

# EXTRATERRITORIAL JURISDICTION IN THE UNITED STATES: AMERICAN ATTITUDES AND PRACTICES IN THE PROSECUTION OF CHARLES “CHUCKIE” TAYLOR JR.

## I. INTRODUCTION

During the latter half of the twentieth century, there was a growing movement in the international community to punish gross violations of international law such as genocide, crimes against humanity, torture, and war crimes.<sup>1</sup> This pursuit of accountability has taken a number of forms, including the use of domestic prosecutions, international tribunals, and universal jurisdiction.<sup>2</sup> Although concerns about sovereignty have discouraged the use of universal jurisdiction in the past, more recently<sup>3</sup> states have expressed greater willingness to utilize it to punish individual offenders and safeguard developing human rights norms.<sup>4</sup> Commentators have traced this trend to the post-World War II prosecutions of Axis leaders, an early example of the international system holding individuals responsible for violations of international law and norms.<sup>5</sup> Since then, a number of states have chosen to try individual offenders for crimes defined by international law when neither the crimes nor the offenders

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1. CHANDRA LEKHA SRIRAM, GLOBALIZING JUSTICE FOR MASS ATROCITIES: A REVOLUTION IN ACCOUNTABILITY 13 (2005).

2. *Id.*

3. *Id.* at 14. It has long been the rule that the “exercise of extraterritorial jurisdiction is appropriate when a sufficient connection exists between the controversy in question and the nation seeking to exercise jurisdiction.” Anthony E. Giardino, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699, 710 (2007). Sriram notes that universal jurisdiction “may constitute a significant challenge to national sovereignty,” and could also be construed as a violation of the principle of non-interference in domestic affairs enshrined in Article 2, sec. 7 of the U.N. Charter. States exercising such jurisdiction attempt to justify it by asserting that certain crimes are so heinous that they threaten the well-being of the international community or of humanity in general. SRIRAM, *supra* note 1, at 14–15.

4. Milena Sterio, *The Evolution of International Law*, 31 B.C. INT’L & COMP. L. REV. 213, 222 (2008).

5. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 146 (1997). The authors contend that international attitudes toward liability for human rights abuses sanctioned by states began to change after World War I and saw a far more marked shift after World War II. *Id.* at 4–6. “The Nuremberg Tribunal established, among other things, the concept of individual criminal responsibility for crimes against humanity.” Erika R. George, *After Atrocity Examples from Africa: The Right to Education and the Role of Law in Restoration, Recovery, and Accountability*, 5 LOY. U. CHI. INT’L L. REV. 59, 61 (2007).

have a relational nexus to the forum state.<sup>6</sup> The United States appeared to join this group in 1994 when it passed 18 U.S.C. §§ 2340 and 2340A (1994).<sup>7</sup> This statute, also known as the Extraterritorial Torture Statute (“ETS”), was designed to codify and implement the nation’s responsibilities as a party to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”).<sup>8</sup> It went largely unused, however, until 2006, when Charles “Chuckie” Taylor Jr., the son of the former President of Liberia, was indicted under its auspices.<sup>9</sup> While Taylor was originally charged with passport fraud,<sup>10</sup> a superseding indictment obtained in December 2006 additionally included two counts of torture and one count of using a firearm in a violent crime.<sup>11</sup> Taylor Jr., an American citizen, was indicted as a result of his activities in Liberia as the leader of the Anti-Terrorist Unit (“ATU”), an “elite military force that provided security” to Charles Taylor Sr.,<sup>12</sup> which was formed shortly after

6. Peter Ford, *Answering for Rights Crimes*, CHRISTIAN SCI. MONITOR, Oct. 18, 1999, at 1. The list of nations engaging in the exercise of universal jurisdiction in recent years includes France, Belgium, Germany, Denmark, and Spain (which famously attempted to prosecute former Chilean leader Augusto Pinochet). *Id.*

7. Under 18 U.S.C. § 2340 (2006), torture is defined as: “[A]n act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or control,” while 18 U.S.C. § 2340A (1994) provides in relevant part:

(a) Offense: 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.

(b) Jurisdiction: There is jurisdiction over the activity prohibited in subsection (a) if—

(1) the alleged offender is a national of the United States; or  
 (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

8. Elise Keppler, Shirley Jean & J. Paxton Marshall, *First Prosecution in the United States for Torture Committed Abroad: The Trial of Charles ‘Chuckie’ Taylor, Jr.*, 15 HUM. RTS. BRIEF, Spring/Summer 2008, at 18, 18–19. Article 5 of the CAT indicates that parties to the Convention are required to prosecute alleged perpetrators of torture when they are present in a party’s territory. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5, Dec. 10, 1984, 1988 U.S.T. 202, 1465 U.N.T.S. 85, 114.

9. Siobhan Morrissey, *Torture Law Gets First Test*, 5 No. 49 ABA J. E-REPORT 3, 3 (2006) (Westlaw, ABAJEREP).

10. Abby Goodnough, *Son of Ex-Liberian Leader Pleads Not Guilty to Fraud*, N.Y. TIMES, July 6, 2006, at A14.

11. David Johnston, *Son of Liberia’s Ex-leader Charged in Miami under Anti-Torture Law*, N.Y. TIMES, Dec. 7, 2006, at A5. The indictment alleged that Taylor Jr. applied electric shocks to the victim’s genitalia and authorized the pouring of scalding water on the victim’s hands and body, the application of a hot iron to the victim’s skin, and the rubbing of salt into the resulting wounds. Indictment, U.S. v. Belfast, No. 06-2075 (S.D. Fla., Dec. 06, 2006). Additional counts concerning other victims were added at a later date. Keppler, Jean & Marshall, *supra* note 8, at 20.

12. Goodnough, *supra* note 10, at A14.

he was elected President of Liberia.<sup>13</sup> His father's tenure as President saw a resurgence of civil conflict from 1999 to 2003, as various rebel groups challenged Taylor Sr.'s rule.<sup>14</sup> The ATU, used as an enforcement mechanism, has been accused of crimes ranging from "violent assaults, beating people to death, rape, and burning civilians alive."<sup>15</sup> Taylor was convicted on October 30, 2008,<sup>16</sup> and sentenced in January 2009 to ninety-seven years in federal prison.<sup>17</sup>

The indictment sparked discussion in some quarters as marking the beginning of a United States policy of exercising greater extraterritorial jurisdiction to protect human rights.<sup>18</sup> A number of bloggers welcomed the indictment and trial as representing a possible thawing of American attitudes toward universal jurisdiction: "Who knows—at this rate, the US might even eventually comply with the Geneva Conventions and adopt universal jurisdiction for grave breaches!"<sup>19</sup> Based on the long history of American reluctance to use its courts to prosecute individuals for offenses unconnected to the United States in contrast to its Western European allies, the special circumstances of this case, and the issues inherent in the exercise of universal jurisdiction to punish atrocities, there is a strong argument that U.S. actions are mere window-dressing rather than a substantial move toward embracing universal criminal jurisdiction as a tool for enforcing international norms.

13. Keppler, Jean & Marshall, *supra* note 8, at 19.

14. *Id.* See Chernor Jalloh & Alhagi Marong, *Ending Impunity: The Case for War Crimes Trials in Liberia*, 1 AFR. J. LEGAL STUD. 53 (2005) for in-depth discussion of the Liberian conflict and the abuses perpetrated by both the Taylor regime and the various rebel groups either aligned with or against him. See also Joanne Brockman, *Liberia: The Case for Changing U.N. Processes for Humanitarian Interventions*, 22 WIS. INT'L L.J. 711 (2004) for an examination of the roots of the Liberian conflict, Charles Taylor's role in it and the related conflict in Sierra Leone, responses by the African Union and the United Nations, and Taylor's indictment by the U.N. Special Court for Sierra Leone for war crimes.

15. Keppler, Jean & Marshall, *supra* note 8, at 19.

16. Carrie Johnson, *Jurors in U.S. Convict Son of Ex-Liberian President Taylor*, WASH. POST, Oct. 31, 2008, at A10.

17. Carmen Gentile, *Son of Ex-president of Liberia Gets 97-Year Prison Sentence*, N.Y. TIMES, Jan. 10, 2009, at A14. Prosecutors had originally requested a sentence of 147 years. He was also ordered to pay \$7,500 in restitution to each of the seven victims who were named as part of his indictment.

18. See IntLawGrrls, *Extraterritorial Torture Case Moves Forward*, <http://intlwgrrls.blogspot.com/2007/09/extraterritorial-torture-cases-moves.html> (Sept. 12, 2007, 09:43) for the proposition that the case could set an important foundation for American jurisprudence in the area. See also *Opinio Juris*, *Universal Jurisdiction Trial Begins in U.S.; No Signs of the Apocalypse Thus Far*, <http://opiniojuris.org/2008/09/24/universal-jurisdiction-trial-begins-in-us-no-signs-of-the-apocalypse-so-far> (Sept. 24, 2008, 23:43 EDT); Johnston, *supra* note 11, at A14 ("Human rights groups praised the indictment, saying the use of the law set an important precedent in an effort to stop abuses around the world.")

19. *Opinio Juris*, *supra* note 18.

This Note uses the Taylor case as a lens through which to examine the United States' attitude toward universal jurisdiction. It argues that, rather than evincing a new direction in jurisprudence, the Taylor indictment is a fundamentally conservative step, as the evidence indicates U.S. reluctance to exercise this type of jurisdiction as a matter of course. It explores American practice of universal civil jurisdiction, attitudes in the United States toward universal criminal jurisdiction, and the special factors in the Taylor case that made the indictment possible. This Note also explores European practices in contrast to U.S. conservatism, and argues in favor of American pragmatism and moderation in this area.

Part II examines the bases for jurisdiction in the international context. Part III explores how the United States has chosen or not chosen to exercise that jurisdiction, and the governmental attitude toward that exercise. Part IV compares the Taylor case to cases in Western Europe to illustrate how reluctant the United States has been to use universal criminal jurisdiction and how conservative the Taylor indictment actually is. Part V is an argument in favor of the American position.

## II. JURISDICTION IN THE INTERNATIONAL CONTEXT

Although there are multiple types of jurisdiction—prescriptive, adjudicative, and enforcement<sup>20</sup>—international law has primarily been concerned with prescriptive, which is the capacity of an individual nation-state to make its laws applicable to “activities, relations, and status of persons or a person’s interest in property.”<sup>21</sup>

The exercise of prescriptive jurisdiction in the international context is hemmed by a series of limitations, and only exercises that fit within these constrained limitations are legal.<sup>22</sup> The most basic theory of jurisdiction is territorial; jurisdiction is furnished over people, things, or acts within the boundaries of a given state.<sup>23</sup> The nationality theory gives states the ability to exercise jurisdiction over their own citizens, and customary

20. Eric Engle, *The Alien Tort Statute and the Torture Victims’ Protection Act: Jurisdictional Foundations and Procedural Obstacles*, 14 WILLAMETTE J. INT’L L. & DISP. RESOL. 1, 25–27 (2006).

21. Adam Isaac Hasson, Note, *Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic—Trends in Political Accountability and Transnational Criminal Law*, 25 B.C. INT’L & COMP. L. REV. 125, 135 (2002). Jurisdiction to adjudicate is concerned with a court’s ability to hear a case “regardless of the law.” Jurisdiction to enforce is use of a state’s enforcement bodies. Engle, *supra* note 20, at 26–27.

22. Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 323–24 (2001).

23. Hasson, *supra* note 21, at 135.

international law indicates that that jurisdiction may be exercised wherever the citizen is located.<sup>24</sup>

The first two jurisdictional bases seem to be the most widely accepted.<sup>25</sup> States have long exercised jurisdiction within their own borders,<sup>26</sup> and it has always been the province of individual nations to define their power vis-à-vis their own citizens.<sup>27</sup> Taking this into account, it seems that the United States has come from a position of traditionalism in the writing of the ETS, as 18 U.S.C. § 2340A purports only to grant jurisdiction if the offender is a U.S. citizen or is found in the United States.<sup>28</sup> The Taylor indictment reflects both of these principles, as he is both a citizen of the United States and was found within its territory.<sup>29</sup>

There are three other major bases of international prescriptive jurisdiction that are less widely accepted than territoriality or nationality.<sup>30</sup> The first of these is the protective principle, which allows nation-states to exercise jurisdiction over non-citizens who harm the state's national security.<sup>31</sup> More contentious and less accepted<sup>32</sup> is the passive personality principle, which allows a state to exercise jurisdiction when one of its citizens is a victim.<sup>33</sup>

24. *Id.*

25. Eugene Kontorovich, *The Inefficiency of Universal Jurisdiction*, 2008 U. ILL. L. REV. 389, 393 (2008). Kontorovich notes that the territoriality and nationality principles largely square up with the Westphalian system concerned with maintaining limitations on international incursions into domestic sovereignty. Other commentators have noted that the nationality theory's application in the United States is somewhat more restrictive than elsewhere: "There is no general principle that U.S. criminal law be applied to nationals wherever they may be." Christopher L. Blakesley & Dan Stigall, *Wings for Talons: The Case for the Extraterritorial Jurisdiction over Sexual Exploitation of Children through Cyberspace*, 50 WAYNE L. REV. 109, 124–25 (2004). That being said, nationality is still one of the primary methods the United States utilizes to exercise extraterritorial jurisdiction. *Id.* at 125. See also Christopher L. Blakesley & Dan E. Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT'L L. REV. 1, 20–22 (2007).

26. Sterio, *supra* note 4, at 229.

27. *Id.*

28. 18 U.S.C. § 2340A(b)(1), (2) (1994). See *supra* note 7 for the full text of the relevant provisions.

29. Goodnough, *supra* note 10, at A14.

30. Kontorovich, *supra* note 25, at 393. These bases of jurisdiction are much more broad than nationality and territoriality, and as such, have met with some resistance. *Id.*

31. *Id.* at 394. This principle has had difficulty obtaining wide support because of "loose notions of harm and causation" that could lead its exercise to resemble universal jurisdiction in certain cases. *Id.* According to Adam Hasson, most European countries have accepted this approach. Hasson, *supra* note 21, at 135. It appears likely that the United States supports this principle as well, considering the position of the Bush Administration toward "enemy combatants" following the September 11 attacks.

32. Kontorovich, *supra* note 25, at 394. Passive personality has generally failed to receive acceptance on a wide scale in the international arena.

33. Hasson, *supra* note 21, at 136.

The last principle, universal jurisdiction, has proven to be the most controversial.<sup>34</sup> This principle makes it possible, and perhaps even mandatory, for states to prosecute certain heinous crimes as defined by international law.<sup>35</sup> This jurisdiction requires no nexus with the forum state, as the location of the act and the citizenship of victims and perpetrators are irrelevant.<sup>36</sup> The exercise of such jurisdiction is grounded in the assertion that there are certain crimes that are so heinous that they damage the international legal system or humanity as a whole.<sup>37</sup>

This exercise of jurisdiction has been classed as “absolute” universal jurisdiction.<sup>38</sup> According to the International Court of Justice, this type of jurisdiction is to be differentiated from “relative” universal jurisdiction,<sup>39</sup> which is extraterritorial jurisdiction exercised under the auspices of one of the other principles.<sup>40</sup> While many states have chosen to exercise what can be viewed as absolute universal jurisdiction,<sup>41</sup> the Taylor indictment is an indication that the United States appears willing to exercise jurisdiction only when it falls into the traditional categories of territoriality and nationality.<sup>42</sup>

### III. AMERICAN PRACTICES OF UNIVERSAL JURISDICTION

An examination of United States policy in the area of extraterritorial jurisdiction indicates an extended history of its exercise in specific contexts. American courts have long exercised relative universal civil

34. *Id.*

35. SRIRAM, *supra* note 1, at 13.

36. M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 88 (2001).

37. SRIRAM, *supra* note 1, at 15. Genocide, war crimes, terrorism and torture are the most common bases for invoking universal jurisdiction.

38. Engle, *supra* note 20, at 28.

39. *Id.* See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14) (Separate Opinion of Judge Guillaume at 39–40) and Joint Separate Opinion of Higgins, Kooijmans, and Buergenthal at 74–75 for the original discussion of the difference between absolute and relative universal jurisdiction.

40. Engle, *supra* note 20, at 28.

41. See Ford, *supra* note 6 for a list of countries that have participated in the exercise of absolute universal jurisdiction.

42. This position seems to be supported by the statements made by members of the Department of Justice at the press conference announcing Taylor Jr.'s indictment: “We are determined through our work . . . that the United States will not serve as a safe haven for individuals who engage in human rights abuses.” U.S. Dep’t of Justice, Press Conference at Washington, D.C. 3 (Dec. 6, 2006) [hereinafter Press Conference Announcing Indictment] (transcript available at TRANSCRIPT OF PRESS CONFERENCE ANNOUNCING INDICTMENT OF ROY BELFAST JR. AKA CHUCKIE TAYLOR ON TORTURE CHARGES (2006), <http://www.justice.gov/criminal/hrsp/pr/speeches/2006/12-06-06fisher-speech-belfast-indict.pdf>).

jurisdiction,<sup>43</sup> but the evidence indicates that universal criminal jurisdiction has not met with the same recognition.<sup>44</sup> Indeed, it appears that the United States favors the exercise of universal civil jurisdiction as opposed to criminal, and any exercise of criminal jurisdiction will be guided by context and political expediency.<sup>45</sup>

The Alien Tort Claims Act<sup>46</sup> was originally passed in 1789<sup>47</sup> and went largely unused until the 1980s.<sup>48</sup> In 1980, the United States Court of Appeals for the Second Circuit handed down *Filartiga v. Pena-Irala*,<sup>49</sup> which interpreted the statute to allow the assertion of claims based on violations of human rights that the court found to be part of the law of nations.<sup>50</sup> The decision indicates that U.S. courts should be open to individuals who can prove the violation of “well-established, universally recognized norms of international law.”<sup>51</sup> The claim is available whether or not the tort was committed on U.S. territory or if the perpetrator was a U.S. citizen.<sup>52</sup> The courts have subsequently seen a great number of cases, three of which have reached the Supreme Court.<sup>53</sup>

43. The Alien Tort Claims Act, which gives federal courts jurisdiction over suits where a non-citizen claims a breach of international law, was passed by the first U.S. Congress in 1789. SRIRAM, *supra* note 1, at 67. Although no direct connection between the controversy, the parties and the United States is required, the defendant must be found in and be served in the United States. *Id.*

44. See Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888 (2003), for an examination of the American response to Belgium's sweeping invocation of universal jurisdiction in its courts. See also Michael Verhaeghe, *The Political Funeral Procession for the Belgian UJ Statute*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 139 (Wolfgang Kaleck, Michael Ratner, Tobias Singelstein & Peter Weiss eds., 2007).

45. There have been a number of investigations undertaken against people in the United States who are accused of having participated in torture, but no other criminal charges have been sought. Keppler, Jean & Marshall, *supra* note 8, at 22. Indeed, the vast majority of actions taken by the United States in dealing with human rights violators are deportations or other immigration charges. *No Safe Haven: Accountability for Human Rights Violators in the United States*, Testimony Before the Subcommittee on Human Rights and the Law, 110th Cong. (2007) (statement of Pamela Merchant, Executive Director, Center for Justice and Accountability).

46. 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

47. See *supra* note 6.

48. Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 146 (2006).

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

50. *Id.* at 880 (“[W]e find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.”).

51. *Id.* at 888.

52. Donovan & Roberts, *supra* note 48, at 146.

53. Engle, *supra* note 20, at 9.

This law was bolstered by the passage of the Torture Victims Protection Act (“TVPA”)<sup>54</sup> in 1992, which allows both U.S. citizens and non-citizens to maintain a cause of action in tort.<sup>55</sup> However, both require the ability of a court to exert personal jurisdiction over the defendant,<sup>56</sup> making the exercise of universal jurisdiction less expansive than it would initially appear. Additionally, the Supreme Court narrowed the application of the Alien Tort Statute in *Sosa v. Alvarez-Machain*<sup>57</sup> by reading the statute to allow causes of action only for those violations of “binding customary rules”<sup>58</sup> that create “norm[s] of customary international law [that are] well defined [enough] to support the creation of a federal remedy.”<sup>59</sup>

As compared to the practice of allowing civil liability under the Alien Tort Statute, the Taylor case seems far less groundbreaking. At least since the handing down of *Filartiga* in 1980, the United States has served as an important forum for civil claims stemming from violations of international human rights norms anywhere in the world.<sup>60</sup> It seems that, rather than moving in the direction of other Western countries and providing a forum for *criminal* litigation of international law violations, the United States has chosen to honor its treaty obligations through the use of a very broad exercise of universal *civil* jurisdiction.

This assertion appears to be borne out by an examination of the United States’ reaction to Belgium’s passage of a broad universal criminal jurisdiction statute. Passed in June 1993,<sup>61</sup> the statute was designed to allow Belgium to punish domestically “serious breaches of international humanitarian law.”<sup>62</sup> The breadth of the statute made it possible for crimes with no link whatsoever to Belgium to be tried there.<sup>63</sup> Initially, there were few complaints about the law,<sup>64</sup> and a few cases were successfully tried.<sup>65</sup>

54. 106 Stat. 73 (1992).

55. Engle, *supra* note 20, at 17.

56. Donovan & Roberts, *supra* note 48, at 148–49.

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

58. *Id.* at 738.

59. *Id.*

60. Indeed, many states including Australia, Switzerland, and the United Kingdom have complained of the extent of the jurisdiction exercised by the United States courts through the application of the Alien Tort Statute and the TVPA. Donovan & Roberts, *supra* note 48, at 147. Additionally, the International Court of Justice, in the joint opinion of Judges Higgins, Kooijmans, and Buergenthal, *supra* note 27, has also noted that the ATS and TVPA provide a “very broad form of extraterritorial jurisdiction.” Arrest Warrant of 11 April 2000, *supra* note 39, at 77.

61. Verhaeghe, *supra* note 44, at 139.

62. *Id.*

63. Ratner, *supra* note 44, at 889.

64. Verhaeghe, *supra* note 44, at 139.



More contentious complaints began to be filed,<sup>66</sup> however, and the situation erupted in 2003 when an investigation of former U.S. President George H. W. Bush, Vice President Dick Cheney, and Secretary of State Colin Powell was requested by Iraqis in relation to the first Gulf War.<sup>67</sup>

The United States immediately began exerting pressure on Belgium to rescind the statute, although there was no real indication that the claim would go to trial.<sup>68</sup> Although Belgium amended the statute to provide some limitations,<sup>69</sup> the United States mounted economic and political pressure on Belgium to do away with it entirely.<sup>70</sup> Secretary of Defense Donald Rumsfeld publicly humiliated the Belgian government by announcing that the United States would not be willing to invest in a new NATO headquarters there.<sup>71</sup> He gave the Belgians an ultimatum: fix the statute within six months or suffer the consequences.<sup>72</sup> Belgium complied, passing a law that required a link in order to exercise jurisdiction.<sup>73</sup> It seems evident that U.S. behavior evinces hostility toward the idea of utilizing expanded extraterritorial jurisdiction as a means of enforcing international law and norms.

With the foregoing points in mind, it seems that the Taylor case is more symbolic than substantial. Steven Ratner has argued that there are factors that make certain cases more attractive for the exercise of extraterritorial jurisdiction than others:<sup>74</sup> presence of the accused in the forum state;

65. In 2001, four perpetrators of the Rwandan genocide were tried and convicted in Belgian courts. Ratner, *supra* note 44, at 889.

66. Complaints were filed against Ariel Sharon, Fidel Castro, Saddam Hussein, former Democratic Republic of Congo Minister for Foreign Affairs Abdulaye Yerodia Ndombasi (which gave rise to the ICJ case cited *supra* note 39), and former Iranian President Hashemi Rafsanjani. *Id.* at 890.

67. *Id.* The Iraqis alleged that Bush Sr. was responsible for war crimes committed during Gulf War I. Verhaeghe, *supra* note 44, at 141.

68. Ratner, *supra* note 44, at 890; Verhaeghe, *supra* note 44, at 145. Secretary of State Colin Powell warned the government of Belgium that the statute threatened its status as the headquarters of the North American Treaty Organization, as allowing investigations of officials visiting there would jeopardize relations. Ratner, *supra* note 44, at 890. Verhaeghe notes additionally that the term “complaint” does not have the same meaning in the Belgian legal system. A complaint in Belgium is merely the complainant’s expression of grievance, and does not form the foundation for an indictment as it does in the United States. Verhaeghe, *supra* note 44, at 145.

69. Ratner, *supra* note 44, at 890. The amendments meant that the controls on cases that had no substantial link were much more stringent. As a result, only the federal prosecutor had the power to initiate cases. The prosecutor also retained the power to refuse to proceed if the complaint was “manifestly unfounded.” *Id.*

70. *Id.* at 891.

71. W. Chadwick Austin & Antony Barone Kolenc, *Who’s Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT’L L. 291, 321–22 (2006).

72. Verhaeghe, *supra* note 44, at 143.

73. Ratner, *supra* note 44, at 891.

74. *Id.* at 894–95.

severity of the alleged atrocities; the strength of the evidence against the defendant; the sense that the case is not driven by politics and does not amount to taking sides in an unfinished conflict; the absence of an effective judiciary in the state where the events occurred; the special links between the state where the events occurred and the potential forum; the defendant's political powerlessness; and the absence of opposition from any state to the prosecution.<sup>75</sup>

The list of factors seems to indicate that the Taylor case was the proverbial "perfect storm": Taylor was in U.S. custody;<sup>76</sup> the alleged atrocities were fairly severe;<sup>77</sup> there was substantial evidence against him;<sup>78</sup> there was a worldwide recognition that the Taylor regime had been a brutal one;<sup>79</sup> Liberia lacked infrastructure, much less an effective judiciary;<sup>80</sup> while never a U.S. colony, it maintains close ties to the United States because of its origins;<sup>81</sup> and Taylor Jr. was simply a U.S. citizen without money or political clout.<sup>82</sup> By virtue of his status as a U.S. citizen, it was unlikely that there would be an outcry against the country of his nationality instituting charges.<sup>83</sup> Taking the entirety of the circumstances into account, Taylor Jr. seemed to provide the perfect opportunity for the

75. *Id.*

76. Keppler, Jean & Marshall, *supra* note 8, at 19.

77. *Id.* at 20. As mentioned previously, Taylor was accused of some very serious behavior, including summary executions; "lock[ing] [others] in a hole in the ground covered with iron bars and wire; order[ing] cutting the genitals of prisoners; . . . and burning and shocking various body parts of prisoners." *Id.* Other incidents are detailed in the text. *Id.*

78. The strength of the evidence was attested to in the press conference held to announce his indictment. Alice Fisher, the Assistant Attorney General for the Criminal Division of the Department of Justice, stated that the case was brought because "it was a good case that we could prove, and these cases are hard cases. In this case alone, we had agents from . . . three different agencies flying all over the world to get evidence from people that might not live in cities, from people outside of cities . . ." Press Conference Announcing Indictment, *supra* note 42, at 3.

79. Charles Taylor Sr. originally claimed exile in Nigeria, but the U.N.-backed Special Court for Sierra Leone later indicted him, recognizing the suffering his organization inflicted on both his own people and those of neighboring Sierra Leone. Brockman, *supra* note 14, at 738–39. He is now awaiting trial on war crimes charges in The Hague, The Netherlands. Johnson, *supra* note 16.

80. Rena L. Scott, *Moving from Impunity to Accountability in Post-war Liberia: Possibilities, Cautions, and Challenges*, 33 INT'L J. LEGAL INFO. 345, 363 (2005).

81. Liberia, while never officially colonized by any of the Western states, was the product of work by the American Colonization Society and other African-American groups who wished to assist freed slaves with the process of repatriation. These former slaves became a faction within Liberian society known as the "Americo-Liberians," and they ran the country until the 1970s. *Id.* at 353–54.

82. At the time of his initial arraignment on passport fraud charges, Taylor Jr. informed the court that he lacked the funds necessary to retain private counsel. Goodnough, *supra* note 10. Clearly, whatever political influence Taylor Jr. possessed lessened once his father stepped down and disappeared entirely by the time he was transferred to The Hague to stand trial.

83. Keppler, Jean & Marshall, *supra* note 8, at 20.

United States to show compliance with CAT without risking an international incident.

This stance is to be contrasted with the case of Major Tomas Ricardo Anderson Kohatsu, a former Peruvian army official.<sup>84</sup> Kohatsu was allegedly linked to “horrendous crimes”<sup>85</sup> during his tenure as a Peruvian intelligence officer<sup>86</sup> and was detained when he flew to the United States to attend a human rights conference.<sup>87</sup> The Department of Justice sought to indict him under the ETS, but ultimately the State Department blocked the indictment.<sup>88</sup> The special agent in charge of Kohatsu’s arrest stated that “[b]ecause of political sensitivities . . . the State Department jumped in.”<sup>89</sup> At stake was the United States’ relationship with Peru and the resulting cooperation on drug enforcement.<sup>90</sup> Additionally, the United States had chosen to work on Peru’s human rights situation through alternate means, choosing to negotiate rather than adopt a hard line.<sup>91</sup> In Kohatsu’s case, the same factors were not present and the United States took a hands-off approach that fell in line with its wider policy of both hostility toward universal criminal jurisdiction and a favoring of alternate means of enforcing international norms. The unique circumstances of Taylor’s case, in light of past United States practices, lead to the conclusion that his case is an outlier rather than a new frontier in American attitudes.

#### IV. EUROPEAN PRACTICE AS A COUNTERPOINT

For many years after World War II, American attitudes toward the use of domestic tribunals to punish violations of international law were similar to those of the majority of states.<sup>92</sup> However, international practice has changed, and commentators have noticed “a trend towards a global desire to protect human rights,” evidenced by increasing use of universal

84. Aaron Solomon, *The Politics of Prosecutions under the Convention Against Torture*, 2 CHI. J. INT’L L. 309, 309 (2001).

85. *State Dept. Helped Peruvian Accused of Torture Avoid Arrest*, N.Y. TIMES, Mar. 11, 2000, at A7. Proffered evidence linked Kohatsu to the torture of a former Peruvian intelligence operative who was left a paraplegic as a result. *Id.*

86. Solomon, *supra* note 84, at 311.

87. Morrissey, *supra* note 9.

88. *Envoy Freed Despite Torture Charge*, CHI. TRIB., Mar. 11, 2000, at 15. The State Department cited diplomatic immunity as the primary reason for their refusal to allow the Department of Justice to proceed with the indictment. *Id.*

89. Morrissey, *supra* note 9, at 3.

90. Solomon, *supra* note 84, at 311.

91. *Id.* at 312.

92. RATNER & ABRAMS, *supra* note 5, at 146.

jurisdiction.<sup>93</sup> The United States' reluctance to use universal criminal jurisdiction stands in stark contrast to the practices of other Western nations.<sup>94</sup> In the 1990s, Austria,<sup>95</sup> Belgium,<sup>96</sup> Denmark,<sup>97</sup> France,<sup>98</sup> Germany,<sup>99</sup> the Netherlands,<sup>100</sup> Spain,<sup>101</sup> Switzerland,<sup>102</sup> and the United Kingdom<sup>103</sup> all exercised universal jurisdiction as a means of punishing individual violators of human rights. In particular, Spain and Belgium have exercised jurisdiction far beyond anything the United States has ever attempted.<sup>104</sup> Their practices provide a striking contrast to the conservatism of the American position.

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93. Gene Bykhovsky, *An Argument Against Assertion of Universal Jurisdiction by Individual States*, 21 WIS. INT'L L.J. 161, 164 (2003).

94. See generally Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057 (2004) (describing the use of universal jurisdiction by various countries).

95. FIONA MCKAY, REDRESS, UNIVERSAL JURISDICTION IN EUROPE: CRIMINAL PROSECUTIONS IN EUROPE SINCE 1990 FOR WAR CRIMES, CRIMES AGAINST HUMANITY, TORTURE AND GENOCIDE 1, 16–17 (1999), available at <http://www.redress.org/downloads/publications/UJEurope.pdf>. Austria indicted a Bosnian Serb accused of participating in the ethnic cleansing of Bosnian Muslims. *Id.*

96. Belgium tried four Rwandans for their participation in the 1994 genocide and sought extradition of a fifth. Additionally, the Belgian courts ruled that Belgium had jurisdiction to try General Augusto Pinochet for his alleged crimes. *Id.* at 19–21.

97. Denmark successfully tried and convicted a Bosnian Muslim for torture committed in a Croat-run prison in Bosnia. *Id.* at 22–23.

98. *Id.* at 26. France indicted a Rwandan accused of participating in the genocide. Additionally, France initiated investigations into abuses in the Congo that resulted in the arrest of General Norbert Dabira, the Inspector-General of the Congolese Armed Forces. See Certain Criminal Proceedings in France (Congo v. Fr.), 2003 I.C.J. 102 (June 17). More recently, France issued a warrant for the arrest of Rwandan leader Paul Kagame's chief of protocol, Rose Kibuye, which was carried out on November 2008 in Frankfurt, Germany. France charged Kibuye with involvement in the 1994 death of former Rwandan leader Juvenal Habyarimana. *Rwandan Says Arrest of Aide Was a Violation of Sovereignty*, N.Y. TIMES, Nov. 12, 2008, at A8.

99. Germany originally indicted four Bosnian Serbs for activities such as genocide and ethnic cleansing. One was transferred to the International Criminal Tribunal for the Former Yugoslavia, but the other three were tried in German domestic courts. MCKAY, *supra* note 95, at 29.

100. *Id.* at 35. The Netherlands indicted a Bosnian Serb for his activities during the civil war in the former Yugoslavia and has prosecuted Sebastien Nzapali, a former Congolese colonel, for crimes against humanity in the DRC during the civil war of the 1990s. *Dutch Hold Congo War Crimes Trial*, BBC NEWS, Jan. 7, 2004, <http://news.bbc.co.uk/2/hi/europe/3374913.stm>.

101. MCKAY, *supra* note 95, at 38–40. The Spanish courts first sought indictments and extraditions related to the “Dirty War” in Argentina. Spain most famously indicted former Chilean dictator Augusto Pinochet, although there have also been a number of extradition requests more recently for Guatemalan military leaders accused of engaging in human rights abuses. Naomi Roht-Arriaza, *Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala*, 9 CHI. J. INT'L L. 79 (2008).

102. The Swiss government has tried a Bosnian Serb and a Rwandan for crimes arising from the human rights abuses in the former Yugoslavia and Rwanda. MCKAY, *supra* note 95, at 41–42.

103. A court in Scotland tried a Sudanese defendant for torture, and the United Kingdom's court system decided in favor of deporting Pinochet to Spain in order to stand trial. *Id.* at 44–45.

104. For more information on Spain's practices, see Roht-Arriaza, *supra* note 101. See also Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin*

### A. *Belgium*

Belgium has long been at the forefront of the universal jurisdiction movement.<sup>105</sup> As discussed previously, Belgium's law wasn't the first of its kind, but it was the most all-encompassing.<sup>106</sup> The first exercise of the Belgian universal jurisdiction statute came in 2001, when it tried four Rwandans for crimes committed during the 1994 genocide.<sup>107</sup> This exercise was perhaps not as revolutionary as it seemed, as all four defendants were found in Belgium.<sup>108</sup> Nonetheless, it proved to be a successful demonstration that courts with no ties to a particular set of events could successfully try cases of human rights violations, and went largely unchallenged.<sup>109</sup>

However, the next case the Belgian courts undertook was far more radical. Belgium charged Abdulaye Yerodia Ndombasi, the Democratic Republic of the Congo's ("DRC") acting Minister of Foreign Affairs,<sup>110</sup> with "grave breaches of the Geneva Conventions and crimes against humanity."<sup>111</sup> Belgium then sought Yerodia's extradition from the DRC in order to try him in Belgium.<sup>112</sup> The DRC resisted and filed a complaint with the International Court of Justice ("ICJ"),<sup>113</sup> which ultimately resulted in the court finding against Belgium and ordering it to rescind the warrant for Yerodia's arrest.<sup>114</sup> Despite the fact that Belgium did not prevail, the state stood strongly for the belief that it had the power to assert universal

*America, China, and Beyond*, 35 GA. J. INT'L & COMP. L. 495 (2007); NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* (2005). For Belgium, see ROHT-ARRIAZA, *supra*, at 186–93. See also Mohamed M. El Zeidy, *Universal Jurisdiction in Absentia: Is It a Legal Valid Option for Repressing Heinous Crimes?*, 37 INT'L L. 835 (2003); Ratner, *supra* note 44; Verhaeghe, *supra* note 44.

105. Jouet, *supra* note 104, at 501.

106. Ratner, *supra* note 42, at 889. Roht-Arriaza asserts that Belgium's statute was revolutionary as it allowed absolute universal jurisdiction—allowing cases to proceed without the presence of the defendant in the forum state, and permitting anyone, including plaintiffs not resident in Belgium, to press charges. The statute was so far-reaching that it even abrogated traditional immunity for sitting heads of state. ROHT-ARRIAZA, *supra* note 104, at 186.

107. The defendants included "two Benedictine nuns, a former professor at the National University of Rwanda . . . and a former businessman and [government] minister." Bassiouni, *supra* note 36, at 145–46.

108. *Id.* at 146.

109. Ratner, *supra* note 44, at 894.

110. Bassiouni, *supra* note 36, at 146.

111. ROHT-ARRIAZA, *supra* note 104, at 186.

112. Bassiouni, *supra* note 36, at 146–47.

113. See Arrest Warrant of 11 April 2000, *supra* note 39.

114. ROHT-ARRIAZA, *supra* note 104, at 186. For more discussion of the Yerodia case and the ICJ's ruling on head of state immunity, see Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 1016–18 (2006).

jurisdiction to punish serious crimes, regardless of the location of the defendant or his position within a government, a stance it has maintained in other situations as well.<sup>115</sup>

### B. Spain

Spain's foray into the exercise of universal jurisdiction also provides a stark counterpoint to the American position. In recent years Spanish courts have been involved in attempted prosecutions of former Chilean leader Augusto Pinochet, members of the Guatemalan junta and several individuals accused of committing atrocities during Argentina's "Dirty War."<sup>116</sup> Although the Spanish Supreme Court sought to narrow the reach of Spanish extraterritorial jurisdiction in the wake of these high-profile cases, the Spanish Constitutional Tribunal overruled it, asserting that no link to the prosecuting state was required in order to exercise jurisdiction.<sup>117</sup>

Clearly the Pinochet case is the most obvious example of Spain's use of extraterritorial jurisdiction. In 1996, "a Spanish prosecutor filed a complaint against Pinochet" based on the alleged commission of human rights abuses during his tenure as leader of Chile.<sup>118</sup> An arrest warrant was issued for Pinochet on the basis that he was accused of involvement in the murder of Spanish nationals and, with the cooperation of the British House of Lords, Pinochet was to be extradited and sent to Spain to stand trial.<sup>119</sup>

115. Bassiouni, *supra* note 36, at 147–48. For another example of Belgium's attempts to assert universal jurisdiction over foreign heads of state, see Tanaz Moghadam, Note, *Revitalizing Universal Jurisdiction: Lessons From Hybrid Tribunals Applied to the Case of Hissène Habré*, 39 COLUM. HUM. RTS. L. REV. 471 (2008), in which the author discusses Belgium's attempted involvement in the case of former president of Chad, Hissène Habré.

116. Jouet, *supra* note 104, at 496–97.

117. *Id.* at 497.

118. Hasson, *supra* note 21, at 147. The complaint alleged that, after the overthrow of the democratically elected president, Salvador Allende, Pinochet launched a campaign of torture against thousands of people in an effort to eliminate possible opponents. *Id.* Some commentators have asserted that the Spanish Audiencia Nacional actually "defied international law" in its indictment of Pinochet for genocide against a "national group," which is defined as "a differentiated human group, characterized by some trait, and integrated into the larger collectivity." Anthony Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. INT'L L. 149, 180 (2006). Spain asserted that the targeting of political opponents constituted genocide, but Colangelo notes that this is somewhat of a stretch, given the fact that the genocide label typically requires national, racial, ethnic, or religious ties. *Id.* Nonetheless, the international polity seemed to go along with Spain's definition despite the fact that the Genocide Convention specifically excludes political groups as victim classes. *Id.* at 181. It seems that the international (or perhaps European) desire was to see extraterritorial jurisdiction used to punish Pinochet, whatever the justification.

119. Moghadam, *supra* note 115, at 480–81. The British House of Lords, when faced with the Spanish extradition request, held that, as the United Kingdom was a signatory of the Torture

While Spain was not ultimately able to prosecute Pinochet in its courts, commentators have noted that “the Pinochet case represented a high-water mark for universal jurisdiction.”<sup>120</sup>

Less high-profile, but perhaps more important, is Spain’s involvement in the prosecution of alleged human rights abuses in Guatemala.<sup>121</sup> During the Guatemalan internal conflict from 1960–1996, two hundred thousand people were killed and four hundred thousand disappeared.<sup>122</sup> Accusations were made that the military had targeted members of the Mayan ethnic minority, and when the Guatemalan government refused to act, aggrieved Guatemalans petitioned the Spanish courts for help.<sup>123</sup> The courts took jurisdiction and began a process of investigation that culminated in the issuance of charges and international arrest warrants for people who committed crimes unrelated to the Spanish polity.<sup>124</sup> Astonishingly, Guatemala’s government reacted to the warrants by placing the accused in custody for a year, although the government ultimately refused to extradite them.<sup>125</sup> Nonetheless, Spain has doggedly continued to pursue the case, and since February 2008, the judge overseeing it has brought numbers of Guatemalan witnesses to Spain in order to testify.<sup>126</sup> While there is uncertainty as to the end results of Spain’s involvement, commentators have noted that Spain’s case has brought the matter to light and is forcing the Guatemalan government to address in some way the legacies of the internal conflict.<sup>127</sup>

In comparison with the work of Belgium, Spain, and numerous other European states, the United States’ overall attitude toward universal

Convention and the Convention formed part of British domestic law, the U.K. had the power to exercise jurisdiction over Pinochet for crimes relating to the substance of the treaty. On a related note, the House of Lords also chose to reject Pinochet’s claim of head of state immunity as the body decided that such immunity represented a violation of *jus cogens* norms. *Id.*

120. *Id.* at 482. After the Spanish authorities released Pinochet for health reasons, he was returned to Chile where the authorities immediately indicted him. Ultimately, charges relating to the commission of homicides and kidnappings during his tenure as leader were dismissed, leaving only charges concerning his role in the cover-up of the alleged atrocities. The process was finally derailed when a Chilean appeals court ruled that Pinochet was not well enough to stand trial. Hasson, *supra* note 21, at 148–49.

121. See Roht-Arriaza, *supra* note 101.

122. The figures were supplied by the U.N.-sponsored Commission on Historical Clarification, which accused the Guatemalan military of having committed genocide in specific areas of the country. *Id.* at 83.

123. *Id.* at 84.

124. *Id.* at 88.

125. *Id.* at 80. The accused included the country’s ex-President, the ex-Defense Minister, the ex-Police Chief, and the former head of the Secret Police. *Id.* at 79.

126. *Id.* at 100.

127. *Id.* at 101.

jurisdiction seems almost reactionary. The reluctance to embrace the practice, even in relation to *jus cogens* crimes, is evidenced by the fact that the United States continues to require a more traditional basis for jurisdiction before becoming involved in war crimes prosecutions.

## V. AN ARGUMENT IN FAVOR OF THE AMERICAN POSITION

While the use of universal jurisdiction to combat impunity is an admirable exercise, it seems that there are too many problems associated with universal jurisdiction to make it a feasible means of punishing *jus cogens* violations on a global scale. On the most general level, there are procedural issues such as obtaining physical control of perpetrators and investigating crimes that took place thousands of miles away.<sup>128</sup> There are other, less concrete problems as well, such as the potential infringement of states' sovereignty, the lack of interaction with victims, and the imperialistic overtones of Western states' involvement with the internal issues of states of the developing world.<sup>129</sup>

### A. Procedural Difficulties

The issues inherent in trying a case where the crime took place thousands of miles away are obvious. Primary among them is the problem of obtaining physical custody of a given defendant. The difficulties encountered in Spain's prosecution of Guatemalan leaders provide an excellent example.<sup>130</sup> In cases where another state has stepped in to prosecute human rights violations, it can be generally stated that the legal system in the home state is either flawed or not functioning.<sup>131</sup> Naomi

128. See Roht-Arriaza, *supra* note 101. See also Hasson, *supra* note 21; Joanne Brockman, *Liberia: The Case For Changing U.N. Processes For Humanitarian Interventions*, 22 WIS. INT'L L.J. 711 (2004); Chernor Jalloh & Alhagi Marong, *Ending Impunity: The Case for War Crimes Trials in Liberia*, 1 AFR. J. LEGAL STUD. 53 (2005).

129. See Bykhovsky, *supra* note 93; Erika R. George, *After Atrocity Examples from Africa: The Right to Education and the Role of Law in Restoration, Recovery, and Accountability*, 5 LOY. U. CHI. INT'L L. REV. 59 (2007); Okechukwu Oko, *The Challenges of International Criminal Prosecutions in Africa*, 31 FORDHAM INT'L L.J. 343 (2008); Maya Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda*, 36 DENV. J. INT'L L. & POL'Y 125 (2008); Linda E. Carter, *Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda*, 14 NEW ENG. J. INT'L & COMP. L. 41 (2007).

130. Roht-Arriaza, *supra* note 101.

131. Ratner, *supra* note 44, at 894–95, referring to Ratner's factors that favor the exercise of extraterritorial or universal jurisdiction over crimes relating to another state. Roht-Arriaza asserts that, in the Guatemala case, the "prosecutors' office remained ineffective, disrespectful to victims, and vulnerable to threats and corruption," and was compromised by the military and criminal elements. Roht-Arriaza, *supra* note 101, at 86.



Roht-Arriaza also notes that the figures involved in the ordering of such atrocities usually retain a fair amount of power, even if they are no longer in leadership.<sup>132</sup> With central weakness and power remaining in the hands of former government officials, it is small wonder that states such as Spain and Belgium have experienced difficulty successfully obtaining the extradition of accused human rights abusers.<sup>133</sup>

The inability to obtain physical custody renders the entire procedure largely moot; while “trials offer a transitional mechanism for normative transformation to express public condemnation of aspects of the past,”<sup>134</sup> the impossibility of exacting punishment on absent defendants undermines the process. When a court passes a meaningless judgment on a defendant it cannot reach, it renders the case a farce—there may be a manifestation of international revulsion for the acts, but the defendant has not truly been held accountable. In this respect, it is similar to amnesty in that there is knowledge of the commission of a crime, but the perpetrators still go free.<sup>135</sup> Such practices indicate to victims that those responsible for their suffering are unlikely ever to be subject to substantial justice, undermining the entire process.<sup>136</sup>

In the same vein, the difficulties of mounting a distant investigation in the face of a hostile government can undercut the effectiveness of international intervention in human rights cases. There are the general difficulties of obtaining specific information and witness testimony;<sup>137</sup> hostile states can prevent outside investigators from having access to witnesses and other important evidence required to build a case,<sup>138</sup> and the

132. Roht-Arriaza, *supra* note 101, at 81.

133. See, for example, Roht-Arriaza, *supra* note 101 for the previously mentioned discussion of Guatemala’s refusal to extradite those accused of atrocities against the Mayan people. She asserts that “[t]he Achilles heel of all international justice efforts . . . is the inability to execute arrest warrants” against important figures deeply involved in the commission of human rights violations. *Id.* at 97. See Arrest Warrant of 11 April 2000, *supra* note 39 for the DRC’s response to Belgium’s attempted extradition of Yerodia.

134. Scott, *supra* note 80, at 397.

135. *Id.* at 391–92. Amnesties are often criticized for “capitulat[ing] to past perpetrators” and for failing to help post-conflict countries internalize the importance of honoring human rights. As a result, it is argued, amnesty helps pave the way for further impunity because there is ultimately a lack of true responsibility. *Id.*

136. Brockman, *supra* note 14, at 739. Brockman argues that allowing leaders who have committed heinous crimes to remain at large “sends the wrong message” to both victims and perpetrators and dangerously weakens the process of rebuilding and reconciliation in post-conflict states. *Id.* at 738.

137. Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT’L L. 635, 679 (2007).

138. Roht-Arriaza, *supra* note 101, at 100. In the Guatemalan case, the Guatemalan court system had ruled that Spain had no jurisdiction to try the case, and so the prosecutor was barred from going to Guatemala to conduct interviews and undertake on-the-spot investigations. *Id.* at 80.

poverty of victims can make it impossible for them to travel the distances required in order to provide testimony.<sup>139</sup> In addition, international rulings have limited tribunals' ability to subpoena documents from high-level officials acting in their official capacities.<sup>140</sup> Without the safeguards of proper investigation and evidence-gathering, what is intended to be a method of exacting justice could devolve into a biased quest<sup>141</sup> for retribution and blame assignment by the international community, which will then congratulate itself on upholding its obligations to safeguard human rights.<sup>142</sup>

### B. Legitimacy Issues

The American position is admirable for other reasons. The choice to prosecute cases in distant fora creates issues surrounding state sovereignty,<sup>143</sup> lack of interface with victims,<sup>144</sup> and the specter of continuing Western imperialism.<sup>145</sup> Hybrid tribunals, combining elements of local and international justice, seem to be a better solution than extraterritorial prosecution.<sup>146</sup>

The international legal system is built on the "dignity of the foreign nation, its organs and representatives, and the functional need to leave

139. *Id.* at 101. When a Guatemalan judge chose to assist with Spain's investigation by interviewing victims himself, he was unable to do so without the government providing funds to pay for witnesses' travel to the court. *Id.*

140. Gordon, *supra* note 137, at 678. The ICC ruled in *Prosecutor v. Blaskic* that, while international tribunals could issue subpoenas with which states were required to comply, they could not attempt to require compliance with subpoenas from state officials acting in their official capacity. *Id.*

141. Bykhovsky, *supra* note 93, at 175. Bykhovsky argues that, while states may claim to be unbiased, there are usually links to one party or another, and this is another point that undermines the legitimacy of the end result. *Id.*

142. Gordon, *supra* note 137, at 710. Professor Gordon makes the point that desire for revenge against the most heinous of perpetrators—such as Saddam Hussein—creates a situation in which the international polity may be out for blood, whatever the price. *Id.* He quotes Justice Murphy's dissent in *In re Yamashita*, 327 U.S. 1 (1946), a case from post-war Japan:

[A]n uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit. The people's faith in the fairness and objectiveness of the law can be seriously undercut by that spirit.

Gordon, *supra* note 137, at 710.

143. See Bykhovsky, *supra* note 93, at 177–79.

144. See George, *supra* note 5, at 71 for a discussion of the problems encountered with the remoteness from the victims of the Rwandan tribunal in Arusha.

145. Oko, *supra* note 129, at 365–66.

146. Jalloh & Marong, *supra* note 14, at 69. See George, *supra* note 5, at 72–76 for an examination of the hybrid tribunal experience in Sierra Leone.

them unencumbered” in the governance of the state.<sup>147</sup> The involvement of a third-party state in the purely domestic matters of another nation violates notions of sovereignty, authority, and immunity for states and individuals.<sup>148</sup> Such action can be characterized as an external tyranny, as there has been no consent to the unilateral imposition of outside authority on a state’s citizenry,<sup>149</sup> and creates a system in which it is possible for one state to sit in judgment of the sovereign acts of another.<sup>150</sup> While some scholars argue that universal jurisdiction is an important tool in punishing violations of *jus cogens* norms,<sup>151</sup> it also has the potential effect of destroying confidence in the state’s ability to administer binding justice within its own boundaries.<sup>152</sup>

The breach of state sovereignty represented by the use of extraterritorial jurisdiction can also give rise to claims of judicial imperialism.<sup>153</sup> Generally, the use of extraterritorial jurisdiction is confined to developed nations<sup>154</sup> and the target state is usually a developing nation.<sup>155</sup> The end result is a proceeding with paternalistic overtones that parties on the receiving end interpret as a manifestation of neo-colonialism.<sup>156</sup> Returning to the point raised in the discussion of

147. Bykhovsky, *supra* note 93, at 177.

148. Christopher Hale, *Does the Evolution of International Criminal Law End with the ICC? The “Roaming ICC”: A Model International Criminal Court for a State-Centric World of International Law*, 35 DENV. J. INT’L L. & POL’Y 429, 440–41 (2007). Hale asserts that “antiquated” notions about sovereignty are often stumbling blocks to the widespread use of universal jurisdiction, while acknowledging that its use must fit within the dominant Westphalian sovereignty model. *Id.*

149. *Id.*

150. Bykhovsky, *supra* note 93, at 178.

151. See Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FOREIGN AFF., Sept./Oct. 2001, at 150, 150 (2001) (Universal jurisdiction offers “a measure of solace to victims and their families and raising the possibility that would-be tyrants will begin to think before embarking on a barbarous path.”).

152. Bykhovsky, *supra* note 93, at 178.

153. Oko, *supra* note 129, at 354.

154. See Moghadam, *supra* note 115, at 484. “The roster of countries that currently have universal jurisdiction statutes reads like a list of names off an epitaph to colonialism: Belgium, France, Germany, the Netherlands, Spain, and the United Kingdom.” *Id.* at 484–85. The Hissène Habré case is the sole example of a state from the developing world attempting to exercise universal jurisdiction. *Id.* at 484.

155. *Id.* at 484. For a list of examples of individuals indicted or tried as a result of the use of extraterritorial jurisdiction, see *supra* notes 92–104. Although the REDRESS Report from which the examples are drawn does not include all uses of extraterritorial jurisdiction, it seems to provide a fairly representative sampling of accused perpetrators. See *supra* notes 92–104.

156. Anita Frölich, *Reconciling Peace with Justice: A Cooperative Division of Labor*, 30 SUFFOLK TRANSNAT’L L. REV. 271, 295 (2007). Frölich points out that former colonial states, such as Spain and Belgium, most often pursue universal jurisdiction in their former possessions. See also Oko, *supra* note 129, at 366 for a discussion of the feelings such undertakings raise in the members of post-colonial societies. Oko asserts that there is a great deal of anti-Western sentiment in the African states

sovereignty, nations using extraterritorial jurisdiction are outsiders without a mandate,<sup>157</sup> and commentators note that Western legal tradition does not always match the needs and desires of targeted states.<sup>158</sup> As a consequence, international prosecutions of human rights abusers are often met with suspicion and hostility born of years of colonialism, as opposed to providing a means of reconciliation and renewal.<sup>159</sup>

These attitudes combine with the distance of the extraterritorial forum to create a disconnect between the victims and the mechanisms of justice.<sup>160</sup> The International Criminal Tribunal for Rwanda (“ICTR”) provides an excellent example of this process. The location of the tribunal in Arusha, Tanzania led to a “limited role for and attention to the needs of the victims,”<sup>161</sup> difficulty with coordinating witness testimony, inadequate provision of information to the Rwandan public about the proceedings,<sup>162</sup> and far less accountability to the victims.<sup>163</sup> Ultimately, justice is not merely a punitive exercise. Rather, there should be provision for victims’ rights to be vindicated, and removing the proceeding entirely from the domestic court system and the population affected by the atrocities also

against which extraterritorial jurisdiction is most often exercised, creating a situation in which the public is demoralized and disinterested and feels it has little stake in the ultimate outcome. *Id.*

157. Bykhovsky, *supra* note 93, at 179.

158. George, *supra* note 5, at 71–72. George points to the International Criminal Tribunal for Rwanda (“ICTR”) as an example of African resistance to one-size-fits-all international adjudication. She notes that Rwanda was the only state to oppose the institution of the ICTR for a number of reasons, including its failure to include a provision for capital punishment. *Id.* Oko notes that the death penalty is generally available in most African countries, and the U.N.’s failure to provide for its use undermines the legitimacy of international adjudication. Oko, *supra* note 129, at 369. “[F]or most Africans, especially the victims of brutality, the only penalty they seek for their abusers is the death penalty.” *Id.* at 370. As a result of the ICTR’s inefficiency and illegitimacy, Rwandans looked elsewhere, developing the *gacaca* system, which “embraced traditional Rwandan values by embracing restoration over retribution.” Cecily Rose, *Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-telling and Reparations*, 28 B.C. THIRD WORLD L.J. 345, 387 (2008).

159. Oko, *supra* note 129, at 366.

160. *See id.* at 371; George, *supra* note 5, at 71; Scott, *supra* note 80, at 406.

161. George, *supra* note 5, at 71.

162. Scott, *supra* note 80, at 406.

163. Oko, *supra* note 129, at 374. Oko quotes the Chief Prosecutor of the ICTR, Hassan B. Jallow:

[T]he holding of trials in Arusha, Tanzania, far away from the theatre of genocide distances the people of Rwanda from a process designed to render justice to its people. For the people to feel that justice was being done, the criminal justice system ought ideally to operate within sight and hearing of the victims themselves.

*Id.* at 372. Human Rights Watch noted that such proceedings created a situation in which the far-away trials lacked visibility in the countries where the atrocities had been carried out, and were often inaccessible for those who would derive the greatest benefit from participating in the proceedings—the victims and “those in whose name the crimes were committed.” *Id.* at 372–73.

removes the opportunity for the victims to derive this benefit from the prosecution.<sup>164</sup>

Taking all of the above-mentioned factors into account, U.S. reluctance to undertake extraterritorial prosecutions under the universal jurisdiction standard is commendable. A conservative approach fosters a need to find better alternatives. Of all of the ways in which the international community has attempted to handle the administration of justice, hybrid tribunals offer the best opportunity for local participation under the watchful eye of international observers.<sup>165</sup> These tribunals combine local and international law and judicial frameworks and are usually sited within the country itself.<sup>166</sup> Their use in these situations should be encouraged. Hybrid tribunals allow the international community some involvement, while still providing responsiveness to the needs of the affected population.<sup>167</sup> Such courts make it possible for post-conflict nations to provide justice, to signal a move away from impunity, and to rebuild the justice system and the rule of law.<sup>168</sup> Additionally, the fact that this type of tribunal takes into account the country's judicial norms by including local courts, advocates, and legal frameworks enhances legitimacy and prevents the perception of the unilateral imposition of outside justice.<sup>169</sup> Extraterritorial prosecutions do none of these things. While there may be concern about the ability of post-conflict nations to dispense on-the-ground justice, it is a great deal more concerning not to allow the nations and their citizens to be involved at all.<sup>170</sup>

164. *Id.* at 371.

165. Brian Barbour & Brian Gorlick, *Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum for Potential Victims*, 20 INT'L J. REFUGEE L. 533, 544–45 (2008). Most recently, hybrid tribunals have also been set up in Cambodia, Sierra Leone, and Lebanon, among other places. *Id.* They have also been established in East Timor and Kosovo. Etelle Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 353 (2006). While the tribunals in Kosovo and East Timor were established and managed by the U.N., the most recent incarnations of these tribunals are the result of negotiations and cooperation between the U.N. and the sovereign nation involved. *Id.* at 355.

166. Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 295 (2003). In hybrid tribunals, “[f]oreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries. The judges apply domestic law that has been reformed to accord with international standards.” *Id.* The hybrid model has been most commonly used in post-conflict countries where the U.N. has not established an *ad hoc* tribunal and no acceptable local alternative exists. *Id.*

167. Laurence Juma, *The Human Rights Approach to Peace in Sierra Leone: The Analysis of the Peace Process and Human Rights Enforcement in a Civil War Situation*, 30 DENV. J. INT'L L. & POL'Y 325, 369 (2002).

168. Scott, *supra* note 80, at 384.

169. Dickinson, *supra* note 166, at 306.

170. Higonnet, *supra* note 165, at 358. Higonnet asserts that, in order to assist post-conflict nations in reforming their societies, the U.N. and the international community “cannot display an

## VI. CONCLUSION

The evidence presented in this Note demonstrates that the prosecution of Charles Taylor Jr. under the ETS does not mark a major change of direction for the United States, but instead illustrates American reluctance to join the international extraterritorial prosecution movement. In the Taylor case, the United States relied on traditional theories of international jurisdiction, and continuing U.S. practice evinces a preference for the use of civil proceedings to fulfill its CAT duties. It seems clear that the United States will probably not embrace the Belgian or Spanish practices of universal jurisdiction; such a position is defensible, if not laudable. The removal of victims' power to participate in the prosecution of human rights abuses raises a host of both procedural and legitimacy questions and should be eschewed in favor of the more cooperative model of hybrid tribunals, where both post-conflict states and the international community can cooperate in order to secure justice for victims of serious human rights violations.

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elitist, paternalistic attitude' toward war crimes victims and national judiciaries, 'i.e., viewing local participation as inherently biased, tribal, inexperienced and inept.' *Id.* (citation omitted). Otherwise, there is the potentiality of "perpetual international oversight—at once unsustainable in practical terms, and dubious in moral terms, given its inherent imperialism." *Id.*

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