this article can be found online at <http://www.droit.belge.be/codes.asp>.

¹³⁸ CODE D'INSTRUCTION CRIMINELLE [C.I.CR.] [CODE OF CRIMINAL PROCEDURE] Arts. 6, 7 (active personality, which includes not only Belgian nationals, but also other persons whose main residence is in Belgium); Art. 10, §§4, 5 (passive personality); Art. 10, §§1, 2, & 3 (protective principles).

¹³⁹ LUC Walley, *Universal Jurisdiction: Lessons from the Belgian Experience*, 5 Y.B. INT'L HUMANITARIAN L. 394 (2002).

¹⁴⁰ Loi relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces conventions of June 16, 1993, MONITEUR BELGE [M.B.], Aug. 5, 1993. Most of the laws and cases of higher Belgian courts cited in this article can be found online at <http://www.belgiumlex.be/>.

¹⁴¹ Walley, *supra* note 139, at 396.

¹⁴² See Paul Kerstens, “*Deliver Us from Original Sin*”: *Belgian Apologies to Rwanda and the Congo*, in *THE AGE OF APOLOGY: FACING UP TO THE PAST* 187, 193 (Mark Gibney et al. eds., 2009); Walley, *supra* note 139, at 396.

¹⁴³ Loi relative à la répression des violations graves de droit international humanitaire of Feb. 10, 1999, Art. 2, M.B., Mar. 23, 1999, 9267.

¹⁴⁴ *Id.*, Art. 5.

latest developments in international criminal law, in particular the adoption on July 17, 1998 of the Rome Statute for an International Criminal Court, signed by Belgium on September 10, 1998.¹⁴⁵

In July 1999, Verhofstadt became prime minister, leading a pro-human-rights coalition of Liberals, Socialists, and Greens.¹⁴⁶ Two years later, Belgium passed the law of July 18, 2001, which amended Article 12*bis* of the Code of Criminal Procedure by conferring jurisdiction on its courts over offenses committed outside Belgium that an international convention required it to prosecute.¹⁴⁷ In so doing, Belgium added torture to the crimes subject to universal jurisdiction under its law, as it had ratified the Convention Against Torture in June 1999.¹⁴⁸

From 1993 to 2003, universal jurisdiction cases in Belgium proceeded according to the standard rules of criminal procedure, with an investigating judge heading the investigation of serious offenses.¹⁴⁹ Belgian investigating judges are members of the judiciary with lifetime tenure.¹⁵⁰ To prevent arbitrary investigations, investigating judges are barred from initiating such proceedings on their own motion.¹⁵¹ There are two ways to launch a judicial investigation.

The first is by a prosecutor's request.¹⁵² The prosecutor has discretion over whether to initiate an investigation and sets investigative priorities within his or her jurisdiction.¹⁵³ While the Constitution formally places the Office of the Prosecutor within the judiciary, the king appoints and removes prosecutors on the advice of the minister of justice. Prosecutors work under the direction and authority of the ministry.¹⁵⁴

Judicial investigations may also be initiated at the request of a victim who presents a complaint to an investigating judge and asks to become a civil party. (In cases involving racial discrimination, certain NGOs may also become civil parties.)¹⁵⁵ When a judicial investigation is launched by a civil party, the courts will always have the last word on whether jurisdiction obtains. If, following an investigation, the *Chambre du conseil* (a court of first instance, consisting of a single judge who oversees the investigating judge's work¹⁵⁶) finds that the defendant has committed no offense and dismisses the case, the civil party must compensate the defendant for his or her attorney's honorarium and fees.¹⁵⁷ But Belgian law does

¹⁴⁵ Belgium Senate, Rapport de la Commission de la Justice, No. 1-749/3 (Dec. 1, 1998), *quoted in* Luc Reydams, *Universal Criminal Jurisdiction: The Belgian State of Affairs*, 11 CRIM. L.F. 183, 193 (2000); Damien Vandermersch, *Prosecuting International Crimes in Belgium*, 3 J. INT'L CRIM. JUST. 400, 402 (2005).

¹⁴⁶ See, e.g., Kerstens, *supra* note 142.

¹⁴⁷ Loi portant modification de l'article 12bis de la loi du 17 avril 1878 contenant le titre préliminaire du Code de procédure pénale, M.B., Sept. 1, 2001, 9673.

¹⁴⁸ Convention Against Torture, *supra* note 11. For Belgium's ratification, see <http://treaties.un.org/>.

¹⁴⁹ C.I.CR. Art. 55.

¹⁵⁰ CONST. Art. 151.

¹⁵¹ C.I.CR. Arts. 56, §1, 61.

¹⁵² *Id.*, Art. 61.

¹⁵³ *Id.*, Arts. 28quater, 28ter.

¹⁵⁴ CONST. Arts. 151 (as amended on Nov. 20, 1998), 151, §1, & 153; CODE JUDICIAIRE [C.JUD.] [Judicial Code] Arts. 138, 143, 143bis, 143ter, 143quater.

¹⁵⁵ C.I.CR. Art. 63; Christine van den Wyngaert, *Belgium*, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 1, 17–18 (Christine van den Wyngaert ed., 1993). Article 9, §3 of the universal jurisdiction statute of June 1993 affirmed that private actors could get direct access to the courts, even when military courts had jurisdiction over the case.

¹⁵⁶ C.I.CR. Art. 127.

¹⁵⁷ *Id.*, Art. 128; C.JUD. Art. 1022.

not contain the two additional disincentives to filing this type of complaint that are found in the French system.¹⁵⁸

Given the lesser degree of control by the Belgian executive branch over universal jurisdiction during this first phase than those of Germany, England and Wales, and France, formal proceedings would be expected to be commenced against a wider range of defendants. In addition, if the opening of the formal proceedings generated substantial international relations costs, the political branches would have to reduce these costs by amending the universal jurisdiction regime to ensure that the prosecutions are dismissed and do not go to trial. The cases bear out each of these hypotheses.

Trial under the original framework. Relatives of Rwandan and Belgian victims of the 1994 Rwandan genocide filed complaints with the Office of the Prosecutor in several Belgian jurisdictions, seeking application of the universal jurisdiction statute.¹⁵⁹ When prosecutors hesitated, the minister of justice directed the head of the Brussels Office of the Prosecutor to launch an official judicial investigation.¹⁶⁰ Belgium deferred its proceedings in favor of the International Criminal Tribunal for Rwanda for two of the six defendants then in Belgium.¹⁶¹ Rwanda not only did not oppose, but in fact supported, the investigation by allowing Belgian investigators onto its territory.¹⁶²

Between April 17 and June 8, 2001, the four remaining defendants were tried before a jury, charged with participating in the commission of war crimes covered by the universal jurisdiction statute.¹⁶³ The jury found the defendants guilty on all charges, except for some of the killings alleged against one defendant. The four received prison sentences ranging from twelve to twenty years.¹⁶⁴

Other cases initiated under the original framework. In January 1999, Belgian and Congolese nationals who had sought refuge in Belgium filed a complaint and asked to be civil parties against the leaders of the Democratic Republic of the Congo for war crimes and crimes against humanity allegedly committed in the territory of the DRC since 1997.¹⁶⁵ On April 11, 2000, the Belgian investigating judge issued an international arrest warrant against Abdoulaye Yerodia Ndombasi, the DRC minister for foreign affairs, for allegedly having made speeches inciting racial violence in August 1998.¹⁶⁶

On October 17, 2000, the DRC instituted proceedings against Belgium before the International Court of Justice, arguing that, in its purported exercise of universal jurisdiction, Belgium had violated the “principle that a State may not exercise its authority on the territory of

¹⁵⁸ See *supra* notes 102–04 and corresponding text.

¹⁵⁹ Reydamas, *supra* note 145, at 202.

¹⁶⁰ Cour d’assises, Bruxelles, Lecture de l’acte d’accusation par l’avocat général 6 [hereinafter Lecture], in *Compte rendu intégral du procès* (Apr. 17–June 8, 2001) [hereinafter *Butare Four Record*], at <http://www.assises.rwanda2001.be/040000.html>; Reydamas, *supra* note 145, at 203; Vandermeersch, *supra* note 145, at 404.

¹⁶¹ Luc Reydamas, *Belgium’s First Application of Universal Jurisdiction: The Butare Four Case*, 1 J. INT’L CRIM. JUST. 428, 430 & n.13 (2003). Belgium deferred to the ICTR in its proceedings against, among others, Ferdinand Nahimana, Georges Ruggiu, Théoneste Bagosora, Bernard Ntuyahaga, Elie Ndayambaje, and Joseph Kanyabashi. Only the last two had been present in Belgium.

¹⁶² *Id.* at 430.

¹⁶³ Lecture, *supra* note 160, at 1, 24–27.

¹⁶⁴ Cour d’assises, Bruxelles, Verdict, in *Butare Four Record*, *supra* note 160, at <http://www.assises.rwanda2001.be/110500.html>.

¹⁶⁵ Arrest Warrant, *supra* note 14, at 9–10, para. 15; Vandermeersch, *supra* note 145, at 406–07.

¹⁶⁶ Arrest Warrant, *supra* note 14, at 6, 9–10, paras. 1, 13, 15.

another State,” the “principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations,” and the diplomatic immunity of the minister for foreign affairs of a sovereign state.¹⁶⁷

The ICJ as a whole concentrated on the issue of immunity and decided not to deal with universal jurisdiction. In a 13-3 vote, the Court concluded that, given the nature and purpose of the arrest warrant, its mere issuance violated the immunity that Yerodia enjoyed as the incumbent DRC minister for foreign affairs. In a 10-6 vote, the Court held that Belgium was required to cancel the warrant and to inform the relevant authorities that it had done so.¹⁶⁸

Meanwhile, in Brussels on June 18, 2001, twenty-three alleged Lebanese and Palestinian victims filed a complaint against Ariel Sharon, then prime minister of Israel, and others allegedly responsible for the massacres, killings, rapes, and disappearances that they claimed took place in Beirut, Lebanon, from September 16 to 18, 1982, in the Sabra and Shatila camps. The complaint alleged genocide, crimes against humanity, and war crimes, and the complainants asked to be civil parties to the case.¹⁶⁹

The investigating judge and the court of appeal declared that they lacked universal jurisdiction over the case, among other reasons because none of the defendants were found in Belgium.¹⁷⁰ But in February 2003, the Court of Cassation, Second Chamber, partially reversed the decision of the court of appeal, asserting that the presence of the defendants in Belgium was not a precondition for the initiation of formal proceedings regarding crimes covered by the universal jurisdiction statute. However, the Court also held that customary international law provided Sharon with immunity from transnational prosecutions based on universal jurisdiction while in office.¹⁷¹ In response to the decision, Israel withdrew its ambassador to Belgium for more than three months.¹⁷²

On March 18, 2003, seven Iraqi citizens and an NGO presented a civil complaint against former U.S. president George H. W. Bush, the incumbent vice president Dick Cheney (secretary of defense at the time of the alleged crimes), the incumbent secretary of state Colin Powell (chairman of the Joint Chiefs of Staff at the time of the alleged crimes), and Gen. Norman Schwarzkopf (the U.S. commander during the Persian Gulf war). The plaintiffs alleged that the release of two bombs over two civilian shelters in Baghdad on the night of February 12, 1991, during the Gulf war—an incident in which 403 people were killed—constituted war crimes.¹⁷³

Belgian foreign minister Louis Michel of the French-speaking Liberal Party said that the case pointed to a serious problem with the universal jurisdiction statute, in that it contained insufficient safeguards against its use for political or persecutory purposes.¹⁷⁴ A Belgian Foreign

¹⁶⁷ *Id.* at 10, para. 17.

¹⁶⁸ *Id.* at 33, para. 78(2), (3).

¹⁶⁹ *Plainte avec constitution de partie civile contre Ariel Sharon* (June 18, 2001), at <http://www.voltairenet.org/article9775.html>.

¹⁷⁰ *La chambre des mises en accusation, Bruxelles, arrêt de la cour d'appel June 26, 2002, Sharon & Yaron*, at http://www.law.kuleuven.be/jura/art/40n1/genocidewet_rechtspraak.html#26062002.

¹⁷¹ Cass., Feb. 11, 2003, No. P.02.1139.F, *reprinted in* 42 ILM 596 (2003) (Eng. trans.).

¹⁷² Walley, *supra* note 139, at 402.

¹⁷³ *See* Le procureur général près la Cour de cassation, en cause Bush et consorts, Note, attached to Cass., Sept. 23, 2003, No. P.03.1216.F; Jean-Pierre Borloo & Pierre Vassart, *Compétence universelle: plainte contre Bush père*, LE SOIR (Bruxelles), Mar. 19, 2003.

¹⁷⁴ Borloo & Vassart, *supra* note 173.

Ministry spokesperson added: "This case proved that there is something wrong with the genocide law The government wants to change the law."¹⁷⁵

Other judicial investigations launched by civil parties during this period included those against former officials of the Khmer Rouge in Cambodia; Driss Basri, a former Moroccan minister; Hashemi Rafsanjani, the former president of Iran; Augusto Pinochet; Saddam Hussein; Fidel Castro; Paul Kagamé, president of Rwanda; Laurent Gbagbo, president of the Ivory Coast; and Yasir Arafat.¹⁷⁶

Changes in the law (2003–present). After the complaint was presented against George H. W. Bush and other U.S. leaders, Secretary of State Powell told Belgium that it was risking its status as a diplomatic capital and host of the NATO headquarters.¹⁷⁷ These pressures prompted an amendment that explicitly permitted an immunity defense based on a person's official capacity, though it also stipulated that the presence of an alleged perpetrator in Belgian territory was not a precondition for the exercise of universal jurisdiction against him. The Chamber of Representatives passed this provision on April 23, 2003, by a vote of 63–48, and it took effect on May 7.¹⁷⁸ The amendment established a series of limitations to the cases that civil parties could initiate, and mechanisms for the minister of justice to bring cases to the attention of other states as a way to divest Belgian courts of jurisdiction.¹⁷⁹ One of these mechanisms was quickly dubbed the "Bush clause," as it was designed to deal with the *George H. W. Bush* case.¹⁸⁰ Parliament added this clause to gain the support of the opposition because a majority still favored universal jurisdiction.¹⁸¹

Following passage of the amendment, Israel returned its ambassador to Belgium.¹⁸² However, the provision was quickly tested and proved insufficient to keep a lid on international tensions. On May 14, 2003, a group of alleged victims filed a complaint against Gen. Tommy Franks, commander of the U.S. and UK forces in the second Gulf war, and Col. Bryan P. McCoy, commander of the Third Battalion, Fourth Regiment of the U.S. Marines, for alleged war crimes committed in Iraq.¹⁸³

¹⁷⁵ See Richard Bernstein, *Belgium Rethinks Its Prosecutorial Zeal*, N.Y. TIMES, Apr. 1, 2003, at A8. For the outcome of the *Sharon* and *Bush* cases, see text at note 192 *infra*.

¹⁷⁶ *Juge d'instruction à Bruxelles, 6 novembre 1998*, in 1999 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE (Belg.) 278; Reydams, *supra* note 145, at 206, 213; Vandermeersch, *supra* note 145, at 406, 408; Jan Wouters, *The Judgement of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks*, 16 LEIDEN J. INT'L L. 253, 266 (2003). Some of the governments concerned reacted strongly to these investigations. For instance, the Iranian Parliament demanded financial compensation for the "pain inflicted upon the Iranian people" as a consequence of the complaint against former president Rafsanjani. See Alain Winants, *The Yerodia Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 LEIDEN J. INT'L L. 491, 503 n.65 (2003).

¹⁷⁷ Ratner, *supra* note 16, at 890; Michael Verhaeghe, *The Political Funeral Procession for the Belgian UJ Statute*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES, *supra* note 35, at 139, 142.

¹⁷⁸ Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire of Apr. 23, 2003, Arts. 4, 5, M.B., May 7, 2003, 9412 [hereinafter April 2003 law] (replacing Art. 5, §3 and Art. 7 of the 1993/1999 law); Universal Jurisdiction Rejection Act of 2003, H.R. 2050, 108th Cong. §2(10) (2003) (describing passage of 2003 Belgian law and vote in the Chamber of Representatives).

¹⁷⁹ April 2003 law, *supra* note 178, Art. 5 (replacing Art. 7 of the 1993/1999 law).

¹⁸⁰ Verhaeghe, *supra* note 177, at 142.

¹⁸¹ Walley, *supra* note 139, at 402–03.

¹⁸² Ratner, *supra* note 16, at 891.

¹⁸³ See Centre de droit international, Université libre de Bruxelles, Développements judiciaires, *Affaire Franks: Plainte*, at http://www.ulb.ac.be/droit/cdi/Site/Developpements_judiciaires.html; KLACHT TEGEN TOMMY

On May 20, 2003, the Belgian Council of Ministers brought the alleged crimes to the attention of the United States pursuant to Article 7, section 4 of the amended universal jurisdiction statute. The following month, in accordance with a decision by the Council of Ministers, the federal prosecutor decided to dismiss the complaint pursuant to Article 7, section 1 of the amended statute, finding that the complaint set forth insufficient grounds for the initiation of formal proceedings. But the plaintiffs appealed the federal prosecutor's decision—as allowed by Article 7, section 1 of the amended statute—and, on a subsidiary basis, sought a declaration by the Constitutional Court as to whether Article 7, section 4 of the amended act violated Articles 10 (establishing equality before the law) and 11 (barring discrimination) of the Constitution and the principle of separation of powers.¹⁸⁴

Meanwhile, on June 10, 2003, the court of appeal held that while Ariel Sharon's status as Israel's prime minister conferred immunity, formal proceedings could move forward against Brig. Gen. Amos Yaron.¹⁸⁵ Two days later, Secretary of Defense Rumsfeld announced that the United States would refuse to pay for a new NATO headquarters building in Belgium and would consider barring U.S. officials from traveling to meetings in Belgium unless it rescinded the universal jurisdiction law, stating that "Belgium appears not to respect the sovereignty of other countries."¹⁸⁶ Within days, Verhofstadt agreed to seek further amendments limiting the statute's reach to cases with direct links to Belgium, and asserted that the 1993 amendment had "ushered in a manifestly abusive political use of this law."¹⁸⁷

On August 5, 2003, Belgium passed a bill—effective two days later—that abrogated the universal jurisdiction statute and introduced amendments to the Criminal Code, the Code of Criminal Procedure, and the Judiciary Act.¹⁸⁸ The August 2003 reform imposed far greater limitations on Belgium's extraterritorial jurisdiction than those adopted in April. First, it provides that only people who had become Belgian citizens or residents after the offense could be prosecuted on the basis of universal jurisdiction for war crimes, crimes against humanity, and genocide.¹⁸⁹ Second, it eliminated the power of victims and NGOs to initiate formal proceedings as civil parties under the passive personality principle and the general enabling clause of Article 12*bis* of the Code of Criminal Procedure, and permits only the federal prosecutor to pursue cases in these situations.¹⁹⁰

FRANKS (15 MEI 2003) & KI 24 SEPTEMBER 2003 (FRANKS EN MCCOY), at http://www.law.kuleuven.be/jura/art/40n1/genocidewet_rechtspraak.html#09092003 [hereinafter *Chambre des mises en accusation, Franks & McCoy*].

¹⁸⁴ *Chambre des mises en accusation, Franks & McCoy, supra* note 183.

¹⁸⁵ Arrêt de la Chambre de mises en accusation (Corpus de la décision), June 10, 2003, at http://www.law.kuleuven.be/jura/art/40n1/genocidewet_rechtspraak.html (then Find "Corpus de la decision").

¹⁸⁶ Ratner, *supra* note 16, at 891 (quoting *News Transcript: Secretary of Defense Rumsfeld at NATO Headquarters* (June 12, 2003), at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2742>); see also Walley, *supra* note 139, at 403.

¹⁸⁷ Ratner, *supra* note 16, at 891 (quoting *Projet de loi relative aux violations graves du droit humanitaire*, July 23, 2003, BELG. PARL. DOC. 51 0103/001).

¹⁸⁸ *Loi relative aux violations graves du droit international humanitaire* of Aug. 5, 2003, Art. 27, M.B., Aug. 7, 2003, 21,182 [hereinafter *August 2003 law*].

¹⁸⁹ C.I.C.R. Art. 6.1bis, as amended by August 2003 law, *supra* note 188, Art. 14; Luc Reydam, *Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law*, 1 J. INT'L CRIM. JUST. 679, 683 (2003) (citing BELG. PARL. DOC. 51 0103/001, *supra* note 187, at 5–6).

¹⁹⁰ C.I.C.R. Art. 12bis. The Constitutional Court upheld the constitutionality of most of these provisions. *Cour d'arbitrage*, Mar. 23, 2005, No. 62/2005.

A transitional provision of the August 2003 law also established that unless at least one of the plaintiffs was a Belgian national when the complaint was presented (or the defendant a Belgian resident when the August 2003 law became effective) *and* the judge had engaged in an investigative act in the case, any proceeding brought before an investigating judge had to be sent by the federal prosecutor to the prosecutor of the Court of Cassation who was obligated to ask the Court to relieve Belgian courts of jurisdiction over the matter.¹⁹¹ On the basis of this transitional provision, on September 24, 2003, the Court of Cassation stripped Belgian courts of jurisdiction over all defendants in the *Sharon* and *Bush* cases, as well as over pending cases that included those against Castro and Kagamé.¹⁹² On the same date, the court of appeal held that, following passage of the August 2003 law, it could no longer entertain an appeal against the federal prosecutor's dismissal of the case against General Franks and Colonel McCoy.¹⁹³

Significantly, and in contrast to the dismissal of cases against high- and mid-cost defendants, proceedings against low-cost defendants have moved forward.¹⁹⁴ For example, in June 2005, businessmen Samuel Ndashyikirwa and Etienne Nzabonimana were convicted by a Belgian jury for the war crimes of murder and attempted murder in Rwanda of Rwandan citizens in April 1994, and respectively sentenced to ten and twelve years in prison.¹⁹⁵ Both were residing in Belgium at the time of their arrests in 2002.¹⁹⁶ In July 2007, Bernard Ntuyahaga, a major in the Rwandan army, was found guilty by a Belgian jury of the war crimes of murder and attempted murder in Rwanda in 1994 of ten Belgian peacekeepers and an undetermined number of Rwandans and was sentenced to twenty years of imprisonment.¹⁹⁷ In December 2009, Ephrem Nkezabera, a former banker and leading member of the Interahamwe militia, was convicted of war crimes, including murders and rapes, committed in Rwanda in 1994 and was sentenced to thirty years.¹⁹⁸

Spain

Because the Spanish regulation of universal jurisdiction has evolved over time, this discussion focuses on two discrete periods, the first spanning the years 1985–2009, and the second extending from November 2009 to the present.

¹⁹¹ August 2003 law, *supra* note 188, Art. 29.

¹⁹² Cass., Sept. 9, 2003, No. P.03.1217.F (Sharon); Cass., No. P.03.1216.F, *supra* note 173 (Bush); Eric David, *Belgium*, in 8 Y.B. INT'L HUMANITARIAN L. 396, 400–02 (2005) (describing the role of the Court of Cassation and the Cour d'arbitrage in the dismissal of the *Kagamé* case and the *TotalFinaElf* case); Vandermeersch, *supra* note 145, at 408 (Sharon, Bush, Castro).

¹⁹³ Chambre des mises en accusation, *Franks & McCoy*, *supra* note 183.

¹⁹⁴ Belgium also proceeded with an investigation of former Chad president Hissène Habré. On February 16, 2009, Belgium instituted ICJ proceedings against Senegal—the country where Habré had been in exile since his 1990 ouster—demanding that Senegal prosecute Habré on the basis of universal jurisdiction or extradite him to Belgium to be tried for crimes against humanity and torture. However, Belgium has taken the position that its jurisdiction over this case is based not on universal jurisdiction but on the passive personality principle. *See* Belg. v. Sen. ICJ Application, *supra* note 19.

¹⁹⁵ *See* Centre de droit international, *supra* note 183, Cour d'assises, Bruxelles, [judgment of] June 29, 2005.

¹⁹⁶ *See* Hague Justice Portal, Etienne Nzabonimana and Samuel Ndashyikirwa, at <http://www.haguejusticeportal.net/eCache/DEF/11/883.TD1GUG.html>.

¹⁹⁷ Centre de droit international, *supra* note 183, Cour d'assises, Bruxelles, [judgment of] July 5, 2007.

¹⁹⁸ Gashegu Muramira, Rwanda: *Belgian Court to Decide Nkezabera's Fate*, NEW TIMES (Kigali), Jan. 14, 2010, at <http://allafrica.com/stories/201001140053.html>. Since he could not attend his trial as he was suffering from cancer, in March 2010 the Cour d'assises of Brussels agreed to a new trial for him. But Nkezabera passed away shortly afterward, which put an end to the legal proceedings against him.

The original legal and institutional framework (1985–2009). The Audiencia Nacional—a Spanish federal jurisdiction including criminal courts that investigate, try, and deal with interlocutory appeals regarding certain crimes—extends to offenses committed abroad.¹⁹⁹ Article 23(4) of the Judiciary Act of 1985—passed as part of Spain’s democratization process—gave Spanish courts jurisdiction over genocide and any other offense committed outside Spanish territory if international conventions required their prosecution in Spain. Spanish courts later interpreted Article 23(4) to confer universal jurisdiction on Spanish courts regarding torture and grave breaches of the Geneva Conventions and Additional Protocol I.²⁰⁰ In this period, Article 23 did not explicitly require that the alleged offender be on Spanish territory or that the case have any other link to Spain.

As for criminal procedure, Spain places the investigation of important offenses in the hands of investigating judges who are members of the judiciary and have life tenure.²⁰¹ The prosecutor’s role during the pretrial phase involves requesting that the judge initiate an investigation, and overseeing the judge’s work.²⁰² Each new government appoints its own head of the Office of the Prosecutor,²⁰³ which is organized hierarchically, the head having ultimate authority.²⁰⁴

There are two additional ways that an investigating judge may initiate an investigation. First, on his own motion,²⁰⁵ and second, by a people’s or private prosecution. Any Spanish citizen—or legal entity—can be a private prosecutor in the criminal process without being the alleged victim of the offense, a so-called people’s prosecutor.²⁰⁶ Also, both Spanish and non-Spanish citizens or legal entities can be private prosecutors in a Spanish criminal process if they are alleged victims of the offense.²⁰⁷ By virtue of the rule of compulsory prosecution, the judge may dismiss the “people’s” or “private” prosecutions only if the alleged facts do not constitute a crime or if the judge determines that she lacks jurisdiction. If the prosecutor disagrees with the judge on the jurisdictional issue, the prosecutor may appeal, but the courts have the final word.²⁰⁸

While the judge may require the people’s prosecutor to deposit an indemnity to pay for eventual trial costs,²⁰⁹ the Judiciary Act establishes that the indemnity should not be set in a way that prevents people’s prosecutions,²¹⁰ and the Constitutional Court has held that the amount of the indemnity must be proportionate to the assets of the people’s or private prosecutor.²¹¹

¹⁹⁹ LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] [LAW ON THE JUDICIARY] Art. 65(1)(e).

²⁰⁰ See, e.g., S.T.S. [Tribunal Supremo], No. 1240/2006, Dec. 11, 2006 (on grave breaches of the Geneva Conventions of 1949 and Additional Protocol I).

²⁰¹ CONSTITUCIÓN ESPAÑOLA [C.E.] Art. 117.

²⁰² LEY DE ENJUICIAMIENTO CRIMINAL [L.E. CRIM.] [CODE OF CRIMINAL PROCEDURE] Arts. 105, 271, 306, 319.

²⁰³ The head of the Office of the Prosecutor is appointed by the king by proposal of the government after the Judicial Council has been heard.

²⁰⁴ TERESA ARMENTA DEU, LECCIONES DE DERECHO PROCESAL PENAL 82–83 (3d ed. 2007).

²⁰⁵ L.E. CRIM. Arts. 303, 308.

²⁰⁶ C.E. Art. 125; L.E. CRIM. Arts. 101, 270; ARMENTA DEU, *supra* note 204, at 86.

²⁰⁷ C.E. Art. 24; L.E. CRIM. Arts. 270(I), (II), 280–81; ARMENTA DEU, *supra* note 204, at 85.

²⁰⁸ L.E. CRIM. Art. 313; ARMENTA DEU, *supra* note 204, at 31–32.

²⁰⁹ L.E. CRIM. Art. 280. Article 281 of the code establishes a number of exceptions to this rule.

²¹⁰ L.O.P.J. Art. 20(3).

²¹¹ Tribunal Constitucional [S.T.C.] No. 62/1983, July 11, 1983; No. 113/1984; No. 1471/1989; No. 326/1994, Dec. 12, 1994, *cited by* ARMENTA DEU, *supra* note 204, at 87.

However, if the case is dismissed for lack of evidence or because the alleged conduct does not constitute a crime, the people's or private prosecutor can be criminally prosecuted.²¹²

In view of the lesser degree of control of the executive branch over universal jurisdiction prosecutions in Spain than in Germany, England and Wales, or France, the posited incentive structure would predict the initiation of formal proceedings against a wider variety of defendants. In addition, if bringing these proceedings resulted in substantial international relations costs, the political branches would have to amend the universal jurisdiction regime to reduce these costs by ensuring that those cases were dismissed without going to trial. The actual cases again demonstrate these points.

Trial under the original framework. The only universal jurisdiction case over international crimes to reach the trial phase in Spain was against retired Argentine captain Adolfo Scilingo, which evolved out of a broader investigation of mass atrocities in Argentina in the 1970s. Scilingo had gained notoriety in Argentina by telling a journalist that the navy had killed some two thousand of the people that it kidnapped and tortured by throwing them unconscious and naked from airplanes into the Río de la Plata, which separates Argentina and Uruguay.²¹³ On October 6, 1997, Scilingo traveled to Spain at the invitation of a Spanish television station that wished to interview him. Following Scilingo's arrival, investigating judge Baltasar Garzón interrogated him, then ordered his arrest.²¹⁴ Garzón also issued incriminating decisions against about 120 people and arrest warrants against about 50 in the Argentine case, 1 of whom had been arrested in Mexico, and extradited first to Spain and then to Argentina.²¹⁵ Claiming that Argentine courts had exclusive jurisdiction over these events, Argentina rejected requests by Garzón for evidence.²¹⁶ But there is no indication that Argentina threatened or took any reprisals against Spain.

After Scilingo's arrest, the prosecutor assigned to the case became relentlessly critical of Garzón's investigation, ultimately joining Scilingo's defense in a challenge to the judge's jurisdiction.²¹⁷ But by the time Scilingo went to trial in December 2004, the situation had radically changed in Argentina, where the government now supported Spanish prosecutions. The situation had also changed in Spain, where the Socialist prime minister José Luis Rodríguez Zapatero had taken office and the Office of the Prosecutor had announced a policy of non-opposition to universal jurisdiction prosecutions.²¹⁸ The trial court convicted Scilingo of crimes against humanity, participating in illegal detention, and torture, sentencing him to a

²¹² L.E. CRIM. Art. 637; CÓDIGO PENAL [CRIMINAL CODE] Art. 205.

²¹³ HORACIO VERBITSKY, *EL VUELO* (1995).

²¹⁴ ROHT-ARRIAZA, *supra* note 84, at 24.

²¹⁵ See, e.g., Juzgado Central de Instrucción [J.C.I.] [central investigating court] No. 5, Audiencia Nacional [A.N.] Madrid, Auto [interlocutory decision], May 8, 2000, at <http://www.derechos.org/nizkor/arg/espana/ritero.html>; *España: comenzó el proceso de extradición del represor Cavallo*, CLARÍN, Mar. 30, 2008, at <http://edant.clarin.com/diario/2008/03/30/um/m-01639928.htm>.

²¹⁶ See Texto del apartado número 8 de la nota del Ministerio de relaciones exteriores argentino (Jan. 15, 1997), at <http://www.derechos.org/nizkor/arg/espana/coop.html>; Decree No. 111/98, Jan. 26, 1998, BOLETÍN OFICIAL, Feb. 9, 1998 (Arg.).

²¹⁷ See Auto de la Sala de lo Penal de la Audiencia Nacional, A.N. Madrid, No. 84/98, Nov. 4, 1998, at <http://www.derechos.org/nizkor/arg/espana/audi.html> [hereinafter Auto No. 84/98].

²¹⁸ See Amnistía internacional, *La Audiencia Nacional condena a el (sic) ex militar argentino Adolfo Scilingo por crímenes de lesa humanidad* (Apr. 19, 2005), at <http://ania.urcm.net/spip.php?article13324>.

total of 640 years in prison.²¹⁹ On July 18, 2007, the Spanish Supreme Court partially reversed the verdict, reducing his sentence to a maximum of 25 years.²²⁰

Other cases initiated under the original framework. Pinochet's arrest and extradition proceedings in the United Kingdom have been extensively discussed in the literature.²²¹ For our purposes, it suffices to say that when Pinochet arrived in London for back surgery in September 1998, the investigation of atrocities in Chile was also being handled by Judge Garzón, whose portfolio had expanded to include Chile as well as Argentina. After consulting with British police, he ordered the pretrial detention of Pinochet and issued an international arrest warrant charging him with the crimes of genocide and terrorism for the murder of Spanish citizens in Chile—though the extradition request would later be expanded to cover universal jurisdiction offenses against non-Spanish victims. When Magistrate Nicholas Evans called the Home Office, he was told that diplomatic immunity was not involved. Late that night, Scotland Yard served Pinochet with an arrest warrant. Apparently, the police failed to inform Home Secretary Jack Straw until after the arrest took place.²²²

British public opinion was divided over the action; the Conservatives criticized it and the left applauded it, the year-old Blair administration having vowed to implement an “ethical foreign policy.” In Spain, Garzón's investigation and extradition enjoyed strong popular support, which the conservative Popular Party government clearly recognized. In both Britain and Spain, political leaders concluded that the most prudent course of action was to leave this issue to the courts.²²³ Meanwhile, the arrest met with a generally enthusiastic reception in Europe, as Switzerland, France, and Belgium joined Spain in seeking Pinochet's extradition.²²⁴

Legal proceedings continued in both Britain and Spain. The Spanish court of appeals rejected a lack-of-jurisdiction claim by the Spanish prosecutor in a decision that essentially repeated the arguments elaborated by the court the day before in the *Scilingo* case.²²⁵ The House of Lords handed down three decisions, the third of which held that Pinochet could be extradited only for torture committed after December 8, 1988,²²⁶ the date on which UK ratification of the Convention Against Torture took effect. Finally, in April 1999, Home Secretary Straw issued a second authorization to proceed with the extradition proceedings regarding the crimes of torture and conspiracy to torture.²²⁷

²¹⁹ See A.N. Madrid, Sala de lo Penal, No. 16/2005, Apr. 19, 2005, at <http://www.derechos.org/nizkor/espanal/juicioral/#casa>.

²²⁰ See S.T.S. No. 798/2007, Oct. 1, 2007, at <http://www.derechos.org/nizkor/espanal/juicioral/#casa>.

²²¹ See, e.g., ROHT-ARRIAZA, *supra* note 84; Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129 (1999).

²²² J.C.I. No. 5, A.N. Madrid, Auto, Sumario [case] 19/97, Oct. 16, 1998; ROHT-ARRIAZA, *supra* note 84, at 1, 34–35; Sugarman, *supra* note 89, at 114.

²²³ ROHT-ARRIAZA, *supra* note 84, at 36–37; Sugarman, *supra* note 89, at 112–14.

²²⁴ See, e.g., *Reasons for Authority to Proceed by Secretary of State Jack Straw, 9 December 1998*, in THE PINOCHET PAPERS 183, 184 (Reed Brody & Michael Ratner eds., 2000).

²²⁵ A.N. Madrid, Sala de lo Penal, Rollo de Apelación [Appeal No.] 173/98, Auto, Sumario 1/98, Nov. 5, 1998; Auto No. 84/98, *supra* note 217.

²²⁶ *R. v. Bartle & Commissioner of Police for Metropolis and Others, Ex Parte Pinochet*, [1999] UKHL 17, [2000] 1 A.C. 147 (H.L.).

²²⁷ See *Second Authority to Proceed by Secretary of State Jack Straw, 15 April 1999*, in THE PINOCHET PAPERS, *supra* note 224, at 373; *Reasons for Second Authority to Proceed by Secretary of State Jack Straw, 5 April 1998*, in *id.* at 375.

However, shortly afterward the political climate changed dramatically, as Chile's governing center-left coalition became increasingly concerned that Pinochet's arrest was jeopardizing its chances of carrying the upcoming presidential election.²²⁸ Spain's prime minister José María Aznar had gone on record as saying that he did not want "Spain to become an International Criminal Tribunal."²²⁹ Moreover, over time the Chilean government had moved from protesting the arrest of Pinochet as an attack on its sovereignty to promising that he could be tried in Chile. Returning Pinochet to Chile would thus be less politically costly for the Labour government than it would have been earlier in the extradition process.²³⁰

According to several journalists' reports, in the summer of 1999 the Chilean, Spanish, and British governments struck a deal to release Pinochet on humanitarian grounds.²³¹ A British-appointed medical team examined the former *de facto* president, concluding that he was not fit to stand trial and that no change in his condition could be expected.²³² Home Secretary Straw announced the termination of the extradition proceedings on March 2, 2000, and Pinochet returned to Chile.²³³

On December 2, 1999, Guatemalan Nobel Peace Prize winner Rigoberta Menchú Tum presented a complaint against general and former *de facto* president Efraín Ríos Montt and seven other Guatemalan officials, alleging the crimes of genocide, torture, terrorism, aggravated murder, and illegal detention committed in Guatemala between 1962 and 1996. At the time, the Spanish Office of the Public Prosecutor was still under the control of the Popular Party of Prime Minister Aznar, and in January 2000, the prosecutor challenged the jurisdiction of the Spanish courts.²³⁴

On February 25, 2003, the Spanish Supreme Court, Criminal Law Section, held in an 8-7 decision that Spanish courts did not have universal jurisdiction over the alleged crime of genocide in Guatemala because (1) the Genocide Convention did not establish the principle of universal jurisdiction, (2) there were no indications that the alleged offenders were on Spanish territory or that Spain had denied their extradition, and (3) the alleged genocide did not affect a Spanish national interest. (The Supreme Court also held that Spanish courts had jurisdiction over the crime of torture but only for torture committed against Spanish citizens in Guatemala.)²³⁵

The people's and private prosecutors went to the Constitutional Court to challenge the decision. Meanwhile, significant events were under way on the political front. The Socialist Zapatero became prime minister on April 17, 2004, and six days later, the job of chief of the Office of the Prosecutor went to Cándido Conde-Pumpido, one of the Spanish Supreme Court judges who had voted in favor of pure universal jurisdiction in the Guatemalan case.²³⁶ On

²²⁸ ROHT-ARRIAZA, *supra* note 84, at 59–60; Sugarman, *supra* note 89, at 114–15.

²²⁹ PILAR URBANO, GARZÓN: EL HOMBRE QUE VEÍA AMANECER 535 (2000).

²³⁰ ROHT-ARRIAZA, *supra* note 84, at 64.

²³¹ *Id.*

²³² See *British Medical Report on Augusto Pinochet*, in THE PINOCHET PAPERS, *supra* note 224, at 447.

²³³ See *Letters from the Home Office to the Spanish, Belgian, Swiss and French Ambassadors Announcing the Termination of Extradition Proceedings, 2 March 2000*, in THE PINOCHET PAPERS, *supra* note 224, at 465; *Statement of Secretary of State Jack Straw in the House of Commons, 2 March 2000 [excerpts]*, in *id.* at 481.

²³⁴ J.C.I. No. 1, A.N. Madrid, Diligencias previas [preliminary proceedings] 331/99, Auto, Mar. 27, 2000.

²³⁵ S.T.S. No. 327/2003, Feb. 25, 2003.

²³⁶ See Cándido Conde-Pumpido, *La justicia universal en la jurisdicción española*, 51 PERSONA Y DERECHO 49 (2004).

September 26, 2005, the Constitutional Court, Second Section, with the support of the prosecutor, reversed the decision by the Supreme Court, holding that it had violated the people's and private prosecutor's right to effective judicial protection as established in Article 24(1) of the Constitution.²³⁷

After the Office of the Prosecutor shifted course on universal jurisdiction and, more important, after the about-face by the Constitutional Court, Spain saw a wave of new universal jurisdiction complaints and renewed attention to older cases. Thus, preliminary or formal proceedings were conducted against the Rwandan president and military for, among other offenses, genocide, crimes against humanity, and war crimes; Moroccan leaders for genocide and torture;²³⁸ the Salvadoran military for the murders of six Jesuit priests and two other people; and four Nazis for their actions in concentration camps during World War II.²³⁹ Most significant, however, are the handful of cases, to which we now turn, that sparked major political and international relations tensions in Spain, and ultimately led to the amendment of the Spanish universal jurisdiction statute in 2009.

In 2003 a group of individuals presented a complaint and asked to be considered prosecutors in a case alleging the crimes of genocide and torture against former Chinese president Jiang and another top official for the persecution since the 1990s of people who belonged to or sympathized with the Falun Gong. Relying on the Spanish Supreme Court's February 2003 decision in the Guatemalan case—that is, on the absence of the alleged offenders from Spanish territory and the lack of any other links between Spain and the case—the investigating judge, the court of appeals, and the Supreme Court rejected the complaint. However, on October 22, 2007, the Constitutional Court, Second Section, overruled these courts' decisions, essentially invoking the same arguments as in the Guatemalan decision of September 2005.²⁴⁰

In a second case against Chinese defendants, on June 28, 2005, two NGOs and an individual filed a complaint and asked to be considered, respectively, people's prosecutors and a private prosecutor against former president Jiang, Li Peng, and six other Chinese officials for their alleged participation in genocide in Tibet. On January 10, 2006, again relying on the Constitutional Court's decision in the Guatemalan case, the court of appeals reversed the investigating judge's initial dismissal of the complaint, which had been supported by the prosecutor, holding that the Spanish courts had jurisdiction over the case.²⁴¹ Through its embassy in Spain, China denounced the decision as interference in its internal affairs.²⁴² On April 9, 2009, investigating judge Ismael Moreno requested that the Chinese government

²³⁷ S.T.C. No. 237/2005, Sept. 26, 2005.

²³⁸ See J.C.I. No. 4, A.N. Madrid, Auto, Sumario 3/2008, Feb. 6, 2008 (Rwanda); J.C.I. No. 5, A.N. Madrid, Diligencias previas 362/2007, Auto, Oct. 29, 2007 (Morocco).

²³⁹ See, e.g., J.C.I. No. 6, A.N. Madrid, Diligencias previas 391/08, Auto, Apr. 10, 2009 (El Salvador); J.C.I. No. 2, A.N. Madrid, Diligencias previas 211/2008, Auto, Sumario 56/2009, Sept. 17, 2009 (Nazis). Other complaints presented by private or people's prosecutors were dismissed on the basis of transnational complementarity or the immunity doctrine. See, e.g., Amnistía internacional, *Otros Casos Abiertos en España*, at <http://www.es.amnesty.org/temas/justicia-internacional/otros-casos-abiertos-en-espana/>; *Justicia española rechaza querrela contra Hugo Chávez y la envía a la CPI*, LA CRÓNICA DE HOY, Mar. 25, 2003, at http://www.cronica.com.mx/nota.php?id_nota=56033 (on the complaint against Venezuelan president Hugo Chávez).

²⁴⁰ S.T.C. No. 227/2007, Oct. 22, 2007.

²⁴¹ A.N. Madrid, Sala de lo Penal, Rollo de Apelación 196/05, Diligencias previas 237/05, Auto, Jan. 10, 2006.

²⁴² Christine A. E. Bakker, *Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can It Work?* 4 J. INT'L CRIM. JUST. 595, 599 (2006).

interrogate Jiang and six other defendants on the charges of genocide and torture in Tibet since 1950.²⁴³

In a third case, the same plaintiffs as in the previous Tibet case lodged a complaint and sought to be people's and private prosecutors against Minister of Defense Lian Guanglie, Minister of State Security Geng Huichang, and five other Chinese leaders for their alleged participation in crimes against humanity for having organized a widespread and systematic attack against the Tibetan civil population leading to 203 deaths and thousands of injuries and illegal detentions in the months prior to the 2008 Beijing Olympics. On August 5, 2008, investigating judge Santiago Pedraz Gómez asserted jurisdiction over the case and admitted the complaint, formally opening criminal proceedings.²⁴⁴ In May 2009, Judge Pedraz requested authorization from the Chinese government to interrogate the two individuals mentioned above and four other defendants for crimes against humanity.²⁴⁵ The Chinese Embassy responded by demanding that the Spanish government take "immediate and effective measures" directed to the rapid dismissal of the case, "to avoid possible obstacles and damages to the bilateral relations between China and Spain."²⁴⁶

On June 24, 2008, six Palestinians from the city of Gaza presented a complaint as private prosecutors against seven Israeli officials, including the former minister of defense Benjamin Ben-Eliezer, for war crimes, alleging that on July 22, 2002, an Israeli aircraft dropped a bomb on the Gaza neighborhood of Al Daraj that targeted suspected Hamas commander Sala Shehadeh but killed and injured civilians and damaged protected property.²⁴⁷ On January 29, 2009, investigating judge Fernando Andreu Merelles admitted the private prosecution, and thus officially opened the criminal proceeding, asserting universal jurisdiction.²⁴⁸ When the Israeli minister of foreign affairs expressed concern, her Spanish counterpart Miguel Ángel Moratinos assured her that Spain's executive branch would do its best to ensure that the investigation had the least possible impact.²⁴⁹

The Spanish Ministry of Justice subsequently embarked on a serious study of a proposal to limit the assertion of universal jurisdiction to cases with some sort of link to Spain, with the goal of restraining diplomatic tensions, according to media reports.²⁵⁰ The prosecutor also requested the dismissal of the case and appealed the decision by the investigating judge against that request.²⁵¹ On July 9, 2009, the court of appeals dismissed the case on the grounds of

²⁴³ See Manuel Altozano, *Pedraz pide a China que le permita interrogar a tres ministros por la represión en Tibet*, EL PAÍS (Madrid), May 5, 2009, at http://www.elpais.com/articulo/espana/Pedraz/pide/China/le/permita/interrogar/ministros/represion/Tibet/elpepuesp/20090505elpepunac_8/Tes.

²⁴⁴ See J.C.I. No. 1, A.N. Madrid, Diligencias previas 242/2008-10, Auto, Aug. 5, 2008; Altozano, *supra* note 243.

²⁴⁵ Altozano, *supra* note 243.

²⁴⁶ *China pide "medidas efectivas" para que la Audiencia abandone el caso sobre el Tibet*, EL PAÍS, May 7, 2009, at http://www.elpais.com/articulo/espana/China/pide/medidas/efectivas/Audiencia/abandone/caso/Tibet/elpepuesp/20090507elpepunac_11/Tes.

²⁴⁷ Javier Fernández Estrada, *Querella contra los responsables de crímenes de guerra cometidos . . . en Gaza* (June 24, 2008), at <http://www.derechos.org/nizkor/espana/doc/gaza.html>.

²⁴⁸ J.C.I. No. 4, A.N. Madrid, Diligencias previas 157/2008, Auto, Jan. 29, 2009.

²⁴⁹ See *La Audiencia Nacional provoca una tormenta política en Israel contra España*, EL CONFIDENCIAL (Madrid), Jan. 30, 2009, at <http://www.derechos.org/nizkor/espana/doc/gaza3.html>.

²⁵⁰ *Justicia estudia prohibir a la Audiencia Nacional juzgar asuntos que no tengan "nexo de conexión" con España*, CADENA SER (Madrid), Jan. 31, 2009, at <http://www.derechos.org/nizkor/espana/doc/gaza4.html>.

²⁵¹ See Pedro Martínez Torrijos, *Al Juzgado*, May 6, 2009, at <http://www.derechos.org/nizkor/espana/doc/gaza7.html>.

Israeli priority over Spain in the exercise of jurisdiction by virtue of the principle of complementarity or subsidiarity.²⁵²

Among the cases against U.S. defendants,²⁵³ a significant complaint as people's prosecutor was filed on March 17, 2009, by the NGO Organization for the Dignity of Spanish Prisoners against six former Bush administration officials, including Attorney General Alberto R. Gonzales, for the crimes of torture and inhumane treatment of protected persons in armed conflict, and a policy of depriving both prisoners of war and civilians of fair and impartial trials. While noting that five Spanish citizens or foreign residents were among the Guantánamo detainees allegedly subjected to torture, the complaint relied on the principle of universal jurisdiction.²⁵⁴

Shortly thereafter, Javier Zaragoza, the chief prosecutor before the Audiencia Nacional, met in that court with William Duncan, counselor for political affairs of the U.S. Embassy in Spain.²⁵⁵ Despite his previous support for universal jurisdiction cases, Spain's chief prosecutor Conde-Pumpido responded harshly to this one, attacking the complaint as "fraudulent" and asserting that admitting it would be tantamount to converting universal jurisdiction into "a toy in the hands of people who want to be at the center of attention."²⁵⁶ In April 2009, the Office of the Prosecutor sought dismissal of the complaint on three grounds: (1) that the defendants had simply acted as legal advisers and did not have decision-making authority; (2) that the complaint did not make concrete and specific allegations and would thus require an investigation into Bush administration policies at odds with the goals of criminal procedure in a rule-of-law state; and (3) that the principle of complementarity or subsidiarity mandated that the petitioners prove that they had first submitted their complaint to the jurisdiction in the best position to try the case.²⁵⁷

On May 4, 2009, investigating judge Velasco Núñez held that the Audiencia Nacional's universal jurisdiction is subsidiary and limited to cases where any country better positioned to investigate and prosecute the crimes does not plan to do so. He further stated that, before deciding whether to admit the complaint, he would send an international rogatory commission to the United States to determine if the alleged facts would be investigated there and, if appropriate, prosecuted and, if so, by what authority and means.²⁵⁸

²⁵² See A.N. Madrid, Sala de lo Penal, Apelación 31/2009, Auto, No. 1/09, July 9, 2009.

²⁵³ The *Couso* case—in which a Spanish investigating judge opened formal proceedings and issued international arrest warrants against three American military officers for war crimes in relation to the killing of a Spanish and a Ukrainian journalist in the "Hotel Palestine" in Iraq—initially relied at least partially on universal jurisdiction given that one of the victims was not Spanish and that Spain did not establish jurisdiction for its courts over these crimes based on the passive personality principle. But the case seems to have become an exclusively passive personality case after the passage of the November 2009 amendment to Article 23(4) of the Spanish Judiciary Act, discussed below, and the narrowing down of the investigation only to the killing of the Spanish journalist as an attack against a civilian population and as an act of violence in order to terrorize the civilian population or journalists. See, e.g., J.C.I. No. 1, A.N. Madrid, Auto, Sumario 27/2007, July 29, 2010. For this reason, this case is not analyzed in this article.

²⁵⁴ Javier Fernández Estrada, Decanato de los Juzgados Centrales de Instrucción de la Audiencia Nacional para el Juzgado Central de Instrucción que por Turno Corresponda, Mar. 17, 2009, at <http://www.nodo50.org/csca/agenda09/palestina/pdf/QUERRELLAVERSIONFINAL.pdf> (complaint).

²⁵⁵ See J. Yoldi, *El fiscal rechaza investigar Guantánamo tras hablar con la EE UU*, EL PAÍS, Apr. 18, 2009, at http://www.elpais.com/articulo/espana/fiscal/rechaza/investigar/Guantanamo/hablar/EE/UU/elpepiesp/20090418elpepinac_4/Tes.

²⁵⁶ *Id.*

²⁵⁷ See J.C.I. No. 6, A.N. Madrid, Diligencias previas 134/2009, Auto, May 4, 2009.

²⁵⁸ *Id.*

In April 2009, Judge Garzón started a separate formal investigation of war crimes and torture allegedly committed by U.S. officials against four Guantánamo detainees, a Spanish resident, and a Spanish, a Lebanese, and a Moroccan citizen.²⁵⁹ The Organization for the Dignity of Spanish Prisoners and the political party United Left, among others, became people's prosecutors in the case.²⁶⁰

Changes in the law (November 2009–present). Less than a month after Judge Velasco refused to dismiss the cases against the six Bush administration lawyers and Judge Garzón opened an investigation for alleged crimes committed in Guantánamo—and only days after the Chinese Embassy requested “immediate and effective measures” to halt the Tibet case—the Socialist and Popular Parties reached an agreement to limit the Spanish universal jurisdiction statute.²⁶¹ On June 25, 2009, the Congress of Deputies overwhelmingly approved an amendment to the universal jurisdiction provision, with 329 votes in favor, 9 against, and 6 abstentions.²⁶² The following October, the Senate approved the bill with minor amendments. The new universal jurisdiction law took effect in early November.²⁶³

Under amended Article 23(4), Spanish courts cannot assert universal jurisdiction unless the accused is on Spanish territory, or there is another relevant link between Spain and the case.²⁶⁴ Amended Article 23(4) also bars Spanish courts from invoking universal jurisdiction if the case is being investigated or prosecuted by an international tribunal or by another state with jurisdiction.

The amended statute was first applied to a war crimes complaint against Iraqi soldiers and police officers acting under the orders of Lt. Gen. Abdol Hossein Al Shemmari for alleged indiscriminate violence against unarmed civilians in the Ashraf Camp in Iraq in July 2009, resulting in a number of deaths and injuries. Adverting expressly to the new reform, the prosecutor sought dismissal of the complaint, inter alia, for failing to meet jurisdictional requirements: the alleged perpetrators were not in Spain, the alleged victims were not Spanish, and there was no other relevant link between Spain and the case.²⁶⁵

Despite the legislature's clear intent to restrict the scope of universal jurisdiction, investigating judge Andreu argued that, even if the amended act had established the requirements relied on by the prosecutor, it also specifies that they should not bar proceedings authorized by treaties and conventions ratified by Spain. Relying on Article 146 of the Fourth Geneva Convention, the judge asserted that Spanish courts did indeed have jurisdiction over the case, despite the lack of a relevant link between the case and Spain.²⁶⁶

²⁵⁹ See J.C.I. No. 5, A.N. Madrid, Diligencias previas 150/09, Auto, Apr. 27, 2009.

²⁶⁰ See J.C.I. No. 5, A.N. Madrid, Diligencias previas 150/09, Auto, Jan. 27, 2010.

²⁶¹ See, e.g., F. Garea & A. Díez, *PP y PSOE se alían para recortar la aplicación de la justicia universal*, EL PAÍS, May 19, 2009; *El Congreso insta al Gobierno a que limite la jurisdicción universal en España*, DIARIO ABC, May 19, 2009, at <http://www.derechos.org/nizkor/espana/doc/jun2.html>.

²⁶² See *El Congreso restringe la aplicación de la justicia universal a casos vinculados con España*, EL CONFIDENCIAL, June 25, 2009, at <http://www.derechos.org/nizkor/espana/doc/jun18.html>.

²⁶³ Ley Orgánica 1/2009, de 3 de noviembre, complementaria de la Ley de reforma de la legislación procesal para la implantación de la nueva Oficina judicial, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial [Organic Law Modifying Judiciary Act of July 1, 1985] (BOLETÍN OFICIAL DEL ESTADO 2009, 1).

²⁶⁴ Article 23(4) now also establishes that Spanish courts can exercise jurisdiction if the victims are Spanish.

²⁶⁵ J.C.I. No. 4, A.N. Madrid, Diligencias previas 211/2009, Auto, Nov. 26, 2009.

²⁶⁶ *Id.* For Geneva Convention No. 4, see *supra* note 11.

In another liberal application of the new statute, and after another request by the prosecutor that the case be dismissed for lack of jurisdiction, Judge Garzón held in January 2010, before he was suspended as a judge, that he still had jurisdiction to continue his Guantánamo investigation because the Spanish citizenship of one of the alleged victims and Garzón's prior investigation in Spain of the four alleged victims for purportedly belonging to the terrorist organization Al Qaeda constituted the necessary link with Spain.²⁶⁷

Notwithstanding these decisions—whose holdings will eventually be reviewed by higher courts—the amended statute has already started to constrain resort to universal jurisdiction in Spain. For instance, on February 26, 2010, Judge Pedraz dismissed the investigation against Chinese officials for lack of a relevant link between the crimes allegedly committed in Tibet in 2008 and Spain.²⁶⁸

III. HOW STABLE IS THE CURRENT UNIVERSAL JURISDICTION REGIME?

The preceding two parts of this article have set forth a theoretical framework about universal jurisdiction cases and provided evidence consistent with this framework to explain why states have concentrated on low-cost defendants, and especially those on whom there is broad agreement in the international community. But how stable is this regime? This part demonstrates that while several scenarios or factors could upset the current equilibrium of the universal jurisdiction regime, there are also good reasons to think that instability is not currently a great danger. In making this point, this part considers some incentives that could be present in universal jurisdiction prosecutions and trials that were not addressed above, incentives that could shift the cost-benefit analysis of political branches over these cases, and lead to (more) prosecutions and trials of mid- and high-cost defendants.

One of these potential incentives stems from the possible use by political branches of universal jurisdiction prosecutions and trials to harass or neutralize foreign political or military enemies.²⁶⁹ In considering this possibility, we start by looking at the actual universal jurisdiction cases to see which states have taken universal jurisdiction cases to trial and the nationality of the defendants tried (table 2, p. 42).

Even though political calculation has figured in these prosecutions and trials, as has been explained, table 2 does not suggest a pattern in which universal jurisdiction has been used to harass or eliminate foreign political or military enemies. To be sure, alleged Nazis have been tried by Israel and states that fought against Germany in World War II, including Australia, Canada, and the United Kingdom. But most of these trials took place in the 1980s and 1990s, long after the war, and were aimed not at the worst of the Nazi leaders or unpunished perpetrators but at defendants who had immigrated to the prosecuting state and whose presence there had generated a domestic and international political issue that demanded a response by the political branches.

²⁶⁷ Auto, Jan. 27, 2010, *supra* note 260.

²⁶⁸ See J.C.I. No. 1, A.N. Madrid, Diligencias previas 242/2008, Auto, Feb. 27, 2010.

²⁶⁹ The territorial, active personality, and passive personality principles would normally provide a jurisdictional basis for trials to harass internal enemies and opponents, making unnecessary the invocation of universal jurisdiction. On the use of trials for political purposes, see, for example, OTTO KIRCHHEIMER, *POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS* (1961); RICHARD H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971).

TABLE 2. UNIVERSAL JURISDICTION TRIALS BY PROSECUTING STATE AND DEFENDANT'S NATIONALITY

Prosecuting State	Number	Defendant's Nationality
Australia	1	Nazi
Austria	1	Former Yugoslav
Belgium	8	Rwandan
Canada	2	Nazi, Rwandan
Denmark	1	Former Yugoslav
France	2	Mauritanian, Tunisian
Germany	4	Former Yugoslav
Israel	2	Nazi
Netherlands	5	Afghan (3), Congolese, Rwandan
Norway	1	Former Yugoslav
Spain	1	Argentine
Switzerland	2	Former Yugoslav, Rwandan
United Kingdom	2	Afghan, Nazi
Total	32	

As for former Yugoslavs, all the prosecuting states have been European and, except for Switzerland, members of NATO, which engaged in armed conflict with Yugoslavia in 1999 because of the situation in Kosovo. Yet the prosecutions and trials of many of these defendants began before 1999 and, again, were aimed not at neutralizing or harassing important Yugoslav leaders but at defendants who had immigrated to the prosecuting states.

Belgian nationals were killed in the context of the genocide in Rwanda, so that it is certainly no coincidence that Belgium is the state that has tried the most Rwandans. We have seen that domestic outrage over particular foreign human rights abuses is an incentive for political branches to launch prosecutions and trials; that outrage was furthered in this situation by the special relationship between Belgium and Rwanda as a former colony. These emotions, however, do not mean that most of these prosecutions and trials were undertaken to harass or eliminate political or military enemies since, once more, most of the Rwandans who went to trial were targeted not because they were important political leaders but because they had immigrated to Belgium. Moreover, none of the remaining prosecuting states (Canada, Switzerland, and the Netherlands) had a history of political or military conflict with the Hutu leadership.

No clear pattern emerges as regards the remaining defendants (four Afghans, a Congolese, an Argentine, a Tunisian, and a Mauritanian), since the prosecuting states had not been involved in old or ongoing conflicts with the leadership of the defendants' state of nationality.

The other indication that universal jurisdiction prosecutions and trials have not been used to harass or eliminate political or military enemies is that these trials have tended to be true adjudicatory processes—proceedings in which the verdict was not predetermined by a political or military rationale but was rather based on the evidence produced.²⁷⁰ Table 3 shows that the acquittal rate has been relatively high in these cases, which suggests that they were true adjudicatory trials.²⁷¹

²⁷⁰ On the distinction between political and legal or adjudicatory trials, see, for example, Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75 (2005); Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529 (2008).

²⁷¹ Another due process criticism that this article will not analyze is that universal jurisdiction trials may be unfair owing to the defendant's lack of familiarity with the prosecuting state's legal system or language, or the prosecuting

TABLE 3. UNIVERSAL JURISDICTION TRIAL OUTCOMES

Trial Outcome	Number	Percent
Acquittal	5	15.63
Conviction	17	53.13
Acquittal on some charges	10	31.25
Total	32	100.00

But even if there are few indications that universal jurisdiction prosecutions and trials have been used to harass or eliminate foreign political or military enemies until now, what would prevent political branches of states from making such use of them in the future? To analyze this question, we should distinguish between the prosecution of foreign political enemies and the prosecution of foreign military enemies because, while trials have been used to harass or suppress the latter, the parties to an armed conflict have usually been able to invoke jurisdictional bases other than universal jurisdiction, including territoriality, passive personality, and the protective principle.²⁷²

A second element to be considered is that all of the universal-jurisdiction-prosecuting states identified in this article's survey are democracies—the immense majority of them well-established ones, as reflected in table 2. In fact, universal jurisdiction can be characterized as an idea applied essentially by Western European and developed Commonwealth states. This description also holds true if we observe which states have received universal jurisdiction complaints or considered cases on their own motion, as reflected in table 4 (p. 44).

One of the reasons why the prosecuting state's form of government may be relevant is that the independence of judges, as noted above, is generally protected in well-developed democracies, which reduces the likelihood of their being subject to political manipulation. Independent judges may dismiss or acquit defendants on legal grounds, including lack of evidence, and tend to react negatively to attempts by the political branches to make political use of the judicial system. In addition, in states where domestic constituencies value the rule of law and independent courts, the blatant manipulation of universal jurisdiction prosecutions may engender additional costs that may effectively offset any gains from the use of these prosecutions to harass or eliminate foreign political enemies.

Incentives may operate differently in authoritarian states, which can more easily manipulate their courts for political purposes. This ability represents another potential challenge to the universal jurisdiction regime's equilibrium. However, while such regimes have historically used trials for their own purposes, they also find few incentives—and strong disincentives—to assert universal jurisdiction. First of all, human rights NGOs and domestic constituencies concerned with foreign human rights are less likely than in democracies to exert influence over political branches of authoritarian states and more likely to focus their concern on the domestic

state's judges' lack of understanding of the society in which the international crimes took place. Analyzing this criticism is beyond the scope of this article because it refers to issues that originate in the cultural or linguistic gap between defendants and judges, rather than in the interaction between law and politics.

²⁷² This distinction applies even to the Nuremberg International Military Tribunal trial, which is often mentioned as an example of universal jurisdiction. Since the Allies had defeated Germany and become the occupying government in Germany, they could claim jurisdiction over these cases based on territoriality and active personality. In addition, many of the crimes took place in the territory of European Allies or against Allied nationals. For an argument that the four Allies exercised jurisdiction in Nuremberg as occupying powers, see ROBERT K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 77–79, 88–89 (1960).

TABLE 4. UNIVERSAL JURISDICTION COMPLAINTS OR CASES BROUGHT ON MOTION OF PUBLIC AUTHORITIES, BY PROSECUTING STATE

Prosecuting State	Number	Percent
Australia	70	6.66
Austria	3	0.28
Belgium	63	5.99
Canada	216	20.55
Denmark	7	0.67
Finland	2	0.19
France	37	3.52
Germany	235	22.36
Iceland	2	0.19
Israel	3	0.28
Luxembourg	1	0.09
Netherlands	9	0.86
New Zealand	1	0.09
Norway	12	1.14
Senegal	1	0.09
South Africa	2	0.19
Spain	259	24.64
Sweden	11	1.05
Switzerland	16	1.52
Turkey	17	1.62
United Kingdom	85	8.09
United States ^a	1	0.09
Total	1051	100.00

^a Since it is not well-known even to U.S. audiences, it is worth noting that the complaint in question refers to the case of Tomás Ricardo Anderson Kohatsu, a Peruvian intelligence official. On March 10, 2000, U.S. agents questioned Anderson Kohatsu at a Houston airport and wanted to arrest him on the basis that he allegedly committed torture in Peru. But he was released after the Department of State argued that he had a right to diplomatic immunity. See, e.g., *State Dept. Helped Peruvian Accused of Torture Avoid Arrest*, N.Y. TIMES, Mar. 11, 2000, at A7. The U.S. case against Charles Emmanuel, Charles Taylor's son, for participating in torture in Liberia, was also considered but not coded because the defendant was born in the United States and active nationality could thus provide a full jurisdictional basis for this prosecution.

human rights situation. Consequently, incentives relating to domestic constituencies are likely to play a much smaller role—if any—in encouraging the political branches of authoritarian states to pass universal jurisdiction statutes and move prosecutions forward. Second, since political branches in authoritarian states are more likely to commit international crimes, their initiation of universal jurisdiction prosecutions poses special risks, as any such proceeding might boomerang and call attention to their own human rights violations, which would increase the potential costs.

A third possible threat to the current equilibrium of the universal jurisdiction regime is that prosecuting states might initiate prosecutions in hopes of being bought off by the defendant's state of nationality. This approach might well lead to the prosecution of mid- and high-cost defendants, especially those with close ties to powerful states that are in a position to provide substantial benefits to would-be prosecuting states. Yet while this is a plausible scenario, certain factors again militate against it. First, although most negotiations take place behind closed doors, defendants' states of nationality apparently tend to threaten the imposition of additional

costs rather than offer benefits to the prosecuting state. That is, they generally favor sticks over carrots. Second, undertaking universal jurisdiction prosecutions solely to obtain benefits may easily backfire, as it may create domestic and international reputational costs that far outweigh the rewards.

IV. SOME NORMATIVE AND INSTITUTIONAL DESIGN IMPLICATIONS

Together with the descriptive and predictive role of the posited theoretical framework, the above analysis has important implications for normative and institutional design debates concerning universal jurisdiction. Although a full analysis of these debates is beyond the scope of this article, this part explains three avenues for exploration and discussion.

Scaling down the Universal Jurisdiction Debate

For one thing, universal jurisdiction will not establish a minimum international rule of law in the sense of either holding a substantial share of the perpetrators of international crimes accountable, or being applied equally across defendants. Since the political branches' expected costs quickly surpass the expected benefits in this type of case, the analysis herein suggests that it is not a coincidence or the result of too premature a judgment that, in the last twenty-five years, only twenty-six people around the world²⁷³ have been criminally convicted on the basis of universal jurisdiction despite the end of the Cold War, the unprecedented position of human rights on the agenda of many societies, and the passing of universal jurisdiction statutes by many states. Rather, a limited potential to convict international criminals seems to be a structural feature of the universal jurisdiction enforcement regime. In addition, given that high- and most mid-cost defendants can impose more costs than any potential prosecuting state is willing to pay, those defendants are in effect beyond the reach of this enforcement regime.

The above analysis also suggests that several common criticisms of universal jurisdiction are unwarranted. First, in view of the tendency of the universal jurisdiction regime to focus on low-cost defendants, it is unlikely to provoke unmanageable international tensions or lead to conflicts between states fighting to prosecute the same defendant, as critics have predicted. Second, as shown above, the universal jurisdiction regime already has coordinating mechanisms in place that encourage states to concentrate on cases of broad international agreement on prosecution and trial. This characteristic runs counter to criticisms that universal jurisdiction is premised on a dangerous utopian idealism that disregards the existing power structure of the international order.²⁷⁴ Third, contrary to critics' fears, the current universal jurisdiction regime already leaves room for consequentialist considerations and creates incentives for individual states to avoid interfering with political solutions to armed conflict and mass atrocities. This feature runs counter to critics' claims that universal jurisdiction is based on deontological assumptions likely to interfere with such solutions.²⁷⁵

²⁷³ The *Eichmann* case is excluded from this total number because it took place in the 1960s.

²⁷⁴ On this criticism, see Goldsmith & Krasner, *supra* note 3.

²⁷⁵ On this criticism, see works cited *supra* note 3. In addition, it is worth noting that if a group of states undertakes to prosecute certain defendants and thus interferes with beneficial political solutions, the problem lies in the group of states itself, not in the international criminal law regime invoked to enforce its decision.

This analysis thus indicates that the two most vocal positions in universal jurisdiction debates have exaggerated the importance of the issues at stake. Universal jurisdiction is unlikely either to establish the broad type of accountability desired by its defenders or to lead to the apocalyptic scenarios forecast by its detractors. This conclusion suggests that the debate about universal jurisdiction should be rearticulated in a more modest way. There is no question that there are benefits and costs to universal jurisdiction statutes, prosecutions, and trials. But one should have access to a realistic assessment of these benefits and costs before discussing whether benefits or costs—or deontological considerations—prevail.

Rethinking the Relationship Between Law and Politics in Universal Jurisdiction

This article's analysis also suggests that politics necessarily plays a role in universal jurisdiction but that universal jurisdiction criminal proceedings and trials have tended to be true adjudicatory processes. If this insight about the relationship between law and politics is correct, both supporters and opponents of universal jurisdiction might do well to consider revising their approach to this relationship.

Supporters of universal jurisdiction have tended to take a legalistic approach, according little or no role to the political branches and seeking to avoid the potential dangers of universal jurisdiction by enacting substantive and jurisdictional rules such as an immunity defense and the requirement that the defendant be in the prosecuting state's territory as a prerequisite for launching formal proceedings.²⁷⁶ But if the posited framework is correct, the supporters of universal jurisdiction should not be asking whether political branches should be part of the universal jurisdiction regime—since this is an unavoidable fact—but rather what the best way would be to give them a voice in this regime.

One critical question is how much prosecutorial discretion and control by the executive branch over prosecutors are desirable. As the five case studies presented above demonstrate, this is not a dichotomous question, as there are many ways to structure the relationships between prosecutors, courts, victims, NGOs, and political branches. Supporters of universal jurisdiction have generally assumed that the less prosecutorial discretion the better, in hopes of avoiding political calculations in universal jurisdiction cases. However, if, as stated above, prosecutorial discretion is only one of the tools used by political branches to control universal jurisdiction cases, supporters would be well-advised to weigh the potential advantages and disadvantages of statutory rules in comparison to prosecutorial discretion.

For instance, accepting a higher level of prosecutorial discretion in a given state may result in narrowing that state's statutory restrictions on universal jurisdiction, such as triable crimes, presence requirements, and the double-criminality rule. Higher levels of prosecutorial discretion may therefore allow universal jurisdiction supporters to cast a wider net if, for example, as a result of this additional discretion, the assertion of universal jurisdiction is not statutorily limited to cases where the alleged perpetrator is visiting or residing in the state. These circumstances may give them more control over the type of human rights abuses around the world that they want the political branches to focus on, rather than leave them to an essentially reactive

²⁷⁶ See REYDAMS, *supra* note 10; Cassese, *supra* note 17. On some of the risks of legalistic approaches to international issues more generally, see, for example, Richard H. Pildes, *Conflicts Between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT'L L. 145 (2003).

approach dependent on the random presence of an alleged international criminal in a potential prosecuting state.

Opponents of universal jurisdiction who have considered it to be an essentially political tool to harass world leaders would be well-advised to take law more seriously.²⁷⁷ This article's analysis has found that, though political incentives explain state behavior in this area, universal jurisdiction has mostly been a project of well-developed democracies—essentially European states and the developed members of the Commonwealth—and that institutions and law have made a difference in its practice. Opponents would thus do better than denouncing universal jurisdiction as merely political by engaging more deeply with the legal arguments that have been made to justify the use of universal jurisdiction under customary and treaty law, describing legal requirements or arrangements that could make universal jurisdiction more acceptable for them, and explaining why state officials' actions in certain situations do not constitute international crimes.

The Two Sides of Selectivity

As a third avenue of inquiry, the posited framework provides elements for a reassessment of selectivity—one of the traditional problems of international criminal trials.²⁷⁸ One of the latest iterations of this criticism against international criminal law has been the accusation that the ICC is a court for Africa, which one could try to explain under the framework by looking at the incentives of the ICC prosecutor. African leaders have recently manifested their dissatisfaction with universal jurisdiction in similar terms.²⁷⁹

Universal jurisdiction's selectivity regarding African leaders could certainly be a possible scenario since African states tend to have relatively low leverage over other states. But, as the survey data indicate, universal jurisdiction trials have not concentrated on African leaders but on even lower cost defendants—those for whom their states of nationality have not been willing to exercise their leverage, and especially those on whose prosecution the international community has broadly agreed.

Although the universal jurisdiction regime, unlike the ICC regime, has not been an international criminal law enforcement regime exclusively or even mainly for Africa, it has been selective in the sense indicated above. Its proponents have tended to leave these selectivity problems aside or to consider them an improper result of political calculations by political branches. But even if these political considerations were improper or morally wrong, an important implication of this article would be that selectivity is such a structural feature of universal jurisdiction that any justification of actual universal jurisdiction statutes, prosecutions, and trials should explain why it is not invalidated by selectivity.

For instance, deterrence as traditionally conceived of in criminal law does not seem to justify punishment in this context since the chances of conviction and a severe sentence are so low even

²⁷⁷ For the characterization of universal jurisdiction as a tool to harass democratic world leaders, see John Bolton, *Democracy Under Arrest*, WALL ST. J., Dec. 16, 2009, at A27.

²⁷⁸ See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 31, 40–46 (1999).

²⁷⁹ See, e.g., AU-EU Expert Group, *supra* note 26, para. 34; Legal Committee Delegates See Principle of Universal Law as Safeguard Against Impunity for Major Crimes; Some Caution on Risk of Abuse, UN Doc. GA/L/3371 (Oct. 20, 2009).

for low-cost defendants that the expected costs of punishment are unlikely to surpass the possible benefits of perpetrating international crimes. Similarly, if retribution is advanced as the justification for punishment in this context—perhaps on the idea that a legitimate legal system requires satisfying the insight that the moral significance of persons or actions should not depend on accidents of place²⁸⁰—one may have to address whether the structural selectivity of universal jurisdiction undermines that justification in the individual cases in which universal jurisdiction is applied. Plausible arguments can surely be made for why selectivity does not invalidate these and other justifications of universal jurisdiction, but any non-ideal-world justification must confront this issue.

The posited incentive structure also suggests that the current selectivity of universal jurisdiction may play an affirmative role in this regime, for two different reasons. First, the legality of universal jurisdiction over international crimes under customary international law is controversial, and the treaty basis for universal jurisdiction prosecutions of the core international crimes suffers from substantial gaps and weaknesses.²⁸¹ Concentrating mostly on defendants whose state of nationality does not support them and about whom there is broad agreement in the international community thus provides a firmer legal and political basis for these prosecutions.²⁸²

Second, this incentive structure reduces the chances of overinclusion of universal jurisdiction cases—that is, the chances that cases that should not be prosecuted will be prosecuted. Universal jurisdiction is a decentralized enforcement regime and the malleability or absence of legal rules does not always result in clear and reliable policy criteria about when prosecutions should be brought. To start with, though international crimes include the most atrocious human rights violations, they can also include conduct that is morally ambiguous. For instance, it is considered a war crime to violate the principle of proportionality by launching an attack in the knowledge that it will cause loss of life to civilians that would be excessive in relation to the anticipated concrete and direct overall military advantage.²⁸³ But what constitutes “excessive” allows broad room for interpretation, and people may reasonably differ over whether conduct that may possibly violate proportionality is morally and legally permissible.

²⁸⁰ For a cosmopolitan defense of universal jurisdiction that relies on this idea, see Noah Feldman, *Cosmopolitan Law?* 116 YALE L.J. 1022, 1061–65 (2007) (book review).

²⁸¹ For an argument on why pure universal jurisdiction over the core international crimes is not legal under customary international law, see, for example, Arrest Warrant, *supra* note 14, at 40–42, paras. 10–12 (Guillaume, J., sep. op.). The treaty basis for universal jurisdiction over crimes against humanity and genocide is weak because there is no special international convention on crimes against humanity, the Genocide Convention does not establish universal jurisdiction, and the ICC Statute does not clearly require or authorize state parties to establish universal jurisdiction over the crimes under the jurisdiction of the Court. As for war crimes, scholars tend to agree that the grave breaches provisions of the Geneva Conventions establish universal jurisdiction, at least when the defendant is present in the prosecuting state’s territory. But the Conventions are not explicit about it and by the end of the 1990s, only one of every six states that had ratified the Conventions had established universal jurisdiction over grave breaches. See Richard van Elst, *Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions*, 13 LEIDEN J. INT’L L. 815 (2000). There is broader consensus that the Convention Against Torture establishes universal jurisdiction when the defendant is present in the prosecuting state’s territory. But even in this case, the Convention is not explicit about it—it only establishes the *aut dedere aut prosequi* principle. See Bassiouni, *supra* note 12, at 55–56.

²⁸² The lack of protest by the defendant’s state of nationality deals with one of the main legal objections against universal jurisdiction—that it violates the principle of state sovereignty.

²⁸³ See, e.g., Additional Protocol I, *supra* note 11, Art. 85(3)(b); ICC Statute, *supra* note 11, Art. 8(2)(b)(iv) (where the loss has to be “clearly excessive”).

By encouraging states to concentrate on broadly agreed-upon defendants, the posited incentive structure may play an affirmative role in the universal jurisdiction regime by promoting the dismissal of many complaints that in fact should not be prosecuted. Since the international community is more likely to reach agreement on cases that clearly constitute the most serious international crimes—such as those committed by Nazis, former Yugoslavs, and Rwandans—one can argue that this selectivity plays an affirmative role in this respect as well.

This system of selection of universal jurisdiction cases is clearly imperfect because states may weigh considerations other than the gravity of the crime in making their determinations and because not every agreement is created equal. In the cases of the former Yugoslavia and Rwanda, the UN Security Council was instrumental in generating broad agreement through its creation of the ICTY and the ICTR. Nevertheless, the permanent members of the Security Council have veto power against the generation of broad agreement in this way. But such agreements are not always produced from the top down. For instance, the reluctance of the British government to free Pinochet shortly after his arrest in London, despite Chile's strong opposition to it, can be explained by the widespread agreement in Europe and elsewhere that Pinochet deserved prosecution and punishment. Though this broad agreement can be attributed to various causes, Chilean exile communities in Europe and elsewhere contributed crucially to this process.²⁸⁴

V. CONCLUSION

This article has argued that paying attention to the incentives operating on the political branches of states is essential to understanding the exercise of universal jurisdiction over the core international crimes. The explanation of the asymmetric nature of the incentives and disincentives for political branches in this area provides a framework that accounts for the current practice of universal jurisdiction and makes it possible to predict how this international criminal law enforcement regime is likely to evolve in the future.

This framework suggests that universal jurisdiction is unlikely equally to result in the minimum international rule of law to which its supporters aspire or to lead to the dangerous abyss that its detractors fear. These two scenarios are unlikely because universal jurisdiction concentrates on defendants who impose little or no cost on prosecuting states, primarily defendants whom the international community agrees should be prosecuted and punished. Moreover, the operative incentives encourage the political branches of individual states to keep using universal jurisdiction in just this way. Whether this makes universal jurisdiction desirable or undesirable is beyond the scope of this article. What is made clear here is that any productive discussion of this and related issues would do well to take into account the framework and findings set forth in these pages.

²⁸⁴ See ROHT-ARRIAZA, *supra* note 84, at 37–40.