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Abstract

Part I of this Article scrutinizes the current definition of genocide in view of its theoretical circumscription in the Genocide Convention and with special reference to the judgment of the International Criminal Tribunal for Rwanda in Prosecutor v. Akayesu. Part II considers the validity and the application of the principle of universal jurisdiction to the crime of genocide, and the consequent duty of states to bring perpetrators of genocide to justice. Part III focuses on the jurisdiction ratione materia of the ICC regarding the crime of genocide. Part IV will pay special attention to the prosecution of genocide in the United States.

ARTICLE

PROSECUTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

*Johan D. van der Vyver**

INTRODUCTION

When indictments were drafted for purposes of the Nuremberg Trials, genocide was not yet perceived as an international crime in its own right, and for that reason the German war criminals, including those directly responsible for and engaged in the execution of the Holocaust, were indicted to stand trial on charges of crimes against the peace, war crimes, crimes against humanity, and a common plan or conspiracy to commit these former crimes.[1] Genocide was indeed mentioned in the Nuremberg indictment, but only as a distinct manifestation of war crimes[2] and crimes against humanity.[3]

In 1946, the General Assembly of the United Nations proclaimed that the crime of genocide is "a denial of the right to existence of entire human groups" and noted that such denial "shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions repre-

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1. *See* 1 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 14 NOVEMBER 1945 - 1 OCTOBER 1946 27-92 (listing charges in indictment) (Nuremberg: Int'l Mil. Tribunal, 1946-49).

2. *Id.* at 43-44. Under the rubric of war crimes, the indictment accused the defendants of committing "deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian population of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others." *Id.* at 43-44; *see also* 2 *id.*, at 45-46.

3. 1 *Id.* at 65. Although genocide is not mentioned by name in Count IV (crimes against humanity), prosecution in this part of the indictment also relied upon instances of genocide mentioned in Count III (war crimes). Further specifics of what amounted to acts of genocide in charges based on crimes against humanity included the systematic persecution of Jews, which involved their being "deprived of liberty, thrown into concentration camps where they were murdered and ill-treated" and confiscation of their properties. *Id.* at 66; 2 *id.* at 70; *see also* Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. L. 415, 426 (1998).

sented by these human groups, and is contrary to moral law and the spirit and aims of the United Nations."[4] The International Convention on the Prevention and Punishment of the Crime of Genocide, 1948[5] (or "Genocide Convention") finally provided the basis for the emergence of a norm of customary international law, with the force of *jus cogens,* which renders genocide punishable. As such, the crime of genocide is subject to universal jurisdiction.

In 1998, the International Criminal Tribunal for Rwanda, in the case of *Prosecutor v. Jean-Paul Akayesu,*[6] rendered the first conviction ever for acts of genocide. Earlier, in *Bosnia and Herzegovina v. Yugoslavia,*[7] the International Court of Justice rejected a submission of the Respondent to the effect that the responsibility of states under the Genocide Convention entails no more than a duty to prevent and punish acts of genocide. Instead, the International Court of Justice held that the Genocide Convention does not preclude state responsibility for acts of genocide. These cases are authority for the proposition that the definition and scope of the crime of genocide as a proscription of customary international law have developed well beyond the confines dictated by the wording of the Genocide Convention itself.

On June 15 through July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries was held in Rome, Italy, with a view to "finalizing and adopting a convention on the es-

4. G.A. Res. 96(I), U.N. GAOR, 1st Sess., Part II (Resolutions), U.N. Doc. A/64/Add.1 (1947); *see also* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 14, 23 (May 28); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 1 (April 8); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 325, 348 (Sept. 13).

5. G.A. Res. 260, U.N. GAOR, 3rd Sess., Part 1, at 174, U.N. Doc. A/810 (1948) [hereafter "Genocide Convention"].

6. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T (Sept. 2, 1998). Summary of judgment is published in 37 I.L.M. 1399 (1998). However, citations in the following paragraphs are from the original judgment in the case. *See also* Paul J. Magnarella, *Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases,* 11 FLA. J. INT'L L. 517, 522-27 (noting that, before Akayesu, Jean Kambanda pleaded guilty to acts of genocide committed in Rwanda, and was sentenced to life in prison).

7. Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 1996 I.C.J. 595 (July 11).

tablishment of an international criminal court."[8] The Rome Conference was preceded by deliberations in New York of an *Ad Hoc* Committee (1995) and a Preparatory Committee (1996-1998), operating under a mandate of the General Assembly of the United Nations to refine a Draft Statute for an International Criminal Court that had been prepared by the International Law Commission ("ILC").[9] The Rome Conference culminated in the approval, by majority vote,[10] of the text of the Statute of the International Criminal Court[11] ("ICC Statute"). The International Criminal Court ("ICC") was given jurisdiction to punish perpetrators of genocide, crimes against humanity, and war crimes[12] in cases where the national courts of a country with custody of the suspect are "unwilling" or "unable" to do so.[13]

Part I of this Article scrutinizes the current definition of genocide in view of its theoretical circumscription in the Genocide Convention and with special reference to the judgment of the International Criminal Tribunal for Rwanda in *Prosecutor v. Akayesu.* Part II considers the validity and the application of the principle of universal jurisdiction to the crime of genocide, and the consequent duty of states to bring perpetrators of genocide to justice. Part III focuses on the jurisdiction *ratione materia* of the ICC regarding the crime of genocide. Part IV will pay special attention to the prosecution of genocide in the United States.

I. *THE CONCEPT OF GENOCIDE*

Genocide has been defined as follows in the Genocide Convention:

> For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;

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8. G.A. Res. 52/160, U.N. GAOR, 52nd Sess., Supp. No. 49, at 384, ¶ 3, U.N. Doc. A/52/49 (1997).

9. *See* Report of the International Law Commission on the Work of its 46th Session, U.N. GAOR, 49th Sess., Supp. No. 10, at 29, U.N. Doc A/49/10 (1994).

10. *Id.* The ICC Statute was adopted by 120 votes in favor, 7 against, and 21 abstentions. *Id.*

11. *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (1998) [hereafter "ICC Statute"].

12. *Id.* art. 5(1)(a)-(c).

13. *Id.* art. 17.

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.[14]

This definition has been retained without change in subsequent instruments, including the Statute of the International Criminal Tribunal for the Former Yugoslavia,[15] the Statute of the International Criminal Court for Rwanda,[16] and the ICC Statute.[17] The Genocide Convention not only renders acts of genocide punishable, but also makes conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide punishable as well.[18] This rule is similarly framed in the Statute of the International Criminal Tribunal for the Former Yugoslavia[19] and in the one for Rwanda.[20] The ICC Statute does not refer to any of these forms of participation in the crime of genocide. The Statutes of the two *ad hoc* criminal tribunals confer criminal responsibility upon any person who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of genocide or any of the other accessorial acts mentioned above.[21]

Five particular elements of the definition of genocide require closer scrutiny: the perpetrator of genocide, the *actus reus*, the target group, the objectives constituting a component of

14. Genocide Convention, *supra* note 5, art. 2.

15. *Statute of the International Tribunal*, art. 4(1), *contained in* annex of *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), *reprinted in* 32 I.L.M. 1193 (1993).

16. *Statute of the International Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 49th Sess., art. 2(2), U.N. Doc. S/RES/955 (1994).

17. ICC Statute, *supra* note 11, art. 6.

18. Genocide Convention, *supra* note 5, at 174-75, art. 3.

19. *Statute of the International Tribunal*, *supra* note 15, art. 4(3).

20. *Statute of the International Tribunal for Rwanda*, *supra* note 16, art. 2(3).

21. *Statute of the International Tribunal*, *supra* note 15, at 1194, art. 7(1); *Statute of the International Tribunal for Rwanda*, *supra* note 16, art. 6(1).

mens rea, and compliance of the definition with the demands of *nullum crimen sine lege*.

A. *The Perpetrator of Genocide*

The perpetrators of genocide are not confined to states or agencies of government, but can also be non-state actors.[22] The language of the Genocide Convention is indicative of an intention to confine liability under international law for acts of genocide to natural persons only. It provides that "[p]ersons" committing genocide, or any of the other acts included in the Genocide Convention's proscriptions, shall be punished.[23] Although "persons" as a juridical concept includes natural as well as juristic persons, the Article expressly refers to "responsible rulers, public officials or private individuals" as examples of persons who might be punishable.[24] Restrictive interpretation of this provision—the general norm of construction that applies to punitive provisions—and in particular application of the *eiusdem generis*-rule, would suggest that an accused under the Genocide Convention, ought to be confined to those who have something in common with "responsible rulers, public officials or private individuals:" that is, natural persons to the exclusion of juristic persons, including the state as a corporate body with legal subjectivity. The duty of State Parties to the Genocide Convention is seemingly confined to undertaking "to prevent and to punish" genocide as a crime under international law.[25]

These provisions raise several intriguing questions pertaining to the criminal liability of natural persons (individuals) for international crimes, the corporate liability of states for criminal wrongdoing, and the corporate liability in international law of juristic persons other than organs of state.

1. Criminal Liability of Natural Persons

In his opening statement in the *Trial against Hermann Wilhelm Göring and Others* at Nuremberg, Chief Prosecuting Counsel for the United States, Justice Robert H. Jackson, observed:

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22. BeAnal v. Freeport-McMahon, Inc., 969 F. Supp. 361, 371 (E.D. La. 1997); *but see* Lee A. Steven, *Genocide and the Duty To Extradite or Prosecute: Why the United States is in Breach of Its International Obligations*, 39 VA. J. INT'L L. 425, 438-39 (1999).

23. Genocide Convention, *supra* note 5, at 175, art. 4.

24. *Id.*

25. *Id.* art. 1.

> The principle of individual responsibility for piracy and brigandage, which have long been recognized as crimes punishable under international law, is old and well-established. That is what illegal warfare is.
> This principle of personal liability is a necessary as well as logical one if international law is to render real help to the maintenance of peace. An international law which operates only for states can be enforced only by war because the most practicable method of coercing a state is warfare.
> . . .
> Of course, the idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons. While it is quite proper to employ the fiction of responsibility for a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity.[26]

The International Military Tribunal, in its judgment, echoed these sentiments by holding that "international law imposes duties and liabilities upon individuals as well as upon States," and that "individuals can be punished for violations of international law."[27] The Tribunal went on to proclaim:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[28]

It is important to note that the reference to the criminal conduct of individuals was not intended to exclude the criminal liability of corporate institutions (juristic persons), but addressed the traditional perception of the time that only states could be subjects of international law. Regarding criminal liability under international law, Nuremberg held that not to be the case. Nuremberg emphatically rejected the proposition that international law is only concerned with the actions of sovereign states and, therefore, provides no punishment for individuals, as well as the assumption that when an act of state is in issue, those carrying it out cannot be held personally responsible.[29]

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26. 2 TRIALS OF THE MAJOR WAR CRIMINALS, *supra* note 1, at 149-50.

27. 1 *Id.* at 223. Judgment has been reprinted in *International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946*, 41 AM. J. INT'L L. 172, 220, 220-21 (1947).

28. 1 TRIALS OF THE MAJOR WAR CRIMINALS, *supra* note 1, at 223.

29. *Id.* at 222-23; *International Military Tribunal (Nuremberg), supra* note 27, at 220.

Nuremberg provided no answer, however, to the further question of whether the individual subject of international criminal law should be confined to persons executing acts of state, to the exclusion of individuals acting in their private capacity. Some believe that only individuals executing acts of the state should be held liable for international crimes. Louis Sohn[30] proclaimed:

> It is difficult to proceed against great sovereign states, and even more difficult to punish them in any meaningful fashion. States function through individuals, however, and eventually means are likely to be found to punish those who are truly responsible for a state's behavior.[31]

Rupa Bhattacharyya, however, begged to differ:

> If compliance can be imposed under international law on individuals who are acting in an official capacity, then there is no legitimate reason why individuals acting in private capacities are also not subject to international laws. If, after all, the international legal order is to be constituted as a rule-of-law system, it is necessary that respect for that law be fostered through its equal application to all members of international society.[32]

The generality of this exposition of individual criminal liability under international criminal law does not address the question of whether a state, by means of treaty arrangements, is capable of rendering its private citizens punishable under international law *per se* (in contradistinction to incorporating criminal proscriptions enunciated in a treaty into the municipal law of

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30. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982).

31. *Id.* at 12; *see also* Rupa Bhattacharyya, *Establishing a Rule-of-Law International Criminal Justice System*, 31 TEX. INT'L L.J. 57, 93-94 (1996); Christopher L. Blakesley, *Jurisdiction, Definition of Crimes and Trigger Mechanisms*, 25 DENV. J. INT'L L. & POL'Y 235, 239 (1997) (noting that "individual responsibility must be the cornerstone of any international court."); Judgment of International Criminal Tribunal for Former Yugoslavia in Prosecutor v. Anto Furundzija, 38 I.L.M. 317, ¶140 (1999) (holding that treaty-based and customary rules of humanitarian law "first and foremost address themselves to the acts of individuals, in particular to State officials or more generally, to officials of a party to the conflict or else to individuals acting at the instigation or with the consent or acquiescence of a party to the conflict.").

32. Bhattacharyya, *supra* note 31, at 74; *see also ILC Draft Articles on State Responsibility*, U.N. GAOR, 51st Sess., Supp. No. 10, at 14, U.N. Doc. A/51/10 (1996) (stating that "[a]n individual who commits a crime against the peace and security of mankind is responsible therefore and is liable to punishment").

the contracting state). When Marek St. Korowics many years ago asserted the subjectivity of individuals under international law with reference, *inter alia*, to the criminal liability of individuals for certain international crimes, he constructed that liability only as a matter of "the state implementing international agreements within its own municipal jurisdiction."[33]

The question as to the criminal liability under international law of natural persons also raises the further question whether "international criminal law" can lay claim to *une raison d'être* beyond or alongside the municipal criminal justice systems of nation-states. In 1950, Georg Schwartzenberger was of the opinion that a state could do no more than contract an international obligation to criminalize certain acts within its national legal system and to punish individuals committing those crimes as a matter of municipal law.[34] Schwartzenberger spoke of "offenses against rules of internationally postulated municipal criminal law."[35]

It is now trite that individuals acting personally or as agents of a government can be held accountable for international crimes.[36] The generality of this statement of the law, however, requires qualification. The criminal responsibility of individuals

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33. Marek St. Korowics, *The Problem of International Personality of Individuals*, 50 AM. J. INT'L L. 533, 545 (1956).

34. Georg Schwarzenberger, *The Problem of an International Criminal Law*, CURRENT LEGAL PROBS. 263 (1950).

35. *Id.* at 268. Schwartzenberger distinguished between (a) extension of national criminal jurisdiction to acts committed outside national borders; (b) incurring international obligation to punish acts of individuals under a country's own municipal criminal law; (c) the duty resting on all states under international law to punish within their own territorial jurisdiction acts identified as criminal violations of *ius gentium* (piracy and war crimes); (d) the punishment of acts in municipal courts which, if not prosecuted, would render the country concerned liable under international law (forgery of foreign coins and banknotes); (e) the responsibility of states to cooperate with one another in administration of criminal justice (extradition of suspects); and (f) international delinquencies and crimes in the true sense, which does not subject a state to punishment but may only compel it to make reparation for moral or material wrongdoing. All instances mentioned in (a) to (e) are really matters of municipal criminal law, given the retributory constraints of (f). Schwartzenberger questioned whether one could at all speak of international criminal law. *Id.* at 264-74.

36. OPPENHEIM'S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 9th ed. 1992) 505-08, ¶ 148; M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 514 (1999); John W. Bridge, *The Case for an International Court of Criminal Justice*, *in* INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 213, 223 (Mark W. Janis ed. 1992); Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW. & CONTEMP. PROBS. 153, 161 (1996); David Stoelting, *Status Report on the International Criminal Court*, 3 HOFSTRA L. & POL'Y SYMP. 233, 252 (1999).

acting in their private capacity—therefore not as organs of state action—must be confined to transgressions of criminal proscriptions under *customary international law* only. In *Ex Parte Quirin*, Chief Justice Harlan Stone said:

> From the very beginning of its history this Court has recognized and applied the law of war as including that part of *the law of nations* which prescribes, for the conduct of war, the status, rights and duties of enemy nationals as well as enemy individuals.[37]

In *Kadic v. Karadzic*, the Court similarly held that rape, torture, and summary executions committed by an individual as part of genocide are actionable as "violations of the law of nations" under the Alien Tort Claims Act (and therefore as a crime under customary international law) "without regard to state action."[38] The Court also stated that the liability of private persons for war crimes, having been recognized since World War I and confirmed by the Nuremberg trials after World War II, has become "an important aspect of international law."[39]

The founding of criminal liability of (natural and juristic) persons other than organs of government *by means of treaty arrangements* is problematic. Many jurisdictions of the world recognize the institution of *pacta de contrahendo*, whereby A and B can enter into a binding agreement for the *benefit* of C. The creation of binding *obligations* of a third person through the contractual arrangements of A and B, however, is not commonly recognized—if at all—since it would violate the foundation of the institution of consensual agreements. State A can therefore bind itself and its officials/subordinate organs through the agency of an international treaty, but cannot, in this writer's opinion, use its treaty powers to criminalize under international law the conduct of its citizens acting in their private capacity. If a State Party to a treaty undertakes to subject the conduct of its private citi-

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37. Ex Parte Quirin, 317 U.S. 1, 27-28 (1943) (emphasis added). The rather obscure distinction made between "enemy nationals" and "enemy individuals" at least includes persons acting as organs of state, and persons acting in their private capacity. *Id.*

38. 28 U.S.C. § 1350 (Supp. III 1997); Kadic v. Karadzic, 70 F.3d 232, 243-44 (2d Cir. 1995).

39. *Id.* at 243; *see also* Jordan J. Paust, *Suing Karadzic*, 10 LEIDEN J. INT'L L. 91, 97 (1997) (noting that private individuals are liable for violations of international law, "especially with respect to genocide, war crimes, and crimes against humanity").

zens to punishment, then it has to do so through its municipal criminal justice system.

Current international law can be invoked to punish individuals for crimes proclaimed as such by international law, subject to the following norms:

- individuals can be held liable in the municipal courts of a state for conduct identified as crimes under customary international law, or proclaimed criminal in a particular treaty and incorporated into the criminal justice system of that state;
- an individual acting as an organ of state or privately can be held criminally liable for conduct proclaimed to be a crime under customary international law;
- a state can render individuals acting as agents of government criminally liable under international law for conduct proclaimed to be criminal by treaty arrangements;
- a state cannot criminalize the conduct of private individuals by entering into a treaty that proclaims the conduct in question punishable—here, the international obligation of a State Party to the treaty can involve no more that a commitment to criminalize and to punish the act within the confines of the state's municipal criminal justice system.

At the time of the entering into force of the Genocide Convention, the provision rendering private individuals liable for acts of genocide and genocidal acts could therefore imply no more than a duty of States Parties to criminalize and to punish the crime of genocide and its accessories within their own municipal criminal justice systems. But that has changed. Since genocide has become a crime under customary international law,[40] private individuals can indeed be held liable under the rules of international law for the crime of genocide.

2. Criminal Liability of States

Responsibility of states for wrongful conduct is indeed rec-

40. *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 4, at 23 (stating that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without conventional obligation. The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope.").

ognized in international law, and the remedies sanctioned by international law for such wrongdoing entail both compensatory and punitive elements. Corporate liability of states has thus been recognized in regard to war crimes committed by Germany during World Wars I and II, and leading experts in the field of international criminal law have argued that the principle of collective responsibility of states for criminal conduct can and ought to be extended.[41] According to M. Cherif Bassiouni, state criminal responsibility would be no more than "a symbolic manifestation by the world community designed to stigmatize internationally violative behaviour, irrespective of the merits or effectiveness of such stigmatization in preventing or controlling internationally violative behaviour."[42] It is, however, submitted that in the context of core crimes under customary international law, corporate liability of states could mean more than just that.

The ILC's Draft Articles of State Responsibility[43] include proposals for state criminal liability, which—if acted upon—will include retributory action for "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas"[44]—provided that the obligation is "so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole."[45] The ILC's Draft Code of Crimes Against the Peace and Security of Mankind again underscores *individual* criminal liability.[46]

State responsibility for criminal conduct has been emphasized in several recent judgments of international tribunals. In *Prosecutor v. Anto Furundzija,* for example, the International Criminal Tribunal for the Former Yugoslavia proclaimed:

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41. *See* M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT 47-48 (1987).

42. *Id.* at 50.

43. *ILC Draft Articles on State Responsibility,* U.N. GAOR, 51st Sess., Supp. No. 10, at 125, U.N. Doc. A/51/10 (1996).

44. *Id.* art. 19(3)(d).

45. *Id.* art. 19(2).

46. *ILC Draft Code of Crimes Against the Peace and Security of Mankind,* U.N. GAOR, 51st Sess., Supp. No. 10, at 14, art. 2, U.N. Doc. A/51/10 (1996). The Draft Code does, as a general principle, recognize the responsibility of states under international law. *Id.* art. 4.

> Under current humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility.[47]

As far as genocide is concerned, the International Court of Justice in *Bosnia and Herzegovina v. Yugoslavia*, rejected a submission of the Respondent that the responsibility of states under the Genocide Convention entails no more than a duty to prevent and punish acts of genocide.[48] The language of the Genocide Convention, the court found, does not preclude any form of state responsibility, and although the Genocide Convention contemplated acts of genocide committed by "rulers" or "public officials,"[49] it does not exclude "the responsibility of a State for acts of its organs."[50]

As far as the ICC is concerned, it accepted from the outset that states will not be subject to the court's jurisdiction. It was also decided in Rome that the court will not exercise jurisdiction over juristic persons.[51] The jurisdiction *ratione personae* of the ICC was therefore confined to natural persons (over the age of 18 years).[52]

3. Criminal Liability of Juristic Persons Other Than the State

The criminal justice system of most countries of the world recognize that a juristic person can be held liable for criminal conduct. Those indicted to stand trial in Nuremberg certainly included several organizations, including the *Reich* Cabinet, the leadership corps of the Nazi Party, the SS, the Gestapo, the SA, and the General Staff of the High Command of the Armed

47. *Prosecutor v. Furundzija*, 38 I.L.M. 317, ¶ 142 (1999).

48. *See* Genocide Convention, *supra* note 5, art. 9 (referring to "the responsibility of a State for genocide or for any of the other acts enumerated in article III").

49. *Id.* art. 4.

50. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 1996 I.C.J. 595, ¶ 32 (July 11).

51. U.N. Doc. A/CONF.183/C.1/WGGP/L.4/Add.3 (1998).

52. ICC Statute, *supra* note 11, art. 25(1).

Forces.[53]

The punishments suitable for juristic persons are evidently not the same as those that can be imposed on natural persons. The Nuremberg trials sought an order to declare the organizations "criminal."[54] The Draft Statute for an International Criminal Court, which constituted the basis of the deliberations in Rome, included (bracketed) proposals pertaining to the criminal liability of juristic persons for any of the crimes within the jurisdiction of the ICC.[55] Although those proposals were eventually abandoned because the Working Group responsible for the drafting of the concerned provisions could not reach a consensus,[56] it is worth noting the kind of penalties that proponents of proposals for the criminal liability of juristic persons had in mind:[57] fines, dissolution, prohibition of the exercise of any activities by the juristic person for a period to be stipulated by the Court, closure of the premises used in the commission of the crime for a period to be determined by the Court, forfeiture of proceeds, property and assets obtained by means of the criminal conduct, and appropriate forms of reparation.

B. *Actus Reus*

The means of achieving the purposes of genocide include killing, causing serious bodily or mental harm, deliberately inflicting certain conditions of life on the target group, taking measures to prevent births within the group, and forcibly transferring children of the target group from the target group. These acts evidently must not be seen in isolation but, to constitute acts of genocide, must be committed as a means of achieving the purpose of genocide, namely the destruction of the target group. The element of fault as circumscribed in the definition can, on the other hand, bring the proscription of genocide to bear on a great variety of specific conduct that would almost inevitably come within the reach of the broad confines of the *actus reus*. In the 1993 *Case Concerning Application of the Convention on the Prevention and Prosecution of the Crime of Genocide (Bosnia*

53. *See* TRIALS OF THE MAJOR WAR CRIMINALS, *supra* note 1, at 80-84, Appendix B.

54. *Id.*

55. *Draft Statute for the International Criminal Court*, 53rd Sess., U.N. Doc. A/CONF.183/2/Add.1 (1998), art. 23(5)-(6).

56. U.N. Doc. A/CONF.183/C.1/L.4/Add.3 (1998).

57. *Draft Statute for the International Criminal Court*, *supra* note 9, art. 76.

& others v. Yugoslavia (Serbia and Montenegro)), the "acts of genocide and genocidal acts" complained of included, and was expressly not confined to,

> murder; summary executions; torture; rape; mayhem; so-called 'ethnic cleansing'; the wanton devastation of villages, towns, districts and cities; the siege of villages, towns, districts and cities; the starvation of the civilian population; the interruption of, interference with, and harassment of humanitarian relief supplies to the civilian population by the international community; the bombardment of civilian population centres; and the detention of civilians in concentration camps or elsewhere.[58]

The International Criminal Tribunal for Rwanda in *Prosecutor v. Jean-Paul Akayesu*[59] analyzed the different components of the *actus reus* in some detail. The examples given of conduct that would qualify as acts of genocide have evidently been informed by the circumstances that prevailed in Rwanda at the time. Different circumstances might render other examples, and those outlined hereafter must therefore not be seen as exhaustive or even necessarily representative of genocidal conduct.

1. Killing Members of the Victim Group

The Tribunal noted that "killing" could mean intentional and unintentional homicides, but that such a broad meaning ought not to be given to that word as contemplated in the definition of genocide. The French text speaks of "*meurtre*" (murder), which more accurately depicts the true intention of drafters of the Genocide Convention. "Killing" within the meaning of genocide should therefore be taken to denote "homicide committed with the intent to cause death."[60]

2. Causing Serious Bodily or Mental Harm to Members of the Victim Group

In the *Eichmann Case*, the District Court of Jerusalem, in its judgment of December 12, 1961, noted that serious bodily or mental harm of members of a group could be caused

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58. Case Concerning Application of the Convention on the Prevention and Prosecution of the Crime of Genocide (Bosnia & Others v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 1 (April 8).

59. Jean-Paul Akayesu, Case ICTR-96-4-T.

60. *Id.* ¶ 500.

> by the enslavement, starvation, deportation and persecution . . . [of members of the group] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation or their rights as human beings, and to suppress them and cause them inhumane suffering and torture.[61]

Taking its lead from this exposition of the law, the International Criminal Tribunal for Rwanda decided that "serious bodily or mental harm . . . [includes but is not limited to] acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution."[62]

3. Inflicting on the Victim Group Conditions of Life Calculated To Bring About Its Physical Destruction in Whole or in Part

Such action would include "subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement."[63] The Cuban delegation at the Rome Conference reminded that it could also consist of the "economic, financial and commercial blockade intentionally causing great suffering or seriously injuring physical integrity or mental or physical health."[64]

4. Imposing Measures Intended To Prevent Births Within the Victim Group

Here, again, the wrongful conduct can include a broad variety of acts, such as "sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages."[65] The Tribunal went on to say:

> In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case

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61. Attorney-General of the Government of Israel v. Adolf Eichmann, 36 I.L.R. 18, 238, ¶ 199 (Dist. Ct. of Jerusalem, Isr. 1961).

62. Jean-Paul Akayesu, Case ICTR-96-4-T, ¶ 507.

63. *Id.* ¶ 505.

64. *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court*, Proposal for Article 5 Submitted by Cuba, 53rd Sess., U.N. Doc. A/CONF.183/C.1/L.17 (1998). The Cuban proposal to include such blockades in the definition of crimes against humanity for purposes of ICC jurisdiction *ratione materiae* fell on deaf ears.

65. Jean-Paul Akayesu, Case ICTR-96-4-T, ¶ 506.

> where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group . . . . [R]ape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats of trauma, not to procreate.[66]

In some communities, loss of virginity or extra-marital pregnancy as such disqualifies the woman from the prospect of marriage, and rape becomes a potent means of genocide in such communities.[67]

5. Forcibly Transferring Children of the Victim Group to Another Group

This component of the *actus reus* must again not be understood in the physical sense only, but also includes "acts of threats or trauma which would lead to the forcible transfer of children from one group to another."[68] An interesting analogy that might be considered in this regard derives from apartheid South Africa: due to the inferior status to which people of color where institutionally condemned by the system, sometimes persons of a less privileged (colored) racial group who could, by virtue of their physical appearance, be mistaken for belonging to the privileged (white) population group, would desert their next-of-kin, move to another part of the country, and assume the identity and status of the privileged group. The question here would be whether the transfer to the other population group could in these circumstances be said to have occurred "forcibly," especially because the government establishment did not encourage the infiltration of its "white domain" in this way. On the other hand, appearance in terms of South Africa's racial classification laws was an important consideration that could influence the racial registration authorities to designate the racial classification of individuals, and it is well known that families were often sepa-

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66. *Id.* ¶ 506-07.

67. *See* Sharon A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 BROOK. J. INT'L L. 327, 338-40 (1995); Siobhán K. Fisher, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.J. 91, 93, 123-24 (1996).

68. Jean-Paul Akayesu, Case ICTR-96-4-T, ¶ 508.

rated in South Africa because of one member of the family being classified as "white" and the other as "colored." The analogy might in the end not be applicable due to the component of special intent that qualifies the *actus reus* in cases of genocide.

C. *The Victims of Genocide*

Genocide is directed against a group of people, not against individuals *per se*. As stated in *Akayesu*, "the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnic, racial or religious group."[69] The judgment of the International Criminal Tribunal for Rwanda in the case against *Akayesu* is in this regard instructive in two respects: it defines each one of these group entities; and it lays the foundation for extension of the target groups by means of analogical interpretation.[70]

1. National, Ethnic, Racial, and Religious Groups

In the *Nottebohm Case*, the International Court of Justice defined nationality as "a legal bond having its basis [in] a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[71] In *Akayesu*, the International Criminal Tribunal for Rwanda accordingly decided that a "national group" comprises "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties."[72] A national group is *eine Nation* (*une Nation*), in contradistinction to *ein Volk* (*un Peuple*). Ethnicity, on the other hand, is a cultural concept, denoting "a group whose members share a common language or culture"[73] (*ein Volk*, *un Peuple*).[74]

A racial group is conventionally defined on basis of "the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious fac-

69. *Id.* ¶ 520.

70. *Id.* The Tribunal did not actually rely on the rules of analogical interpretation but arrived at the same result in deference to the *travaux préparatoires* of the Genocide Convention.

71. Nottebohm Case (Liechtenstein v. Guatemala) (Second Phase), 1955 I.C.J. 4, 23 (Apr. 6).

72. Jean-Paul Akayesu, Case ICTR-96-4-T, ¶ 511.

73. *Id.* ¶ 512.

74. *See also* Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L. Q. 102, 103 (1976).

tors."[75] South African apartheid racist laws did not define race as a concept. Instead, they applied different criteria to allocate a racial classification to persons subject to their decrees. Being "white" depended on a persons appearance and general acceptance by other members of the community,[76] whereas being a Native/Bantu/Black/African depended on belonging to an aboriginal race or tribe of Africa.[77] Most instructive was the definition of "coloured person", *i.e.*, "a person who is not a white person or a native."[78]

Finally, a religious group is "one whose members share the same religion, denomination or mode of worship."[79] For purposes of genocide, one could—it is submitted—avoid the perplexities attending the concept of "religion."[80] Subjecting a group claiming to be a religious community to any of the manifestations of the *actus reus* with the intent to effect its destruction, in whole or in part, constitutes genocide, irrespective of the group's self identification as a "religious community"—as will appear in the following paragraph.

2. Genocide with Respect to Groups not Expressly Mentioned in the ICC Statute

The Genocide Convention did not specify all the groups that are potential victims of action designed to destroy them. *Prosecutor v. Akayesu* is precisely a case in point. The distinction between Hutu and Tutsi in Rwanda falls between the cracks.[81] These two factions of the Rwandan population shared the same nationality, race, and by and large, the same religion. They could not be classified as distinct ethnic groups: they share the

75. Jean-Paul Akayesu, Case ICTR-96-4-T, ¶ 513.

76. §1(1) of Population Registration Act 30 of 1950 (S. Afr.).

77. *Id.*

78. *Id.*

79. Jean-Paul Akayesu, Case ICTR-96-4-T, ¶ 514.

80. Those perplexities appear, for example, in a recent South African case, *Wittmann v. Deutscher Schulverein,* Pretoria and Others, identifying "religion" with a "system of faith and worship" as "the human recognition of superhuman controlling power and especially of a personal God or gods entitled to obedience and worship." The judgment then mentions "Jewish, Christian, Moslem, Buddhist and other faiths practicing their religion . . . ." as instances of religious communities. Buddhism is, however, a non-theistic religion and would therefore not qualify as a "religion" under above circumscription. Wittmann v. Deutscher Schulverein, Pretoria and Others, 1998 (4) SA 423 (T), at 449 (South Africa 1998).

81. Magnarella, *supra* note 6, at 530.

same language and culture. The divide is based on material means (cattle owners and the other) and social status in the community.

A strictly positivistic approach might lead to the conclusion that only persons falling precisely in any of the categories mentioned by name in the Genocide Convention could be victims of the crime of genocide as perceived in international law. Amy Ray thus entertained the view that perpetrators of gender-specific violence inflicted on women in the former Yugoslavia could not be prosecuted under the rubric of genocide[82] since "gender is not a group identity sufficient to invoke the laws against genocide."[83] The judgment of the International Criminal Tribunal for Rwanda, luckily, did not follow this restricted line of reasoning.

Although the International Criminal Tribunal for Rwanda proceeded on the assumption that the Hutu and Tutsi constituted different ethnic groups, it must have been well aware that this assumption was contradicted by its own definition of ethnicity.[84] Perhaps for that reason, it decided in the negative on the question of whether the four categories mentioned in its Statute (which are identical to those in the Genocide Convention and the ICC Statute) constituted a *numerus clausus*.[85]

The tribunal came to this conclusion in deference to the *travaux préparatoires* of the Genocide Convention. The reasoning of the tribunal, however, also highlights general principles of law pertaining to the extension of the reach of a statutory enactment by means of analogical interpretation. The tribunal perhaps avoided relying on analogical interpretation because of constraints generally recognized in its application to criminal law, founded on the adage *nullum crimes sine lege*.

Matthew Lippman argued that the Genocide Convention should be applied (or amended) to afford protection to "any coherent collectivity which is subject to persecution," including "political groups and possibly women, homosexuals, and eco-

82. Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 AM. U. L. REV. 793, 821 (1997).

83. *Id.* at 822.

84. Jean-Paul Akayesu, Case ICTR-96-4-T, ¶ 512.

85. *Id.* ¶ 514.

nomic and professional classes."[86] The International Criminal Tribunal for Rwanda less generously confined the extended reach of the Genocide Convention's protection to "'stable' groups, constituting in a permanent fashion and membership . . . which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups."[87] The key conception here is that group members belong to the group on an involuntary basis, or—in the words of the judgment—"automatically, by birth, in a continuous and often irremediable manner."[88] In the vernacular of Dutch legal philosopher Herman Dooyeweerd (1894-1977), the common denominator of the four group entities mentioned in the definition of genocide is that they all represent "institutional communities . . . which by their inner nature are destined to encompass their members to an intensive degree, continuously or at least for a considerable part of their life, and such in a way independent of their will."[89] *Prosecutor v. Akayesu* is authority for the proposition that action of the kind mentioned in the definition of genocide, intended to destroy a group of people not expressly mentioned in the definition but which shares this attribute of being "institutional" as defined by Dooyeweerd, will indeed constitute genocide.

A group that comes to mind in this regard is the homosexual community. Concerns were raised at the Rome Conference by some delegates lest the ICC Statute might be interpreted to afford protection to gays and lesbians. As a result, a rather silly definition of "gender" was inserted in the Statute,[90] partially to lay those "fears" to rest. Those concerns, however, will not preclude extension of the definition of genocide to protect persons constituting an "institutional community" by virtue of their sex-

86. Lippman, *supra* note 3, at 464; *see also* Thomas W. Simon, *Defining Genocide*, 15 WISC. INT'L L. J. 243, 244-47 (1999) (arguing that any collection of people, perceived by perpetrators of mass killings as group to be exterminated, ought to qualify as victims of genocide).

87. Jean-Paul Akayesu, Case ICTR-96-4-T, ¶ 510; *see also* Magnarella, *supra* note 6, at 529-31.

88. Jean-Paul Akayesu, Case ICTR-96-4-T, ¶ 510.

89. HERMAN DOOYEWEERD, III, A NEW CRITIQUE OF THEORETICAL THOUGHT 187 (1984).

90. *See* ICC Statute, *supra* note 11, art. 7(3) (stating that "[f]or the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.").

ual orientation. Subjecting someone to ridicule or contempt merely on account of their (involuntary) gender-based orientation is as much a crime against humanity as was condemnation of persons to an inferior status in public life because of their (involuntary) racial extraction under the South African apartheid system. Killing such people, or causing serious bodily or mental harm to them, or deliberately inflicting on them conditions of life calculated to bring about their physical destruction in whole or in part, or forcibly transferring children of the gay and lesbian community to another group, with the intent to destroy that community in whole or in part, is as much an act of genocide as was the slaughtering of Tutsi by the Hutu community of Rwanda.

There is much to be said for the view that a customary-law concept of genocide is much broader than the definition of that crime contained in the Genocide Convention. Acts of the kind mentioned in the convention targeting a group not falling within the narrow categories expressly mentioned or impliedly included in the convention's definition of genocide would nevertheless be genocide under customary international law, provided that genocidal intent can be demonstrated. Accordingly, Beth Van Schaack argues that the extermination of political groups, though deliberately excluded from the Genocide Convention definition of genocide, is punishable as an act of genocide under customary international law.[91] However, jurisdiction of international criminal tribunals, including the ICC, is limited to the Genocide Convention's definition of genocide. Therefore, prosecutions for genocide under customary international law in cases falling outside that definition can only occur in municipal criminal courts.

D. *Mens Rea*

The element of fault prescribed for the crime of genocide is a variety of *dolus specialis* and as such qualifies the acts through which genocide is committed: the act must be committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[92] Intent can take on one of three

91. Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259 (1997).

92. ICC Statute, *supra* note 11, art. 6.

forms:

- *dolus directus*, in which event the wrongful consequences of the act were foreseen and desired by the perpetrator (A desires the death of B and foresees that his act will bring about B's death: if A in these circumstances commits the act and B dies in consequence of that act, then A will be judged to have acted with direct intent to kill B);
- *dolus indirectus*, in which event certain (secondary) consequences in addition to those desired by the perpetrator of the act were foreseen by the perpetrator as a certainty, and although the perpetrator did not desire those secondary consequences he/she nevertheless committed the act and those consequences did set in (A desires the death of B and foresees that if he were to put poison in B's food, other guests at B's table will most certainly also die; knowing that C will be joining B for dinner, A nevertheless poisons the food and in so doing causes the death of both B and C; in regard to the death of C, A acted with indirect intent); and
- *dolus eventualis*, in which event the perpetrator foresaw consequences other than those desired as a possibility (not a certainty) and nevertheless went ahead with the act (A desires the death of B and foresees that if he were to shoot B while B is driving his car, other passengers in the car may possibly also be injured or even killed; if A nevertheless goes ahead and shoots B while B is driving the car with C as his passenger, A will be held liable for the injuries, or the death, of C under the rubric of *dolus eventualis* even though he might not have wished C any harm).

Dolus eventualis differs from negligence. In the case of *dolus eventualis*, the perpetrator foresaw the (secondary) consequences that might result from the wrongful act. In the case of negligence, he/she did not foresee those consequences while a reasonable person would have been expected to foresee the possibility of those consequences resulting from the wrongful act. In Anglo/U.S. legal systems, *dolus eventualis* is usually defined as a manifestation of fault in cases where the perpetrator acted "recklessly" with regard to the (undesired) consequences of his/her act. In legal systems where "recklessness" features prominently

in the circumscription of fault, the distinction between *dolus eventualis* and negligence becomes blurred.

Special intent as an element of genocide will be confined to *dolus directus*. The "mental element" of crimes within the jurisdiction of the ICC—which apply "[u]nless otherwise provided"—requires that the material elements of the crime must have been committed "with intent and knowledge."[93] In relation to the consequences of the unlawful act, intent is defined as requiring that "[the] person means to cause [the] consequence or is aware that it will occur in the ordinary course of events."[94] Knowledge, in turn, is only present if "awareness that . . . a consequence will occur in the ordinary course of events" can be demonstrated.[95] The verb used in these passages, "will occur," includes *dolus directus* and *dolus indirectus*, but not *dolus eventualis*. However, the special nature of genocide, particularly its component of "intent to destroy," leaves no scope for liability for the principal act in cases of *dolus indirectus*. Destruction of the group will always be the primary objective of the principal perpetrator, while *dolus indirectus* applies to secondary consequences beyond those actually desired by the perpetrator. *Dolus indirectus* can, however, lead to a conviction in cases of complicity in genocide.

Due to the requirement of special intent, there is also no place for *versari in re illicita* in the international law prohibition of genocide. Regarding the *versari* doctrine, a person committing a wrongful act is responsible for all harmful consequences of the act—those brought about by his/her act as well as those ensuing from the act of someone else—irrespective of his/her fault regarding those other consequences. For example, if A robs a grocery store, and B, the shop owner, fires a shot at the robber, misses, and accidentally hits and kills his own wife, the *versari* rule provides that the robber can be held criminally liable for the death of B's wife.[96] The *versari* rule is frowned upon in legal systems where criminal liability is strictly based on fault in respect of the harmful consequences of the criminal act.[97] The

93. *Id.* art. 30(1).

94. *Id.* art. 30(2)(b).

95. *Id.* art. 30(3).

96. For a discussion and application of the *versari*-rule in the United States, see Jackson v. State, 408 A.2d 711 (Md. 1979).

97. *See, e.g.*, R. v. Martineu, [1990] 2 S.C.R. 633 (Can.) (striking down § 213(a) of Canadian Criminal Code (R.S.C. 1970, c. C-34), which had sanctioned *versari* rule).

requirement of special intent for the crime of genocide, as well as the circumscription in the ICC Statute of the "mental element" as a precondition for criminal liability,[98] clearly excludes *versari in re illicita.*

This also applies to the requirement in some criminal justice systems of malice as, supposedly, a constituent element of intent for purposes of criminal liability for certain offenses. Malice is a component of the motive that prompted certain conduct and is not an ingredient of fault. Intent—a certain manifestation of fault—deals with the guilty knowledge of the perpetrator: *what* did the perpetrator of the act contemplate with his/her act; did he/she foresee the consequences of his/her act, either as a certainty or as a possibility? Malice, on the other hand, addresses the question of *why* the perpetrator acted wrongfully. Malice can of course serve as proof of intent, and it can be taken into account as an aggravating circumstance that would influence the sentence imposed by the criminal court. It is not, however, a component of intent as such. Intentional homicide is not necessarily motivated by malice, ill-will, or spite, but might even be prompted by compassionate, perhaps noble, considerations, *i.e.*, the case of euthanasia. There are a few isolated offenses of which malice is essentially a requirement—not as a manifestation of intent but as a distinct element in its own right of the offense—for example in the case of malicious prosecution, or in the case of murder with malice aforethought as a special category of criminal homicide.

Although malice is not a distinct element of the crime of genocide, by virtue of the very nature of genocide, it invariably attends the commission of that crime. Thus, malice has important evidentiary value in cases of genocide.

Proving (special) intent on the part of the accused is always difficult. In *Prosecutor v. Karadzic & Mladic (Rule 61)*, the International Criminal Tribunal for the Former Yugoslavia noted that special intent to commit genocide may be inferred from a number of facts, such as

> the general political doctrine which gave rise to the acts . . . or the repetition of destructive and discriminatory acts, . . . the pepretration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the

98. ICC Statute, *supra* note 11, art. 30.

> group—acts which are not in themselves covered by the list in . . . [the definition of genocide] but which are committed as part of the same pattern of conduct.[99]

In the case of *Akayesu*, the International Criminal Tribunal for Rwanda decided that:

> it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the preparation of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.[100]

The objective of genocide as embodied in the requirement of special intent, on the one hand, limits the kind of acts that would constitute genocide. On the other hand, the objective of genocide can also serve to bring into the confines of the *actus reus* a broad perception of killings, bodily or mental harm, that inflicts conditions of life, prevents births, and transfers children. For example, killing members of the target group might be preceded as part of the process of destruction of the target group—and therefore as a constituent component of the *actus reus*—by mental torture or rape.

Depicting rape as "a form of genocide directed specifically at women"[101] has a certain emotional appeal, but cannot serve as a directive for purposes of the juridical meaning of genocide. Rape can, however, become a constituent part of genocide provided it is committed as part of the genocidal *actus reus* and with genocidal intent.

The judgment of the International Criminal Tribunal for Rwanda in *Akayesu* illustrates the point. The tribunal decided that "rape and sexual violence . . . constitute genocide in the same way as any other act as long as they were committed with

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99. Prosecutor v. Karadzic & Mladic (Rule 61), Cases Nos. IT-95-5-R61 and IT-95-18-R61, 108 I.L.R. 86 (1998), ¶ 94 (July 11, 1996).

100. Jean-Paul Akayesu, Case ICTR-96-4-T, ¶ 522.

101. Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59, 65 (1993).

the specific intent to destroy, in whole or in part, a particular group, targeted as such."[102] In the special circumstances of that case, rape and sexual violence were committed as "an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."[103] Rape and sexual violence *per se* are indeed not genocide, but where the physical and mental violence committed against women, selected for that purpose by reason of their group affiliation, are committed with genocidal intent, they become part of the *actus reus* and therefore punishable as acts of genocide.

It is also important to note that the Tribunal gave a broad definition of sexual violence and rape:

> The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident . . . in which the Accused ordered the Interahamwe[104] to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. The Tribunal noted in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interhamwe among refugee Tutsi women at the bureau communal.[105]

The General Assembly of the United Nations on several occasions also addressed the advent of rape and sexual violence committed by, among others, members of the Serbian Forces against Muslim women in Bosnia and Herzegovina as "a deliberate weapon of war in fulfilling the policy of 'ethnic cleansing,'"

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102. Jean-Paul Akayesu, Case ICTR-96-4-T, ¶ 729.

103. *Id.*

104. *Id.* ¶ 689. This refers to "armed local militia."

105. *Id.* ¶ 686.

holding that such acts constituted instances of genocide.[106]

E. *Complicity in Genocide*

The ICC Statute makes no explicit mention of liability for complicity in the commission of a crime within the jurisdiction of the ICC, as does the Statute of the International Criminal Tribunal for the Former Yugoslavia[107] and the Statute of the International Criminal Tribunal for Rwanda.[108] It does, however, render an accomplice liable in certain narrowly defined circumstances. Having defined the liability of the principal actor(s) for any of the crimes within the jurisdiction of the ICC, the ICC Statute extends jurisdiction of the ICC *ratione personae* to include someone who:

> [i]n any other way contributes to the commission or attempted commission of such crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court or
> (ii) Be made in the knowledge of the intention of the group to commit the crime.[109]

Incitement to commit a crime is only a competent sentence in the case of genocide.[110]

In *Prosecutor v. Akayesu*, the International Criminal Tribunal for Rwanda held that genocide and complicity in genocide are mutually exclusive: one cannot be convicted of both crimes if

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106. G.A. Res. 192, U.N. GAOR, 50th Sess., Supp. No. 49, at 225, ¶ 3, U.N. Doc. A/50/49 (1995); *see also* G.A. Res. 121, U.N. GAOR, 47th Sess., Supp. No. 49, at 44, U.N. Doc. A/47/49 (1992); G.A. Res. 143, U.N. GAOR, 48th Sess., Supp. No. 49, at 263, U.N. Doc. A/48/49 (1993); G.A. Res. 205, U.N. GAOR, 49th Sess., Supp. No. 49, at 226, U.N. Doc. A/49/49 (1994).

107. *See* Statute of the International Tribunal, *supra* note 15, art. 4(3) (rendering punishable genocide, as well as conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide).

108. *See* Statute of the International Tribunal for Rwanda, *supra* note 16, art. 2(3) (rendering punishable genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide).

109. ICC Statute, *supra* note 11, art. 25(3)(d).

110. *Id.* art. 25(3)(e).

the conviction is based on the same act.[111] Complicity in genocide necessarily implies the existence of the principal act of genocide;[112] but that does not mean that an accomplice can only be tried if the principal perpetrator has been identified and convicted.[113]

Complicity can consist of (i) instigating; (ii) aiding and abetting; or (iii) procuring the means for committing the principal act.[114] In *Prosecutor v. Tadic (Judgment)*, the International Criminal Court for the Former Yugoslavia decided in this regard:

> The Trial Chamber finds that assisting and abetting includes all acts of assistance by words or acts that lends encouragement or support, as long as the requisite intent is present. Under this theory, presence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it.
>
> . . .
>
> In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offense . . . and his participation directly and substantially affected the commission of that offense through supporting the actual commission before, during, or after the incident.[115]

A prime example of incitement to commit genocide, referred to in *Prosecutor v. Akayesu*, may be gleaned from the facts attending the conviction in the Nuremberg Trials of Julius Streicher, editor-in-chief between 1932 and 1945 of the anti-Semitic newspaper, *Der Stürmer*. Streicher was convicted of crimes against humanity, because at the time of the Nuremberg Trials genocide had not yet been identified for indictment purposes as a distinct crime under international law. Today, however, he would most likely have been convicted of incitement to commit

111. Jean-Paul Akayesu, Case ICTR-96-4-T, ¶¶ 531, 698, 723.

112. *Id.* ¶ 526, 529.

113. *Id.* ¶ 530.

114. *Id.* ¶ 532, 536.

115. Prosecutor v. Tadic (Judgment) (Case No. IT-94-I-T), 112 I.L.R. 2 (1999), ¶¶ 689, 692 (May 7, 1997).

genocide, or perhaps, on the basis of *dolus directus* on his part,[116] even of participating in the crime of genocide through aiding and abetting. In convicting the accused (of a crime against humanity), the Nuremberg Tribunal observed:

> Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined in the Charter, and constitutes a Crime against Humanity.[117]

In *Prosecutor v. Akayesu*, the International Tribunal for Rwanda sought at some lengths to distinguish between aiding and abetting *as an accomplice* in the crime of genocide, and *participating* in the crime of genocide through aiding and abetting. The distinction between an accessory or accomplice (*particeps criminis*) and a concurrent wrongdoer (*socius criminis*) seems to be the point in issue here.

The accomplice must have knowledge of the genocidal intent of the principal actor,[118] but need not share the desire to destroy, in whole or in part, the national, ethnical, racial, or religious group targeted by the perpetrators of genocide.[119] Transcribed into the technical vernacular alluded to earlier, the Tribunal was saying that *dolus indirectus* will suffice to render an accused punishable as an accessory. The Tribunal further expressed the opinion that complicity by aiding and abetting will always require a positive act (a mere omission will not do).[120]

For the aider and abetter to be a *socius criminis*—a participant in the principal act—he/she must act with the specific genocidal intent (*dolus directus*);[121] and here—according to the

116. Streicher clearly had knowledge of the extermination of Jews and in several editorials expressed strong support for their persecution.

117. 22 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 1, at 549.

118. Jean-Paul Akayesu, Case ICTR-96-4-T, ¶ 537.

119. *Id.* ¶¶ 538-40, 543-44, 724.

120. *Id.* ¶ 535.

121. *Id.* ¶ 546. In paragraph 724, the Tribunal stated that participation in the crime through aiding and abetting will attract individual responsibility for the crime of genocide "in particular" where the accused had the specific intent to commit genocide. The words in quotation marks suggest that the specific intent to commit genocide is not essential in this case. If that is what the Tribunal sought to convey in paragraph 724, then the statement contradicts its earlier exposition of the law. In the author's opinion, the words "in particular" in paragraph 724 must be taken to be no more than sloppy formulation—which, by the way, is overall not uncommon in the written judgment. *Id.*

Tribunal—the *actus reus* (the planning, preparation, or execution of genocide) could consist of an omission.[122] The Tribunal, however, referred for support to the English case of *The Queen v. Coney*, where on the contrary it was decided, in the words of Hawkins, J., that "to constitute an aider or abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals."[123] *Coney* actually dealt with aiding and abetting by an accomplice, and reference to that case in the context of participation in a crime as a co-perpetrator was therefore entirely out of place.

F. *Nullum Crimen Sine Lege*

Deviations in the jurisprudence of international tribunals from the exact wording of the Genocide Convention raise the question as to the measure of precision with which an offense need to be defined in order to satisfy the demands of *nullum crimen sine lege.*

In countries with an uncodified system of (criminal) law, some flexibility normally applies as far as common law crimes are concerned. The Nuremberg tribunals followed this precedent. In *The Hostage Case*,[124] Judge Edward F. Carter, reading the first part of the judgment, observed:

> Any system of jurisprudence, if it is to be effective, must be given an opportunity to grow and expand to meet changed conditions. The codification of principles is a helpful means of simplification, but it must not be treated as adding rigidity where resiliency is essential. To place the principles of international law in a formalistic strait-jacket would ultimately destroy any effectiveness that it has acquired.[125]

Judge Carter went on to say:[126]

> It is not essential that a crime be specifically defined and

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¶ 724. *See also* R. v. Jefferson, (1994) 1 All E.R. 270 (CA), at 280 (holding that "[a]n aider and abettor [by encouragement] . . . is aware of and party to the requisite intent of the principal offender").

122. Jean-Paul Akayesu, Case ICTR-96-4-T, ¶ 547.

123. The Queen v. Coney, 8 QBD 534 (1882).

124. 11 UNITED STATES OF AMERICA v. VON LIST & OTHERS, TRIALS OF WAR CRIMINALS BEFORE THE NUEREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10, NUEREMBERG OCTOBER 1946 TO APRIL 1949 757 (Washington D.C.: U.S. Government Printing Office, 1950).

125. *Id.* at 1235.

126. *Id.* at 1239.

> charged in accordance with a particular ordinance, statute, or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally. If the acts charged were in fact crimes under international law when committed, they cannot be said to be *ex post facto* acts or retroactive pronouncements.[127]

M. Cherif Bassiouni was therefore perfectly right in saying that the same standard of specificity required for the circumscription of criminal offences by some criminal justice systems does not apply in international law.[128] Jordan Paust even went so far as to express doubt whether the Nuremberg Tribunals regarded *nullum crimen sine lege* to be a principle of international law.[129]

The Draft Statute for an International Criminal Court prepared by the ILC[130] did not contain definitions of the crimes within the jurisdiction of the proposed International Criminal Court. The ILC's preference was for confining the subject-matter jurisdiction of the ICC to crimes that have been defined in treaties in force, but adding those ones that would be defined in the Draft Code of Crimes Against the Peace and Security of Mankind,[131] which the ILC was in the process of

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127. It has been noted that the Nuremberg tribunals applied *ex post facto* laws because the crimes with which the German war criminals were charged had been defined in a Control Council Law after the event. *See* Bryan MacPherson, *Building an International Criminal Court for the Twenty-First Century*, 13 CONN. J. INT'L L. 1, 9, 10. (1998). The Nuremberg tribunals maintained, however, that the charges were based on pre-existing rules of customary international law derived from international conventions, customs and usages of war, and general principles of criminal justice recognized by "civilized nations." *See* VON LIST & OTHERS, *supra* note 124, at 1239. It might be noted in passing that the Nuremberg indictments did not comply with the concomitant norm requiring the competent punishments to have been sanctioned by law (*nulla poena sine lege*). *See* T.B. Murray, *The Present Position of International Criminal Justice*, 36 GROTIUS TRANSACTIONS 191, 196-97 (1950); Thomas H. Sponsler, *The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen*, 15 LOY. L. REV. 43, 51-52 (1968-69); William A. Schabas, *War Crimes, Crimes Against Humanity and the Death Penalty*, 60 ALB. L. REV. 733, at 735 (1997).

128. M. Cherif Bassiouni, *"Crimes Against Humanity": The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457, 469 (1994).

129. Jordan J. Paust, *Its No Defence: Nullum Crimen, International Crime And the Gingerbred Man*, 60 ALB. L. REV. 657, 666 (1997).

130. *Report of the International Law Commission on the Work of its 46th Session*, U.N. GAOR, 49th Sess., Supp. No. 10, at 29, U.N. Doc A/49/10 (1994).

131. *ILC Draft Code of Crimes Against the Peace and Security of Mankind*, U.N. GAOR, 51st Sess., Supp. No. 10, at 14, U.N. Doc. A/51/10 (1996).

drafting.[132]

At the early stages of the deliberations in New York, some delegations insisted on incorporating in the ICC Statute definitions of all the crimes within the jurisdiction of the Court. The Report of the Ad Hoc Committee (1995) recorded the concerns that prevailed in this regard:

> As regards the specification of crimes, the view was expressed that a procedural instrument enumerating rather than defining the crimes would not meet the requirements of the principle of legality (*nullum crimen sine lege* and *nulla poena sine lege*) and that the constituent elements of each crime should be specified to avoid any ambiguity and to ensure full respect for the rights of the accused.[133]

It is not impossible that some delegations that insisted on precise definitions of crimes were using the argument as a lever to delay, and perhaps prevent, the establishment of the ICC. However, there was in the end little that could be said in support of not defining the crimes within the jurisdiction of the ICC with as much precision as international compromises and the constraints of language would permit. *Nullum crimes sine lege* is a sound principle of criminal justice and evidently includes within itself a high degree of legal certainty as to the precise meaning and constituent components of each crime. *Nullum crimen sine lege* and *nulla poena sine lege* soon came to be generally accepted as the norm that ought to trump arguments of expediency and urgency.[134]

The strategies considered as a means of satisfying the demands of *nullum crimes sine lege* included incorporating the definitions contained in various treaties into the ICC Statute through cross-references, taking definitions from the Nuremberg Charter and the Statutes of the International Tribunals for the former Yugoslavia and Rwanda and elaborating those definitions for purposes of the ICC, or urging the ILC to finalize its drafting of the Code of Crimes Against the Peace and Security of

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132. *Report of the International Law Commission on the Work of Its 44th Session, Report of the Working Group on the Question of an International Criminal Jurisdiction*, U.N. GAOR, 47th Sess., Supp. No. 10, at 145, 167, U.N. Doc. A/47/10 (1992).

133. *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, at 12, U.N. Doc. A/50/22 (1995).

134. *See* Leila Sadat Wexler, *Committee Report on Jurisdiction, Definition of Crimes, and Complementarity*, 25 DENV. J. INT'L L. & POL'Y 221, 224-25 (1997).

Mankind[135] and using the Code as a definitional basis for the jurisdiction of the ICC *ratione materiae.*[136] In the end, those refining the ICC Statute saw fit to include definitions of the crimes within the jurisdiction of the ICC in the ICC Statute itself.

The ICC Statute therefore affords express sanction to the principles of *nullum crimen sine lege*[137] and *nulla poena sine lege,*[138] meticulously defines the crimes within the jurisdiction of the International Criminal Court,[139] and ensures that the subject matter jurisdiction of the ICC cannot be extended to crimes before such crimes are defined in the ICC Statute.[140]

As indicated above, the interpretation of the definition of genocide in recent jurisprudence of international tribunals exceeds the bounds of the language used in the Genocide Convention—and mimicked in subsequent international instruments—for example, by extending the protection afforded to target groups to include all institutional groups (those whose membership are not exclusively determined by voluntary entry into and exit from the group), such as gay and lesbian communities. Since the definition of genocide in the ICC Statute is identical to the one subjected to such extensive interpretation, and in spite of the emphasis in the ICC Statute on legal certainty and the principle of *nullum crimen sine lege,* it is to be expected that the ICC will follow this broad interpretation of the crime of genocide. The ICC is also expressly authorized to prosecute persons who directly and publicly incite others to commit genocide,[141] as well as those who aid, abet, or otherwise assist in the commission or attempted commission of the crime of genocide.[142] For purposes of the ICC, the dispute as to the liability of states for genocide will on the other hand be of no consequence as far as ICC jurisdiction is concerned, since the jurisdiction *ratione personae* of the ICC has been confined to natural persons only.

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135. *ILC Draft Code of Crimes Against the Peace and Security of Mankind,* U.N. GAOR, 51st Sess., Supp. No. 10, at 14, U.N. Doc. A/51/10 (1996).

136. *Report of the Ad Hoc Committee, supra* note 133, ¶ 57.

137. ICC Statute, *supra* note 11, art. 22.

138. *Id.* art. 23.

139. *Id.* arts. 6-8.

140. *Id.* arts. 5(2), 22-23.

141. *Id.* art. 25(3)(e).

142. *Id.* art. 25(3)(c).

II. *UNIVERSAL JURISDICTION*

The principle of universality of "offenses generally recognized as of universal concern" affords jurisdiction to any state, "regardless of the situs of the offense and the nationalities of the offender and the offended."[143] Offenses against customary law of a peremptory nature,[144] including treaty obligations that have become part of customary international law,[145] constitute *crimen contra omnes* and can as such be prosecuted in any state on behalf of the international community. Universal jurisdiction trumps the principle of territoriality, which in general determines the jurisdiction of courts of law in criminal matters: crimes subject to universal jurisdiction may be punished by any state in custody of the offender, irrespective of the place where the offense was committed.[146]

It should be noted that several international conventions incorporated the principle of universal jurisdiction for prosecution of crimes to which they relate by mandating State Parties to either extradite a suspect in its custody or to assert jurisdiction over that suspect, irrespective of where the crime was committed.[147] It is interesting to note that the Genocide Convention

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143. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788 (1988).

144. *See* Jordan J. Paust, *Universality and the Responsibility To Enforce International Criminal Law: No US Sanctuary for Alleged Nazi War Criminals*, 11 HOUSTON J. INT'L L. 337 (1989).

145. JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 293 (1996).

146. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 36, at 469-70; 2 M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 31-33 (1986); Murray, *supra* note 127, at 194-95; Christopher L. Blakesley, *United States Jurisdiction over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1139-41 (1982); Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violaters of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 211-15 (1983); Jeffrey Allan McCredie, *Contemporary Uses of Force Against Terrorism: The United States Response to Achille Lauro—Questions of Jurisdiction and Its Exercise*, 16 GA. J. INT'L & COMP. L. 435, 439 (1986); Hans Corell, *Nuremberg and the Development of an International Criminal Court*, 149 MIL. L. REV. 87, 90 (1995); Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS. 153, 165-66 (1996); Paust, *supra* note 39, at 95-96; MacPherson, supra note 127, at 3-4; Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 321 (1998); Van Schaack, *supra* note 91, at 2278-80.

147. *See, e.g.*, Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, art. 4(2), 22 U.S.T. 1641, 1645; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civilian Aviation (Sabotage),

does not base its jurisdictional provisions on the principle of universal jurisdiction—at least not as far as prosecutions in the national courts of a State Party is concerned.[148] However, few today would deny that genocide clearly qualifies as violations *erga omnes* within the meaning of the doctrine of universal jurisdiction.[149] Kenneth Randall argued that universal jurisdiction with respect to genocide under customary international law can coexist with the principle of territoriality as a matter of treaty law.[150] In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures*, Judge Lauterpacht likewise held that the definition of "genocide" in Article 1 of the Genocide Convention was intended "to permit parties, within the domestic legislation that they adopt, to assume universal jurisdiction over the crime of genocide—that is to say, even when the acts have been committed outside their respective territories by persons who are not their nationals."[151]

Those who deny the feasibility of universal jurisdiction for the prosecution of acts of genocide, regrettably, included the delegation of the United States at the Rome Conference, which opposed the Rome model for the establishment and functioning of the ICC and condemned the international law principle of universal jurisdiction. In the intervention at the Rome Confer-

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Sep. 23, 1971, art. 5(2), 24 U.S.T. 565, 570; Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, art. 5, 1015 U.N.T.S. 244, 246; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, art. 3(2), 28 U.S.T. 1975, 1979; International Convention Against Taking of Hostages, Dec. 17, 1979, art. 5(2), 18 I.L.M. 1456, 1458; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, art. 5(2), 23 I.L.M. 1027, 1028, *as modified in* 24 I.L.M. 535 (1985).

148. *See* Genocide Convention, *supra* note 5, art. 6 ("Persons charged with genocide . . . shall be tried by a competent tribunal of the State *in the territory of which the act was committed*, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."); *see also* Van Schaack, *supra* note 91, at 2268, 2277-78.

149. *See* Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 1996 I.C.J. 595, ¶ 31 (July 11); David Stoelting, *Status Report on the International Criminal Court*, 3 HOFSTRA L. & POL'Y SYMP. 233, 249 (1999).

150. Randall, *supra* note 143, at 837; *see also* A.R. Carnegie, *Jurisdiction over Violations of the Laws and Customs of War*, 39 BRIT. Y.B. INT'L L. 402, 408-09 (1963).

151. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, 1993 I.C.J. 325, 443, ¶ 110 (Sept. 13).

ence of the U.S. delegation on July 13, 1998 pertaining to a proposal put forward by the Bureau of the Conference,[152] its spokesperson said:

> We must object very strongly and in principle to this option, because the language effectively incorporates universal jurisdiction for the crime of genocide . . . . We are sympathetic to the goal of ensuring prosecution for genocide, but we cannot support this way of achieving it. This option reaches beyond the treaty parties to subject non-parties to the Court's jurisdiction . . . .

A. *Historical Perspective*

It seems clear that the notion of universal jurisdiction originated from a need to bring pirates and brigands[153] to justice[154]—though it should be noted that brigands were prosecuted under municipal laws and not under the law of nations. Why exactly the urge to combat piracy gave birth to the principle of universality has become a matter of controversy.[155] There does, however, seem to be a simple explanation: pirates practiced their evil trade on the high seas, which are beyond the territorial jurisdiction of any state; and purely for practical reasons, the high seas were therefore, for purposes of jurisdiction, regarded not as *res nullius* but as *res omnium communes*.[156] In the

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152. *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Bureau Proposal, U.N. Doc. A/CONF.183/C.1/L.59 (1998). The Bureau Proposal was submitted to the Committee of the Whole with a view to narrowing down the issues in an attempt to reach consensus before time would run out.

153. *See* Sponsler, *supra* note 127, at 44 (defining brigands as "men often traveling in quasi-military gangs, often veterans of a particular campaign, who rove the countryside plundering and disrupting the peace and security of the area").

154. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW, § 113 (8th ed., 1866); Sponsler, *supra* note 127, at 44; Joyner, *supra* note 146, at 165-66.

155. Sponsler, *supra* note 127, at 45. Thomas Sponsler mentions several proposed justifications for this development in international law: (1) piracy was regarded as an offense against the law of nations; (2) pirates were perceived to be the enemies of all mankind and therefore anyone could capture and prosecute them; (3) historically, universal jurisdiction to prosecute piracy grew out of established practices of criminality; or (4) the universality principle emerged fortuitously from uniform state practices in dealing with piracy.

156. *See* 2 JOHN BASSET MOORE, II, A DIGEST OF INTERNATIONAL LAW 951-52 (1906); GEORG SCHWARZENBERGER, INTERNATIONAL LAW 154 (1957); Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177, 193 (1945); MacPherson, *supra* note 127, at 3; *see also* Convention on the High Seas, Apr. 29, 1958, art. 19, 13 U.S.T.

Lotus Case, Judge Moore (dissenting), having endorsed the principle of universality with regard to piracy, went on to say:

> [A]s the scene of the pirate's operations is the high seas, which is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish.[157]

The *ratio* of its origin might be relied upon by opponents of the concept of universality to protest the extension of its application to instances where crimes are not committed in no-man's land. The emphasis, however, has shifted from the purely formal to the substantive legitimization of universal jurisdiction.[158] In *Demjanjuk v Petrovsky*, the court defined the current norm that supports, and at the same time confines, its application:

> The "universality principle" is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses.[159]

The criterion for application of the principle of universal jurisdiction must accordingly be sought in the heinous nature of the crime (of which its dimensions are an element) and not so much in the absence of territorial jurisdiction of nation states with regard to the locality of the crime. The extension of the principle of universality to war crimes and crimes against humanity was accordingly solidified by the Nuremberg and Tokyo trials,[160] since the establishment of the post-War tribunals and their proceedings was clearly based on the principle of universal jurisdiction.[161]

2312, 2317, 450 U.N.T.S. 82, 92; United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 105, 21 I.L.M. 1261, 1289.

157. The Lotus Case (France v. Turkey), 1927 P.C.I.J. Ser. A. (Judgments) No. 10 (Judgment No. 9) (1929).

158. *See* Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 279 (1988) (referring in this context to "offences that because of their nature are of concern to all states").

159. Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985).

160. Sponsler, *supra* note 127, at 49-50.

161. *Demjanjuk*, 776 F.2d at 582.

B. *Endorsement of Universal Jurisdiction by National Courts*

The principle of universal jurisdiction has indeed been approved and applied in the jurisprudence of many countries. For example, in 1950, in the trial of General Wagener, the Supreme Military Tribunal of Italy had this to say:

> These norms [concerning crimes against laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one.
>
> . . .
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> The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognize borders, punishing criminals wherever they may be.
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> . . .
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> Crimes against the laws and customs of war . . . are . . . crimes of *lèse-humanité* (*reati di lesa umanità*) and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offenses. The latter generally concern only the States against whom they are committed; the former concern all civilized States, and are to be opposed and punished, in the same way as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed.[162]

The principle of universal jurisdiction was also raised in Israel in the case against Adolph Eichmann. It was there stated that:

> the interest in preventing and punishing acts belonging to the category in question [crimes against humanity]—especially when they are perpetrated on a very large scale—must necessarily extend beyond the borders of the State to which the perpetrators belong and which evinced tolerance and encouragement of their outrages; for such acts can undermine the foundations of the international community as a whole and impair its very stability.[163]

In France, an objection raised by Klaus Barbie on grounds

162. Prosecutor v. Tadic, 105 I.L.R. 419, 482 (Int'l Criminal Trib. for the Former Yugoslavia, Appeals Chamber, 1995) (internal citations omitted).

163. Attorney-General of Israel v. Eichmann, 36 I.L.R. 277, 279 (S. Ct. of Isr., 1962).

that he had been the victim of "disguised extradition"[164] was dismissed by the *Chambre d'Accusation* of the Court of Appeals. The Court of Cassation (Criminal Chamber) quoted with approval the following statement of the Court of Appeals: "[B]y reason of their nature, the crimes against humanity . . . do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontier and extradition rules arising therefrom are completely foreign."[165]

In the United States, in the case of *Demjanjuk v Petrovsky*, universal jurisdiction was also directly in issue. Israel sought the extradition from the United States of Demjanjuk to stand trial in that country for war crimes and crimes against humanity committed by him as a Nazi official in Poland. Demjanjuk opposed the application *inter alia* on the grounds that Israel had no jurisdiction to prosecute crimes committed outside its geographical boundaries. Having asserted that international law recognized universal jurisdiction over certain crimes,[166] the court decided that the fact that Demjanjuk was to be charged with having committed the criminal acts in Poland did not deprive Israel of authority to bring him to trial.

According to Jordan Paust, universal jurisdiction over international crimes has been recognized in the United States since "the dawn of . . . [its] history."[167] The United States has certainly since early times recognized the power of its courts to prosecute persons for acts of piracy,[168] and by participating in the Nuremberg and Tokyo trials, it has recognized the validity of universal

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164. Klaus Barbie had been sentenced to death *in absentia* by the *Tribunal Permanent des Forces Armées de Lyon* for atrocities committed while he was head of the Gestapo in Lyon in the period 1942-44. France traced his presence to Bolivia, which refused to extradite him to France. Bolivia subsequently deported Barbie to French Guiana, where he was arrested on arrival and taken to France.

165. Fédération Nationale des Déportés et Internés Résistants et Patriotes v. Barbie, 78 I.L.R. 125, 130 (Fr. Ct. of Cassation (Criminal Chamber) 1985).

166. Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985).

167. Paust, *supra* note 146, at 211.

168. *See, e.g.*, United States v. Smith, 18 U.S. (5 Wheat.) 153, 162 (1820). This case states:

> the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offense [of piracy] against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offense is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment.

Id. *See also* United States v. La Jeune Eugenie, 26 F. Cas. 832, 843 (C.C.D. Mass. 1822) (No. 15,551) (stating that "no one can doubt, that vessels and property in the posses-

jurisdiction with respect to at least war crimes and crimes against humanity.[169] U.S. courts often refer with approval to the principle of universality with regard to crimes other than piracy.[170] The Restatement of Foreign Relations Law of the United States is quite explicit in this regard:

> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction . . . is present.[171]

In Canada, the case of *Regina v. Finta* is of special importance in this regard.[172] Imre Finta was prosecuted in Canada for atrocities committed against 8617 Jews in Szeged, Hungary, between May 16 and June 30 of 1944, including unlawful confinement, robbery, kidnapping, manslaughter, and deportation to death camps in Auschwitz and Straβhof. Although Finta was acquitted (La Forest, J., dissenting), the principle of universal jurisdiction with regard to war crimes and crimes against humanity was confirmed by the court.

Section 11(g) of the Canadian Charter of Rights and Freedoms, 1982, provides that any person charged with an offense has the right:

> not to be found guilty on account of any act or omission unless, at the time of the commission of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations.[173]

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sion of pirates may be lawfully seized on the high seas by any person, and brought in for adjudication").

169. *Demjanjuk*, 776 F.2d at 583.

170. *See, e.g.*, Rivard v. United States, 375 F.2d 882, 885-86 (5th Cir. 1967) (conspiracy); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (terrorism); *Demjanjuk*, 776 F.2d at 581-83 (crimes against humanity); United States v. Yunis, 681 F. Supp. 896, 900-01 (D.D.C. 1988) (aircraft piracy and hostage taking).

171. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

172. Regina v. Finta, [1994] 1 S.C.R. 701, 112 D.L.R. (4th) 513 (1994); *see, e.g.*, Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 245-49 (1997); Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT'L L. J. 457, 472-73 (1998).

173. Constitution Act 1982, C.R.C., ch. 11, § 1 (1982) (Can.).

The principle of universality inherent in this provision was more restrictively regulated in Sections 7(3.71)-(3.77) of the Canadian Criminal Code. Those provisions confined the jurisdiction of Canadian courts to punish acts or omissions committed outside the territorial boundaries of Canada to (i) war crimes and crimes against humanity, (ii) committed by a citizen of, or a person employed in, a state which is at war with Canada, or, alternatively, committed against a Canadian citizen or a citizen of an ally of Canada in the armed conflict. The Criminal Code further requires that the accused be present in Canada and that the act or omission, had it been committed in Canada, would have constituted an offence under the laws of Canada.

The specific factor that gives a crime the international dimension of universality, according to Justice La Forest, emerges whenever "it is of direct concern to the international community and may be prosecuted wherever the alleged offender may be found."[174] Justice Cory (in whose judgment Gonthier and Major, JJ. Concurred) also alluded to the principle of universal jurisdiction, as an exception to the rule of territoriality, citing an Australian publicist in support of the proposition that the principle of universality is based upon "the accused's attack upon the international order as a whole and is of common concern to all mankind as a sort of international public policy."[175]

The principle of universal jurisdiction also featured prominently in the proceedings in Spain and in England against General Augusto Pinochet. An *actio popularis*[176] brought by a group of private individuals against Pinochet for offenses of genocide, torture, and terrorism committed in Chile during the period when the accused was President of that country (1973-1990) culminated in a 285-page indictment, issued by Judge Garzon of Spain on December 10, 1998. The judge based Spain's competence to prosecute Pinochet for crimes committed in Chile (not necessarily against Spanish citizens) on the principle of universal

174. Regina v. Finta, [1994] 1 S.C.R. at 752, 112 D.L.R. at 547.

175. Gillian Triggs, *Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?*, 16 MELB. U. L. REV. 382, 389 (1987-1988).

176. *See* C.E. art. 125 (1978)(Sp.) (mandating that "[c]itizens may exercise popular action and participate in the Administration of Justice . . . ."); *see also* L. E. CRIM., art. 270 (Sp.) (mandating that "[a]ll Spanish citizens, whether or not they are victims of the crime, may file an action, by exercising the popular action . . ."). As to *actiones populares* in general, see J.D. van der Vyver, *Actiones Populares and the Problem of Standing in Roman, Roman-Dutch, South African and American Law*, *in* ACTA JURIDICA 191 (1978).

jurisdiction as embodied in Spanish statutory law[177] (since Spain has a codified system of law, the jurisdiction of a Spanish court must find its base in the written law of the country).

While Pinochet was undergoing medical treatment in England, a request of Spain for his extradition was received by the British authorities. The proceedings in the British courts were largely focused on the question of whether Pinochet was entitled to immunity for crimes committed while he was the head of state, and eventually how the principle of "double criminality"—which forms part of British extradition law—would play itself out insofar as charges proferred against Pinochet based on allegations of torture, murder, and conspiracy to murder were concerned.[178] Application of the principle of universal jurisdiction had a decisive influence on the final judgment.

The House of Lords decided[179] that, as far as both civil and criminal liability is concerned, a head of state enjoys absolute or complete immunity while he remains in office (immunity *ratione personae*).[180] At common law,[181] heads of state forfeit personal immunity on ceasing to serve in that capacity,[182] but still cannot

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177. *See* L.O.P.J., Ley orgánica 6/1985, de 1 de Julio, art. 23(4)(a)(b) (Sp.) (authorizing criminal jurisdiction of Spanish courts "although the offense may have been committed outside of the national territory, if committed by a national or a foreigner," provided offense is codified in Spanish law).

178. The Home Secretary indicated that he would not consider extradition of Pinochet on charges of genocide.

179. R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte (No. 3), [1999] 2 All E.R. 97 (H.L.) [hereinafter Ex Parte Pinochet Ugarte (No. 3)].

180. *See* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 718-19 (9th Cir. 1992); Lafontant v. Aristide, 844 F. Supp. 128, 131-32 (E.D.N.Y. 1994).

181. The common law position has been written into the laws of the United Kingdom. The Diplomatic Privileges Act of 1964 was enacted to give effect to the *Vienna Convention on Diplomatic Relations*. *See* DIPLOMATIC PRIVILEGES ACT (U.K., 1964 c.81). By virtue of the State Immunity Act of 1978, the provisions of the Diplomatic Privileges Act also apply to "a sovereign or other head of state." STATE IMMUNITY ACT, art. 20(1) (U.K., 1978 c.33).

182. *See* Sir Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers*, 247 RECUEIL DES COURS 19, 88 (1994-III) (stating that "former Head of State is entitled . . . to none of the facilities, immunities and privileges which international law accords to Heads of States in office."). A former head of state can be sued on his/her private obligations. *See* Ex-King Farouk of Egypt v. Christian Dior, S.A.R.L., 24 I.L.R. 228 (Fr. Ct. App. of Paris 1957) (holding ex-King Farouk of Egypt not entitled to immunity from jurisdiction of French courts after abdication); *see also* Société Jean Dessès v. Prince Farouk, 65 I.L.R. 37 (Trib. de Grande Instance of the Seine 1963) (holding that, though debts were contracted before abdication, ex-King cannot prevent French creditors from suing him in French courts, since

be sued for acts performed in their official capacity while they were heads of state (immunity *ratione materiae*).[183] Criminal conduct is not necessarily excluded from the range of official functions of a head of state,[184] and the House of Lords was also not prepared to exclude torture committed before the Torture Convention of 1984[185] entered into force from "official functions" of the head of state[186] so as to exclude the operation of immunity *ratione materiae*.[187] It is clear, however, that following the entering into force of the Torture Convention for a particular state, the head of that state cannot claim immunity *ratione materiae* for acts that fall within the criminal proscriptions of the convention.[188]

The principle of double criminality requires that the

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sovereign immunity had disappeared). Immunity *ratione materiae* will also not be of any avail to a former head of state for private or criminal acts. *See, e.g.*, Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962); United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997). *See also* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 36, ¶ 456.

183. *See* Hatch v. Baez, 14 N.Y. Sup. Ct. 596, 600 (1876) (discussing immunity of former President of Dominican Republic for official acts); *see also* Watts, *supra* note 182, at 88-89 (comparing "acts of state" to Head of State's personal acts); OPPENHEIM'S INTERNATIONAL LAW, *supra* note 36, ¶ 456.

184. *See* Marcos v. Federal Dept. of Police, 102 I.L.R. 198, 203-04 (Switz. Fed. Trib. 1989) (holding that, although former President of Philippines was immune for criminal acts committed while in office, U.S. courts could institute proceedings against him because State of Philippines expressly waived immunity).

185. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 147.

186. Siderman de Blake v. Argentina, 965 F.2d 699, 717-19 (9th Cir. 1992) (deciding that although official torture by agents of state is prohibited by international law as matter of *jus cogens* and can therefore not be recognized as sovereign act, prosecution for such acts of torture in another country is nevertheless excluded under norms pertaining to immunity *materiae personae*).

187. The House of Lords in this respect overruled its earlier decision in R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte, [1998] 4 All. E.R. 897 [1998] 37 I.L.M. 1302 (H.L.) [hereinafter Ex Parte Pinochet Ugarte (No. 1)] (deciding, with Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting, that Pinochet cannot claim immunity *ratione materiae* for criminal acts committed while he was in office). The latter judgment was set aside by the House of Lords on the basis of the principle *nemo iudex idoneus in propria causa est*, because the connections of one of the Law Lords with Amnesty International, which had an interest in the case, had not been disclosed to the defense team. *See* R. v. Bow Street Magistrate, Ex Parte Pinochet Ugarte (No. 2), [1999] 1 All E.R. 577, 586-89 (H.L.) [hereinafter Ex Parte Pinochet Ugarte (No. 2)]. The merits of the matter consequently had to be reconsidered. *See* Ex Parte Pinochet Ugarte (No. 2), *supra*, at 577.

188. Ex Parte Pinochet Ugarte (No. 3), *supra* note 187. Lord Goff of Chieveley (dissenting) supported the dissenting opinions of Lord Slynn of Hadley and Lord Lloyd of Berwick in Ex Parte Pinochet Ugarte (No. 1) that torture can qualify as an "official functions" of a head of state. *Id.* He went on to find that the Torture Convention did

crime(s) proferred by the requesting state against the person whose extradition is sought must have been a crime in the requested state (had the act been committed in that state) on the date of the commission of the crime and not merely on the date of the request for extradition (as had been held in the first House of Lords decision). In virtue of the principle of double criminality, the extradition of Pinochet can only be authorized with respect to acts of torture[189] committed after December 8, 1988—the date on which the United Kingdom ratified the Torture Convention.[190]

As far as application of the principle of universal jurisdiction to the law of England is concerned, the judgment in the House of Lords is—to say the least—quite confusing. Lord Browne-Wilkinson, for example, expressed the view that "[t]he *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed"[191] and that "long before the Torture Convention of 1984 state torture was an international crime in the highest sense."[192] Yet, Lord Browne-Wilkinson was not prepared to accept that acts of torture, as rendered punishable by customary international law (which forms part of English common law), could be prosecuted in British courts (by virtue of the principle of universal jurisdiction) prior to the enactment of the Criminal Justice Act of 1988. And since the absence of a tribunal to prosecute the customary-law prohibition of torture was tendered as the reason why, in spite of the customary proscription of torture, acts of torture could indeed be part of "official functions" of the head of state for purposes of immunity *ratione materiae*, this flaw in his reasoning had a decisive influence on the outcome of the case.

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not exclude immunity *ratione materiae* for acts of torture committed by a former head of state as part of his/her official functions. *Id.*

189. Charges relevant to hostage-taking do not meet the requirements of double criminality because, in terms of the Taking of Hostages Act of 1982, a threat to "kill, injure or continue to detain the hostage" as a means of intimidating others to do or to refrain from doing something is an essential component of the offense. No such threats were alleged against Pinochet. Taking of Hostages Act 1982, art. 1(b) (U.K., 1982 c.28). *See* Ex Parte Pinochet Ugarte (No. 3), *supra* note 187.

190. The torture provision of the British Criminal Justice Act of 1988 entered into force on 29 September 1988. *See* Criminal Justice Act, 1988, art. 134 (U.K., 1988 c.36) (crime of torture). Lord Hutton preferred that date to be decisive for extradition purposes. *See* Ex Parte Pinochet Ugarte (No. 3), *supra* note 179, at 164.

191. Ex Parte Pinochet Ugarte (No. 3), *supra* note 179, at 109.

192. *Id.*

Lord Hutton likewise postulated that "acts of torture were clearly crimes against international law and that the prohibition of torture had acquired the status of *jus cogens*"[193]—that is, prior to the entering into force of the Criminal Justice Act of 1988. He was not prepared, however, to concede universal jurisdiction with respect to torture that preceded the provisions in the Torture Convention regulating universal jurisdiction.[194]

Lord Phillips of Worth Matravers also endorsed the validity of universal jurisdiction in international law:

> Since the 1939-45 war states have recognised that not all criminal conduct can be left to be dealt with as a domestic matter by the laws and the courts of the territories in which such conduct occurs. There are some categories of crime of such gravity that they shock the consciousness of mankind and cannot be tolerated by the international community. Any individual who commits such a crime offends against international law. The nature of these crimes is such that they are likely to involve the concerted conduct of many and liable to involve the complicity of the officials of the state in which they occur, if not the state itself. In these circumstances it is desirable that jurisdiction should exist to prosecute individuals for such conduct outside the territory in which such conduct occurs.[195]

According to Lord Phillips, however, uncertainties still exist as to whether national courts can exercise universal jurisdiction in cases not covered by conventions making provision for it, and the national courts of Great Britain only acquired extra-territorial jurisdiction to prosecute extra-territorial acts of torture after the Criminal Justice Act of 1988 had become law. International criminal tribunals, on the other hand, do have jurisdiction to prosecute crimes subject to universal jurisdiction, and immunity *ratione materiae* cannot be claimed by perpetrators of such crimes when brought before an international criminal tribunal. State immunity *ratione materiae*—in a word—cannot co-exist with international crimes and extraterritorial jurisdiction. Because the acts allegedly committed by Pinochet cannot be classified as having been committed "in performance of his functions as head of

193. *Id.* at 164.

194. *See id.*; *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 147.

195. Ex Parte Pinochet Ugarte (No. 3), *supra* note 179, at 188.

state" for purposes of immunity *ratione materiae*, Pinochet can be prosecuted for "so much of the conduct alleged against [him] as constitutes extradition crimes."[196]

Lord Millett dealt with the principle of universal jurisdiction at some length, and quite admirably, citing, *inter alia*, the *Eichmann Case*,[197] and noting that "[t]he way in which a state treated its own citizens within its own borders had become a matter of legitimate concern to the international community."[198] For universal jurisdiction to be applicable, he said, two basic requirements must be satisfied:

> First, they [the crimes] must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, they must be so serious and on a scale that they can justly be regarded as an attack on the international legal order.[199]

Lord Millett went on to say that English courts can find jurisdiction on the common law and customary international law (which is part of the common law), "and accordingly . . . the English courts have and always have had extra-territorial jurisdiction in respect of crimes of universal jurisdiction under customary international law."[200] He was further of the opinion that "the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984."[201] Lord Millett therefore concluded that, already in 1973, British courts did possess extraterritorial jurisdiction to try cases of torture and conspiracy that had been committed on the scale mentioned in the indictment against Pinochet and that the courts "did not require the authority of statute to exercise it."[202] But having said all of that, he decided to conform to the majority opinion, holding that Pinochet cannot be extradited for crimes committed before the Criminal Justice Act of 1988

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196. *Id.* at 192.

197. Attorney-General of Israel v. Eichmann, 36 I.L.R. 277 (1968) (S. Ct. of Isr. 1962).

198. Ex Parte Pinochet Ugarte (No. 3), *supra* note 179, at 177.

199. *Id.*

200. *Id.*

201. *Id.* at 178.

202. *Id.*

came into force (on September 29, 1988)[203]—but not without reminding the reader once again that "[f]or my own part, I would allow the appeal in respect of the charges to the offences in Spain and to torture and conspiracy to torture wherever and whenever carried out."[204]

C. *Endorsement of Universal Jurisdiction by International Tribunals*

The Trials of German and Japanese war criminals following World War II were based on the principle of universal jurisdiction. The Nuremberg Tribunal noted that the Signatory Powers, in creating the tribunal, in defining the law to be applied by the tribunal, and in making regulations for the proper conduct of the trials, "have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."[205] In commenting on this statement, the Secretary-General of the United Nations said: "It is possible and . . . probable that the Court considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every State."[206]

The opinion of the Secretary-General is, of course, not conclusive evidence of an intention to endorse the extended application of the principle of universal jurisdiction to crimes, which at the time had not been included in the universality paradigm; that is, to war crimes and crimes against humanity.[207] Several judgments of war crime tribunals established by the United States and Great Britain, however, expressly based their jurisdiction—at least in part or alternatively to other jurisdictional grounds—on the principle of universal jurisdiction.[208]

In the *Hostage case*, the U.S. Military Tribunal encapsulated the jurisdictional principle as follows: "An international crime is . . . an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state

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203. Indeed, this was not the decisive date reflected in the opinions of the plurality that constituted concurrence in the final outcome of the case.

204. Ex Parte Pinochet Ugarte (No. 3), *supra* note 179, at 180.

205. 1 TRIALS OF THE MAJOR WAR CRIMINALS, *supra* note 1, at 218.

206. SECRETARY-GENERAL, THE CHARTER AND JUDGMENT OF THE NUREMBERG TRIBUNAL: HISTORY AND ANALYSIS 80 (1949).

207. *See* Randall, *supra* note 143, at 806.

208. *See id.* at 804-10; *see also* Lippman, *supra* note 172, at 238-340.

that would have control over it under ordinary circumstances."[209] In the *Hadamar Trial*, the U.S. Military Commission subscribed to:

> the general doctrine recently expounded and called "universality of jurisdiction over war crimes," which has the support of the United Nations War Crimes Commission and according to which every independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished.[210]

In the *Trial of Lothar Eisenträger & Others*, the U.S. Military Commission echoed this view:

> A war crime . . . is not a crime against the law or criminal code of any nation, but a crime against the *jus gentium*. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments to the effect that only a sovereign of the *locus criminis* has jurisdiction and that only the *lex loci* can be applied, are therefore without foundation.[211]

The British Military Court for the Trial of War Criminals formulated the universality bases of its jurisdiction as follows:

> That under the general doctrine called Universality of Jurisdiction over war crimes, every independent state has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed.[212]

The International Criminal Tribunal for the Former Yugoslavia also emphatically endorsed the principle of universal jurisdiction. In the case against Dusko Tadic, the Trial Chamber observed:

> the crimes which the International Tribunal has been called

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209. VON LIST & OTHERS, *supra* note 124, at 1241.

210. The Hadamar Trial (Alfons Klein & Others), 1 L. Rep. Trials War Crimes 46, 53 (U.S. Mil. Comm., Wiesbaden 1945).

211. Trial of Lothal Eisentrager & Others, 14 L. Rep. Trials War Crimes 8, 15 (U.S. Mil. Comm., Shanghai 1947).

212. The Almedo Trial (Otto Sandrock & Others), 1 L. Rep. Trials War Crimes 35, 42 (Almedo, Netherlands 1945); see also The Zyklon B. Case (Bruno Tesch & Others), 1 L. Rep. Trails War Crimes 93, 103 (Hamburg 1946).

> upon to try [crimes against humanity and grave breaches of the Geneva Conventions] are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objections to an international tribunal properly constituted trying these crimes on behalf of the international community.[213]

This statement of the law was confirmed in the Appeals Chamber, where the court went on to say: "Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity."[214]

In *Prosecutor v. Anto Furundzija*, the International Criminal Tribunal for the Former Yugoslavia endorsed the principle of universal jurisdiction in the case of torture:

> it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the au-

213. Prosecutor v. Tadic, 105 I.L.R. 420, 441, ¶ 42 (Int'l Crim. Trib. for Former Yugoslavia 1997).

214. Prosecutor v. Tadic, 105 I.L.R. 453, 483, ¶ 58 (Appeals Chamber 1997). This case also endorsed the principle of universal jurisdiction as enunciated in *Wagener* and *Eichmann*. *Tadic*, 105 I.L.R. 481-83, ¶ 57.

> thors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*,[215] and echoed by the USA court in *Demjanjuk*,[216] "it is the universal character of the crimes in question *i.e.*, international crimes which vest in every State the authority to try and punish those who participate in their commission."[217]

The International Court of Justice also subscribed to the principle of universal jurisdiction, and more in particular with regard to genocide. In *Bosnia and Herzegovina v Yugoslavia*, it referred to a passage in the Case on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,[218] emphasizing the universal character of the crime of genocide to make the point: "It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.[219]

It thus seems clear that every state has the right—and indeed a duty—to bring to justice in its municipal courts perpetrators of genocide in its custody, irrespective of the locality where the acts of genocide occurred. It must be emphasized, though, that implementation of the principle of universal jurisdiction in any particular state will depend on the constitutional and criminal justice system of that state. In countries where customary international law is self-executing and enjoys precedence over nationally enacted law, the courts of the country can exercise universal jurisdiction without further ado. That will also apply to states where international law is self-executing but subordinate

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215. Attorney-General of Israel v. Eichmann, 36 I.L.R. 277 (S. Ct. of Isr. 1962).

216. Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985).

217. Prosecutor v. Anto Furundzija, 38 I.L.M. 317, ¶ 156 (Int'l Crim. Trib. for Former Yugoslavia 1999).

218. G.A. Res. 96(I), U.N. GAOR, 1st Sess., Part II (Resolutions), U.N. Doc. A/64/Add.1 (1947); *see also* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 14, 23 (May 28); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 1 (April 8); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 325, 348 (Sept. 13).

219. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 1996 I.C.J. 595, 616 (July 11).

to statutory law of the country and where there is no statute that would prevent the exercise of jurisdiction by the national courts with respect to international crimes subject to universal jurisdiction. Other countries might have written the principle of territoriality into the laws regulating their criminal procedure and would therefore require a special statutory exception to that rule in the case of international crimes that qualify for universal jurisdiction. Countries with a codified system of (criminal) law might require that the universal jurisdiction of their courts be incorporated into the written law. International tribunals will not be subject to any such constraints.

III. *PROSECUTION OF GENOCIDE IN THE INTERNATIONAL CRIMINAL COURT*

We have established thus far that genocide is included in the subject matter jurisdiction of the ICC, that only natural persons (to the exclusion of juristic persons, including states) can be prosecuted for acts of genocide in the ICC, that genocide has come to be regarded as a crime *contra omnes* and as such is subject to universal jurisdiction, and that constitutional constraints that might hamper implementation of the principle of universality in some municipal criminal justice systems are never an obstacle in the case of international tribunals. The next passages will show that universal jurisdiction nevertheless will not be applied to its full extent in the ICC, and that the jurisdiction of the ICC is complementary to that of municipal criminal justice systems. Additionally, considerations of state sovereignty cannot legitimately be raised to contest the propriety, or the *de facto* exercise, of jurisdiction by the ICC. Last, the ICC Statute includes several safeguards against frivolous prosecutions.

A. *Preconditions to the Exercise of Jurisdiction by the ICC*

The principle of universal jurisdiction, if fully applied, would afford inherent jurisdiction to the ICC[220] with regard to all the crimes within its subject-matter jurisdiction. A proposal to that effect, submitted by Germany, was in the end not adopted

220. Inherent jurisdiction denotes "the power to hear cases without receiving an express grant of authority." Patricia A. McKeon, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 ST. JOHN'S J. LEGAL COMMENT. 535, 553 (1997).

by the Rome Conference. As a compromise, the ICC Statute lays down the following "Preconditions to the Exercise of Jurisdiction":

> 1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
>
> 2. In the case of . . . [a referral by a State Party or where the Prosecutor initiated an investigation], the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (b) The State of which the person accused of the crime is a national.
>
> 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.[221]

As a general rule, therefore, jurisdiction of the ICC is not dependent on the nationality of the accused, and because all the crimes within the jurisdiction of the ICC are subject to universal jurisdiction, a state cannot shield the prosecution of its citizens by not ratifying the ICC Statute.

If a case has been referred to the ICC by the Security Council,[222] then the court has inherent jurisdiction to investigate and prosecute the matter. The Security Council can refer a matter to the ICC in the circumstances stipulated in Chapter VII of the Charter of the United Nations, for example where the Security Council decides that a situation constitutes a "threat to the peace, [a] breach of the peace, or [an] act of aggression."[223] This situation will almost invariably be the case where acts of genocide appear to have been committed.

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221. ICC Statute, *supra* note 11, art. 12.

222. *See id.* art 13(b).

223. U.N. CHARTER art. 39.

If the case has been referred to the ICC by a State Party[224] or the prosecutor conducted the investigation *proprio motu*,[225] then the ICC Statute simply requires that either the state in whose territory the crime was committed (the territorial state) or the nation state of the accused must have accepted the jurisdiction of the ICC before the court can exercise jurisdiction in such cases. If neither of those two states have ratified the ICC Statute, then either of them can trigger the jurisdiction of the court by lodging a declaration with the Registrar of the ICC, the mechanism through which the ICC governs, with regard to the particular criminal act stipulated in the declaration. There are two exceptions to this general rule:

> When ratifying the ICC Statute, a state can submit an opt-out declaration pertaining to war crimes that will remain valid for a period of not more than seven years as from the date on which the ICC Statute becomes binding on that state. The opt-out declaration does not only exclude the duty of the State Party to cooperate with the ICC but also excludes the jurisdiction of the Court over war crimes committed by a national of that State Party, or within its territory, during the opt-out period for that State Party.[226]
>
> Should the ICC Statute be amended in the future to add any crime (including the crime of aggression)[227] to the list of crimes within the subject-matter jurisdiction of the ICC, it will be open to States Parties to decline to accept that amendment. In that event, the ICC will not have jurisdiction over that crime if committed by a national, or within the territory, of the State Party which has not accepted the amendment of the Statute.[228]

The provision relating to war crimes creates a rather strange

224. *See* ICC Statute, *supra* note 11, arts. 13(a), 14.

225. *See id.* arts. 13(c), 15.

226. *See id.* art. 124.

227. In terms of the ICC Statute, the crime of aggression has been conditionally included in the subject matter jurisdiction of the ICC. For the ICC to exercise jurisdiction with regard to acts of aggression, a definition of aggression and the conditions under which the court can exercise jurisdiction with respect to that crime must first be agreed upon and incorporated into the ICC Statute by means of, and in accordance with the formalities prescribed for, an amendment of the ICC Statute. *See id.* arts. 5(1)(d), 5(2). Following the Rome Conference, the General Assembly of the United Nations established a Preparatory Commission to prepare the next of certain outstanding matters, including the elements of crimes. G.A. Res. 105, U.N. GAOR, 53rd Sess., Supp. No. 49, vol. 1, at 359, U.N. Doc. A/54/49 (1998).

228. ICC Statute, *supra* note 11, art. 121(5).

state of affairs: if a war crime has been committed by a citizen of a state which is not a party to the ICC Statute, then the ICC can nevertheless exercise jurisdiction with respect to that crime, provided only that the territorial state has either ratified the ICC Statute or has made a declaration under Article 12(3) accepting the exercise of jurisdiction by the ICC with regard to that crime. If, however, the state concerned does ratify the ICC Statute, then it can make a declaration under Article 124 of the ICC Statute excluding the jurisdiction of the ICC with respect to war crimes committed by any of its nationals or within its territory in the period for which that declaration remains valid (which is limited to a maximum of seven years from the date on which the Statute becomes binding on that state).

In cases of genocide, it is almost unthinkable that a territorial state or a nation-state would not at least on an *ad hoc* basis agree to the exercise of jurisdiction by the ICC. It is also almost inconceivable that the Security Council would decline to refer a case involving genocide to the ICC, but with the Security Council one can of course never tell.[229]

B. *The Principle of Complementarity*

The Tenth Preambular Paragraph of the ICC Statute proclaims that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." Article 1 of the ICC Statute mentions the principle of complementarity as one of the cornerstones of the ICC regime. Article 17, under the heading of "Issues of Admissibility," provides:

> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> (b) The case has been investigated by a State which has juris-

229. Jesse Helms, *We Must Slay This Monster: Voting Against the International Criminal Court Is Not Enough. The US Should Try to Bring It Down*, FIN. TIMES, July 31, 1998, at 18. It is perhaps worth noting that Senator Jesse Helms (R-NC), chairman of the Senate Special Committee on Foreign Relations, has expressed the resolve to seek assurances from the Clinton administration that "the US will never . . . allow its national security decisions to be judged by an International Criminal Court."

diction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;[230]

(d) The case is not of sufficient gravity to justify further action by the Court.[231]

The point to be emphasized is that the competence to bring the perpetrator(s) of crimes within the jurisdiction of the ICC to justice remains the prime responsibility of nation-states. Only if states with jurisdiction in the matter are unwilling or unable to prosecute, can the matter be referred to the ICC.

Governments, including that of the United States, who fear that their officials or military personnel might become the target of frivolous prosecutions in the ICC should take comfort in this important principle of ICC jurisdiction. M. Cherif Bassiouni was quite right in his assessment "that the concerns of the United States are overstated and that the interests of the United States in having a [sic] ICC far outweigh the marginal and far-fetched concerns that have been articulated by political opponents of the ICC."[232] As noted by Paul Marquardt, "[a]n international criminal court is not likely to expend scarce political capital on pointless and alienating attacks on great power policy, and it is certainly not in the court's interest to do so."[233] The U.S. fears have in any event been adequately refuted in a note by Jerome Shestack and David Stoelting:

Portraying the ICC as a malleable tool that America's enemies

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230. Article 20 deals with double jeopardy, and its Paragraph 3 stipulates instances where the principle of *non bis in idem* will not apply, for example if the purpose of the earlier trial was to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC, or the proceedings were not conducted independently or impartially in accordance with the rules of due process recognized by international law.

231. ICC Statute, *supra* note 11, art. 17.

232. M. Cherif Bassiouni, *War Crimes Tribunals: The Record and the Prospects: Conference Convocation*, 13 AM. U. INT'L L. REV. 1400, 1403 (1998).

233. Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 144 (1995); *see also* Ruth Wedgwood, *Improve the International Criminal Court*, *in* TOWARD AN INTERNATIONAL CRIMINAL COURT? 53, 64 (1999).

> would utilize to further political means is also misleading and, in fact, demeans U.S. Courts. In every instance, national courts—and not the ICC—would be the preferred forum for the trial of accused war criminals. Only if national courts were either unavailable or ineffective[234] would the ICC proceed. Obviously, the ability of U.S. courts to prosecute instances of war crimes would obviate the need for trial of a U.S. citizen by the ICC. Moreover, the draft treaty contains a number of safeguards designed to minimize the possibility of any politically motivated prosecution. In addition, the United States, if it ratifies the ICC treaty, would play a role in the selection of judges and prosecutors of the highest integrity.[235]

It is important to note that the United States has been more diligent than most other countries in condemning and prosecuting members of its own armed forces who violated the norms of humanitarian law.[236] To this might be added that the United States can in any event suspend the prosecution for war crimes of U.S. nationals in the ICC—its main concern—for a period of seven years; that is, on condition that it ratifies the ICC Statute, and does so subject to a declaration to that effect.[237]

C. *Considerations of State Sovereignty*

The ICC Statute in several respects implicates the sovereignty of states, not the least of which derives from competence of the ICC to exercise jurisdiction if it considers a nation-state to be "unwilling" to prosecute a person suspected of having committed a crime within the jurisdiction of the ICC.[238] Article

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234. "Unavailable" and "ineffective" appeared in the Draft Statute that was under consideration at the time the note was written. Those words became "unable" and "unwilling" in the ICC Statute.

235. Jerome J. Shestack & David Stoelting, *The International Criminal Court: Setting the Record Straight*, CICC MONITOR, July 16, 1998, at 3.

236. Jordan Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 118 (1972). Jordan Paust speaks of "the American commitment to international law demonstrated in the long history of condemnations and prosecutions of even our own soldiers and civilians." *Id.*

237. *See* ICC Statute, *supra* note 11, art. 124.

238. *See* M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 160-65 (1992); Robert T. Mounts, *War Crimes and Other Human Rights Abuses in the Former Yugoslavia*, 16 WHITTIER L. REV. 387, 423-24 (1995); Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990's*, 10 DICK. J. INT'L L. 223, 234-35 (1992); Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 713-14 (1996).

17(2) of the ICC Statute circumscribes "unwillingness" as a precondition for setting ICC jurisdiction in motion:

> In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court . . . .;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.[239]

Unwillingness also has a bearing on the principle of *ne bis in idem* as defined in the ICC Statute. The rule against double jeopardy reiterates that the trial of a particular person in a national court will not preclude the ICC from prosecuting the person for conduct that constituted the basis of that trial[240] if: (i) the purpose of the proceedings in the national court was to shield the person concerned from prosecution in the ICC for a crime within the jurisdiction of the court, or (ii) those proceedings were not conducted "independently or impartially in accordance with the norms of due process recognized by international law" and it is furthermore demonstrated that the proceedings were "inconsistent with an intent to bring the person concerned to justice."[241]

The ICC Statute thus affords to the ICC the authority to cast a value judgment on the criminal justice systems of nation-states.

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239. ICC Statute, *supra* note 11, art. 17(2).

240. It might be noted that the international norm depicting the rule against double jeopardy differs from the U.S. perception of that rule. In the United States, double jeopardy only excludes a second trial *for the same crime* (a person convicted or acquitted in a state court can again be tried for the same act in a federal court, or *vice versa*), whereas the international standard of *ne bis in idem* excludes a second trial *for the same conduct.*

241. ICC Statute, *supra* note 11, art. 20(3).

The PrepCom's Report of 1996 recorded some concerns in this regard:

> It was noted that while the determination of "availability" of national criminal systems was more factual, the determination of whether such a system was "ineffective"[242] was too subjective. Such a determination would place the Court in the position of passing judgement on the penal system of a State. That would impinge on the sovereignty of national legal systems and might be embarrassing to that State to the extent that it might impede its eventual cooperation with the Court.[243]

The sovereignty argument—"the underlying tension between state sovereignty and the need for international justice"[244]—was raised but never really stressed by any of the delegations at the Rome Conference or pursued at great lengths. Little could be said in support of states that would afford protection, through sham trials or otherwise, to perpetrators of genocide or other heinous crimes. Perhaps the governments represented in New York and in Rome were also sensitive to the general decline of the substantive enclave of state sovereignty in international law.[245] As noted by Patricia McKeon, "[t]he doctrine that a state has absolute authority, independent of the affairs of other nations is outdated and unrealistic,"[246] and "[t]here is a balance between a society's right to its sovereignty and the right of the international community to ensure punishment of criminal be-

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242. *Supra* note 233 and accompanying text.

243. Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol I: Proceedings of the Preparatory Committee During March-April and August 1996, U.N. GAOR, 51st Sess., Supp. No. 22, at 38, ¶ 161, U.N. Doc. A/51/22 (1996).

244. McKeon, *supra* note 220, at 549.

245. *See* J.D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 420-41 (1991). Oppenheim argues that the notion of sovereignty in the sense of "a supreme power and authority" is a constitutional concept that cannot be applied to states within the international community. *Id.* "No state has supreme legal power and authority over other states in general, nor are states generally subservient to the legal power and authority of other states. Thus the relationship of states on the international plane is characterised [sic] by their equality and independence and, in fact, by their interdependence." *Id.*, *see also* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 36, at 125, ¶ 37.

246. McKeon, *supra* note 220, at 564; *see also* Bridge, *supra* note 36, at 225; Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 DENV. J. INT'L L. & POL'Y 419, 431-32 (1995).

havior for certain acts which otherwise would go unpunished."[247] Oppenheim likewise discarded the notion of absolute sovereignty in international relations, noting that "the very notion of international law as a body of rules of conduct binding upon states irrespective of their internal law, implies the idea of their subjection to international law."[248] This is borne out by the Draft Declaration on Rights and Duties of States adopted by the ILC in 1949, where it provides:

> Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.[249]

Paul Marquardt observed accordingly, with reference to the Nuremberg Trials, that "an individual has a legal duty, on pain of prosecution, to disobey his sovereign national government if it attempts to violate certain international legal principles."[250] The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia added its voice to the issue at hand in the case against Dusko Tadic:

> It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights.[251]

Jelena Pejic argued that inherent jurisdiction of the ICC should not be viewed as an encroachment on state sovereignty, because "states are free to become parties to the statute and will be guided by sovereign will in making that determination."[252] The point is not altogether well-taken. Although the duty to cooperate with the ICC is treaty-based, that does not apply to the submission of nationals of any particular state to the criminal law proscriptions of customary international law. Karl Vasak, in defining the special characteristics of international human rights

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247. McKeon, *supra* note 220, at 564.

248. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 36, at 125, ¶ 37; *see also* Murray, *supra* note 127, at 193-94; Marquardt, *supra* note 232, at 142.

249. Draft Declaration on Rights and Duties of States (1949), art. 14, *reprinted in* THE WORK OF THE INTERNATIONAL LAW COMMISSION 165-67 (5th ed. 1996).

250. Marquardt, *supra* note 233, at 142.

251. Prosecutor v. Tadic (Jurisdiction) [(Appeals Chamber 1995)] 105 I.L.R. 453, 483, ¶ 58.

252. Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 321 (1998).

law,[253] noted that while, conventionally, the binding effect of general international law was commonly believed to derive from consent and agreement—that is, express agreement in the case of treaty law and tacit agreement in the case of customary international law—international human rights law can be made applicable to a state as a matter of compulsion and on an involuntary basis.[254] Vasak also noted that international human rights law is not dependent on the principle of reciprocity[255] but postulates entitlements and obligations *erga omnes*.[256] There can no longer be any doubt that persons committing crimes under in-

253. Karel Vasak, *Le Droit International des Droits de l'Homme*, 140 RECUEIL DES COURS 333, 404-09 (1974-IV).

254. *Id.* at 407-09.

255. The principle of non-reciprocity was first enunciated in the opinion of the European Commission of Human Rights in the case of Austria v. Italy, 4 Y.B. Eur. Conv. Hum. Rts. 116, 138 (1961) (noting that, in relation to High Contracting Parties, purpose of European Convention of Human Rights and Fundamental Freedoms was not "to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realize the aims and ideals of the Council of Europe . . . to establish a common public order"). *See also id.* at 140 (depicting obligations under European Convention of Human Rights as "essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any High Contracting Parties than to create subjective and reciprocal rights for High Contracting Parties themselves"). In Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain), 1970 I.C.J. 3, 32, ¶¶ 33-34, the International Court of Justice endorsed the principle, in an *obiter dictum*, that "[s]uch obligations derive from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination" and amount to obligations *erga omnes*. *Belgium v. Spain, supra.* In the 1971 Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia(South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 56, ¶ 126, the ICJ confirmed—this time around as a matter of *ratio decidendi*—the notion of *obligationes erga omnes* emanating from international norms for the protection of human rights, holding that the practice of apartheid and racial discrimination provided a sound basis for the Security Council to terminate the mandate under which South Africa had administered South West Africa/Namibia, and for barring *erga omnes*, including non-Member States of the United Nations, recognition of the legality of any acts of the South African government in violation of the concerned Security Council Resolution. Advisory Opinion, *supra.* The ICJ thereby overruled its earlier decision in Ethiopia v. South Africa; *see also* Liberia v. South Africa (Second Phase), 1966 I.C.J. 6 (holding, on basis of principle of reciprocity, that Applicants had no interest in matter and therefore lacked standing in case). *See generally* J.D. van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9, 67-71 (1991).

256. Vasak, *supra* note 253, at 404-07. Other attributes that signify the specificity of international human rights law, according to Karel Vasak, include the standing of individuals as subjects of international human rights law, necessary compliance of international human rights law with norms of the legal idea (legal ethics), international human rights law being a derivative system (deriving its substance from national systems

ternational customary law cannot be shielded behind the refusal of their governments to submit to institutions and proceedings established to prosecute those crimes.

Pejic made a further observation as to inherent jurisdiction of the ICC, which cannot be contested:

> [I]nherent jurisdiction does not mean exclusive or primary jurisdiction. It does not imply that the court will have a better claim than national courts to exercise jurisdiction. It will often happen that a case which involves a crime within the ICC's inherent jurisdiction will be tried by a national court because it has been determined that domestic jurisdiction takes precedence. It should be remembered that, in keeping with the principle of complementarity, the court would be seized of a case only when a national criminal justice system is genuinely unwilling or unable to pursue a case.[257]

D. *Safeguards Against Frivolous Prosecutions*

The United States was one of seven countries that voted against the adoption of the ICC Statute.[258] The U.S. delegation participated in the deliberations in New York and in Rome with a simple mandate: opt for a viable tribunal subject only to the condition that the United States be given the competence to prevent the prosecution of U.S. citizens in the ICC!

In an interview with the *Washington Post*, David Scheffer, the then-newly appointed Ambassador-at-Large for War Crime Issues of the United States (and later head of the U.S. delegation in Rome), said that "[a]ny arrangement by which a UN-sponsored tribunal could assert jurisdiction to prosecute Americans would be political poison in Congress."[259] And he was right. Senator Jesse Helms (Chairman of the Committee on Foreign Relations of the U.S. Senate) in a letter to Secretary of State Madeleine Albright, dated 26 March 1998, while lamenting press reports indicating "that the United States is 'showing new flexibility' in

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for the protection of human rights), and international human rights law's purport of laying down minimum standards only. *Id.*

257. Pejic, *supra* note 252, at 321.

258. Other delegations that voted against adoption of the ICC Statute included China, India, and Israel.

259. Thomas W. Lippman, *Ambassador to the Darkest Areas of Human Conflict*, WASH. POST, Nov. 18, 1997, at A19.

its negotiating position on the creation of a new permanent UN International Criminal Court," stated quite emphatically:

> Madam Secretary, I am unalterably opposed to the creation of a permanent UN criminal court . . . . [A] treaty establishing such a court without a clear US veto, . . . will be dead-on-arrival at the Senate Foreign Relations Committee.

An editorial writer of the *New York Times* on one occasion depicted the U.S. position as a matter of "'everybody but us' justice"[260]—a position, she went on to say, "that would . . . invite the other nations of the world to look at the court as something that the United States has designed for its own purposes."[261]

The United States sought to achieve its goal by means of several strategies. The most obvious means of shielding U.S. citizens from prosecution in the ICC would be to require Security Council consent for all prosecutions in that court so as to make allowance for the United States to utilize its veto in the Security Council to forestall the prosecution of U.S. citizens. When this proved to be unacceptable to a vast majority of states, the U.S. delegation attempted to devise conditions that would afford Washington the power to achieve its objective by not ratifying the ICC Statute, combined with either a "state-consent" or an "opt-out" regime.

The state consent arrangement as envisaged by the U.S. delegation would make the exercise of jurisdiction by the ICC dependent on ratification of the ICC Statute by the state in whose territory the act was committed (the territorial state) *and* the nation-state of the accused,[262] or alternatively by rendering ICC jurisdiction over acts committed in the territory of a state not party to the ICC Statute or by officials or agents of those states "in the course of official duties and acknowledged by the State as such," subject to acceptance of the jurisdiction of the ICC by the non-State Party concerned.[263] The United States finally proposed an

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260. Tina Rosenberg, *War Crimes Tribunals: The Record and the Prospects*, 13 AM. U. INT'L L. REV. 1383, 1408 (1998).

261. *Id.* at 1409-10.

262. *See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Proposal Submitted by the United States of America*, 53rd Sess., U.N. Doc. A/CONF.183/C.1/L.70 (1998).

263. *See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Proposal Submitted by the United States of America*, U.N. Doc. A/CONF.183/C.1/L.90 (1998).

opt-out regime in regard to crimes against humanity and war crimes that will remain in force for ten years, combined with the right of a State Party that opted out under this regime to withdraw from the Statute with immediate effect upon conclusion of the ten-year period.[264] The United States was willing to accept the jurisdiction of the ICC for acts of genocide because that is not the kind of criminal conduct U.S. citizens are likely to engage. All of these proposals were rejected by the Rome Conference—for obviously good reasons based on the demands of equal protection and non-discrimination as essential components of retributive justice, and the need for a truly effective tribunal to deal with matters that fall within the jurisdiction *ratione materiae* of the ICC.

States concerned about their sovereignty may take comfort in precautions embodied in the ICC Statute to prevent frivolous prosecutions. For instance, the Prosecutor decides whether to proceed with a prosecution, taking into account, among other things, the conditions of admissibility laid down in Article 17.[265] Further, the decision to prosecute (or not to prosecute) is subject to review by the Pre-Trial Chamber (of three judges).[266] Additionally, the jurisdiction of the ICC may be challenged on the basis of the principle of complementarity by the accused, by a state that has jurisdiction to prosecute the accused, or by the territorial state or the national state of the accused.[267] Last, the ICC may of its own accord determine the admissibility of the case with a view to the prior right of a state to prosecute the accused.[268]

The principle of complementarity is also decisive when the custodian state receives a request from the ICC to surrender a suspect to the court[269] and is also called upon to extradite the same person to another state[270] that has jurisdiction to prosecute that person. The custodian state is required to surrender a suspect to the ICC only after the ICC has established that the state

264. *Id.*

265. ICC Statute, *supra* note 11, art. 53(1).

266. *Id.* art. 53(3).

267. *Id.* art. 19(2).

268. *Id.* art. 19(1).

269. *See id.* art. 102(a). The word "surrender" is reserved for delivering up a person to the ICC. *Id.*

270. *See id.* art. 102(b). The word "extradition" is reserved for delivering up a person from one state to another. *Id.*

requesting extradition is unwilling or unable to prosecute that person—that is, if the requesting state is a State Party to the ICC Statute.[271] If the requesting state is not a State Party to the ICC Statute and the custodian state is not under an obligation, by virtue of an extradition treaty or otherwise, to extradite the suspect to the requesting state, then the custodian state will be obliged to surrender the suspect to the ICC.[272] If the requesting state is not a State Party to the ICC Statute but the custodian state is under an international obligation to extradite the suspect to the requesting state, then the custodian state is given a discretion to either surrender the suspect to the ICC or to extradite her/him to the requesting state.[273] This is not an absolute discretion: the custodian state must in the exercise of its discretion take into account all the relevant facts, including the date on which the request to surrender and the request to extradite were received (presumably the fact that the one or the other was received at an earlier date will count for something), the interests of the requesting state in the matter, including, *inter alia*, whether the crime was committed in the territory of the requesting state, the nationality of the suspect and of the victims of the crime (the question here is presumably what interest the requesting state might have in prosecuting the suspect), and the possible surrender of the suspect by the requesting state to the ICC.[274]

The ICC Statute is also quite meticulous in stipulating the duty of the custodian state in cases where the ICC requests the surrendering of a suspect for a particular crime while the requesting state seeks extradition of the same person to stand trial for conduct other than that which constitutes the basis of the crime which the ICC has in mind.[275] Here a distinction is not made, as far as the requesting state is concerned, between States Parties to the ICC Statute and non-States Parties. But if the custodian state is not under an international obligation to extradite the suspect to the requesting state, priority must always be given

271. *Id.* art. 90(2).

272. *Id.* art. 90(4). If the question of admissibility of the case in the ICC has not yet been determined, then the custodian state can deal with the request for extradition at its own discretion. *Id.* art. 90(5).

273. *Id.* art. 90(6).

274. *Id.*

275. *Id.* art. 90(7).

to the request of the ICC. If, on the other hand, the custodian state is under an international obligation to extradite the suspect to the requesting state, then it is again given a judicial discretion to choose between the ICC and the requesting state, taking into account the same considerations stipulated above.[276]

IV. *THE PROSECUTION OF GENOCIDE IN THE UNITED STATES*

The United States in 1986 ratified the Genocide Convention subject to a package of reservations, understandings, and declarations ("RUDs"). These RUDs included two reservations, five understandings, and one declaration.[277] The declaration made the entering into force of the ratification instrument dependent on the enactment of implementation legislation, which occured in 1988 when the Genocide Convention Implementation Act (the Proxmire Act) became law.[278]

The reservations required, in the one instance, specific consent to submit a dispute involving the Genocide Convention to the International Court of Justice, and the other, a proclamation concerning the supremacy of the U.S. Constitution over the treaty obligations of the United States. These reservations have no bearing on prosecutions for acts of genocide in an international tribunal. The ICC Statute authorized the Assembly of States Parties to make recommendations for the settlement of disputes between two or more States Parties regarding the interpretation or application of the statute, and expressly provides that those recommendations can include referral of the dispute to the International Court of Justice,[279] but that applies to disputes regarding the ICC Statute and not to disputes concerning the Genocide Convention. Moreover, the supremacy reservation can only apply to the duty imposed on States Parties to the Genocide Convention to enact *municipal* legislation to give effect to the provisions of the Genocide Convention and to provide effective penalties in their *domestic criminal justice systems* for persons

276. *See supra* note 272 and accompanying text.

277. S. Res. on the Ratification of the Genocide Convention, 99th Cong. 2349 (Feb. 19, 1986) (enacted). As to the package of RUDs, *see* Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away With It*, 11 MICH. J. INT'L L. 90 (1989); Lippman, *supra* note 3, at 483-88.

278. 18 U.S.C.A. §§ 1091-93 (1988).

279. ICC Statute, *supra* note 11, art. 119(2).

guilty of genocide.[280] The supremacy reservation was in any event superfluous, since the Genocide Convention expressly requires States Parties to do the above "in accordance with their Constitutions."[281]

The list of understandings[282] entails the following devices:

- "intent to destroy in whole or in part" required by Article II of the Convention must be taken to mean the specific intent to destroy in whole "or in substantial part";
- "mental harm" referred to in Article II(b) of the Convention must be restricted to "permanent impairment of mental faculties through drugs, torture, or similar techniques";
- the principle of double criminality must apply as a condition of extradition;
- acts committed in armed conflict without the requirement of specific intent must not be taken to constitute genocide; and
- participation of the United States in an international penal court as contemplated by Article VI of the Convention will be conditional upon ratification of the concerned treaty by the U.S. Senate.

The last two understandings are in conformity with principles in and underlying the ICC Statute: special (genocidal) intent applies to all instances of genocide, including those committed in times of war, and the ICC is being established by means of a multi-national treaty. The double criminality understanding applies to extradition arrangements for the prosecution of genocide in the municipal courts of another country, and has no bearing on the surrendering of a suspect for prosecution in the ICC. The meaning attached by the United States to the concepts of "intent to destroy . . . in part" and to "mental harm" might substantively deviate from the meaning given to those concepts in international law.

It has been said that ratification of the Genocide Convention by the U.S. Senate was merely "a symbolic act"[283] and that

280. *See* Genocide Convention, *supra* note 5, art. V.

281. *Id.*

282. *See supra* note 275 and accompanying text.

283. LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 144, 238 (1991).

the Senate, by insisting on the so-called Sovereignty Package reflected in the RUDs, was determined to "reduce the convention to nothing more than a symbol of opposition to genocide,"[284] or, in the words of Jordan Paust, "to gut the treaty of any meaningful effect."[285] The Genocide Convention Implementation Act restricts jurisdiction of U.S. federal courts to instances of genocide committed in the United States, and to acts of genocide committed by a U.S. citizen abroad. Its ultimate effect is seemingly to preclude the prosecution in the United States of foreign nationals who have committed acts of genocide in a foreign country, thereby rendering the United States a safe haven for foreign perpetrators of genocide.[286]

Consider the following hypothetical. Elizaphan Ntakirutimana is wanted by the International Criminal Tribunal for Rwanda for crimes committed in that country as part of the genocidal onslaught of Hutus against the Tutsi. Ntakirutimana found his way to Texas, where he was detained. He cannot be extradited to Rwanda under any extradition treaty that might exist, because the Tribunal is not part of the criminal justice system of Rwanda. Special legislation was, therefore, enacted in the United States to authorize the surrender of persons wanted for prosecution in the *ad hoc* criminal tribunals.[287] On January 24, 1995, the United States had entered into an Agreement on Surrender of Persons Between the Government of the United States and the Tribunal [for Rwanda] and sought to surrender Ntakirutimana to the Rwandan tribunal pursuant to that agreement, as sanctioned by the subsequent legislation. The Federal District Court would have nothing of it.[288] Since the Agreement was not entered into in accordance with the constitutional treaty procedures, requiring approval of an international treaty by a two-thirds majority of the U.S. Senate, it was unenforceable and indeed unconstitutional. The Court ordered the release of the suspect from custody.

Because Ntakirutimana is not a U.S. citizen and the criminal acts of which he was suspected were not committed in the

284. *Id.* at 241.

285. Paust, *supra* note 236, at 94.

286. *See* Steven, *supra* note 22, at 462, 464-65.

287. *See* National Defense Authorization Act for the Fiscal year 1996, Pub. L. 104-106 of Feb. 10, 1996, 110 Stat. 486 (1996).

288. In Re Surrender of Ntakirutimana, 988 F.Supp. 1038 (S.D.Tex. 1997).

United States, he could not be prosecuted in the United States under the Genocide Convention Implementation Act. The question therefore arises whether the United States is precluded by its own legislation from assuming universal jurisdiction to prosecute acts of genocide as offenses under customary international law committed by persons in the position of Ntakirutimana. The Constitution of the United States authorizes Congress "[t]o define . . . offences against the Law of Nations,"[289] and—as noted by Jordan Paust—Congress is thereby merely given "a concurrent power to define and punish offences against international law, not an exclusive power at the expense of the treaty power and that of the judiciary, which are also constitutionally based."[290] Paust emphasized that domestic legislation was not required in order to prosecute treaty-based acts of genocide in the United States,[291] and it might further be argued that the competence of U.S. courts to prosecute crimes under the law of nations is not rendered obsolete by municipal legislation that deals only partially with the same international crime. Had Ntakirutimana been a U.S. citizen, or had the acts been committed in the United States, the prosecution would arguably have to be conducted under the auspices and within the confines of the Genocide Convention Implementation Act. But since that is not the case, he can arguably be prosecuted for his unlawful deeds as offenses under the law of nations (customary international law). There are precedents to substantiate this course of conduct: although war crimes have been codified in the Unified Code of Military Justice in 1950, military tribunals sometimes prefer charges based on the law of nations.[292]

As far as the ICC is concerned, the restricted competence afforded to U.S. courts by the Genocide Convention Implementation Act is in any event of no consequence. It would at best

289. U.S. CONST. art. I, § 8, cl. 10.

290. Paust, *supra* note 275, at 103.

291. *Id.* at 103-04.

292. In terms of Article VI of the U.S. Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." *See* U.S. CONST. art. VI, cl. 2. In terms of art. I(8)(10), Congress has been given the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10. In consequence of the latter provision, U.S. military tribunals have prosecuted members of the armed forces under the Uniform Code of Military Justice, or, alternatively, for offenses against the law of nations. Paust, *supra* note 146, at 213; Steven, *supra* note 22, at 444.

only render U.S. courts "unable" to prosecute foreign perpetrators of genocide who seek refuge in the United States. Should the United States ratify the ICC Statute, it would be under a treaty obligation to surrender such fugitives to the ICC to be prosecuted in that forum. The United States could thus do no more than specify the extent to which it was prepared, domestically, to comply with its State-Party obligations under Article V of the Genocide Convention.

An apologist for U.S. rejection of the ICC Statute from the perspective of U.S. self-interest referred to the crime of genocide from a very special standpoint:[293] while noting that the ICC Statute expressly precludes its ratification subject to reservations[294] and referring to the RUDs that attended ratification of the Genocide Convention by the United States, he maintained that the ICC Statute implicated the national sovereignty of the United States with regard to the crime of genocide. He quite rightly pointed out that the United States will be subject to the meaning attached to genocide by an international tribunal in disregard of the meaning preferred by the U.S. Senate.[295]

As indicated earlier, the question of state sovereignty was never a major issue at the Rome Conference. The U.S. apologist furthermore missed the point that prosecution of a U.S. citizen for acts of genocide (as defined by international law) does not depend on U.S. Senate ratification of the ICC Statute, or for that matter, of the Genocide Convention. Acts of genocide will be prosecuted in the ICC as a crime under customary international law, informed by the definition of genocide in the ICC Statute and the Genocide Convention, and not by the whims and fancies of the U.S. Senate.

CONCLUSION

As far as international law is concerned, the formal circumscription of the crime of genocide in the Genocide Convention has become sacrosanct—if for no other reason then simply because government representatives charged with composing international instruments that are pertinent in this regard are

293. *See* John Bolton, *Reject and Oppose the International Criminal Court*, *in* TOWARD AN INTERNATIONAL CRIMINAL COURT? 37, 39 (Alton Frye ed., 1999).

294. ICC Statute, *supra* note 11, art. 120.

295. *See* Paust, *supra* note 236, at 94.

loath to reopen debates and revitalize controversies that have already been settled. The substance of the concept of genocide has, however, not remained stagnant. The International Criminal Tribunal for Rwanda in *Prosecutor v. Akayesu* has, for example, broadened the scope of the groups expressly protected by the Genocide Convention (national, ethnical, racial, and religious groups) to include all institutional (involuntary) social entities. This would include persons affiliated in group-conscious communities by social status, not founded on either nationality, ethnicity, race, or religion, provided only that one is—so to speak—born into the social group. It would also include persons who find a common bond through sexual identity, gender, and sexual orientation.

This still leaves other groups whose destruction might be sought in the process of power-mongering out in the cold, including, for example, persons sharing a common party-political allegiance. Although a strong argument can be advanced in support of the proposition that convictions of any kind—including religious and political persuasions—are not (entirely) matters of personal choice, the *travaux préparatoires* of the Genocide Convention bears strong testimony against including political groups among those whose destruction the convention sought to expose to punishment under the rubric of genocide. Compelling arguments have been advanced to show that the persecution of political groups in a manner and on a scale that would otherwise satisfy the Genocide Convention's definition of genocide is indeed genocide under the norms of customary international law. Since the jurisdiction of international criminal tribunals, including the ICC, has been linked to the definition of genocide in the Genocide Convention, it might however be difficult to persuade the prosecution in those tribunals to take action against someone whose criminal conduct does not fall squarely within the confines of the convention (as refined and expanded by judicial interpretation).

As far as the ICC is concerned, the following counter-argument ought to be put to the test: although the ICC Statute borrowed its definition of genocide from the Genocide Convention, the court does not profess to enforce the Genocide Convention *per se* but has been established with a view to bringing to justice perpetrators of the most heinous crimes *under customary international law.* The primary consideration of the ICC should there-

fore be whether the charges in any particular case are based on the proscriptions of customary international law that are covered by its subject-matter jurisdiction and as defined in the ICC Statute. Provided the customary law offense is covered by the wording selected by drafters of the ICC Statute to define that offense, the ICC will be competent to hear the case. The ICC is bound by the wording of the Genocide Convention and not by its *travaux préparatoires*.

The crimes within the jurisdiction of the ICC, including genocide, are furthermore subject to universal jurisdiction. The primary competence and duty to bring perpetrators of those crimes to justice rest with the nation-state having custody of the suspect. Acts committed with intent to destroy, in whole or in part, a distinct group that might not come within the confines of national, ethnical, racial, or religious groups (or other groups falling within that genus), can nevertheless be prosecuted as acts of genocide in municipal courts—that is, even if the ICC or an *ad hoc* international tribunal would not entertain jurisdiction in the matter, provided that jurisdiction of the municipal court, founded on the principle of universality, is not excluded by the rules of criminal procedure that regulate the court's competence to hear a case.

Prosecution of, for example, a U.S. citizen for acts of genocide under the criminal justice system of another country or in the ICC is for the same reason not dependent on ratification of the ICC Statute by the United States. Conviction in a foreign jurisdiction, or in the ICC, of a U.S. citizen for acts of genocide is also not determined by the meaning attached to "genocide" in the instrument that attended the ratification by the United States of the Genocide Convention in 1986 or by the provisions of the Genocide Implementation Act of 1988. The United States could by way of municipal law do no more than specify the extent to which it was prepared, domestically, to comply with its State-Party obligations under Article V of the Genocide Convention. The definition and conditions for the prosecution of acts of genocide under international law is *ultra vires* the United States.