

# Universal Jurisdiction in a Divided World: Conference Remarks\*

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## I. INTRODUCTION

Governments frequently collude in the commission of genocide, war crimes, and crimes against humanity. 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. This fact creates a fundamental problem for international criminal jurisdiction. It is unlikely that a government that is responsible for the crimes would be efficacious in their prosecution. For that reason, sole reliance on the usual mechanisms of municipal law enforcement would be misplaced in this context. The problem, then, is how to fashion a jurisdictional structure that circumvents obstruction by perpetrator regimes while still maintaining legitimate foundations for the exercise of judicial power.

One of the mechanisms commonly proposed for this purpose is 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 perpetrators or victims. The rationale for universal jurisdiction is that crimes such as genocide, war crimes, and crimes against humanity are an affront to humanity and, therefore, are of concern to all states. The problem of governmental collusion in the crimes and resultant unwillingness to prosecute is ameliorated by vesting jurisdiction in all states.<sup>1</sup>

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1. 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 political pressures within the country. Where incapacity rather than unwillingness is the problem, a broader range of

The attraction of universal jurisdiction is compelling. Law should intervene when innocent human beings are slaughtered, tortured, and subjected to other atrocities. If all states have jurisdiction over the relevant crimes, then at least some perpetrators may be prosecuted some of the time, thereby providing more deterrence, retribution, and condemnation of the crimes, and more incapacitation and perhaps even rehabilitation of perpetrators, than would otherwise exist.

The case for universal jurisdiction would be a strong one if we could assure that prosecutions would be brought and tried impartially and with due process; that the law applied would consist exclusively of the established content of international law; and that relevant national executive organs would hold a veto power over prosecutions, to be used (only) when a prosecution might bring dire international-relations consequences. The problem with universal jurisdiction is that we cannot ensure that these conditions are met. Rather, there is the real risk of prosecutions that are politically motivated; that are carried out without due process; that apply law that exceeds what is universally accepted as established international law; or that are undertaken without sufficient political control to avoid dire consequences on the international plane.

The question that must be asked about universal jurisdiction is whether the potential benefits are worth the risks. Sometimes universal jurisdiction will work well; perpetrators will be duly tried and punished, and the purposes of criminal justice will be served. Sometimes, universal jurisdiction will not work well; defendants will be tried without due process, or in politically motivated, biased proceedings that may themselves exacerbate interstate tensions.

Today, after identifying a number of important but often obscured features of the historical development of universal jurisdiction, I will consider, in the light of that history, the strengths and weaknesses of universal jurisdiction, in relation both to due process and to international relations. My intention is to pose – but, unfortunately, not to dispose of – serious questions to be confronted in fashioning mechanisms for the prevention of the most serious international crimes.

## II. THE HISTORICAL DEVELOPMENT OF UNIVERSAL JURISDICTION

Universal jurisdiction has been created in haste over the centuries. Interspersed with long quiescent periods have been flurries of activity during

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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 internal 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.

which, in the press of events, facts have been overlooked or exaggerated and flawed analogies have been drawn. Viewed in the most positive light, a discontinuous series of less than careful steps have been taken. Viewed less generously, a vaulting ambition that misrepresents the conditions of existing law has prevailed. So often pressed by matters of compelling moral significance, proponents of universal jurisdiction have sometimes sacrificed circumspection and rigorous analysis. As we shall see, this manner of proceeding has not been without its casualties. The purpose of the present section is to understand better the substantive issues relating to the doctrine of universal jurisdiction by tracing its provenance and development.

#### A. Piracy

The crime generally cited as the original subject of universal jurisdiction is piracy. 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.”<sup>2</sup>

There have been, however, some consistent themes in 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. 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 . . . .<sup>3</sup>

A rather 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 universal jurisdiction over piracy from

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

3. Convention on the High Seas, Apr. 29, 1958, arts. 15, 16, 13 U.S.T. 2312, 450 U.N.T.S. 82; *see also* U.N. Convention on the Law of the Sea, Dec. 10, 1982, arts. 101, 102, U.N. Doc. A/CONF. 62/122, 21 I.L.M. 1261 (1982) (emphasis added).

becoming a source of interstate conflict. This rationale has been elaborated by Professor Crockett:

[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.<sup>4</sup>

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 was vividly reflected in the 1956 debate on the law of piracy, in the U.N. 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.<sup>5</sup>

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.<sup>6</sup>

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

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

6. Piracy has a land counterpart, brigandry, the law of which developed con-

### B. World War II

Following the development of universal jurisdiction over piracy and the possible extension of universal jurisdiction to slave trading (a crime, like piracy, pursued for private gain),<sup>7</sup> the law of universal jurisdiction changed little until the aftermath of World War II (WWII). In the post-war years, numerous prosecutions for war crimes and crimes against humanity were conducted in both national and international tribunals. Although the jurisdictional bases for some of those trials are 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 upon faulty reasoning.

The courts that conducted the post-war trials at the national level 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

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temporarily with the law of piracy (though less robustly), and which may also be subject to universal jurisdiction. See Willard Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 177, 190-94 (1945). Like piracy, brigandage is committed for private gain. See *id.* at 184.

7. While none of the many treaties aimed at the suppression of the slave trade provides 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 (THIRD) OF FOREIGN RELATIONS § 404 (1987); Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 798 (1988). Others take a more agnostic view. See, e.g., M. SORENSON, *MANUAL OF PUBLIC INTERNATIONAL LAW* 365, 366 (1968). 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 RUTGERS L.J. 371, 390 n.55 (1999).

Whatever the legal status of universal jurisdiction over slave trading, it is important for present purposes that nineteenth- and twentieth-century slave trade, like piracy (as legally defined), was carried out for private gain. See M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1132 (1999).

basis at all). At least some of the national courts appear to have exercised universal jurisdiction, whether or not they explicitly so stated. According to the United Nations Law Reports on Trials of War Criminals, published in 1947, “there have been numerous . . . trials by the Courts of one ally of offenses committed against the nationals 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. . . .”<sup>8</sup>

The *Monte* case is a particularly interesting example in this regard because the defendant was not a national of one of the Axis powers. In the *Monte* case, the defendant, a Spanish national, was tried before a French military tribunal in Paris for “murder and ill-treatment” of Belgian and Spanish as well as French inmates at a concentration camp in Germany.<sup>9</sup>

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.<sup>10</sup> While the view that the Nuremberg tribunal exercised universal jurisdiction has gained considerable currency, 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. 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 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.<sup>11</sup>

In that position, the Allies exercised judicial and all other powers of sovereignty in Germany. At a minimum, the Allies, acting in their capac-

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8. UNITED NATIONS WAR CRIMES COMMISSION, XV LAW REPORTS OF TRIALS OF WAR CRIMINALS 43 (1947-49).

9. *See id.* at 45-46.

10. By contrast, it is uncontroversial that the International Military Tribunal for the Far East (popularly known as the “Tokyo Tribunal”) based its jurisdiction on the consent of the Japanese government. *See* Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, \_\_ (forthcoming 2001).

11. 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).

ity 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.”<sup>12</sup> Indeed, this is the view reflected in the Judgment of the Nuremberg tribunal, which states: “[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.”<sup>13</sup> The jurisdictional basis of the Nuremberg tribunal was not delineated with greater precision than that in the tribunal’s 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 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

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12. Randall, *supra* note 7, at 805-06.

13. Judgment of the International Military Tribunal, Sept. 30, 1946, *reprinted in* RICHARD A. FALK ET AL., *CRIMES OF WAR* 96 (1971).

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.<sup>14</sup>

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"<sup>15</sup> is equally applicable to 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,"<sup>16</sup> the meaning appears 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. The Nuremberg tribunal, then, likely was not an instance of the exercise of universal jurisdiction in the post-war trials.

It is significant that, when and to the extent that universal jurisdiction actually was applied in the post-WWII trials, as it appears to have been in some of the trials in national courts, 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 crimi-

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14. 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).

15. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 461 (S. Paul A. Joosten ed., 1948).

16. Judgment of the International Military Tribunal, *supra* note 13, at 96.

nals in its custody regardless of the nationality of the victim or the place where the offense was committed.”<sup>17</sup>

Because no specific precedent existed prior to WWII for subjecting war crimes and crimes against humanity to universal jurisdiction, 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. While the law of piracy limited the crime, by definition, to acts done for private gain, 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, can become a source and 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 the reasoning underpinning its use – became precedent for subsequent applications of universal jurisdiction to war crimes and crimes against humanity.

### C. *The Aftermath of the Aftermath of WWII*

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.

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 holds that it cannot be applied to any offence other than the one men-

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17. 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.*

tioned 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 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.<sup>18</sup>

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.”<sup>19</sup>

Notwithstanding whatever uncertainty may have existed after the war, and even into the 1960s, as to the legal status of universal jurisdiction, the Geneva Conventions of 1949 “codified” the use of universal jurisdiction over war crimes, treating the doctrine as an accepted feature of customary international law.

While not codified in any treaty, universal jurisdiction over crimes against humanity has also been treated as a feature of customary international law. 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 an analogy to piracy.<sup>20</sup>

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

19. *Id.* at 300 (citations omitted).

20. *See id.* at 299.

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 does not provide for universal jurisdiction. 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 States.<sup>21</sup> The United States' stated reasons for opposing provision for universal jurisdiction in the Genocide Convention were that "it would apparently seek to establish a rule of law applicable to nationals of States which have not consented to it, namely, such States as may not ratify the Convention," and that universal jurisdiction over genocide could become a source of or be used as a tool in interstate conflicts.<sup>22</sup> 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. 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.<sup>23</sup>

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.

#### *D. 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. The treaties on hijacking and other crimes on aircraft, crimes against the safety of maritime navigation, hostage-taking, attacks on internationally protected persons and U.N. personnel, terrorist bomb-

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21. 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 U.N. GAOR 6th Comm., 3d Sess., pt. I, Summary Records, 394-406 (1948).

22. Memorandum of the United Nations Secretary-General, *Historical Survey of the Question of International Criminal Jurisdiction*, *supra* note 21 at 137, Appendix 13.

23. See RESTATEMENT, *supra* note 7, § 404 cmt. a (1987).

ings, and torture,<sup>24</sup> each contain provisions permitting a state party to prosecute individuals believed to have committed the enumerated crimes when such individuals 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."<sup>25</sup>

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 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.

The legal basis for the universal jurisdiction provisions of the terrorism treaties need not have passed without comment by the treaties' drafters and signatory states. In brief, the terrorism treaties' universal jurisdiction provisions could have been presented as "proposing the development of cus-

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24. 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.

25. 131 CONG. REC. S8999 (daily ed. June 27, 1985) (statement of Sen. Specter).

tomary international law,” to be accepted or rejected by states through the usual processes of state practice and *opinio juris*.<sup>26</sup> But no such theories were offered. Rather, in the absence of contrary explanation, some commentators concluded that, 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 must have “created” universal jurisdiction over those crimes, with application to the nationals of consenting and non-consenting states alike.

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 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.<sup>27</sup>

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.

Nevertheless, the legal basis for the jurisdictional provisions of the terrorism treaties was left essentially unspecified. As we shall see, that casual treatment of the jurisdictional legality of the terrorism treaties had unanticipated consequences two decades later in the debate concerning the jurisdiction of a permanent International Criminal Court.

#### *E. The International Criminal Court*

In 1998, a treaty was adopted for the establishment of a permanent International Criminal Court (ICC).<sup>28</sup> At the conclusion of a diplomatic conference in Rome, one hundred twenty states voted to adopt the treaty;

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26. For a full elaboration of this point, see Morris, *supra* note 10.

27. The legal status of the universal jurisdiction provisions of the terrorism treaties is dealt with at length in Morris, *supra* note 10.

28. See Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9.

seven states (including the United States) voted against adoption; and twenty-one states abstained.

Perhaps the most intractable controversy during and after the ICC treaty negotiations concerned the jurisdiction of the court. The jurisdictional scheme ultimately adopted in the treaty rejected universal jurisdiction, providing instead that the ICC could exercise jurisdiction when either the defendant was a national of a state party to the treaty or the crime was alleged to have been committed on the territory of a state party.<sup>29</sup>

The latter, territorial, basis for jurisdiction would allow the court to exercise jurisdiction over the national of a non-party state, without the consent of that defendant's state of nationality. The United States objected vociferously to that provision, arguing (as it had in the debate on the Genocide Convention)<sup>30</sup> that a treaty could not lawfully create jurisdiction over non-party nationals. The U.S. indicated that this issue was of enormous significance, and would, unless resolved, prevent the U.S. from signing the treaty.

Although the ICC treaty did not provide for the ICC to exercise universal jurisdiction, proponents of the treaty's jurisdictional scheme relied heavily upon the "law and principles" of universal jurisdiction in supporting the ICC treaty's jurisdictional regime. Virtually every imprecision, flawed analogy, and casual expansion in the history of universal jurisdiction would now haunt the debate on the ICC. The U.S., having partaken in rather loose treatment of the legal basis for international criminal jurisdiction, particularly in the post-war trials and the terrorism treaties, would now, to harken back to piracy, be hoisted by its own petard.

Proponents of ICC jurisdiction over non-party nationals argued that, since each state party to the treaty had universal jurisdiction over genocide, war crimes, and crimes against humanity as a matter of customary international law, those states were free to exercise that jurisdiction jointly in an international court. This, they argued, was exactly what had occurred at Nuremberg.<sup>31</sup> Moreover, they maintained, universal jurisdiction could lawfully be created by treaty. The terrorism treaties were cited as support and precedent for this proposition.<sup>32</sup>

The United States argued that the treaty's provisions for ICC jurisdiction over non-party nationals were unlawful because they constituted an attempt to bind non-parties to the treaty's terms. The U.S. never elabo-

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29. *See id.* at art. 12. Article 12 further provides that if neither the territorial state nor the defendant's state of nationality are parties to the treaty, either of those states may provide consent on an *ad hoc* basis, thereby enabling the ICC to exercise jurisdiction. *See id.*

30. *See supra* note 22 and accompanying text.

31. *But see supra* notes 10-16 and accompanying text.

32. *But see supra* notes 24-27 and accompanying text.

rated a full legal argument on the point.<sup>33</sup> Indeed, the U.S. undermined its own legal position by offering, in the course of negotiations, to accept ICC jurisdiction over non-party nationals under certain conditions (for example, if “official acts of state” were exempt from that jurisdiction). Offering such bargains undermined the United States’ claim that ICC jurisdiction over non-party nationals violated important principles of international law. Eventually, the primary U.S. negotiator on the ICC adopted the position that there was no point in engaging in legal debate on the lawfulness of ICC jurisdiction over non-party nationals. Rather, he now stated, what was urgently needed was a “practical solution.”<sup>34</sup>

On December 31, 2000 (the deadline for signature without ratification, by the terms of the treaty), the United States signed the treaty for an International Criminal Court. In his statement authorizing U.S. signature of the treaty, President Clinton stated:

In signing, however, we are not abandoning our concerns about significant flaws in the treaty. In particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty, but also claim jurisdiction over personnel of states that have not. . . .

Court jurisdiction over U.S. personnel should come only with U.S. ratification of the treaty. The United States should have the chance to observe and assess the functioning of the Court, over time, before choosing to become subject to its jurisdiction. Given these concerns, I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied.<sup>35</sup>

The ultimate outcome of the conflict over ICC jurisdiction remains to be seen. What is clear, however, is that the controversy itself grows out of a history in which the law of international criminal jurisdiction has long been treated without the clarity that it warrants.

### III. THE MERITS AND DRAWBACKS OF UNIVERSAL JURISDICTION IN ITS MODERN FORM

The doctrine of universal jurisdiction has evolved, as we have seen, through a process that has been less circumspect and deliberate than we

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33. For extended considerations of the lawfulness of ICC jurisdiction over non-party nationals, see Morris, *supra* note 10; Michael Scharf, *The ICC’s Jurisdiction Over the Nationals of Non-party States*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* (Sarah B. Sewall & Carl Kaysen eds. 2000).

34. 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).

35. *Clinton’s Words: The Right Action*, N.Y. TIMES, Jan. 1, 2001, at A6 (text of President Clinton’s statement authorizing U.S. signature of the ICC Treaty).

might have hoped. The question that must now be soberly considered is whether and when universal jurisdiction is in fact sound policy. In examining the merits and drawbacks of universal jurisdiction, I will focus on the advisability of universal jurisdiction rather than on its current legal status. Even if customary international law were determined currently to entail universal jurisdiction over some crime or crimes, the question would remain whether that should continue to be the case. Law can change. Treaties can be created or amended; parties can adhere or withdraw. Customary international law can be altered through the acts of states. Development of the customary law of jurisdiction may entail expansion, retraction, or refinement of the reach of extraterritorial jurisdiction, as warranted. My focus today, therefore, is less on what the law is than on what it should be and in what direction it should develop. This perspective seems particularly appropriate with respect to universal jurisdiction in light of the foibles of its history.

#### *A. Due Process*

The assumption underlying the doctrine of universal jurisdiction appears to be that 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 problems 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. Not all states share a common view of the content of international law. Some states, for example, take the view that using cluster bombs or damaging water supplies or electrical grids (as was done by NATO in Kosovo) is a war crime, a view that the NATO states do not share. 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.

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 exceeds the internationally accepted definition of that crime. Among the Spanish charges against Pinochet were charges of genocide. 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 under the Genocide Convention and under customary international law. The Spanish Audencia Nacional, ruling in pretrial proceedings, held that the definitional limitation imposed under established international law was inappropriate and did not properly capture the concept of genocide. 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 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 international law giving rise to 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 in which the conduct occurred. Here, the due process problem arose not from a disagreement among states as to the existing content of international law, but rather, from a disagreement among states as to what the content of international law should be.

The lack of judicial independence in many countries presents an additional, threshold problem. 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 recent 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. The indictment included multiple charges of torture allegedly committed during Habre’s rule of Chad.

In March, 2000, Senegal elected a new president. Since President Wade has taken office, there have been conspicuous shenanigans 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 against Habre. All of that occurred after President Wade had appointed Habre’s defense lawyer to be President Wade’s special legal advisor.

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 due process and judicial independence in many countries. States refuse extradition requests on these grounds; organizations dedicate their efforts to exposing and reforming judicial systems lacking in due process. 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.

### *B. Interstate Relations*

In addition to due process problems, universal jurisdiction entails pitfalls in the interstate relations realm. The situations in which genocide, war crimes, or crimes against humanity may be alleged are generally large-scale conflicts in which governments are involved. Because official acts will often be at issue in prosecutions under universal jurisdiction, such trials often will 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, foreseen by the law of piracy, that universal jurisdiction will become a source and an instrument of interstate conflict.

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 will sometimes be used as a tool for achieving other political ends.

The problem of the political deployment of universal jurisdiction could arise in two ways. First, states may exercise universal jurisdiction as a means of gaining advantage over their opponents in interstate conflicts by prosecuting nationals of those opponent states for conduct carried out in the course of the conflict. In the recent war in the Democratic Republic of the Congo, Angola and its allies, Namibia and Zimbabwe, fought in support of the Kabila government of the Congo in opposition to Rwanda and its allies. Rwandan forces are reported to have carried out a series of massacres of Congolese civilians in 1998. It is not difficult to imagine Angolan officials seeking to prosecute Rwandan officials for alleged genocide, war crimes, and crimes against humanity committed against Congolese

victims in the course of that war. While prosecutions for such crimes would in general be desirable, it surely would not be desirable for those prosecutions to be conducted for political purposes by opposing parties to the conflict.

The political deployment of universal jurisdiction may also arise in a second class of cases. States may exercise universal jurisdiction as a means of gaining advantage over states with whom they are in conflict by prosecuting nationals of those opponent states for conduct unrelated to the conflict between the two states. Staying with the central African context in which Rwanda and Zimbabwe were adversaries in the conflict in the Congo, 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.<sup>36</sup>

Another example, this time not hypothetical, comes from the Middle East. On October 23, 2000, a statement was issued by the Arab League indicating that Arab states will freeze all but formal diplomatic relations with Israel<sup>37</sup> and, in the same statement, that “Arab nations shall pursue, in accordance with international law, those responsible for these brutal prac-

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36. Since early 2000, there has been a widespread movement among black Zimbabweans to seize land owned by whites in Zimbabwe. The movement justifies 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, Apr. 24, 2000, at 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, Apr. 14, 2000, at 31. The campaign of land seizures has been accompanied by murders, beatings, arson and other widespread violence. See Graham, *supra*.

As stated in the Treaty for an International Criminal Court, 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 identity of the group or collectivity.” ICC Treaty, *supra* note 29, 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, *supra*, art. 7(1)(h), and is done “in connection with [specified acts including murder].” ICC Treaty, *supra*, 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, *supra*, art. 7(1).

The point here is not to make a case 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 Congo.

37. See Susan Sachs, *Arab States Take Diplomatic Steps to Punish Israel*, N.Y. TIMES, Oct. 23, 2000, at A1.

tices . . . ” (referring to alleged Israeli crimes, under the Geneva Conventions, against Palestinians).<sup>38</sup>

Prosecutions of Rwandan officials in Angolan courts, Zimbabwean officials in Rwandan courts, or Israeli officials in courts of member states of the Arab League, carried out under universal jurisdiction, would unavoidably suffer from at least the appearance of partiality and politicization. Such prosecutions would likely contribute to the exacerbation of interstate conflicts.

When one state institutes proceedings under universal jurisdiction against the national of another state, the defendant's state of nationality may claim (and probably would claim, where its official acts or policies are implicated) that the prosecution is politically motivated and baseless. States likely would make that claim both when the prosecution is indeed baseless and sometimes, when the prosecution is well founded, to shield perpetrators. 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 efficacy of universal jurisdiction is minimized. 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 exercise of universal jurisdiction.

Because the conduct forming the basis for universal jurisdiction prosecutions will often be official acts, universal jurisdiction over genocide, war crimes, and crimes against humanity will unavoidably be available as an instrument of interstate conflict. Universal jurisdiction therefore entails a significant risk of bias or the appearance of bias in the handling of cases, and commensurate exacerbation of interstate tensions.

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, perhaps even including armed conflict. For example, as mentioned earlier, the Arab League's statement on October 23, 2000 included a reference to prosecution of Israelis suspected of grave breaches of the Geneva Conventions. Given the strained and precarious status of relations in the Middle East at the time of that statement, it is possible that prosecutions of Israeli officials in courts of member states of the Arab League could have sparked a war in the region and perhaps beyond. In such circumstances, it would be imperative that high-level executive decision-makers, duly informed by intelligence and analy-

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38. See *Arab Statement: 'Criminals of War Who Committed Massacres,'* N.Y. TIMES, Oct. 23, 2000, at A12.

sis from foreign ministries, have the power to preclude prosecutions that could lead to international catastrophe.

In some legal systems, this kind of control would already 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. 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 results may be destructive.

One might observe at this point that, if the potential for improper use of universal jurisdiction is so great, then it is perplexing that we do not see more examples of its misuse. Indeed, it is true that, in most of its modern applications, universal jurisdiction has functioned essentially as intended (though the Pinochet and Habre cases present a more complex picture).

One explanation that might be offered for the relative absence of misuse of universal jurisdiction is that states that have the most power to exercise universal jurisdiction tend to have developed legal systems with internal controls providing for independent judiciaries and due process. Those are not states, therefore, that will abuse universal jurisdiction. Lawless states, by contrast, will not exercise universal jurisdiction because they will simply conduct such arrests and summary executions (or even less formal proceedings) as they see fit, without the niceties of a claim to any particular type of jurisdiction. These combined predictions about the behavior of two categories of states would lead to the conclusion that universal jurisdiction should cause little mischief in practice.

But that explanation is not entirely persuasive, even lawless states attempt to justify their actions to domestic or international audiences or both. The Yugoslav government did not, for example, simply execute or even summarily incarcerate the two Canadians and two Brits it arrested in August, 2000. Rather, Milosevic announced charges of terrorism and publicized his plans for prosecution. Similarly, the Yugoslav government accused four Dutch nationals arrested in Serbia in July, 2000, of plotting to kidnap Milosevic. The need for justification and rhetorical advantage remains great for all states. There would be costs to the reputation of a state for conducting prosecutions in blatant violation of international law. Universal jurisdiction allows a prosecuting state, whatever its actual motiva-

tions, to claim for itself the mantle of enforcing international humanitarian law.

There is another reason not to be complacent about the modern exercise of universal jurisdiction. If we have not seen grave abuses, the explanation may lie in the fact that the modern use of universal jurisdiction is in its nascent stages. The “enormous potential of universal jurisdiction” is likely in the process of being recognized, not only by the well-intentioned states and organizations of the world, but also, by the malefactors. We are only now seeing the emergence of the active exercise of universal jurisdiction. *Pinochet* and *Habre* are perhaps the highest profile cases. But they are not alone, and human rights organizations are actively engaged in identifying, researching, and persuading governments to pursue additional cases. What remains to be seen is how universal jurisdiction will be deployed in future months and years now that the universal cat is out of the bag.

I have argued that universal jurisdiction may be exercised by courts lacking in due process, independence, and impartiality and may be used improperly for political purposes, or deployed without adequate control by the relevant executive actors. 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. Indeed, 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 and air sabotage is finding some acceptance internationally. 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 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. 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 its 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 crime and the state that would be prosecuting – that is, in cases where the only basis for jurisdiction would be universal jurisdiction. Based on his first-hand experience over the past decade, David Scheffer, the U.S. Ambassador at Large for War Crimes Issues, has told us here today:

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; to persuade Italy, Germany, Russia, and Turkey to prosecute Ocalan; and to encourage 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].<sup>39</sup>

If the states that we would wish to exercise universal jurisdiction are frequently reluctant to do so, and if universal jurisdiction may be subject to use for nefarious purposes, then the question must be asked whether the benefits of universal jurisdiction will outweigh its costs in practice.

#### IV. CONCLUSION

Universal jurisdiction has significant drawbacks. Yet the need remains for means to punish, deter, and condemn international crimes that cause enormous human suffering. There are a number of jurisdictional mecha-

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39. Remarks of David Scheffer, *supra* note 34.

nisms 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 are currently being created for Cambodia and Sierra Leone and, in a somewhat different form, for East Timor. In addition to international and mixed tribunals, there also remains the possibility of prosecutions in national courts under the usual territoriality, nationality, protective, and passive personality bases for jurisdiction.

Still, we must recognize the likelihood of future situations in which genocide, war crimes, or crimes against humanity are committed but none of those fora are available for their 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, when it comes into existence, will lack jurisdiction over crimes committed by non-party nationals, at least if the crimes were committed on the territory of a non-party state.<sup>40</sup> Mixed tribunals will likely be created only after a regime change in the primarily affected state. As noted at the outset, the domestic jurisdiction of the principally affected state will often be ineffective because the crimes at issue often are committed by or with the approval of governments against their own nationals within their own territories and because, if there has been a regime change, the new regime may lack a functioning judicial system.<sup>41</sup>

Considering all of those gaps in jurisdictional coverage, we can readily imagine a situation in which the only form of jurisdiction 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 contexts in which universal jurisdiction will be the last and only resort. The alternative to universal jurisdiction, then, would be no criminal proceedings. This would presumably result in an unsatisfied demand for justice and consequently, a heightened risk of revenge killings and the like.

Surely, in any given case, properly exercised universal jurisdiction would be preferable to the absence of prosecutions. But, the analysis can-

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40. See *supra* note 29 and accompanying text.

41. See *supra* note 1 and accompanying text.

not 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 I have briefly considered? The regime of universal jurisdiction must be evaluated as a whole. The question is not whether 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.

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. We have drifted rather unselfconsciously toward universal jurisdiction. 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. However, the drawbacks of universal jurisdiction do not end there. Universal jurisdiction entails important risks that we would overlook only at our peril. The potential pitfalls in fashioning jurisdictional mechanisms in this field must be soberly addressed. The awful need to do something should not lead to incaution in determining exactly what it is that should be done.