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Atrocity and the Dilemma of Jurisdiction:
The *Yerodia* Decision of the International Court
of Justice

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I. Introduction

Under the international law doctrine of universal jurisdiction, any state may prosecute individuals for certain international crimes without regard to the territory where the crimes were committed or the nationality of perpetrators or victims.⁽¹⁾ Universal jurisdiction is thus distinguished from other internationally recognized bases for states' jurisdiction by the fact that universal jurisdiction is not based on a particular nexus between the offense and the prosecuting state.⁽²⁾

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(1) See RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 404, 423 (1987).

(2) Four bases for jurisdiction – territoriality, nationality, protective principle, and passive personality – constitute the rather standard

There is some disagreement on which crimes are subject to universal jurisdiction. There is consensus that piracy is subject to universal jurisdiction. Many authors also include genocide, war crimes, and crimes against humanity on the list. Still others would add hijacking and other "terrorist" crimes, as well as torture. Very broad readings would include transnational drug trafficking and other offenses, with the broadest interpretations of universal jurisdiction including even common crimes.⁽³⁾ As the doctrine of universal jurisdiction has developed over the decades and centuries, the precise parameters of the doctrine and its underlying rationales have remained somewhat ambiguous.

list of internationally recognized jurisdictional bases other than universal jurisdiction. Kenneth Randall provides a useful description of those four bases:

the territoriality principle (when an offense occurs in the prosecuting state's territory); the nationality principle (when the offender is a national of the states); the passive personality principle (when the victim is a national of the state); and the protective principle (when an extraterritorial act threatens the state's security or a basic governmental function).

Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 *TEX. L. REV.* 785, 787-88 (1988). Unlike universal jurisdiction, then, each of these forms of jurisdiction is based on some particular nexus between the crime and the prosecuting state.

(3) See generally Randall, *supra* note 2; Amnesty International, *UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND IMPLEMENT LEGISLATION* 1-3 (2001).

The present article deals exclusively with universal jurisdiction over crimes. There may also be universal jurisdiction for certain torts, a subject beyond the scope of the present article.

When the Case Concerning the Arrest Warrant of April 11, 2000 (Democratic Republic of Congo versus Belgium),⁽⁴⁾ also called the “*Yerodia*” case, was put on the docket of the International Court of Justice (ICJ), there was great anticipation that the international law and underlying principles of universal jurisdiction would be clarified, articulated, and concretized through the adjudication of that case. In the event, the outcome was somewhat different. The Democratic Republic of Congo (DRC), the moving party in the case, in the course of the litigation, retracted its claims challenging Belgium’s reliance on universal jurisdiction in general, and retained only its claim that Belgium had violated certain applicable immunities in its exercise of jurisdiction in the particular case in question.⁽⁵⁾ Belgium did not object to this narrowing of the issues, and the court rendered a decision on the basis of the immunity issue alone.⁽⁶⁾ Several judges, however, in separate and dissenting opinions, did address the issues concerning universal jurisdiction in some depth, reaching strikingly divergent conclusions.

After briefly considering the court’s holding on immunities, including the implications of the court’s decision on immunities for the exercise of jurisdiction by the new

(4) *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice, General List No. 121, judgment of Feb. 14, 2002 (hereinafter “*Yerodia*”), ¶ 52.

(5) *Yerodia*, ¶ 21, 45.

(6) See *Yerodia* (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal), ¶ 2.

International Criminal Court, the present article will focus on the road not taken by the court's majority: the question of universal jurisdiction.

II. Background of the *Yerodia* Case

The dispute between the DRC and Belgium arose when the Brussels court of first instance issued an international arrest warrant for the detention of Ndombasi Yerodia, then Foreign Minister of the DRC. The warrant stated that Yerodia was suspected of having committed crimes against humanity and grave breaches of the 1949 Geneva Conventions before his appointment as foreign minister. In particular, it was alleged that Yerodia had made speeches inciting ethnic Hutus to attack and massacre Tutsi residents of Kinshasa. Based on complaints by a number of victims of those attacks who had fled to Belgium, a criminal investigation had been initiated in Belgium in 1998. That investigation led to the issuance in April 2000 of the international warrant for the arrest of Yerodia, who had by that time been appointed as Foreign Minister of the DRC.⁽⁷⁾

The warrant for the arrest of Yerodia was issued pursuant to a Belgian law that provides that Belgian courts shall have universal jurisdiction over serious violations of international humanitarian law.⁽⁸⁾ Under that law, Belgian courts have jurisdiction over covered offenses, regardless of where they were committed, regardless of the nationality of

(7) *Yerodia*, ¶ 13-15; *Yerodia* (dissenting opinion of Judge Van den Wyngaert), ¶ 2.

(8) *Yerodia*, ¶ 15.

either the victim or the accused, and regardless of whether the accused is present in Belgian territory.⁽⁹⁾ The Belgian universal-jurisdiction law does not recognize immunities based on the official capacity of defendants.⁽¹⁰⁾

III. The ICJ's Decision on Immunities

In litigating *Yerodia*, the DRC took the position that a Minister for Foreign Affairs is entitled to absolute immunity from criminal prosecution, arrest, or investigation for purposes of prosecution in any foreign state for the duration of that minister's period in office. The DRC argued that this immunity covers prosecution for any acts, whether private or public, and regardless of whether those acts were committed before or during the period in office.¹¹ Belgium contended, to the contrary, that the immunity enjoyed by incumbent foreign ministers is limited to acts carried out in the course of their official functions. Since the acts of which Yerodia was accused occurred before his appointment as foreign minister and not as official functions, Belgium argued, no immunity would apply.⁽¹²⁾

The ICJ held that, under customary international law,⁽¹³⁾ sitting foreign ministers enjoy full immunity from the criminal

(9) *Yerodia*, ¶ 15.

(10) *Yerodia*, ¶ 15.

(11) *Yerodia*, ¶ 47.

(12) *Yerodia*, ¶ 49.

(13) Finding that no treaties specify the immunities enjoyed by ministers for foreign affairs, the ICJ decided the immunities issue on the basis of customary international law. See *Yerodia*, ¶ 52.

jurisdiction of other states – such that incumbent foreign ministers would be protected from "any act of authority" by another state which would hinder them in the performance of their duties.⁽¹⁴⁾ Under the ICJ's holding, it is immaterial whether a foreign minister is, at the relevant time, present in the territory of the prosecuting state on an "official" or a "private" visit, or whether the prosecution relates to acts committed before the foreign minister took office or while in office.⁽¹⁵⁾ It also is immaterial whether the prosecution relates to acts performed in an "official" capacity or a "private" capacity.⁽¹⁶⁾ Moreover, there is no special exception made to an incumbent foreign minister's absolute immunity from criminal process when that person is accused of having committed crimes under international law.⁽¹⁷⁾ The ICJ held that, regardless of any of those factors, a foreign minister has immunity from the criminal jurisdiction of another state because

if a Minister for Foreign Affairs is arrested in another state on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office Furthermore, even the mere risk that, by traveling to or transiting another state a Minister for Foreign Affairs might

(14) *Yerodia*, ¶ 54. The Court stated that it found no exception to this rule in state practice or in the constituting instruments or practice of international criminal tribunals. *Yerodia*, ¶ 58.

(15) *Yerodia*, ¶ 55.

(16) *Yerodia*, ¶ 55.

(17) *Yerodia*, ¶ 58.

be exposing himself or herself to legal proceedings could deter the Minister from traveling internationally when required to do so for the purposes of the performance of his or her official functions⁽¹⁸⁾.

In reaching this conclusion, the court, without extensive analysis or elaboration, presents a functionalist argument. As the court states,

In customary international law the immunities accorded to Ministers for Foreign Affairs are ... to ensure the effective performance of their functions In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. ... In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. ...

The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he

(18) *Yerodia*, ¶ 55.

or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.¹⁹

(The rationale offered here by the court raises the question whether certain other high governmental officials whose functions require travel abroad might also be entitled to immunities under the court's analysis).

Even while announcing this very broad holding recognizing absolute immunity from criminal process for sitting foreign ministers, the court maintained that this immunity from jurisdiction does not affect the officials' individual criminal responsibility. The court argued that "immunity" does not mean "impunity"⁽²⁰⁾. The court offered four mechanisms through which such an official could potentially be held accountable for international crimes: first, a foreign minister's state may itself prosecute him; second, his state may waive the immunity, thereby allowing another state to prosecute; third, after the minister is no longer in office, the court of another state, if it has jurisdiction under international law, may prosecute that former foreign minister for any acts committed before or after the minister's period of office, and

(19) *Yerodia*, ¶ 53-54.

(20) *Yerodia*, ¶ 60.

for private acts committed during his or her tenure⁽²¹⁾. Or, fourth and finally, the court suggested, an incumbent or former foreign minister may be tried by an international criminal tribunal having jurisdiction over the alleged crimes⁽²²⁾.

A number of commentators – including several of the ICJ judges in their separate opinions in this case – have questioned how effective these four mechanisms would be in practice⁽²³⁾. As has been observed, it is unlikely that a state would prosecute its own foreign minister (in the absence of a regime change in that state). It is similarly unlikely that a state would waive the immunity of its own foreign minister to allow another state to prosecute him (again, barring a change of regime). The crimes in question are likely to have been committed during the official's tenure in office - not before or after- and may or may not be considered "private acts."⁽²⁴⁾ So other states may well remain barred from prosecuting, under the rules stated by the ICJ in *Yerodia*, even after the individual leaves office. And

(21) *Yerodia*, ¶ 61.

(22) *Yerodia*, ¶ 61.

(23) See, e.g., *Yerodia* (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal), ¶ 78; *Yerodia* (dissenting opinion of Judge Al-Khasawneh), ¶ 6; *Yerodia* (dissenting opinion of Judge Van den Wyngaert), ¶ 34-38.

(24) There is a controversial question in international criminal law concerning whether grave international crimes are to be considered official public acts when they are committed as official acts of governments or pursuant to governmental policy or whether, instead, such crimes, by their very nature, are never a legitimate public function and therefore always to be characterized as private acts for purposes of immunities. See *Yerodia* (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal), ¶ 85; *Yerodia* (dissenting opinion of Judge Al-Khasawneh), ¶ 6; *Yerodia* (dissenting opinion of Judge Van den Wyngaert), ¶ 36

finally, concerning prosecution by international criminal tribunals, even if such a tribunal were to have jurisdiction, international tribunals typically have quite limited capacity.

This fourth proposed mechanism of accountability – the prosecution of a sitting official by an international criminal tribunal - raises an important additional issue. This question concerns the implications of the *Yerodia* decision for the operation of the new International Criminal Court (ICC).

The ICJ in *Yerodia* states that,

an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include ... the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."⁽²⁵⁾

The ICJ appears to have spoken too broadly in this respect. In fact, consistent with the *Yerodia* holding on immunities, the ICC would have the power to prosecute an incumbent foreign minister (or other covered official) of a state

(25) *Yerodia*, ¶ 61.

that is a party to the ICC Treaty - but not a covered official of a state that is not a party to the treaty. This point becomes clear when we consider the basis for the ICC's purported jurisdiction over nationals of states that are not parties to the ICC Treaty.

The ICC Treaty provides that, under certain circumstances, the ICC may exercise jurisdiction even over nationals of states that are not parties to the treaty and have not otherwise consented to the court's jurisdiction. Article 12 provides that, in addition to jurisdiction based on Security Council action under Chapter VII of the United Nations Charter and jurisdiction based on consent by the defendant's state of nationality, the ICC will have jurisdiction to prosecute the national of any state when crimes within the court's subject-matter jurisdiction are committed on the territory of a state that is a party to the treaty or that consents *ad hoc* to ICC jurisdiction for that case⁽²⁶⁾. That territorial basis would empower the court to exercise jurisdiction even in cases where the defendant's state of nationality is not a party to the treaty and does not consent to the exercise of jurisdiction.

Advocates of ICC jurisdiction over non-party nationals argue that the foundation for the ICC's jurisdiction over non-party nationals when the crime is committed on the territory of a state party is that the territorial state has delegated its

(26) Rome Statute of the International Criminal Court. July 17, 1998. U.N. Doc. A/CONF. 183/9, art. 12 [hereinafter ICC Treaty].

territorial jurisdiction to be exercised by the ICC⁽²⁷⁾. The reasoning is that, since the territorial state would have the right to prosecute for offenses committed on its territory, the territorial state also has the right to delegate that jurisdiction to be exercised by an international court⁽²⁸⁾.

Offering a variant on this rationale, some proponents have contended that ICC jurisdiction over the nationals of non-party states is based upon the principles of universal jurisdiction pursuant to which the courts of any state may prosecute the nationals of any state for certain international crimes. Since any individual state could prosecute perpetrators regardless of their nationality, it is argued, a group of states may create an international court empowered to do the same. Under this theory, each state party, in effect, delegates to the international court its universal jurisdiction⁽²⁹⁾. Under either theory (delegated territorial jurisdiction or delegated universal jurisdiction), the ICC's jurisdiction over nationals of non-party states rests on the *delegated* jurisdiction of one or more states.

The overbreadth in the ICJ's reasoning concerning immunity before the ICC now becomes clear. Obviously, states

(27) See, e.g., Michael Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 *LAW & CONTEMP. PROBS.* 67 (Winter 2001).

(28) For full and contrasting treatments of the issue of ICC jurisdiction over non-party nationals, see Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 *LAW & CONTEMP. PROBS.* 13 (Winter 2001); Scharf, *supra* note 27.

(29) See, e.g., Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, *supra* note 27 at 77.

(the territorial state or, under the delegated-universal-jurisdiction theory, any or all states parties) can delegate to the ICC only such jurisdiction as those states have. If states are obliged to recognize a certain immunity, as the *Yerodia* decision requires, then those states' delegated jurisdiction logically must carry that immunity with it. The consequence is that, if states would be legally required to afford immunity from prosecution to sitting heads of state, foreign ministers, and perhaps other high officials, then the ICC (when acting without Security Council referral and without the consent of the officials' state of nationality) would be similarly constrained.

This immunity before the ICC would apply only to non-party nationals; it would not apply to officials of states parties to the ICC Treaty. States parties waive the immunity of their officials under Article 27 of that treaty, which states "immunities ... which may attach to the official capacity of a person ... shall not bar the Court from exercising its jurisdiction over such a person". But that treaty provision constitutes a waiver of immunity only by states parties. For *non-party* states, there is no such waiver. The head of state or foreign minister of a non-party state would maintain immunity⁽³⁰⁾.

(30) This conclusion is consistent with the thrust of Article 98(1) of the ICC Treaty, which provides that, [t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can

In sum, none of the four mechanisms proposed by the ICJ for ensuring the accountability of officials that enjoy immunities in fact holds much potential for achieving that objective. Rather, there appears to be a real, and perhaps inevitable, trade-off between the benefits of immunities and those of criminal accountability – a trade-off that the ICJ majority evades in its decision.

IV. The ICJ Opinions on Universal Jurisdiction

The DRC, in its original pleadings in the *Yerodia* case, challenged the lawfulness of Belgium's issuance of an international arrest warrant on the basis not only of the international law of immunities but also of the international law concerning universal jurisdiction. The DRC argued that

[t]he *universal jurisdiction* that the Belgian State attributes to itself [constitutes a] [v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations⁽³¹⁾.

Although the DRC later abandoned the universal jurisdiction claim, and the ICJ's majority opinion does not address universal jurisdiction in substance, several of the

first obtain the cooperation of that third State for the waiver of the immunity.

ICC Treaty, *supra* note 26, Art. 98(1).

(31) *Yerodia*, ¶ 17.

separate and dissenting opinions in the case do engage the matter on the merits (and in very fundamental terms), reaching quite divergent conclusions. ICJ President, Judge Guillaume, concludes that:

States primarily exercise their criminal jurisdiction on their own territory. In classic international law, they normally have jurisdiction in respect of an offence committed abroad only if the offender, or at least the victim, is of their nationality, or if the crime threatens their internal or external security. Additionally, they may exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. But apart from these cases, international law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*⁽³²⁾.

Judge Oda takes a more agnostic position:

It is one of the fundamental principles of international law that a State cannot exercise its jurisdiction outside its territory. However, the past few decades have seen a gradual widening in the scope of the jurisdiction to prescribe law. From the base established by the Permanent Court's decision in 1927 in the "*Lotus*" case, the scope of

(32) *Yerodia* (separate opinion of Judge Guillaume), ¶ 16.

extraterritorial criminal jurisdiction has been expanded over the past few decades to cover the crimes of piracy, hijacking, etc. Universal jurisdiction is increasingly recognized in cases of terrorism and genocide. Belgium is known for taking the lead in this field and its 1993 law ... may well be at the forefront of a trend. There is some national case law and some treaty-made law evidencing such a trend.

Legal scholars the world over have written prolifically on this issue. Some of the opinions appended to this Judgment also give guidance in this respect. I believe, however, that the Court has shown wisdom in refraining from taking a definitive stance in this respect as the law is not sufficiently developed and, in fact, the Court is not requested in the present case to take a decision on this point.⁽³³⁾

Judge Koroma states that: "In my considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide."⁽³⁴⁾

Judges Higgins, Kooijmans, and Buergenthal observe that,

(33) *Yerodia* (dissenting opinion of Judge Oda), ¶ 12.

(34) *Yerodia* (separate opinion of Judge Koroma), ¶ 9.

while none of the national case law to which we have referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an *opinio juris* on the illegality of such a jurisdiction. In short, national legislation and case law, – that is, State practice – is neutral as to the exercise of universal jurisdiction.

There are, moreover, certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful....

[T]he international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy....

We may thus agree with the authors of the Oppenheim, 9th Edition ... that: While no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications

pointing to the gradual evolution of a significant principle of international law to that effect⁽³⁵⁾.

In sum, the law of universal jurisdiction is far from settled⁽³⁶⁾. The present article will consider the current status and future development of universal jurisdiction, as a matter of law and of policy, and will conclude that, in the final analysis, the costs of universal jurisdiction may in fact outweigh its benefits.

V. Universal Jurisdiction: A Critical Examination

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- (35) *Yerodia* (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal), ¶ 45-46, 51-52.
- (36) In addition to examining the legal status of universal jurisdiction in general, several of the opinions in *Yerodia* examined in particular the status of universal jurisdiction “*in absentia*.” Belgium had instituted its action and issued its arrest warrant against Mr. Yerodia when he was not present on Belgian territory. Judge Guillaume concluded that: “Universal jurisdiction *in absentia* as applied in the present case is unknown to international law.” *Yerodia* (separate opinion of Judge Guillaume), ¶ 12. Judges Higgins, Kooijmans, and Buergenthal pose the question: “Is it a precondition of the assertion of universal jurisdiction that the accused be within the territory?” and then answer that “[i]f the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law . . . which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction.” *Yerodia* (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal), ¶ 53, 58. Judge Van den Wyngaert concludes that “there is no conventional or customary international law or legal doctrine in support of the proposition that (universal) jurisdiction for war crimes and crimes against humanity can only be exercised if the defendant is present on the territory of the prosecuting state.” *Yerodia* (dissenting opinion of Judge Van den Wyngaert), ¶ 58. The issue of *in absentia* exercise of universal jurisdiction thus represents yet another layer of controversy concerning the law of universal jurisdiction.

Under universal jurisdiction, the courts of any state may exercise jurisdiction without regard to the territory where the crime occurred or the nationality of its perpetrators or victims.

The underlying rationales for universal jurisdiction ultimately turn on enforcement considerations. Universal jurisdiction is proposed in situations in which the ordinary mechanisms of jurisdiction based on territoriality or the nationality of perpetrators or victims are unlikely to be effective in ensuring accountability. This sort of enforcement problem may arise for two reasons.

First, for certain crimes with significant transnational features, there may be no state with territorial jurisdiction and it may be difficult to identify the nationality of perpetrators (or, perhaps, even victims). Piracy provides the prototypical example. Pirates, often lacking identifiable nationality, commit crimes on the high seas outside the territory of any state⁽³⁷⁾. In many cases, therefore, no state would have jurisdiction over a given act of piracy if establishing jurisdiction required the prosecuting state first to establish its particular nexus with the crime. Universal jurisdiction solves this problem by allowing any state to prosecute without regard to nexus.

The second and distinct circumstance in which effective enforcement may be unlikely in the absence of universal jurisdiction is when the crime in question is one that typically involves the collusion of governments. All too often,

(37) See *infra* pp. 17-19.

governments themselves collude in genocide, war crimes, or crimes against humanity, and then seek to shield the perpetrators from justice. The crimes of the Nazis, the Khmer Rouge, the 1994 “interim government” of Rwanda, factions in the former Yugoslavia, and countless others were committed pursuant to official state policy and authority. In such cases, the crimes are often committed on the territory of the colluding state by its own nationals and against its own nationals. In such circumstance, the one state with nexus-based jurisdiction is unlikely to prosecute. The problem of governmental collusion in the crimes, and the resultant unwillingness of that state itself to prosecute, is ameliorated by vesting jurisdiction in all states under universal jurisdiction⁽³⁸⁾.

The attraction of universal jurisdiction is compelling. Crimes that are candidates for universal jurisdiction are crimes, often including heinous crimes⁽³⁹⁾, that would otherwise

(38) In some situations, governments may be not unwilling but, rather, unable to conduct prosecutions for genocide, war crimes, or crimes against humanity because of a collapsed domestic justice system or because of domestic political pressures. Where incapacity rather than unwillingness is the problem, a broader range of remedies, including but not limited to universal jurisdiction, may be possible. In such cases, the national government may be enabled to conduct prosecutions through the provision of substantial international assistance (in bolstering the domestic judicial system or in addressing domestic political pressures); or the national government might consent to the jurisdiction of an international tribunal; or a mixed tribunal combining national and international personnel and control could be utilized.

(39) Contrary to what is commonly supposed, universal jurisdiction does not cover exclusively the most heinous crimes. For example, piracy, which is robbery on the high seas, *see infra* pp. 17-19, is no more heinous than robbery on land. Nor does universal jurisdiction cover *all* of the most heinous crimes. Mass murder, child abuse,

tend to go unpunished and unanswered. If all states have jurisdiction over the relevant crimes, then at least some perpetrators may be prosecuted some of the time, thereby providing more retribution, deterrence, and condemnation of the crimes, and more incapacitation and perhaps even rehabilitation of perpetrators, than would otherwise exist⁽⁴⁰⁾.

and many other appalling crimes would not come under universal jurisdiction, absent additional factors. So the factor of heinousness alone cannot explain which crimes are and are not likely to be subject to universal jurisdiction.

- (40) This article proceeds on the working assumption that criminal prosecutions are a useful and appropriate response to genocide, war crimes, and crimes against humanity, in at least some circumstances. This assumption can be challenged, however, in a variety of ways. The usual list of benefits anticipated from prosecutions for international crimes generally includes some combination of deterrence, retribution, incapacitation and/or rehabilitation. *See, e.g.* Aryeh Neier, WAR CRIMES 81-84 (1998) (deterrence, rehabilitation, deterrence).

But one may question the efficacy of criminal justice in deterring crimes of this type and magnitude. Justice Jackson stated the problem eloquently in his opening address at the Nuremberg tribunal, saying:

I am too well aware of the weakness of juridical action alone to be content that in itself [the tribunal's] decision under this charter can prevent future wars. Judicial action always comes after the event. Wars are started only on the theory and in the confidence that they can be won. Personal punishment, to be suffered only in the event the war is lost, will probably not be a sufficient deterrent to prevent a war where the war makers feel the chances of defeat to be negligible.

Robert Jackson, Opening Address, TRIAL OF GERMAN WAR CRIMINALS, 39, S. DOC. NO. 129, 79th Cong., 1st Sess., (1946).

Some view retributivism as morally misguided. Incapacitation of selected offenders may seem inadequate and beside the point where crimes of enormous magnitude have been committed by and against whole segments of national or regional populations. And rehabilitation, while it may be a realistic prospect for some followers, is probably beyond the realm of possibility for the most responsible leaders like Hitler or Pol Pot.

The case for universal jurisdiction would be a strong one if we could assure that prosecutions would be brought and tried without bias or partisanship; that due process requirements would be consistently observed; that the law applied would consist exclusively of the incontrovertible content of international law (and not reflect broader national laws); and that relevant national executive organs would hold the power to veto the exercise of jurisdiction when a prosecution might bring dire international-relations consequences. The problem with universal jurisdiction is that we cannot ensure that these conditions are met⁽⁴¹⁾.

The question, then, of whether criminal law is appropriate to the task of responding to genocide, war crimes, and crimes against humanity is far from a closed issue. It is not the issue, however, to be engaged in the present article. Rather, proceeding on the working assumption that criminal prosecutions for the crimes in question would have some value at least some of the time, the present paper will focus on the advantages and drawbacks of pursuing such prosecutions through the particular mechanism of universal jurisdiction.

- (41) In addition to these difficulties, there is also the complex issue of the relationship of universal jurisdiction to amnesties. Universal jurisdiction gives each individual state the power to decide whether to honor a national amnesty granted by another state for genocide, war crimes, or crimes against humanity. If, for example, State A ends a civil war by concluding a peace agreement that entails an amnesty for abuses committed before or during the war, that national amnesty cannot bind other states. Each individual state may choose whether to respect that amnesty issued by State A or to ignore it and, exercising universal jurisdiction, prosecute in its own courts individuals who are covered by the amnesty granted by State A. Each state deciding whether to honor the amnesty would make that decision based on its views of the law, of morality, or of what is in its own interests. Because the issues concerning amnesties require complex analyses in their own right that would go beyond the scope of the present article, the issue is noted here but not engaged.

The question, given that we cannot ensure that these conditions will be met, is whether the potential benefits of universal jurisdiction are worth the potential costs. Sometimes universal jurisdiction will work well; perpetrators will be duly tried and punished, and the purposes of the criminal law will be served. Sometimes, universal jurisdiction will not work well; defendants will be tried without due process, or in partisan proceedings that may themselves exacerbate international tensions.

The history of universal jurisdiction illuminates the strengths and weaknesses of the doctrine, as well as revealing the reasons for its current structure. After considering the history of universal jurisdiction, the present article will evaluate the doctrine in relation both to due process and to international relations, concluding that universal jurisdiction may, in the final analysis, offer rather meager benefits and pose significant dangers.

A. The History of Universal Jurisdiction

Universal jurisdiction has been created in haste over the centuries. Interspersed with long quiescent periods have been flurries of activity during which, in the press of events, facts have been overlooked or exaggerated and flawed analogies have been drawn. As we shall see, this manner of proceeding has not been without its casualties.

For a pointed critique of the application of universal jurisdiction by a third state to an individual covered by a national amnesty, see John Bolton, *Judge of the Seven Seas?*, LEGAL TIMES, Jan. 11, 1999, p.21.

1. Piracy

The crime generally cited as the original subject of universal jurisdiction is piracy⁽⁴²⁾. The definition of “piracy” under customary international law was a matter of notorious ambiguity for centuries. The authors of the Harvard Research in International Law, writing in 1932, concluded that “[t]here is no authoritative definition”⁽⁴³⁾.

There have, however, been certain consistent features of the legal definition of piracy. From its inception, the law of piracy distinguished “pirates,” who operated privately and for private gain, from “privateers” or others commissioned or authorized by states⁽⁴⁴⁾. As stated in the 1958 Convention on the High Seas, and restated virtually identically in the 1982 U.N. Convention on the Law of the Sea,

Piracy consists of any of the following acts:

1. Any illegal acts of violence, detention or any act of depredation, *committed for private ends* by the crew or the passengers *of a private ship or a private aircraft ...* ⁽⁴⁵⁾.

(42) See, e.g., Kenneth Randall, *Universal Jurisdiction Under International Law*, *supra* note 2 at 791 (and sources cited therein); Ethan Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT’L ORG. 479, 486-91 (1990).

(43) Harvard Research in Int’l Law, *Draft Convention and Comment on Piracy*, 26 AM. J. INT’L L. 739, 769 (1932).

(44) See Alfred Rubin, THE LAW OF PIRACY 1-214 (1998).

(45) Convention on the High Seas, arts. 15, 16, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; U.N. Convention on the Law of the Sea, arts. 101, 102, Dec. 10, 1982, U.N. A/CONF. 62/122, 21 I.L.M. 1261 (1982) (emphasis added).

A stable feature of the law of piracy has been, then, that the definition of piracy turns critically on its including private acts and excluding the official acts of states. This feature of the legal definition of piracy is significant. By excluding state acts from the definition of piracy, the law of piracy was designed to prevent the exercise of universal jurisdiction over piracy from becoming a source of interstate conflict. As Professor Crockett puts it:

[If universal jurisdiction] could be asserted *vis-a-vis* a State, potentially undesirable consequences are evident. The threat to international peace and stability could be of grave significance if a State whose interests have not been directly infringed sought to punish a State which authorized an act of piracy

[A]fter balancing the threat of State violence against the danger to international peace from allowing universal jurisdiction against the offending States, it is reasonable to opt for the rule that State acts will not be within the definition of piracy.⁽⁴⁶⁾

In addition to reducing the potential for sparking interstate conflict, limiting the definition of piracy to private acts also has inhibited the use of universal jurisdiction over piracy as a *tool* of interstate conflict. The potential for such use is well reflected in the 1956 debate on the law of piracy in the

(46) Clyde Crockett, *Toward a Revision of the International Law of Piracy*, 26 DEPAUL L. REV. 78, 88 (1976).

U.N. General Assembly's Sixth Committee, in which the 1958 Convention on the Law of the Sea was negotiated. As reported in the proceedings of a 1957 meeting of the Grotius Society, with Sir Gerald Fitzmaurice presiding:

Clearly, then, there was an element of controversy in the discussion on piracy [in the Sixth Committee debate]. In fact, it was this subject which produced the only heated incident in an otherwise orderly and constructive debate on the law of the sea as a whole. The reason for this becomes plain when it is realised that the representatives who were criticising the view that piracy is essentially a crime "committed for private ends by the crew or the passengers of a private ship or a private aircraft" came mostly from the Soviet Union and the countries associated with it, and that the representatives who took the other view came mostly from the Western powers. Nor was the controversy purely academic. It was alleged by the Soviet Union and its supporters that the activities in the China Sea of the Nationalist Chinese naval forces, aided and abetted by those of the United States, were "piratical" - a point of view which was of course vigorously denied by the spokesmen of the countries concerned.⁽⁴⁷⁾

(47) H.N. Johnson, *Piracy in Modern International Law*, 43 GROTIIJS TRANSACTIONS 63, 64 (1957).

The result of those debates, as we know, was to retain the exclusion of all but private acts from the definition of piracy. The law of piracy continued specifically to exclude from the definition of piracy and, so, from the reach of universal jurisdiction, cases involving acts taken pursuant to the authority and policy of states. From its earliest days, the law of piracy has, in this way, minimized the extent to which universal jurisdiction over the crime could become a source or a tool of interstate conflict⁽⁴⁸⁾.

It is of particular interest, in this regard, to observe that when, in the nineteenth century, the European states agreed in the Declaration of Paris⁽⁴⁹⁾, to abolish privateering - thereby creating a prohibition that would include conduct commissioned by states - those states did not extend a system of universal jurisdiction to cover privateering.

2. The Aftermath of World War II

Following the development of universal jurisdiction over piracy and the possible extension of universal jurisdiction to slave trading⁽⁵⁰⁾. (a crime, like piracy, pursued for private

(48) Piracy has a land counterpart, brigandry, the law of which developed contemporaneously with the law of piracy (though less robustly), and which may also be subject to universal jurisdiction. See William Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 177, 190-94 (1945). Like piracy, brigandage is, by definition, committed for private gain. See *id.* at 184.

(49) Declaration Respecting Maritime Law, Paris, 16 April 1856. *published at* <<http://www.lib.byu.edu/~rdh/wwi/1914m/gene1856.html>>.

(50) *Id.* Beginning in the nineteenth century and continuing since, there has been developing international cooperation in efforts

gain),⁽⁵¹⁾ the law of universal jurisdiction changed little until the aftermath of World War II (WWII). In the post-war years,

toward the elimination of the trade in slaves. See Cherif Bassiouni, *Enslavement* 663-704 in 1 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni, ed. 1999). While none of the many treaties aimed at the suppression of the slave trade provide for universal jurisdiction, there is a prevalent view that slave trading is subject to universal jurisdiction as a matter of customary international law. See RESTATEMENT, *supra* note 1 at § 404; Randall, *supra* note 2, at 798; Cherif Bassiouni, *Theories of Jurisdiction and their Application in Extradition Law and Practice*, 5 CAL. W. INT'L L.J. 1, 54 (1974). Others take a more agnostic view. See, e.g., M. Sorenson, MANUAL OF PUBLIC INTERNATIONAL LAW 365, 366 (1968) ("In view of the extensive treaties seeking to wipe out slave-trade, it is possible that international customary law would today sustain an assertion of universal jurisdiction with respect to this offence."). Roger Clark summarizes the matter:

Universal jurisdiction is countenanced by the Conventions [on the High Seas and on the Law of the Sea] for piracy, but only flag state jurisdiction for the slave trade. Nevertheless, some States, including Greece, New Zealand, Nicaragua and Vanuatu, claim universal criminal jurisdiction over the slave trade, apparently without protest from other States. The authors of the Restatement Third of Foreign Relations Law of the United States support the right to do so, but without citation to this or any other individual state practice. . . . The Reporters give no supporting authority other than widespread disapproval of the trade and a general reference to the slavery conventions. Since the conventions refer to territorial and flag state jurisdiction, they hardly make the case.

Roger Clark, *Steven Spielberg's Amistad and Other Things I Have Thought About in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery*, 30 RUTGER'S L.J. 371, 390 n.55 (1999).

- (51) Whatever the legal status of universal jurisdiction over slave trading, it is important to note for present purposes that nineteenth- and twentieth-century slave trade, like piracy (as legally defined), was carried out for private gain. As Professor Chibundu has observed in relation to slave trade, "the lawbreakers themselves either were not nationals of an acknowledged member-state of the international legal system . . . [or] they were acting in direct contravention of the undertaking of their national states." M.O.

numerous prosecutions for war crimes and crimes against humanity were conducted in both national and international tribunals. Although the jurisdictional basis for some of those trials is ambiguous and, in some cases, controversial, a major development in the doctrine of universal jurisdiction can be traced to this period. Unfortunately, this development was based in part on faulty reasoning.

The best known of the post-war trials is probably that conducted by the International Military Tribunal at Nuremberg (“Nuremberg tribunal”). The jurisdictional basis for that tribunal is controversial. Although the view that the Nuremberg tribunal exercised universal jurisdiction has gained some currency, that view appears to be incorrect. The alternative hypothesis, that the Nuremberg tribunal’s jurisdiction was based on the Allies’ governmental authority within post-war Germany, comports more consistently with the historical evidence.

The four Allied States that established the Nuremberg tribunal had taken on supreme authority in Germany after the war. As stated in the Berlin Declaration of June 5, 1945,

**The Governments of the United States of America,
The Union of Soviet Socialist Republics and the
United Kingdom, and the Provisional Government
of the French Republic, hereby assume supreme**

Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT’L L. 1069, 1132 (1999).

authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority⁽⁵²⁾.

In that position of supreme authority, the Allies exercised judicial and all other powers of sovereignty in Germany. One may debate whether the Allies were the German sovereign in 1945 or merely stood *in loco sovereignis*⁽⁵³⁾. At a minimum, the Allies, acting in their capacity as the effective German sovereign, consented to the prosecution of German nationals at the Nuremberg tribunal. A maximalist reading would be that the Nuremberg prosecutions were actually an exercise of national jurisdiction by the effective German sovereign, the Allies. As Professor Randall puts it, "the jurisdiction of the [Nuremberg tribunal] and the zonal tribunals arguably arose from the victorious Allies' assumption of whatever jurisdiction Germany would have had over the specific offenses"⁽⁵⁴⁾. Indeed, this is the view reflected in the Judgment of the Nuremberg tribunal, which states:

(52) Berlin Declaration. June 5, 1945, 60 Stat. 1649, 1650. *See also* Agreement Between the Governments of the United States of America and the Union of Soviet Socialist Republics and the United Kingdom and the Provisional Government of the French Republic on Certain Additional Requirements to be Imposed on Germany. Sept. 20, 1945, 3 Bevens 1254 (further delineating the powers to be exercised by the Allies including prosecutions for war crimes).

(53) For a discussion of this point, see Morris, *High Crimes and Misconceptions*, *supra* note 28, at 38-39.

(54) Randall, *supra* note 2, at 805-06.

[T]he making of the Charter [establishing the Nuremberg tribunal] was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world⁽⁵⁵⁾.

The jurisdictional basis of the Nuremberg tribunal was not delineated with greater precision than that in the Global Charter or Judgment.

While there is strong evidence that the Nuremberg tribunal based its jurisdiction on the consent of the Allies as effective German sovereign, the theory that the Nuremberg tribunal based its jurisdiction on universal jurisdiction has attained some credence over the years. The passage from the U.N. Secretary General's 1949 Report on the Nuremberg tribunal, from which this theory may have garnered some of its force, begins by quoting the same sentence from the Nuremberg Judgment quoted immediately above. It then goes on to say:

In this statement the Court refers to the particular legal situation arising out of the unconditional surrender of Germany in May 1945, and the declaration issued in Berlin on 5 June 1945, by the four Allied States, signatories of the London Agreement. By this declaration the said countries

(55) Judgment of the International Military Tribunal. Sept. 30. 1946. *reprinted in* Richard A. Falk et al., *CRIMES OF WAR* 96 (1971).

assumed supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any State, municipal or local government or authority. The Court apparently held that in virtue of these acts the sovereignty of Germany had passed into the hands of the four States and that these countries thereby were authorized under international law to establish the Tribunal and invest it with the power to try and punish the major German war criminals.

The Court, however, also indicated another basis for its jurisdiction, a basis of more general scope. "The Signatory Powers" [the Tribunal said], "created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they 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". The statement is far from clear, but, with some hesitation, the following alternative interpretations may be offered. It is possible that the Court meant that the several signatory Powers had jurisdiction over the crimes defined in the Charter because these crimes threatened the security of each of them. The Court may, in other words, have intended to assimilate the said crimes,

in regard to jurisdiction, to such offences as the counterfeiting of currency. On the other hand, it is also possible and perhaps more probable, that the Court considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every State. The case of piracy would then be the appropriate parallel. This interpretation seems to be supported by the fact that the Court affirmed that the signatory Powers in creating the Tribunal had made use of a right belonging to any nation. But it must be conceded, at the same time, that the phrase "right thus to set up special courts to administer law" is too vague to admit of definite conclusions⁽⁵⁶⁾.

The Secretary General was right to be wary of drawing, from that passage in the Nuremberg judgment, the conclusion that the Nuremberg tribunal's jurisdiction was based on either the protective principle (the reference to counterfeiting) or the universality principle (the reference to piracy). Rather, the assertion in the Nuremberg Judgment that, in establishing the Nuremberg tribunal, the Allies had "done together what any one of them might have done singly"⁽⁵⁷⁾ is equally applicable to

(56) SECRETARY GENERAL OF THE UNITED NATIONS. THE CHARTER AND JUDGMENT OF THE NUREMBERG TRIBUNAL: HISTORY AND ANALYSIS at 80, U.N. Doc. A/CN.4/5, U.N. Sales No. 1949V.7 (1949).

(57) 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 461 (S. Paul A. Joosten ed., 1948).

a sovereign-consent theory as to a universal-jurisdiction theory of that tribunal's jurisdiction. Indeed, read together with the passage of the Judgment which states that "the making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered,"⁽⁵⁸⁾ the meaning seems more consistent with the view that the jurisdiction of the Nuremberg tribunal rested on the effective sovereign powers of the Allies to prosecute or consent to the prosecution of German nationals.

These considerations have not precluded assertions that the Nuremberg tribunal rested its competence on the collective exercise of universal jurisdiction. For example, the U.N. Commission of Experts on the former Yugoslavia made the claim that,

States may choose to combine their jurisdictions under the universality principle and vest this combined jurisdiction in an international tribunal. The Nuremberg International Military Tribunal may be said to have derived its jurisdiction from such a combination of the national jurisdiction of the States Parties to the London Agreement setting up that Tribunal⁽⁵⁹⁾.

(58) Judgment of the International Military Tribunal. *supra* note 55, at 96.

(59) *Interim Report of the Independent Commission of Experts Established Pursuant to Security Council Resolution 780, 1992*, ¶ 73, U.N. Doc. S/25274 (1993).

For this assertion, the Commission provided no support whatsoever. In light of the evidence that the Nuremberg tribunal rested its jurisdiction on the exercise of effective sovereignty by the Allies or, at a minimum, on the consent of that effective sovereign, quite substantial evidence, which does not appear to exist, would be required to uphold the Commission's claim.

Simultaneous with the operation of the Nuremberg tribunal, the allied powers also conducted the International Military Tribunal for the Far East (the "Tokyo Tribunal.") In the case of the Tokyo tribunal, the Japanese government (which, at least formally, retained sovereign power in Japan after the war) acceded, in the *Instrument of Surrender*,⁽⁶⁰⁾ to prosecution of Japanese nationals before the International Military Tribunal for the Far East. The *Instrument of Surrender* states that the Japanese government accepts the provisions set forth in the Potsdam Declaration of July 26, 1945⁽⁶¹⁾, and agrees to "take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to that Declaration"⁽⁶²⁾. The Potsdam Declaration, in turn, provides that "stern justice shall be meted out to all war criminals"⁽⁶³⁾. The Potsdam Declaration further states that the terms of the Cairo Declaration shall be carried

(60) Sept. 2, 1945, 3 Bevens 1251.

(61) 3 Bevens 1204; *see* *Instrument of Surrender*, *supra* note 60. at 1251.

(62) *Instrument of Surrender*, *supra* note 60, at 1252.

(63) *Potsdam Declaration*, *supra* note 97, at 1205, ¶ 10.

out⁽⁶⁴⁾. The Cairo Declaration included the statement that “[t]he ... allies are fighting this war to restrain and punish the aggression of Japan”⁽⁶⁵⁾. The primacy of the Instrument of Surrender, read together with the two Declarations, in constituting Japan’s consent and, thereby, forming the jurisdictional basis for the Tokyo tribunal, is affirmed both in the Tokyo tribunals charter and in its judgment⁽⁶⁶⁾.

The warranted conclusion appears to be that the jurisdictional basis of both the Nuremberg and Tokyo tribunals was not the exercise of universal jurisdiction but, rather, the consent of the defendants’ states of nationality. With regard to Tokyo, this conclusion is uncontroversial. Regarding Nuremberg, what must be said, at a minimum, is that the tribunal rested its jurisdiction largely on the fact that the

(64) *See id.* ¶ 8.

(65) Communiqué, First Cairo Conference, Dec. 1, 1943, 3 Bevens 858 at the First Cairo Conference, November 22-26, 1943 leaders of the Allied states conferred on the progress of the war, with particular focus on operations in the Far East; *see also* R. JOHN PRITCHARD, AN OVERVIEW OF THE HISTORICAL IMPORTANCE OF THE TOKYO WAR TRIAL 9 (1987) [hereinafter PRITCHARD, AN OVERVIEW]; R. John Pritchard, *The International Military Tribunal for the Far East and Its Contemporary Resonances*, 149 MIL. L. REV. 25, 27-28 (1995) [hereinafter, Pritchard, *The International Tribunal*].

(66) *See* PRITCHARD, AN OVERVIEW, *supra* note 65, at 9 n.16 (citing Proceedings, Vol. 20: Judgment, T.48415-19, and Annex A-1 - A-5); *see also In re Yamashita*, 327 U.S. 4, 13 (1945) (“Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty of violations of the law of war.”); John Pritchard, *The International Military Tribunal for the Far East and its Contemporary Resonances: A General Preface to the Collection*, in THE TOKYO MAJOR WAR CRIMES TRIAL xxxi (J. Pritchard ed., 1998).

Allies, as effective sovereign in post-war Germany, consented to the trial of German nationals⁽⁶⁷⁾.

While the international tribunals at Nuremberg and Tokyo appear not to have based their authority on universal jurisdiction, at least some of the national courts that prosecuted the post-war cases appear to have exercised universal jurisdiction, whether or not they so stated explicitly. The national courts that conducted post-war trials based their jurisdiction on various combinations of territoriality, nationality, passive personality, protective principle, and universal jurisdiction, often listing several of those bases and sometimes not specifying a jurisdictional basis at all. What must be said is that some form of universal jurisdiction appears to have formed the basis for at least some of the prosecutions in some of the national courts. As stated in the United Nations Law Reports of War Criminals, published in 1947,

there have been numerous ... trials by the Courts of one ally of offenses committed against the nationals

(67) One may certainly question whether the Allies should have acted *in loco sovseignitis* in post-war Germany. Concerns could be raised as to whether the Allies were sufficiently interested in the welfare of the German population to act as the German sovereign. Conducting or consenting to war-crimes prosecutions at the Nuremberg tribunal could be among the points of concern. But the questions of the wisdom and legitimacy of Allied government in post-war Germany need not be resolved in order to acknowledge that precisely such a government did exist. In the position of sovereign or acting sovereign, the Allies fulfilled the role of the government of Germany and, in that capacity, conducted or consented to the prosecution of German nationals by the Nuremberg tribunal.

of another ally or persons treated as Allied nationals, and in many trials no victims were involved of the nationality of the state conducting the trial ... ⁽⁶⁸⁾.

It is significant that, when and to the extent that universal jurisdiction was applied in the national-level post-WWII trials, it was conceptualized, often explicitly, as analogous to universal jurisdiction over piracy. A British military court, for example, in its opinion convicting a German defendant for killing a Dutch civilian in the Netherlands stated 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 offense was committed"⁽⁶⁹⁾.

Because no specific precedent existed prior to WWII for subjecting war crimes and crimes against humanity to universal jurisdiction⁽⁷⁰⁾, it is unsurprising that the extension of universal jurisdiction to those crimes would have relied in part on analogies to the law of piracy. There was, however, an important flaw in that analogy. The law of piracy limited the crime, by definition, to acts done for private gain⁽⁷¹⁾. That

(68) XV LAW REPORTS OF TRIALS OF WAR CRIMINALS 43 (1947-49).

(69) I LAW REPORTS OF TRIALS OF WAR CRIMINALS 35, 42 (1949) (Brit. Mil. Ct. - *Almelo* 1945). The *Almelo* court listed three possible bases for its jurisdiction over the case, universal jurisdiction being one of them. *See id.*

(70) *See Randall, supra* note 2, at 803.

(71) *See supra* pp. 17-19.

definitional requirement excluded the official acts of states from the definition of piracy and, thus, from the reach of universal jurisdiction. By contrast, allegations of war crimes and crimes against humanity frequently concern conduct carried out under official state policy or authority. Universal jurisdiction over war crimes and crimes against humanity therefore may be subject to politicization and to use as an instrument of interstate conflict in a way that universal jurisdiction over piracy was designed to avoid.

This flaw in the analogy between universal jurisdiction over piracy and universal jurisdiction over war crimes and crimes against humanity was not acknowledged by those who extended universal jurisdiction to the latter category of crimes in the post-war trials. The significant implications of the flaw in the analogy went unaddressed. Nevertheless, as we shall see, the use of universal jurisdiction in the post-war trials – to whatever extent it was actually used (itself a matter of dispute) and whatever the shortcomings in reasoning underpinning its use – became precedent for subsequent applications of universal jurisdiction to war crimes and crimes against humanity.

3. The Aftermath of the Aftermath of World War II.

The jurisdictional bases of some of the trials following WWII, including particularly the Nuremberg tribunal, have remained ambiguous and, in some cases, controversial. The legal literature in the decades following the war reflected uncertainty concerning the jurisdictional bases of the post-war

trials and, relatedly, the legal status of universal jurisdiction. A.R. Carnegie, in an excellent work in 1963, reflected that,

[a]lthough a special exception was made [by creation of the Nuremberg tribunal] for the major war criminals 'whose offences have no particular geographical location', the basis of the jurisdiction by which it was proposed to try them was not made explicit at the time. . . .

It must be admitted, [regarding the national-level trials], that reasoned statements of the grounds on which the courts based their claim to the right to exercise jurisdiction over the accused are the exception rather than the rule, and that the exceptional instances are not always helpful with regard to the general question. The Tokyo Tribunal regarded its activities as falling with the terms of the Potsdam Declaration, whose terms had been accepted by the Japanese Government in its formal Instrument of Surrender. It would seem that, in the Tribunals' view, the Japanese Government must therefore have been taken as having consented to the Allies' exercise of jurisdiction over its nationals, and it was not presumably necessary to decide whether apart from this consent such jurisdiction could lawfully have been exercised. The United State Military Tribunal in the *Justice* trial also considered the question of its jurisdiction in detail;

but the principal reason which it advanced for its right to exercise jurisdiction was that mentioned by the International Military Tribunal at Nuremberg, namely, the right of the occupying powers to exercise supreme authority on account of the surrender and collapse of Germany. In both cases, the grounds on which the courts chose to base their jurisdiction obviated the necessity for any thorough discussion of the nature of the jurisdiction to which violations of the laws and customs of war give rise.

It would seem ... that in the developing process of international law[,] major war crimes may be well on their way to becoming crimes of universal jurisdiction. The evidence for the exercise of this kind of jurisdiction in State practice is not as clear as that for the exercise of passive personalty jurisdiction, but the weight of authority in favour of the applicability of the former principle from jurists and sources of persuasive authority is so considerable that this might be sufficient to decide the issue in any future dispute. Furthermore, now that so many major war crimes are crimes of universal jurisdiction by agreement among States, the principle seems likely to be adopted by

customary international law on this account alone⁽⁷²⁾.

The Israeli Supreme Court, writing in 1962 in the *Eichmann* case, considered the range of conflicting views on universal jurisdiction:

One of the principles whereby States assume.... the power to try and punish a person for an offence is the principle of universality This principle has wide currency and is universally acknowledged with respect to the offence of piracy *jure gentium*. But while general agreement exists as to this offence, the question of the scope of its application is in dispute. Thus, one school of thought hold that it cannot be applied to any offence other than the one mentioned above [piracy], lest it involve excessive interference with the competence of the State in which the offence was committed. ...

A second school of thought ... agrees, it is true, to the extension of the principle to all manner of extra-territorial offences committed by foreign nationals, but regards it as only an auxiliary principle to be employed in circumstances in which no resort can be had to the principle of territorial

(72) A.R. Carnegie, *Jurisdiction Over Violations of the Laws and Customs of War*, 39 BRIT. Y.B. INT'L.L. 402, 414, 416-17, 423 (1963).

sovereignty or to the nationality principle, two principles on which all are agreed. ...

A third school of thought holds that the rule of universal jurisdiction, which is valid in cases of piracy, is logically applicable also to all such criminal acts of commission or omission which constitute offences under the laws of nations (*delicta juris gentium*), without any reservation whatever or at most subject to a reservation of the kind mentioned above. This view has been opposed in the past because of the difficulty of securing general agreement as to the offences to be included in the above-mentioned class.

A fourth view is that expressed *de lege-ferenda* by Lauterpacht in 1949 in the Cambridge Law Journal:

It would be in accordance with an enlightened principle of justice – a principle which has not yet become part of the law of nations – if, in the absence of effective extradition, the courts of a State were to assume jurisdiction over common crimes, by whomsoever and

wherever committed, of a heinous character⁽⁷³⁾.

The *Eichmann* court ultimately concluded that the application of universal jurisdiction was appropriate in the case before the court. In so deciding, it reasoned, based on the post-war trials, that “[t]he truth is - and this further supports our conclusion that Israel is justified in applying the principle of universal jurisdiction in the *Eichmann* case - that the application of this principle has for some time been moving beyond the international crime of piracy”⁽⁷⁴⁾.

Notwithstanding the uncertainty that existed after the war, and even well into the 1960s, concerning the legal status of universal jurisdiction, the Geneva Conventions of 1949⁽⁷⁵⁾ “codified” the use of universal jurisdiction over war crimes, treating the doctrine as an accepted feature of customary international law. The 1949 Geneva Conventions provide that:

(73) Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 277, 298-99 (Isr. Sup. Ct. 1962) (citations omitted).

(74) Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 277, 298-99 (Isr. Sup. Ct. 1962) (citations omitted).

(75) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter “Geneva I”]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter “Geneva II”]; Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter “Geneva III”]; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter “Geneva IV”].

Each High Contracting Party shall be under the obligations to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts⁽⁷⁶⁾.

While not codified in any treaty, universal jurisdiction over crimes against humanity too has been treated as a feature of customary international law⁽⁷⁷⁾. Applying universal jurisdiction to prosecute Eichmann for crimes against humanity, the Supreme Court of Israel relied both upon the precedents created by the post-war trials and also, once again, on the analogy to piracy. As the court reasoned,

[T]here is full justification for applying here the principle of universal jurisdiction since the international character of “crimes against

(76) Geneva I, *supra* note 75, art. 49; Geneva II, *supra* note 75, art. 50; Geneva III, *supra* note 75, art. 129; Geneva IV, *supra* note 75, art. 146. The same articles in each respective convention also provide the option that each High Contracting Party may, “if it prefers . . . hand such persons over for trial to another High Contracting Party”

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict also makes provision for universal jurisdiction, stating:

The High Contracting parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

Art. 28, 249 UNTS 240-88, signed 14 May, 1954.

(77) See, Randall, *supra* note 2, at 802, 810-814.

humanity” ... dealt with in this case is no longer in doubt ... [T]he basic reason for which international law recognizes the right of each State to exercise such jurisdiction in piracy offences – notwithstanding the fact that its own sovereignty does not extend to the scene of the commission of the offence ... and the offender is a national of another State or is stateless – applies with even greater force to the above-mentioned crimes⁽⁷⁸⁾.

Genocide, too, has been treated in recent decades as giving rise to universal jurisdiction under customary international law. The 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide⁽⁷⁹⁾ does not provide for universal jurisdiction. Rather, the Convention provides that 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 as shall have accepted its jurisdiction”⁽⁸⁰⁾. Universal jurisdiction over genocide was proposed but rejected during the negotiation of the Genocide Convention, in view of strong opposition by France, the Soviet Union, and the United

(78) *See* Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 277, 299 (Isr. Sup. Ct. 1962).

(79) Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

(80) *Id.*, art. VI.

States⁽⁸¹⁾. Quite apart from the terms of the convention on genocide, however, genocide has subsequently been treated as giving rise to universal jurisdiction as an accepted feature of customary international law. The *Cvjetkovic* court in Austria in 1995, the *Jorgic* court in Germany in 1997, and the *Pinochet* court in Spain (in pretrial proceedings) in 1998, among others, have affirmed the use of universal jurisdiction in prosecutions for genocide⁽⁸²⁾. By 1987, the Restatement of the Foreign Relations Law of the United States, without qualification, listed genocide (as well as war crimes) as giving rise to universal jurisdiction⁽⁸³⁾.

Universal jurisdiction over genocide, war crimes, and crimes against humanity, then, has come to be widely treated as an accepted feature of customary international law. The origin and basis of this development, however, are actually questionable - and based on questionable reasoning - as we have seen.

(81) See Memorandum of the United Nations Secretary-General, *Historical Survey of the Question of International Criminal Jurisdiction*, 144-45, Appendix 14.

A similar proposal to provide for universal jurisdiction over genocide was defeated in the U.N. General Assembly's 6th Committee. See *G.A.O.R., 1948, 3d sess., Part I, 6th Comm. Summary Records*, 394-406.

(82) See, e.g., Republic of Austria v. Cvjetkovic. Landesgericht. Salzburg (1995); Germany v. Jorgic, Oberlandesgericht Dusseldorf, Urteil vom 6. September 1997; Audiencia Nacional - Criminal Chamber en banc Appeal 173/98 - First Section - Criminal Investigation 1/98 Central Court of Investigation Number Six (Madrid, 5 November 1998).

(83) See RESTATEMENT, *supra* note 1 at § 404 (comment a).

4. The Terrorism Treaties

The 1970s and 1980s saw the creation of a new series of treaties providing for universal jurisdiction, now addressing crimes described as international terrorism. Treaties on hijacking⁽⁸⁴⁾ and other crimes on aircraft⁽⁸⁵⁾, crimes against the safety of maritime navigation⁽⁸⁶⁾, hostage-taking⁽⁸⁷⁾, attacks on internationally protected persons⁽⁸⁸⁾, and U.N. personnel⁽⁸⁹⁾, terrorist bombings⁽⁹⁰⁾, and torture⁽⁹¹⁾, each contain provisions permitting a state party to prosecute individuals believed to have committed the enumerated crimes when such individuals

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- (84) *See* Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.
- (85) *See* Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention of Sept. 23, 1971, Feb. 24, 1988, S. Treaty Doc. No. 100-19.
- (86) *See* Convention and Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668.
- (87) *See* International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS No. 11,081, 1316 U.N.T.S. 205.
- (88) *See* Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.
- (89) *See* Convention on the Safety of United Nations and Associated Personnel, Dec. 15, 1995, U.N. GAOR 49th Sess., Supp. No. 49, Vol. 1, at 299, U.N. Doc. A/49/49 (1994), 34 I.L.M. 482 (1995).
- (90) *See* International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249 (1998).
- (91) *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85. Torture is not a terrorism offense, but the Torture Convention's jurisdictional provisions fit within the mold of the provisions found in the terrorism conventions.

are found within its territory. As no link other than presence of the suspect is required, jurisdiction would not be based on territoriality, nationality, protective principle or passive personality but, rather, upon universality of jurisdiction. In support of these treaties, the analogy to piracy was once again drawn – together, this time, with references to crimes against humanity. As stated by U.S. Senator Arlen Specter:

Today's international criminals have left the high seas for airplanes and trucks loaded with explosives. But the threat posed by terrorists is just as universal as that once posed by pirates, and, like piracy, terrorism should be prosecuted as a "universal crime" against humanity.⁽⁹²⁾

Once again, the analogy to piracy was flawed insofar as the new "terrorists" often were state-sponsored and were typically acting for political rather than private ends. Nevertheless, this flaw in the analogy again went unnoticed. In any event, by this time, this difference between terrorism and piracy would presumably have been dismissed as insignificant since universal jurisdiction over war crimes, genocide, and crimes against humanity - crimes in which there typically is governmental involvement - had by now become accepted as customary.

There was, however, an additional problem that burdened the provisions for universal jurisdiction in this new

(92) 131 CONG. REC. S8999 (daily ed. June 27, 1985) (statement of Sen. Specter).

generation of treaties. The new problem was that, for at least some of the crimes covered by the universal jurisdiction provisions, there was no basis in customary international law for the universal jurisdiction claimed. This was in contrast to the provisions for universal jurisdiction in the 1949 Geneva Conventions regarding which there was at least a colorable argument that, since the trials following WWII, the crimes at issue were subject to universal jurisdiction as a matter of customary international law.

The states that drafted and became parties to the terrorism treaties did not delineate a theory supporting the lawfulness of the jurisdiction claimed. Rather, the treaties appear baldly to purport to create, by treaty, jurisdiction having no other lawful basis, and to make that jurisdiction applicable to nationals of states that are not parties to the treaties.

Since the crimes covered by the terrorism treaties arguably were not previously recognized as entailing universal jurisdiction, and yet the treaties provide that universal jurisdiction may be exercised over those crimes, the treaties, it has been argued, must have "created" universal jurisdiction over those crimes⁽⁹³⁾. But, as I will attempt to demonstrate, truly *universal* jurisdiction cannot be created by treaty. Treaty parties can agree to create jurisdiction that will operate as

(93) See, e.g., Michael Scharf, *The ICC's Jurisdiction Over the Nationals of Non-party States* 220-22, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* (Sarah B. Sewall & Carl Kaysen, eds. 2000).

“universal” between the parties, but cannot create, by treaty, jurisdiction that is truly universal in the sense that it would apply also to the nationals of non-party states. The terrorism treaties, if they “create” true universal jurisdiction at all, do so through contributing to the development of customary law, not through some exceptional form of fiat by treaty.

States are not obliged simply to accept purported new subjects of universal jurisdiction. In the absence of customary law recognizing universal jurisdiction over a given crime, each state may acquiesce in or protest against a proposed new subject of universal jurisdiction. In the event of a protest, the ensuing debate would invoke the usual criteria for determining the legitimacy of a new form of jurisdiction⁽⁹⁴⁾. Customary law governing the matter would then emerge accordingly. The terrorism treaties that some believe create universal jurisdiction represent agreements by the states parties not to object when other states (or, at least, other states parties) exercise jurisdiction as delineated by the treaties. But the treaties cannot bind non-parties similarly to accept the treaties’ terms.

How, then, are we to understand the import of the treaties that do appear on their face to purport to create universal jurisdiction? Are they simply void, having exceeded the bounds of the customary international law of universal

(94) For discussion of those criteria, see Morris, *High Crimes and Misconceptions*, *supra* note 28, at section 2(c) and sources cited therein.

jurisdiction? Some have taken that view⁽⁹⁵⁾. An alternative theory, however, would view the treaties as “proposing” the development of customary law⁽⁹⁶⁾.

The terrorism treaties that are cited as creating universal jurisdiction all concern crimes that were, at the time of the treaties’ conclusion, already prime candidates for universal jurisdiction. The crimes shared the principal indicia of crimes over which universal jurisdiction is suitable. They were crimes of substantial seriousness, of concern to all states, and which are difficult to control without substantial international cooperation⁽⁹⁷⁾. What the treaties did was, in effect, to propose -

(95) *See, e.g.*, Jordan Paust, Extradition of the Achille-Lauro Hostage-Takers: Navigating the Hazards, 20 *VANDERBILT J. OF TRANSNAT’L L.* 235, 254 (1987) (“universal jurisdiction under the Hostages Convention . . . is highly suspect with regard to defendants who are not nationals of a signatory to the Hostages Convention”).

(96) This issue was touched on by Higgins, *et al.*, in their joint separate opinion in *Yerodia*, noting:
Whether this obligation [to exercise this form of jurisdiction] is an obligation only of treaty law, *inter partes* or, whether it is now, *at least as regards the offenses articulated in the treaties*, an obligation of customary international law was pleaded by the Parties in this case by not addressed in any great detail. . . .
Accordingly, we offer no view on these aspects.
Yerodia (Joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal) ¶ 42-43.

(97) Michael Akehurst has made a similar observation:
Hijacking is probably not covered by the definition of piracy in international law, but there is doctrinal authority for the view that it is subject to universal jurisdiction nevertheless; Japan in fact claimed universal jurisdiction even before the Hague Convention. Hijacking threatens international communications to the same extent as piracy; it is an attack on international order and injures the international community as a whole, which means that all

to articulate⁽⁹⁸⁾ in a clear form - the suggestion that the crimes become recognized as entailing universal jurisdiction. States were then free to respond to that proposal, by active acceptance (in becoming states parties to the treaties) or active rejection (by objecting to the treaties or to prosecutions brought pursuant to them) or passive acquiescence (by accepting, or refraining from objecting to, the treaties or prosecutions pursuant thereto). As D'Amato has put it,

[t]he articulation of a rule of international law – whether it be a new rule or a departure from and modification of an existing rule – in advance of or concurrently with a positive act (or omission) of a state gives a state notice that its action or decision will have legal implications. In other words, given such notice, statesmen will be able freely to decide whether or not to pursue various policies, knowing that their acts may create or modify international law⁽⁹⁹⁾.

It appears that, as one might have predicted, the response to the jurisdictional provisions of the terrorism treaties has

States have a legitimate interest in repressing it. The policy reasons which justify universal jurisdiction over piracy justify it equally in the case of hijacking.

Michael Akehurst, *Jurisdiction in International Law*, 1973 BRIT. Y. B. INT'L L. 145, 161-62.

(98) On the role of articulation in the development of customary international law, see ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 74-87 (1971).

(99) D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW. *supra* note 98, at 75.

been acceptance and acquiescence. There have been a number of prosecutions under the terrorism treaties of individuals who were not nationals of states parties to those treaties, and yet there appears to be thus far no case in which the defendant's state of nationality has objected to that exercise of jurisdiction.

In the *Yunis* case⁽¹⁰⁰⁾, for example, the United States prosecuted a Lebanese national under the United States' implementing legislation for the Convention for the Suppression of Unlawful Seizure of Aircraft⁽¹⁰¹⁾ and the International Convention Against the Taking of Hostages⁽¹⁰²⁾ Lebanon was a party to the former but not the latter convention. Nevertheless, Lebanon raised no objection to the prosecution of Yunis for hostage taking.

U.S. v. Rezaq⁽¹⁰³⁾ is the other case sometimes cited to demonstrate that the United States prosecutes nationals of states not parties to the terrorism treaties under legislation implementing those treaties. But Rezaq, a Palestinian, was not a national of a state whose treaty participation the United States would have recognized at the time or whose diplomatic objection the United States would have recognized even if, contrary to the facts as they actually unfolded, an attempt had been made to lodge a protest against the exercise of jurisdiction

(100) *United States v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

(101) *Supra* note 84.

(102) *Supra* note 87.

(103) *United States v. Rezaq*, 899 F. Supp. 697 (D.D.C. 1995); *United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998).

over Rezaq⁽¹⁰⁴⁾. Because of those features of the Rezaq case, the fact that no state objected to the prosecution of Rezaq does little to clarify one way or the other the status of the terrorism treaties relative to the customary law of universal jurisdiction.

As of the time of this writing, there have been, to the author's knowledge, no diplomatic protests against the exercise of universal jurisdiction over the crimes that form the subject matter of the terrorism treaties. If that trend continues, then, with sufficient time and state practice, universal jurisdiction over these crimes will pass into customary law.

Through the process of a treaty proposing a new application of universal jurisdiction, the usual processes of customary law development may be accelerated. This occurs not through any deviation from the usual principles governing the development of custom, but simply through an increased rate of occurrence of those actions (acceptance, acquiescence, expressions of *opinio juris*, and the like) through which

(104) See Telephone Interview with Scott Glick, prosecuting attorney in *U.S. v. Rezaq*, U.S. Department of Justice, Terrorism Division, in Washington, DC, on September 15, 1999.

A claim, by Rezaq, to Jordanian nationality would not have been helpful to his case. Jordan was a party to the hijacking convention pursuant to which Rezaq was prosecuted. See *id.*

A similar circumstance arose in the case of *Public Prosecutor v. S.H.T.*, a case prosecuted in the Netherlands pursuant to the Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 84, and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, *supra* note 87. in which the defendant "had been born in Jerusalem and was a resident of East Jerusalem." *Public Prosecutor v. S.H.T.*, 74 INT'L L. REPORTS 162, 163 (1987).

customary law develops⁽¹⁰⁵⁾. The treaty itself does not “create” universal jurisdiction, and it could not do so insofar as that would involve the alteration of customary international law without the necessary processes of state practice and *opinio juris*. Rather, each of the treaties floats a clear proposal for

(105) This approach to the meaning of the jurisdictional provisions of the terrorism treaties is reflected in Professor Schachter’s reasoning. As he has written:

several multinational conventions dealing with crimes of international significance such as hijacking and sabotage of aircraft, hostage-taking, [and] injury to internationally protected persons . . . oblige the parties to extradite or alternatively try and punish individuals accused of the crime covered by the convention. A significant feature is that the treaty obligation applies to all offenders apprehended by the State in question, whether the crime was committed in or outside of the State and whether or not it involved injury to nationals. An inference has been drawn from the fact that these conventions have been adopted and ratified by a large number of States that ‘universal jurisdiction’ applies to the crimes in question. . . . The reasoning here is that if a large number of States have agreed to the obligation to try and punish such offences, the States must, as a matter of logic, have the *right* to exercise such jurisdiction under general (i.e., customary) international law. It follows that the right under customary law extends to all States, parties and non-parties. . . .

To reach the conclusion that customary law allows for universal jurisdiction in regard to the crimes covered by the treaties, one has to rely on three conditions:

- 1) The adoption of the conventions by overwhelmingly large majorities of States;
- 2) The implication drawn from these conventions that international law permits States to exercise jurisdiction on a universal basis in regard to the crimes in question;
- 3) The widespread ratification of the Conventions considered as relevant State practice that conforms to the implicit customary law principle State in (2) above.

Oscar Schachter, *Entangled Treaty and Custom*, in INTERNATIONAL LAW AT A TIME OF COMPLEXITY 717, 725-26 (Yoram Dinstein ed., 1989).

response. If a non-party state *were* to object to the jurisdiction proposed or to its exercise, the validity of the jurisdiction would have to be evaluated in the usual way. A determination would have to be made as to whether the claimed new basis of jurisdiction comported with the principles underlying and defining the customary international law of jurisdiction⁽¹⁰⁶⁾.

The merits of this view of the terrorism treaties as proposing the development of custom may be clarified by a contrasting example. Imagine that, rather than providing for universal jurisdiction over hijacking, hostage taking, and the like, the treaties had provided for universal jurisdiction over larceny. The larceny treaty or prosecutions brought pursuant thereto presumably would have been objected to promptly by states preferring to retain exclusive jurisdiction over larceny committed on their own territory when that larceny has no special link with other states. It is hard to imagine how the larceny treaty's universal jurisdiction provisions could be defended. Non-party states would readily prevail by showing that there is no support in customary international law principles for the claimed jurisdiction and that treaties to which they are not parties cannot "create" otherwise baseless jurisdiction over crimes committed on their territories.

The difference between the hypothetical larceny treaty and the terrorism treaties is that the crimes covered by the terrorism treaties, if and to the extent that they were not

(106) For a discussion of those principles, see Morris, *High Crimes and Misconceptions*, *supra* note 28 at § 2(c) and sources cited therein.

already subject to universal jurisdiction at the time of the treaties' promulgation, have characteristics that make them likely candidates for universal jurisdiction (meaning that such jurisdiction was likely to be accepted and, therefore, become customary) while larceny does not. The crimes covered by the terrorism treaties typically are crimes with significant transnational features, are crimes of the sort that are difficult to control without substantial international cooperation and, often, are particularly heinous. Ordinary larceny, by contrast, does not share those characteristics. For that reason, states would be unlikely to accept the universal jurisdiction proposed in the hypothetical larceny treaty even while states appear, thus far, to be willing to accept the universal jurisdiction proposed in the terrorism treaties.

To the extent that the terrorism treaties are viewed as proposing a new feature of customary law, subject to acceptance or rejection by non-parties, they are a potentially constructive contribution to international legal development. Viewed as an attempt simply to impose otherwise non-existent jurisdiction over the nationals of non-party states without those states' consent, the treaties would simply be void in that respect. The terrorism treaties do not represent any exceptional power to create universal jurisdiction by treaty or in any other exceptional way to alter the customary international law of jurisdiction outside of the usual processes of state practice and *opinio juris*.

Not only is the notion of creating universal jurisdiction by treaty inconsistent with the fundamental principles of international law, but it is also dangerous policy for another reason. If it were possible for states to create universal jurisdiction at will by treaty, then states could, for nefarious purposes, augment their extraterritorial powers by signing treaties giving themselves global jurisdiction on whatever subject matter they would like. Based both on legal principle and on policy, then, it would be a mistake to think that truly universal jurisdiction could be created by treaty.

The history of universal jurisdiction has been a somewhat checkered one, as we have seen. The doctrine has evolved, from the law of piracy to the terrorism treaties, through a process that is less circumspect and deliberate than might have been hoped. Flawed reasoning and expedient expansions have marked a haphazard course of development. Unsurprisingly, given the foibles of its history, the current legal status of universal jurisdiction is unsettled, as reflected in the array of diverging opinions rendered by the judges of the ICJ in *Yerodia*.

B. The Future of Universal Jurisdiction

While the *Yerodia* decision did not resolve the many issues concerning universal jurisdiction, it did begin to clarify some of the questions and controversies. Those issues will eventually be resolved, more clearly or less, through further state practice and, perhaps, through further litigation. In light of the unsettled state of the law in this field, the critical question to be

soberly confronted by states, and perhaps courts, is whether and when adopting or accepting a doctrine of universal jurisdiction is in fact sound policy. Consideration of a set of problems potentially posed by universal jurisdiction in the realms of due process and of interstate relations should inform that policy analysis.

1. Due Process

The assumption underlying expansionist trends in the doctrine of universal jurisdiction is that, through the application of universal jurisdiction to genocide, war crimes, crimes against humanity, and the like, the courts of law-abiding states will provide justice where criminal actors in abusive regimes would otherwise have impunity for their crimes. There is, however, no guarantee that universal jurisdiction will actually operate in this way. Universal jurisdiction empowers the courts of all states to exercise jurisdiction over the relevant crimes. Judicial systems that are corrupt, abusive or lawless are empowered equally with others. Due process failings in the application of universal jurisdiction may therefore be anticipated.

One form of due-process failing will occur if states exercise universal jurisdiction to conduct prosecutions for acts that do not clearly constitute an international crime under established international law. The content of international law is inevitably controversial at its margins. Some states, for example, take the view that damaging water supplies or electrical grids that are in both military and civilian use (as was

done by NATO in Kosovo) is a war crime⁽¹⁰⁷⁾, while other states (including the NATO states) take a different view of the matter. If a prosecuting state applies law that, in its view, is valid international law but that is not universally accepted as established international law, then that prosecution would fail to fulfil the due-process requirements that the criminal law be non-vague, specific, and prospective in its application⁽¹⁰⁸⁾.

One aspect of the Spanish action in 1998 against General Augusto Pinochet of Chile involved a particularly clear example of the attempted exercise of universal jurisdiction to impose criminal liability based on a definition of an “international crime” that exceeded the internationally accepted definition of that crime. Among the Spanish charges against Pinochet were charges of genocide⁽¹⁰⁹⁾. The Pinochet defense argued that the “group” alleged to have been victimized by Pinochet was not “a national, ethnical, racial or religious group,” as specified within the definition of genocide

(107) See, e.g., Ian Brownlie, Co-Agent for the Federal Republic of Yugoslavia, Remarks before the ICJ in the Case Concerning Legality of the Use of Force (May 10, 1999) (on file with author). See also Alex Kirby, *Kosovo Waterways Bombing a ‘War Crime’* (visited Mar. 22, 2000), published at <http://news2.thls.bbc.co.uk/hi/english/world/newsid_394000/394326.stm>; Bruce Zagaris, *Complaint Before War Crimes Tribunal Charges NATO Leaders with War Crimes*, 15 INT’L L. ENFORCEMENT REP. 249 (1999).

(108) See generally International Covenant on Civil and Political Rights, art 15(1), Dec. 16, 1966, 999 U.N.T.S. 171; Wayne LaFave, CRIMINAL LAW §2.3, 2.4 (3d ed. 2000).

(109) See Audiencia Nacional – Criminal Chamber en banc Appeal 173/98 – First Section – Criminal Investigation 1/98 Central Court of Investigation Number Six (Madrid, 5 November 1998).

under the Genocide Convention⁽¹¹⁰⁾ and under customary international law⁽¹¹¹⁾. The Spanish Audiencia Nacional, ruling in pretrial proceedings, held that this definitional limitation imposed under established international law did not properly capture the concept of genocide⁽¹¹²⁾. The genocide charges were, therefore, retained.

As a result of that holding, Spain sought to exercise universal jurisdiction to impose liability for an international crime, genocide, even though the conduct giving rise to the charges did not fall within the international definition of the crime. A defendant was to be prosecuted on the basis of universal jurisdiction for the crime in question - but the elements of that international crime were not even alleged by the prosecuting authority. The defendant, therefore, was sought to be held criminally liable for conduct which did not constitute the crime charged under international law and did not constitute the crime charged in the country, Chile, in which the conduct occurred. Here, the due process problem arose not from a disagreement among states as to the actual content of international law but, rather, from a disagreement among states as to what the content of international law *should be*.

(110) See Audiencia Nacional – Criminal Chamber en banc Appeal 173/98 – First Section – Criminal Investigation 1/98 Central Court of Investigation Number Six (Madrid, 5 November 1998).

(111) See, e.g., ICC Treaty, *supra* note 26, art. 6 (defining genocide).

(112) See Audiencia Nacional – Criminal Chamber en banc Appeal 173/98 – First Section – Criminal Investigation 1/98 Central Court of Investigation Number Six (Madrid, 5 November 1998).

The lack of judicial independence in many countries presents an additional, threshold problem for universal jurisdiction. Non-independence of the judiciary renders remote the prospect of impartiality and due process, particularly in politically charged cases, which prosecutions under universal jurisdiction tend to be.

The case of Hissene Habre illustrates this point. Habre ruled Chad from 1982-1990. Based on universal jurisdiction, Habre was indicted on February 3, 2000 in Senegal⁽¹¹³⁾. The indictment included multiple charges of torture allegedly committed during Habre's rule of Chad⁽¹¹⁴⁾.

In March, 2000, Senegal elected a new president. After President Wade took office, there were notable irregularities in the Habre case. In June, 2000 (about three months after President Wade's election), the indicting chamber of the court hearing the Habre case was deliberating on a motion for dismissal of the case. At the same time, a panel headed by President Wade called an unscheduled meeting of the Superior Council of the Magistracy of Senegal. At that meeting, the investigating judge for the Habre case (in effect, the prosecutor) was removed from his post. The president of the indicting chamber was promoted to the State Council. On July 4, that president of the indicting chamber dismissed all charges

(113) See Norimitsu Onishi, *An African Dictator Faces Trial in His Place of Refuge*, N.Y. TIMES, Mar. 1, 2000, A3; Human Rights Watch, *Senegal Actions on Ex-Chad Dictator Deplored*, AFRICA NEWS (July 4, 2000); <http://www.hrw.org/press/2000/07/habre0705.htm>.

(114) See Human Rights Watch, *supra* note 113; Onishi, *supra* note 113.

against Habre. All of that occurred after President Wade had appointed Habre's defense lawyer to be President Wade's special legal advisor⁽¹¹⁵⁾.

There is, then, reason to suspect that the dismissal of the Habre case involved political tampering with the judiciary at the highest levels. In this instance, it appears to have resulted in the dismissal of a prosecution. In another set of circumstances, non-independent judiciaries may be politically influenced to indict or to convict.

States and human rights organizations are appropriately concerned about the lack of judicial independence in many countries. States refuse extradition requests on these grounds; organizations dedicate their efforts to exposing and reforming non-independent judicial systems. One of the problems with universal jurisdiction as it relates to due process is that universal jurisdiction extends extraterritorially the powers of non-independent or otherwise flawed judiciaries. In evaluating universal jurisdiction, careful consideration must be given to whether it is wise to augment the power and extraterritorial reach of all the judiciaries of the world, and to do so in a category of cases particularly prone to politicization⁽¹¹⁶⁾.

(115) Human Rights Watch, *supra* note 113.

(116) A remarkable passage appears in the 1999 publication, "Thinking Ahead on Universal Jurisdiction: Report On a Meeting Hosted by the International Council on Human Rights Policy." The report, in a section entitled "When should prosecution based on universal jurisdiction be encouraged?", states that:
[p]articipants . . . noted that the ability to secure a fair trial in the jurisdiction where the subject is found may be a relevant consideration in advocating prosecution based on

2. Interstate Relations: Universal Jurisdiction in a Divided World.

A robust doctrine of universal jurisdiction would pose significant risks in the realm of interstate relations. The situations in which genocide, war crimes, or crimes against humanity may be alleged are generally large-scale conflicts in which governments are involved. Allegations of state-sponsored crimes of terrorism also are common. Because official acts would frequently be at issue in prosecutions under universal jurisdiction, such trials often would constitute, in effect, the judgment of one state's policies and, perhaps, officials, in the courts of another state. In such instances, there is the risk

universal jurisdiction. The concerns discussed related to general adherence to fair trial rights, sentencing questions, and trials *in absentia*.

Meeting participants did not advocate the development of a list of "acceptable" and "unacceptable" states based on each jurisdiction's adherence to fair trial standards generally. Instead, most seemed willing to leave these considerations to case-by-case decisions. This approach is supported by the fact that legal systems are not static – they can be more or less fair depending on the type of case and, in some circumstances, the publicity it receives. . . . If advocates are concerned about whether a suspect can get a fair trial in the country in which he/she is found, they should press for other states to undertake prosecution of the case.

International Council on Human Rights, THINKING AHEAD ON UNIVERSAL JURISDICTION: REPORT ON A MEETING HOSTED BY THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY 25-26 (1999).

The report of the meeting of human rights experts and activists does not address the fact that human rights organizations will not control which states conduct prosecutions and will not be able to prevent a state that chooses to proceed with a prosecution under universal jurisdiction from doing so.

(foreseen by the law of piracy) that universal jurisdiction would become a source and an instrument of interstate conflict. As Judge Higgins et al. observed in their joint separate opinion in *Yerodia*,

[o]ne of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights. The difficult task that international law today faces is to provide that stability in international relations by a means other than the impunity of those responsible for major human rights violations⁽¹¹⁷⁾.

The starting point of the rationale for universal jurisdiction is that all states have an interest in ensuring accountability for the crimes in question. Even if we accept, *arguendo*, the existence of such a unity of interest (a point which could be debated), the interests of states obviously diverge on a great number of other matters. Because criminal trials for war crimes, genocide, and crimes against humanity do not exist in isolation from those other aspects of interstate relations, we must anticipate that universal jurisdiction would sometimes be used as a tool for achieving other political ends. As Judge Guillaume observed in his separate *Yerodia* opinion, to accept universal jurisdiction may often be “to encourage the

(117) *Yerodia* (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal), ¶ 5.

arbitrary for the benefit of the powerful, purportedly acting as the agent for an ill-defined 'international community'."⁽¹¹⁸⁾

Universal jurisdiction could be deployed for political purposes in a variety of ways. We can imagine states conducting selective and strategic prosecutions under universal jurisdiction of nationals of states with which they are in conflict. For example, Rwanda and Zimbabwe were adversaries in the conflict in the DRC in the late 1990s. We can imagine Rwandan officials seeking to prosecute Zimbabwean leaders for crimes against humanity allegedly committed in the violent expropriation of land owned by whites in Zimbabwe⁽¹¹⁹⁾.

(118) *Yerodia* (separate opinion of Judge Guillaume). ¶ 15. Judge Guillaume makes that comment specifically in relation to universal jurisdiction *in absentia*, but it is virtually equally true of all universal jurisdiction.

(119) During 2000, there was a widespread movement among black Zimbabweans to seize land owned by whites in Zimbabwe. The movement justified its actions based on the historical and continuing inequities of land distribution in the country. The campaign of seizures, many violent, "was sparked in February [2000] by President Robert Mugabe, who encouraged supporters to seize the farms after he lost a referendum that would have allowed him to reclaim and redistribute land. Mugabe calls the white farmers enemies of the state." Jessica Graham, *More Zimbabwe Farms Invaded*, N.Y. POST, April 24, 2000, p. 25. "Within days [of Mugabe's statements], thousands of armed men occupied farms across the country – many of them violently. A large number of the squatters are being paid to occupy the farms, and some said they were paid by ruling party activists." Angus Shaw, *Zimbabwe Court Orders Farm Squatters' Ouster*, HOUSTON CHRONICLE, April 14, 2000, p. 31. The campaign of land seizures was accompanied by murders, beatings, arson and other widespread violence. See Graham, *supra*.

As stated in the ICC Treaty, the definition of crimes against humanity includes "persecution." Persecution, under the treaty, is constituted by "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the

Beyond the blatant use of universal jurisdiction for purposes of pursuing an opponent in the courtroom as well as the battlefield, there is the more subtle and, in some ways, even more serious problem of states' adjudicating cases with such highly politicized content that the political perspective of the prosecuting state (or individual prosecutor) is inevitably consequential. Belgian magistrates, for example, have taken up investigations (with or without subsequent indictment) of not only Ndombasi Yerodia but, also, Ariel Sharon, Yasser Arafat, Henry Kissinger, Fidel Castro, Saddam Hussein, and others. In such politicized contexts, the decision, involving the exercise of prosecutorial discretion, of which cases to pursue and which to bypass cannot help but be informed by the political perspectives of the prosecuting state or individual prosecuting official.

These sorts of problems do not arise under a narrow doctrine of universal jurisdiction, applicable to private acts like piracy. But these problems of politicalization are inherent to a

identity of the group or collectivity." ICC Treaty, *supra* note 26, art. 7(2)(g). Such persecution constitutes a crime against humanity only when that persecution is on impermissible grounds including race, ethnicity, or political affiliation, ICC Treaty, art. 7(1)(h), and is done "in connection with [specified acts including murder]." ICC Treaty, arts. 7(1)(h), 7(1)(a). Finally, to constitute crimes against humanity, the act must be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." ICC Treaty, art. 7(1).

The point here is not to make a case for or against the proposition that the events in Zimbabwe constitute crimes against humanity. The point, rather, is that it would not be difficult to imagine such a case being made, in the example given, by prosecutors in Rwanda intent on punishing Zimbabwean leaders for unrelated conduct in the war in the DRC.

broad doctrine of universal jurisdiction applicable to genocide, war crimes, crimes against humanity, terrorism, and the like.

When one state institutes proceedings under universal jurisdiction against the national of another state, the defendant's state of nationality may claim that the prosecution is politically motivated and baseless. States likely would make that claim both when the prosecution is indeed baseless and also, sometimes, when the prosecution is well founded. The issue will be who is to judge the propriety of the prosecutions. If the defendant's state of nationality can reject the prosecuting state's claim to jurisdiction, then the purpose of a broad doctrine of universal jurisdiction is largely defeated. If, on the other hand, the state of nationality cannot effectively reject the claim to jurisdiction, then there is no effective insurance against the abusive, or at least partisan, exercise of universal jurisdiction.

Ironically, while politicized prosecutions are undesirable for the reasons discussed, a prosecutorial system without any form of veto power by the political actors responsible for foreign policy may be undesirable as well. Prosecutions of foreign nationals, especially officials or leaders, may have dire international consequences. In such circumstances, it is imperative that high-level executive decision makers, duly informed by intelligence and analysis from foreign ministries, have the power to preclude prosecutions that could lead to international catastrophe.

In some legal systems, this kind of executive control would exist by virtue of the fact that a prosecutor is an executive officer operating under the control of the executive branch of government. In other legal systems, however, an individual prosecutor or even a private complainant can require the government to proceed with a prosecution and, where necessary, an extradition request.

The Spanish legal system provides an example. Under Spanish law, a crime victim may institute an *accion popular*, which may then be pursued to prosecution by the public prosecutor or pursued by the individual complainant as a private prosecution if the public prosecutor does not take up the case⁽¹²⁰⁾. Where the power to engage the state in an exercise of universal jurisdiction is held by individual prosecutors, or even private individuals, who are not subject to adequate control by governmental actors apprized of and responsible for international relations, the net results may be destructive⁽¹²¹⁾.

IV. Conclusion

(120) See Constitution of Spain, art. 125, *as amended* (Aug. 27, 1992); Spanish Criminal Procedure Law, arts. 101, 270.

(121) In a thoughtful piece by Curtis Bradley, he observes that:

The unilateral arrest and prosecution of former leaders poses an obvious risk of generating international friction. It certainly has strained relations between Great Britain and Chile, and, needless to say, between Spain and Chile. Although perhaps not likely in the *Pinochet* case itself, it is easy to conceive of scenarios in which resort to the Pinochet method might even trigger military conflicts. This danger would be even higher if, as some people have advocated, the Pinochet method is extended to allow the prosecution of *current* officials.

Curtis Bradley, *The "Pinochet Method" and Political Accountability*, 3 GREEN BAG 5, 8 (1999).

Universal jurisdiction may be exercised by courts lacking in due process, may be used for political or partisan purposes, and may have serious negative international consequences. However, all of this is true not only of universal jurisdiction but also of the other internationally recognized forms of jurisdiction including jurisdiction based on territoriality, nationality, protective principle, and passive personality. Why, then, point to these pitfalls as a basis for questioning the desirability of universal jurisdiction in particular? The reason rests on an evaluation of costs and benefits.

The benefits of states' having jurisdiction over crimes committed on their own territory are enormous. Maintaining law and order within its own territory is a central function of government. Similarly, jurisdiction over a state's own nationals (or at least the option of asserting such jurisdiction) is a concomitant of the very meaning of the political relationship between a state and its nationals. The protective principle allows states to exercise jurisdiction in self-protection where offenses abroad are directed against the security of the state or threaten the integrity of governmental functions. The passive personality basis for jurisdiction also entails significant benefits in assuring accountability for crimes through prosecutions by victims' states in situations where no other state may step forward to prosecute. The application of this basis for jurisdiction to particular classes of crimes such as hijacking or air sabotage is finding some acceptance internationally⁽¹²²⁾.

(122) See RESTATEMENT, *supra* note 1, at §402 (comment g).

With regard to other classes of crimes, however, the mere identity of the victim (the individual who is robbed, for example, while visiting a foreign capital) would generally not be considered a valid basis for jurisdiction. Indeed, the exercise of passive personality jurisdiction in relation to such crimes would likely be seen as an impingement upon the territorial prerogatives of the state where the crime occurred. Overall, the passive personality basis for jurisdiction is more controversial than the other bases.¹²³ In the case of each of these forms of jurisdiction (though least clearly for passive personality which, appropriately, is the most controversial of these four bases for jurisdiction), the benefits of jurisdiction outweigh its costs, even taking into account the potentials for abuse.

The question to be asked about universal jurisdiction is whether, in practice, its benefits will outweigh its costs. Universal jurisdiction entails the potential costs that have been described. Its potential benefits are not simple to evaluate. Universal jurisdiction may function well some of the time, but experience to date suggests that the states that we might hope would exercise universal jurisdiction rarely do so, particularly in the most high-profile cases. Universal jurisdiction empowers states to exercise jurisdiction, but has not been particularly effective in actually moving states to act. Governments tend to shy away from prosecuting high-level perpetrators from other states in the absence of some specific nexus between the crimes and the state that would be prosecuting - that is, in cases where

(123) *See id.*

the only basis for jurisdiction would be universal jurisdiction. Based on his firsthand experience in the field over the past decade, David Scheffer, then U.S. Ambassador at Large for War Crimes Issues has said:

My own experience has been sobering, to say the least. I have found governments almost universally determined not to use the universal jurisdiction tools they have to prosecute. We actually have spent years seeking to encourage governments to exercise their powers. The U.S. has sought, unsuccessfully, to encourage Spain, Denmark, Sweden, Germany, Israel and other states to prosecute Pol Pot; Italy, Germany, Russia, and Turkey to prosecute Ocalan; and Austria, Italy, and other European and Middle-Eastern states to prosecute Iraqi individuals including Saddam Hussein. [In all these cases], we hear very pragmatic reasoning by prosecutors.

In so many of these cases, I have wanted to use the U.S. legal system. But we are hampered by the gaps in our own law [that prevent prosecutions under universal jurisdiction for these crimes]⁽¹²⁴⁾.

If the states that we would wish to exercise universal jurisdiction are frequently reluctant to do so, and if universal

(124) Remarks of David Scheffer, at the conference "Universal Jurisdiction: Myths, Realities, and Prospects," held at the New England School of Law, Nov. 3, 2000 (speaking notes on file with author).

jurisdiction may be subject to use for nefarious or partisan purposes, then the question must be asked whether the benefits of universal jurisdiction will outweigh its costs in practice⁽¹²⁵⁾.

(125) The usual list of benefits anticipated from prosecutions for international crimes includes some combination of deterrence, retribution, incapacitation, and rehabilitation. *See infra* note 40. Universal jurisdiction, because it locates prosecutions in national rather than international fora, might be thought to render an additional benefit that would warrant consideration. This would be the benefit of prosecuting states' themselves becoming more compliant with international criminal law through the process of conducting prosecutions enforcing that body of law.

Why states comply with international law to whatever extent they do (itself a disputed matter) is a controversial issue. *See* Jack Goldsmith & Eric Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, working paper published at

<<http://www.law.uchicago.edu/Publications/Working/index.html>>; Harold Koh, *Review Essay: Why Do Nations Obey International Law?*, 106 YALE J. INT'L L. 2599 (1997). A constructivist account views international law as "sticky." As described by Risse and Sikkink,

The more [governments] "talk the talk," . . . the more they entangle themselves in a moral discourse which they cannot escape in the long run. In the beginning, they might use arguments in order to further their instrumentally defined interests, that is, they engage in rhetoric They become entangled in arguments and the logic of argumentative rationality slowly but surely takes over.

Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 16 (Thomas Risse *et al.*, eds. (1999)). Harold Koh incorporates constructivist observations into a broader theory of compliance. In his words,

It is through this transnational legal process, this repeated cycle of interaction, interpretation, and internalization, that international law acquires its "stickiness," that nation-states acquire their identity, and that nations come to "obey" international law out of perceived self-interest. In tracing the move from the external to the internal, from one-time grudging compliance with an external norm to habitual internalized obedience, the key factor is repeated participation in the transnational legal process.

Koh, *supra* at 2655.

Given the constructionist observation, we might ask whether states' exercise of universal jurisdiction over international crimes would be expected to improve those states' compliance with the international norms enforced in their prosecutions. Even if the constructivist account provides an accurate (or partial) explanation of states' compliance with international law (a point on which I take no position here), it is not clear that the exercise of universal jurisdiction would have this beneficial effect. The constructivist account is premised on the conditions that the state in question is engaged in repeated participation and that the participation concerns the application of the norm to the state itself. Those conditions are unlikely to be met in relation to universal jurisdiction. Prosecutions under universal jurisdiction are likely to be conducted only infrequently within any particular state. And such a prosecution, precisely because it is based on universal jurisdiction, would involve the enforcement of international law against a defendant who is a national of a state other than the prosecuting state. A one-time (or rare) prosecution of a non-national seems unlikely to have any but the most attenuated effects on a state's subsequent compliance with the international norms in question.

The likelihood of beneficial effect is further reduced by the nature of the particular subject matter at issue. The prohibitions of genocide, war crimes, and crimes against humanity are uncontroversial in their general statement. States do not profess a right to commit any of the above. The specifics of the law concerning these crimes, however, is still very much in the process of development. See Morris, *High Crimes and Misconceptions*, *supra* note 28, at 30-33 (and sources cited therein). The combination of the infrequency of prosecutions under universal jurisdiction within any given state together with the fact that the body of law to be applied is less than fully developed limits the likelihood of a great stickiness effect. States that exercise universal jurisdiction rarely rather than repetitively could commit themselves to little beyond their pre-existing acknowledgment of a norm against genocide, war crimes, or crimes against humanity, while retaining ample capacity to distinguish any future situations in which their own conduct could be criticized. It seems unlikely that episodic applications of universal jurisdiction to enforce the law of genocide, war crimes, or crimes against humanity against nationals of other states by states otherwise disposed to commit those very crimes would substantially change that disposition or hinder its expression.

The question, once again, is whether the potential benefits of universal jurisdiction would outweigh its costs in practice. This

In evaluating the costs and benefits of universal jurisdiction, the availability of alternative routes for prosecution must be considered. There are a number of jurisdictional mechanisms that may be suitable alternatives to universal jurisdiction in some circumstances.

Ad hoc international criminal tribunals, such as those created by the U.N. Security Council in the 1990s to try cases of genocide, war crimes, and crimes against humanity committed in the former Yugoslavia and Rwanda represent one approach. The ICC also will provide a forum for some cases. An additional mechanism for pursuing accountability for international crimes is the mixed tribunal. Tribunals composed of a combination of national and international judges and other personnel have been established for Sierra Leone and, in a somewhat different form, East Timor. In addition to international and mixed tribunals as mechanisms for the prosecution of genocide, war crimes, and crimes against

brief consideration of the potential for universal jurisdiction to increase compliance with international criminal law norms by the prosecuting state suggests that such benefits are likely to be minimal. Law-abiding states – those states whose conduct of prosecutions under universal jurisdiction would be most likely to comport with requirements of due process and non-politicization – presumably do not need to conduct prosecutions in order to comply with international norms against genocide, war crimes, and crimes against humanity. And those non-law-abiding states whose compliance with international criminal law we might hope to gain through their conduct of “sticky” prosecutions are also the states most likely to conduct prosecutions lacking in impartiality or due process. The issue, then, in terms of the constructivist question, is whether the likely “stickiness” gains, together with other anticipated gains, would outweigh the likely costs associated with universal jurisdiction.

humanity, there also remains the possibility of prosecutions in national courts under the usual territoriality, nationality, protective, and perhaps passive personality bases for jurisdiction. None of these approaches is perfect; yet each may be useful to some degree in some situations.

Still, we must recognize the likelihood of future situations in which genocide, war crimes, or crimes against humanity are committed but none of these types of fora are available for prosecution. The Security Council has been far from consistent in creating ad hoc international criminal tribunals. For every Yugoslavia or Rwanda tribunal, there are multiple contexts arguably warranting an international tribunal but in which no such tribunal is established. The ICC lacks jurisdiction (absent a U.N. Security Council resolution) over crimes committed by non-party nationals, at least if the crimes were committed on the territory of a non-party state⁽¹²⁶⁾. And, as noted at the outset, the domestic jurisdiction of the principally affected state frequently will be ineffective because the crimes at issue often are committed by or with the approval of governments within their own territories. In such situations, domestic prosecutions are unlikely if the abusive regime is still in power. For the same reasons, mixed tribunals will likely be created only after a regime change in the primarily affected state. Even if there has been a regime change, the new regime may be unable to conduct adequate prosecutions in its own domestic court (because of a collapsed justice system, which frequently

(126) See ICC Treaty, *supra* note 26, art. 12.

burdens post-conflict governments) or may be unwilling to conduct prosecutions (because of political pressures within the country or because the new regime is sympathetic to the perpetrators).

Considering all of those gaps and lapses in jurisdictional coverage, we can readily imagine situations in which the only form of jurisdiction effectively available would be universal jurisdiction. The question of whether the benefits of universal jurisdiction will outweigh its costs must be considered in light of the fact that there will be some contexts in which universal jurisdiction will be the last and only resort. The alternative to universal jurisdiction, then, would be no criminal proceedings. This, presumably, would result in an unsatisfied demand for justice and a consequently heightened risk of acts of revenge.

Surely, in any given case, properly exercised universal jurisdiction would be preferable to the absence of prosecutions. But the analysis cannot end there. The two relevant questions are, first: In what proportion of cases will a state actually step forward to conduct a bona fide exercise of universal jurisdiction? And, second: How frequently will universal jurisdiction be exercised in the undesirable ways that this article has briefly considered? The regime of universal jurisdiction must be evaluated as a whole. The question is not whether, in any given case, a well-motivated, well-executed exercise of universal jurisdiction would be better than a complete absence of justice processes when crimes against humanity have been committed. The question, rather, is

whether, in practice, a regime of universal jurisdiction will do more good or more harm overall⁽¹²⁷⁾.

There is a notable reluctance to take a critical view of jurisdictional mechanisms for the prosecution of genocide, war crimes, and crimes against humanity. Perhaps because of the heartrending nature of the crimes in question, proposed remedies and enforcement mechanisms too often escape rigorous scrutiny. The usual criticism of universal jurisdiction, if one is made at all, is that it will not be used enough - that states, acting on the basis of self-interest, will fail to exercise jurisdiction over crimes that do not directly concern them. But the drawbacks of universal jurisdiction do not end there. As I have described, universal jurisdiction entails important risks that we would overlook only at our peril. The question is what beneficial effect universal jurisdiction would have in practice, and at what cost in terms of due process and international relations. When this question is soberly confronted, it is not at all clear that a robust doctrine of universal jurisdiction would be good law or wise policy.

(127) I am indebted to Robert Keohane for discussion of this issue.

