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The Legal Limits of Universal Jurisdiction

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Recommended Citation

Anthony J. Colangelo, The Legal Limits of Universal Jurisdiction, 47 Va. J. Int'l L. 149 (2006)

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The Legal Limits of Universal Jurisdiction

ANTHONY J. COLANGELO*

I.	Introduction	150
II.	Universal Jurisdiction's Prescriptive-Adjudicative Symbiosis ..	157
III.	The Customary Law of Universal Jurisdiction	163
	A. Adjudicative Versus Prescriptive Universal Jurisdiction.....	163
	B. "Conventional" Versus Customary Universal Jurisdiction.....	166
	C. Treaties and the Prescriptive Substance of Universal Crimes.....	169
IV.	Evolving and Enforcing the Limits of Universal Jurisdiction ...	182
V.	Conclusion	185
VI.	Appendix	186

Despite all the attention it receives from both its supporters and critics, universal jurisdiction remains one of the more confused doctrines of international law. Indeed, while commentary has focused largely and unevenly on policy and normative arguments either favoring or undercutting the desirability of its exercise, a straightforward legal analysis breaking down critical aspects of this extraordinary form of jurisdiction remains conspicuously missing. Yet universal jurisdiction's increased practice by states calls out for such a clear descriptive understanding. The following Essay will engage this under-treated area. It will offer to explicate a basic, but overlooked, feature of the law of universal juris-

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* Associate in Law, Columbia Law School. I would like to thank Robert D. Sloane, Petros Mavroidis, Tony D'Amato, Tom Lee, and participants in the Associates workshop at Columbia Law School. I would also like to thank Columbia Law librarian Dana Neacsu for her excellent research assistance. Special thanks go to the lovely Carrie Rief.

diction: If national courts prosecute on grounds of universal jurisdiction, they must use the international legal definitions—contained in customary international law—of the universal crimes they adjudicate; otherwise, their exercise of universal jurisdiction contradicts the very international law upon which it purports to rely. The Essay will argue that this legal feature derives from the distinctively symbiotic nature of universal prescriptive jurisdiction (the power to apply law to certain persons or things) and universal adjudicative jurisdiction (the power to subject certain persons or things to judicial process). Unlike other bases of jurisdiction in international law, the prescriptive substance of universal jurisdiction authorizes and circumscribes universal adjudicative jurisdiction; in other words, it defines not only the universal crimes themselves, but also the judicial competence for all courts wishing to exercise universal jurisdiction.

The Essay will look to chart out some important implications of this thesis for the real-world practice of universal jurisdiction: It will evaluate how most easily to determine the customary definitions of universal crimes, to detect breaches of international law by courts that manipulate subjectively those definitions, and to enforce against such illicit manipulation. The Essay will contend that while some definitional aspects invariably remain to be ironed out by state practice, the provisions of widely-ratified and longstanding international treaties provide generally the best record of the core customary definitions of universal crimes, and accordingly, supply not only a harmonized point of departure for courts wishing properly to exercise universal jurisdiction, but also a useful means for detecting breaches of international law by overzealous courts seeking only to exploit universal jurisdiction for purely political or sensationalist ends. The framework presented thus will address concerns that universal jurisdiction hazards unbridled abuse. As the Essay will argue, the law of universal jurisdiction does not; rather, it prescribes legal limits. And the Essay will conclude that in the end, these limits are enforced not by those states exercising universal jurisdiction, but instead by other jurisdictionally-interested states—that is, most often by those states whose national citizens are the subject of foreign universal jurisdiction proceedings.

I. INTRODUCTION

Unlike other bases of jurisdiction in international law, universal jurisdiction requires no territorial or national nexus to the alleged act or ac-

tors over which a state legitimately may claim legal authority.¹ Universal jurisdiction instead is based entirely on the commission of certain “universal crimes.”² At the present stage of development of international law, this category of crime is generally considered to include piracy, slavery, genocide, crimes against humanity, war crimes, torture, and “perhaps certain acts of terrorism.”³ It is no secret that the near future may envisage an increased rubric of universal crime that includes, *inter alia*, human sex trafficking, nuclear arms smuggling, and perhaps other characteristically transnational offenses. A “universal jurisdiction” attaches to these crimes, so the argument goes,⁴ because they are universally condemned and all states have a shared interest in proscribing such crimes and prosecuting their perpetrators.⁵ Accordingly, every state has what is called prescriptive jurisdiction, or lawmaking authority,⁶ to proscribe universal crimes wherever they occur and whomever they involve, and adjudicative jurisdiction to subject the alleged universal criminal to its judicial process.⁷ Thus, if a State *A* national commits a universal crime against another State *A* national in State *A*, all states have jurisdiction to prosecute.

Universal jurisdiction has been the focus of much policy and normative debate: It has been hailed as a catalyst in the global struggle to bring to justice elusive international criminals like tyrants and terrorists, while on the other hand decried as a dangerously pliable tool for hostile states to damage international relations by initiating unfounded proceedings against each other’s officials and citizens.⁸ Such expansive jurisdiction

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1. See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

2. See *id.* § 404 cmt. a.

3. See, e.g., *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (citing RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987)); see also THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 29 (Stephen Macedo ed., Princeton Univ. 2001) [hereinafter THE PRINCETON PRINCIPLES]; Anthony J. Colangelo, *The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes*, 36 GEO. J. INT’L L. 537, 578–602 (2005).

4. This Essay will not address directly the underlying rationale for universal jurisdiction or its extension to certain crimes, but will accept for present purposes its legal existence as well as the generally acknowledged list of crimes. The focus of the Essay instead will be on clearly marking out some important legal parameters that govern how courts must exercise such jurisdiction under international law.

5. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a (1987).

6. *Id.* § 401(a).

7. *Id.* § 401(b).

8. For a good primer on the debate, compare Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86 (2001), with Kenneth Roth, *The Case for Universal Jurisdiction*,

has in fact provoked sharp backlash from many circles—including former and current U.S. administrations.⁸ Yet in the face of some blows to its use,⁹ universal jurisdiction is, for the foreseeable future, here to stay. A number of states' courts have in the past year alone exercised this type of extraordinary jurisdiction,¹⁰ and the recent proliferation of domestic legislation providing for universal jurisdiction¹¹ signals that the trend will only continue.

But despite the heated political controversy that surrounds it, and its increased use by states, a straightforward legal analysis interrogating some basic features of universal jurisdiction remains strangely lacking. This Essay will engage this under-treated area; it will not ask whether and under what circumstances universal jurisdiction might be a good idea, but rather will seek to discern the international law governing how courts must exercise universal jurisdiction when in fact they pursue such exercises, as well as the international legal consequences of improper exercises of universal jurisdiction. My argument therefore will be pri-

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80 FOREIGN AFF. 150 (2001). For a progressive, normative restatement of how universal jurisdiction ought to be exercised so as to facilitate its purposes, see THE PRINCETON PRINCIPLES, *supra* note 3.

8. Due to pressure from other nations—principally the United States—Belgium restricted the application of its controversially expansive universal jurisdiction law to require, *inter alia*, more traditional links with Belgium, immunity for foreign governmental officials, and an increased role for the public prosecutor. See Steven R. Ratner, Editorial Comment, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 891 (2003).

9. See Ratner, *supra* note 9; Glenn Frankel, *Belgian War Crimes Law Undone by Its Global Reach*, WASH. POST, Sept. 30, 2003 at A01.

10. Spain convicted Argentine naval officer Adolfo Scilingo for "crimes against humanity" based on his participation in a program of throwing political prisoners from airplanes during Argentina's "dirty war." Reuters, *Argentine Ex-Officer Convicted in Spain; 'Dirty War' Trial First of Its Kind*, WASH. POST, Apr. 20, 2005, at A17; Giles Tremlett, *'I Don't Try To Justify Myself'*, GUARDIAN, Apr. 21, 2005, at 6. Spain has also issued warrants for three United States soldiers concerning an incident in which a U.S. tank fired on a Baghdad hotel, killing two journalists. Drew Brown, *Spanish Judge Wants 3 Soldiers Arrested in Journalists' Deaths*, SEATTLE TIMES, Oct. 20, 2005, at A16. One of the journalists killed was not a Spanish national; therefore any charges brought based on his death would rely upon the ground of universal jurisdiction. In Britain, London's Central Criminal Court recently convicted Afghan warlord Farayadi Sawar Zardad of torture and hostage taking in Afghanistan between 1991 and 1996. Nikki Tait, *UK Court Convicts Afghan Warlord*, FIN. TIMES, July 19, 2005, at 12. Similarly, Dutch courts have brought charges against two former Afghan generals for war crimes and torture committed during the Soviet occupation of Afghanistan in the 1980s. Marlise Simons, *2 Afghans Face Dutch War-Crimes Charges From 80's Soviet Era*, N.Y. TIMES, Sept. 29, 2005, at A13. Belgium has even resuscitated its "universal jurisdiction law" to grandfather in a case against former Chadian dictator Hissene Habre. Marlise Simons, *Belgium Indicts Chad's Ex-Leader*, N.Y. TIMES, Sept. 30, 2005, at A8.

11. See *infra* notes 82–86 (listing legislation implementing the Statute of the International Criminal Court and providing for universal jurisdiction).

marily a legal one, albeit with important policy implications that will contribute to the larger debate since it goes to the very heart of when and how universal jurisdiction can be exercised under international law. The argument will proceed as follows:

It is presently contrary to international law for one state to extend unilaterally its prescriptive jurisdiction into the territory of another state absent some territorial or national link to the matter over which the first state claims competence—for example, where the act has an impact within that state's territory, involves its nationals, or directly threatens its security.¹² Thus State *B* cannot, without such a link, project its domestic laws onto State *A* and vice versa. Yet, as we have seen, the principle of universal jurisdiction grants all states—including our hypothetical State *B*—jurisdiction to prosecute universal crimes irrespective of where the crimes occur or which state's nationals are involved (either as perpetrators or victims). This immediately raises the important—but thus far neglected—legal question: What prescriptive jurisdiction prescribes universal crimes? In concrete terms, what prescriptive law must national courts apply when they exercise universal adjudicative jurisdiction?

The answer, this Essay will submit, is international prescriptive jurisdiction, and thus in substance, international law. In other words, while a state's national law may not extend unilaterally its prescriptive reach into the territory of another state, international law can, and does, just that with respect to the proscription on universal crime—only in cases of universal jurisdiction, the adjudication of this international legal prohibition occurs through the operation of national courts. Because the international prescriptive substance of universal crimes authorizes a given court's universal jurisdiction, courts must apply that substance—that is, the international legal definitions of the crimes—when they exercise universal jurisdiction, or else their jurisdictional claim contradicts the very international law upon which it purports to rely. The thesis from which I will build my argument therefore is simply that the exercise of universal adjudicative jurisdiction fundamentally depends upon the application of the legal substance of universal prescriptive jurisdiction, and that this prescriptive substance—the definitions of universal crimes—derives from customary international law.

Part II will explain how this thesis brings to light and grounds itself in the uniqueness of universal jurisdiction among the jurisdictional bases

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12. See *infra* note 33, and accompanying text, listing bases of jurisdiction.

generally accepted in international law. For unlike other bases, universal jurisdiction's prescriptive substance at the same time *authorizes* and *circumscribes* courts' adjudicative jurisdiction; it defines not only the universal crimes themselves, but also the judicial competence for all courts wishing to exercise universal jurisdiction. And it is a prescriptive substance common to all states since it can arise only as a matter of customary law, universally binding on them all. My claim thus will place legal limits on the exercise of universal jurisdiction. It is not just the empowerment of states by international law to adjudicate certain matters under any prescriptive law they see fit. Instead, when national courts prosecute on a theory of universal jurisdiction they must apply the international legal definitions of the crimes they adjudicate, or else their jurisdiction conflicts with international law. Part II also will employ this thesis to rebut the claim that because courts typically need some form of domestic authorization to exercise their jurisdiction, universal jurisdiction depends not on international law but on national law.

The thesis raises a number of important questions for the practice of universal jurisdiction that need answering, namely: How are courts to go about determining the definitional substance of what might be dubbed "fuzzy" customary international law? Further, how can states evaluate whether a universal jurisdiction court departs from the customary definition of the crime, thus rendering its underlying jurisdiction contrary to international law? And finally, how can interested states—that is, states on whose territories the universal crimes occurred and/or whose nationals are the subject of universal jurisdiction proceedings—enforce against illegitimate definitional expansions of universal crimes by overzealous courts seeking only to exploit universal jurisdiction for political or sensationalist ends?

In response to these questions, Parts III and IV will offer a basic framework for evaluating the legality of universal jurisdiction exercises under this Essay's thesis. In response to the first question—how to determine the customary definitions of universal crimes—Part III will look to the formation of customary law generally, and will maintain that as to universal crimes in particular, their core substantive elements are set forth quite explicitly in the various treaties and conventions prohibiting the crimes under positive international law. I will not argue that treaty law sets forth definitively the customary definitions of universal crimes, but rather the best *evidence* of what those definitions are. While the contention that treaties may generate customary law is perhaps not entirely free from debate with respect to, for example, the formation of "instant

custom” at the moment the treaty enters into force absent opportunity for subsequent international acceptance of or acquiescence in the rules contained therein, or the establishment of custom through only bilateral treaties, I need not go so far for my argument. The treaties proscribing the various universal crimes represent a relatively longstanding consensus not only as to the prohibition on those crimes, but also—necessarily—as to their substance. On this point, the Appendix to this Essay will critically survey the positive law relating to each of the universal crimes listed above and assay some of the more important definitional provisions which supply a harmonized prescriptive foundation for courts wishing to exercise universal jurisdiction.¹³ My purpose in so doing is not to elaborate comprehensively all aspects of the definitions of universal crimes under customary law, but rather to provide courts and international lawyers with a useful point of departure in line with the analytical framework forwarded by this Essay. To be sure, although state practice and *opinio juris* (the two elements that make up customary law) continue to fill in, refine and modify aspects of these customary definitions, for present purposes courts have a clear and workable catalog of core definitions handy, in the form of treaty provisions and legislation transposing those provisions onto domestic law, with which to prosecute universal crimes. In fact, national legislation enabling universal jurisdiction characteristically draws from treaty law to define the relevant offense¹⁴ and courts consequently use that substantive definition to prosecute universal crimes,¹⁵ thus reinforcing custom in this respect.

Next, because treaty provisions largely evidence the core definitions of universal crimes, we might respond to the second question—how to determine when universal jurisdiction courts deviate from the customary definitions of the crimes—by saying initially that there are “easy cases” and “hard cases.” Where a court claiming universal jurisdiction clearly departs from the subject crime’s core definition—as evidenced by the treaty—absent a showing that customary law has evolved to justify such a departure, the illegitimacy of its jurisdictional claim is easily-identifiable. Especially subject to easy-case categorization are universal crimes with rule-based elements. A quick example here, and one that

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13. See Appendix, *infra*. As the Appendix bears out, the treaties themselves tend to avow either an explicit or implicit purpose to codify or create custom in their respective areas of international lawmaking.

14. See *infra* notes 82–86.

15. See *infra* text accompanying notes 104–16.

will be discussed in more detail below,¹⁶ is the Spanish *Audiencia Nacional*'s illegitimate expansion of the victim classes in the definition of genocide to include political groups, which purported to justify the court's assertion of universal jurisdiction over former Chilean dictator Augusto Pinochet.¹⁷ Under this Essay's framework, had the case gone forward on these grounds,¹⁸ Chile—both the territorial and national state—would have had a powerful legal claim to reject Spanish jurisdiction since the definition the court employed was plainly exorbitant. But although treaties strongly evidence the core elements of universal crimes, there invariably will be aspects of the definitions that need to be ironed out further by state practice. Thus, objections to universal jurisdiction that are not based on a court's clear departure from the universal crime's core substantive definition—as evidenced by the treaty—might fall into the “hard case” category. Especially subject to hard-case classification are crimes that depend on the application of standards. Examples here might include whether a specific act constitutes a war crime under standards of target selection and proportionality contained in the Geneva Conventions and their Additional Protocols,¹⁹ or whether a particular interrogation technique constitutes torture under the Torture Convention's widely-accepted definition of the crime.²⁰ The jurisprudence of international criminal tribunals and of national courts exercising universal jurisdiction—decisions which are not precedent on their own but nonetheless evidence state practice,²¹ would be particularly helpful guides here. But in order to illustrate most simply its basic thesis, this

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16. See *infra* text accompanying notes 104–16.

17. See *infra* text accompanying notes 104–06.

18. Torture ended up being the relevant crime of extradition for Great Britain, though Pinochet ultimately was not extradited but sent back to Chile because he was determined medically unfit to stand trial. See *Regina v. Bow St. Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, [1999] No. 3, 2 W.L.R. 827, 833–36 (opinion of Lord Browne-Wilkinson), *reprinted in part in THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN* 255, 268 (Reed Brody & Michael Ratner, eds., 2000) (hereinafter *THE PINOCHET PAPERS*).

19. I have argued against the use of universal jurisdiction over war crimes generally for this reason. See Appendix E, *infra*; Colangelo, *supra* note 3, at 587–94 (observing that these standards afford courts too much latitude to allege war crimes against U.S. forces despite an unprecedented adherence to international humanitarian law in the NATO bombing in the former Yugoslavia and the 2003 invasion of Iraq).

20. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 1, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter *Torture Convention*]; see also *infra* Appendix F (for example, the phrase “severe pain or suffering” is particularly open to interpretation).

21. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. a, b (1987).

Essay admittedly concerns itself more with the easy cases—though the hard cases undoubtedly supply fertile ground for further legal evaluation of universal jurisdiction assertions in line with the framework forwarded here. Indeed, and as Part IV indicates in its enforcement discussion, where territorial and national states—states that have a strong legal interest in a given universal jurisdiction assertion—object to the definition of the crime that purports to justify another state’s universal jurisdiction claim, the resolution of that international legal clash will go far toward determining further the customary definition of the crime at issue.

Finally, Part IV will deal with the question of enforcement against a court’s illegitimate definitional expansion of a universal crime upon which the court purports to base its jurisdiction. Part IV will explain that the international legal limits of universal jurisdiction are indeed enforceable against such courts, and that the enforcers are those states with concurrent jurisdiction over the alleged crimes—that is, states with territorial or national jurisdiction. As I will show, where jurisdictionally interested states reject an illegitimate universal jurisdiction claim stemming from an improper manipulation of the underlying crime’s definition, international law considers the universal jurisdiction claim an enduring breach. In short, it is not the state exercising universal jurisdiction, but most often those states whose nationals are in the dock, that are the enforcers of the legal limits of universal jurisdiction.

II. UNIVERSAL JURISDICTION’S PRESCRIPTIVE-ADJUDICATIVE SYMBIOSIS

Jurisdiction is the central concept in the interface between the nation state and international law; as such, it describes the power allocation both among individual states and between states and international law. A state’s jurisdiction, or what some may call “sovereignty,”²² refers by and

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22. Although notoriously opaque, the label “sovereignty” invokes the familiar definition of state power by implying the state’s autonomous jurisdictional authority to create, implement, and enforce its own laws; in short, it provides a metric by which changes in a given power dynamic—for purposes of the present discussion, that between the state and international law—may be measured. See Marcel Brus, *Bridging the Gap between State Sovereignty and International Governance: The Authority of Law*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 7–10 (Gerard Kreijen, ed. Oxford 2004). See generally John H. Jackson, *Sovereignty-Modern: A New Approach To An Outdated Concept*, 97 AM. J. INT’L L. 782, 786, 789–90 (2003). For a discussion of the evolution of the concept of sovereignty toward a human rights-based, popular sovereignty see W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866 (1990).

large to its authority to make, apply, and enforce law. More distinctly, a state's prescriptive jurisdiction is its authority to apply its law to certain persons or things,²³ and its adjudicative jurisdiction is its authority to subject persons or things to its judicial process.²⁴ Importantly, "[j]urisdiction to enforce or adjudicate is dependent on jurisdiction to prescribe."²⁵ Thus a state has no inherent authority to subject persons or things to its judicial process if that state has no lawmaking authority over those persons or things to begin with.²⁶

The international law of jurisdiction is a customary law. That is, it is not based on treaties or other positive agreements among states, but

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23. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1987).

24. *Id.* § 401(b).

25. CHRISTOPHER L. BLAKESLEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 132 (2001); RESTATEMENT § 431 cmt. a.

26. States may, however, agree either formally or informally to delegate among themselves jurisdiction absent territorial or national prescriptive authority—but such an exercise of jurisdiction is only legitimate insofar as it stems from the delegation of jurisdiction by a state with territorial or national prescriptive authority. For example, there is a form of extraterritorial criminal jurisdiction exercised by some European states, in particular Germany, called the "vicarious administration of justice" or "representation" principle which allows for the application of municipal criminal law based only on the custody of a foreign defendant without other territorial or national links. This type of jurisdiction is, however, preconditioned upon "a request from another state to take over criminal proceedings, or either the refusal of an extradition request from another state and its willingness to prosecute or confirmation from another state that it will not request extradition." *Extra-territorial Criminal Jurisdiction*, in COUNCIL OF EUROPE, EUROPEAN COMMITTEE ON CRIME PROBLEMS 14 (1990). Unlike universal jurisdiction, the representation principle conforms with the classical sovereignty model under which states have full prescriptive authority regarding conduct within their territories. First, the principle requires some form of agreement or consent between the custodial/prosecuting state and the territorial state. *See id.*

((T)he 'representation' principle differs from the principle of universality in that the decision to prosecute is not taken in isolation by the state claiming jurisdiction, but requires a certain understanding, if not agreement, by the other state which is more directly concerned, for instance the state where the offence has been committed.).

Hence, the territorial state permits the custodial state's application of prescriptive jurisdiction, which of course the territorial state has a sovereign prerogative to delegate. Also in this connection, the principle is decidedly subordinate to other principles of jurisdiction, which take priority. *See* Jurgen Meyer, *The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction*, 31 HARV. INT'L. L.J. 108, 116 (1990). Second, the substantive crime must be virtually indistinguishable as between the custodial and territorial states; the custodial state literally acts as a surrogate for the territorial state. *See id.* at 111

((T)he principle of the vicarious administration of justice...implies that it is insufficient to find an applicable norm of the place of conduct which is identical to the [custodial state's] norm; the particular conduct must also satisfy the elements of that norm. Moreover, the grounds of justification and excuse under the law of the place of conduct must be observed....);

see also COUNCIL OF EUROPE, *supra* at 14. In contrast, universal jurisdiction can be exercised irrespective of the permission and *despite* the prescriptive legislation of the territorial state.

rather on state practice and *opinio juris*, or the state's belief or intent that it is acting with legal purpose²⁷ (though by these two components, as I show in more detail below, treaties certainly may *inform* or *evidence* the customary law of jurisdiction).²⁸ While all states may contribute to international custom since it embodies their collective "general practice accepted as law,"²⁹ custom is an external force on each individual state that makes up part of the international law-making collective.³⁰ The legal construct of jurisdiction essentially comprises the package of "external rules that have defined [the nation] as a 'nation.'"³¹ Presently those rules circumscribe the prescriptive reach of states based principally on their authority over territory and national citizens. Traditional bases therefore hold that a state has jurisdiction over acts that occur—even in part—within its territory (subjective territoriality), may not occur but have an effect within its territory (objective territoriality), involve its national citizens (active and passive personality—based on perpetrator and victim respectively), and are directed against its security (protective principle).³² Despite an observable allowance for concurrent jurisdiction by multiple states, e.g., a matter occurs (or has an effect) in the territory of one state but involves one or more nationals of another state, and even conflicts between states with concurrent jurisdiction,³³ the jurisdictional

27. See e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (describing this component as "a sense of legal obligation"); Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 3 Bevans 1153, 1179 (describing this component as "accepted as law").

28. See discussion *infra* note 46.

29. Statute of the International Court of Justice, *supra* note 28, at art. 38.

30. In a recent defense of customary law, George Norman and Joel Trachtman explain this phenomenon in the following manner: while custom is "endogenous to states as a group—meaning that it is not a vertical structure produced outside or above the group of states—it has an independent, exogenous influence on the behavior of each individual state." George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 542 (2005).

31. Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1113 (1982) [hereinafter D'Amato, *The Concept of Human Rights*]; Anthony D'Amato, *Is International Law Really "Law"?* 79 NW. U. L. REV. 1293, 1308 (1985)

(As a construct of international law, a nation is nothing more nor less than a bundle of entitlements, of which the most important ones define and secure its boundaries on a map, while others define its jurisdictional competency and the rights of its citizens when they travel outside its borders.).

32. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987); see also Anne-Marie Slaughter, *Defining the Limit: Universal Jurisdiction and National Courts*, in UNIVERSAL JURISDICTION 168, 172 (Stephen Macedo, ed., 2004) (noting that like territorial and national bases of jurisdiction, this protective principle is "defined in terms of [a state's] territorial integrity or the safety of its citizens.").

33. See, e.g., Case of S.S. Lotus (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 30–31 (Sept. 7) (ruling on the collision of a French ship with a Turkish ship, and observing that

construct provides a relatively practicable and objective measure of the authority of individual states *vis a vis* one another concerning a particular matter. Thus State *B* may apply its prescriptive jurisdiction to persons and things within its territory, and therefore may apply its jurisdiction to a State *A* national within State *B* borders. State *B* may even have a jurisdictional claim over a State *B* national who happens to be in State *A*. But absent some justifying territorial or national nexus (or agreement between the states),³⁴ State *B* may not project unilaterally its domestic laws onto State *A*. For instance State *B* may not project unilaterally, say, its traffic codes, onto State *A*. That issue is squarely within State *A*'s sovereign jurisdiction.³⁵ It follows that State *B*'s courts cannot apply State *B*'s traffic code to a State *A* driver, driving only in State *A*, and with no other jurisdictional connection to State *B* since there exists no prescriptive jurisdiction upon which State *B*'s adjudicative jurisdiction may rely. It would be as if some British court applied the British rule that drivers must drive on the left side of the road to a U.S. citizen, driving only in the United States and with absolutely no connection to Britain. Such an application plainly would clash with international law.

Yet universal jurisdiction allows State *B*'s courts adjudicative authority with respect to an act that occurs entirely within State *A*'s borders, has no effect on the territory of State *B*, and involves only State *A* national citizens. If, as we have said, State *B* cannot extend its prescriptive jurisdiction into the territory of State *A*, universal jurisdiction begs the question of what prescriptive jurisdiction authorizes State *B*'s courts. In cases of universal jurisdiction that prescriptive jurisdiction is, as a legal matter, international—for as we have seen already, extraterritorial prescriptive jurisdiction of this sort cannot by law be national, e.g., State *B* may not apply unilaterally its municipal law concerning traffic codes to State *A* nationals acting with respect to other State *A* nationals in State *A*. Universal crimes are instead proscribed at the level of international law which, unlike national prescriptive jurisdiction, does extend into the territory of all states.

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[n]either the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.).

34. See *supra* note 27.

35. Indeed, it is difficult to imagine a scenario in which, even with a link to the conduct in question, one state's prescriptive jurisdiction regarding traffic codes could justifiably extend into the territory of another state.

Universal jurisdiction is therefore quite unique among the bases of international jurisdiction in two discrete but related respects. First, its prescriptive and adjudicative faces are distinctively symbiotic: The prescriptive substance of universal crimes not only defines the crimes themselves, but also authorizes the adjudicative competence for all states engendered by the commission of those crimes. In other words, universal adjudicative jurisdiction depends upon the definitional substance of the crime as prescribed by universal prescriptive jurisdiction.

Second, the legal content of this prescriptive jurisdiction is moored in customary international law. By contrast, a state's jurisdiction over its territory or nationals—while certainly a matter of international law at the edges since it describes the state's authority *vis a vis* other states—is not, at the level of a state's domestic law, necessarily substantiated by the content of international law. International law merely sets the perimeters inside which states have sovereign lawmaking authority (to the extent that they do not legislatively act contrary to international law—by endorsing universal crimes).³⁶ It follows that states may grant their courts jurisdiction over any subject matter they please within these territorial and national prescriptive perimeters. The same cannot be said of universal jurisdiction—courts' subject matter jurisdiction is circumscribed by the prescriptive substance of the international law outlawing universal crimes. Hence if certain State *A* nationals put into action a program of extermination of other State *A* nationals based on the latter group's race or ethnic identity, courts in State *B* would have the authority, under international law, to prosecute the former group for the universal crime of genocide. But crucially, State *B*'s adjudicative jurisdiction would be contingent upon the customary definitional substance of the crime prosecuted, i.e., genocide. Put differently, absent territorial or national links or some other legitimating understanding between the states, State *B* could not prosecute the State *A* actors under its municipal code for a series of homicides; like our traffic code hypothetical, such an application would conflict with international law. In sum, a state's universal adjudicative jurisdiction is empowered not by the state's own domestic prescriptive authority—based on, for instance, its authority over national territory or citizens—but rather, by international law. Consequently, when states exercise universal jurisdiction they are legally constrained to

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36. A question arises where the state, through government power, commits universal crimes on a grand scale. Such a state arguably has waived its jurisdiction under international law. For example, it has been suggested that "[a] State that massively violates the rights of an ethnic minority risks forfeiture of its rights to control a given part of its territory." Brus, *supra* note 23, at 13.

adjudicate the prescriptive substance of the crime under international law.

The objection immediately will be made, however, that national courts typically have no authority to pull *sua sponte* from the sky principles of international law according to which they may then adjudicate a matter; instead they must rely upon some domestic law granting them jurisdiction. And thus, the very idea of international prescriptive jurisdiction depends entirely on domestic law. It follows, the argument goes, that (contrary to my stated position) the state court that asserts universal jurisdiction gets its authority not from international law but from that state's domestic legislation. References to what skeptics might sardonically label "so-called international law" may make for nice and popular dicta in the court's opinion, but as a matter of law they are utterly irrelevant.

This position misunderstands the international law of jurisdiction. The principle of universal jurisdiction empowers states *in the first instance* with the capacity to adjudicate certain matters where they otherwise would have no authority to do so. How the sovereign state then authorizes its own judicial bodies to adjudicate the matter is up to the state's domestic law (and thus courts are not randomly pulling from the sky international law). For instance, the domestic law of the state may indeed permit the court to draw directly from international law, or domestic law may incorporate or reflect international law,³⁷ in which case the state would be using its domestic laws and procedures to adjudicate the substance of international law. But importantly, for cases of universal jurisdiction the substance of the law must accord with the prescriptive jurisdiction that governs it—that is, it must be international.

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37. These two approaches to international law by national legal systems are called monism and dualism respectively. Under the monist approach to international law,

[t]he state's constitutional system must recognize the supremacy of international law. The national legislature is bound—constitutionally bound—to respect international law in enacting legislation. The national executive is constitutionally required to take care that international law be faithfully executed, even in the face of inconsistent domestic law. The national judiciary must give effect to international law, notwithstanding inconsistent domestic law, even domestic law of a constitutional character.

LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 64 (Dordrecht 1995). Dualism, on the other hand, views international law as the law between sovereign states, a law that is separate and apart from domestic law. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 30 (1990). Thus, for international law to be part of a dualist state's domestic legal system, it must be implemented through domestic legislation. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 107 (1991). Most states incorporate aspects of both approaches with regard to the domestic application of international law.

III. THE CUSTOMARY LAW OF UNIVERSAL JURISDICTION

If state courts' universal adjudicative jurisdiction depends upon universal prescriptive jurisdiction as defined by international law, then our next question asks how to determine the content of this prescriptive jurisdiction, or the customary definitions of universal crimes. This Part contends that the answer lies in the provisions of the widely-ratified and relatively longstanding multilateral treaties proscribing universal crimes under positive international law. To frame my argument, I begin with two distinctions. The first elaborates upon the distinction between the more procedural law of universal adjudicative jurisdiction and the more substantive law of universal prescriptive jurisdiction. The second, to be clear about the customary character of universal jurisdiction, observes the difference between a treaty-based or "conventional" version of universal jurisdiction, which necessarily confines itself to the states party to the convention that generates such jurisdiction, and the customary law of universal jurisdiction, which extends to all states. I then explain how treaty provisions proscribing universal crimes provide a strong and easily-measurable record of customary law's universal prescription as to those crimes—in other words, the prescriptive jurisdiction that governs state courts' exercises of universal adjudicative jurisdiction.

A. *Adjudicative Versus Prescriptive Universal Jurisdiction*

Although universal adjudicative jurisdiction depends upon the substance of universal prescriptive jurisdiction (or conversely, the substance of universal prescriptive jurisdiction authorizes universal adjudicative jurisdiction), the customary rules of universal adjudicative and prescriptive jurisdiction are nonetheless distinct in their character and development. Universal adjudicative jurisdiction essentially outlines the procedural connection needed for courts to assert jurisdiction over the person(s) before it. For universal jurisdiction purposes, this procedural element exceptionally requires no territorial or national nexus to the accused criminal over which a court asserts judicial authority.³⁸

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38. The conventional or positive law relating to this aspect of jurisdiction is found in treaty provisions establishing states parties' jurisdiction to prosecute, i.e., the provisions determining whether states may exercise jurisdiction over acts committed outside their territories, having no effect on their territories and involving non-nationals. See, e.g., the Torture Convention's prosecute-or-extradite provisions set forth *infra*, note 52.

My focus here, however, is on universal prescriptive jurisdiction, which relates more to the subject matter over which the court claims competence—that is, the substance of universal crime itself. Due perhaps to a need for legal analysis explaining an increased exercise in the last decade or so of jurisdiction by courts having no territorial or national links to the defendants they seek to prosecute,³⁹ commentary has concentrated unevenly on the unqualified, and literally global ambit of universal adjudicative jurisdiction,⁴⁰ while important aspects of the prescriptive scope and definition of universal crimes themselves have been overlooked. To illustrate, piracy is commonly understood as a core universal crime because throughout international legal history any state's courts could prosecute the pirate absent territorial or national links to him or his piratical acts, and more recently, such adjudicative procedure has been strongly endorsed in conventional law.⁴¹ But the question of what precisely "piracy" is as a matter of customary law has garnered little attention⁴²—and yet, as we have seen, this customary definition determines the legal availability of a given court's universal subject matter jurisdiction. To take a more modern and contentious example, "terrorism" has been rejected by courts as a crime of universal jurisdiction. The reason for this rejection stems not from a void of state practice favoring far-reaching adjudicative jurisdiction over the perpetrators of this type of crime, but rather from the absence of a coherent customary definition of

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39. See LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* 1 (2003) (noting that "[m]ore cases of 'universal jurisdiction' have been reported in the past decade than throughout the whole history of modern international law.").

40. Commentary has tended to focus almost exclusively on the availability of universal jurisdiction for courts—i.e., adjudicative jurisdiction, without discussing the substance of the crime itself—i.e., prescriptive jurisdiction. See, e.g., THE PRINCETON PRINCIPLES, *supra* note 3, at 21–25 (listing various universal crimes but not explaining how to define them and dealing largely with procedural issues such as due process, extradition, evidence-gathering, immunities, statutes of limitations, amnesties, resolution of competing jurisdictions, double jeopardy, and settlement of disputes between states with concurrent jurisdictional claims). The author has found one article that discusses universal jurisdiction as a prescriptive jurisdiction, but only to make the point that while a state's universal prescriptive jurisdiction is extraterritorial, jurisdiction to enforce is territorial. See Roger O'Keefe, *Universal Jurisdiction – Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735 (2004) (dealing primarily with the ICJ opinion in the Arrest Warrant case, and not discussing the nature of the prescriptive jurisdiction under the universality principle, the main focus of this Essay).

41. M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in *UNIVERSAL JURISDICTION* 47–48 (Stephen Macedo ed., 2004).

42. For an historical account of the crime that highlights confusion about what set piracy apart from other actions on the high seas, see Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183 (2004).

“terrorism.”⁴³ In the words of the United States Court of Appeals for the Second Circuit in the recent *Yousef* opinion:

Unlike those offenses supporting universal jurisdiction under customary international law—that is, piracy, war crimes, and crimes against humanity—that now have fairly precise definitions and that have achieved universal condemnation, ‘terrorism’ is a term as loosely deployed as it is powerfully charged.... No consensus has developed on how to properly define ‘terrorism’ generally.... [Such] strenuous disagreement among States about what actions do or do not constitute terrorism...[means that] terrorism—unlike piracy, war crimes, and crimes against humanity—does not provide a basis for universal jurisdiction.⁴⁴

Thus the answer to the question of how to determine the customary definitional content of universal crimes is of increasing legal and practical importance.

On my view, developed below, that the answer lies in the substantive definitions of treaties, the international crime at issue in *Yousef*, which involved planting and exploding a bomb on a civilian aircraft—not abstractly “terrorism”—clearly would be subject to universal jurisdiction. The relevant international instrument, the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, not only evidences a custom of universal adjudicative jurisdiction by providing for extraterritorial and extra-national jurisdiction over alleged plane-bombers,⁴⁵ it fills the prescriptive customary hole that so worried

43. *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003).

44. *Id.* at 87–89 (internal citation and quotation omitted).

45. Article 5 of the Montreal Convention provides that:

Each Contracting State shall...take such measures as may be necessary to establish its jurisdiction over the offences [defined]...in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

Article 7 states:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177, 181–82 [hereinafter *Montreal Convention*]. For a discussion of how these provisions evidence custom, see Colangelo, *supra* note 3, at 598:

A state’s entrance into a treaty with other states and commitment to be bound thereby constitutes the maximal expression of state sovereignty and “assent” to the particular

the Second Circuit by prescribing a definite international law articulation of the crime of plane-bombing.⁴⁶ Thus while "terrorism" abstractly-labeled may not be subject to universal jurisdiction because of its definitional uncertainty, certain clearly-defined acts of terrorism, like plane-bombing, are.⁴⁷

B. "Conventional" Versus Customary Universal Jurisdiction

But treaties and custom are of course essentially different types of law. And like all bases of jurisdiction in international law, "[u]niversal jurisdiction is a fundamentally customary, not treaty-based, law."⁴⁸ So before we make the jump from treaty definitions to customary definitions, one more distinction should be made between what might be called treaty-based or "conventional" universal jurisdiction on the one hand, and customary universal jurisdiction on the other. So-called "conventional" universal jurisdiction is somewhat of an oxymoron, or at the least, a misnomer. Because such jurisdiction is rooted in treaty law, it provides neither in fact, nor in law, a truly "universal" jurisdiction.⁴⁹ It

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rules contained in that treaty; the state's implementing legislation pursuant to the treaty compounds this assent by demonstrating a "general usage and practice" designed to enforce those rules; and finally, "the [state's] judicial decisions recognize and enforce that law" in practice.

The Montreal Convention, which was put into effect in 1971, currently has 173 states parties, which means that in the last thirty years the vast majority of states in the world have agreed to bind themselves to and put into practice through domestic legislation and judicial enforcement the provisions of the treaty. [And while] the Montreal Convention "creates a basis for the assertion of jurisdiction that is moored in a process of formal law-making and that is binding only on the States that accede to it[,]...it is precisely this process of formal lawmaking between sovereign states, their mutual assent to the rule agreed upon, and their affirmative adoption and implementation of this rule in domestic legislation and judicial decisionmaking that constitutes evidence of the customary rule. What is important to keep in mind is that the treaty, the municipal legislation, and the judicial opinion are not *themselves* customary international law; rather they make up the absolute best evidence of what a state, the United States, and all other states party to the Montreal Convention consider to be a legally binding practice—and in this respect supply the most powerful evidence possible of customary international law there is. (internal citation omitted) (emphasis in original).

46. Article 1 of the Montreal Convention defines the offense as:

unlawfully and intentionally...plac[ing] or caus[ing] to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight....

Montreal Convention, *supra* note 46, at art. 1

47. Colangelo, *supra* note 3, at 594-603

48. *Id.* at 567; see also *Yousef*, 327 F.3d at 96 n.29.

49. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE

merely vests a comprehensive jurisdiction for states party to a convention *inter se* with respect to the prosecution of a crime that is the subject of the convention; states party may (and in some cases are obliged to) — under the jurisdictional provisions of the convention—exercise their adjudicative jurisdiction absent territorial or national links to the offense that the convention prescriptively defines and outlaws. Though the convention's prescriptive mandate—i.e., the proscription on the crime—ostensibly binds all states party all the time, conventions tend to limit procedurally the exercise of a state courts' adjudicative jurisdiction, absent territorial or national links to the crime, to instances where the alleged offender is afterwards present or "found" in that state party's territory and it does not extradite him to another state party.⁵⁰

To illustrate, the Torture Convention prescriptively defines and bans the crime of torture for states party to the Convention.⁵¹ And through its prosecute-or-extradite provisions,⁵² the Convention provides for an equivalent of universal adjudicative jurisdiction over torture as among the states party. As a matter of positive law, however, both the Convention's prescriptive ban on torture and its grant of extraterritorial and extra-national adjudicative capacity to courts to prosecute torturers comprehend only the jurisdictions of those states party to the Convention.⁵³ In other words, the Torture Convention does not, on its own, bind non-

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USE IT 64 (1994) (explaining that treaty-based jurisdiction is never "universal jurisdiction *stricto sensu*" because such jurisdiction concerns only the states parties to the treaty).

50. This provision is commonly referred to as a "prosecute-or-extradite" provision, or *aut dedere aut judicare*.

51. Torture Convention, *supra* note 21, at 197; *see also* Appendix F, *infra*.

52. Torture Convention, *supra* note 21, at 198. Article 5(2) of the convention provides that "[e]ach State Party shall...take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him...." And Article 7(1) provides:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in [the relevant provision] is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

Id. at 198.

Lori Damrosch has noted that "at a minimum all the prosecute-or-extradite crimes [like torture] are ones as to which there is an *option* to exercise jurisdiction without any link to the crime other than custody of the offender." Lori F. Damrosch, *Connecting the Threads in the Fabric of International Law*, in UNIVERSAL JURISDICTION 91, *supra* note 33, at 94 (emphasis in original).

53. For instance, Article 34 of the Vienna Convention on the Law of Treaties provides that "[a] Treaty does not create either obligations or rights for a third State without its consent," and Article 35 provides that treaties are only binding on non-parties where the non-party "State expressly accepts that obligation in writing." Vienna Convention on the Law of Treaties, May 23, 1969, arts. 34 & 35, 1155 U.N.T.S. 331, 333, 8 I.L.M. 679 (entered into force Jan. 27, 1980).

parties.

By contrast, the customary basis of universal jurisdiction over torture, both in terms of its prescriptive ban on the crime and in terms of its adjudicative scope allowing all states' courts to prosecute the crime, extends beyond those states party to the Torture Convention to contemplate the jurisdiction of all states—making jurisdiction in fact, and in law, “universal.” So if State *A* and State *B* are parties to the Torture Convention, and State *B* asserts jurisdiction pursuant to the Convention over a State *A* national found in State *B* for torture committed in State *A* against other State *A* nationals, State *B* is not exercising universal jurisdiction, but is simply discharging its treaty obligations.⁵⁴ Similarly, in *Yousef*, while the Second Circuit found that it did not have universal jurisdiction as a matter of *customary law*, it did find jurisdiction under the Montreal Convention and its domestic implementing legislation with respect to acts committed by a Pakistani national, which killed and injured Japanese nationals on a Philippine flag airliner flying from the Philippines to Japan (there was no evidence that a U.S. citizen was even aboard the flight).⁵⁵ Critically, in the Torture Convention hypothetical, and in *Yousef*, both the prosecuting and the territorial states were parties to the applicable conventions⁵⁶ and the prosecuting states used the prescriptive definitions of the crimes contained in the conventions.⁵⁷

To place the jurisdictional competence of the prosecuting state in the torture hypothetical outside of that vested by the treaty, we would need to make either State *A* (the territorial state), or State *B* (the prosecuting state), or both, non-parties to the Convention. Plainly if either both State

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54. This was essentially the reasoning of Lord Browne-Wilkinson speaking for the English House of Lords in *Pinochet III*, where he concluded that Pinochet could be extradited to Spain under the Torture Convention since

the states with the most obvious jurisdiction...do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i.e. there is universal jurisdiction....Since Chile, Spain and the United Kingdom are all parties to the Convention, they are bound under treaty by its provisions whether or not such provisions would apply in the absence of treaty obligation.

THE PINOCHET PAPERS, *supra* note 19. The Netherlands also recently convicted a torturer absent territorial or national links to his crimes which occurred in the former Zaire (now Democratic Republic of the Congo) based on the Dutch implementation of the Torture Convention's provisions. See 51 NETH. INT'L L. REV. 439, 444–49 (2004).

55. *Yousef*, 327 F.3d at 97, 108–10.

56. *Id.* at 109 n.43.

57. *Id.* at 110 (observing that the domestic implementing legislation “carefully tracks the text of the Montreal Convention”). As to the definition of the crime in particular, the Montreal Convention and 18 U.S.C. § 32(b)(3) define the crime in substantively identical terms, see *infra* note 69.

A and State *B* are non-parties, or just State *B* is a non-party, State *B* cannot pretend to assert jurisdiction based on a treaty to which it is not party, and which accordingly does not vest it with jurisdiction. But what about the scenario in which State *B* is a party to the Convention and State *A* is not? Can State *B* still prosecute a State *A* national for torture committed in State *A* against only State *A* nationals based on the positive law of the Torture Convention? The answer would seem to be no, and the reason is that the Torture Convention, by itself, does not extend its prescriptive jurisdiction outlawing torture into the territory of non-parties, i.e., State *A*. And therefore, State *B*, acting pursuant only to the Convention, would have no *positive* prescriptive jurisdiction authorizing its adjudicative jurisdiction under the Convention.

The State *B* prosecution could, however, rely on the customary law of universal jurisdiction because its prescriptive jurisdiction *does* extend into the territory of all states to proscribe torture, and likewise vests all states with the adjudicative jurisdiction to prosecute the torturer. But State *B*'s customary adjudicative jurisdiction would only be valid insofar as it accords with the governing customary prescriptive jurisdiction. And so we come back to the question of how to determine the prescriptive substance of universal crimes under customary law.

C. Treaties and the Prescriptive Substance of Universal Crimes

As we have seen, unlike treaties and other positive law instruments that affect only those states that have signed onto them through a formal international lawmaking process, customary law is universal in its application. Moreover, it is evidenced by and evolves organically in light of state practice conditioned by *opinio juris*. Such practice is manifest, for instance, in the state's entrance into a treaty. The idea that generalizable or "norm-creating" treaty provisions—like, for example, proscriptions on internationally agreed-upon crimes—generate customary law is not new⁵⁸ and is, in the words of the International Court of Justice, "indeed one of the recognized methods by which new rules of customary interna-

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58. Professor D'Amato first made the argument over forty years ago in his article *Treaties as a Source of General Rules of International Law*, 3 HARV. INT'L L.J. 1 (1962); see also ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 105–66 (1971) [hereinafter D'AMATO, THE CONCEPT OF CUSTOM]; see also D'Amato, *The Concept of Human Rights*, *supra* note 32 at 1127–47. See generally Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988); Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71 (1996).

tional law may be formed.”⁵⁹ Although some might feel the need to temper the formation of custom through treaty by requiring a certain threshold number of states party to the treaty or the passage of a certain amount of time before its provisions could constitute custom,⁶⁰ this Essay needs not go so far for its argument. Each of the treaties prohibiting universal crimes enjoys longstanding and widespread acceptance; indeed, and as the Appendix bears out, the treaties themselves even tend to avow either an explicit or implicit purpose to codify or create custom in their respective areas of international lawmaking.⁶¹ That treaties do so is, again, nothing new for international law. The Nuremberg Tribunal, for instance, applied to the accused Nazi war criminals before it, as a matter of customary law, the detailed provisions of the 1907 Hague Convention and the 1929 Geneva Convention on the Prisoners of War.⁶² The Tribunal, citing no state practice other than that of states agreeing upon the rules contained in, and entering into, these treaties, observed that the rules were “declaratory of the laws and customs of war.”⁶³ As Anthony D’Amato points out, “[i]t strains credulity to suppose that state practice had become so detailed by 1939—particularly between 1929, the date of the Geneva Convention, and 1939!—that the conventions were merely ‘declaratory’ of such practice. Rather, the more reasonable interpretation is that the conventions ‘declared’ what the practice is by virtue of the fact that the signatories undertook to declare that practice operative under the conventions themselves.”⁶⁴

The argument from treaty law engages therefore not just the prohibition on the crime but also the articulation of its content. It goes beyond

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59. North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 41 (Feb. 20); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987) (“International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.”).

60. See generally Scott & Carr, *supra* note 59.

61. See Appendix, *infra*. The express or implied avowal of generating custom, when buttressed by the history of actions and reactions of states in respect to these treaties, would seem to take care of Dr. Michael Akehurst’s concerns that *opinio juris* must accompany a treaty for its provisions to create custom; the ways in which he sees this criterion satisfied are a declaratory statement in the treaty or its preparatory materials to this effect, or by subsequent practice and *opinio juris* supporting the rule. Michael Akehurst, *Custom as a Source of International Law*, in THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 1974–1975 1, 45, 49 (R.Y. Jennings & Ian Brownlie eds., 1977).

62. *International Military Tribunal Judgment*, in NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT 83 (1947).

63. *Id.*

64. D’AMATO, THE CONCEPT OF CUSTOM, *supra* note 59, at 123.

accepting that genocide is prohibited as a matter of international law because the Genocide Convention prohibits it—treaties are the source of most if not all international human rights norms in this regard⁶⁵—to contend that the substantive definition of the crime is reflected in the treaty provisions and, in line with Part II of this Essay, that it is a definition to which courts must adhere in exercising universal jurisdiction. Again, I do not argue that the treaty provisions setting forth penal characteristics constitute themselves definitively the customary definitions of universal crimes; rather, these provisions make up strong *evidence* of what the customary definitions are. It follows too that definitions contained in legislation implementing domestically a state's treaty obligations or simply transposing onto domestic law the treaty's definitional provisions are particularly useful to courts since these domestic-law definitions reproduce, by their very nature, the substance of the conduct prohibited by the treaty.⁶⁶ My model necessarily allows for some flexibility in the definitions of the crimes insofar as domestic legislation does not substantively alter the definition of the treaty provision it transforms into domestic law.⁶⁷ Even apart from obvious differences that will result from translating the treaty provisions into different languages for purposes of domestic legislation, slight variations on the language are almost inevitable given the universal prescriptions of treaties as compared to the more state-specific prescriptions of domestic legislation.⁶⁸ Using

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65. See D'Amato, *The Concept of Human Rights*, *supra* note 32, at 1128–48.

66. Of course, if the implementing legislation does not reproduce faithfully the crime as set forth in the treaty, the state would be in violation of its treaty obligations, and consequently, the definitions in the implementing legislation would not reflect the customary definitions of the crime (as set forth in the treaty).

67. An example of an improper substantive alteration of a treaty definition is Germany's former Criminal Code § 220a, which translated the definition of genocide contained in the 1948 Genocide Convention into German law. Under the Convention's provisions, the act of genocide is defined as “[d]eliberately inflicting on the group conditions of life **calculated** to bring about its physical destruction in whole or in part.” The translation in § 220a criminalizes “inflict[ing] on the group conditions **apt** to bring about its physical destruction in whole or in part.” Kai Ambos & Steffen Wirth, *Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts*, in *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW* 769, 784–786 (Horst Fischer et al. eds., 2004) (emphasis in secondary source). Ambos and Wirth explain that the use of the word “apt” in the literal German translation “substantially changes the elements of the inflicting-destructive-conditions-[provision] of genocide with respect to both the ordinary meaning and the *travaux préparatoires* of the Convention.” *Id.* at 786

68. To take one example, the Montreal Convention, *supra* note 46, provides for the equivalent of universal jurisdiction over anyone who
unlawfully and intentionally:

....
places or causes to be placed on an aircraft in service, by any means whatsoever, a de-

positive international law as the starting point for determining the substance of universal crimes accommodates the modification of definitions through evolutions in customary law regarding the crimes while presently providing courts with harmonized and fairly precise definitions that safeguard, among other things, bedrock criminal law principles of legality, "namely, no crime without a law, no punishment without a law"⁶⁹ in the context of international criminal law.⁷⁰

There is, however, a circularity problem. How can state practice change the customary definitions of universal crimes if states are legally constrained in their exercise of universal jurisdiction to use, as it were, the customary definitions "as they exist"? This circularity problem tends to afflict customary international law generally.⁷¹ The easy solution for our purposes would be for states to get together and simply change the definition of the crime through an amendment to the relevant treaty, or

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vice or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight.

The U.S. implementing legislation, codified at 18 U.S.C. § 32(b)(3) (1996), similarly provides for jurisdiction over

[w]hoever willfully--

....

places or causes to be placed on a civil aircraft registered in a country other than the United States while such aircraft is in service, a device or substance which is likely to destroy that aircraft, or to cause damage to that aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight.

69. Bassiouni, *supra* note 42, at 45.

70. The history and development of international criminal law has relied on less stringent legality requirements than what might be found under domestic law. See Jordan J. Paust, *It's No Defense: Nullum Crimen, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657, 664-671 (1997); Alfred P. Rubin, *Is International Criminal Law "Universal"?*, 2001 U. CHI. LEGAL F. 351, 357-363 (2001). Thus, so long as states do not expand the definitions of the crimes beyond their customary meanings, states may specify further the definitions of the crime as set forth in a treaty to comport with more stringent domestic legality requirements, as are typical in civil law, code-based systems. For instance, Germany's Code of Crimes Against International Law transforms the ICC crimes into domestic legislation. "Each crime was, however, reformulated into language consistent with German legal terminology, and to ensure that [sic], as required by the German Constitution, the crimes were clearly defined at the time of the commission of the act." Steffen Wirth, *Germany's New International Crimes Code: Bringing a Case to Court*, 1 J. INT'L CRIM. JUST. 151, 153 (2003). The drafters of the ICC evidently were also concerned with specificity problems and therefore agreed to promulgate more specific "Elements of Crimes," which are "non-binding guidelines for the Court, aids for application and interpretation designed to help judges and prosecutors as well as legal counsels appearing in cases before the Court." Wiebke Rückert & Georg Witschel, *Genocide and Crimes Against Humanity in the Elements of Crimes*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW, *supra* note 68, at 61.

71. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporters' note 2 (1987).

to create a new instrument relating to that crime. This process has taken place to some extent with respect to crimes spelled out in the statute for the newly-established International Criminal Court and to a lesser degree (since they are not treaties, strictly speaking) in the statutes of various international tribunals created under the auspices of the United Nations. For example, the Charter of the International Military Tribunal under which the Nazis were prosecuted defined crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations...."⁷² Although acts such as torture, imprisonment, and rape could potentially fall into the "other inhumane acts" receptacle, they are not set forth explicitly in the Charter and courts using its definitional provisions therefore would be on more precarious ground prosecuting these crimes as universal crimes against humanity than in prosecuting a listed offense such as "extermination" or "enslavement." Yet by the end of the last century, international law evolved such that the statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the ICC Statute, do affirmatively list torture, imprisonment and rape as crimes against humanity,⁷³ thus clarifying or perhaps adding to the customary definitions of crimes against humanity and, in any event, providing courts with firmer prosecutorial footing as to certain of these crimes. Judicial opinions also may contribute to the development or clarification of the definitions under customary law. For example, although the Genocide Convention nowhere explicitly mentions rape in its list of acts that may qualify as genocide when "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such,"⁷⁴ international criminal tribunal judgments make clear that acts constituting genocide encompass acts of rape committed with the requisite *mens rea*.⁷⁵

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72. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

73. Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, at art. 5, U.N. SCOR, 48th Sess., 3217th mtg., U.N.Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, at art. 3, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Rome Statute of the International Criminal Court, art. 7, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter ICC statute].

74. Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277.

75. See *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment, ¶ 53 (Dec. 6, 1999); *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, ¶ 117 (May 21, 1999); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 507-08 (Sept. 2, 1998).

But all these examples are of legal developments engineered by quintessentially international agreements or institutions. More difficult is the question of when and how national courts advance customary law in domestic proceedings that apply international law, including, naturally, exercises of universal jurisdiction. We can say, for instance, that if the consistent and widespread practice of states prosecuting the international crime of genocide deems intent to destroy a group based on its political self-identification to satisfy the *mens rea* component of the crime, the customary definition of genocide has expanded to include within its victim class political groups along with the national, ethnic and racial groups carved out by the Genocide Convention. But the first state to extend the definition in this way violates customary law by improperly asserting jurisdiction over a crime that—at that moment—prescriptively does not qualify as universal.⁷⁶ Yet customary law's recursive constitution may immediately reduce the illegality of that act if interested states—say, the alleged universal criminal's state of national citizenship and/or the state on whose territory the crime occurred—acquiesce in or approve of the universal jurisdictional assertion.⁷⁷ And particularly if other states then prosecute genocide in a way that recognizes political groups as victims, the first state's illegal act will have planted a customary "seed,"⁷⁸ the cultivation of which, by state practice, will have modified the customary definition of genocide. The possibility of custom evolving beyond treaty definitions was even expressly built into the ICC Statute.⁷⁹

Evolutions in custom likewise may alter and even expand the capacity of states to allow procedurally for universal adjudicative jurisdiction over the perpetrators of international crimes. For instance, while like the Torture Convention, a number of positive instruments dealing with uni-

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76. This especially would be the case in this example because including political groups in this victim classification was debated and rejected in the drafting of the Genocide Convention. For a history of the drafting debate on this issue see Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L. J. 2259, 2262–2269 (1997).

77. I discuss this point in more detail, see Part IV, *infra*.

78. Anthony D'Amato, *The Theory Of Customary International Law*, 82 AM. SOC'Y INT'L L. PROC. 242, 246 (1988); D'Amato, *Is International Law Really "Law"?*, *supra* note 32, at 1310–11; D'AMATO, *THE CONCEPT OF CUSTOM*, *supra* note 59, at 97–98.

79. Rome Statute of the International Criminal Court, art. 10, U.N. Doc. A/CONF.183/9 (July 17, 1998) ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."). For a detailed analysis of Article 10, see Leila Nadya Sadat, *Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute*, 49 DEPAUL L. REV. 909 (2000).

versal crimes provide for extraterritorial and extra-national jurisdiction by state courts over alleged offenders (the conventional equivalent of universal adjudicative jurisdiction), the Genocide Convention does not. In fact, extraterritorial jurisdiction was explicitly rejected in the Convention's drafting.⁸⁰ Thus to accept genocide as a universal crime, one must view custom as having expanded the adjudicative scope of jurisdiction as to genocide beyond that envisaged by the treaty to encompass the jurisdiction of all states, irrespective of the place of the crime.

But again, my focus here is on prescriptive jurisdiction, or the substance of the universal crime under international law. Because, as we have seen, treaties furnish neither definitive nor exhaustive definitions of universal crimes due to the organic nature of customary law, courts may not always be obliged to use the precise definitional language of the treaty when exercising universal jurisdiction, though it will often be the case that the treaty definition is the best—not to mention the most readily available—evidence of custom. In fact, the practice of universal jurisdiction evidences this latter point.

To begin with, states' domestic laws facilitating universal jurisdiction flow routinely from the criminalization of the conduct in question at the level of international conventional law. These domestic laws may, for instance, fulfill a state's obligations under a treaty and thus, either through specific implementing legislation (typical in common law countries) or general enabling clauses making the treaty provisions directly applicable (typical in civil law countries),⁸¹ translate into national law

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80. For a detailed and persuasive explanation of this point, see REYDAMS, *supra* note 41, at 48–53.

81. For example, Austria's criminal code provision providing for universal jurisdiction states that extraterritorial, extra-national jurisdiction applies to "criminal offences, if Austria is under an obligation to prosecute them—even if committed abroad—irrespective of the penal law of the State where they were committed." Strafgesetzbuch [StGB] [Penal Code] §64(1)(6) (Austria), *translated in* REYDAMS, *supra* note 40, at 94. "The term 'obligation' in §64(1) subparagraph 6 refers to a treaty obligation." REYDAMS, *supra* note 40, at 97. Another example is Belgium's Code de procédure pénale, titre préliminaire, article 12 bis, which has a general enabling clause that reads: "The Belgian courts are competent to take cognizance of offences committed outside the territory of the Kingdom that are the object of an international convention binding on Belgium if the convention obliges in any way to submit the case to the competent authorities for the purpose of prosecution." REYDAMS, *supra* note 40, at 105. Likewise, Denmark's Straffeloven [Strfl] § 8(1)(5) (Denmark), provides: "Acts committed outside the territory of the Danish State, shall also come within Danish criminal jurisdiction, irrespective of the nationality of the perpetrator where the act is covered by an international convention in pursuance of which Denmark is under an obligation to start legal proceedings." REYDAMS, *supra* note 40, at 127. An enabling provision appears also in France's criminal code with respect to self-executing treaties. REYDAMS, *supra* note 40, at 132–33. Somewhat of a departure from this model, the German code, StGB, *supra*, § 6, "Offences Against Internationally Protected Interests or Rights" lists international crimes over

the international substance of the crime for courts to prosecute. Prevalent examples include domestic legislation regarding the Torture Convention,⁸² the Genocide Convention,⁸³ and the Geneva Conventions and their Additional Protocol I⁸⁴—this latter legislation has, in a number of states, been substituted for by legislation implementing the newly established ICC.⁸⁵ Some legislation expressly declares its purpose in this regard. The since-tamed Belgian War Crimes Act,⁸⁶ under which Belgian courts have prosecuted a number of Rwandan war criminals for acts committed in Rwanda against Rwandans,⁸⁷ had as its purpose “to define

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which universal jurisdiction exists—all of which, except for one, are directly the subject of an international treaty—and provides a catch-all provision that provides jurisdiction over “acts that are to be prosecuted by the terms of an international treaty binding on the federal republic of Germany even if they are committed outside the country.” REYDAMS, *supra* note 40, at 142. Spain’s Ley Orgánica del Poder Judicial, article 23.4 follows this model as well, listing offenses prohibited under conventional international law, and providing also for jurisdiction over “any other offence which Spain is obliged to prosecute under an international treaty or convention.” REYDAMS, *supra* note 40, at 183. The Netherlands’ 2003 International Crimes Act, which amended the Wartime Offenses Act and implements in part the ICC Statute, likewise draws from treaty law to define the offenses over which it provides universal jurisdiction, namely, genocide, crimes against humanity, torture and grave breaches (and even non-grave breaches) of the Geneva Conventions and their Additional Protocol I. See International Crimes Act of 19 June 2003, English version available at <http://www.icrc.org/ihl-nat.nsf/0/fb9070f8fc60c047c1256da30032f0b0?OpenDocument>.

82. See Australia’s Crimes (Torture) Act, 1988, translated in REYDAMS *supra* note 40, at 89–90; Uitvoeringswet Folteringsverdrag [The Netherlands’ Act Implementing the Torture Convention], *id.* at 167–69.

83. See Israel’s Crime of Genocide (Prevention and Punishment) Law 1950, see REYDAMS, *supra* note 40, at 160; Switzerland’s Code pénal Suisse, title 12bis, Offences Against the Interests of the International Community, *id.* at 195.

84. See Australia’s Geneva Conventions Act 1957, translated in REYDAMS *supra* note 40, at 87–88; Belgium’s War Crimes Act, which goes beyond the conventional law to add conduct from Additional Protocol II (non-grave-breaches), and subsequently was amended to add genocide and crimes against humanity, *id.* at 106–107, but implementation of the law has been substantially restricted through amendment due to international pressure, see *supra* note 1; Canada’s Geneva Conventions Act, REYDAMS *supra* note 40, at 120; the Netherlands’ Crimes in Wartime Act, *id.* at 167; Switzerland’s Code pénal militaire, articles 9(1) and 109(1) and Code pénal Suisse, article 6bis, *id.* at 195–196.

85. See Australia’s International Criminal Court Act 2002, REYDAMS, *supra* note 40, at 88–89; Canada’s Crimes Against Humanity and War Crimes Act which “incorporates the provisions of the ICC Statute into Canadian legislation,” *id.* at 122–124; Germany’s Code of Crimes Against International Law, “which makes the core ICC crimes offences under domestic law,” *id.* at 144; the United Kingdom’s International Criminal Court Act 2001, which limits universal jurisdiction to foreigners either resident when the offense was committed, or subsequently become resident and reside in the U.K. at the time proceedings are brought, *id.* at 206. See REYDAMS, *supra* note 40, at Part II: Universal Jurisdiction in Municipal Law (discussing the exercise of universal jurisdiction by fourteen states). For specific examples, see pg. 87–90 (Australia), 97 (Austria), 105–07 (Belgium), 120–24 (Canada), 127 (Denmark), 132–34 (France), 142–46 (Germany), 159 (Israel), 165–69 (the Netherlands), 183–84 (Spain), 193–96 (Switzerland), 204–06 (United Kingdom).

86. See Ratner, *supra* note 9.

87. See Luc Reydams, *Belgium’s First Application of Universal Jurisdiction: The Butare Four*

three categories of grave breaches of humanitarian law and to integrate them into the Belgian domestic legal order.”⁸⁸ In fact, “[t]o remain consistent with the definitions used in international law, the Act textually refers to the wording of the relevant provisions of the international conventions.”⁸⁹ And its definitional provisions even explicitly invoke the relevant conventions by name; for example, the Act sets forth the definition of genocide after stating that the crime is defined “[i]n accordance with the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.”⁹⁰

As a result of this legislative translation of international law into national law, the practice of courts has been to use positive international law (as reflected in national law) to define the subject universal offense when exercising universal jurisdiction. To take one of the earliest and most well-known examples of universal jurisdiction, the definitions of “war crimes” and “crimes against humanity” contained in the Nazi and Nazi Collaborators (Punishment) Law under which the Israeli Supreme Court convicted Nazi war criminal Adolf Eichmann for acts which

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Case, 1 J. INT’L CRIM. JUST. 428 (2003). Some of these convictions are problematic under international law. For example, as Reydamas points out:

Some of the war crimes of which one of the defendants, Higaniro, was convicted took place when there was no armed conflict at all in Rwanda. The two incendiary reports attributed to him dated from late 1993 and early 1994. Contrary to the prosecutor’s assertion, there was no armed conflict in Rwanda between 4 August 1993 (date of the Arusha Peace Accords) and 6 April 1994. While sporadic violent incidents took place during this period they did not reach the threshold of application of the 1949 Geneva Conventions and Additional Protocol II.

Id. at 435.

88. Stefaan Smis & Kim Van der Borght, *Introductory Note to Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, 38 I.L.M. 918, 919 (1999).

89. *Id.*

90. *Id.* at art. 1, § 1. Although the Act formally adopts the prescriptive definitions of the crimes from conventional law, like the Netherlands’ International Crimes Act it went beyond conventional law regarding the adjudicative availability of universal jurisdiction over “grave breaches” by including within this category acts that were not committed as part of an international conflict. Smis and Van der Borght explain that

contrary to the Geneva law, the Belgian Act does not make a distinction between international and non-international conflicts for the purposes of defining grave breaches. In fact, pursuant to [the Conventions], the term “grave breaches” is only applicable to international armed conflicts. The violations of humanitarian law in non-international armed conflicts (Additional Protocol II) do not fall within the ambit of the [legislative] undertaking referred to in [connection with grave breaches]. However, considering the number of violations of international humanitarian law that are committed in non-international conflicts, the Belgian legislator found it wise to extend the application of “grave breaches” to violations of the laws of war committed during internal conflicts.

Id. at 920.

were—leaving no doubt as to the universal basis of the jurisdiction—committed before Israel was even a state, embodied the definitions of the respective crimes in the Nuremberg Charter.⁹¹ The Israeli Supreme Court justified its competence to judge Eichmann on the grounds that “international law [enforces itself] by authorizing the countries of the world to mete out punishment for the violation of its provisions, which is effected by putting these provisions into operation either directly or by virtue of municipal legislation which has adopted and integrated them.”⁹² Quoting the Nuremberg Tribunal, the Court observed that “the Charter, with all the principles embodied in it—including that of individual responsibility—must be seen as ‘the expression of international law existing at the time of its creation; and to that extent (the Charter) is itself a contribution to international law.’”⁹³ The Charter had, in the words of the Court, “formed part of the customary law of nations.”⁹⁴ Consequently, through the enactment of the law, the Israeli legislature “gave effect to international law and its objectives.”⁹⁵ The United States endorsed universal jurisdiction over these precise crimes—as defined

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91. The Nazi and Nazi Collaborators (Punishment) Law defines the crimes as “crime against humanity” means any of the following acts:

murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds;

“war crime” means any of the following acts:

murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.

Demjanjuk v. Petrovsky, 776 F.2d 571, 579 (6th Cir. 1985) (quoting the The Nazi and Nazi Collaborators (Punishment) Law). The Nuremberg Charter defines the crimes as:

(b) *War Crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to salve labor or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds....

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, arts. 6(b), 6(c), Aug. 8, 1945, E.A.S. No. 472, 82 U.N.T.S. 280.

92. Judgment reproduced in English, 2 LEON FRIEDMAN, *THE LAW OF WAR* 1664 (Fred L. Israel & William Hansen eds., 1972).

93. *Id.* at 1666 (quoting I.M.T. (1947), vol. 1, 218).

94. *Id.* at 1667.

95. *Id.* at 1668..

under Israeli law—when it subsequently extradited another war criminal, John Demjanjuk, to Israel for prosecution in connection with crimes he had allegedly committed as a World War II concentration camp guard.⁹⁶ Ruling the extradition legal under national and international law, the Court of Appeals for the Sixth Circuit examined the definitions of the crimes contained in the Israeli law and held that Israel had universal jurisdiction over war crimes and crimes against humanity.⁹⁷ More recently, France's Court of Cassation found jurisdiction over a Rwandan national for crimes committed in Rwanda during that country's civil war based on France's domestic legislation implementing the Torture Convention, and despite the fact that Rwanda was not party to the Convention.⁹⁸ The Court held that French courts were competent to "judge persons who could be guilty, in a foreign country, of tortures," under the Torture Convention's definition of the crime,⁹⁹ which is incorporated by reference into the French Penal Code through article 689-2 of the Penal Procedures Code.¹⁰⁰ Furthermore, courts also use the decisions and judgments of international tribunals to inform their application of international law. For example, in convicting on universal jurisdiction grounds Adolfo Scilingo, an Argentine naval captain, for his involvement in "death flights" during Argentina's military rule from 1976-1983, Spain's *Audiencia Nacional* drew from the case law of the ICTY and the text of the ICC to specify, among other things, the elements of crimes against humanity under international law, the character of the civilian

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96. Demjanjuk was later acquitted by the Israeli Supreme Court on these specific charges due to flaws in the documents identifying him as "Ivan the terrible," the guard against which the charges were directed. Based on evidence that he was nonetheless a concentration camp guard, Demjanjuk's legal battles continue. For a summary see Nathan Guttman, *Demjanjuk To Appeal US Decision To Deport Him*, JERUSALEM POST, Dec. 30, 2005, at 5.

97. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-583 (6th Cir. 1985).

98. See United Nations, Status of ratification of the Convention against Torture, <http://www.ohchr.org/english/law/cat-ratify.htm> (last visited Dec. 21, 2005).

99. Cour de Cassation [Cass. Crim] [highest court of ordinary jurisdiction], Jan. 6, 1998. Nr. X 96-82.491 Pf. Nr. Y 96-82.492, translated in 1 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 598, 599 (Horst Fischer, et al. eds., 1998).

100. Article 689-2 reads:

Whoever, outside the territory of the Republic, commits acts qualified as a felony or delict, which constitute torture within the meaning of the first article of the convention against torture and other cruel, inhumane, or degrading penalties or treatment, adopted in New York on December 10, 1984, may be prosecuted and tried by French courts if he is found in France.

C. PR. PEN. art. 689-2 (Fr.), translated in THE AMERICAN SERIES OF FOREIGN PENAL CODES: 29 THE FRENCH CODE OF CRIMINAL PROCEDURE 294 (Edward M. Wise, ed., Gerald L. Kock & Richard S. Frase trans., 1988) (1964).

population against which the crimes must be directed, the generalized and systematic nature of the crimes, and issues of command responsibility.¹⁰¹

Where legislatures or courts depart from the treaties, however, they are obliged to undertake a rigorous and *bona fide* inquiry into the status of customary law to justify the definition they employ. But doesn't this divination of custom just bring us right back to the initial concern of courts subjectively defining universal crimes, leading to the legally unjustified harassment of high-profile individuals for purely political or sensationalist motives? These claims might stick if the real-world practice of courts exercising universal jurisdiction wantonly flouted the legal strictures imposed by universal jurisdiction's prescriptive limits. But in fact the reported cases of universal jurisdiction reveal that courts by and large apply faithfully and responsibly the international legal definitions of universal crimes as evidenced in positive international law.¹⁰² Where courts do not—and have no international legal argument to support their deviation—their violation of international law is readily apparent, and perhaps most importantly, interested states have a strong legal basis to reject such claims.

For instance, under this Essay's analysis, Spain's *Audiencia Nacional* defied international law when it upheld jurisdiction over former Chilean dictator Augusto Pinochet for genocide based on crimes allegedly committed against a "national group" by stretching this victim class designation beyond its customary definition to include "a national human group, a differentiated human group, characterized by some trait, and integrated into the larger collectivity."¹⁰³ Finding that the acts alleged constituted genocide since they were designed "to destroy a differentiated national group" of political opponents irrespective of their nationalities, i.e., "those who did not fit in [Pinochet's] project of national reorganization...[whether] Chileans or foreigners,"¹⁰⁴ the court effectively (and none-too-subtly) amended the victim groups within the definition of genocide. The court's own conclusory reasoning bespeaks the lack of legal support for its position;¹⁰⁵ genocide has been defined consistently

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101. American Society of International Law, International Law in Brief, *Audiencia Nacional of Spain: Sentence for Crimes Against Humanity in the Case of Adolfo Scilingo* (April 19, 2005), available at <http://www.asil.org/ilib/2005/04/ilib050426.htm#j3>.

102. For a comprehensive cataloging with summaries of exercises of universal jurisdiction in municipal courts, see REYDAMS, UNIVERSAL JURISDICTION, *supra* note 40, at 81–226.

103. Quoting the English translation in THE PINOCHET PAPERS, *supra* note 19, at 103.

104. *Id.* at 103–04.

105. *Id.* at 100. The court's argument relies principally on the former Spanish legislation in

since the 1948 Genocide Convention in the statutes of international courts and treaties to have as victim groups only a “national, ethnical, racial or religious group, *as such*.”¹⁰⁶ In the words of the ICTR, “a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship.”¹⁰⁷ The *Audiencia*’s sprawling construction eviscerates the “as such” qualifier¹⁰⁸ and de facto enlarges the class of victims to include potentially any group whatsoever—including, as in the case before it, political groups, which had been explicitly rejected as victims in the drafting of the Genocide Convention.¹⁰⁹ In short, the ruling clashes with one of the more recognizable legal demarcations of the crime of genocide under international law.

In sum, and as the *Audiencia*’s exaggerated ruling shows, positive law articulates not just the substance of universal crimes but also a clear benchmark against which illicit overreaching may be measured. Where such overreaching occurs, the rulings conflict with international law and the exercise of universal jurisdiction is illegitimate. Interested states therefore have a solid legal basis to oppose the exercise of universal jurisdiction in such circumstances. For instance, had the charges concerning Pinochet’s extradition from Great Britain—which had arrested the former dictator pursuant to Spain’s request—relied on Spanish allegations of genocide (instead of torture, which ended up being the relevant

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place when the acts allegedly were committed, under which the intent element of genocide encompassed intent to totally or partially destroy a “national ethnic, religious or social group,” *id.* at 27, 100 (emphasis added), and which was therefore in clear departure from Article 1 of the Genocide Convention which prescribed intent to destroy, in whole or in part, a “national, ethnical, racial or religious group, as such.” See Appendix C, *infra*.

106. See ICTY Statute, *supra* note 74, at art. 4; ICTR Statute, *supra* note 74, at art. 6; ICC Statute, *supra* note 74, at art. 6.

107. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 512 (Sept. 2, 1998). Notably, the jurisprudence of the ICTR has abandoned the notion expressed in the Tribunal’s first finding of genocide in *Akayesu*, at ¶ 516, that the victim class could include “any stable and permanent group”—a definition that would nonetheless still exclude the wholly political group found to be victims in the *Audiencia*’s ruling. Subsequent rulings have determined that the victims of the Rwandan genocide, the Tutsi, were indeed an ethnic group within the meaning of the Statute. Prosecutor v. Musema, Case No. ICTR-96-13-A ¶ 934 (Jan. 27, 2000); Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 95, 98 (May 21, 1999). For an explanation of why the *Akayesu* ruling extending the victim class to “stable and permanent groups” based on the *travaux préparatoires* of the Genocide Convention was wrong, and why the Tutsi constituted a protected class under the correct definition in any event, see William A. Schabas, *The Crime of Genocide in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 447, 450–456 (Horst Fischer et al. eds., 2001).

108. The “as such” language was added to “implicitly include” a specific motive. Schabas, *supra* note 108, at 458.

109. See discussion, *supra* note 77.

crime of extradition),¹¹⁰ Chile would have been perfectly justified in protesting the legality of Spain's jurisdiction under international law on the grounds that the basis for jurisdiction—that is, genocide as defined by the *Audiencia's* ruling—was faulty.¹¹¹ The idea of states successfully objecting to the legality of universal jurisdictional assertions is not far-fetched: Congo successfully obtained a World Court ruling invalidating a Belgian claim of universal jurisdiction over Congo's then-Minister of Foreign Affairs on grounds of sovereign immunity,¹¹² which resulted in Belgium's repeal of the arrest warrant.¹¹³ Indeed, Chile actively considered bringing the Pinochet case to the World Court based on its objections that Pinochet enjoyed immunity¹¹⁴ (the case was, for practical purposes, resolved when British Secretary of State Jack Straw allowed Pinochet to return to Chile on medical grounds).¹¹⁵ The legal argument presented here would have been another arrow in Chile's quiver of legal objections to Spanish jurisdiction, and quite a sharp one at that. And although it is certainly the most formal avenue, taking the case to the World Court is by no means the only option among the panoply of mechanisms by which states may express their legal objections and attempt to protect their legal rights or "entitlements" under international law,¹¹⁶ entitlements such as jurisdictional authority over territory and nationals.

IV. EVOLVING AND ENFORCING THE LIMITS OF UNIVERSAL JURISDICTION

So far this Essay has argued that universal jurisdiction is a customary law which, like all customary law, may evolve by violations that gain

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110. See THE PINOCHET PAPERS, *supra* note 19, at 268.

111. As it turns out, Chile did protest the legality of the jurisdiction, but on grounds of diplomatic and sovereign immunity. See Susan Cornwell, *Chilean Visitors Find Pinochet Looking Well*, WASH. POST, Nov. 16, 1998, at A19; Laurie Goering, *Chile's Response to Pinochet Arrest A Gauge of Progress*, CHI. TRIB., Oct. 21, 1998, at 4; *World/Nation Briefs*, NEWSDAY, Nov. 7, 1998, at A12.

112. Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14).

113. See REYDAMS, *supra* note 40, at 116.

114. See Goering, *supra* note 112; Ray Moseley, *Chile Will Ask World Court to Intervene for Pinochet: Ex-Dictator Fighting Extradition to Spain*, CHI. TRIB., Sept. 29, 1999, at 6.

115. Statement of Secretary of State Jack Straw in the House of Commons, March 2, 2000, reproduced in THE PINOCHET PAPERS, *supra* note 19, at 481.

116. D'Amato, *Is International Law Really Law?*, *supra* note 32, at 1304–07 (describing legal rights as "entitlements" and applying the terminology to international law); *id.* at 1310–1313 (explaining how countermeasures enforce international law).

acceptance and eventually come to reflect a new consensus of state practice and *opinio juris*. But it has also argued that the treaty-based definitions of universal crimes best evidence custom, and accordingly constrain the legitimate exercise of universal jurisdiction by courts. The tension in these arguments raises perhaps one last question worth addressing: How can we tell whether a violation of international law resulting from a court's expansion of the treaty definition of a universal crime (a) signals a possible shift in customary law, or (b) represents an enduring breach of that law? In other words, how are the legal limits of universal jurisdiction enforced?

Framed broadly, the question of violations blossoming into custom is endemic to all customary law,¹¹⁷ but in this particular circumstance the proper legal analysis may not be too difficult to discern. The answer lies in the reactions of other jurisdictionally-interested—i.e., national and territorial—states. The protest and acquiescence of states to what amounts to an international legal claim by another state has long been held to be a constitutive element of custom.¹¹⁸ And a claim of authority to prescribe and adjudicate foreign conduct by foreign nationals under a theory of universal jurisdiction is as clear an international legal claim as any. Particularly important to the customary calculus are the reactions of states that have a substantial legal interest in the claim at issue, that is, states whose legal rights or entitlements are directly implicated by the claim.¹¹⁹ In comparison to other areas of international law where it may be hard to identify and measure the various interests of various states implicated by a given claim,¹²⁰ the universal jurisdiction scenario presents a relatively clear picture of the interested states and the degree of their interests. The legally interested states are those states that otherwise would have jurisdiction over the acts and persons involved; they are those states whose nationals are the subject of the universal jurisdiction claim and/or whose territories suffered the alleged conduct giving rise to universal jurisdiction.

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117. See *supra* text accompanying note 78.

118. See Akehurst, *supra* note 62, at 38–42 (and cases cited therein).

119. *Id.* at 40

(If an act affects the interests of only one State, protest by that State will carry great weight...[and] [t]he extent to which a State's interests are affected varies according to the nature of the act concerned. Failure to protest against an assertion *in abstracto* about the content of customary law is less significant than failure to protest against concrete action taken by a State in a specific case which has an immediate impact on the interests of another State.).

120. See *id.*

Accordingly, where a court asserting universal jurisdiction expands the definition of the crime upon which it grounds its competence beyond the crime's customary definition—a definition evidenced largely by treaty law—the reactions of national and territorial states determine the customary status of the universal jurisdiction court's definitional expansion.¹²¹ As we have seen, these states may take a number of measures to repudiate the legality of the universal jurisdiction state's claim; they may, for instance, officially protest,¹²² take the case to the World Court and, naturally, if the universal jurisdiction is asserted in absentia,¹²³ refuse to extradite the accused. To enforce the definitional limits of the crime under customary law therefore, states objecting to universal jurisdiction on the grounds set forth above would be well-advised to make explicit their rejection of the universal jurisdiction court's illegitimate definitional expansion upon which the court purports to base its competence.

Consequently, the potential for evolving—or not—the definitions of universal crimes by the process of customary law-violation-turned-new-

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121. A non-interested state may try to insulate itself from the definitional expansion of a universal crime by invoking the persistent objector doctrine of international law, which holds that "a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987). However, "[h]istorically, such dissent and consequent exemption from a principle that became general customary law has been rare." *Id.*; see also Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985) (observing that while historically rarely invoked, the principle may play a more instrumental role in modern international lawmaking that occurs through institutional organs such as the United Nations).

122. The contribution of protest alone unaccompanied by some tangible response as a constitutive element of custom is the subject of some controversy. See Akehurst, *supra* note 63, at 40–41 (disagreeing with D'Amato's view that unaccompanied protests are not enough to block a new rule); R.A. Mullerson, *New Thinking by Soviet Scholars: Sources of International Law*, 83 AM. J. INT'L L. 494, 506–07 (1989). In cases of universal jurisdiction, the protest will almost inevitably be accompanied by some form of response, whether it is a suit against the state asserting universal jurisdiction or simply a refusal to extradite.

123. The status of universal jurisdiction in absentia is not yet clear under international law. See Colangelo, *supra* note 3, at 548–49

(Universal jurisdiction in absentia is presently caught in a customary twilight that will witness either the development or the dismissal of the practice depending on the actions and reactions of states in the next part of this century. State practice has not yet worn into the fabric of international law an affirmative custom of universal jurisdiction in absentia assertions. At the same time, however, an incipient trend supporting this type of assertion is emerging, and those who take a permissive view of international law might legitimately submit that custom does not explicitly prohibit universal jurisdiction in absentia.)

(internal citations omitted).

custom rests not with the state asserting universal jurisdiction, but instead most often with the states whose nationals are in the dock. Where interested states object to the universal jurisdiction assertion by rejecting an illegitimate definitional expansion of the crime that purports to justify the universal jurisdiction court's competence, the court's violation represents an enduring breach of international law. In other words, the objection to jurisdiction effectively blocks a potential shift in customary law as to the definition of the crime. However, if interested states approve of or acquiesce in the court's definitional expansion of the crime, such approval or acquiescence may signal a possible customary shift regarding the definition of the crime in line with the definition adjudicated by the court. Hence if the Pinochet extradition had taken place, and if the Spanish courts had rested their jurisdiction on the universal crime of genocide using their exorbitant definition of the crime—which we know is exorbitant because we can measure it objectively against the treaty definition—Chile would determine, either by approval or rejection of Spanish jurisdiction based on this definition, the *potential* for a customary definitional expansion of genocide as contrived by the Spanish courts. It should be emphasized that even were Chile to approve of the exorbitant definition and the resulting universal jurisdiction, Spain's jurisdiction would still conflict with international law; one territorial or national state's approval of or acquiescence in a definitional expansion would not be enough to change the customary definition of the crime,¹²⁴ especially against the backdrop of a widely-ratified and longstanding treaty to the contrary.

V. CONCLUSION

The purpose of this Essay has been to explicate a basic but overlooked legal feature of universal jurisdiction: If national courts prosecute on grounds of universal jurisdiction, they must use the international legal definitions—as derived from customary law—of the universal crimes they adjudicate. The Essay further has attempted to explain the

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124. A basic definition of the hard-to-pin-down threshold for determining the existence of customary law appears in the Restatement, which states that “[c]ustomary international law results from a *general* and *consistent* practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (emphasis added). Whatever view one takes of how much practice achieves the threshold level of generality and consistency necessary to form customary law, one improper assertion of universal jurisdiction accepted as legitimate by an interested state and in the face of a treaty to the contrary would not meet that test.

best way of going about determining what those definitions are, by looking to the provisions of widely-ratified and longstanding international treaties. An important implication of this conclusion addresses concerns that universal jurisdiction hazards unbridled abuse for purely political and sensationalist ends. As I hope to have shown, the international law in this area does not permit such abuse; rather, it prescribes legal limits of universal jurisdiction. These limits are enforced not by those states exercising universal jurisdiction, but principally by those states whose nationals are the subject of foreign universal jurisdiction proceedings. Indeed, should states come to recognize this Essay's thesis, the near future may very well see precisely this type of legal argument being made where universal jurisdiction claims are in dispute.

VI. APPENDIX

Basic Treaty Provisions (with Commentary) Defining Universal Crimes

PIRACY

The Convention on the High Seas, more commonly known as the Geneva Convention on the Law of the Sea, sets forth the substance of the crime of piracy for purposes of customary law. It was first signed in April of 1958, entered into force in 1962, and has 62 states party.¹²⁵ The Convention states in its preamble that it was designed to "codify the rules of international law relating to the high seas" and, in so doing, "adopted the following provisions as generally declaratory of established principles of international law,"¹²⁶ thus explicitly embodying the custom in this area. The Convention provides that "[a]ll states shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State,"¹²⁷ and defines "piracy" as "any of the following acts":

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, and directed:

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125. United Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty2.asp> (last visited June 14, 2006).

126. Convention on the High Seas pmbl., done Apr. 29, 1958, 1 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter Geneva Convention on the Law of the Sea].

127. *Id.* at art. 14.

On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.¹²⁸

Articles 100 and 101 of the more recent Montego Bay Convention on the Law of the Sea, which entered into force in 1994 and has 149 states party,¹²⁹ contain a prohibition on and definition of piracy in language virtually identical to that in the Geneva Convention.¹³⁰

SLAVERY

The Geneva and Montego Bay Conventions on the Law of Sea also recognize the criminal nature of slavery as a matter of customary law in their provisions. The conventions provide (again, in essentially identical language) that “[e]very State shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free.”¹³¹

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128. *Id.* at art. 15.

129. United Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty6.asp> (last visited June 14, 2006).

130. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 516 U.N.T.S. 205, 21 I.L.M. 1261 [hereinafter Montego Bay Convention on the Law of the Sea]. Article 100 states: “All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.” And Article 101 states:

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

131. Geneva Convention on the Law of the Sea, *supra* note 127, at art. 13; *see also* Montego

There are, however, conventions more specific to the crime that explicate its customary definition. The Slavery Convention, signed at Geneva on September 26, 1926, which has 80 states party¹³² and which was amended by a 1957 Protocol (that changes obligations under the Convention in respect of the League of Nations to obligations of the United Nations) that currently has 59 states party¹³³ expresses in its preamble the universal scope of its "intention of securing the complete suppression of slavery in all its forms and of the slave trade by land and sea," "to find a means of giving practical effect throughout the world to such intentions," and "to conclude to that end more detailed arrangements."¹³⁴ The Convention sets forth the following definitions:

Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.¹³⁵

These definitions are further mirrored and reinforced in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which entered into force in 1957¹³⁶ and currently has 119 states party.¹³⁷

Bay Convention on the Law of the Sea, *supra* note 131, at art. 99.

132. United Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty3.asp> (last visited June 14, 2006).

133. United Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty1.asp> (last visited June 14, 2006).

134. Slavery Convention, pmbl., Sept. 25 1926, 46 Stat. 2183, 60 L.N.T.S. 253, *amended by* Protocol Amending the Slavery Convention, *opened for signature* Dec. 7, 1953, 7 U.S.T. 479, 212 U.N.T.S. 17.

135. *Id.* at art. I.

136. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, arts. 1, 7, *done* Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3. Article 7 in the "Definitions" Section IV of the Convention provides:

(a) "Slavery" means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and "slave" means a person in such condition or status;

(b) "Slave trade" means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition

GENOCIDE

The plain language of Article I of the 1948 Genocide Convention, which has 138 states party,¹³⁸ firmly entrenches genocide as a crime under international law. It provides: “The Contracting Parties *confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”¹³⁹ Article II defines genocide as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

Killing members of the group;

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

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

Imposing measures intended to prevent births within the group;

Forcibly transferring children of the group to another group.¹⁴⁰

Article III makes illegal “Genocide; Conspiracy to commit genocide; Direct and public incitement to commit genocide; Attempt to commit genocide; [and] Complicity in genocide.”¹⁴¹ This definition has endured unaltered up through present-day conventional law.¹⁴² As noted,¹⁴³ judicial gloss has construed certain acts, such as rape, to fall within the definition of acts that can qualify as genocidal.

CRIMES AGAINST HUMANITY

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of a slave with a view to selling or exchanging him; all acts of disposal by sale of exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance.

137. United Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty4.asp> (last visited June 14, 2006).

138. United Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp> (last visited June 14, 2006).

139. Convention on the Prevention and Punishment of the Crime of Genocide art I, Dec. 9, 1948, 78 U.N.T.S. 277 (emphasis added).

140. *Id.* at art. II.

141. *Id.* at art. III.

142. The ICTY, ICTR and ICC all use the Genocide Convention’s definition to define the crime. See ICC Statute, *supra* note 74, art. 6; ICTR Statute, *supra* note 74, art. 2; ICTY Statute, *supra* note 74, art. 4.

143. See *supra*, discussion accompanying notes 73–75.

There is no unifying international instrument concerning crimes against humanity, though these crimes have been the subject of watershed instruments of international criminal law. The Charter of the International Military Tribunal at Nuremberg defined crimes against humanity as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹⁴⁴

The Principles of the Charter state that crimes against humanity are crimes irrespective of their legality under domestic law, signifying that they are offenses under international law.¹⁴⁵ Since Nuremberg, a number of international instruments have catalogued crimes against humanity. The most precise and comprehensive of these are the statutes governing international criminal courts. As noted,¹⁴⁶ the statutes of the ICTY and ICTR explicitly include, *inter alia*, imprisonment, torture, and rape among "other inhumane acts."¹⁴⁷ The ICC statute particularizes further the list of crimes against humanity,¹⁴⁸ refines the "other inhumane acts" catch-all with the express requirement that the acts must be "of a similar character [to other crimes against humanity] intentionally causing great suffering, or serious injury to body or to mental or physical health," and provides detailed definitions of the terms and crimes listed as crimes against humanity.¹⁴⁹

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144. Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 280.

145. This reading is confirmed by the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, princ. II, July 29, 1950, U.N. GAOR, 5th Sess., Supp. No. 12, at 11, U.N. Doc. A/1316 (1950).

146. See *supra* discussion accompanying note 74.

147. ICTR Statute, *supra* note 74, art. 3; ICTY Statute, *supra* note 74, art. 5.

148. ICC Statute, *supra* note 74, art. 7. Subsection 1 provides the general definition of crimes against humanity and adds to the explicit list: (in connection with rape) sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; enforced disappearance of persons; and the crime of apartheid.

149. *Id.* Subsections 2 and 3 define the crimes and terms in Subsection 1. The latter two provisions read:

For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

WAR CRIMES

War crimes are the subject of more international conventions than any other universal crime. The so-called "Law of the Hague" and "Law of Geneva," referring respectively to the overlapping Hague and Geneva Conventions governing the rules of war, largely account for international law in this area,¹⁵⁰ though the statutes and jurisprudence of international

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(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

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150. See generally M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS 285-86 (1997). Among the relevant Hague Conventions here are the: Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, and its Regulations Respecting the Laws and Customs of War on Land; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, and its Regulations Respecting the Laws and Customs of War on Land. The four Geneva Conventions are: 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 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members

criminal tribunals also contribute instrumentally to the customary scope and definition of war crimes. I have argued elsewhere against the blanket exercise of universal jurisdiction over war crimes.¹⁵¹ Two independently persuasive reasons combine to caution strongly against the use of war crimes generally for universal jurisdiction purposes. First, aspects of the law of war are inherently vulnerable to manipulation. For instance, many of the laws of target selection and proportionality boil down to standards invariably encompassing marginal cases,¹⁵² the legality of which in practice will depend largely on the interpretive discretion of the prosecuting court, thus making war crimes allegations and prosecutions vulnerable to massage by politically motivated states for purely sensationalist or propagandist, rather than legal, incentives. This high degree of exposure to political abuse combines to trouble the use of universal jurisdiction over war crimes with the reality that "any armed conflict, no matter how carefully planned and executed and no matter what the justification, will involve instances that can be viewed as war crimes."¹⁵³ That is, unlike other universal crimes—e.g., genocide, slavery—these marginal instances that potentially could be viewed as criminal may be, as a practical reality of war, inevitable. Thus, universal jurisdiction over war crimes is both susceptible to political manipulation and available virtually every time an armed conflict takes place, no matter the legality or the desirability of a given military action or, for that matter, its unprecedented adherence to humanitarian law. There is accordingly a real danger that "[t]he usefulness of universal jurisdiction under the right circumstances would be undermined by stretching the category to include wrongful or doubtful circumstances."¹⁵⁴ Furthermore, universal adjudicative jurisdiction is legally flimsy here since no positive instrument

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of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (1950) [hereinafter Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention Relative to the Treatment of Prisoners of War]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention Relative to the Protection of Civilian Persons in Time of War], and the two Additional Protocols are: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted* June 8, 1977, 1125 U.N.T.S. 609.

151. See Colangelo, *supra* note 3, at 587–94.

152. See *id.* at 588–92.

153. *Id.* at 593.

154. *Id.* at 592.

concerning the law of armed conflict provides affirmatively in its jurisdictional provisions for the conventional equivalent of universal jurisdiction.¹⁵⁵

The most legally sound and practically responsible exercise of universal jurisdiction over war crimes limits the doctrine to “grave breaches” of the Geneva Conventions. A colorable legal argument can be made that “the general obligations to enforce, which include the specific obligations to prevent and repress ‘grave breaches’ of the 1949 Geneva Conventions and Protocol I, allow states to expand their jurisdiction to include the theory of universality.”¹⁵⁶ To the extent that the Conventions condition the existence of a “grave breach” on a *willful* violation of the relevant provision(s),¹⁵⁷ this high *mens rea* prerequisite creates a needed threshold for prosecutions that protects against baseless assertions of universal jurisdiction over marginal cases rooted only in political or sensationalist motives. The relevant articles outlining “grave breaches” in the Conventions are: Article 50 common in the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field and the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea¹⁵⁸ which have 195 states party respectively;¹⁵⁹ Article 130 of the 1949 Geneva Convention Relative to the

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155. Thus leaving to the state wishing to subject an alleged war criminal to its adjudicative process absent territorial or national links a frail reliance on the permissive nature of jurisdictional assertions generally under international law (since there is conversely nothing in positive law prohibiting such assertions over war crimes). See Bassiouni, *supra* note 42, at 51–52.

156. *Id.* at 52.

157. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 151, art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *supra* note 151, art. 51; Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 151, art. 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147; Protocol I, *supra* note 151, arts. 11, 85.

158. They provide in pertinent part:

Grave breaches... shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 151, art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *supra* note 151, art. 51.

159. OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, TREATIES IN FORCE 493–94 [hereinafter TREATIES IN FORCE].

Treatment of Prisoners of War,¹⁶⁰ which has 195 states party;¹⁶¹ Article 147 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War,¹⁶² which has 195 states party,¹⁶³ and Articles 11 and 85 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts,¹⁶⁴ which has 182 states party.¹⁶⁵

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160. It provides in pertinent part:

Grave breaches...shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 151, art. 130.

161. TREATIES IN FORCE, *supra* note 160.

162. It provides in pertinent part:

Grave breaches...shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 151, art. 147.

163. TREATIES IN FORCE, *supra* note 160.

164. Protocol I provides the most detailed index of grave breaches. Article 11(4), which relates to the physical and mental protection of the wounded, sick and shipwrecked, provides that [a]ny wilful act or omission which seriously endangers the physical or mental health of a person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions [listed] in paragraphs 1 and 2 [of the Article] or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

The "grave breach" provision of Protocol I is, however, Article 85, which provides in full: Article 85. Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or

TORTURE

The relevant international instrument proscribing the universal crime of torture is the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁶⁶ which currently has 141 states party.¹⁶⁷ The preamble evidences the universal scope of the

health:

- (a) Making the civilian population or individual civilians the object of attack;
- (b) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
- (c) Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
- (d) Making non-defended localities and demilitarized zones the object of attack;
- (e) Making a person the object of attack in the knowledge that he is hors de combat;
- (f) The perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

- (a) The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
- (b) Unjustifiable delay in the repatriation of prisoners of war or civilians;
- (c) Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- (d) Making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
- (e) Depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

Protocol I, *supra* note 151, art 85.

165. States Parties to the Following International Humanitarian Law and Other Related Treaties as of 14-Jun-2006, [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf).

166. Torture Convention, *supra* note 21.

167. United Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp> (last visited June 14, 2006).

prohibition, which grounds itself in the "recognition of the equal and inalienable rights of all members of the human family" and "universal respect for, and observance of, human rights and fundamental freedoms" necessitating "the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world."¹⁶⁸ To be sure, the chairman-rapporteur of the Working Group established by the U.N. Commission on Human Rights who drew up the Convention, and an author of the initial drafts of the Convention, make clear that the Convention's principal aim was to strengthen enforcement of the existing international ban on torture, not to outlaw it because "the Convention is based upon the recognition that [torture is] already outlawed under international law."¹⁶⁹ Article 1 of the Convention provides:

For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁷⁰

ACTS OF TERRORISM

As previously discussed,¹⁷¹ while "terrorism" broadly-labeled is not a crime of universal jurisdiction due to its definitional infirmity, there are certain clearly-defined international crimes most people would consider to be acts of terrorism that are subject to universal jurisdiction. Two examples that come immediately to mind are the hijacking and bombing of aircrafts. The main international conventions dealing with these crimes are, respectively, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the Hague Hijacking Convention,¹⁷² which currently

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168. Torture Convention, *supra* note 21, preamble.

169. J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT I (1988).

170. Torture Convention, *supra* note 21, at art. 1.

171. See *supra*, discussion accompanying notes 43-47.

172. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22

has 185 states party,¹⁷³ and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (the Montreal Convention),¹⁷⁴ which currently has 186 states party.¹⁷⁵ Both instruments provide for the conventional equivalent of universal adjudicative jurisdiction in their jurisdictional provisions.¹⁷⁶ As to the definitions of the crimes, under Article 1 of the Hague Hijacking Convention:

1. Any person who on board an aircraft in flight:
unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or
is an accomplice of a person who performs or attempts to perform any such act commits an offence (hereinafter referred to as “the offence”).¹⁷⁷

And under Article 1 of the Montreal Convention:

1. Any person commits an offense if he unlawfully and intentionally:
performs an act of violence against a person on board an aircraft in flight if that is likely to endanger the safety of that aircraft; or
destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endan-

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U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Hague Hijacking Convention].

173. TREATIES IN FORCE, *supra* note 160, at 373-74.

174. Montreal Convention, *supra* note 46.

175. TREATIES IN FORCE, *supra* note 160, at 374-75.

176. Article 4 of the Hague Hijacking Convention provides that, in addition to states with territorial or national links to the offense:

Each Contracting State shall...take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

Hague Hijacking Convention, *supra* note 173, art. 4. Similarly, Article 5 of the Montreal Convention provides that:

Each Contracting State shall...take such measures as may be necessary to establish its jurisdiction over the offences [defined]...in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

177. Hague Hijacking Convention, *supra* note 173, art. 1.

ger its safety in flight; or
destroys or damages air navigation facilities or interferes with
their operation, if any such act is likely to endanger the safety of
the aircraft in flight; or
communicates information which he knows to be false, thereby
endangering the safety of the aircraft in flight.

2. Any person also commits an offence if he:
attempts to commit any of the offences mentioned in paragraph 1
of this Article; or
is an accomplice of a person who commits or attempts to commit
any such offense.¹⁷⁸

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178. Montreal Convention, *supra* note 21, art. 1.

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