Alien Torts in Europe? Human Rights and Tort in European Law

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Abstract

Human rights are universally recognized. Their enforcement, however, often requires the action of particular states. This paper examines private law remedies in tort in several Member states of the European Union to remedy human rights violations occurring outside the European Union. It concludes that the laws examined are examples of universal jurisdiction and rights and duties of private persons under international law, which are two key elements of the post-Westphalian state system.

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Part I: Private Law Protection of Human Rights in various Member States of the European Union

Introduction

One of the principle remedies in U.S. law for violations of human rights is the private law of torts. In fact, torts appear in practice to be the almost exclusive remedy to extraterritorial torts which violate human rights in U.S. law.[1] This is not to say that there is no possibility of penal sanction for human rights violations in U.S. law. Indeed, there is a torture statute in U.S. federal criminal law.[2] However, that statute is rarely if ever invoked. Similarly, as in Britain, a federal statute outlaws hostage taking under a theory of universal jurisdiction.[3] Again, that statute is only rarely invoked.[4]

In Europe, in contrast, the principal remedy for violations of basic human right is penal law. But though penal law is the principal remedy for human rights violations in Europe tort also plays a role as a remedy for human rights violations both overseas and in Europe. Various national laws and even, to a lesser extent, European and international law offer limited but significant secondary private law remedies. Thus, in terms of remedies, European and American law are each others' mirrors. However, both legal systems, though using different legal methods, are ultimately seeking to deter and punish similar fact patterns. This raises the question whether human rights violations are best seen as torts, crimes, or both. In fact, the two systems of control can and

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* **All URLs in footnotes were last visited February 1, 2005.**

1 "[T]here are no significant criminal cases for torture and crimes against humanity in the United States despite the legality of such prosecutions. Pursuant to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" Beth van Schaack, *In Defence of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int'l. L. J. 141, 148-149 (Winter, 2001).

2 The statute states: "Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life." 18 U.S.C. § 2340a (1994).

3 The Hostage Taking Act, 18 U.S.C. § 1203 (1994). (Universal jurisdiction over individuals who, "whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act").

4 See, e.g., *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) (jurisdiction over accused hijacker proper under Hostage-Taking Act).

should be mutually reinforcing and complementary. This is because tort remedies have certain advantages over penal remedies: one of tort's principal strengths is that it preserves the limited resources of the state's prosecutor. Tort remedies also allow complaints to be made even where such complaints are – generally for economic reasons – politically unpopular. At the same time, however, some wrongful acts deserve not merely economic sanction but also deprivation of liberty. Thus there clearly is a place for criminal law in the regulation of the most extreme violations of human rights. Both penal and civil law have advantages and disadvantages as remedies and should operate in conjunction as complements to each other. Both U.S. and European law would be improved by a careful consideration of each others' legal remedies. Such a comparison would also improve the state of human rights globally. If ever there were a sense and purpose of comparative law and global governance that is it The normative recommendation of this work is that both Europe and America should extend and expand their protection of victims of tortuous violation of basic human rights wherever violations of those rights occur. Many victims of violations of fundamental human rights live in the third world. Many third world countries suffer from corrupt governments and overburdened courts. The economic and political inequalities between, say, poor peasants on the one hand and wealthy multinational companies and/or governments on the other explain why, practically speaking, there is often no remedy for basic violations of human rights in the third world. Even if there were no corruption in any third world country the fact that systematic violations of human rights can be very profitable explains why such rights must be protected in the first world. After all, it is the first world which profits from unfair and in fact predatory labour practices in the third world. While the U.S. and Europe are already making efforts in the direction of global human rights governance the tempo of global governance in the interest of human rights will be increased as each of the transatlantic partners perceives the benefits of objective comparative legal analysis on legal policy making.

Our analysis of remedies in tort for individuals in European law will first consider the law of the Member States then European law. This is because: 1) The principal remedies are in fact in national law, though complementary remedies do exist at the EU as well. 2) The principle of subsidiarity places primacy on the laws of the Member States. 3) The law of the European Union incorporates the general principles of law of the Member States into its own general principles. After we conclude our consideration of the laws of the Member States we will then consider the European Convention on Human Rights.

I. The Common Law: Tort Remedies to Human Rights Violations in Britain

Our analysis begins with the common law where we use Britain as the example. This methodological approach might at first appear erroneous: There are few common law jurisdictions in the EU. Of countries in the EU only Britain, Ireland, Malta and perhaps Cyprus can claim to be common law jurisdictions. We begin with British law because judicial review of domestic laws against the European Convention on Human Rights (ECHR) via the British Human Rights Act will almost certainly result in the importation of constitutional law doctrines from the U.S. to the U.K. where they may in turn find themselves drawn on for interpreting community law.

Just as U.S. law draws on British and other common law jurisdictions as persuasive evidence of the common law, so also do British courts draw on U.S. as persuasive evidence of British common law. This can be seen clearly just by examining the *Pinochet* cases. For example, in the final *Pinochet* decision on the merits[5], the House of Lords cited literally a half dozen U.S. cases as persuasive evidence of British law or of how British law should be interpreted.[6] The original *Pinochet* case was even more generous in its citation of U.S. authority. It is not merely the raw quantity of cases that are cited by the British courts that explain the importance of U.S. law for Europe, however. It is also the fact that many legal concepts exist in both British and U.S. law and that these doctrines are the same or so nearly similar as to explain the extensive citation of U.S. cases by British courts and lawyers. Similarly, U.S. courts also cite British cases as persuasive evidence of what the law is or how it should be interpreted.[7] This should be hardly surprising as the common law is one legal system with common sources and methods of finding and interpreting law.

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5 *Regina v. Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No. 3)* (24 March, 1999) 1 A.C. 147 (House of Lords, 2000) (hereafter Pinochet 3).

6 The cases cited by the court were: *Argentine Republic v. Amerada Hess Shipping Corporation* (1989) 109 S. Ct. 683; *Demjanjuk v. Petrovsky* (1985) 603 F. Supp. 1468; 776 F.2d 571; *Jimenez v. Aristeguieta* (1962) 311 F.2d 547; *Lafontant v. Aristide* (1994) 844 F. Supp. 128; *Princz v. Federal Republic of Germany* (1994) 26 F.3d 1166; *Saltany v. Reagan* (1988) 702 F. Supp. 319; *Sampson v. Federal Republic of Germany* (1997) 975 F. Supp. 1108; *Schooner Exchange v. M'Faddon* (1812) 11 U.S. (7 Cranch) 116; *Siderman de Blake v. Republic of Argentina* (1992) 965 F.2d 699; and *United States of America v. Noriega* (1990) 746 F. Supp. 1506; (1997) 117 F.3d 1206. This is not considering cases cited by the litigants nor U.S. cases cited in the other Pinochet cases!

7 See, e.g. *Lawrence v. Texas* __ U.S. __ (June 26, 2003), *available at*: <http://a257.g.akamaitech.net/7/257/2422/26jun20031200/www.supremecourtus.gov/opinions/02pdf/02-102.pdf and *at*: http://supct.law.cornell.edu/supct/html/02-102.ZS.html>.

A. Common Law Doctrines Common to both British and U.S. Law in Transnational Law

1. Immunity

The British State Immunity Act[8] and the U.S. Foreign Sovereign Immunities Act, are one example where even U.S. and British legislation run in parallel. In fact, in *Pinochet 3*, the House of Lords cited an interpretation of the U.S. Foreign Sovereign Immunities act (enacted in 1976) as evidence of the correct interpretation of the British State Immunity Act of 1978.[9] The House of Lords, like the U.S. courts, noted the bifurcation of immunity into commercial acts (*acto jure gestiones*) and sovereign acts (*acto jure imperii*) which is of course also the position of international law.[10] There are also parallels between the Hostage Taking Acts in U.S. and British law. These are far from the only statutory similarities. These similarities track similarities in customary law, constitutional law, sources of law and legal methods and doctrines. Let us examine some doctrines of law that illustrate that the British and American law parallel each other as they are common law jurisdictions.

2. Act of State Doctrine

The Act of State doctrine is essentially the same in British law as in American. "[C]ourts will not sit in judgment on the act of a foreign sovereign performed within the territories of that sovereign"[11] – which is in fact just about word for word the same formulation found in U.S. law. The House of Lords in *Pinochet 3* again cites U.S. authority in its elucidation of the meaning of the Act of State doctrine, noting that though the two doctrines are distinct in English law, in U.S. law they have not always been treated as separate from each other.[12] More significantly, the House of Lords in *Pinochet 3* also cites to *Filartiga v. Pena-Irala*[13] as evidence to justify its rejection of the notion that the Act of

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8 UK State Immunities Act, 20th July 1978, *available at*: <http://www.law.berkeley.edu/faculty/ddcaron/Documents/RPID%20Documents/rp04038.html>.

9 *Pinochet 3*, at161.

10 *Id.* The court again cites U.S. case law, namely *Saudi Arabia v. Nelson*, 88 I.L.R. 189.

11 *Duke of Brunswick v. King of Hanover* (1848) 2 H.L.Cas. 1.

12 *Pinochet 3*, at 159, citing *Kirkpatrick & Co. Inc. v. Environmental Tectonics Corporation International* (1990) 110 S. Ct. 701; 493 U.S. 400, 405.

13 *Filartiga v. Pena-Irala*, 630 F.2d 876; 1980 U.S. App. LEXIS 16111 (2d. Cir., 1980) (hereafter *Filartiga)*. The House of Lords also cites *Hilao v. Estate of Marcos* (1994) 25

State doctrine bars proceedings against an individual for acts of torture:[14] This citation of U.S. authority as persuasive evidence of British law is hardly idiosyncratic: Citation to U.S. cases occurs extensively in the initial vacated *Pinochet* decision.[15] That decision was vacated not due to any substantive error but rather due to a procedural error of form: Lord Hoffman's did not disclose his wife's ties to Amnesty International. Substantively, as to the Act of State doctrine in English law, Lord Slynn of Hadley noted that "the position is much the same as it was in the earlier statements of the United States courts".[16]

3. Comity

Comity exists in British law just as it does in American law. Again, its meaning is nearly exactly the same: The rules of comity are "the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to each other".[17] In the context of jurisdiction, "[t]he rules of comity require that the United Kingdom does not assert or assist in the assertion of jurisdiction over the internal acts of a foreign state".[18]

4. Forum non conveniens

Forum non conveniens in British law is, again, very similar to comity in U.S. law. In discussing *forum non conveniens* in British law the House of Lords has stated:

> "Where a plaintiff sues a defendant as of right in the English court and the defendant applies to stay the proceedings on grounds of *forum non conveniens*,

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F.3d 1467 and *Liu v. Republic of China* (1989) 892 F.2d 1419 for the proposition that the Act of State doctrine will not bar proceedings against individuals for acts of torture and that neither doctrine bars inquiry into conduct that violates fundamental human rights.

14 *Pinochet 3*, at 159, citing *Kuwait Airways Corporation v. Iraqi Airways Co.* (unreported), 29 July 1998; *Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A.* [1983] *2 Lloyd's Rep. 171 and Letelier v. Republic of Chile* (1980) 488 F. Supp. 665. Again, note that the British court is citing U.S. law as authority for the legal position of the common law.

15 *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte*, 1 A.C. 61, 85 (House of Lords, 25 Nov. 1998 – judgement vacated for rehearing) (hereafter Pinochet 1).

16 *Id.*

17 *Buck v. The Attorney General* [1965] 1 Ch. 745, [1965] 1 All ER 882 at 770.

18 *Pinochet 3*, at 172, citing *I Congreso del Partido* [1983] 1 A.C. 244; *Buck v. Attorney-General* [1965] Ch. 745.

> the principles to be applied by the English court in deciding that application in any case not governed by Article 2 of the Brussels Convention are not in doubt. They derive from the judgment of Lord Kinnear in *Sim v. Robinow* (1892) 19 R. 665 at 668 where he said: 'the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.'"[19]

However, though the court looks to the interest of the plaintiff and defendant as well as the ends of justice it does not, unlike U.S. courts, consider public interest or public policy.[20] Thus, while both the U.S. and British courts engage in a balancing of several different factors to determine whether the forum is inconvenient, the number of factors in the British formulation of *forum non conveniens* is more limited than is the case in the U.S.

5. International Law and the Common Law

Just as in the U.S., customary international law is an integral part of British common law. In the final *Pinochet* decision on the merits of extradition the House of Lords held: "The English courts are open to the concept of consulting customary international law, as it has evolved over time, as a basis for the common law."[21] However, though customary international law is a part of the common law Britain, like the U.S. and other common law jurisdictions,[22] is a dualist legal system as to treaty law. That is, treaties must be incorporated into domestic law via an enabling act and are not presumed to have direct domestic effect until Parliament (or Congress) passes legislation giving the treaty such effect.[23] The two legal systems are very similar, at times congruent, and mutu-

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19 *Lubbe and Others and Cape Plc. and Related Appeals* [2000] UKHL 41; [2000] 4 All ER 268; [2000] WLR 1545 (20th July, 2000), *available at*: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/2000/41.html&query=%22forum+non+conveniens%22&method=all>.

20 *Id.*

21 *Pinochet 3*, at 161, citing *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B.529, 551-554, 576-579; *I Congreso del Partido* [1983] 1 A.C. 244, 261 and *Littrell v. United States of America* (No. 2) [1995] 1 W.L.R. 82.

22 "While Australia, as a common-law country, operates the general dualist approach to the domestic effect of international agreements, it does not appear from the judgments of the High Court that Australian law replicates that rule with anything quite like the constitutional rigour with which it is embodied in article 26 section 6 of the Constitution", *Kavanagh v. Governor of Mountjoy Prison* [2002] IESC 11 (Supreme Ct. Eire, 01 March 2002), para 25.

23 "Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legis-

ally referencing in their evolution not only as to their sources of law, hierarchisation of norms, but also as to their inferential and interpretive methods, even as to positive statute law. Thus U.S. law has a certain indirect relevance to Europe.

B. Extraterritorial Human Rights Protection in Domestic British Law: The Pinochet Cases

Pinochet, former dictator of Chile, was accused by prosecutors in Spain of committing murder and conspiracy to murder as well as of conspiring to commit acts of torture.[24] The result of the case may seem unsatisfactory: Pinochet was ultimately allowed to retire in comfort due to ill health.[25] However, the legal issues determined in the case present some hopeful indicators for the future of human rights.

The issue to be decided in *Pinochet* was whether Pinochet could be extradited for crimes he was accused which took place in Chile, Spain and in other countries or whether Pinochet enjoyed immunity as a head of state and thus could not be extradited. Thus the central issue in *Pinochet*, the extent of the immunity of a former head of state, was essentially the same issue seen in *Congo v. Belgium*[26] and Ariel Sharon's case. The House of Lords ruled that it is clearly[27] the case that a former head of state is immune for official acts dur-

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lation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant." Lord Oliver of Aylmerton in *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry (the 'International Tin Council case')* [1990] 2 AC 418, 500.

24 *Pinochet 1, at*, 85 (House of Lords, 25 Nov. 1998 – judgement vacated for rehearing).

25 *R. v Secretary of State for the Home Department, ex parte The Kingdom of Belgium; R. v Secretary of State for the Home Department, ex parte Amnesty International Limited and others*, Queen's Bench Division (Crown Office List) CO/236/2000, CO/238/2000, (Transcript: Smith Bernal) (15 February 2000).

26 Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), ICJ 14/II/2002, 2000 I.C.J. 121, 18 (Feb. 14), *available at:* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_toc.htm.

27 "The immunity of an existing head of state for acts performed in his governmental capacity is well recognised." *Pinochet 3,* at 173.

ing his term of office even after that office has expired.[28] Similarly it is almost as clear that any criminal acts undertaken for the personal benefit of the head of state are not subject to immunity. The court had no difficulty concluding that "[a] former head of state cannot have immunity for acts of murder committed outside his own territory".[29]

The difficult factual question in *Pinochet* is whether the acts of torture undertaken by Pinochet's government were official acts of the state or rather were personal acts of Pinochet. Pinochet did not personally torture or murder – rather he ordered his subordinates to do so for him. Were his motives sadistic? Such motives, if present, would be evidence of an act undertaken for personal benefit and thus not subject to immunity. This question was considered in the initial court decision. That decision was, however, vacated due to a procedural impropriety – Lord Hoffmann ought to have excused himself, or at least disclose the fact that he[30] and his spouse did charitable work for one branch of Amnesty International. The question was not as to any improper bias on the part of Lord Hoffmann[31] but rather as to any appearance of impropriety. The court rightly vacated the original judgment because it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[32]

The difficult legal issue in *Pinochet* was whether a head of state can be liable for acts of torture (and, by extension, other acts in violation of *jus cogens*) after the expiry of his or her term of office. The court reasoned that: the prohibition of torture internationally is *jus cogens;* that any act in violation of *jus cogens* cannot be immunized[33]; and that as a consequence no act of torture can be immunized. The court reaches this conclusion because: "Certain crimes are deemed so odious that no reticence in involving the United Kingdom in the internal disputes of foreign states would be shown in relation to them."[34] The court thus rejected the argument that head of state immunity would prevent prosecution (and thus extradition) for perfectly logical reasons because interna-

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28 "A former head of state only has immunity with regard to his acts as a head of state but not with regard to acts which fall outside his role as head of state." *Id.,* at 154.

29 *Id*.

30 *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte. Pinochet* [2000] 1 A.C. 119 (House of Lords, 1999) (hereafter Pinochet 2), at 129.

31 *Id.,* at 132 and 146.

32 *Id.*, at 135 citing *Rex v. Susex Justices, Ex parte McCarthy* [1924], 1 K.B. 256, 259.

33 "International law recognises crimes against humanity and the Torture Convention says that no circumstances can be invoked as justification for torture. Therefore it cannot be a part of the function of a head of state under international law to commit those crimes." *Pinochet 3,* at 154.

34 *Id.,* at 155.

tional law does not command a state to accord immunity to a former head of state for acts which are prohibited under international law, *a fortiori* where such crimes result in individual liability.[35] Simply put: "Neither a former head of state nor a current head of state can have immunity from criminal proceedings in respect of acts which constitute crimes under international law."[36] Any other view would be illogical and frustrate the purpose of the Convention Against Torture (CAT). As we shall see, however, this holding may be in conflict with the case of *Congo v. Belgium* which was later decided by the International Court of Justice (ICJ) (*infra*).

Could Pinochet have argued that he should not be extradited on the grounds of comity? Probably not. This is because of the international maxim "*aut dedere aut adjudicare*" – states must either extradite or prosecute those who commit international crimes.[37] This maxim of international customary law has direct effect in Britain since customary international law is part of the common law.[38] Further, immunity should be distinguished from comity. Comity, whether in British or U.S. law, is a courtesy extended by one state to another in mutual respect and may be withdrawn unilaterally. In contrast, while American courts regard head of state immunity of *de facto* states as a privilege extended and not a right (*e.g., Kadic v. Karadzic*),[39] other courts appear to consider state immunity as a corollary to sovereign equality and the head of state and diplomatic immunities as emanations thereof, and thus a duty. The importance of the distinction can be seen in *Congo v. Belgium* and *Pinochet 3*. In *Congo v. Belgium*, the ICJ seems to think that the principle of immunity arises out of the principle of sovereign equality and thus may be non-derogable. In contrast, in *Pinochet 3*, the rule of non-intervention, which also arises out of the sovereign equality of states was not regarded as a *jus cogens* rule because the duty of non-intervention increasingly admits of exceptions.[40] That is a logical contradiction.

The view of the court in *Pinochet 3* is the better view because it reflects actual state practice and serves the goal of protecting human rights, a good common to all persons. States are legal fictions created by people to provide the

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35 *Id.*

36 *Id.,* at 160.

37 *Pinochet 3*, at 154.

38 *Pinochet 3*, at 154.

39 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S 1005 (1996).

40 "[D]uring the course of the century the treatment by a state of its own citizens, at least in certain areas of fundamental importance, has ceased to be regarded as a matter of internal affairs. The violation of a norm of *jus cogens* certainly is not so regarded." *Pinochet 3*, at 186.

citizen with, in Aristotle's words, the means to the good life.[41] Thus where we see a conflict between a legal fiction and an actual reprehensible act we should be willing to construct the interpretation of the legal fiction as a function of the end that it serves – which is another argument that in fact the norm against torture should be hierarchically superior to the norm of sovereign equality. All states are subject to the norm against torture and thus their sovereign equality is respected even when that sovereignty is limited by universal obligations of all states to each other and/or the international system.

In *Pinochet 3* the court determined that if there were any customary international law against conspiracy to commit torture then Pinochet could be criminally liable for his acts prior to becoming Chile's head of state. The court also ruled that Pinochet could be held liable for actions committed after Chile's accession to the Convention Against Torture in 1984 despite the fact that Chile had granted amnesty to all state criminals.[42] So the difficult issue is whether he could also be liable for acts of torture committed while head of state. Of course, to determine the extradition issue the court did not actually need to answer this question: having found extraditable crimes prior to and after the term of office of Pinochet he would be able to be extradited. The logic of the court, however, would compel a conclusion that Pinochet should even be liable for those crimes committed during his tenure as head of state because "International law recognizes crimes against humanity and the Torture Convention says that no circumstances can be invoked as justification for torture. Therefore it cannot be a part of the function of a head of state under international law to commit those crimes."[43] The court considers it "inconceivable" that the Torture Convention would somehow exempt those who order mass murder from liability.[44] The court notes that the universal jurisdiction against torturers is consistent with international law stating that: "Article 8(4) [of the Convention Against Torture] combined with article 5 amounts to an acknowledgment that offences of torture committed in one state can be regarded as having taken

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41 Aristotle, *Politics*, Book I, Part II, Para. 9: "When several villages are united in a single complete community, large enough to be nearly or quite self-sufficing, the state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of a good life. And therefore, if the earlier forms of society are natural, so is the state, for it is the end of them, and the nature of a thing is its end. For what each thing is when fully developed, we call its nature, whether we are speaking of a man, a horse, or a family. Besides, the final cause and end of a thing is the best, and to be self-sufficing is the end and the best." *available at*: <http://classics.mit.edu/Aristotle/politics.mb.txt> (translation by Benjamin Jowett).

42 *Pinochet 3*, at 158.

43 *Id.,* at 154.

44 *Id.*

place in the state of which the victim is a national."[45]

The court in *Pinochet 3* ultimately ruled that Pinochet would enjoy immunity for acts prior to Chile's signature of the convention against torture. This is not, however, because the court determined the difficult factual issue – whether the acts of torture were official or personal acts. Nor did the court determine the difficult legal issue – whether the norm against torture is hierarchically superior to the norm of sovereign equality. Instead the court determined that it did not need to answer these questions because in any event the conspiracy, torture, and murders were not at the time of their occurrence violations of British law and thus did not meet the standard of double actionability and thus were not extraditable offences. However, the court also states:

> "Crimes against humanity are crimes not against a state but against individuals and are triable anywhere. Until recently there were almost no international tribunals so international crimes could be tried only before a national court. Even in 1946 the concept of territoriality of jurisdiction for crimes against humanity was not really in issue."[46]

In further justification of its decision, the court notes that Chilean domestic law has outlawed torture and that Chile has acceded to the Convention Against Torture and thus that the case is not one of a state forcing its laws on another but of punishing behaviour which is universally accepted as abhorrent and criminal.[47] Though the great majority of the claims against Pinochet would not have been punishable offences in Britain some were and thus, in theory, Pinochet was liable to extradition. In fact, however, he was not due to his advanced age and supposed infirmity.

What are we to make of this decision? The legal conclusions in *Pinochet 3* are, perhaps surprisingly, very favourable to human rights despite the fact that Pinochet remains unpunished. Practically speaking though, Pinochet's case, like that of *Congo v. Belgium* or *France v. Khaddafy*[48] or Sharon's cases[49] or

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45 *Id.*

46 *Id.,* at 157.

47 *Id.,* at 159.

48 Arrêt du 13 mars 2001, no 1414, relatif aux poursuites engagées contre le colonel Kadhaffi (hereafter Kadhaffi).

49 *Sharon, Ariel, Yaron, Amos et Autres*, Arrêt de la Cour d'Appel de Bruxelles, 26/6/2002 *available at*: <http://www.sabra-shatila.be/documents/arrest020626.pdf>; Belgium Supreme Court, 22 February 2001; Cour de Cassation, Arrêt de 12 Fevrier, 2003 unofficial English translation *available at*: <http://www.indictsharon.net/12feb2003dectrans.pdf>; Procureur contre Ariel Sharon et Consorts, Cour de Cassation, Arrêt de 24/9/2003, *available at:* <http://www.coeicl.de/dokumente/sharon_judgement_240903_juris_cass_a1.pdf>.

Habré's case,[50] is evidence of the great reluctance of states to subject the leaders of other states to personal liability for crimes against the law of nations. However, the efforts made by the dissenting Lords in *Pinochet 1* to distinguish the "special jurisdiction" of international criminal tribunals as somehow "exceptional" and thus limit human rights claims to international tribunals ring hollow. Lord Slynn in *Pinochet 1* states:

> "There is thus no doubt that states have been moving towards the recognition of some crimes as those which should not be covered by claims of state or head of state or other official or diplomatic immunity when charges are brought before international tribunals.
>
> …
>
> It has to be said, however, at this stage of the development of international law that some of those statements read as aspirations, as embryonic. It does not seem to me that it has been shown that there is any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justifiable in national courts on the basis of the universality of jurisdiction. Nor is there any *jus cogens* in respect of such breaches of international law which require that a claim of state or head of state immunity, itself a well-established principle of international law, should be overridden.
>
> That international law crimes should be tried before international tribunals or in the perpetrator's own state is one thing; that they should be impleaded without regard to a long-established customary international law rule in the courts of other states is another. It is significant that in respect of serious breaches of "intransgressible principles of international customary law" when tribunals have been set up it is with carefully defined powers and jurisdiction as accorded by the states involved; that the Genocide Convention provides only for jurisdiction before an international tribunal or the courts of the state where the crime is committed, that the Rome Statute of the International Criminal Court lays down jurisdiction for crimes in very specific terms but limits its jurisdiction to future acts."[51]

But this ignores one question and several facts: from where do international tribunals derive their legitimacy? It also ignores that the norms against genocide, torture and similar international crimes are themselves *jus cogens*. Thus we are faced with a conflict between the norms of non-intervention and sovereign equality – both of which increasingly admit of exceptions on the one hand, and the norms against genocide, war crimes and torture on the other. Hi-

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50 Arrêt n' 135 du 04-07-2000 / Accusation (Senegal: Cour d'appel de Dakar, 2000); Arrêt n' 14 du 20-3-2001 Pénal (Cour de Cassation, 2001).

51 *Pinochet 1*.

erarchically each of these norms may at first appear equivalent because they are all *jus cogens*. However, practically it is clear that the doctrine of sovereign equality and immunity increasingly admits exceptions and thus logically is not in fact *jus cogens*. In contrast, the norms against genocide, war crimes, and torture appear to admit of no exception. Finally, morally, there is no contest: international crimes are reprehensible, as are the artificial legal constructs which shield them.

In fact international criminal tribunals' jurisdictional power has always been justified not on historical practice but on the fact that the crimes adjudicated are so grievous as to be obviously universally reprehensible and thus universally punishable. That is of course a *jus naturale* argument, though no one wants to admit it.[52] Asserting that international criminal tribunals somehow are exceptional and not expressive of valid rules of international law (why?) is not only legally questionable it also renders the legitimacy of international criminal tribunals even more questionable giving rise to accusations that such tribunals are nothing other than "victors' justice".

Synthesis

For all its similarities to U.S. law Britain appears, on first glance, to offer fewer remedies for extra-territorial violations of human rights. We have just seen, however, that there are at least criminal law remedies in British domestic law for overseas violations of *jus cogens* norms. But there seems to be no equivalent to the Alien Tort Statute[53] or Torture Victims Protection Act[54] in British law. Does this mean that alien tort claims cannot be litigated in the U.K.? Hardly. There are three ways an alien tort claim could be litigated: first, by relying on customary international law; second, by relying on the ordinary rules of domestic British tort law; third, based on the Human Rights Act and ECHR. The arguments based on the ECHR are considered in the next chapter. We will look at the first two arguments in detail here as they are remedies within national law.

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52 "Where… neither treaty nor customary international law is available or applicable, the appeal to higher legal norms must be phrased as an appeal to natural law; and of course the conceptual and jurisprudential boundaries between customary *jus cogens* norms and natural law norms are notoriously vague." Eric Posner, *Transitional Justice As Ordinary Justice*, Harv. L. Rev. 117 HVLR 761, 794 (January, 2004).

53 28 U.S.C. § 1350.

54 Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73.

1. Arguments for Torts in the Common Law Based on Crimes in Customary International Law

As to the argument on customary international law it runs as follows: International law recognizes the existence of crimes and torts with appurtenant individual liability. Customary international law is an integral part of the common law. While customary international law – like custom generally in the common law – can be overruled by statute it also requires no enabling act to be enforced. International custom does, however, require the ordinary elements of custom: practice over a long period of time and *opinio juris*. For every common law crime there is a corresponding common law intentional tort. Thus, all crimes under customary international law entail corresponding torts in common law.

To argue that the above logic is invalid because international law supposedly only binds states ignores long standing state practice. Even in classical international law piracy[55] and slave trading were crimes and torts in violation of the law of nations. International law also recognizes individual tort liability in the case of capture of enemy ships during time of war, i.e. the "prize" jurisdiction of admiralty courts.[56] In contemporary international law a host of further crimes against peace, war crimes, genocidal acts and torture have been added to the list of acts which inculpate individuals in tort and crime.[57]

The clear trend in the last half century has been toward recognition of rights and duties held directly by individuals arising out of international law. Torts and crimes in violation of the law of nations almost always benefit from universal jurisdiction, even universal jurisdiction *in absentia*, which explains the advantage of this theory for plaintiffs.

Returning then to the argument that international crimes imply corresponding common law torts we can see the logic of this argument through two syllogisms:

SYLLOGISM 1:

Major premise:

There are a number of internationally recognized crimes which are customary international law.

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55 *In re Piracy Jure Gentium* [1934] A.C. 586.

56 William Blackstone, Commentaries on the Laws of England, 67 (facsimile of 1st ed. 1765-1769, Univ. of Chi. ed., 1979).

57 Eugene Davidson, The Trials of the Germans: An Account of the Twenty Two Defendants Before the International Tribunal at Nuremberg, 19 (1966).

Minor premise:

Just as in U.S. law, customary international law is an integral part of British common law.

Conclusion:

Thus, customary international crimes such as piracy, slave trading, and now the various war crimes and crimes against humanity are an integral part of the common law.

The logic of the above syllogism seems fairly compelling. Each of the premises is true, the syllogism is well formed so the conclusion seems inescapable. Let us now consider a second syllogism. The first major premise of the second syllogism is the conclusion of the first syllogism:

SYLLOGISM 2:

Major premise:

Customary international crimes such as piracy, slave trading, and now the various war crimes and crimes against humanity are an integral part of the common law.

Minor premise:

For each common law crime there is a corresponding common law intentional tort.

Conclusion:

Thus, international crimes have corresponding common law intentional torts.

This argument may seem somewhat surprising unless we understand that customary international law is an integral part of the common law. Once we recognize that proposition, the implications lead to the conclusion there exists a corresponding tort for each of the customary crimes under international law – and thus one can make a claim in torts such as torture in the common law even without an Alien Tort Statute.

The deductive argument, that international crimes imply corresponding common law torts, can also be proven inductively. The inductive arguments look to the practice of other states – which is of course one element of customary international law. Several other nations also allow private law domestic actions for crimes against international law. The best and most well known examples are the Alien Tort Statute[58] and Torture Victim Protection Act.[59] We

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58 28 U.S.C. § 1350 (2000).

59 Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2000) [hereinaf-

shall later see that in French Civil law as well as in Belgium and Senegal that one may combine tort claims with criminal claims via the *action civile*. Just as in the common law, customary international law in French civil law is an integral part of French law. Thus, even without an alien tort statute it is in theory possible to bring a tort claim for a violation of the law of nations in French law and those countries which are influenced by French law such as Belgium, Senegal, and literally dozens of other countries. In arguing that international torts exist or that international crimes give rise to corresponding common law torts, the Alien Tort Statute, as well as the writings of Blackstone and Coke, are persuasive evidence of the common law, and also as evidence of customary international practice in support of the existence of "torts in violation of the law of nations". Substantively, no one can argue against allowing tort compensation in terms of transactional justice: The purpose of justice is to right wrongs and law serves justice.

As to jurisdiction, it is logical to presume that if universal jurisdiction exists as to the substantive crime which is the basis of the intentional tort claim then it would logically also exist as to the corresponding common law tort. If the law permits the greater punishments of imprisonment or execution it also permits a lesser punishment of restitution.

2. Human Rights Protection through the Ordinary Common Law Tort Regime

Tort claims of individuals for wrongs committed overseas can of course also be brought as ordinary torts under British law. Customary common law torts such as wrongful imprisonment, battery, conversion, or action on the case could be applied to extra-territorial human rights violations, subject, however, to the ordinary rules of conflicts of law and without the benefit of universal jurisdiction which would exist in the case of crimes against humanity, war crimes, crimes against peace, piracy and slave trading.

In sum, human rights violations can be remedied in domestic British law through torts in violation of the law of nations, ordinary domestic torts and the Human Rights Act which essentially enables ECHR claims to be made in British courts. Remedies under the ordinary domestic tort regime are conditioned, as in the United States, by jurisdiction, immunity, and a number of domestic prudential concepts.

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ter TVPA].

II. Tort Remedies to Human Rights Violations in Civil Code Countries

A. France

Our examination of civil law countries is divided into two parts: Francophone and German civil law countries. We consider French civil law first among civil law countries because French law has had a marked influence on the construction of the European Communities and Union. To this must be added the extensive influence of the French civil code throughout the world. The French legal system is, like the British, a model for that of many other countries, notably in Africa but also in Québec.

The French legal system is also on its own terms sufficiently interesting to merit extensive consideration. As we have seen, American and British common law presume that treaties are not self executing and require ratification to have domestic effect. This is not the case in France. France is a monist regime.[60] Treaties, like international law generally in French law,[61] are an integral part of French law. Treaties are thus presumed to be self executing and require no parliamentary enabling act to have domestic effect. In fact, treaty law is hierarchically superior to French domestic law.[62] French treaties do require ratification, however.[63] Further, though self executing, they do not necessarily have "*effet direct*" (direct effect). That is, though we may presume that a French treaty generally creates individually enforceable rights and duties that

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60 « Une claire option moniste paraît a priori résulter du texte de l'article 55 de la Constitution du 4 octobre 1958, lequel déclare que 'les traités ou accords régulièrement ratifiés ou approuvés ont dès leur publication une autorité supérieure à celle des lois' ». ("A clear monist option appears to result a priori from Art. 55 of the French Constitution of October 4, 1958 which declares that 'treaties or agreements regularly ratified or approved have on publication an authority superior to that of laws'".) Pierre-Marie Dupuy*, Droit International Public*, Paris 2002: Éditions Dalloz, page 404 (author's translation).

61 « le 14° alinéa du Préambule de la Constitution du 27 octobre 1946 auquel on sait que le Préambule de la Constitution de 1958 fait un renvoi exprès, proclame l'attachement de la République « aux règles du droit public international » ("Line 14 of the preamble of the constitution of October 27, 1946, to which the preamble of the constitution of 1958 makes direct reference, declares the attachment of the republic 'to the rules of public international law'"). *Id.* at 408 (author's translation).

62 Constitution Française de 1958.

63 Pierre-Marie Dupuy, *Droit International Public*, Paris 2002: Éditions Dalloz, page 404.

presumption can be overcome.[64] In order to be directly enforceable by an individual a treaty in French law must at least be sufficiently precise (neither ambiguous nor vague) to permit objective decision[65] and must also not require on its own terms the necessity of creating domestic measures of enforcement.[66] The most conservative view also argues that the intention of the parties must have been to create directly enforceable rights on the part of individuals,[67] though one can argue that such is presumptively the case of all legal instruments.

Our discussion of French law will proceed from the most theoretical abstraction and move with greater refinement to actual legal practice. Such a method is chosen as it reflects the deductive reasoning so characteristic of French law, which reasons from general principles of law embodied in statutes to individual cases rulings which, in theory, only concern the actual parties to the case.

1. Customary Law

Though it is true that French treaties are self executing and thus require no parliamentary enabling act to have domestic effect, and as such are an integral part of French law[68], that is true only of ordinary legislation. The situation is less clear as to customary international law.[69] In all events, however, if customary international law is to be given direct effect within the French domestic legal order then the custom must be sufficiently clear so that it can be applied objectively.[70] That fact can obviate some disputes but not all. What of the case where customary law is in fact perfectly clear, say as to the *jus cogens* norm prohibiting torture? There the situation is more complex. The French courts of general jurisdiction (*Tribunaux de Grand Instance, Cours d'Appel*, and *Cour de Cassation*) recognize the superiority of customary international law to French legislation.[71] For example, where French domestic law would hold a

64 *Id.*, at 398.
65 *Id.*
66 *Id.*
67 *Id.*
68 Constitution Francaise de 1958, Art. 55.
69 Moncef Kdhir, *Juge Francais et Droit International non Ecrit,* 6 Revue du Droit Public, Novembre-Décembre 2003, 1581, 1582 (herafter Kdhir).
70 Pierre-Marie Dupuy, *Droit International Public*, Paris2002: Éditions Dalloz, page 398.
71 « Les juridictions judiciaires ne manifestent aucune réticence à invoquer la coutume internationale à l'appui de leurs décisions. Dans un arrêt rendu le 6 avril 1826, la Cour de cassation se référait déjà à la 'coutume devenue une maxime incontestable du droit des gens' ou de 'règle absolue du droit international'. » Kdhir, at 1584.

foreign head of state liable for crimes, the international custom of immunity for heads of state during their term of office prevented suit of the foreign head of state.[72] In contrast, disconcertingly,[73] the administrative courts, including the French constitutional court (*Conseil Constitutionnel*)[74] do not consider customary international law when interpreting administrative acts.[75] This is also true of the general principles of international law which, in French administrative courts, do not over-ride French administrative acts.[76] However, the fact is French courts of general jurisdiction take the opposite view both to custom and to general principles of law. French courts of general jurisdiction regard general principles of international law as hierarchically superior to and an integral part of French domestic law.[77] Thus in the case of Barbie (*Argoud*)[78] the *Cour d'Appel de Lyon* recognized that the crimes alleged were not merely crimes against French law but also against international law[79] and thus actionable in France. The court in *Argoud* also recognized the primacy of the general principles of international law as a part of international law.[80] While the split between the executive and legislature on this point seems problematic, claims for torts in violation of the law of nations would be ordinarily brought before a court of general jurisdiction (*Tribunal de Grand Instance*) which regards not only treaty law but also customary law as an integral part of the French domestic legal order. Consequently, French courts could recognize the possibility of an *action civile* in conjunction with a case prosecuting a crime under customary international law. Accordingly, we now turn our attention to the *action civile* in French law.

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72 'la coutume internationale s'oppose à ce que les chefs d'État en exercise puissent, en l'absence de dispositions internationales communes s'imposant aux parties concernées, faire l'objet de poursuites devant les juridictions pénales d'un État étranger' (Author's translation: international custom prevents making the head of state in office an object of the criminal jurisdiction of a foreign state, at least absent general international dispositions [to the contrary]) *Kadhaffi*. This is but one example where the cross-currents of the "war on terrorism" and human rights lead to the surprising result of mutually reinforcing each other and extending the reach of extraterritorial jurisdiction for torts.

73 Kdhir, at 1585-1586.

74 « La jurisprudence du Conseil constitutionnel accorde peu de place au droit international non écrit. » *Id.* at, 1582.

75 « ni l'article 55 de la Constitution ni aucune autre disposition de valeur constitutionnelle ne prescrit ni n'implique que le juge administratif fasse prévaloir la coutume internationale sur la loi en cas de conflit entre ces deux normes. » *Id.* at 1584.

76 *Id.,* at 1593.

77 *Id.*

78 Cass. Crim., 4 juin l964, Argoud, Bull, p. 410.

79 Kdhir, at 1585.

80 *Id.*

2. *Statute Law*

a) *A Hybrid of Tort and Crime: Action Civile*

In principle and practice victims of crime in France have the right to compensation in tort through an *action civile*.[81] One very interesting point of the *action civile* is that it can be initiated by the victim of the crime.[82] Historically the common law also permitted private persons to initiate prosecutions of crimes in order to conserve very limited judicial resources. That is no longer the case in the U.S. However, the same conduct may give rise to a proceeding in tort or in criminal law. Nevertheless, U.S. common law does not offer a procedure similar to the *action civile* even in the civil law jurisdiction of Louisiana[83] – though the Racketeering Influenced and Corrupt Organizations Act (RICO)[84] does permit a combination of civil and criminal claims in cases combating organized crime.

In the *action civile* criminal and tort procedures are combined. That combination offers a certain judicial economy by reducing the number of court proceedings. Article 2 of the French Penal Code[85] provides that:

> "all who have personally suffered a damage directly caused by the crime have a right to reparation of that damage by a civil cause of action. ['action civile'].
>
> Renunciation of the civil cause of action in no way suspends or stops the public prosecution, subject to the exceptions provided for in line 3 of article 6."[86]

Article 418, paragraph 2 "On the constitution and effects of the civil party" of

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81 Stefan Gewaltig, *Die action civile im französischen Strafverfahren*, Frankfurt am Main 1990: Peter Lang, page 6 (hereafter Gewaltig).

82 Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 Cal. L. Rev. 542, 669 (1990).

83 "In France, by virtue of the procedure of *la partie civile,* the civil action may be brought along with the penal proceedings but such is not the case in Louisiana or the United States." William E. Crawford, *Louisiana Civil Law Treatise: Tort Law*, § 3.1. (2000).

84 18 U.S.C. § 1962

85 Ordonnance nº 58-1296 du 23 décembre 1958 art. 1, Journal Officiel du 24 décembre 1958 en vigueur le 2 mars 1959. *available at*: <http://lexinter.net/PROCPEN/titre_preliminaire.htm>.

86 Author's translation. The original text reads: « L'*action civile* en réparation du dommage causé par un crime, un délit ou une contravention appartient à tous ceux qui ont personnellement souffert du dommage directement causé par l'infraction. La renonciation à l'*action civile* ne peut arrêter ni suspendre l'exercice de l'action publique, sous réserve des cas visés à l'alinéa 3 de l'article 6. » Ordonnance nº 58-1296 du 23 décembre 1958 art. 1 Journal Officiel du 24 décembre 1958 en vigueur le 2 mars 1959. *available at*: <http://lexinter.net/PROCPEN/titre_preliminaire.htm>.

the French Code of Criminal Procedure further states that:

> "All persons who, in conformity with Article 2, claim to have been injured by a wrong can, if they have not yet done so, move to be considered a civil party in the case. No lawyer is required to make this motion before the court. The civil party can, in support of their cause of action, ask for damages corresponding to the damages which they have suffered."[87]

Thus all persons who are directly injured through the criminal act have the right to compensation for the damages resulting there from.[88] However, the claim for damages must be made at trial, and may not be first made on appeal.[89] Interestingly, civil parties are disqualified from being witnesses in the criminal action.[90]

An *action civile* is not only of interest before French courts. The resulting compensation from damages to *parties civiles* may be enforced anywhere the defendant's assets can be found – even before common law courts, where familiar procedures for recognition and enforcement of foreign judgments are well established.[91]

The *action civile* is further evidence for the proposition that criminal liability generally creates tort liability. The *action civile* exists in at least French, Belgian, and Senegalese civil law and almost certainly in other jurisdictions which model their domestic law on French law. It is the author's hypothesis that a further examination of other civil law jurisdictions would reveal the *action civile*, or a homologue, exists in most civilian jurisdictions. A similar cause of action, the *Adhäsionsverfahren*, also exists in German civil law, though it is apparently less often resorted too. Civilian legal systems recognize 1) the actionability of international crimes in domestic proceedings and 2) the possibility that an injured plaintiff may sue the defendant criminal tortfeasor. This empirical evidence proves that in the Alien Tort Statute is not idiosyncratic.

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87 Article 418, French Code of Criminal Procedure (author's translation). The original text states: « Toute personne qui, conformément à l'article 2, prétend avoir été lésée par un délit, peut, si elle ne l'a déjà fait, se constituer partie civile à l'audience même. Le ministère d'un avocat n'est pas obligatoire. La partie civile peut, à l'appui de sa constitution, demander des dommages-intérêts correspondant au préjudice qui lui a été causé. », *available at*: http://lexinter.net/PROCPEN/constitution_de_partie_civile_tc.htm.

88 Art. 2 Code de Procédure Pénale (C.P.P.); Gewaltig, *at* 8.

89 Crim. 5.3.1964, J.C.P. 1964.ll.13689; Crim. 25.10.1966, J.C.P. 1966, 1, page 9.

90 Article 422 French Code of Criminal Procedure, *available at*: <http://lexinter.net/PROCPEN/constitution_de_partie_civile_tc.htm>.

91 See, e.g., *Raulin v. Fischer* [1911] 2 K.B. 93 (Eng.).

b) Article 689 French Code of Criminal Procedure (Code de Procédure Pénale)

Article 689 of the French Code of Criminal Procedure (*Code du Procédure Pénale*), provides that:

> "[t]he authors or accomplices of offences committed outside the territory of the Republic can be sued in the French courts and judged by them ... whenever an international convention grants jurisdiction to the French courts."[92]

Thus, if the suspect is in France then Universal jurisdiction exists for the wrongs listed in these conventions. According to Stern, Art. 689 applies to conventions that, according to their terms, are not self-executing such as Article 5 of the Torture Convention.[93]

3. Case Law

We have already discussed briefly the case of Klaus Barbie (*Argoud*) [94] and also *France v. Khaddafy*.[95] Here we will look in greater detail at two claims litigated in France due to genocide in Rwanda where the plaintiffs made motions as *parties civiles* for an *action civile*.

a) In Re Munyeshyaka[96]

W. Munyeshyaka, a Rwandan national, was charged in France with crimes against humanity and genocide. The aggrieved parties also made a claim for compensation in tort via the *action civile*. The lower court ruled that there was no jurisdiction in this case because the acts were committed outside of France and the victims and perpetrators were not French nationals. The French *Cour de Cassation* partially affirmed and remanded the case on the basis that while there was no universal jurisdiction as to genocide there would be universal ju-

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92 Brigitte Stern, *Universal Jurisdiction over Crimes Against Humanity under French Law-Grave Breaches of the Geneva Conventions of 1949-Genocide-Torture-Human Rights Violations in Bosnia and Rwanda*, 93 Am. J. Int'l. L. 525, 528 (April, 1999) (translation by Brigitte Stern; hereafter Stern).

93 *Id.*

94 Cass. Crim., 4 juin l964, Argoud, Bull, p. 410.

95 Kadhaffi.

96 *In Re Munyeshyaka* 1998 Bull. crim., No. 2, at 3., Cour de Cassation, Arrêt de 6 janvier 1998 (n° de pourvoi: 96-82491) *available at*: <http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXRXAX1998X01X06X00002X000.>

risdiction for torture under Article 689-2 of the Code of Penal Procedure.

This decision might seem odd at first: after all, genocide is clearly a crime under international law. What was the courts reasoning in Munyeshyaka?

The court notes that the crimes of genocide and complicity thereto are defined in Art. 211-1 of the French Code of Criminal Procedure and by the Convention Against Torture. However, in domestic French law the crime of genocide requires action in concert to execute a plan. In contrast, the crime of torture (a crime codified in Art. 222 of the French Penal Code) requires no such concert of action or plan. Further, the Genocide Convention of 1948 does not contain in its own terms any rule of universal jurisdiction. It merely authorizes state parties to adjudicate genocidal acts on their own territory or to constitute international tribunals to adjudicate such claims. The court thus implies that 1) there may have been no concerted plan of action of the Rwandan genocide; 2) even if there were, the French courts would not have jurisdiction to adjudicate such a claim under international law absent some positive act of the French legislator.

The court also considered claims of violations of international humanitarian law under the Geneva Convention. According to §§ 1 and 2 of Article 112-2, French Code of Criminal Procedure,[97] criminal principals and accomplices to serious violations of the Geneva Convention of 12 August 1949, those who violate the laws and customs of warfare, and those who commit crimes against humanity can, if found in France, be judged before French courts and that as a result claims against the defendant on the basis of torture would be able to be litigated in France even where victim and perpetrator were not French nationals provided the perpetrator be present in France. Having determined that on the basis of the facts and allegations that the complaint on the basis of genocide was ill founded, but that a claim against torture would be well founded the court partially annulled the earlier proceedings and remanded the case to the lower court for determination.

b) In Re Javor[98]

The case of *Procureur v. Javor*[99] involved a criminal prosecution of *Javor* for

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97 Law of 22 May, 1996, n° 96-432.

98 *In Re Javor*, 1996 Bull. crim., No. 132, at 379. French Cour de cassation, Criminal Chamber, March 26, 1996. (Cour de Cassation (Chambre criminelle) Arrêt 26 mars 1996 (Javor) N°: 95-81527) *available at*: <http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXRXAX1996X03X06X00132X000.>

torture of the Yugoslavian claimants who also brought tort claims using the *action civile*. The court noted that according to Art. 689-1 and Art. 689-2 of the French Code of Criminal Procedure all persons who, outside of French territory, have committed acts of torture as defined in the CAT, can be prosecuted and judged by France if found in France. In *Javor*, however, there was no indication at all that the defendants were on French territory. Whether the accused is in France must be determined by the prosecutor not the victim. Since the defendant was not proven by the prosecutor to be in France claims on the basis of Art. 689-1 and Art. 689-2 could not succeed.

The court did recognize that "all persons who are victims of a crime in contravention of the New York Convention [Against Torture of 1984] have a right to bring a tort claim [lit. *action civile*] against the criminal tortfeasor"[100] and that "denial of this right constitutes denial of an equitable trial as guaranteed by the European Convention on Human Rights".[101] However, while true in theory in practice the defendant was not in France and thus no claim could be made on the basis of the CAT.

The claims under the CAT could not be heard because of jurisdiction. However, plaintiffs also made claims on the basis of the four Geneva conventions which entered into force for France on 28 December 1951. There the court noted that state parties agree to make the necessary legislative measures to suppress via adequate sanctions grave violations of the terms of those conventions. However, the court also noted: 1) the obligations of those conventions only bind states, and 2) the conventions are not directly applicable in domestic law, and implies the reason therefore is that that particular convention is only binding states. Explicitly, the court also notes that the rights guaranteed by the four conventions are too general and ambiguous to be directly applicable. Art. 689 of the French Code of Criminal Procedure defining allowable cases of universal jurisdiction in France did not apply to the case because the four Geneva conventions are not directly applicable. Thus plaintiff had no claim on the basis of the Geneva conventions.

Though no claim was possible in this case on the basis of the Geneva conventions the court did make clear that all treaties are nonetheless an integral part of French law implying that on other facts a claim based on the Geneva conventions might succeed. The court states:

> "An international convention which is sufficiently precise and does not therefore require particular measures prior to its application is directly applicable.

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99 *Id.*
100 *Id.*
101 *Id.* (author's translation).

> Such a convention [i.e. one sufficiently precise to require no enabling legislation to have effect in domestic law] creates rights which benefit individuals".[102]

As we know, treaties in French law are self executing though they may in certain circumstance not grant directly enforceable rights to individuals.

It would be unwise to regard the French concept of "*effet direct*" as equivalent to *Drittwirkung* or "self execution": the French court, though it does speak of "*effet direct*" does not use the term *Drittwirkung*. A functionalist analysis of *effet direct* looks not at the artificial theoretical constructs created by lawyers and judges but rather at the practical effects those constructs have. If we look at *effet direct* on its own terms and as a representative of the French legal system rather than trying to force it to fit foreign legal abstract concepts either from the common law (self executing treaties) or German law (*Drittwirkung*) we avoid doctrinal confusion since the overlap of these concepts is not perfect. Conceptual abstraction permits explanation of a variety of different cases – but complex concepts whether adapted, adopted or used as metaphors or analogies almost always create at least some confusion when transposed into international law or when subsumed into other similar foreign legal concepts. Those problems can be avoided simply by considering not the abstraction but the concrete cases to which the abstract concept refers. This is the advantage of empiric induction. It does not lead to sweeping (or overbroad) conclusions but does resolve problems as they arise.

In any event, the court in *Javor* does not speak in terms of "self executing treaties". Rather it seems to assume that all treaties are self executing, but that some treaties cannot vest rights in individuals without enabling legislation simply because of their ambiguity.

Thus, the case against *Javor* was rejected not because there could be no claim under the Geneva conventions but rather because such a claim would have to be founded on some positive aspect of domestic French law.

The court in *Javor* does not address the issue whether the claim could have been made under customary law. Here there would be room for creative lawyering. If, as in *Javor*, there is no French domestic law on which to base the claim then the plaintiffs could argue that the facts constitute a violation of customary international law and that customary international law is an integral part of French domestic law. Just as in the common law, custom is an integral part of French law and the ordinary regime of *droit commun* could be applied to international torts, including those torts which are also violations of custom-

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102 *Id.* (author's translation).

ary international law.

On this point, whether and how jurisdiction may be obtained for international torts and crimes in French law, Brigitte Stern notes that:

> "These cases [*Javor* and *Munyeshyaka*] illustrate the reluctance of the French courts to assert universal jurisdiction. This attitude is not a French exception, but is quite widespread. According to Kenneth Randall, '[t]he universality principle remains under-utilized in the struggle to eliminate the most heinous crimes of the modern world.' This explains why in France the cases brought against Pinochet did not rely on universal jurisdiction but on passive personality jurisdiction."[103]

Just as we see that states are reluctant to lift the veil of immunity, so also are states hesitant to exercise universal jurisdiction. In fact, however, a compelling argument can be made that universal jurisdiction exists to all international crimes which are also violations of *jus cogens* first by looking at the fact that universal jurisdiction exists as to pirates and slave traders and also by looking at the teleology of the more modern international crimes which represent such heinous acts as to be of mutual concern of all nations and thus liable to universal jurisdiction. In any event, immunity and jurisdiction appear to be the two greatest limitations to liability, whether in crime or in torts, for severe violations of human rights.

B. Belgium

Belgium had offered universal jurisdiction *in absentia* without regard to the nationality of the victim or criminal, perhaps the most wide ranging exercise of jurisdiction over human rights in the world, certainly in Europe until 2003. However, the ICJ in *Congo v. Belgium* determined that one case prosecuted under this statute was a violation of the principle of immunity of acting ranking ministers and could not proceed. This fact, and enormous U.S. pressure, caused Belgium to modify its wide ranging law on universal jurisdiction in 2003.[104] The general interpretation is that the new legislation has severely curtailed Belgian extra-territorial jurisdiction. While it is true that now victims

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103 Stern, at 529.

104 Florian Hausweisner, *Belgium's Controversial War Crimes Law Amended*, 19 Int'l Enforcement L. Rep. 449 (November, 2003). *See*, Loi de 5 Août 2003 relative à la répression des infractions graves au droit international humanitaire, Title I, Belgian Penal Code of 5 August 2003, Art. 136 bis, *available at*: <http://www.ulb.ac.be/droit/cdi/Codepenal2003.html>.

must be Belgian or legal residents of Belgium at the time of the crime as we will see the statute remains very extensive and in some areas has actually expanded its protections.

1. The New Legislation

The new legislation entirely removes the old legislation and in its place modifies several sections of the Belgian Criminal Code. The principal new and modified sections of the Penal Code are summarized as follows:

* Art. 1bis of the Penal Code appears to be a reaction to *Congo v. Belgium* and provides that "In conformity with international law, prosecutions are prohibited against: heads of state, heads of government, and foreign ministers of foreign affairs during their term of office as well as other persons recognized as enjoying immunity under international law."[105] Note, however, that this limitation leaves open the possibility of suing those enjoying immunity after termination of their term of office.

* Art. 6 of the Belgian Penal Code was amended so that "all Belgians" now includes "all Belgians or any other person having their principal residence in Belgium".

* Art. 10 of the Belgian Penal Code now provides that foreigners can be prosecuted in Belgium for violations of human rights protected in Book II, Title 1 of the Belgian Penal Code if the victim was a Belgian national or resident or a person who, since at least three years in effect resides in Belgium habitually and legally.[106]

* Art. 12 of the Belgian Penal Code was extended so that not only international conventions but also international custom could be the basis of a claim.[107]

* Art. 136 was newly created and extensively defines a wide range of criminal activities and is extremely generous to victims. Crimes against international law under Art. 136 includes, for example, apartheid, destruction of historic monuments, and forced resettlements.[108] Such crimes can be heard by Belgian courts and punished under Belgian law (Art. 43 quarter, § 1, a Belgian Penal Code).

We can conclude from this that while Belgium has limited the claimants to

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105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.*

Belgian citizens and legal residents at the time of the crimes it has also broadened its protections to acts such as apartheid and forced resettlements. Further, claims may be made not only on the basis of international statute but also on the basis of customary law. Thus, the new legislation stands on surer ground. Of course it would be desirable if the protections of the Belgian law were extended at least to the citizens of other EU Member States and if the inquiry was not whether the claimant was a legal resident of Belgium at the time of the crime but rather at the time of prosecution. That being said, if the jurisdictional limits can be overcome plaintiffs would be able to combine their actions with claims as *parties civiles*. We now look at the Belgian law on *action civile*.

2. The Action Civile in Belgium

Belgian civil law, like French civil law, recognizes the existence of an *action civile* for damages in cases of crimes. It is worth noting that accomplices may be held liable for acts of principals. Accomplice liability in Belgian law is very extensive: The plaintiff need not prove that the defendant accomplice intended to aid the criminal principal to achieve the criminal object.[109] Plaintiffs need not prove fraudulent intention of accomplices to defraud[110] or criminal intent.[111] Further, all defendants, accomplices, and principals are liable jointly and severally for all damages resulting from the criminal tort, even absent any overt action or agreement to act in concert.[112]

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109 «Pour être coauteur ou complice, il n'est pas nécessaire qu'il y ait eu intention criminelle tendant à porter préjudice à la masse» (Cass. 13 septembre 1989, Rev. dr. pén. 1990, 59). (Author's translation: To be an accomplice or co-author it is not necessary that there have been the criminal intent tending to cause injury. (hereafter: accomplice cause).

110 «Pour condamner en droit un accusé comme coauteur ou complice d'une faillite frauduleuse, il n'est pas requis que l'accusé ait agi dans l'intention frauduleuse de porter atteinte aux biens; il suffit qu'il soit établi que quelqu'un ait commis ce délit et que l'accusé y ait participé d'une des manières énumérées aux articles 66 et 67 du Code pénal (art. 489 du Code pénal)» (Cass. AR P. 93.0510.N, 22 mars 1994, Arr. Cass. 1994, 299). Author's translation: To legally sanction an accused as accomplice or co-author of fraudulent bankruptcy it is not necessary that the accused acted with a fraudulent intention to damage goods; it suffices that it be established that someone has committed this wrong and that the accused participated in one of the manners enumerated in articles 66 and 67 of the Penal Code.

111 *Id.*

112 «Toutes les personnes condamnées pour un même délit sont tenues dans leur propre chef d'indemniser la partie civile, quel que soit le degré de participation de chacune d'elles au délit commun, et même si entre les personnes condamnées il n'y avait ni accord préalable, ni unité d'action» (Cass. 22 décembre 1947, Arr. Cass. 1947, 425) ». Author's translation: All persons found guilty of one crime are held individually re-

Having examined the Belgian statutory law we can now examine the cases litigated under those laws and their predecessor law to suppress grave breaches of international humanitarian law.

3. Case Law

How have the statutes worked in practice? The Belgian criminal laws, though curtailed as to victims who may sue, have in fact been substantively extended as outlined above. Though Belgium has procedurally limited access to its courts Belgium could legally extend its protection not merely to residents at the time of the crime but also to those who have become Belgian residents since the crime and even to other residents and citizens of EU Member States. The earlier Belgian legislation was not illegal, but rather impractical; the courts were somewhat overwhelmed with claimants, and some claims were not meritorious. Most importantly, the Belgian legislation angered the United States and Israel. But these political problems do not go to the legality of the statute rather to its political practicality. With that thought we now look at some litigated Belgian cases.

a) The Ariel Sharon Cases

A claim in tort was brought in Belgium against the head of state of Israel, Ariel Sharon, as well as several other Israeli defendants for massacres of Palestinian civilians at the Sabra and Shattila refugee camps which occurred prior to Sharon's term of office as head of state. The case was initially determined inadmissible as to all defendants. However, on appeal that decision was partially reversed. The Belgian appeals court ruled that the case against Sharon would not be considered as he was an acting head of state entitled to immunity for all acts, even those occurring prior to his term of office. However, the other defendants did not enjoy immunity and the jurisdiction was valid.[113] As to them the case was allowed to go forward even *in absentia*.[114] The Belgian Supreme

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sponsible to indemnify the civil party, whatever their degree of individual participation in the common crime, and even if among the condemned there was no agreement prior to the crime nor any unity of action.

113 *Sharon, Ariel, Yaron, Amos et Autres*, Arrêt de la Cour d'Appel de Bruxelles, 26/6/2002, *available at*: <http://www.sabra-shatila.be/documents/arrest020626.pdf>.

114 Alain Winants, *The Yerodia Ruling of the International Court off Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 Leiden Journal of International Law, 508 (October, 2003).

Court consequently affirmed this decision.[115] However, in the interim the ICJ at the case of *Congo v. Belgium* ruled that head of state immunity extended also to ranking ministers thus sowing confusion and injustice in the Belgian laws. This, and enormous pressure from the United States, caused Belgium to modify its law on universal jurisdiction. Consequently, in a second decision by the Belgian Supreme Court the case was dismissed in its entirety.[116] Let us then look at *Congo v. Belgium* to see exactly how procedural issues blunted substantive justice.

b) Belgium v. Congo

The ICJ case *Congo v. Belgium* appears to have been crucial in the hobbling of the Belgian law. We examine that decision to understand its limits in order to see what might still be done to the Belgian legislation to make it more effective. We conclude that the Belgian legislation could at least offer a cause of action to persons who are Belgian citizens or residents or EU citizens or residents at the time of the lawsuit. We also conclude that jurisdiction *in absentia* remains a possibility though the issue of whether and when non-Belgian victims may bring a cause of action is actually more important. Finally we conclude that the decision of the ICJ is morally indefensible and suffers from flawed logic.

i. Immunity

The Belgian law of universal jurisdiction *in absentia*, as applied in a Belgian case, was adjudicated by the International Court of Justice and found incompatible with international law in the case *Congo v. Belgium*. In *Congo v. Belgium*[117] the ICJ distinguishes between absolute and relative universal jurisdiction. In that case Abdulaye Yerodia Ndombasi, the Congolese minister of foreign affairs, was indicted by Belgium for war crimes during his term of office. During the court proceedings the term of the minister's office ended. The minister raised as a defence that at the time of indictment he enjoyed ministerial

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115 Cour de Cassation, Arrêt de 12 Fevrier, 2003. Unofficial English translation *available at*: <http://www.indictsharon.net/12feb2003dectrans.pdf>.

116 *Procureur contre Ariel Sharon et Consorts*, Cour de Cassation, Arrêt de 24/9/2003, *available at:* <http://www.coeicl.de/dokumente/sharon_judgement_240903_juris_cass_a1.pdf>.

117 Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), ICJ 14/II/2002, *available at:* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_toc.htm.

immunity. The defence was upheld. However, the court's determination that ministers enjoy immunity during their term of office appears to rest on fiat of the court and appears to have no authority of custom or treaty underlying it. The court's finding that official acts which constitute war crimes, crimes against humanity, and crimes against the peace may, indeed must, enjoy immunity as to heads of state and ranking ministers is simply illogical and indefensible.

The international court did not rule against Belgium on the theory that the exercise of universal jurisdiction *in absentia* was invalid *per se*. A majority of the judges clearly think that universal jurisdiction *in absentia* can be valid[118]. Instead the ICJ in *Congo v. Belgium* ruled against Belgium on the basis of immunity. According to the ICJ, government Ministers are analogous to heads of state and thus are immune as to official acts during their term of office even after expiry of their term. One can rightly ask, however, where this analogy comes from, for it seems to be purely an invention of the court. *Congo v. Belgium* is a rather shocking decision actually; the crimes of which the former minister was accused were clearly in violation of *jus cogens* yet the court is arguing that they must be granted immunity. Applying this logic several prosecutions at the Nuremburg or Tokyo tribunals should have been rejected. Unsurprisingly, the decision is severely criticized. We will consider that decision and its critique in order to see the limits international law places on exercise of jurisdiction and the rules it imposes on immunity of government officials.

The ICJ decision reached the conclusion that it is a firmly established rule of international law that high ranking government official enjoy immunity as to their official acts both in civil and criminal cases arising out of customary international law – even in cases where those acts are violations of *jus cogens*![119] The ICJ attempted to defend the indefensible offering the trite and unsatisfying rhyme that 'immunity' does not mean 'impunity'. The court notes that Ministers who are also international criminals can be prosecuted "(i) in their own country; (ii) in other states, if the state they represent waives immunity; (iii) after they cease holding office; and (iv) before an international court."[120] Obviously in practice none of these prosecutions will ever happen so the argument rings hollow. For example, acts committed during the term of office, so long as they are official acts, will be immune to prosecution even after the termination of the term of office. Thus, only acts undertaken for per-

118 Alain Winants, *The Yerodia Ruling of the International Court off Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 Leiden Journal of International Law, 500 (October, 2003).

119 *Id.*, at 497.

120 *Id.*, at 498.

sonal benefit and not in the service of the state will no longer be immunized after expiration of the term of office.[121] Winants rightly criticizes the ICJ's argument, calling potential prosecution "hypothetical" at best. He also criticizes the argument from analogy that a high ranking minister is like a head of state or diplomat which he also sees as a weak one. He also points out that the court ignores recent developments in international law.[122] Thus, Winants states that the ruling of the ICJ on immunities is: "very doctrinal and narrow-minded" and is "likely… to lead to a *de facto* total impunity of high ranking office holders".[123] He points out rightly that some crimes can only be committed with the state as their instrumentality and reiterates Lord Steyn's argument in *Pinochet 1*, that if immunity applies to official acts of state then "when Hitler ordered the 'final solution' his act must be regarded as an official act deriving from the exercise of his functions as Head of State'".[124] It is simply absurd to offer immunity to mass murderers in the interests of "order". Winants concludes that: "It may well be that the Belgian approach is foolhardy, but in contrast to this the ruling of the ICJ is lacking in courage"[125] which seems to me a polite way to call someone a coward. Winants critique is in all events well founded. The ICJ has taken one step backward to excusing the worst acts of barbarism in the interest of elevating "order" above "justice". The ICJ's rationale is based on a flawed assumption of international law that order is the primary concern of international law since order is a precondition to justice. That presumption is false – ultimately, justice creates order and injustice creates disorder – and is increasingly rejected as sovereignty evolves from an absolute hermetic Westphalian conception to relativised and increasingly integrated view due to globalisation of communication, production, and trade.

ii. Relative and Absolute Universal Jurisdiction

If the court decision in *Congo v. Belgium* is basically substantively indefensible is there anything to be salvaged from the erroneous decision which ignores basic principles of morality and justice? The more interesting portion of *Congo v. Belgium* concerns a distinction made by several judges in their separate opinions between "absolute" and "relative" universal jurisdiction ("*compétence universelle*" and "*compétence universelle par défaut*"). Again, the court seems to be struggling to invent new terms to cope with the new legal reality

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121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.*, at 499.
125 *Id.*

resulting from globalisation. The ideas of "absolute" and "relative" universal jurisdiction, though conceptually defensible, do not appear to have been a part of international discourse prior to *Congo v. Belgium*. That can be seen in the fact that the terms in French and English are different. "Universal jurisdiction by default" would be a better translation of "*compétence universelle par défaut*" than absolute jurisdiction. Similarly the term "*relativisé*" appears nowhere in the term "*compétence universelle*" which then would also translate as – universal jurisdiction!

According to the separate opinions of several judges in *Congo v. Belgium*, absolute universal jurisdiction (*compétence universelle par défaut*) is asserted when the state exercising jurisdiction to prescribe has no link to the act over which jurisdiction is asserted.[126] For example, where a defendant is not on the territory of the state and where the act did not occur on the territory of the state or involved any of its nationals there is a "*défaut*" (absence, default) of the defendant and any exercise of jurisdiction is universal in the widest sense of the term i.e. "absolute". In contrast, where there is some connection between the act over which jurisdiction is exercised and the territory or nationals of the state exercising jurisdiction to proscribe we can speak of relative universal jurisdiction or "*compétence universelle*" – for there is no absent defendant or absent act.[127]

The ICJ in *Congo v. Belgium* implies that relative universal jurisdiction is permissible under international law[128] and draws a distinction between absolute universal jurisdiction and relative universal jurisdiction.[129] It does not determine when or whether absolute universal jurisdiction is permissible, though the historic example of pirates indicates that in some instances absolute jurisdiction is admissible under international law. Pirates are *hostes humani generis*,[130] enemies of all mankind, and as such are subject to universal jurisdiction. War criminals, mass murderers and those who torture are also enemies of mankind and should also be subject to absolute universal jurisdiction.[131] Relative univer-

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126 Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on The Congo v. Belgium Case,* European Journal of International Law, 13 Eur. J. Int'l L. 853 *available at:* <http://www.ejil.org/journal/curdevs/sr31-03.html#31-3> (hereafter Cassese).

127 See, *Congo v. Belgium,* opinion of President Guillaume and opinion of Judge Higgins, Kooigmans and Buergenthal.

128 *Id.*

129 Cassese.

130 See, e.g., *U.S. v. Smith*, 18 U.S. 153; 5 L. Ed. 57; 1820 U.S. LEXIS 250; 5 Wheat. 153 (1820).

131 „Folterer, Mörder und Kriegsverbrecher sollten wie früher Piraten und Sklavenhändler als Feinde des Menschengeschlechts behandelt werden." (author's translation: "Those

sal jurisdiction is, however, a lesser infringement on another state's sovereignty than absolute universal jurisdiction. An exercise of relative jurisdiction would therefore be more likely to be seen as consistent with a state's international obligations.

Congo v. Belgium does not address the issue of the permissibility of absolute universal jurisdiction.[132] However, state practice is increasingly admitting universal jurisdiction, including absolute universal jurisdiction.[133] Thus, reasoning *a maiore ad minus*, relative universal jurisdiction is probably valid under customary international law.

Absolute universal jurisdiction is somewhat controversial, particularly in criminal cases. Yet in some cases, for example piracy, and probably war crimes as well, absolute criminal jurisdiction is clearly permissible under international law. States may legally exercise their power to prescribe outside of their territory under: 1) a theory of passive personality, wherein a state can prosecute crimes against its nationals, 2) a theory of active personality, wherein it prosecutes its criminal nationals or 3) under the protective principle which permits a state to defend emanations of its sovereignty outside its own territory such as its currency against counterfeiters.[134] These are not the only theories under which jurisdiction to prescribe may be legally exercised. But these are the main theories. Absolute universal jurisdiction is less problematic in civil cases[135] because there is no question of the state exercising power over a life or liberty interest but merely over a property right.

In sum, the court in *Congo v. Belgium* admits at least that Ministerial immunity is not an absolute right and can be at least waived if not derogated from. Further the court did not rule that jurisdiction *in absentia* was *per se* illegal. Still, the argument that a Minister can be immune for acts which are violations of *jus cogens* due to immunity simply runs contrary to the trend of international law since Nuremberg. Consequently, it is possible that the customary practice of states will outpace the court which they created and that the authors of the majority opinions in *Congo v. Belgium* will one day feel embarrassed, if

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who torture and commit war crimes should, like the pirate and slave handler of yore, be handled as common enemies of all humanity"). Thomas Giegerich, „Extraterritorialer Menschenrechtsschutz durch U.S. Gerichte: Sachwalterschaft für die Internationale Gemeinschaft oder judizieller Imperialismus?", in: Eckart Klein, Christoph Menke (eds.), *Menschheit und Menschenrechte: Probleme der Univalisierung und Institutionalisierung* (2001) p. 163. *Also see: Filartiga.*

132 Cassese.

133 *Id.*

134 *Id.*

135 *Id.*

not ashamed, at their failure to protect the innocent victims of failed states. After all, it is the practice of states which makes international customary law, the ICJ merely confirms it. Legal decisions in international law are only persuasive evidence of customary international law.[136]

C. Senegal – The Habré Cases

It might seem odd to look at the law of a developing country to determine how to protect human rights globally via private tort law. However, the third world is where most human rights abuses occur. Further Senegal, a former French colony, is an ACP.; Member and its legal system is modelled on that of France. Like France and Belgium, Senegal is a civil law country signatory to the New York Convention Against Torture of 1984 (CAT) offering its plaintiffs extra-territorial jurisdiction in a very limited number of cases and also offering victims of crimes the possibility of constituting themselves as parties to the case in *action civile*. A famous case against Chad's former dictator, Hissène Habré was litigated in Senegal which we now examine to see the extent and limits of extraterritorial jurisdiction in a developing third world country.

The relevant cases we will briefly examine are *Ministère Public et François Diouf v. Hissène Habré*[137] and *Souleymane Guengueng et autres v. Hissène*

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136 "With respect to the International Court of Justice, Article 59 of the ICJ Statute expressly states that '[t]he decision[s] of the Court ha[ve] no binding force except between the parties and in respect of that particular case.' ICJ Statute, June 26, 1945, art. 59, 59 Stat. 1055, U.S.T.S. 993. With respect to the European Court of Human Rights, the Court is only empowered to 'interpret[ ]' and 'appl[y]' the rules set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Apr. 11, 1950, 213 U.N.T.S. 221, E.T.S. No. 5 ('European Convention') – an instrument applicable only to its regional States parties--not to create new rules of customary international law. See European Convention art. 32 (stating that the Court's jurisdiction 'extend[s] to all matters concerning the interpretation and application of the Convention'); see also ICJ Statute art. 38 (listing judicial decisions as 'subsidiary,' rather than primary, sources of customary international law). Accordingly, the international tribunal decisions cited by plaintiffs are not primary sources of customary international law. …these decisions may constitute subsidiary or secondary sources", *Flores v. Southern Peru Copper Corp.* 343 F.3d 140, 169-170, 62 Fed. R. Evid. Serv. 741, (2nd Cir., Aug 29, 2003) (also explaining that ECHR decisions are at most a secondary source of international law.

137 Arrêt n° 135 du 04-07-2000 / Accusation (Senegal: Cour d'appel de Dakar, 2000).

Habré[138]. The aforementioned appellate decision determined that an *action civile* and criminal prosecution against former Chadien dictator Hissène Habré was not admissible in Senegalese domestic law because "Senegalese positive law does not at present include a cause of action for crimes against humanity".[139] Art. 295-1 of the Senegalese Penal Code does provide for a cause of action for torture, thus meeting Senegal's treaty obligations under Art. 4 of the Convention Against Torture. However, Art. 669 of the Senegalese Code of Criminal Procedure only admits universal jurisdiction under an express number of limited cases, namely for crimes and torts which threaten the security of the state (as opposed to the security of its citizens) and for counterfeiting.[140] The court notes the fact that a crime is universally punishable does not necessarily mean that a particular court has jurisdiction to punish,[141] i.e. it reiterates that while states have a duty not to commit acts in violation of *jus cogens* they do not have a duty to remedy other state's violations of *jus cogens*.[142] The court in *Ministère Public et François Diouf v. Hissène Habré* interprets the extraterritorial jurisdiction enumerated in Art. 699 Code of Criminal Procedure as an exhaustive list of all possible jurisdiction. That is probably the better. Similarly, the court rejected the argument that the Convention Against Torture displaces Art. 699, again likely correctly.[143]

In its own terms then the decision seems to conclude that Senegal does not recognize the jurisdiction of its own courts to punish crimes against customary international law absent a Senegalese statute transposing those crimes into domestic law as domestic crimes or through explicit mention in the Senegalese Penal Code as crimes over which extraterritorial jurisdiction may be exercised and possibly both. While the decision has been criticized as being the product of executive intervention,[144] there are some points for hope within its terms. Though a court in Senegal may not consider itself properly seized to adjudicate the case of Habré, because its statute on extraterritorial jurisdiction does not go

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138 Arrêt n° 14 du 20-3-2001 Pénal (Cour de Cassation, 2001).

139 Arrêt n° 135 du 04-07-2000 / Accusation (Senegal: Cour d'appel de Dakar, 2000).

140 *Ministère Public Et François Diouf Contre Hissene Habré,* Arrêt n° 135 du 04-07-2000 / Accusation (Senegal: Cour d'appel de Dakar, 2000), Point 3°, decision on the merits (« sur le fond ») *available at*: <http://www.hrw.org/french/themes/habre-decision.html> (hereafter Habré).

141 *Id.*, Point 3°, decision on the merits (« sur le fond »).

142 Sampson v. Federal Republic of Germany (1997) 975 F.Supp. 1108.

143 *Id.*

144 Dustin N. Sharp, *Prosecutions, Development, and Justice: The Trial of Hissein Habré*, 16 Harv. Hum. Rts. J. 147 169-170 (Spring, 2003); Reed Brody, *The Prosecution Of Hissène Habré – An "African Pinochet"*, 35 N. Engl. L. Rev. 321, 331-332 (Winter, 2001).

far enough, the court does recognize the principle "*aut dedere, aut judicare*".[145] The court also recognizes that Art. 27 of the Vienna Convention prohibits a state from interposing its domestic law to excuse its non-observance of a treaty obligation.[146] Consequently, in the face of an extradition request, the court implies that Senegal would be compelled to deliver Habré to a state which was willing to prosecute him.

Interestingly, the Senegalese appellate court (*Cour d'appel*) cites French law. It notes that, after France enacted Art. 221-1 of the French Penal Code, which criminalized torture it then enacted the Law of 16 December 1992, (entry into force, 1 March 1994), which introduced Art. 689 into the French Code of Criminal Procedure. Art. 689 permits universal jurisdiction over a number of crimes including torture. Thus, the Senegalese court seems to accept the decision of the French court – that the court requires the enactment of a special law granting jurisdiction over crimes of torture – as persuasive evidence as to Senegalese. The results are of course unfavourable for human rights but internal logic is not wholly absent from the court's argument.

This case was appealed to the Senegalese Supreme Court (*Cour de Cassation*) which affirmed the results of the Appellate court (*Cour d'appel*) for essentially the same reason, noting, however, that Habré was under house arrest and again implying that he could be extradited to another country if so accused.[147] Since these cases were litigated an action has been brought against Habré in Belgium.[148] This may be the best hope for justice in this case, so it may not yet be over.[149]

D. Germany

The final European Member State whose law we shall examine is Germany. We are looking at German law last because the majority of civil law countries

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145 *Habré*, Point 3°, decision on the merits (« sur le fond ») *available at*: <http://www.hrw.org/french/themes/habre-decision.html>.

146 *Id.*

147 *Souleymane Guengueng et Autres c. Hissène Habré*, Arrêt n° 14 du 20-3-2001 Pénal (Cour de Cassation, 2001), *available at*: <http://www.hrw.org/french/themes/habre-cour_de_cass.html>.

148 The complaint in the Belgian case is *available at*: <http://www.hrw.org/french/press/2003/tchad0603.htm>.

149 Dustin N. Sharp, *Prosecutions, Development, and Justice: The Trial of Hissein Habré*, 16 Harv. Hum. Rts. J. 147 170-171 (Spring, 2003).

in Europe more closely follow French civil law. However, as German civil law has some basic differences – notably, a greater emphasis on case law and less emphasis on deduction of rules of law from general principles as well as less doctrinal influence on the substantive law it certainly merits investigation. German civil law is more recent and thus seen as more modern and has successfully been exported to countries throughout the Far East and Eastern Europe. Further, the German doctrine of *Drittwirkung* strongly influences the question of individual rights both with respect to the state and among private persons *inter se*. Since our discussion of third party effect (*Drittwirkung*) immediately follows this chapter it seems appropriate to close this chapter with a brief examination of German law. We will see, however, that though there are some differences between German and French civil law that they are more similar than different as to the question of whether and when individuals have directly enforceable rights before national courts for claims arising out of international law.

1. German Statute Law

a) Adhäsionsverfahren

The *Adhäsionsverfahren* is the German homologue to the *action civile*. Essentially, like the *action civile*, it permits the incorporation of tort claims in a criminal trial in order to avoid the risk of inconsistent judgments and for reasons of judicial economy.

According to § 403 para 1 line 1 Code of Criminal Procedure (StPO) injured parties can make claims for monetary compensation in criminal trials. The right to compensation is covered in § 823 para 2 German Civil Code (BGB) in connection with § 266 German Criminal Code (StGB). Thus, at least in theory, it would be possible to bring an *Adhäsionsverfahren* so that a criminal prosecution would also result in compensation to claimants. Such procedures are, however, in practice rare. There are several possible reasons for this: The plaintiff must know that they have the right; the plaintiff must take the initiative and ask for the application of the right; plaintiffs may prefer to go before the civil courts; the *Adhäsionsverfahren* is obscure and complicates the proceedings; and, finally, the penal judge may be uncomfortable determining the existence and extent of tort damages. Despite these reservations, the *Adhäsionsverfahren*, like the *action civile* and Alien Tort Statute, is evidence of the general principle of law that ordinarily crimes imply corresponding torts which can be the basis of a claim under customary international law in those states where customary international law is an integral part of the domestic legal order – the case of France, Britain, and the United States.

b) § 7 German Criminal Code (StGB)

German law applies the passive personality extraterritorial jurisdiction in § 7 of the German Penal Code which states:

> "(1) German penal law applies to acts which in foreign countries are directed against Germans when the act at the place where the action occurred is sanctioned by punishment or the place of the act is under no sovereign's penal law.
>
> (2) For other acts which occur in foreign countries German penal law applies when the deed at the place of the act is sanctioned by punishment or the place of the act is under no sovereign's penal law and the actor
>
> 1. at that time was a German or since the occurrence of the act has acquired German nationality or
>
> 2. at the time of the act was a foreigner and is in Germany and, although the extradition law permits his extradition according he has not been extradited because no extradition request was placed or the extradition request was denied or the extradition is not executable."[150]

Thus, for example, where a German citizen sexually abuses a minor child citizen of Kazakhstan and then returns to Germany and such sexual abuse is punishable both under the law of Kazakhstan and in German law the criminal act may be punished in Germany despite the passage of the statute of limitations[151] since (like RICO) § 7 StGB looks not at procedural aspects of foreign law but rather only to the substance of the law. It seems that Germany has a doctrine similar to British double actionability which requires that extraterritorial crime be punishable both in the domestic and foreign legal system.

2. German Case Law

a) Malenkovic

In the *Malenkovic*[152] (Varvarin bridge) case the Yugoslavian survivors and relatives of a NATO air-strike against a bridge in Yugoslavia sued Germany in German courts for a violation of the Geneva conventions arguing that the bridge attacked was a civilian target. The facts of this case are thus very simi-

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150 Author's translation.

151 BGH 3 StR 437/99 – Beschluss v. 08. März 2000 (LG Hannover).

152 *Malenkovic*, Beschluss v. 10 Oktober 2003 (LG Bonn), Az.: 1 O 361/02 *available at:* <http://www.uni-kassel.de/fb10/frieden/themen/NATO-Krieg/varvarin-urteil.html>; <http://www.justiz.nrw.de/RB/nrwe/lgs/bonn/lg_bonn/j2003/1_O_361_02urteil20031210.html>.

lar to those of *Bankovic*.[153] Unfortunately, the result was also similar: no liability was found.

The German trial court (1st Civil Chamber, Landgericht Bonn) determined that the case was admissible jurisdictionally as founded on § 18 Civil Process Ordinance (ZPO).[154] However, the substantive claim was determined to be without merit.[155] The plaintiff was required to pay the defendant's costs, which is the ordinary rule in Europe, unlike the U.S. On the merits, the court determined that the plaintiff had no cause of action either in German domestic law or in international law and rejected the argument that Art. 25 of the German Constitution (*Grundgesetz*) would allow a remedy under international law for even if Art. 25 applied the court determined that no violation of international law existed.

Though the court admits that torts in violation of the law of nations can exist it ascribes the right of remedy not to the individual injured but to their state relying on the rule that, generally, individuals have no legal personality in international law. This erroneous view merits a probing analysis in order to demonstrate why it is also a dangerous view.

It may have been true in 1940 that, aside from the exceptions of piracy and slave-trading, individuals had no directly enforceable rights under international law. Today, however, that principle admits of many more exceptions, and those exceptions are growing. As recently as 1970 torture may not have been banned under customary international law. Today it clearly is.

The court in *Malenkovic* attempts to explain away the many exceptions to the increasingly anachronistic and outdated rule by attributing the enforcement of individual rights under international law to states. The court even goes so far as to try to argue that individual rights arise not from custom – despite plenty of state practice to the contrary – and attempts, unpersuasively, to argue that individual rights arise under international law only out of conventions and trea-

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153 Vlastimir and Borka Bankovic and Others v Belgium et al., App. No. 52207/99, 12.12.2001, (2002) 41 ILM 517, *available at*: http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=bankovic&sessionid=709433&skin=hudoc-en. http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=6223&sessionId=709433&skin=hudoc-en&attachment=true.

154 Beschluss v. 10 Oktober 2003 (LG Bonn), Az.: 1 O 361/02, *available at:* <http://www.uni-kassel.de/fb10/frieden/themen/NATO-Krieg/varvarin-urteil.html>; <http://www.justiz.nrw.de/RB/nrwe/lgs/bonn/lg_bonn/j2003/1_O_361_02urteil20031210.html>.

155 *Id.*

ties. The court at best is unintelligent, at worst dishonest. Obviously all rights are enforced by states! Taking the courts logic to its conclusion no individual anywhere has any right – for they must depend on the state for the defence of that right. And that reveals the danger of the courts reasoning: it elevates the state above the people who constitute it. If people do not have rights, except as mediated by states, then all freedoms are enjoyed only at the grace of the state. Any totalitarian would be pleased with the courts reasoning. However, the court exactly reverses the roles of the people who constitute the state in order to protect their rights. One can justifiably call the decision in *Malenkovic* reactionary. The same result could have been reached on other more defensible grounds. In any event, the *Declaration des Droits de l'Homme*, the Universal Declaration of Human Rights, and countless constitutions all echo one commonality: States do not create human rights. They recognize them. States, constituted by persons, are compelled to recognize human rights because they are inherent to the human condition. The fact that states do not always recognize human rights does not change the fact of their existence. It is exactly because human rights are of universal validity that they can be enforced against outlaw and pariah regimes. Human rights are inherent to the human condition and thus inalienable, and states ignore this fact at their own peril: international law admits a right of self determination and to democracy. Essentially, though the court may not realize it, it is arguing that human rights are a mere creation of the state and can thus be destroyed at will, which is the essence of totalitarianism. The court thus elevates a legal fiction above reality. Further, if we examine the national and international instruments it is clear that human rights are not conceived by other states or the international system as anything other than an inherent and thus inalienable part of the human condition. Finally, the court's reasoning is tautological: all legal rights are enforced by states. So arguing that human rights are something other than inherent and inalienable (an argument which would please any fascist) because those rights are protected (or not) by states ignores the real question: whether, and why, per the court, human rights are alienable. The court does not answer that question because it cannot, at least not defensibly within a liberal legal order.

How does the court's flawed tautological argument play out? Legally speaking, the court's argument, which fundamentally opposes human rights, ignores the role of *jus cogens* and also natural law in shaping individual human rights in international law. As Justinian, Cicero,[156] Aquinas, and Aristotle[157]

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156 Aquinas's famous maxim is "Lex Mala, Lex Nulla" – a bad law is no law at all. Aquinas echos earlier statements by Justinian and Cicero, for example: "What of the many deadly, the many pestilential statutes which nations put in force? These no more deserve to be called laws than the rules a band of robbers might pass in their assembly....

argue, immoral laws are not law at all but at most a perversion of the law. As we saw in the case of Eichmann, some conduct is so heinous as to escape the ordinary procedural safeguards of non-retroactivity because it is wrong in all places and at all times. The allegations in *Eichmann*, if true, were so heinous that any person should naturally have recoiled in horror. The court's argument, like so many erroneous positivist arguments of the last bloody century ignores entirely the subordination of law to morality which must exist in any just legal order.

Returning to *Malenkovic*, the court acknowledged that the European Convention on Human Rights in Art. 5 (5) creates a directly enforceable individual right via Art. 34 ECHR. However, the court applies the same logic as *Bankovic*, that the ECHR does not apply, because the bombardment took place outside of the jurisdiction of any contracting state party and thus does not meet the jurisdictional requirement of Art. 1 ECHR.[158] Just as in *Bankovic*, this ignores that the planes flew from NATO basis under orders from state parties to the ECHR. The court thus presents us with a fine piece of formalism in the service of inhumanity.

Arguments by the plaintiffs were also made on the basis of the Hague convention on land warfare. The court rejects the argument that the Hague convention on land warfare only applies between state parties and any right of compensation therein is the right of the state and not the individual.[159] Similarly the court ruled that the Geneva Convention on Protection of Civilians in War and its optional protocol only applies to the relations of state parties and not to their citizens stating that while civilians "enjoy protection" under Art. 51 of

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[T]herefore Law is the distinction between things just and unjust, made in agreement with that primal and most ancient of all things, Nature; and in conformity to Nature's standard are framed those human laws which inflict punishment upon the wicked but defend and protect the good." See, Cicero, "Laws" in: Clarence Morris, (ed.), *Great Legal Philosophers: Selected Readings in Jurisprudence* 51 (1997).

157 "If the written law tells against our case, clearly we must appeal to the universal law, and insist on its greater equity and justice." Richard McKeon, *The Basic Works of Aristotle*, "Rhetoric", page 1374 (1941). For Aristotle customary law and natural law appear to have been identical.

158 *Malenkovic*, citing ECHR case 12.12.2001, EuGRZ 2002, 133.

159 Art. 2-3 Hague Convention on Land Warfare, 18 October 1907 (Art. 2 HLKO). The court also refers the reader to the *Distomo* case, German Supreme Court (BGH), judgement of 26 June 2003, Az.: III ZR 245/98, published in NJW 2003, 3488 et seq., *available at*: <http://www.jurathek.de/showdocument.php3?session=0&ID=6052&referrer=446> (hereafter BGH, 26.6.2003). For more details see German Supreme Court decision of 13.6.1996, (BGH Az.: III ZR 40/95, in NJW 1996, 3208 f).

that convention that does not give rise to a corresponding right legally enforceable by an individual. Even Art. 51's provisions for liability do not create rights enforceable by individuals according to the court noting that the Convention and its Protocol do not establish any procedure for individuals to make claims.

The court also rejects plaintiff's argument that the complainants right stems from the law of German state liability. The court admits that the individual may have guaranties in national law more extensive than those in international law, but in *Malenkovic* holds that such is not the case. The plaintiffs' attempt to rely on the general liability principles of German tort law embodied in § 823 of the German Civil Code (BGB) also fails[160] because German state-liability for torts does not exist in the case of armed conflicts. Rather, such cases are governed by international humanitarian law[161] and, essentially, the German court sees the state-liability regime as "suspended" in time of war leaving only the province of international law – which as we saw earlier the court believed, erroneously, did not directly give rights (or duties) to individuals. For similar reasons the court rejected the liability of the Civil Service.[162]

What is surprising about the *Malenkovic* decision is not that liability was not found, but rather the reasons for which it was not found. Plaintiffs in both *Bankovic* and *Malenkovic* argued that the aircraft flew from bases in Europe and were directed to do so by European states. Consequently it could be logically argued that while the targets were not under jurisdiction for Art. 1 of the ECHR the tortfeasor was. The courts also completely ignore that sending the bombers was an exercise of jurisdiction – jurisdiction to enforce. Ignoring that, even if one accepted the courts' decision as to Art. 1 ECHR that still leaves the fact that the plaintiffs may have had tort claims under customary international law. The court in *Malenkovic* essentially ignores any possibility that the plaintiffs might, as individuals, have rights against the tortfeasors, say for air-piracy or state terrorism. The court could of course have reached the same result merely by arguing that the actions of the pilots were *acto jure imperii* and that as such they were subject to immunity. Instead it takes a conservative, even reactionary, approach and ignores the trend toward recognizing that individuals do in fact have directly enforceable rights and duties under international law and the existence of customary international law to that effect. To add insult to injury the court requires the plaintiffs, who have lost their relatives to a possi-

160 German Supreme Court decision of 13.6.1996, (BGH Az: III ZR 40/95, in NJW 1996, 3208 f).

161 BGH, 26.6.2003.

162 § 839 German Civil Code in connection with Art. 34 German Constitution.

bly illegal aerial bombardment, to pay compensation of the defendants' court costs.

b) The Distomo Case

In the *Distomo* case,[163] Greek plaintiffs sued the German government for compensation for a massacre of 300 Greek nationals in 1944. Though the case had been heard by the highest Greek court (finding for plaintiff),[164] the German Supreme Court did not give *res judicata* effect to that decision for procedural reasons.[165] On the merits, the German Supreme Court (BGH) determined that the act, though illegal, was nonetheless subject to state immunity[166] because individuals in 1944 had no directly enforceable individual rights under international law, and thus a claim made now for an act in violation of international law in 1944 does not result in a right to compensation.[167] The court also argues that only states had directly enforceable rights under international law at the time of the crime.[168]

The court also determined that the appeals court was correct in finding that the Federal Law for Compensation of Victims of national-socialist persecution[169] did not apply. The court did agree, however, that it could hear the claim as an ordinary tort claim. Though Art. 5 (2) of the London Convention[170] had held such claims in suspension until a final settlement of the peace the "two plus four treaty"[171] operated in fact as the necessary final settlement of the war.[172] However, once again, state immunity prevented any valid substantive claim.

The court also noted that there was no liability of the civil service under § 839 German Civil Code – just as in *Malenkovic*. This raises the issue of parallels and divergences between *Distomo* and *Malenkovic*.

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163 BGH, 26.6.2003.

164 *Prefecture of Voiotia v. Federal Republic of Germany*, Case No 11/2000, Judgment of 4 May 2000, Greek Areopag. Note however that a later decision refused to enforce the judgment against German assets in Greece on the basis of internal Greek law rendering the decision essentially symbolic.

165 *Distomo,* BGH, NJW 2003, pp. 3488-3489.

166 *Id.*

167 *Id.*, at 3491.

168 *Id.*

169 *Bundesentschädigungsgesetz – BEG* of 18 September 1953 (BGBl. I p. 1387).

170 Published 4 July 1956, BGBl. II S. 864.

171 12 September 1990, BGBl. II S. 1318; in force since 15 March 1991, BGBl. II S. 585.

172 BGH, NJW 2003, 3488, at 3490.

Though *Malenkovic* was decided by the absence of jurisdiction and not by reason of state-immunity, *Distomo* and *Malenkovic* are parallel in that *Distomo* holds that in a war-zone ordinary rules of liability are largely suspended and that individuals do not generally have directly enforceable rights under international law. However, *Distomo* is a better decision because 1) the court in *Distomo* recognizes the evolution toward directly enforceable individual rights and duties under international law, 2) the court in *Distomo* reaches the real issue: whether states are immune for violations of *jus cogens*, but limits its decision to the facts of the case, holding that states are currently immune for past violations of international law if the state would have been immune at the time of the violation of international law. Thus, the court in *Distomo*, unlike the court in *Malenkovic*, leaves room for evolution of the law either as to whether immunity would not apply to an Act of State in violation of *jus cogens* today. The court in *Distomo* also seems more open to the idea of the possibility of directly enforceable individual rights under international law than in *Malenkovic*, though holding that such rights do not in fact exist given the facts of the *Distomo* case.

We can also compare *Distomo* to *Sampson v. Germany* [173] at least on the facts and note that the parallel U.S. case reaches the same results for similar reasons: state immunity. It seems rather clear that immunity is, internationally, the greatest obstacle to remedies for individual claimants in cases of serious violations of international law. The second greatest obstacle, at least in Germany, is the persistence of the notion that international law only grants remedies to states. However, as was abundantly demonstrated in American, British, and Francophone law this is simply no longer no longer a valid view of international law. On this point Germany, or at least the court in *Malenkovic*, finds itself taking the minority view.

Synthesis: Private Law Protection of Human Rights before the E.U. Member States

As we have seen plaintiffs are not without remedies in the cases brought before domestic courts of the Member States of the European Union for extra-territorial violations of human rights law, including the possibility of making claims for compensation as *parties civiles* in an *action civile*. In theory this would also be possible in German law through the *Adhäsionsverfahren*. Though it is clear that the principal remedy for human rights violations in

173 *Sampson v. Federal Republic of Germany* (1997) 975 F. Supp. 1108.

Europe is criminal prosecution and the principal remedy for human rights violations in U.S. law is tort, both systems do not exclusively rely on tort law or criminal law to punish, deter, and compensate victims of human rights violations even where those victims are not nationals of the forum jurisdiction. Tort law and criminal law should play complementary roles in preventing and remedying violations of human rights.

Part II: Private Law Protection of Human Rights under the European Convention on Human Rights

Introduction

What are the possibilities and limits of tort law as a remedy for violations of private rights of individuals under the European Convention on Human Rights (ECHR)? To ultimately answer that question we will first consider: some points of general interpretation and individual rights under the ECHR.

I. The European Convention on Human Rights (ECHR)

We can best approach understanding *Drittwirkung* and competing hierarchical categories using the functionalist method of looking at practical causes and effects empirically and inductively. With this method we can now attempt to analyse the scope of the rights guaranteed by the ECHR. We proceed in both cases by analysing the relevant treaty's terms and then looking at leading cases that attempt to interpret and apply the treaties. We conclude that opportunities do exist for the protection of human rights via tort law, even extraterritorially, within the ECHR.

A. The Terms of the European Convention on Human Rights

1. Article 1 ECHR

Art. 1 of the European Convention on Human Rights states:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

Two notes are important here. First, the convention on its own terms expressly extends its protections to "everyone" "subject to the jurisdiction" of the contracting state[174] without regard to nationality.[175] This protection goes beyond

174 Karl Josef Partsch, *Die Rechte und Freiheiten der europäischen Menschenrechtskonvention*, Berlin 1966: Duncker & Humblot (hereafter Partsch), p. 60.

175 "[I]n becoming a Party to the Convention a state undertakes to secure Convention

the ordinary duty of states imposed by international law to respect the rights of foreign citizens.[176] The ECHR is not linked to citizenship for such would not serve the goals of the convention.[177] Furthermore, individuals may either be personally subject to the jurisdiction of the contracting state (*in personam* jurisdiction) or be subject to the jurisdiction of the contracting state by reason of personal property (*in rem* jurisdiction).[178] Merely having property subject to the jurisdiction of the court can subject the individual to its jurisdiction. This implies that the convention protects the fundamental rights of individuals rather than the interests of contracting states, as case law shows.[179] For example, in *Ireland v. UK*, the European Court of Human Rights stated that: "Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'."[180] Similar reasoning also applies to the genocide convention.[181]

Though individuals may bring claims against other states, non-governmental organizations (NGOs) do not have standing to bring cases before the ECHR.[182] The Strasbourg Court has held that:

> "it is clear ... that it is not the applicant Union, as such, which is the victim of the alleged infringement of the right guaranteed by article 14 of the Convention. It is not the association itself, in fact which could be compelled to compulsory labour, but each of its members as individuals. It follows that, as regards the alleged violation of Article 4, the applicant Union cannot claim to be the victim of a violation of the Convention."[183]

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rights and freedoms 'not only to its own nationals and those of other High Contracting Parties but also to nationals of States not parties to the Convention and to stateless persons'." Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent jurisprudence of the European Court of Human Rights*, 14 European Journal of International Law 529, 548 (2003) (quoting *Austria v. Italy*, 4 YB ECHR (1961), 138-140) (hereafter Orakhelashvili).

176 Partsch, at 60.

177 *Id.*

178 *Id.,* at 60-61.

179 Orakhelashvili, at 529, citing *Austria v. Italy*, 4 YB ECHR (1961), 140.

180 *Id.,* citing *Ireland v. UK*, 58 ILR (1980) 188, at 291.

181 Advisory Opinion on Reservations, ICJ Reports (1951) at 23.

182 Marek Antoni Nowicki, *Non-Governmental Organisations (NGOs) before the European Commission of Human Rights*, in: Michele de Salvia/Mark E. Villiger (eds.), *The Birth of European Human Rights Law*, Baden-Baden 1998: Nomos, p. 82, citing *Union of Air Hostesses und Attendants und Others v. Greece.*

183 *Union of Air Hostesses und Attendants und Others v. Greece*. See also, e.g., Applications Nos. 9900/82, Dec. 4.5.83, D.R. 32, p. 261; 9939/82. Dec. 4.7.83, D.R 34, p.

NGOs often play a key "watchdog" role in protection of human rights – but they cannot play this role under the terms of the ECHR as it is today.

What of the "territoriality" of the conventions rights? The extension of the protections of the convention to citizen and non-citizen alike is very favourable to human rights' protection of non-citizens, since a general climate of respect for the law is necessary for the protection of human rights. However, the limitation of those rights to those places "subject to the jurisdiction" of a contracting party is unfavourable to human rights protection globally. The convention's protections do not travel with the citizen of a contracting party when they leave the jurisdiction of a contracting state. Historically, however, until the industrial revolution law was essentially personal: thus Roman law would apply to Romans outside of the territory of the Empire. In the medieval era Christians, Moslems and Jews had different rights in one country. We can also still see vestiges of law based on the person and not territory. These are most evident in religious law, which in some states (notably those influenced by Islamic religion) is the governing positive law of family relations including the law of successions. The idea that the law follows the person is also reflected in the law of nationality of those states which, like Germany, determine nationality by descent according to the rule of *ius sanguine*. Historically this differential personalized treatment explained, for example, why Jewish persons could become moneylenders though that was forbidden to Christians. Unfortunately the human rights protections of the convention are not extended like the laws of the Roman Empire to the person of the citizens of a contracting state. Under Article 1, once a person is no longer subject to the jurisdiction of the contracting parties they no longer enjoy the legal protection of the convention.

On the other hand, the convention does protect the rights not only of citizens but also of all persons within the jurisdiction of a contracting party. Even transient persons enjoy the human rights protection of the convention. This is a very generous fact for that is not at all the case of the constitutional protections of the U.S. which are increasingly seen as not having application or having only reduced application to non-citizens.

As we will see in the cases of *Al-Adsani, Bankovic,* and *Loizidou*, the principal issue in any litigation for extra-territorial effect of the convention is simply whether the convention even applies at all. The non-applicability of the convention to extra-territorial conduct – even where such conduct is a violation of customary international law! – is a serious limitation of the convention. We now will look at the specific protections of the convention to see whether they can be the basis for individual claims in tort.

213; ll553/85 and ll658/85 (joined), Dec. 9.3.87, D.R. 5l, p. 136.

2. *Article 5 – Right to Liberty and Security*

Art. 5 states:

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.
>
> (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

Art. 5 (5) is intended to assure the enforcement of the familiar rights of criminal procedure protected under Art. 5 (1) – 5 (4) before national courts. Art. 5 (5) thus serves a similar function with Art. 13 (*infra*).[184] The right to compensation for wrongful arrest is, however, subject to ordinary jurisdictional rules (a claimant must appear before the proper court) and must have exhausted his local remedies.[185] Art. 5 (5) essentially creates a private cause of action in tort to remedy abuse of human rights by the government. Thus, the ECHR in fact does guarantee its protections in part through tort.

3. *Article 3 – Freedom from Torture*

Art. 3 states clearly and succinctly in its entirety:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Art. 3 requires that remedies for torture must be given to 'everyone', not only victims whose torture involves the state accused of not providing the necessary remedy. On this basis one can argue for an extensive reading of Article 3, particularly since torture is a violation of *jus cogens*, universally condemned, and liable to universal jurisdiction. One scholar thus argues that "Article 1 extends to everyone who is under the jurisdiction of the state when claiming that their rights guaranteed by the Convention, such as freedom from torture, have been violated, and it is not necessarily limited to situations where a victim is actually tortured within the jurisdiction of that state."[186] The extradition or forced repatriation[187] of a person from a state party to the ECHR to a state where that

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184 A. H. Robertson J. G. Merrills, *Human Rights in Europe*, Manchester University Press: Manchester and New York (1993) p. 83.

185 Wemhoff v. the Federal Republic of Germany, judgment of 27 June 1968, Series A, No. 7.

186 Orakhelashvili, at 551.

187 Andrew Clapham, *Human Rights in the Private Sphere*, Oxford 1993: Clarendon, pp. 189-190 (hereafter Clapham).

person will likely be tortured or subject to an inhuman punishment is a violation of Article 3.[188] The responsibility of a state party can even be invoked for acts by terrorists who are not state sponsored or even for acts of non-contracting States.[189]

4. Article 6 – Right to a Fair Trial

Art. 6 essentially guaranties usual rights of the accused to a fair and speedy trial seen in all developed countries before a neutral judge. However, Art. 6 of the ECHR does not contain any express provision as to what form of court proceeding is required. Thus, for example one of the parties to a proceeding does not necessarily have the right to be a witness in his cause.[190] However, unlike Art. 13, Art. 6 creates immediately enforceable rights in all persons subject to the jurisdiction of a state party.[191] Thus, Art. 6 can be invoked before national courts where the convention has internal effect within the domestic legal order.[192]

5. Article 13 – Right to an Effective Remedy

Art. 13 of the ECHR states:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

It can only be invoked in connection with some other right guaranteed under the ECHR.[193] What is meant by "effective remedy"? The ECHR has held that "an effective remedy under Article 13 must mean a remedy that is as effective

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188 Partsch, at 109.

189 *Id.,* at189; see, e.g., *Mrs. W. v. Ireland*, Applic. 9360/81, 32 D. & R. 190 para. 14. ("The High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when the authority is exercised within their own territory, but also when it is exercised abroad").

190 Wilhelm Braumüller, *Die Menschenrechte in der Praxis des Europarates*, Stuttgart 1972: Universitätsverlagsbuchhandlung, p. 47, citing: Komm. ZE, l092/61: V, p. 210 (hereafter Braumüller).

191 P. van Dijk, C.J.H. van Hoof, *Theory and Practice Of the European Convention on Human Rights*, Deventer/Boston 1990: Kluwer Law and Taxation Publishers, p. 525, citing ECHR Judgment of 26 March 1987, A.116 (1987), p. 31 (hereafter van Dijk/van Hoof).

192 *Id.*

193 Braumüller, at 111 citing Komm. ZE, 3325/67: X, p. 528); van Dijk/van Hoof, at 521.

as it can be, having regard to the restricted scope for recourse inherent in any system for the protection of national security."[194]

As was already mentioned, Article 13 does not provide a cause of action in its own terms but rather only in combination with some other article of the convention. However, once another right is invoked, if that right can be heard before a national court in a domestic proceeding, Art. 13 would allow a remedy against persons – even against persons acting in their official capacity![195] One could argue, probably unsuccessfully, that Art. 13 implies a waiver of immunity of state officials. A criminal complaint linked to a claim for compensation in tort raises the issue of whether Art. 13 and Art. 6 para 1 can be invoked as a defence which does seem to be the case.[196]

All these possible claims raise the question whether and when the ECHR has "direct effect". The question for reasons already extensively discussed in the preceding chapter is actually ill put. The answer to this question will show why. Let us look at the legal facts: It is true that only a state party may be sued under the ECHR. Strictly speaking the ECHR has no direct third party effect.[197] However, as expressly noted by the Strasbourg court, the convention is relevant "even in the sphere of relations between individuals".[198] This relevance arises through application of the ECHR within the domestic legal order of the contracting states by laws such as Britain's Human Rights Act. Further, in monist states such as France where treaty law is part of the domestic legal order the ECHR does have direct effect.[199] So while it is possible to pose questions about "*Drittwirkung*" and/or "direct effect" these abstract analytical tools can really only yield confusing answers. However, by asking more specific concrete questions we can reach satisfactory answers obviating the need for confused terminological hair-splitting.

As we can see, on its own terms, there are a few legal arguments under the ECHR that could be made for victims of torts in violation of human rights, most significantly perhaps Art. 5 (5) of the ECHR. How do these rights work out in the practice? To answer that question we look at case law.

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194 van Dijk/van Hoof, at 531, quoting ECHR Judgement of 26 mar 1987, pp. 30 and 32.

195 « L'article 13 propose aux etats contractants d'ouvrir la voie an droit de recours devant une instance nationale dans le cadre du droit interne, 'alors meme que la violation aurait ete commise par des personnes agissant dans l'exercice de leurs functions officielles'. », Imre Békés, *L'Article 13* in: Michele de Salvia/Mark E. Villiger (eds.), *The Birth of European Human Rights Law*, Baden-Baden 1998 : Nomos, p. 25.

196 Braumüller, citing Komm. ZE, l 794/63: IX, p. l78.

197 Clapham, at 298.

198 *Id.*

199 *Id.*

B. Cases Litigated under the Convention

With a basic understanding of the texts which may be the basis for protection of human rights in tort we can now see how the ECHR applies those texts and whether this application ever results in extra-territorial effect of the ECHR. Sadly the results are disappointing. In just about all cases the ECHR is interpreted conservatively such and is not applied outside the territory of the contracting parties.

1. Bankovic

In *Bankovic*, survivors and relatives of civilian victims killed by a NATO air-bombardment of the Belgrade Radio-Television station complained of violations of Article 2 (right to life), Article 10 (freedom of information) and Article 13 (right to an effective remedy) of the European Convention of Human Rights. The claims were determined as inadmissible as the place bombarded was not within the Article 1 jurisdiction of the Convention.[200]

The court reasoned that, wherever decided, the act was performed outside the jurisdiction of the state-parties.[201] The court, bound by the Vienna Convention on treaties,[202] applied an "ordinary meaning"[203] test to the phrase "within their jurisdiction in context of the object and purpose of the convention and subsequent practice.[204] The court quickly concluded that as to the ordinary meaning of "jurisdiction" in Article 1 of the ECHR, state jurisdictional competence is primarily territorial and that exceptions thereto are defined and limited by the territorial rights of other states.[205] The court found that state practice[206]

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200 Orakhelashvili, at 530.

201 "The Court notes that the real connection between the applicants and the respondent States is the impugned act which, wherever decided, was performed, or had effects, outside of the territory of those States.", *Bankovic*, para. 54.

202 *Golder v. United Kingdom*, 21 February 1975, Publications ECHR, Series A no. 18, § 29), cited in *Bankovic,* para. 55.

203 Article 31 § 1 of the Vienna Convention 1969; *Johnston and others v. Ireland,* 18 December 1986, Publications ECHR, Series A no. 112, § 51 cited in *Bankovic*, para. 56.

204 Article 31 § 3 (b) of the Vienna Convention 1969 cited in *Bankovic*, para. 56.

205 *Bankovic*, para. 59, citing Mann, "The Doctrine of Jurisdiction in International Law", RdC, 1964, vol. 1; Mann, "The Doctrine of Jurisdiction in International Law, Twenty Years Later", RdC, 1984, Vol. 1; Bernhardt, *Encyclopaedia of Public International Law*, 1997 ed., Vol. 3, pp. 55-59 "Jurisdiction of States" and 1995 ed., vol. 2, pp. 337-343 "Extra-territorial Effects of Administrative, Judicial and Legislative Acts"; Oppenheim *International Law*, 9th ed. 1992 (Jennings and Watts), Vol. 1, § 137; P.M. Dupuy, *Droit International Public*, 4th ed. 1998, p. 61; Brownlie, *Principles of Inter-*

and the *travaux préparatoires* of the convention[207] supported this view. Though the court acknowledges that the ECHR is a "living instrument"[208] it notes that the *travaux préparatoires* clearly indicate the intent of the contracting state parties.[209]

This decision has been sharply criticized. Orakhelashvili notes that the court in *Bankovic* was at the margin of its mandate and that a ruling would require the court to adjudicate and overrule legal principles and considerations external to the Convention.[210] Nonetheless he criticizes the decision because the court did not decide the case for those reasons but rather attempted to justify its decision within the terms of the convention itself,[211] but ignored the duty of the court "to resolve any doubts in the light of the object and purpose of the treaty".[212] Orakhelashvili goes on to say that: "The general impression ...from *Bankovic* and *Al-Adsani* is that the European Court feels free to pick and choose between different methods of interpretation as if there were no order or hierarchy between these methods."[213]

Orakhelashvili is correct. There is even a term for this type of decision making: it is called "legal realism". To prove his charge, Orakhelashvili notes that: "...specific interpretive methods were misapplied... the Court has practically failed in the two cases to accord due importance to the nature of the European Convention as an instrument of public order establishing obligations of an objective nature, which go beyond the reciprocal commitments of individual contracting states. Furthermore, the Court also neglected the question of

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national Law, 5th ed. 1998, pp. 287, 301 and 312-314).

206 *Bankovic*, para. 62.

207 *Bankovic*, para. 63.

208 "It is true that the notion of the Convention being a living instrument to be interpreted in light of present-day conditions is firmly rooted in the Court's case-law. …(for example, the *Soering* judgment *Soering*, ECHR, 7 July 1989, Publications ECHR, Series A no. 161; the *Dudgeon v. the United Kingdom* judgment of 22 October 1981, Publication ECHR, Series A no. 45; *The X, Y and Z v. the United Kingdom* judgment of 22 April 1997, *Reports* 1997-II; V. v. *the United Kingdom* [GC], no. 24888/94, § 72, ECHR 1999-IX; and *Matthews v. the United Kingdom* [GC], no. 24833/94, § 39, ECHR 1999-I)… The Court concluded in the latter Loizidou-judgment that former Articles 25 and 46 of the Convention could not be interpreted solely in accordance with the intentions of their authors expressed more than forty years previously". *Bankovic*, para 64.

209 *Bankovic*, para 65.

210 Orakhelashvili, at 531.

211 *Id.*

212 *Id.,* at 530.

213 *Id.,* at 537.

how certain provisions of the Convention are mirrored in general international law. Finally, the Court's line of reasoning in both cases lacked the requisite degree of coherence when dealing with the previous jurisprudence of the Convention organs."[214]

In sum, the court's decision if unprincipled was also inept. A more coherent and defensible decision could have been reached either on the basis of state immunity or on the international law concerns expressed by Orakhelashvili. We can see the flaw in the courts' reasoning this way: suppose that a band of robbers and murders decided in Italy to conspire to kill a Serbian, then went to Serbia and killed the person, and returned to Italy to enjoy their plunder. Would the victim and survivors then be "subject to the jurisdiction" of the ECHR for their criminal conspiracy? Certainly. Further, the NATO aircraft, as aspects of the state, are by their very nature an exercise of jurisdiction, namely jurisdiction to enforce. Thus the convention should apply. The reasoning of the court in *Bankovic* is flawed.

2. Al-Adsani

A recent decision of the European Court of Human Rights (ECHR), *Al-Adsani v. United Kingdom*[215] is factually similar to *Saudi Arabia v. Nelson*[216]. Al-Adsani, a British pilot in the Kuwaiti air force, was tortured by the Kuwaiti government, apparently for distributing salacious tapes of an important sheikh.[217] The plaintiff was not only beaten and threatened but was severely burned, ultimately requiring medical treatment in Britain.[218] The plaintiff based his claims on Art. 3 (freedom from torture) and Art. 6 (the right of access to a court) of the ECHR. Art. 3 was determined to be inapplicable outside the jurisdiction of the contracting states.[219] Art. 6 was also complied with by the contracting state because of the immunity of foreign states. *Al-Adsani* was a case of the immunity of a state (as opposed to an individual)[220] for officially sanctioned torture.[221] Again, state immunity shows itself to be a key problem in guaranteeing human rights. Citing *Nelson*[222] and *Amerada Hess*[223] (among

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214 *Id.*
215 *Al-Adsani v. United Kingdom*, ECHR 21 November 2001.
216 *Saudi Arabia v. Nelson*, 88 I.L.R. 189.
217 *Id.*, para 10.
218 *Id.*, para 13.
219 Orakhelashvili, at 530 (2003).
220 *Id.*, 23-24.
221 *Id.*, para 3, paras 21-22.
222 *Saudi Arabia v. Nelson*, 88 I.L.R. 189.

others) the ECHR found Kuwait to be immune.[224] Like the case of *Sampson v. F.R.G.*,[225] *Al-Adsani* relies on the tenuous distinction that while states may not violate their *jus cogens* obligations, those obligations do not require states to create remedies for their breach by other states.[226] Thus a state can grant another state immunity for violation of *jus cogens*. The only other reading of that case would be that torture is not in fact a norm *erga omnes*[227] or *jus cogens*[228] which, given the convention against torture and state practice, is not the case. Further, *Al-Adsani* cannot be read as carving out a "*de minimis*" defence to torture: The plaintiff was severely burned (unlike Nelson who suffered no permanent physical injury). This decision, like the decision in *Belgium v. Congo*, effectively denudes *jus cogens* and if applied to the war crimes of the last world war would have exonerated many of those convicted.

However, *Al-Adsani* does contain one hidden gem for those who wish to defend human rights. *Al-Adsani v. Gov't of Kuwait*[229] clearly states that for

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223 *Argentine Republic v. Amerada Hess Shipping Corporation* (1989) 109 S. Ct. 683.

224 For a good analysis of Al-Adsani see: Markus Rau, *After Pinochet: Foreign Sovereign Immunity in Respect of Serious Human Rights Violations – The Decision of the European Court of Human Rights in the Al-Adsani Case*, GLJ vol. 3 No. 6 - 1 June 2002.

225 *Sampson v. F.R.G.,* 250 F.3d 1145 (7th Cir., 2001).

226 *Al-Adsani v. United Kingdom,* ECHR 21 November 2001, para 23: "States are not entitled to plead immunity where there has been a violation of human rights norms with the character of *jus cogens*, although in most cases the plea of sovereign immunity had succeeded."

227 Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon an Examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporations*, 20 Berkeley J. Int'l L. 91, 153 (2002). *Erga omnes* obligations are a consequence of general principles of international law. They are non-derogable duties owed by all states to the international community. Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para 33. All states have an interest in the protection of an *erga omnes* norm.

228 *Id.,* at 153 (2002). *Jus cogens* norms cannot be derogated from. All *jus cogens* norms are *erga omnes* but not all *erga omnes* norms are also *jus cogens* norms. *Jus cogens* norms are owed by states towards each other and, possibly, towards individuals. This explains why well every state has a remedy against violation of a norm *erga omnes*, no state must grant a remedy for a violation of *jus cogens*. *Erga omnes* norms are owed by states to the entire international community. *Id.* For an excellent discussion of *jus cogens* vs. *erga omnes* in the international criminal context see, Cherif Bassiouni, *International Crimes, Jus Cogens and Obligatio Erga Omnes,* SOS-Attentats, Conference Proceedings, 265-278 (2002) *available at:*
http://www.law.duke.edu/journals/lcp/articles/lcp59dFall1996p63.htm.
59 Law & Contemp. Probs. 63 (Autumn 1996).

229 107 I.L.R. 536, 540 (Eng. C.A. 1996): "In international law, torture is a violation of a fundamental human right, it is a crime and a tort for which the victim should be com-

every crime there is a corresponding intentional tort in international law as well as domestically. Thus *Al-Adsani* leaves open two possibilities for plaintiffs. One is to argue from customary law that the common law, as French law, directly incorporates customary international law as part of the common law/droit commun; that for every common law crime there is a corresponding tort; and thus, plaintiffs can sue under the ordinary tort regime while enjoying the jurisdictional benefits of universal jurisdiction as to violations of *jus cogens*. This does not, however, remove the defences of the state to immunity. But, logically, state immunity cannot be asserted in violation of *jus cogens*, because *jus cogens* norms are by definition non-derogable. Further, even if immunity for violations of *jus cogens* were not a logical impossibility, the immunity of the state must be distinguished from the immunity of the state's agent. By suing not the state but its agent the issue of the state's immunity is obviated. Then only the personal immunity of the defendant will be at issue. While ranking ministers and heads of state, according to the ICJ, do enjoy personal immunity for official acts during their term of office, this does not mean that lower ranking state officials have personal immunity. Further, personal immunities are limited to official acts after expiration of the officials' term of office.

3. Brumarescu and Loizidou: Extraterritoriality and Expropriation

Not all cases that seek to apply the ECHR outside the territory of the EU fail. In two cases of expropriation of land outside the EU but within the jurisdiction of contracting states, jurisdiction was found. The cases of *Loizidu v. Turkey*[230] and *Brumarescu v. Romania*,[231] although judged by the European Court of Human Rights and thus possibly valid only in Europe, may be evidence of a right to compensation or restitution for nationalization's under international law.[232]

Though Romania is not a member of the EU it, like Turkey, is a signatory to the ECHR. Thus the application of the ECHR was not really problematic. However, as it acts as a companion case to the more controversial case of *Loizidou v. Turkey* we will look at it briefly. In *Brumarescu*, the Brumarescu's house was nationalized by the Romanian government in 1950.[233] That nation-

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pensated."

230 *Loizidu v. Turkey*, ECHR 28/7/1998.

231 *Brumarescu v. Romania*, ECHR, 28/10/1999.

232 But see: *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398.

233 *Brumarescu v. Romania*, 28 October 1999, ECHR Application no. 28342/95 (Judgment: Merits) para. 12, *available at:*

alization was wrongful in the sense that by Romanian domestic law the Brumarescus should have been exempted from nationalization.[234] The house was later sold in 1974 by the state to a third party. The house then passed by inheritance to the Mirescus. The European Court recognized the right of the Brumarescus to compensation.[235]

Loizidou v. Turkey more clearly raised the issue of what is meant by jurisdiction in Article 1 of the ECHR. Loizidu owned land on Cyprus – which was, however, seized when the Turkish government invaded and occupied northern Cyprus.[236] Turkey then created a puppet government which, however, has been recognized *de jure* by no state other than Turkey. The court had no problem finding that northern Cyprus was subject to the jurisdiction of Turkey because of the Turkish military presence. This opens up the possibility of arguing that NATO occupied areas of Yugoslavia were subject to the jurisdiction of one or several of the state parties to the ECHR or its rarely invoked American counterpart.

Like *Brumarescu*, *Loizidu v. Turkey* also recognized a right to compensation for the seizure of the plaintiff's land.[237] *Brumarescu* could, however, be limited by the fact that the nationalization was not in the public interest but rather was in the interest of only private persons.[238] Similarly *Loizidou* could be limited by the fact that Turkey had no legal right to invade Cyprus, and thereby violated the Charter of the United Nations.[239] In fact, the emerging norm against nationalization is one more evidence of the limitation of state sovereignty. The historic definition of a state's sovereignty was ultimate and absolute authority over all persons and objects within its territory. This ultimate and absolute power is increasingly relativized in the contemporary international system.

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http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=32051&sessionId=709797&skin=hudoc-en&attachment=true.

234 *Id.,* at para. 15.

235 *Id.,* at para. 22.

236 *Loizidou v. Turkey (preliminary objections)*, 23 March 1995, Publications ECHR, Series A no. 310, para. 11.

237 *Id., at* para. 26-27 (ECHR 1998).

238 *Brumarescu v. Romania* (Application no. 28342/95), para. 13 (ECHR, 28 October 1999).

239 *Loizidou v. Turkey* (Article 50) (40/1993/435/514) para. 13 (ECHR, 28 July 1998).

4. *Tugar v. Italy*[240]

In *Tugar v. Italy* an Iraqi mine clearer operating in Iraq detonated a mine losing one leg as a result. The mines were sold by Italy. At the time Italy had no export licensing requirements on mines. It later enacted one but only after the sale of the mine in question. Tugar's complaint was based on Art. 2 and Art. 13 of the European Convention on Human Rights. His claim was determined to be inadmissible, however, due to Art. 1 which applies the convention to those acts "within the jurisdiction" of the contracting state parties. While the manufacture and even sale of the mines occurred in Italy, they were sent outside the territory of a state party to the convention and further ultimately deployed not by a contracting party but by Iraq. Essentially, Tugar's claim was that Italy negligently failed to prevent sale of arms to an outlaw state or government. Of course, the ECHR can apply outside the territory of the Contracting Parties:

> "A measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee."[241]

A point the court conceded to Tugar. However, Tugar's case was distinguished from the *Soering* decision[242], on the argument that the decision to extradite is an act of "jurisdiction"[243] and that, in contrast, the injury to Tugar:

> "can not be seen as a direct consequence of the failure of the Italian authorities to legislate on arms transfers. There is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible 'indiscriminate' use thereof in a third country, the latter's action constituting the direct and decisive cause of the accident which the applicant suffered." [244]

This distinction is of course very similar to that made in the common law of torts between cause in fact and proximate cause: in Tugar's case, while there would be causation in fact, there would not be proximate causation.

The logic of the decision in *Tugar* does not seem flawed but the outcome is

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240 *Tugar v. Italy,* Application No. 22869/93 (ECHR 18 October 1995) *available at* : http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=2341&sessionId=710132&skin=hudoc-en&attachment=true.

241 *Soering*, ECHR, 7 July 1989, Publications ECHR, Series A no. 161, p. 33, para 85.

242 *Id.*

243 Then why isn't the decision in *Bankovic* to send bombing aircraft also an act of jurisdiction?

244 *Tugar v. Italy*, Application No. 22869/93 (ECHR 18 October 1995).

very dissatisfying. The struggle to suppress anti-personnel mines is very important since such mines kill long after the conflict that led to their deployment and the victims are often children. Further, Tugar was working for an NGO which offered mine clearing operations as a sub-contractor. The decision does not say whether there was a contract and if so with which state. Suppose Tugar had been employed as a directly or indirectly by an ECHR signatory. Suppose further, that an ECHR signatory was exercising actual control over the area that Tugar was working in. Those presuppositions would be good arguments for application of the ECHR to his case.

Conclusion

Our study has revealed that the laws of the Member States of the European Union are generally the most successful line of attack on extra-territorial human rights violations. Secondarily, the ECHR may be able to be used to remedy human rights violations. We have seen that the principle remedy in European law is criminal prosecution, but that tort law can and does play a supplementary and/or secondary role as a legal remedy to violations of human rights outside the territory of the Member States. Our study has also revealed that the national laws both of the EU Member States and the United State could, consistent with international law, go further than they do in protecting human rights outside of Europe.

Protections at the supra-national are possible before the European Court of Human Rights. Such protections, however, are generally limited in their effect to Europe. Whether before courts of the Member States or before the European Court of Human Rights, creative lawyering could extend human rights protection to cases within the terms of existing treaties.

Throughout this study we have seen that the principle limitation on extra-territorial defence of human rights is immunity and jurisdiction. Both these obstacles, while serious, are not insurmountable. It seems relatively clear that the United States has gone further in the protection of human rights through private law just as it is equally clear that Europe has much more vigorously used criminal law to prosecute such offences. However, these offences are so heinous that ideally Europe and the United States will learn from each other and extend the protection of human rights. Just as Europe would do well to consider an Alien Tort Statute, so would the United States do well to consider the *action civile*. These are just the two most obvious examples. This work has tried to highlight other areas where good faith application of the law as it is can be used to extend the protection of human rights to all persons in the world. Hopefully it will contribute to that task.

Table of Cases

International Law

International Court of Justice Cases

Reservations to the convention on the prevention and punishment of the crime of genocide, Advisory Opinion of 28 May 1951, ICJ Reports (1951) p. 15-58

Barcelona Traction, Light and Power Company, Limited, Judgment of 5 February 1970, Second Phase, (1970) ICJ Reports p. 4-52

Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), (Feb. 14, 2002), 41 ILM 536 (2002).

European Court of Human Rights Cases

The cases of the ECHR can all be found on internet at: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

Al-Adsani v. United Kingdom, (21 November 2001)

Austria v. Italy, 4 YB ECHR (1961), 138-140

Vlastimir and Borka Bankovic and Others v Belgium et al., App. No. 52207/99, 12.12.2001, (2002) 41 ILM 517

Brumarescu v. Romania (Application no. 28342/95) (28 October 1999)

Wemhoff v. the Federal Republic of Germany, (Application no. 2122/64) [1968] ECHR 2 (27 June 1968)

Golder v. the United Kingdom, (21 February 1975), Publications ECHR, Series A no. 18

Ireland v. UK, 58 ILR (1980) 188

Loizidou v. Turkey (preliminary objections), (23 March 1995), Publications ECHR, Series A no. 310

Loizidou v. Turkey (Article 50) (40/1993/435/514) (28 July 1998)

Matthews v. the United Kingdom [GC], (Application number 24833/94)(1999-I)

Mrs. W. v. Ireland, (Application number 9360/81), 32 D. & R. 190

Soering, (7 July 1989), Publications ECHR, Series A no. 161

Dudgeon v. the United Kingdom, (22 October 1981), Publications ECHR, Series A no. 45

The X, Y and Z v. the United Kingdom (22 April 1997), *Reports* 1997-II

Tugar v. Italy, (Application No. 22869/93) (18 October 1995)

Union of Air Hostesses und Attendants und Others v. Greece. See also, e.g., Applications Nos. 9900/82, Dec. 4.5.83, D.R. 32, p. 261; 9939/82. Dec. 4.7.83, D.R 34, p. 213; ll553/85 and ll658/85 (joined), Dec. 9.3.87, D.R. 5l

V. v. *the United Kingdom* [GC], (Application no. 24888/94), § 72, ECHR 1999-IX

Common Law

United States

Argentine Republic v. Amerada Hess Shipping Corporation (1989) 109 S.Ct. 683

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398

Demjanjuk v. Petrovsky (1985) 603 F.Supp. 1468; 776 F.2d 571

Duke of Brunswick v. King of Hanover (1848) 2 H.L.Cas. 1.

Filartiga, v. Pena-Irala, 630 F.2d 876; 1980 U.S. App. LEXIS 16111 (2d. Cir., 1980) (*Filartiga)*

Flores v. Southern Peru Copper Corp. 343 F.3d 140, 62 Fed. R. Evid. Serv. 741, (2nd Cir., Aug 29, 2003)

Hilao v. Estate of Marcos 25 F.3d 1467 (1994)

Jimenez v. Aristeguieta 311 F.2d 547 (1962)

Kadic v. Karadzic 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S 1005 (1996)

Kirkpatrick & Co. Inc. v. Environmental Tectonics Corporation International (1990) 110 S.Ct. 701; 493 U.S. 400

Lafontant v. Aristide 844 F.Supp. 128 (1994)

Lawrence v. Texas __ U.S. __ (June 26, 2003).

Letelier v. Republic of Chile 488 F.Supp. 665 (1980)

Liu v. Republic of China 892 F.2d 1419 (1989)

Princz v. Federal Republic of Germany 26 F.3d 1166 (1994)

Saltany v. Reagan 702 F. Supp. 319 (1988)

Sampson v. F.R.G., 250 F.3d 1145 (7th Cir., 2001)

Sampson v. Federal Republic of Germany 975 F. Supp. 1108 (1997)

Saudi Arabia v. Nelson, 88 I.L.R. 189

Schooner Exchange v. M'Faddon 11 U.S. (7 Cranch) 116 (1812)

Siderman de Blake v. Republic of Argentina 965 F.2d 699 (1992)

United States of America v. Noriega 746 F. Supp. 1506; 117 F.3d 1206

United States v. Smith, 18 U.S. 153; 5 L. Ed. 57; 1820 U.S. LEXIS 250; 5 Wheat. 153 (1820)

United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991)

United Kingdom

Al-Adsani v. Gov't of Kuwait [Eng. C.A. 1996] 107 I.L.R. 536

Buck v The Attorney General [1965] 1 Ch. 745, [1965] 1 All ER 882

Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A. [1983] 2 Lloyd's Rep. 171

In re Piracy Jure Gentium [1934] A.C. 586

J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry (the 'International Tin Council case') [1990] 2 AC 418

Kuwait Airways Corporation v. Iraqi Airways Co. (unreported), 29 July 1998

Littrell v. United States of America (No. 2) [1995] 1 W.L.R. 82

Lubbe and Others and Cape Plc. and Related Appeals [2000] UKHL 41; [2000] 4 All ER 268; [2000] WLR 1545 (20th July, 2000)

R. v Secretary of State for the Home Department, ex parte The Kingdom of Belgium; R. v Secretary of State for the Home Department, ex parte Amnesty International Limited and others, Queen's Bench Division (Crown Office List) CO/236/2000, CO/238/2000, (Transcript: Smith Bernal) (15 February 2000)

Raulin v. Fischer [1911] 2 K.B. 93 (Eng.)

Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte, [1998] 1 A.C. 61, 85 (House of Lords, 25 Nov. 1998 – judgement vacated for rehearing) (Pinochet 1)

Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte. Pinochet [2000] 1 A.C. 119 (House of Lords, 1999) (Pinochet 2)

Regina v. Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No. 3) [24 March, 1999] 1 A.C. 147 (House of Lords, 2000) (Pinochet 3)

Rex v. Susex Justices, Ex parte McCarthy [1924], 1 K.B. 256, 259

Trendtex Trading Corporation v. Central Bank of Nigeria [1977] Q.B.529, 551-554, 576-579; *I Congreso del Partido* [1983] 1 A.C. 244, 261

Eire

Kavanagh v. Governor of Mountjoy Prison [2002] IESC 11 (Supreme Ct. Eire, 01 March 2002)

Civil Law

France

Cass. 22 December 1947, (Arr. Cass. 1947, 425)

Crim. 3 May 1964, J.C.P. 1964.ll.13689

Argoud, Crim. 4 June 1964, JCP. 1964, II, 13806, rapport Comte (France: Cour de Cassation, Chambre Criminelle)

Crim. 25 October 1966, J.C.P. 1966, 1

Cass. 13 September 1989, Rev. dr. pén. 1990, 59, note J.S.)

Cass. AR P. 93.0510.N, 22 March 1994, Arr. Cass. 1994, 299)

In Re Javor. 1996 Bull. crim., No. 132. France: Cour de cassation, Criminal Chamber, March 26, 1996. (Cour de Cassation (Chambre criminelle) Judgement of 26 March 1996 (Javor) N°: 95-81527)

In Re Munyeshyaka. 1998 Bull. crim., No. 2, at 3, Cour de Cassation, Judgement of 6 January 1998 (N° de pourvoi: 96-82491)

Judgement of 13 March 2001, no 1414, relatif aux poursuites engagées contre le colonel Kadhaffi

Belgium

Sharon, Ariel, Yaron, Amos et Autres, Belgium: Supreme Court, judgement of 22 February 2001

Sharon, Ariel, Yaron, Amos et Autres, Arrêt de la Cour d'Appel de Bruxelles, judgement of 26 June 2002

Sharon, Ariel, Yaron, Amos et Autres, Cour de Cassation, judgement of 12 February, 2003

Procureur contre Ariel Sharon et Consorts, Cour de Cassation, judgement of

24 September 2003

Senegal

Arrêt n' 135 du 04-07-2000 / Accusation (Senegal: Cour d'appel de Dakar, 2000)

Souleymane Guengueng et Autres c. Hissène Habré, Decision n° 14, 20 March 2001 Pénal (Cour de Cassation, 2001)

Germany

German Supreme Criminal Court, BGH 3 StR 437/99 – Beschluß v. 08. März 2000 (LG Hannover) Az.: 1O 361/02

German Constitutional Court Judgement of 13 May 1996, (BVerfG, Az: 2 BvL 33/93) printed in BVerfGE 94, 315-334

German Supreme Court Judgement of 26 June 2003 (BGH, Az.: III ZR 245/98, "Distomo"), published in NJW 2003, 3488 et seq.

German Supreme Court Judgement of 13 June 1996, (BGH, Az.: III ZR 40/95, "Tennishalle"), published in NJW 1996, 3208 et seq.

Greece

Prefecture of Voiotia v. Federal Republic of Germany, Case No 11/2000, Judgment of 4 May 2000, Greek Areopag.

Bibliography

Aristotle, "Rhetoric", in: McKeon, Richard (ed.). *The Basic Works of Aristotle*, "Rhetoric" (1941).

Aristotle, *Politics,* in: The Works of Aristotle Translated into English, (Benjamin Jowett ed., Oxford Univ. Press (1966) (350 B.C.).

Bassiouni, M. Cherif, *International Crimes: Jus Cogens and Obligatio Erga Omnes,* SOS-Attentats, Conference Proceedings, (2002).

Békés, Imre, *L'Article 13,* in: Michele de Salvia/Mark E. Villiger (eds.), *The Birth of European Human Rights Law,* Baden-Baden 1998: Nomos, 25-29.

Bernhardt, Rudolf (ed.), *Encyclopaedia of Public International Law*, vol. 2, Amsterdam 1995: Elsevier; vol. 3, Amsterdam 1997: Elsevier.

Blackstone, William, Commentaries on the Laws of England, 67 (facsimile of 1st ed. 1765-1769, Univ. of Chi. ed., 1979).

Braumüller, Wilhelm, *Die Menschenrechte in der Praxis des Europarates*, Stuttgart 1972: Universitätsverlagsbuchhandlung.

Brody, Reed, *The Prosecution of Hissène Habré – An "African Pinochet"*, 35 N. Engl. L. Rev. 321 (Winter, 2001).

Brownlie, *Principles of International Law*, 5th edition, Oxford: 1998.

Cassese, Antonio, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case,* European Journal of International Law, 13 Eur. J. Int'l L. 853, *available at:* <http://www.ejil.org/journal/curdevs/sr31-03.html#31-3> *(Cassese).*

Cicero, "Laws", in: Clarence Morris (ed.), *Great Legal Philosophers: Selected Readings in Jurisprudence* 51 (1997).

Crawford, William E., *Louisiana Civil Law Treatise: Tort Law*, St. Paul, Minn. 2000: West Group.

Clapham, Andrew, *Human Rights in the Private Sphere*, Oxford 1993: Clarendon *(Clapham).*

Davidson, Eugene, The Trials of the Germans: An Account of the twenty-two Defendants before the International Military Tribunal at Nuremberg (1966).

Dupuy, Pierre-Marie, *Droit International Public*, Paris 1998: Éditions Dalloz.

Frase, Richard S., *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 Cal. L. rev. 542 (1990).

Gewaltig, Stefan, *Die action civile im französischen Strafverfahren*, Frankfurt am Main 1990: Peter Lang (*Gewaltig*).

Giegerich, Thomas, „Extraterritorialer Menschenrechtsschutz durch U.S. Gerichte: Sachwalterschaft für die Internationale Gemeinschaft oder judizieller Imperialismus?", in: Eckart Klein, Christoph Menke (eds.), *Menschheit und Men-*

schenrechte: Probleme der Univalisierung und Institutionalisierung, Berlin 2002: Berliner Wissenschafts-Verlag, 155-166.

Hausweisner, Florian, *Belgium's Controversial War Crimes Law Amended*, 19 Int'l Enforcement L. Rep. 449 (November, 2003).

Kdhir, Moncef, *Juge Francais et Droit International non Ecrit*, 6 Revue du Droit Public, Novembre-Décembre 2003, 1581 (*Kdhir*).

Mann, "The Doctrine of Jurisdiction in International Law", RdC, 1964, Vol. 1.

Mann, "The Doctrine of Jurisdiction in International Law, Twenty Years Later", RdC, 1984, Vol. 1.

Nowicki, Marek A. *Non-Governmental Organisations (NGOs) before the European Commission of Human Rights*, in: Michele de Salvia/Mark E. Villiger (eds.), *The Birth of European Human Rights Law*, Baden-Baden 1998: Nomos, 267-273.

Oppenheim, *International Law*, 9th edition, Harlow 1992: Longman.

Orakhelashvili, Alexander, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 European Journal of International Law 529 (2003).

Partsch, Karl Josef, *Die Rechte und Freiheiten der Europäischen Menschenrechtskonvention*, Berlin 1966: Duncker & Humblot.

Posner, Eric, *Transitional Justice As Ordinary Justice*, 117 Harv. L. Rev. 761 (2004).

Ramasastry, Anita, *Corporate Complicity: From Nuremberg to Rangoon an Examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporations,* 20 Berkeley J. Int'l L. 91 (2002).

Rau, Markus, *After Pinochet: Foreign Sovereign Immunity in Respect of Serious Human Rights Violations – The Decision of the European Court of Human Rights in the Al-Adsani Case*, GLJ Vol. 3 No. 6 - 1 (2002).

Robertson, A. H. & Merrills, J. G., *Human Rights in Europe*, Manchester and New York 1993: Manchester University Press.

Sharp, Dustin N., *Prosecutions, Development, and Justice: The Trial of Hissein Habré*, 16 Harv. Hum. Rts. J. 147 (Spring, 2003).

Stern, Brigitte, *Universal Jurisdiction over Crimes against Humanity under French Law – Grave Breaches of the Geneva Conventions of 1949 – Genocide-Torture-Human Rights Violations in Bosnia and Rwanda,* 93 Am. J. Int'l. L. 525 (April, 1999) *(Stern)*.

van Dijk, P, van Hoof, C.J.H., *Theory and Practice of the European Convention on Human Rights*, Deventer / Boston 1990: Kluwer Law and Taxation Publishers *(van Dijk/van Hoof)*.

van Gerven, Walter, *The Legal Protection of Private Parties in the Law of the European Economic Community,* in: F.G. Jacobs (ed.), *European Law and the Individual*, Amsterdam / New York / Oxford 1976: North-Holland Publishing Company, 1-17 *(van Gerven)*.

van Schaack, Beth, *In Defence of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int'l. L. J. 141 (2001).

Winants, Alain, *The Yerodia Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction,* 16 Leiden Journal of International Law, 508 (October, 2003).

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