FIRST LECTURE
AMERICAN FOREIGN POLICY: AN OVERVIEW

1. INTRODUCTION

The international image of the United States is currently at a low. Condemnation by the international community of states of American foreign policy has escalated to level that exceedsCso it would seemCthe patterns of reprobation that emerged from time to time in modern history.

Perhaps this is so much the more noticeable in the aftermath of September 11^{th}. The profoundly hideous crimes of 9/11 provoked almost universal sympathy with, and support for, the United States in its deepest moment of unspeakable grief. The world came close to being absolutely united in its condemnation of international terrorism and its solidarity with the United States. That solidarity included almost universal support for America=s military response against the country that harbored the evil leadership of al Qaeda and its misguided following.

But subsequently, or perhaps after a brief interlude, the international esteem of the United States has taken a plunge for the worst.

I am well aware of the fact that, as far as perceptions entertained by the outside world community are concerned, most Americans don=t care two hoots. It barely caused a ripple on either side of the political divide in the recent Presidential election campaign.

For a proper understanding of American foreign policies, it is nevertheless useful to unravel the long-term biases of the United States, and to trace their manifestations in recent policy decisions and actions of the American government. I would suggest that those decisions and actions have decisively influenced the negative responses that at the moment seem to blemish America=s international image.

2. ISOLATIONISM AND EXCEPTIONALISM

International relations of the United States have over the years been tainted by a certain mind-set. First and foremost in this regard is the notion that the United States is something special and should within the international arena be treated differently. In conformity with this conviction, the United States has in the past maintained a degree of isolationism from institutions, norms and obligations that have come to be perceived as conducive to the promotion of international comity. Refusal of the United States to become a member of the League of Nations over what some American analysts described as a mere triviality is often quoted as a prime example of American isolationism of yesteryear.

But American isolationism has also penetrated the post-World-War II history of inter-state relations. The United States has in fact become notorious for its reluctance to ratify international treaties for the promotion and protection of human rights. In cases where the United StatesCalways belatedlyCdid accede to human rights conventions and covenants, its instruments of ratification were consistently attended by a package of reservations, understandings and declarations carefully designed to ensure that the United States will not be bound by any provision which are not in conformity with existing laws and practices in the United StatesChowever much those laws and practices might deviate from international standards, or indeed elementary principles, of human rights protection.[1] The United States has not ratified the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Suppression and Punishment of the Crime of Apartheid (1973), or the Convention on the Elimination of All Forms of Discrimination against Women (1979). It is furthermore one of only two countries in the world that have not ratified the Convention on the Rights of the Child (1989).[2]

The United States indeed always takes an active part in the drafting of multinational treaties. It almost invariably adopts an extremely conservative position regarding the substance of those treaties, prompting other countries in a spirit of compromise to abide by less than desired arrangements and lukewarm implementation procedures. But even then, when the time for ratification comes, the United States simply refuses to play ball.

The United States mostly rely on considerations of state sovereignty to justify its isolationist stand and to refute criticism of its lack of leadership in the implementation of international human rights standards. Here, too, apologists for the American position are well behind our times. One of the major developments of international law since the Nuremberg Trials has been a rapid decline in considerations of state sovereignty along Westphalian lines. Nuremberg, with its Asovereignty-limiting rationale,@ introduced a new world order under a rule of law that penetrates serious wrong-doing within municipal borders.[3] As noted by Lord Millett in the judgment of the British House of Lords in the *Pinochet Case*: AThe way in which a state treated its own citizens within its own borders had become a matter of legitimate concern to the

[1] See in greater detail, Van der Vyver AAmerican Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness@ 50 (2001) *Emory Int=l L Rev* 775 777-91.

[2] The United States on 23 January 2003 did ratify the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, UN Doc A/Res/54/263 (25 May 2000) and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, UN Doc A/Res/54/263 (25 May 2000).

[3] Broomhall *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003) 2.

international community.@[4] Earlier, the International Criminal Tribunal for the Former Yugoslavia observed in the appeal of *Duško Tadi*: "It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights."[5]

Since the demise of communism, insistence of the United States on a right to be afforded special privileges in international law took on the form of American exceptionalism rather than isolationism. There is of course a certain link between isolationism and exceptionalism, but the two concepts attract different emphases. Isolationism signifies non-participation in affairs of the international community of states, while exceptionalism implies participation in international institutions and norm-creating activities but on basis of a privileged status for the state singled out for preferential treatment.

3. The Only Super Power Syndrome

Spokespersons of the United States mostly seek to legitimize their country=s claim to a privileged position in international relations on basis of the United States being the only remaining super power in the world. This, according to American claims, brings with it a responsibility for the maintenance of international peace and security. Executing that responsibility will allegedly be jeopardized unless the United States is afforded a special privileged status within the international arena and be singled out as the beneficiary of a prerogative of dispensation from legal constraints imposed by international law for the maintenance of codes of conduct in war and peace, and for the peaceful coexistence of countries of the world.

The United States thus participated in the Conference of Diplomatic Plenipotentiaries that was held in Rome on 15 June to 17 July 1998 for the establishment of an international criminal court[6] with the primary resolve to ensure that American nationals will not be subjected to the jurisdiction of the court without the consent of the American government. In an interview with the *Washington Post,* Ambassador at Large for War Crimes Issues and leader of the American delegation in Rome, David Scheffer, said it quite bluntly: AAny arrangement by which a UN-sponsored tribunal could assert jurisdiction to prosecute Americans would be political poison in Congress,@[7] Earlier, Senator Jesse Helms in a letter addresses to Secretary of State Madeleine

[4] *R v Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte (Amnesty International & Others Intervening) (No 3)* [1999] 2 *All ER* 97 177 (HL).

[5] *Prosecutor v Tadic (Jurisdiction) (Appeals Chamber)* 105 (1997) *Int=l L Rep* 453 par 58 (at 483).

[6] The ICC Statute was adopted by the Rome Conference on 17 July 1998 and entered into force on 1 June 2002 following its ratification by 60 states. To date, 97 states have ratified the Statute.

[7] Lippman AAmbassador to the Darkest Areas of Human Conflict@ *Washington Post* (18

Albright (dated 26 March 1998) promised that any treaty establishing Aa permanent U.N. criminal court ... without a clear U.S. veto ... will be dead-on-arrival at the Senate Foreign Relations Committee.@

The major argument advanced in support of American exceptionalism within the ICC context is founded on the only-super-power syndrome. It has been argued that, being the only remaining super power in the world, the United States has also become the primary peace-keeping force of our times; and American troops engaged in peace-keeping operations abroad do not want to run the risk of prosecutions in an international criminal tribunal for acts committed in the interest of peace and security on earth. In an address at the University of Oklahoma's College of Law delivered on 24 February 1998, Ambassador Scheffer thus explained:

> [N]o other country shoulders the burden of international security as does the United States. In the post-Cold War world, the U.S. military is called upon to defend our national security from a wide range of threats; to carry out mandates from the Security Council; to fulfill our commitments to NATO; to help defend our allies and friends; to achieve humanitarian objectives, including the protection of human rights; to combat international terrorism; to rescue Americans and others in danger; and to prevent the proliferation or use of weapons of mass destruction. ... It is in our collective interests that the personnel of our militaries and civilian commands be able to fulfill their many legitimate responsibilities without unjustified exposure to criminal legal proceedings. The permanent court must not be manipulated for political purposes to handcuff governments taking risks to promote international peace and security and to save human lives. Otherwise, the permanent court would undermine the efforts to confront genocide, crimes against humanity, and war crimes.[8]

Justice Richard Goldstone, former Prosecutor in the International Criminal Tribunals for the former Yugoslavia and International Tribunal for Rwanda, in a press interview at the Rome Conference gave short shrift to this reasoning: AI really have difficulty understanding that policy,@ he said: AWhat the US is saying is, >In order to be peacekeepers ... we have to commit war crimes=.@[9] To this one might add that the United States does not have a mandate to engage in peace-keeping; that is a primary function of the United Nations Organization.

4. A PERSECUTION COMPLEX

Which brings us to a further element of the American mind-set that influences its international

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Nov 1997) A19.

[8] On file with author; see also Scheffer AUS Policy on International Criminal Tribunals@ 13 (1998) *Am Univ Int=l L Rev* 1389 1399; Scheffer AThe United States and the International Criminal Court@ 93 (1999) *AJIL* 12 18-9.

[9] AGoldstone: US Stance Contradictory@ 3 (17 June 1998) *Terra Viva*.

policies; that is, a certain paranoia, a perception of being the target of international envy and persecutionCwhich evidently gained revived impetus from the terrorist onslaught of September 11th.

The persecution syndrome clearly filtered through in American reasoning regarding the international criminal court; the fear that American nationals will be singled out for frivolous investigations and prosecutions. It should be noted, though, that an American national can only be prosecuted in the ICC without the consent of the American government for the crime of genocide, a crime against humanity, or a war crime if the crime was committed on the territory of a foreign country that has ratified the ICC Statute or has agreed on an *ad hoc* basis to the exercise of jurisdiction by the ICC in the particular case.[10] The ICC Statute furthermore contains numerous precautions against unwarranted investigations. Power of the Prosecutor to initiate an investigation *proprio motu* is, for example, subject to judicial control.[11] And most importantly, the jurisdiction of the ICC is complementary to that of national criminal justice systems of countries with a special interest in the matter under investigation. The first right and duty to bring perpetrators of the crimes within the jurisdiction of the ICC to justice vest in national courts. ICC jurisdiction can only be triggered if the national authorities are either unwilling or unable to bring the perpetrator to justice.[12] All statesCthat is, any state and not only states parties to the ICC StatuteCcan foreclose the exercise of jurisdiction by the ICC by simply conducting a *bona fide* investigation into allegations of wrongdoing by a national of that state.[13] If following an investigation, the national state should decide not to proceed with a prosecution for lack of probable cause, that=s it: the ICC cannot step in but must abide by the sovereign exercise of the investigatory prerogative of the municipal administrators of justice.

The United States most certainly has much to be proud of and is indeed the envy of many people in the world. Its economic prosperity, military might, scientific excellence, the technological achievements of its people, and much more have placed it above the best of all times. Everyone will agree that America is the land of opportunities. It has been said that the percentage of church-going citizens in the United States by far exceeds that in all the other countries of the world with a predominantly Christian population. To me, having been raised in a plural society where group-related rivalries had almost reached epidemic dimensions, a very special attribute of the American nation is its placing the predominance of being American above sectional alliances of its racial, ethnic, religious and linguistic components. Being American can rightly do a person proudCthat is, in many, many respects.

However, it is wrong to assume that wide-ranging envy of the many positive attributes and

[10] Statute of the International Criminal Court art 12.

[11] *Id* art 15(3).

[12] *Id* art 17.

[13] *Ibid*.

achievements of the United States is a malleable tool to be abused in a wide-ranging campaign to disadvantage American nationals. Acts of terror committed against American targets do of course require special precautions to limit the risks of their repetition, but the typical perception of persecution entertained by those engineering American foreign relations goes well beyond the fear of military interventions or terrorist attacks.

5. PROMOTION OF AMERICAN SELF-INTERESTS

American foreign policy is also conditioned by a strong commitment to place the perceived interests of the United States above considerations of international cooperation and the rule of law. During the election campaign of 2000, Condoleezza Rice, currently Secretary of State in the Busch administration, lamented the fact that some Americans seem to think that the exercise of power by the United States should be guided by Ahumanitarian interests@ or Athe interests of >the international community=,@[14] and promised that the foreign policy of a Republican government Awill ... proceed from the firm ground of the national interest, not from the interests of an illusionary international community.@[15]

Promoting the self-interests of one=s own country is in principle quite commendable. Doing so to the detriment of others or in violation of international law is a different matter. There is also ample evidence to suggest that political gain of persons in authority is often interpolated to simulate the best interests of the entire community. American foreign policy is at times no exception to this rule.

The United States has furthermore become notorious for taking action in its short-term interests with quite devastating long-term consequences. Its support for the *muj˜hid’n* (Muslim rebels) of Afghanistan in their struggle against the Soviet occupation (1979-1989) thus paved the way for the Taliban to take over political control of the country. When the United States offered military support to Iraq in its war against Iran (1980-1988), it had no regard for the fact that Iraq was actually the invading aggressor and furthermore turned a blind eye to conspicuous atrocities committed by Saddam Hussein. What was perceived at the time to be in the best interest of the United States turned out to have become an American night mare.

6. A MESSIANIC WORLD MISSION

A further determinant of American foreign policy worth mentioning is the belief in a missionary calling of the United States to save the world from repressive regimes.

Self-accreditation of being God=s chosen nation is deeply imbedded in the political history of the United States. There has always been a distinctly militant component to the assumption by

[14] Condoleezza Rice APromoting the National Interest@ 79.1 (1999) *Foreign Affairs* 45 47.

[15] *Id* 62.

the United States of a missionary calling for bringing Abarbarism@ in the world to its kneesCone that does not seek compliance with the UN Charter or the approval or acquiescence of the international community of states but would prompt the United States to take up arms on its own initiative.

In its most radical extreme, the commitment to military intervention is commonly referred to as Athe Reagan doctrine@. In an address to the Security Council of the United Nations on 20 January 2000, Senator Jesse Helms (R-NC) explained:

> In the United States during the 1980's, we called this the Reagan Doctrine. In some cases, America has assisted freedom-fighters around the world who are seeking to overthrow corrupt regimes.
>
> We have provided weaponry, training and intelligence. And in other cases, the United States has intervened directly.
>
> And in other cases, such as in Central and Eastern Europe, we supported peaceful opposition movements with moral, financial and covert forms of support.
>
> But in each case, it was America=s clear intention to help bring down communist regimes that were oppressing their peoples, and thereby, replace the dictators with democratic governments.
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> The democratic expansion of freedom in the last decade of the 20th century is a direct result of those policies.
>
> In none of those cases, however, did the United States ask for, or receive, the approval of the United Nations to legitimize its actions. And it=s a fanciful notion that free peoples need to seek approval of an international body, some of whose members are totalitarian dictatorships, to lend support to nations struggling to break the chains of tyranny and claim their inalienable God-given rights.
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> The United Nations ... has no power to grant or decline legitimacy to such actions They are inherently legitimate.[16]

In an address delivered at Whitehall Palace in London on 19 November 2003 on the United States= Iraqi policy, President George W Bush referred to the Aliberty deficit@ in the Middle East and identified a Acommitment to the global expansion of democracy@ as a Apillar of security@ to be pursued, adding:

> We will use force when necessary in the defense of freedom. And we will raise up an ideal of

[16] Reprinted in *The New York Times* of 21 January 2000 <http://www.nytimes.com> .

democracy in every part of the world.[17]

When President Woodrow Wilson in 1917 proclaimed that A[t]]he world must be made safe for democracy,@[18] he was speaking in the context of democracies having been placed in peril due to aggressive expansionism. Those words were not intended to substantiate offensive military action to achieve the noble cause of good governance. The International Court of Justice in the *Nicaragua Case* of 1986 decisively condemned Athe Reagan doctrine@ when it decided that the provision of weapons or logistical or other support by the United States to rebel forces seeking to overthrow their own government constituted an Aarmed attack@ and amounted to the threat or use of force, or intervention in the internal affairs of other states, in violation of international law.[19] The *Nicaragua Case* is also authority for the proposition that being involved in Aindirect aggression@Cthat is, the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another stateCis a violation of a rule of customary international law.[20]

It is perhaps also important to emphasize that international support could serve as the guide for distinguishing between military operations conducted under the banner of a morally defensible norm, and those prompted merely by considerations of the belligerent=s own national interests. For that very reason, the United Nations, and not the United States, has been charged with promoting the basic human rights and fundamental freedoms of all the peoples of the world, and has been established as the sole institution with authority to take action for the maintenance of international peace and security. Implementing sanctions, and taking armed action, as a means of dealing with a threat to the peace, a breach of the peace or an act of aggression, were deliberately subjected to tedious procedures centered upon the veto power of the five super powers, exactly so that those retributory measures will not lightly be undertaken. The difficulty of obtaining the required support for the exercise of those powers must not be taken to legitimize unilateral action in cases where the formalities have not or cannot be complied with.

7. A SENSE OF SELF-RIGHTEOUSNESS

American exceptionalism and a self-assumed missionary political calling are founded on an

[17] APresident Bush Discusses Iraq Policy at Whitehall Palace in London: Remarks by the President at Whitehall Palace Royal Banquet HouseCWhitehall Palace London, England@ http://www.whitehouse.gov/news/release/20031119-1.html

[18] AAddress delivered to a joint session of Congress, 3 April 1917" (eds) Baker & Dodd *The Public Papers of Woodrow Wilson, vol. 1; War and Peace* 6 14 (1927).

[19] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America): Merits* 1986 *ICJ* 103 par 196.

[20] *Id* par 195.

immodest sense of self-righteousness. The International Religious Freedom Act of 1998[21] may be singled out here to make the point.

The Act, among other things, authorizes the President to impose all kinds of punitive measures against states which, in the opinion of a politically appointed commission, violate certain basic principles of religious freedom, including in the case of Aparticularly severe violations of religious freedom@ as defined in the Act,[22] economic sanctions of various kinds.

The International Religious Freedom Act raises several constitutional issues. Through its Aentanglement@ with matters of religion in virtue of the Act, the American government is required to engage in conduct on the international level which it is constitutionally prohibited from doing domestically. Applying a religious test for selecting members of the Commission assigned to administer the Act is furthermore unconstitutional in virtue of Article VI paragraph [3] of the Constitution of the United States. From the perspective of sphere sovereignty, the Act is censurable for affording to a *political* institution the competence to evaluate and to judge the propriety of *religious* dogma and practices.

For a political institution to engage in a dialogue with foreign governments regarding practices founded on religious scruples is furthermore no easy task. Religious convictions and the conduct emanating from such convictions are not susceptible to rational discourse. Faith in the religious sense is the acceptance without question of phenomena that cannot reasonably be demonstrated, and the norms that underpin religious practices require blind obedience from all persons belonging to the particular faith community. Religious scruples are based on conviction and can best be addressed by adversaries through the medium of persuasion. In the domain of religious conviction, sanctions are not the answer and could in fact be counter productive. Sanctions can at best become a tool of reform in cases of human rights violations if their sponsors patently occupy the moral high ground. In matters of religion, there is no clearly identifiable moral high ground beyond the one claimed by every religious sect in adversarial argument.

Unbecoming religious practices imposed by state legislation ought indeed not to be tolerated, but for one state to take unilateral action against others perceived by it to be at fault is not the way to go. The appropriate platform on which repressive practices of states founded on religious predilections ought to be addressed is one within the international arena.

8. Translating Policy into Action

[21] Pub L No 105-292 (2 Oct 1998), 112 Stat 2787 (codified in scattered sections of 22 *USC*).

[22] 22 USC ' 6402(11) (1998):@[S]ystematic, ongoing, egregious violations of religious freedom, including violations such asC(A) torture or cruel, inhuman, or degrading treatment or punishment; (B) prolonged detention without charges; (C) causing the disappearance of persons by the abduction or clandestine detention of those persons; or (D) other flagrant denial of the right to life, liberty, or security of persons.@

The notion of being something special that warrants isolationism from the outside world and exceptional privileges and immunities within the world community; the perception of being on the receiving end of wide-ranging hostile action in virtue of resentments of the victim country=s national excellence; a commitment to place short-term interests of the United States above everything else; a national calling to topple unbecoming governments and impose democratic structures of state authority on recalcitrant regimes; and a sense of self-righteousnessCthe terms of reference of American foreign policy, recorded here in no particular orderCare all founded on historical roots that penetrate deeply into the Graeco-Roman, Christian and Enlightenment influences upon the immigrants who were destined to become definitive forces of an American mind-set.[23] Manifestations of that mind-set in contemporary international relations are a matter of profound concern. Consider the following examples:

(a) In 1984, when the International Court of Justice asserted jurisdiction to hear a complaint brought by Nicaragua based on military and logistical support by the United States to the Contras seeking to overthrow the government of the Applicant State,[24] the United States responded by withdrawing from further proceedings in the case, terminated the automatic jurisdiction of the ICJ in regard to international disputes to which the United States is a party, and has since then consistently refused to subscribe to or accept the jurisdiction of the Court.[25]

(b) The United States almost as a matter of course declines to comply with its obligation under the Vienna Convention on Consular Relations to inform the consulate of a foreign country whenever a national of that country has been indicted to stand trial in the United States for a criminal offence. It has on three occasions been condemned in the ICJ for these violations of its treaty obligation, once in regard to a citizen of Guatemala, once in regard to two nationals of Germany, and in the most recent case involving 52 Mexicans.[26] The United States, with the support of the US Supreme Court,[27] ignored provisional measures ordered by the ICJ not to proceed with executions of the convicted persons pending a final decision of the Court.[28] The

[23] See Skillen *With or Against the World? America=s Role Among the Nations* (2005).

[24] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America): Jurisdiction and Admissibility* 1984 *ICJ* 391.

[25] Matters involving the United States which have been brought before the ICJ subsequent to that date were based on consent of the United States contained in treaties that preceded the 1984 judgment.

[26] *Case Concerning the Vienna Convention on Consular Relations (Paraguay v United States)* 1998 *ICJ* 99; *LaGrand Case (Germany v United States)* 1999 *ICJ* 103; Avena & Other Mexican Nationals (Mexico v United States) 2003 *ICJ* 2.

[27] *Breard v Green* 523 US 371 (1998); and see also *Federal Republic of Germany v United States* 526 US 111 (1999).

Guatemalan citizen and one of the German nationals were executed while their case was pending before the ICJ, while the other German national was executed the day after judgment was given against the United States[29] and in defiance of an order of the Court to stay the execution pending a re-trial following compliance by the United States with the Vienna Convention.

On 28 February 2005, President Bush, in response to the ICJ's judgment in the Mexican case issued the following Presidential Determination:

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligation under the decision of the International Court of Justice in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena), 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[1]

However, on 1 April 2005, immediately after the above Presidential Determination, the United States informed the Secretary-General of the United States of its withdrawal from the Protocol to the Vienna Convention on Consular Relations under which disputes emanating from the Convention must be submitted to the ICJ. A spokesperson for the State Department explained that withdrawal from the Protocol was prompted by "foreign interference in the domestic capital justice system" of the United States.[2]

The United States was on several occasions similarly condemned by the Inter-American Commission of Human Rights for non-compliance with the Vienna Convention. The Commission noted that Aa hightened level of scrutiny@ is called for in all capital cases, that non-compliance with the Vienna Convention constituted a violation of the rules and principles of the due process of law, and that failure to comply with the Vienna Convention amounted to arbitrary deprivation of the right to life of the convicted person.[3]

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[28] *Case Concerning the Vienna Convention on Consular Relations (Paraguay v United States)* 1998 *ICJ* 99; *LaGrand Case (Germany v United States of America) (Request for the Indication of Provisional Measures)* 1999 *ICJ* 9.

[29] *LaGrand Case (Germany v United States of America) (Judgment)* 2001 *ICJ* 466.

[1] Presidential Determination, March 30, 2005.

[2] Liptak "U.S. Says It Has Withdrawn From World Judicial Body" *New York Times* (10 March 2005) A14.

[3] *Ramón Martinez Villareal v United States of America* Report No 52/42, Case No 11.753, par 51 52 70 (10 Oct 2002); see also *Cesar Fierro v United States of America*, Report No 99/03, Case No 11.331 (29 Dec 2003) (noting that should the convicted person be executed, it would constitute an arbitrary deprivation of his right to life).

(c) In 1990, Willie L Celestine, who had been sentenced to death in the United States on charges of first-degree murder, brought an application before the Inter-American Commission on Human Rights, claiming among other things that the death penalty was applied in the United States on a racially discriminatory basis.[4] He was executed while the case was pending before the Commission.

(d) The United States has also been condemned by the Inter-American Commission on Human Rights in 1987 for not upholding the principle of equal protection of the laws in regard to capital punishment. The Commission said in this regard:

> For the federal Government of the United States to leave the issue of the application of the death penalty to juveniles to the discretion of State officials results in a patchwork scheme of legislation which makes the severity of the punishment dependent, not, primarily, on the nature of the crime committed, but on the location where it was committed. Ceding to state legislatures the determination of whether a juvenile may be executed is not of the same category as granting states the discretion to determine the age of minority for the purpose of purchasing alcoholic beverages or consenting to matrimony. The failure of the federal government to preempt the states as regards the most fundamental rightCthe right to lifeCresults in a pattern of legislative arbitrariness throughout the United States which results in the arbitrary deprivation of life and inequality before the law, contrary to ... the American Declaration on the Rights and Duties of Man ...[5]

The Inter-American Commission on Human Rights entertained several applications concerning juvenile executions in the United States. The Commission decided that an international norm has emerged, as a matter of *ius cogens*, establishing 18 years as the minimum age at which individuals are liable to face the death penalty.[6] Here, too, the United States proceeded with the execution of juveniles in spite of precautionary measures recommended by the Commission not to do so while the matter remained in dispute.[7] The Commission held that the executions

[4] IACHR, Resolution 23/89, Case No 10/031 (United States) *Annual Report of the Inter-American Commission on Human Rights, 1989-1990* OEA/Ser L/V/II/77 rev 1 doc 7, 63-73 (17 May 1990).

[5] IACHR, Res 3/87 (United States) *Annual Report of the Inter-American Commission on Human Rights, 1985-1987* OEA/Ser L/V/II/71 rev 1 doc 9, original Spanish at 148 (22 Sept 1987).

[6] *Michael Dominique v United States of America* Report No 62/02 Case No 12.285, par 64 83 85 (22 Oct 2002).

[7] Napoleon Beazley v United States of America Report No 101/03, Case No 12.412 (29 Dec 2003); Douglas Christopher Thomas v United States of America Report No 100/03, Case No 12.240 (29 Dec 2003); Gary T Graham, now known as Shaka Sankefa v United States of

amounted to violation of the juvenile's right to life and recommended that compensation be paid to their next of kin. In the latest case, the juvenile had already been executed before the matter was brought before the Commission. The Commission nevertheless ruled that the case was admissible for adjudication before the Commission.[8]

On 1 March 2005, the US Supreme Court in *Roper v Simmons* proclaimed juvenile executions to be unconstitutional.[9] Although six of the judges (including one who concurred in the dissent) took international standards into account, no one of the judges referred to any of the cases that condemned the practice of juvenile executions in the United States.

(e) The United States stands accused of having embarked on the war in Iraq in indisputable violation of international law and in blatant defiance of the United Nations.[10] Its reasons for doing so are, to say the least, quite dubious. Its act of aggression has thus far taken the lives of thousands of people, mostly non-combatant civilians. It has plunged a relative peaceful communityCalbeit under the iron fist of dictatorial ruleCinto a state of turmoil and anarchy. Instead of combating terrorism, the United States and its allies have on the contrary created a fertile field for the cultivation of terrorism.

Refusal of the United States to afford prisoner-of-war status to person held captive in Guantanamo Bay furthermore clearly violates the Third Geneva Convention on the Protection of Prisoners of War, and the methods of interrogation of those captives are, to say the least, highly questionable.

(f) The United States is currently engaged in a malicious campaign to discredit and to undermine the International Criminal Court simply because drafters of the Rome Statute refused to render American nationals immune from prosecution in the Court for crimes against humanity and the

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America Report No 97/03, Case No 11.193 (29 Dec 2003); see also Cesar Fierro v United States of America Report No 99/03, Case No 11.331 (29 Dec 2003) (the Commission holding that should the applicant be executed, it would constitute an arbitrary deprivation of life).

[8] *Tracy Lee Housel v United States of America* Report No 16/04, Petition No 129/2002 (27 Feb 2004).

[9] *Roper v Simmons*, 161 L. Ed. 2d 1 (2005). In *Stanford v Kentucky* 492 US 361 (1989), the US Supreme Court had set the minimum age at which a juvenile may be sentenced to death at 16 years. On the same day, the US Supreme Court decided that mentally retarded persons were not exempt from capital punishment (*Penry v Lynaugh* 492 US 302 (1989)). The Court subsequently reversed this decision, holding that executions of the mentally retarded constituted cruel and unusual punishment and was therefore unconstitutional (*Atkins v Virginia* 536 US 304 (2002)).

[10] *See* in greater detail, Van der Vyver A*Ius Contra Bellum* and American Foreign Policy@ 28 (2003) *SAYBIL* 1.

most serious of war crimes.[11] John Bolton, who was to become Under Secretary of State for Arms Control and International Security and is currently the nominee to become the United States= ambassador to the United Nations, thus proclaimed:

> [W]hether the ICC survives and flourishes depends in a large measure on the United States. We should therefore ignore it in our official posture, and attempt to isolate it through our diplomacy, in order to prevent it from acquiring any further legitimacy or resources.[12]

Earlier, Senator Jesse Helms, at the time chair of the Senate Special Committee on Foreign Relations, writing in the *Financial Times* depicted the ICC as Aa threat to US national interests,@ adding that Ait is our responsibility to slay it before it grows to devour us.@[13]

And the list goes on.

9. CONCLUSION

In 1945, the United States and other founding members of the United Nations Organization Apledge[d] themselves to take joint and separate action in co-operation with the Organization@ to promote Auniversal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion;@[14] and it is not merely fortuitous that the American First Lady, Eleanor Roosevelt, chaired the Human Rights Commission which drafted the Universal Declaration of Human Rights to afford substance to the concept of human rights and fundamental freedoms referred to in the UN Charter.

The United States has sadly lost the incentive to honour that pledge. It, on the contrary, does not hesitate to challenge the authority of the United Nations or discredit international law whenever the powers that be in Washington DC consider that authority or the decrees of that law to contradict their self-assumed and often short-sightedly perceived interests.

American imperialismCa certain variety of neo-colonialismCis not aimed at ruling the world or any part thereof beyond the national borders of the United States. Nor is it truthfully inspired by humanitarian concerns or a desire to impose American democracy, or any variety thereof, on

[11] Van der Vyver The International Criminal Court: American Responses to the Rome Conference and the Role of the European Union (2003).

[12] Bolton ACourting Danger, What=s Wrong With the International Criminal Court@ 54 (Winter 1998/99) *The National Interest* 60 71.

[13] Helms AWe Must Slay This Monster: Voting Against the International Criminal Court is Not Enough. The US Should Try to Bring It Down@ *Financial Times* (31 July 1998) 18.

[14] UN Charter arts 55 56.

communities subject to a dictatorship or group-related discrimination. Where the target country singled out by the United States for diplomatic pressure, economic sanctions or military intervention happens to be in the grips of undemocratic rule, a denial of basic freedoms or sectional repression, those contingencies of unbecoming governmental practices will be exploited to afford a cloak of legitimacy to the American offensive, and to substantiate the widely held perception in the United States that American self-interests coincide with the best interest of the international community of states.

The superiority of the United States in respect of military capabilities can not be disputed. However, superiority should take on the form of leadership within the confines of the international legal order and not of domination. If the United States, as the only remaining super power, were to be entrusted with the responsibilities of international peace-keeper and promoter of democratic values, it ought to execute those responsibilities on the basis of internationally defined norms for the peaceful co-existence of states and not with its national self-interests as the only guide. It should submit itself to the norms it seeks to enforce and not undermine the rule of international law by seeking to place itself above the law.

Two further comments will suffice in response to the current demonstration of might in American foreign policy: (a) Typically, brute force and instilling fear of reprisals are the strategy of dominance resorted to by persons in authority who cannot muster support for a preferred program of action through the moral appeal of their cause; and (b) Unassailable power in political confrontation or armed conflict will never succeed in subverting terrorism but on the contrary invites acts of terror violence as a strategy of ideological rivalry.

SECOND LECTURE

RATIFICATION OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Since the dawn of Western thought, political science to a large extent remained focused upon finding strategies and devices to constrain the exercise of political power, because power does tend to corrupt[15] As articulated by Emil Brunner, "To possess power is a constant temptation to abuse power."[16]

Over the years, many commendable constitutional strategies for the curtailment of political power and in the interest of justice have indeed been constructed that might serve to restrict the abuse of state authority. Those strategies include[17] the institution of representative political rule and popular control of government in a democratic dispensation; decentralization of the instruments of government and the devolution of power in a federal structure with autonomous regional and local bureaucracies; distribution of political functions through the separation of powers; limiting the enclave of political authority by proscribing state interference in the private lives of individuals and in the internal affairs of institutions other than the state in accordance with the principle of sphere sovereignty; surveillance of administrative acts of the government by an ombudsman so as to ensure that the interests of the public are properly considered and duly protected; confining the powers of persons in authority, in accordance with the rule of law, to clearly and meticulously defined and statutorily enacted legal entitlements; and shielding through a bill of rights an

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[15] J.E.E. DALTON-ACTON, ESSAYS ON FREEDOM AND POWER, 364 (ed.) G. Himmelfarb (1949) (stating: "Power tends to corrupt, and absolute power corrupts absolutely").

[16] EMIL BRUNNER, JUSTICE AND THE SOCIAL ORDER, 188 (translated by M. Hottinger) (1945).

[17] *See* J.D. van der Vyver, *Political Power Constraints and the American Constitution*, 104 SOU. AFR. L.J. 416, 417-32 (1987).

enclave of fundamental freedoms of the citizen from legislative and executive interference.

The directives of good governance never penetrated the exercise of power in international relations. Until well into the twentieth century, international relations, by contrast, were conditioned by a fairly absolute notion of state sovereignty, and it is only in our day and age that the rule against aggression, the right to self-determination of peoples within a political community, international concerns for the protection of human rights and fundamental freedoms, the manifestation of trans-national interests in the preservation of a clean and healthy environment, the exercise of universal jurisdiction to bring perpetrators of the most heinous international crimes to justice, and the like, culminated in a rapid decline of the national sovereignty of states.[18]

However, the implementation of such international norms has remained dubious, firstly because international relations are almost invariably conditioned by considerations of national self-interest and seldom, if ever, by truly altruistic concerns; and secondly, because there is no equal justice in the international arena. In the relationships between states, power trumps the implementation of retributive justice, rendering the super powers a law onto themselves.

Nor have efforts of the United Nations to resolve international disputes by non-aggressive means, and to subject punitive and restorative interventions for humanitarian ends to Security Council control, proved successful in restraining the powerful nations, on the international level, from taking the law into their own hands. The only truly effective power constraint has been the balance of power between potent political adversaries.

In these circumstances, the emergence of a single super power is rather frightening; and the fact that the United States has been singled out as that super power does not make it less so. For a foreign observer, the policies and practices of the United States in the arena of international relations are quite confusing. Its

[18] *See* Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY L. REV. 321, 420-43 (1991).

foreign policy fluctuates between the seemingly contradictory forces of engagement and isolationism. On the municipal level, the United States has gained a long-standing reputation for a constitutional dispensation that was creative in its original design and remained a model of political propriety in the substance of its most fundamental guarantees. Yet, in international legal relations, the United States belies those very same principles of justice and equity to which it owes the acclaim and the envy of the international human rights community.

Although the United States engages actively in the drafting of multi-national treaties to constrain unbecoming conduct of individuals and nations, it insists on singling itself and its nationals out from enforced compliance with those norms. The United States claims a right to be above the dictates of international law. American exceptionalism has thus become the name of the game.

The United Nations Organization was established in 1945 on the basis of "faith in fundamental human rights."[19] It furthermore committed itself to promoting "*universal* respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[20] Member States solemnly pledged themselves "to take joint and separate action in co-operation with the Organization" for the achievement of that commitment.[21]

The United States has acted in violation of its solemn pledge, as a Member State of the United Nations Organization, to take *joint and* separate action for the promotion of *universal* respect for, and observance of, human rights and fundamental freedoms (i) by not ratifying some international instruments for the protection of human rights and fundamental freedoms and, in respect of the ones which it did ratify, by refusing to abide by any provisions which deviate from

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[19] CHARTER OF THE UNITED NATIONS, Preamble, 59 Stat. 1031, T.S. No. 993, 1976 Y.B.U.N 1043, *reprinted in* 3 BEVANS 1153.

[20] *Id*., art. 55(c) (emphasis added).

[21] *Id*., art. 56.

practices sanctioned by existing American law; and (ii) by refusing to submit its own compliance with international human rights constraints to judicial scrutiny. The United States nevertheless (iii) assumed the right to judge and to take action against others who (in its own opinion) violate (its own perceptions of) the principles of human rights.

1. Becoming Part of the International Human Rights Community

The United States has been particularly reluctant in ratifying international human rights instruments. Its representatives often took an active part in the drafting of human rights treaties—mostly taking a particularly conservative stand, with its own internal political interests as a primary guide. Proponents of international human rights standard almost invariably pursue compromises that would satisfy American demands—if for no other reason, then simply because the United States happens to carry the purse for implementation expenditures. The result is quite often a mediocre convention with lukewarm enforcement procedures—and subsequently, when ratification is called for, Washington D.C. simply would not play ball!

The United States has in recent years—belatedly—ratified a number of international human rights treaties: the Convention on the Prevention and Punishment of the Crime of Genocide (1948)[22] in 1986;[23] the Covenant on Civil and Political Rights (1966)[24] in 1992;[25] the Convention against Torture and Other

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[22] Convention on the Prevention and Punishment of the Crime of Genocide, 27 U.N.T.S. 277.

[23] Cong. Rec. S1355-01 (daily ed., Feb. 19, 1986).

[24] Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368 (1967).

[25] 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

Cruel, Inhuman or Degrading Treatment or Punishment (1984)[26] in 1994;[27] the Convention on the Elimination of All Forms of Racial Discrimination (1965)[28] in 1994,[29] and most recently the two Protocols to the Convention on the Rights of the Child (2000) in 2003. Those Protocols deal with involvement of children in armed conflict and the sale of children, child prostitution and child pornography.

It is perhaps worth noting that the Convention on the Rights of the Child (1989)[30] has been ratified by all but two countries of the world. Those two countries are Somalia (which since 1992 has had no government that could ratify the Convention) and the United States. There are no indications that the United States intends ratifying the Convention soon. The United States, furthermore, seemingly has no intention whatsoever to ratify the Covenant on Economic, Social and Cultural Rights (1966),[31] and ratification of the Convention on the Elimination of All Forms of Discrimination against Women (1979)[32] has been on

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[26] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

[27] Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

[28] Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195.

[29] 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).

[30] Convention on the Rights of the Child, G.A. Res 44/25, Annex 44 U.N. GAOR, 44th Sess., Supp. (No.49), at 167, U.N. Doc. A/44/49, *reprinted in* 28 I.L.M. 1448.

[31] Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, *reprinted in* 6 I.L.M. 360 (1967).

[32] Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res 34/180, U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/180.

hold for a considerable time with seemingly again no prospect of that being done within the foreseeable future.

Ratification by the United States of the human rights covenant and conventions mentioned above was attended by a bundle of reservations, understandings and declarations (RUDs) the substance of which may be reduced to a single proposition: the United States shall abide by only those provisions compatible with the American constitution and which are in conformity with existing American law.

In her analysis of the RUDs that conditioned ratification by the United States of the Covenant on Civil and Political Rights, Christy Green speaks of "'Swiss cheese' treaty making"[33] and likens it to the Russian Matrioshkas—oblong wooden figures that can be twisted apart at the middle to reveal any number of smaller dolls—requiring interpreters "to penetrate layer upon layer of reservations, understandings, and declarations that pose progressively greater obstacles to achieving the goals of the treaty."[34] It has been said that ratification of the Genocide Convention by the U.S. Senate was merely "a symbolic act"[35] and that, by insisting on the so-called Sovereignty Package reflected in the RUDs[36] and given effect in the United States by the Genocide Convention

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[33] M. Christian Green, *The "Matrioshka" Strategy: US Evasion of the Spirit of the International Covenant on Civil and Political Rights*, 10 SOU. AFR. J. HUM. RTS. 357, 358 (1994).

[34] *Id*., at 358-59.

[35] LAWRENCE J. LE BLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION, 144. Durham/London: Duke Univ. Press (1991); and *see also id*., at 238.

[36] *Supra* note 15. As to the package of RUDs, *see* Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away With It*, 11 MICH. J. INT' L. 90 (1989-90); Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L &

Implementation Act (the Proxmire Act),[37] the Senate was determined to "reduce the convention to nothing more than a symbol of opposition to genocide"[38]—or in the words of Jordan Paust, "to gut the treaty of any meaningful effect."[39]

2. RATIFICATION POLICY OF THE UNITED STATES

Louis Henkin summarized as follows the "principles" upon which the U.S. Senate insists when it comes to the ratification of international human rights instruments:[40]

> 1. The United States will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the United States Constitution.
>
> 2. United States adherence to an international human rights treaty should not effect—or promise—change in existing U.S. law or practice.
>
> 3. The United States will not submit to the jurisdiction of the International Court of Justice to decide disputes as to the interpretation or application of human rights conventions.

COMP. L. 415, 482-88 (1998); Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT'L L.J. 286, 350-54 (1999).

[37] Genocide Convention Implementation Act, 102 Stat. 3045 (1988), 18 U.S.C.A., §§ 1091-93.

[38] LE BLANC, *supra* note 21, at 241.

[39] Paust, *supra* note 22, at 94; and *see also* Samantha Power, *The United States and Genocide Law: A History of Ambivalence*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 165, 166 (eds.) Sarah B. Sewall & Carl Kaysen. Lanham/Boulder/New York/Oxford: Rowman & Littlefield (2000) (noting that the American RUDs "significantly weakened the Convention").

[40] L. Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 A.J.I.L. 341, 341 (1995).

> 4. Every human rights’ treaty to which the United States adheres should be subject to a "federalism clause" so that the United States could leave implementation of the convention largely to the states.
>
> 5. Every international human rights agreement should be "non-self-executing."

(a) *The Constitutional Constraints*

It stands to reason that the internal or constitutional powers of any government must be exercised subject to existing constitutional constraints. However, the United States also elected to subject its international obligations to limitations that might be, or ought to be, of municipal significance only. In doing so, the United States has set a bad example that may be, and indeed often is, mimicked by countries whose respective constitutions, from the human rights point of view, leave much to be desired.

In the ratification document pertaining to the Genocide Convention,[41] the United States expressly proclaimed:

> That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

In subsequent ratification instruments, a similar provision was inserted as a Senate instruction that did not constitute part of the instrument of ratification as such;[42] and in case of the Torture Convention, the President of the United States was instructed not to deposit the instrument of ratification before having informed all existing and prospective ratifying parties to the Convention that the United States will not be required or permitted to pass legislation or take action

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[41] *Supra* note 9, Reservation I(2).

[42] *See* par. IV of the ratification instruments attending the Covenant on Civil and Political Rights (*supra*, note 11) and the Convention on Racial Discrimination (*supra*, note 15).

prohibited by its Constitution as interpreted by the United States.[43] The change of strategy was probably prompted by the reaction and adverse comments of several States Parties to the reservation in the Genocide ratification instrument proclaiming the supremacy of the United States Constitution.[44]

Reservations pertaining to certain particular constitutional guarantees include the protection of free speech and the proscription of cruel and unusual punishment.

The Covenant on Civil and Political Rights mandates States Parties to outlaw in their municipal legal systems any propaganda for war, and the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[45] The Convention on the Elimination of All Forms of Racial Discrimination directs States Parties to condemn all propaganda of racial superiority or of racial hatred and discrimination.[46] In view of First Amendment free speech jurisprudence, reservations were included in the concerned instruments of ratification to exclude the binding force of these provisions as far as the United States is concerned.[47]

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[43] *See* par. IV of the ratification instruments attending the Torture Convention (*supra*, note 13).

[44] *See* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS, 39. Cincinnati: Anderson Publishing Co. (1996).

[45] Covenant on Civil and Political Rights, *supra* note 10, art. 20.

[46] Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 14, art. 4.

[47] *Supra* note 11, Reservation 1(1), and *see also id*., Understanding III(2); *supra* note 15, Reservation I(1).

The Covenant on Civil and Political Rights[48] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[49] prohibit "cruel, inhuman or degrading treatment or punishment." The Eighth Amendment to the Constitution of the United States outlaws "cruel and unusual punishments" only. Here, again, reservations included in the instruments of ratification cut the international criteria down to the size dictated by American constitutional interpretations.[50]

The free speech reservations are unfortunate, but understandable. In the United States, the First Amendment freedoms for very special historical reasons manifest the *Grundnorm* of the entire system of constitutional rights protection.[51] However, that is not the case as far as the (limited) scope of the Eighth Amendment is concerned. It is reasonable to assume that ratification of the Covenant on Civil and Political Rights and of the Torture Convention without subordinating their "punishment or treatment" provisions to existing American jurisprudence might have inspired the further judicial development of the criminal justice system of the United States so as to bring it into conformity with international standards. The reservations in question were presumably intended, or would in any event serve, to stifle such development.

The Convention on the Elimination of All Forms of Racial Discrimination[52] in several of its provisions addresses discriminatory practices by persons and

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[48] *Supra* note 10, art 7.

[49] *Supra* note 12, art. 16.1.

[50] *Supra* note 11, Reservation I(3); *supra* note 13, Reservation I(1).

[51] *See* J.D. van der Vyver, *Constitutional Free Speech and the Law of Defamation*, in 112 SOU. AFR. L.J. 527, 593-94, 595 (1995); Johan D. van der Vyver, *Universality and Relativity of Human Rights: American Relativism*, 4 BUFFALO HUM. RTS. L. REV. 43, 60 (1998).

[52] *Supra* note 14.

institutions other than the state. For example, Article 2(1)(d) instructs States Parties "to bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any person, group or organization." The United States entered a reservation to this and other similar provisions, upholding the application policy of the U.S. Supreme Court founded on the notion of "state action."[53] This seems quite unnecessary, since there is authority for the proposition that instances of "private" racial discrimination do come within the confines of the Thirteenth (anti-slavery) Amendment, which is not hampered by a "state action" application criterion.[54] Many instances of racial discrimination in the private sphere have furthermore been outlawed in the United States by various Civil Rights Acts.

(b) *The Salience of Existing Laws and Practices*

The American RUDs go well beyond constitutionally defined limitations of state action. The United States will not bind itself to any human rights norm that contradicts, or is not precisely in conformity with, existing federal or state law, including federal and state law that have not been enacted to give effect to Bill-of-Rights directives.

Article 15.1 of the Covenant on Civil and Political Rights[55] proclaims that, should a lighter sentence for a particular offence be prescribed by law subsequent to the commission of that offence, the accused should be given the benefit of the lighter sentence. Not so in the United States. There the courts would normally impose the sentence that was in place at the time the offence was committed. A reservation upholding this practise, was entered by the United States.[56]

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[53] *Supra* note 15, Reservation I(2).

[54] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[55] *Supra* note 10.

[56] *Supra* note 11, Reservation I(4).

In the United States, juvenile offenders may be tried as though they were adults at the time a particular crime was committed—and it might be added that the nature of the crime, rather than the mental capacity of the accused, serves as the sole criterion in this regard. A reservation to American ratification of the Covenant on Civil and Political Rights endorsed the intention of the United States to uphold this practice.[57]

The United States is adamant to retain the death penalty,[58] including juvenile executions.[59]

The United States would not unconditionally commit itself to separating detainees awaiting trial from convicted prisoners;[60] and whereas international directives emphasize reformation and social rehabilitation as legitimate penitentiary objectives,[61] the United States persisted in also applying punishments as a deterrent and as a means of incapacitating prisoners.[62]

In general, the protection to be afforded to juveniles in terms of the Covenant on Civil and Political Rights[63] will not apply, as far as the United States is concerned, to persons under the age of 18 years who volunteered for military service.[64]

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[57] *Id*., Reservation I(5).

[58] *Supra* note 13, Understanding II(4).

[59] *Supra* note 11, Reservation I(2).

[60] *Id*., Understanding II(3).

[61] *See* Covenant on Civil and Political Rights, *supra* note 10, art. 10.3.

[62] *Supra* note 11, Understanding II(4).

[63] Covenant on Civil and Political Rights, *supra* note 10, arts. 10(2) and 14(4).

[64] *Supra* note 11, Reservation I(5).

(c) *Jurisdiction of International Tribunals*

In 1946, the United States submitted to the compulsory *ipso facto* jurisdiction of the International Court of Justice (ICJ) in terms of Article 36(2) of the Statute of the ICJ,[65] which means in effect that international disputes between the United States and any other state that was also subject to the compulsory *ipso facto* jurisdiction of the ICJ could be brought before that Court by either party without any further agreement. Following the assumption of jurisdiction by the ICJ in the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*[66]—a case in which the United States was the respondent—the United States declined to participate in the further proceedings of that case,[67] and on October 7, 1985, President Ronald Reagan terminated the compulsory jurisdiction of the ICJ over the United States with effect six months from that date. The United States could henceforth on an *ad hoc* basis agree to the jurisdiction of the ICJ in any international dispute to which it is a party.

Some international human rights treaties, including the Genocide Convention and the Convention on the Elimination of All Forms of Racial Discrimination, make provision for disputes between States Parties emanating from the treaty to be referred to the ICJ. The United States will have nothing of it, but may agree on an *ad hoc* basis to submit itself to ICJ jurisdiction.[68] The arbitration clause in the

[65] Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993, *reprinted in* 3 Beavans 1179.

[66] Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), 1994 I.C.J. 391 (26 November 1994).

[67] *See* Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), 1995 I.C.J. 1 (22 January 1995).

[68] *See* Reservation I(1) to the Genocide Convention (*supra* note 9); and *see also id*., Understanding II(5); Reservation I(3) to the Convention on the Elimination of All Forms of Racial Discrimination (*supra* note 15).

Torture Convention is also not binding on the United States.[69]

These reservations are most unfortunate. In the early 1950's, the ICJ was called upon to decide whether reservations to the Genocide Convention were at all feasible. The Court advised that they were, provided a particular reservation did not defeat the object and purpose of the Convention.[70] Although reservations to the Genocide Convention entered by the United States do not nullify the Convention's objectives,[71] they do deprive the Convention of its enforcement life-line.[72] The same applies to conditions under which the United States ratified—and could escape enforcement of—the Convention on Racial Discrimination and the Torture Convention. Louis Henkin strongly condemned the United States for having refused to subject itself to international adjudication.[73]

Following a judgment of the ICJ condemning the United States for not upholding its duty under a Protocol to the Vienna Convention on Consular Relations in the case of 51 Mexicans who had been sentenced to death, President Bush, on 31 March 2005 issued the following Presidential Determination:

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[69] *Supra* note 13, Reservation I(2).

[70] Reservations to the Convention on Genocide (Advisory Opinion), 1951 I.C.J. 13.

[71] *See* Nicholas F. Kourtis & Joseph M. Titlebaum, *International Convention on the Prevention and Punishment of the Crime of Genocide: United States Senate Grant of Advice and Consent to Ratification*, 1 HARV. HUM. RTS. Y.B., 227, 231 (1988).

[72] *Id*., at 234; and *see also* Lawrence J. LeBlanc, *The ICJ, the Genocide Convention, and the United States*, 6 WISC. INT'L L.J. 43 (1987).

[73] Henkin, *supra* note 26, at 349.

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligation under the decision of the International Court of Justice in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena), 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[74]

However, on 1 April 2005, immediately after the above Presidential Determination, the United States informed the Secretary-General of the United States of its withdrawal from the Protocol to the Vienna Convention on Consular Relations under which disputes emanating from the Convention must be submitted to the ICJ. A spokesperson for the State Department explained that withdrawal from the Protocol was prompted by "foreign interference in the domestic capital justice system" of the United States.[75]

It should be noted, on the other hand, that the United States did submit to the (facultative) inter-State adversarial procedures provided for in the Covenant on Civil and Political Rights,[76] and the Torture Convention.[77] The inter-state adversarial procedure provided for in the Convention on the Elimination of All Forms of Racial Discrimination[78] is in any event not optional.[79]

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[74] Presidential Determination, Feb 28, 2005.

[75] Liptak "U.S. Says It Has Withdrawn From World Judicial Body" *New York Times* (10 March 2005) A14.

[76] *Supra* note 11, Declaration III(3). However, the United States did not ratify the Optional Protocol to the Covenant on Civil and Political Rights (1976), which makes provision for an individual complaints procedure.

[77] *Supra* note 13, Declaration III(2).

[78] Convention on the Elimination of All Forms of Racial Discrimination,

(d) *Federalism*

It has likewise become standard practice for the United States to enter RUDs aimed at safeguarding the states from intrusions on their areas of jurisdiction by the federal authorities through the treaty powers vested in the President and the Senate.[80]

The United States is perhaps in a unique position in the world today in that its federal (national) Bill of Rights does not deal comprehensively with the protection of basic human rights and fundamental freedoms. American federalism is furthermore the reverse of most systems for the devolution of political power. In the United States, the powers vested in the federal political authorities are circumscribed in the Constitution, and all residual powers vest in the (regional) state authorities. The protection of some of the most basic rights and freedoms of the individual has thus come to be the responsibility of the states.

This applies, among other things, to the protection of the most basic of all freedoms, the right to life. It is left to the states to authorize or to proscribe the death penalty; and it is within the province of the states to uphold juvenile executions and to determine at what age a person may become competent to be sentenced to death. Reservations and understandings in respect of the death penalty[81] and juvenile executions[82] have been entered with the federal

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supra note 14, art. 11.

[79] The United States did not subscribe to the facultative individual complaints procedure (art. 14) of this Convention.

[80] *See supra* note 11, Understanding II(5); *supra* note 13, Understanding II(5); *supra* note 15, Understanding II.

[81] *Supra* note 44.

[82] *Supra* note 45.

distribution of powers in mind.

Because different (regional) standards of protection in respect of certain basic human rights apply in the United States, the country has come under fire for denying to persons within its jurisdiction the equal protection of the laws. In the *Case of Roach and Pinkerton*,[83] the Inter-American Commission of Human Rights condemned juvenile executions in the United States for exactly that reason:

> For the federal Government of the United States to leave the issue of the application of the death penalty to juveniles to the discretion of State officials results in a patchwork scheme of legislation which makes the severity of the punishment dependent, not, primarily, on the nature of the crime committed, but on the location where it was committed. Ceding to state legislatures the determination of whether a juvenile may be executed is not of the same category as granting states the discretion to determine the age of majority for purposes of purchasing alcoholic beverages or consenting to matrimony. The failure of the federal government to preempt the states as regards this most fundamental right—the right to life—results in a pattern of legislative arbitrariness throughout the United States which results in the arbitrary deprivation of life and inequality before the law, contrary to Article I [the right to life] and II [the right to equality before the law] of the American Declaration of the Rights and Duties of Man, respectively.[84]

Federalism has also provided an excuse for the United States not to uphold the principle against double jeopardy in its internal criminal justice system. American courts have interpreted the federal structure of the United States to afford to different states as against one another, and to the union as against a state or a state as against the union, separate sovereign status. The dual sovereignty doctrine has led the U.S. Supreme Court to decided that successive prosecutions by two states for the same conduct are not barred by the rule against double

[83] Case 9647 (U.S. 1978), Inter-Am. C.H.R. 151, OEA/Ser. L/V/II.71, doc. 9 rev. 1 (22 September 1987).

[84] *Id*., par. 63.

jeopardy,[85] and that prosecution in the federal courts is not precluded by the conviction or acquittal of the same accused for the same conduct in a state court, or *vice versa*:[86]

> The dual sovereignty doctrine is founded on the common-law conception of crime as an offence against the sovereignty of the government. When a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences".[87]

Perhaps the most notorious case in which the double sovereignty doctrine was applied was the prosecution and conviction of police officers in a federal court for the assault of one Rodney King (which was caught on tape by a bystander) following their acquittal for the same conduct in a state court.[88]

Conviction or acquittal in a state court for a particular offence therefore does not render obsolete a second trial under the federal criminal justice system based on exactly the same set of facts, and *vice versa*. An Understanding in the document of ratification of the Covenant on Civil and Political Rights endorsed this deviation in the United States from the internationally recognized norm against double jeopardy (which precludes successive trials based on the same conduct).[89]

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[85] Heath v. Alabama, 474 U.S. 82, 88 (1985).

[86] United States v. Wheeler, 435 U.S. 313, 320 (1978); and *see also* United States v. Lanza, 260 U.S. 377, 382 (1922); Westfall v. United States, 274 U.S. 256, 258 (1927); Bantkus v. Illinois, 359 U.S. 121, 128-29 (1959); Abbate v. United States, 359 U.S. 187, 193-94 (1959).

[87] United States v. Lanza, *supra* note 70, at 382.

[88] The incident constituted the basis of the decision in Kroon v. United States, 518 U.S. 81 (1996)—though application of the dual sovereignty doctrine was not in dispute in that appeal.

[89] *Supra* note 11, Understanding II(4).

(e) *International Law as Part of the Law of the Land*

In the United States, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land."[90] In virtue of this provision, international treaties are, as a general rule, self-executing in the United States; that is to say, their provisions become part of the municipal law of the country without further ado. Self-executing treaties are subordinate to the Constitution, equal in status to federal law, and superior to state law: should a self-executing treaty provision be in conflict with the Constitution, then the treaty provision will be null and void in the United States; should the treaty provision contradict a federal law, the one later in date will remain valid; and a treaty provision will trump a conflicting state law.

A treaty will be self-executing if it is intended by the parties to create municipally enforceable rights and its provisions are sufficiently precise to be legally executed;[91] however, the status of international treaties (and customary law) within the municipal legal system of states is governed by the constitutional law of the state concerned, and not by international law. In the United States, certain considerations may render a treaty non-self-executing. For example, if the treaty addresses a subject-matter which by virtue of the Constitution falls within the jurisdiction of Congress,[92] or if the treaty requires action to be taken by the federal government,[93] then the treaty will not automatically become part of the municipal legal system.

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[90] U.S. CONST., art. VI.

[91] *See* Stefan A. Riesenfeld & Frederick M. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI-KENT L. REV. 293, 295 (1992).

[92] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES, § 111,cmt *i* (1987).

[93] Foster v. Neilson, 27 U.S. 253, 314 (1829).

In the 1950's, a certain Senator Bricker of Ohio proposed an amendment to the US Constitution that would have rendered all international treaties non-self-executing in the United States and would even have prevented congressional legislation to implement human rights treaties.[94] The Bricker Amendment was defeated, but, according to Louis Henkin, its ghost lived on and was resurrected by the package of RUDs which left "the Covenant [on Civil and Political Rights] without any life in the United States."[95]

It has become standard practice for the United States to add a Declaration to its instruments of ratification of human rights treaties rendering those treaties non-self-executing.[96] Nor has any effort been made to enact legislation that would incorporate any of the concerned human rights norms into the municipal law of the United States. The Genocide Convention Implementation Act[97] is perhaps an exception to the rule. But here, too, the provisions of the Act deviate in important respects from, for example, the internationally accepted definition of genocide. The element of *mens rea* as defined in the Genocide Convention, namely "intent to destroy, in whole or in part, a national, ethnical, racial or religious group," has been transcribed in the American legislation as "intent to destroy, in whole or in *substantial* part, a national, ethnical, racial or religious group" (emphasis added). The Genocide Convention Implementation Act furthermore restricts jurisdiction of federal courts of the United States to instances of genocide committed in the United States, and to acts of genocide committed by an American citizen abroad. Its ultimate effect is therefore to preclude the prosecution in the United States of foreign nationals who have committed acts of genocide in a foreign country, thereby seemingly rendering the

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[94] *See* Louis Henkin, *supra* note 26, at 348-49.

[95] *Id*., at 349.

[96] *See supra* note 11, Declaration III(1); *supra* note 13, Declaration III(1); *supra* note 15, Declaration III.

[97] Genocide Convention Implementation Act, *supra* note 23.

United States a safe haven for foreign perpetrators of genocide.[98]

3. CONCLUDING OBSERVATIONS

The ratification policy of the United States has been severely criticized by American human rights scholars[99] and NGOs.[100] Riesenfeld and Abbott noted that the RUDs insisted upon by the Senate as conditions for ratification of human rights treaties "threatens to undermine the credibility of U.S. participation in the international legal process."[101] Christy Green in the same vein observed:[102]

> The United States has been the target of international criticism not so much for its own violations as for its unwillingness to use its position in the world to set a good example for others. The United States has a role to play as a member of the vanguard of nations trying to advocate human rights not only in theory, but in practice. It should assume this role and work for the improvement of rights in the world community rather than grudgingly ratifying treaties, while at the same time concealing their goals within layer upon layer of qualifications.

It should also not pass unnoticed that, within the domestic arena of the American structures of power, the ratification strategies insisted on by the Senate in effect vests in the treaty-making apparatus of the State a competence to manipulate the

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[98] *See* Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations*, 39 VA. J. INT'L L. 425, 462, 464-65 (1999).

[99] *See*, for example, Louis Henkin, *supra* note 26; Christy Green, *supra* note 19.

[100] *See*, for example, Lawyers Committee for Human Rights, *Statement on U.S. Ratification of the Covenant on Civil and Political Rights*, 14 HUM. RTS. L.J. 125 (1993).

[101] Riesenfeld & Abbott, *supra* note 75, at 293.

[102] Green, *supra* note 19, at 370-71.

self-executing and non-self-executing character of human rights conventions[103]—and in so doing, to frustrate the constitutional directive proclaiming ratified treaties to be the supreme law of the land.[104] The package of RUDs also vests control over the interpretation of "the supreme law of the land" in the President and Senate.[105] There are—I am sure—some separation-of-powers arguments to be made here, but that can best be left to American constitutional experts to sort out.

Efforts of the United Nations to establish universal respect for and observance of human rights and fundamental freedoms have come under stress due to the emergence in recent years of the notion of cultural relativism. As defined by Ann Mayer, cultural relativism in general "condemn[s] the notion that there are universal standards by which all cultures may be judged and ... den[ies] the legitimacy of using values taken from Western culture to judge institutions of non-Western cultures."[106] Cultural relativists "also tend to oppose the idea that human rights norms are universal."[107]

There is a general tendency to assume that cultural relativism in international human rights perceptions is something essentially un-Western. Adamantia Pollis and Peter Schwab argues, for example, that the Western sources of human rights theories, and Western dominance in the formative years of the United Nations, deprive the concept of human rights of any claim to universality.[108] Jack

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[103] *See* Riesenfeld & Abbott, *supra* note 75, at 295-99.

[104] U.S. CONST. Art. VI.

[105] *See* Riesenfeld & Abbott, *supra* note 75, at 299-302.

[106] ANN.ELIZABETH.MAYER, ISLAM AND HUMAN RIGHTS, 8. Boulder/San Francisco: Westview Press; London: Pinter Publishers (1995).

[107] *Id*.

[108] Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct*

Donnelly presupposes that cultural relativism resides in (non-Western) "traditional communities," such as pre-colonial African villages, Native American tribes, and traditional Islamic social systems.[109] Kimberley Schooley seems to think that communitarianism—a strong group identity—is a *sine qua non* of relativist thinking within the human rights discourse.[110] Cultural relativism in the context of human rights protection is, however, perceived by probably most analysts of the concept as an invention of the Muslim world. In principle, though, American exceptionalism in regard to international human rights is as much a manifestation of the relativist position as that of any Muslim state.

It might well be that deviations from internationally recognized standards of human rights protection in the case of the United States are less reprehensible than those current in, for example, China or Arab states that insist on a relativistic approach to international human rights.[111] But that judgment is in itself informed by a Western bias. There is, as the other side of the coin, a body of opinion in the Muslim world maintaining that relative leniency in the penal policies of countries which emphasize procedural due process as the foundation of human rights protection, tends to promote rather than counteract violations of substantive human rights. Jurisprudentially, the American constitution may furthermore fall short of generally accepted norms of good government, as evidenced, for example, by the sweeping language of its Bill of Rights, substitution of judicial supremacy for the principle of constitutionality, unprincipled application jurisprudence founded on a slippery "state action" doctrine, inconsistencies in the

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with Limited Applicability, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES, 4 (eds.) Pollis & Schwab. New York: Praeger (1979).

[109]Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 410 (1984).

[110] Kimberley Jounce Schooley, *Cultural Sovereignty, Islam, and Human Rights—Toward a Communitarian Revision*, 25 CUMB. L. REV., 651, 679 (1994-95).

[111] *See* Christy Green, *supra* note 19, at 370.

interpretation policies of justices of the U.S. Supreme Court, and the sacrifice—through the joint effect of these constitutional characteristics—of the directive norms of legal certainty. In most instances, these shortcomings were indeed put to good use in order to arrive at a more or less judicious outcome. Nevertheless, if *universal* faith in human rights is to be the norm, then that must apply to the East and the West, to South and North—including the United States of America. Assuming that the United Nations standards of human rights protection are "Western" in nature, it is difficult to understand why the country perceived to be the leading force in that region of the world should experience problems with adhering to those standards.

THIRD LECTURE

AMERICAN EXCEPTIONALISM IN RESPECT OF INTERNATIONAL CRIMINAL JUSTICE

On June 15 through July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries was held in Rome, Italy, with a view to "finalizing and adopting a convention on the establishment of an international criminal court."[1] The Rome Conference was preceded by deliberations in New York of an *Ad Hoc* Committee (1995) and a Preparatory Committee (1996-1998), operating under a mandate of the General Assembly of the United Nations to refine a *Draft Statute for an International Criminal Court* that had been prepared by the International Law Commission (ILC).[2] The Rome Conference culminated in the approval, by majority vote,[3] of the text of the Statute of the International Criminal Court.[4] The Statute will enter into force following its ratification by 60 states. At the closing date (December 31, 2000), 139 countries, including the United States, have signed the ICC Statute, and as of date 29 states have deposited their instruments of ratification with the Secretary-General of the United Nations.

Jurisdiction *ratione materiae* of the International Criminal Court (ICC) has been confined to the crime of genocide, crimes against humanity, war crimes, and

[1] G.A. Res. 52/160 of 15 Dec. 1997 (annex), U.N. GAOR Supp. (No. 49), U.N. Doc. A/52/49, at 384, § 3.

[2] U.N. Doc. A/CONF.183/2/Add. 1 (14 April 1994).

[3] The ICC Statute was adopted by 120 votes in favor, 7 against (including China, India, Israel and the USA), and 21 abstentions.

[4] *Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (17 July 1998), reprinted in 37 I.L.M. 1002 (1998) (hereafter "ICC Statute").

(conditionally) the crime of aggression.[5] Its jurisdiction *ratione personae* and jurisdiction *ratione territorium* are based on the principle of nationality and territoriality: the ICC can only exercise jurisdiction if either the state of which the suspect is a national or the state on whose territory the crime was committed has either ratified the ICC Statute or has on an *ad hoc* basis accepted the exercise of jurisdiction by the ICC in the particular case to be prosecuted.[6] The jurisdiction of the ICC is furthermore complementary to that of national criminal justice systems: the ICC can only exercise jurisdiction if the state with custody of a suspect is either unwilling or unable to bring that person to justice;[7] and in deference to the right and duty of national states to prosecute the crimes within the jurisdiction of the ICC, preference is given to extradition of the suspect to a country with a special interest in the matter under an existing extradition treaty[8] or status-of-forces agreement.[9] Since the crimes within the subject-matter jurisdiction of the ICC are crimes under customary international law and subject to universal jurisdiction, the perpetrator can be prosecuted in the national courts of any state whose system of criminal procedure makes allowance for the exercise of universal jurisdiction, irrespective of the nationality of the perpetrator or the place where the crime was allegedly committed.[10]

The United States supported in principle the establishment of a permanent international criminal court, but subject to one overriding condition: the court was

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[5] *Id*., art. 5.

[6] *Id*., art. 12.

[7] *Id*., art. 17.

[8] *Id*., art. 90.

[9] *Id*., art. 98(2).

[10] *See* J.D. van der Vyver, *Universal Jurisdicition in International Law*, 24 SOU. AFR. Y.B. INT'L L. 107 (1999); Johan D. van der Vyver, *supra* note 22, at 319-36; Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, EMORY INT'L L. REV. 1, 37-65 (2000).

not to have jurisdiction over American nationals—at least not as far as crimes against humanity and war crimes are concerned. An editorial writer of the *New York Times* on one occasion referred to the American government's policy in regard to the ICC as a matter of "'everybody but us' justice"[11]—a position, she went on to say, "that would ... invite the other nations of the world to look at the court as something that the United States has designed for its own purposes."[12]

1. American Support for and International Criminal Court

The United States from the outset approached the establishment of an international criminal court with preconceived notions that can perhaps best be described as "cautious and indifferent."[13] It over time seemingly did become supportive of an international criminal tribunal.[14] The *Foreign Relations Authorization Act, Fiscal Year 1994 and 1995*, recorded as follows the "Sense of the Senate on the Establishment of an International Criminal Court":[15]

> (1) the establishment of an international criminal court with jurisdiction over crimes of an international character would greatly strengthen the international rule

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[11] Tina Rosenberg, Conference Convocation for War Crimes Tribunals: The Record and Prospects (March 31, 1998), in 13 AM. U. INT'L L. REV. 1406, 1408 (1998).

[12] *Id*., at 1409-10.

[13] Timothy C. Evered, *An International Criminal Court: Recent Proposals and American Concerns*, 6 PACE INT'L L. REV. 121, 157 (1994).

[14] *See* Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203, 226-27 (1998) (referring to statements of President Bill Clinton and U.S. Ambassador to the United Nations Bill Richardson in support of the ICC); David Stoelting, *Status Report on the International Criminal Court*, 3 HOFSTRA L. & POL'Y SYMP. 223, 276-82 (1999).

[15] Foreign Relations Authorization Act, Fiscal Year 1994 and 1995, sec. 517(b), H.R. 2333, 103rd Cong., 108 Stat. 382, at 469 (1994).

of law;
(2) such a court would thereby serve the interests of the United States and the world community; and
(3) the United States delegation should make every effort to advance this proposal at the United Nations.

The Senate did add that it would not ratify a treaty establishing the court "which permits representatives of any terrorist organization, including but not limited to the Palestine Liberation Organization, or citizens, national or residents of any country listed by the Secretary of State ... as having repeatedly provided support for acts of international terrorism, to sit in judgment on American citizens,"[16] or one that would not guarantee that the court would take no action infringing upon or diminishing the rights of American citizens under the First and Fourth Amendments to the Constitution of the United States, as interpreted by the United States.[17]

In his opening address at a conference on *Fifty Years After Nuremberg: Human Rights and the Rule of Law*, held at the University of Connecticut on October 15, 1995, the President of the United States said:[18]

By successfully prosecuting war criminals in the former Yugoslavia and Rwanda, we can send a strong signal to those who would use the cover of war to commit terrible atrocities that they cannot escape the consequences of such actions. And a signal will come across even more loudly and clearly if nations all around the world who value freedom and tolerance establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law.

On September 22, 1997, President Clinton in his address to the 52nd Session of the

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[16] *Id*., § 518.

[17] *Id*., § 519.

[18] 31.42 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1840, at 1843 (Oct. 23, 1995).

General Assembly of the United Nations reiterated these sentiments:[19]

> The United Nations must be prepared to respond [to the demands of people who do not enjoy universal human rights] not only by setting standards but by implementing them. To deter abuses, we should strengthen the U.N.'s field operations and early warning systems. To strengthen democratic institutions, the best guarantors of human rights, we must pursue programs to help new legal, parliamentary, and electoral institutions get off the ground. To punish those responsible for crimes against humanity and to promote justice so that peace endures, we must maintain our strong support for the U.N.'s war crime tribunals and truth commissions. And before the century ends, we should establish a permanent international court to prosecute the most serious violations of humanitarian law.

On 25 March 1998, while addressing the people of Rwanda at Kigali Airport and referring to the acts of genocide in that country, President Clinton said:[20]

[W]e must make it clear to all those who would commit such acts in the future that they too must answer for their acts ... Internationally, as we meet here, talks are underway at the United Nations to establish a permanent international criminal court. Rwanda and the difficulties we have had with this special tribunal underscore the need for such a court. And the United States will work to see that it is created.

However, the support of the United States for the establishment of a permanent international criminal tribunal was conditional upon the U.S. government being afforded the power to veto the prosecutions of American citizens before such a tribunal—a condition which President Clinton did not care to share with his audience in Connecticut, the United Nations or at Kigali Airport.

2. CONSIDERATIONS OF SUPPOSED NATIONAL SELF-INTEREST

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[19] 33.39 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1386, at 1389 (Sept. 29, 1997).

[20] 34.13 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 495, at 497 (March 30, 1998).

Speaking at the Commonwealth Club in San Francisco, California on May 13, 1998, David Scheffer, Ambassador at Large for War Crime Issues of the United States and leader of the American delegation in Rome, said it all quite bluntly:[21]

> The U.S. delegation has been and will continue to be guided by our paramount duty: to protect and advance U.S. interests.

The fact of the matter is, though, that American interests are not served by the position it has taken in regard to the ICC. The United States can gain absolutely nothing by not ratifying the ICC statute—except avoiding a financial contribution and not having to cooperate with the Court to bring perpetrators of the concerned international crimes to justice. American nationals cannot avoid liability for international crimes simply because the United States might decline to ratify the ICC Statute, because those crimes were not the creation of the Rome Conference. The universal jurisdiction of national courts over American citizens suspected of having committed any of the crimes within the jurisdiction of the ICC is likewise founded on an age-old principle of customary international law, and the jurisdiction of the ICC to prosecute perpetrators of genocide, crimes against humanity and war crimes is founded on indisputable and internationally recognized grounds, namely the jurisdictional principles of territoriality and nationality. By ratifying the ICC Statute, the United States will on the contrary become party to a commendable structure of international criminal justice and derive the right to be represented in the judicial and other organs of the Court. What troubles the United States is in reality not a matter of principle or of self-interest but of internal political expedience.

In an interview with the *Washington Post*, Ambassador Scheffer said that "[a]ny arrangement by which a U.N.-sponsored tribunal could assert jurisdiction to

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[21] David J. Scheffer, *Seeking Accountability for War Crimes: Past, Present and Future*, available on line at <http://www.state.gov/www/policy_remarks/1998/980513_scheffer_war_crimes.html>; and *see* Samantha Power, *The United States and the Genocide Law: A History of Ambivalence*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 165, at 172 (eds.) Sarah B. Sewall & Carl Kaysen. Lanham/Boulder/New York/Oxford: Rowan & Littlefield (2000).

prosecute Americans would be political poison in Congress."[22] And he was right. Senator Jesse Helms, Chairman of the Committee on Foreign Relations of the U.S. Senate, in a letter to the then Secretary of State Madeleine Albright, dated 26 March 1998,[23] while lamenting press reports indicating "that the United States is 'showing new flexibility' in its negotiating position on the creation of a new permanent U.N. International Criminal Court," stated quite emphatically:

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

The United States sought to exclude the jurisdiction of the ICC in respect of Americans through a wide range of options and proposals, which may be classified into two main categories: the one based on the assumption that the United States would ratify the ICC Statute, and the other on the assumption of its not doing so.

(a) *Securing American Demands through a Security Council Veto*

In the initial phases of the deliberations for the establishment of an international criminal court, the United States sought to safeguard its own nationals from prosecution in the ICC by insisting on Security Council authorization of all prosecutions in the ICC. That would enable the United States, as a Permanent Member of the Security Council, to veto decisions of the Council calling for the prosecution of an American national.

The United States was indeed willing to concede "inherent jurisdiction" of the ICC[24]

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[22] Thomas W. Lippman, *Ambassador to the Darkest Areas of Human Conflict*, in WASH. POST, at A19 (Nov. 18, 1997).

[23] On file with the author.

[24] Inherent jurisdiction denotes "the power to hear cases without receiving an express grant or authority." Patricia N. McKeon, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International*

in regard to the crime of genocide, but as far as crimes against humanity and war crimes are concerned—the U.S. from the outset opposed ICC jurisdiction with regard to aggression—it insisted upon a decisive role for the Security Council. In an address delivered at The Carter Center in Atlanta, Georgia on November 13, 1997, David Scheffer encapsulated the United States' viewpoint as follows: "The U.N. Security Council should play an essential role in a trigger mechanism, where the prosecutor would exercise considerable independence."[25] The United States proposal, in a nutshell, amounted to the following:

- X In cases of genocide, the ICC shall have automatic jurisdiction;

- X In cases of war crimes and crimes against humanity, the jurisdiction of the ICC can be triggered by a referral of either the Security Council or a State Party to the ICC Statute;

- X The Security Council, or the State Party concerned, will only refer "a situation" to the Court involving war crimes or crimes against humanity, and it will then be up to the Prosecutor, "with full integrity and independence,"[26] to decide who to prosecute, and for what crime, within the context of the situation identified by the Security Council or the State Party.

Justice, 12 ST. JOHN'S J. LEGAL COMMENT. 535, 553 (1997). In Rome, "automatic jurisdiction" was in due course substituted for "inherent jurisdiction" because the latter phrase might be taken to denote jurisdiction over the nationals of States Parties only. *See* Elizabeth Wilmshurst, *Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 127, 132 (ed.) Roy S. Lee. The Hague/London/Boston: Kluwer Law Int'l (1999).

[25] David Scheffer, Address at The Carter Center conference on *The United States and the Establishment of a Permanent International Criminal Court* (Nov. 13, 1997), in THE UNITED STATES AND THE ESTABLISHMENT OF A PERMANENT INTERNATIONAL CRIMINAL COURT 16, 17. Atlanta: The Carter Center (1997).

[26] *See* the United States Position Paper of March 30, 1995 (on file with the author); and *see also* Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 A.J.I.L. 22, 27 (1999).

- X In the case of referrals by a State Party, if the situation concerns a state of affairs pertaining to international peace and security with which the Security Council is seized pursuant to its Chapter VII powers, then the Security Council must approve the referral of the situation to the ICC.

Although the United States thus seemingly conceded the competence of States Parties to refer a situation to the ICC, the Security Council would remain in charge: by simply dealing with the situation as a matter that implicates international peace and security, the Security Council can ensure that its permission for prosecutions stemming from that situation be required—and the United States (and any other Permanent Member) can then again veto the decision authorizing the prosecution.

In his Statement of June 17, 1998 in the Plenary Session of the Rome Conference, Bill Richardson, United States Ambassador to the United Nations, explained the policy position of his government regarding the role of the Security Council and said:

> A permanent Court cannot stand alone. It must be part of the international order, and supported by the international community. The United Nations Security Council remains a vital part of that world order. Because of the Security Council's legal responsibilities for maintaining international peace and security, the United States believes that the Council must play an important role in the work of the permanent Court, including the Court's trigger mechanism. The Council must be able to pursue the aims of peace. The Council must be able to refer critical situations to the Court for investigation, and must be able to instruct countries to cooperate with the Court if necessary and appropriate within its powers. The Council's mandatory Chapter VII powers will be absolutely essential to the workings of the Court—not only for enforcement but also to ensure the true universality of its jurisdiction and powers. From the point of view not only of law but of vital policy, the Court must operate in coordination—not in conflict—with the Security Council and its role and powers under the U.N. Charter.[27]

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[27] Bill Richardson, *Statement in the Plenary Session of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (June 19, 1998) (on file with the author).

There is a compelling reason why the United States could not possibly have it the way it wanted: an arrangement whereby the Security Council would have the power to control prosecutions in the ICC "will effectively render the ICC ... a political tool of the Security Council."[28] If the United States, and the other Permanent Members of the Security Council, were to be entrusted with a competence to veto the prosecution of a suspect while other States Parties to the ICC Statute would not enjoy the same competence, the principle of equal treatment and non-discrimination—a vital component of the demands of justice—would be violated. Furthermore, the United States did not even attempt to conceal its uncompromising resolve to use its veto in the Security Council to prevent the prosecution of American citizens before the ICC. If all the countries of the world were to claim the power to shield their own citizens from prosecution in the ICC, then the court would indeed be "dead on arrival" in the international community of states.

The paradox of submitting on the one hand that the ICC will inevitably (or may) become politicized[29] or might not act impartially[30]—as apologists for the American

[28] Matthew D. Peter, *The Proposed International Criminal Court: A Commentary on the Legal and Political Debate Regarding Jurisdiction that Threatens the Establishment of an Effective Court*, 24 SYRACUSE J. INT'L L. & COM. 177, 195 (1997); and *see also* Daniel H. Derby, *An International Criminal Court for the Future*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 307, 314 (1995) ("creating a court to serve the interests of the Security Council is not the same as creating a court to serve the interests of states that are not members of the Security Council"); Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 322 (1998).

[29] Cara Levy Rodriques, *Slaying the Monster: Why the United States Should not Support the Rome Treaty*, 14 AM U. INT'L L. REV. 805, 833 (1999); and *see also* John Bolton, *Courting Danger: What's Wrong With the International; Criminal Court*, 54 THE NATIONAL INTEREST 60, 64 note 8 (Winter 1998/99) (depicting, somewhat squeamishly, that insertion in the ICC Statute of art. 8(2)(b)(viii)—pertaining to population resettlements in occupied territories—as "an excellent example of the politicization of what is masquerading as a purely legal process") .

position have maintained—and then on the other hand to propose Security Council veto of ICC actions as an appropriate remedy,[31] must finally not pass unnoticed. John Bolton, for example, proclaimed that "the supposed 'independence' of the Prosecutor and the Court from 'political' pressures (such as the Security Council) should be more a source of concern for the United States than an element of protection."[32] Such reasoning not only lacks insight in the very nature of the Security Council and its empirical track record, but also demonstrates insensitivity to the demands of equal justice for all. Kenneth Roth said it all:[33]

> The answer is that the International Criminal Court is not a political body, such as the United Nations, or even a tribunal to resolve political disputes between states, such as the International Court of Justice ... Instead, the International Criminal Court will have the fact-specific task of determining whether evidence exists to investigate or prosecute a particular suspect for a specific crime. The history of other international criminal tribunals gives us strong reason to have confidence in such a court.

(b) *Securing American Demands through Non-Ratification*

The American delegation in Rome finally attempted to exclude the jurisdiction of the Court in respect of American nationals on the assumption that the United States would not ratify the ICC Statute. Upon that understanding, it sought to satisfy its Washington mandate:

X by making the exercise of jurisdiction by the ICC dependent on ratification of the ICC Statute by the state on whose territory the crime was allegedly

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[30] Rodriques, *supra* note 124, at 837.

[31] *Id*., at 841-42.

[32] Bolton, *supra* note 124, at 65.

[33] Kenneth Roth, *Endorse the International Criminal Court*, in TOWARD AN INTERNATIONAL CRIMINAL COURT? 19, 28 (Project Director) Alton Frye. New York: Council on Foreign Relations (1999).

committed (the territorial state) *and* the state of which the accused is a national (the national state);[34]

- X by rendering ICC jurisdiction over acts committed in the territory of a State not Party to the ICC Statute, or by officials or agents of those states "in the course of official duties and acknowledged by the State as such," subject to acceptance of the jurisdiction of the ICC by the non-Party State concerned;[35] and/or

- X by introducing an opt-out regime in regard to crimes against humanity and war crimes that will remain in force for ten years, combined with the right of a State Party that opted out under this regime to withdraw from the Statute with immediate effect upon conclusion of the ten years period.[36]

The first proposal would enable the United States to prevent a trial against an American citizen from going forward by its simply not ratifying the ICC Statute; the second would at least protect officials or agents of the United States government (which would include members of the military forces) from prosecution in the ICC,

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[34] *See Proposal Submitted by the United States of America*, U.N. Doc. A/CONF.183/C.1/L.70 (14 July 1998).

[35] *See Proposal Submitted by the United States of America*, U.N. Doc. A/CONF.183/C.1/L.90 (16 July 1998). It is perhaps interesting to note that the Nuremberg Tribunal, in the *Case against Göring & Others*, emphatically rejected the proposition, advanced by defense counsel, that a person ought not to be held personally responsible for an offence committed by that person while carrying out an act of state. *See* TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL , vol. 1, 222-23. Nuremberg: Int'l Mil Tribunal (1947).

[36] *See Proposal Submitted by the United States of America*, *supra* note 130. According to Ambassador Scheffer, this was a "joint proposal" of the Permanent Members of the Security Council. David J. Scheffer, *The United States and the International Criminal Court*, 93 A.J.I.L. 12, 19-20 (1999).

provided only that the United States refrain from ratifying the ICC Statute and formally acknowledge the individual to be prosecuted as an official or agent of the United States; and the third would enable the United States to opt out as far as liability for crimes against humanity and/or war crimes are concerned, in which event—according to the proposal—the consent of the United States would be required "before the Court may exercise its jurisdiction over the cases mentioned in that paragraph"—i.e. crimes against humanity and/or war crimes.

The United States attempted to market the second proposal mentioned above by noting that it would be highly embarrassing for a state to have to admit that the crime under investigation was committed by one of its agents acting in his or her official capacity, and that a government would therefore most likely not simply make that acknowledgment in order to avoid the exercise of jurisdiction by the ICC over the culprit. There are indications that some of the Like-Minded Group (those delegations who supported an independent tribunal based on the rule of law and the principle of equal justice for all, and opposed the American claim to exceptionalism) were willing to accept this proposal as a compromise, but it came too late (on the penultimate day of the Rome Conference) for building consensus on the issue.

The last option mentioned above (the opt-out arrangement) must have been particularly attractive to Washington D.C. If it had been accepted, the United States could ratify the Statute, become eligible to nominate, and be party to the election, of judges and other Court officials, and enjoy all the other privileges and rights of States Parties, and yet reserve for itself the power to stifle investigations of and prosecutions for crimes against humanity and war crimes in the bud. The fact that the United States could in this way prevent prosecutions of American citizens for crimes against humanity and war crimes must not pass unnoticed.

In his report-back of July 23, 1998 to the Committee on Foreign Relations of the U.S. Senate, Ambassador Scheffer explained the above (abortive) proposals of the United States along the following lines:

> Our position is clear: Official actions of a non-party state should not be subject to the court's jurisdiction if that country does not join the treaty, except by means of Security Council action under the U.N. Charter. Otherwise, the ratification procedure would be meaningless for governments. In fact, under such a theory,

two governments could join together to create a criminal court and purport to extend its jurisdiction over everyone, everywhere in the world. There will necessarily be cases where the international court cannot and should not have jurisdiction unless the Security Council decides otherwise. The United States has long supported the right of the Security Council to refer situations to the court with mandatory effect, meaning that any rogue state could not deny the court's jurisdiction under any circumstances. We believe this is the only way, under international law and the U.N. Charter, to impose the court's jurisdiction on a non-party state. In fact, the treaty reaffirms this Security Council referral power. Again, the governments that collectively adopt this treaty accept that this power would be available to assert jurisdiction over rogue states.

> Second, as a matter of policy, the United States took the position in these negotiations that states should have the opportunity to assess the effectiveness and impartiality of the court before considering whether to accept its jurisdiction. At the same time, we recognized the ideal of broad ICC jurisdiction. Thus, we were prepared to accept a treaty regime in which any state party would need to accept the automatic jurisdiction of the court over the crime of genocide, as had been recommended by the International Law Commission in 1994. We sought to facilitate U.S. participation in the treaty by proposing a 10-year transitional period following entry into force of the treaty and during which any state party could "opt-out" of the court's jurisdiction over crimes against humanity or war crimes. We were prepared to accept an arrangement whereby at the end of the 10-year period, there would be three options—to accept the automatic jurisdiction of the court over all of the core crimes, to cease to be a party, or to seek an amendment to the treaty extending its "opt-out" protection. We believe such transition period is important for our government to evaluate the performance of the court and to attract a broad range of governments to join the treaty in its early years. While we achieved the agreement of the Permanent members of the Security Council for this arrangement as well as appropriate protection for non-party states, other governments were not prepared to accept our proposal. In the end, an opt-out provision of seven years for war crimes only was adopted.[37]

One might as follows interpolate the above rhetoric with the initial resolve of

[37] Statement of David. J. Scheffer, Ambassador-at-Large for War Crimes Issues, Department of State: *Is a U.N. International Criminal Court in the U.S. National Interest?*, 105th Cong. 14-15 (1998).

Washington D.C. in mind, namely to secure an American veto of the prosecution of American citizens in the ICC:

- X The United States was willing to concede automatic jurisdiction of the ICC in regard to acts of genocide, because Americans have never in the past—and will in all likelihood never in the future—engage in such acts;

- X An opt-out regime in regard to crimes against humanity and war crimes as proposed by the United States could shield American citizens, as well as citizens of the "rogue states" of the world, from prosecution in the ICC, but one could nevertheless bring the perpetrators of those crimes before the ICC through the agency of a Security Council referral;

- X Should the Security Council seek to refer to the ICC a situation involving American citizens, then the United States will have the power to veto the referral.

And that is what it really was all about!

The Rome Conference, however, elected not to accept the proposals of the United States.

3. American Exceptionalism Explained

In 1688, the Glorious Revolution terminated the repressive reign of the Royal House of Stuart in England. One of the first acts of state required of the newly appointed monarchs, William III and Mary, was to sign into law the English Bill of Rights.[38] The Bill of Rights, among other things, abolished several sweeping royal prerogatives that had vested in the English Kings since the dawn of that country's history, including the prerogative of suspension (whereby the King could suspend the operation of any law) and the prerogative of dispensation (whereby the King could exempt any person or any category of persons from obeying laws specified by the

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[38] Bill of Rights, 1 Will. & M., ses. 2, c. 2 (1688).

King).[39] The Bill of Rights thus initiated in England the principle of equality before the law and the equal protection of the laws, which also came to be a basic norm of justice in the United States.

In Rome and thereafter, the United States was insisting upon the reinstatement in the international arena of the dispensation of those laws seeking punishment for the most heinous crimes, with the prerogative power of granting a dispensation vested in the American government and citizens of the United States being the sole beneficiaries. It is upon this basis only that the United States—in the words of Ambassador Scheffer—"remains strongly committed to the achievement of international justice."[40]

So, why treat nationals of the United States differently? The arguments advanced by Ambassador David Scheffer on many occasions amount to the following: almost all international 911 calls are channeled to Washington D.C., because the United States, being the only remaining super power in the world, has become the major/only peace-keeping force of our times;[41] and American troops engaged in peace-keeping efforts abroad do not want to run the risk of prosecutions in an international criminal

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[39] *Id*., arts. I and VII.

[40] Scheffer, *supra* note 131, at 22.

[41] *See also* Ruth Wedgwood, *Improve the International Criminal Court*, in TOWARD AN INTERNATIONAL CRIMINAL COURT? 53, 66 (Project Director) Alton Frye. New York: Council on Foreign Relations (1999); Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93, 101-02 (1999); Marten Zwanenburg, *The Statute of the International Criminal Court and the United States: Peacekeeping under Fire?*, 10 EUR. J. INT'L L. 124, 126-27 (1999); Marten Zwanenburg, *The Statute of the International Criminal Court and the United States: Peace Without Justice?* 12 LEIDEN J. INT'L L. 1, at 6 (1999); Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 85, 91-92 (eds.) Sarah B. Sewell & Carl Kaysen. Lanham/Boulder/New York/Oxford: Rowman & Littlefield (2000).

tribunal for acts committed in the interest of peace and security on earth. In an address at the University of Oklahoma College of Law delivered on February 24, 1998, Ambassador Scheffer thus explained:

> ... no other country shoulders the burden of international security as does the United States. In the post-Cold War world, the U.S. military is called upon to defend our national security from a wide range of threats; to carry out mandates from the Security Council; to fulfill our commitments to NATO; to help defend our allies and friends; to achieve humanitarian objectives, including the protection of human rights; to combat international terrorism; to rescue Americans and others in danger; and to prevent the proliferation or use of weapons of mass destruction. Many other governments participate in our military alliances and a larger number of governments participate in the U.N. and other multinational peacekeeping operations, such as SFOR in Bosnia. It is in our collective interests that the personnel of our militaries and civilian commands be able to fulfill their many legitimate responsibilities without unjustified exposure to criminal legal proceedings. The permanent court must not be manipulated for political purposes to handcuff governments taking risks to promote international peace and security and to save human lives. Otherwise, the permanent court would undermine the efforts to confront genocide, crimes against humanity, and war crimes.[42]

Justice Richard Goldstone, former Prosecutor in the International Criminal Tribunals for the Former Yugoslavia and International Tribunal for Rwanda, in a press interview at the Rome Conference gave short shrift to this reasoning: "I really have difficulty understanding that policy," he said: "What the US is saying is, 'In order to be peacekeepers ... we have to commit war crimes.' That's what the policy boils down to."[43]

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[42] David J. Scheffer, Address at Univ. of Oklahoma College of Law (Feb. 24, 1998) (on file with the author); and *see also* David J. Scheffer, *U.S. Policy on International Criminal Tribunals*, in 13 AM. U. INT'L L. REV. 1389, 1399 (1998); Scheffer, *supra* note 131, at 18-19.

[43] *Goldstone: US Stance Contradictory*, in 3 TERRA VIVA, at 7 (June 17, 1998); and *see also* Zwanenburg, *Peacekeeping under Fire? supra* note 137, at 142; Zwanenburg, *Peace Without Justice?*, *supra* note 137, at 7.

Attempts to justify the American position also reflected a certain paranoia:[44] the Iraqis, Iranians, Libyans and many others are out there to get us, and they shall do so by provoking malicious prosecutions against American citizens in the ICC. David Scheffer thus spoke of "our interest in protecting against unwarranted prosecutions of our nationals, as well as nationals of other responsible members of the international community, while ensuring the prosecution of those who should be brought before an international tribunal."[45] John Bolton added a further dimension to the American scare tactics:[46]

> ... the main concern is not that the Prosecutor will indict the isolated U.S. soldiers who may violate our own laws and values, and their own military training and doctrine, by allegedly committing a war crime. The main concern should be for the president, the cabinet officers who comprise the National Security Council, and other senior civilian and military leaders responsible for our defense and foreign policy. They are the potential targets of the politically unaccountable Prosecutor created in Rome.

In the debate on the ICC in the Sixth Committee of the General Assembly, Ambassador David Scheffer, in his intervention of October 21, 1998, proclaimed:

> All of us in Rome shared a common goal that an international court should be able to prosecute tyrants who commit mass murder, mass rape, or mass torture against their own citizens, while at the same time not inhibiting States from contributing to efforts to help protect international peace and security. The irony of the Rome outcome on Article 12[47] is not lost on us. Consider the following. A State not a

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[44] *See* Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 357 (1999).

[45] Scheffer, *U.S. Policy*, *supra* note 138, at 1398.

[46] Bolton, *supra* note 124, at 63.

[47] The provision requiring that either the territorial state or the national state of

> party to the treaty launches a campaign of terror against a dissident minority inside its territory. Thousands of innocent civilians are killed. International peace and security are imperiled. The United States participates in a coalition to use military force to intervene and stop the killing. Unfortunately, in so doing, bombs intended for military targets go astray. A hospital is hit. An apartment building is demolished. Some civilians being used as human shields are mistakenly shot by U.S. troops. The State responsible for the atrocities demands that U.S. officials and commanders be prosecuted by the International Criminal Court. The demand is supported by a small group of other states. Under the terms of the Rome treaty, absent a Security Council referral, the court could not investigate those responsible for killing thousands, yet our senior officials, commanders, and soldiers could face international investigations and even prosecution.[48]

There are many fallacies in the Scheffer hypothetical:[49] the incident he constructed will not meet the threshold requirement applicable to war crimes,[50] nor the requirement of "intent and knowledge."[51] It is also not clear on what basis he

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the accused must ratify the ICC statute or agree to the exercise of jurisdiction by the ICC before the ICC can exercise jurisdiction in any particular case. *See supra* the text accompanying note 101.

[48] David J. Scheffer, Address at Sixth Committee of the General Assembly (Oct. 21. 1998) (on file with the author), *reprinted in part* in David J. Scheffer, *The U.S. Perspective on the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 116, 116-17 (eds.) Sarah B. Sewall & Carl Kaysen. - Lanham/Boulder/New York/Oxford: Rowman & Littlefield (2000); and *see also* David J. Scheffer, Address at Dartmouth College (Oct. 23, 1998) on *Human Rights and International Justice* (on file with the author); Wedgwood, *The International Criminal Court: An American View*, *supra* note 137, at 101.

[49] *See also* Zwanenburg, *Peacekeeping Under Fire?, supra* note 136, at 138-41.

[50] *See* ICC Statute, *supra* note 99, art. 8(1) (providing that a war crime will only be justiciable in the ICC "in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes").

[51] *Id*., art. 30.

professed that "those responsible for killing thousands" cannot be investigated by the ICC: the criminal liability of the mass murderers, rapists and torturers, like that of American perpetrators of crimes within the jurisdiction of the ICC, is not dependent on ratification of the ICC Statute by the state of their nationality; and if the custodian state has not ratified the Statute, there is in any event nothing that can be done under the Statute to compel it to prosecute or surrender the culprits. Furthermore, if international peace and security was to be protected in the circumstances of the hypothetical, why would there not be a Security Council referral?

Cherif Bassiouni was quite right in responding "that the concerns of the United States are overstated and that the interests of the United States in having a [*sic*] ICC far outweigh the marginal and far-fetched concerns that have been articulated by political opponents of the ICC."[52] As noted by Paul Marquardt, "[a]n International Criminal Court is not likely to expend scarce political capital on pointless and alienating attacks on great power policy, and it is certainly not in the court's interest to do so."[53] The American fears have in any event been adequately refuted in a note by Jerome Shestack and David Stoelting:[54]

> Portraying the ICC as a malleable tool that America's enemies would utilize to further political means is also misleading and, in fact, demeans U.S. Courts. In every instance, national courts—and not the ICC—would be the preferred forum

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[52] M. Cherif Bassiouni, *Conference Convocation for War Crimes Tribunals: The Record and Prospects (Mar. 31, 1998), Response to Ambassador Scheffer's Speech*, 13 AM. U. INT'L L. REV. 1400, 1403 (1998).

[53] Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 144 (1995); and *see also* Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, in 77.6 FOREIGN AFFAIRS 20, 23 (1998); Wedgwood, *Improve the International Criminal Court, supra* note 136, at 64.

[54] Jerome J. Shestack & David Stoelting, *The International Criminal Court: Setting the Record Straight*, in 24 CICC MONITOR, 3 (July 16, 1998), *reprinted* in 24 TERRA VIVA, middle pages (July 16, 1998).

> for the trial of accused war criminals. Only if national courts were either unavailable or ineffective[55] would the ICC proceed. Obviously, the ability of U.S. courts to prosecute instances of war crimes would obviate the need for trial of a U.S. citizen by the ICC. Moreover, the draft treaty contains a number of safeguards designed to minimize the possibility of any politically motivated prosecution. In addition, the United States, if it ratifies the ICC treaty, would play a role in the selection of judges and prosecutors of the highest integrity.

4. Discrediting the ICC Statute

Failure of the American delegation to secure dispensation of American citizens from the laws and procedures of international criminal justice resulted in an attack upon several provisions of the ICC Statute, characterized by a certain degree of inconsistency and advanced at the level, quite often, of a high-school debate. The issues selected by the delegation to legitimize its negative vote, namely the competence of an independent prosecutor to conduct an investigation *proprio motu*, and providing for a review conference after a period of seven years from the date of the entry into force of the ICC Statute instead of the ten years probationary period proposed by the United States, were described by Yale Professor Ruth Wedgwood—a quasi apologist for American exceptionalism—as "red herrings, since they added little to the risk Americans were already willing to accept."[56]

Only two issues of concern deserve further comment: first, the question whether submission to the ICC regime would have constitutional implications for the United States; and secondly, the jurisdictional regime of the ICC in respect of the nationals of non-Party States.

(a) *Constitutional Concerns*

Many countries had to amend, and are in the process of amending, their constitutions in order to ratify the ICC Statute. The kind of constitutional obstacles that made this

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[55] The phrase "unavailable or ineffective" was subsequently replaced by "unwilling or unable".

[56] Wedgwood, *Fiddling in Rome*, *supra* note 148, at 23.

necessary included criminal immunity of the head of state (for example France) and a constitutional proscription of extraditing nationals of the state concerned for prosecution in a foreign country (for example Germany). No such constitutional impediments apply to the United States.

The question as to whether the American Constitution would preclude ratification of the ICC Statute by the United States has nevertheless been debated at some lengths[57] (needless to say, the United States will under no circumstances amend its Constitution in order to comply with any demands of international law[58]).

Most of the arguments raised to substantiate constitutional objections to ratification of the ICC Statute by the United States are conspicuously without foundation, for example the one claiming that the ICC Statute "lacks a crucial link to the Bill of Rights" by not affording protection against unlawful searches and seizures.[59] The truth of the matter is that policing for purposes of ICC trials will be conducted by municipal officials, and that those officials operating in the United States will have to go about their business subject to the regular constraints that apply in the United States. The ICC Statute expressly provides that searches and seizures are to be executed by officials of a State Party "in accordance with the provisions ... of national law."[60]

The argument that seems to surface most frequently questions the constitutional

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[57] *See*, for example, Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990's*, 10 DICK. J. INT'L L. 223, 247-48 (1992); Marquardt, *supra* note 148, at 101-35 (1995); Stoelting, *supra* note 109, at 281-82; Wedgwood, *The Constitution and the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 119, 120-30 (eds.) Sarah B. Sewall & Carl Kaysen. Landham/Boulder/New York/Oxford: Rowman & Littlefield (2000).

[58] Wedgwood, *supra* note 152, at 130.

[59] Rodriques, *supra* note 124, at 814-15.

[60] ICC Statute, *supra* note 99, art. 93(1)(h).

tenability of a treaty that would expose nationals of the United States to criminal prosecution without the benefit of a jury trial as guaranteed by the Sixth Amendment to the Constitution of the United States.[61] However, the ICC is not an American court and will not apply American law. Every American citizen is involuntarily subject to two systems of law (counting federal and state law as one): American law on the one hand, and customary international law that applies to and places obligations upon individuals on the other. No American citizen can escape liability for those crimes that have been identified as offences against humankind. The prosecution of those crimes is indeed subject to universal norms of due process—specified in great detail in the ICC Statute and which do not fall one inch short of the principles of criminal justice recognized in the United States. A jury trial is not one of those principles—not even in the United States.[62] There is furthermore ample authority for the proposition that the constitutional guarantee of a jury trial does not apply to international criminal tribunals.[63] Kenneth Roth further pointed out that the

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[61] *See* Ilia B. Levitine, *Constitutional Aspects of the International Criminal Court*, in 9.2 N.Y. INT'L L. REV. 27, 37-38 (1996); Rodriques, *supra* note 124, at 814-15; Robinson O. Everett, *American Servicemen and the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 137, 137, 140-41 (eds.) Sarah B. Sewall & Carl Kaysen. Landam/Boulder/New York/Oxford: Rowman & Littlefield (2000) (referring to the absence in the ICC of "jurors or ... members of a court-martial" who, having been in the armed services or having had military experience, would have an "understanding of the military society and its needs"); and *see also* the Bill To Protect United States Military Personnel and Other Elected and Appointed Officials of the United States Government Against Criminal Prosecution by an International Criminal Court to which the United States is Not a Party, par. (6), 1999 CONG. U.S. S 4654 and 1999 CONG. U.S. HR 4654 (1999).

[62] *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J. stating that the right to trial by jury and the immunity from prosecution except as a result of an indictment "are not the very essence of a scheme or ordered liberty" and that their abolition would not violate "a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'.")

[63] *See*, for example, United States v. Tiede and Ruske, *reprinted in* 19 I.L.M.

absence of jury trials also obtains in other democratic countries to which the United States routinely extradites suspects,[64] and those suspects could include American nationals.

Louis Henkin was of the opinion that "[i]f the proposed permanent International Criminal Court came into existence and the United States adhered to it, United States participation would not be constitutionally troublesome,"[65] explaining that "the procedure for rendition, apprehension, trial, and punishment are not likely to raise issues more troubling than those that are constitutionally accepted in interstate extraditions."[66] Earlier, he noted that

> there is nothing in the Constitution that would seem to forbid the United States to agree to an international tribunal, whether sitting in the United States or elsewhere, that would apply international law to acts committed by individuals in the United States, including United States citizens and residents. It would be international law that governed their acts and that was being applied by the international tribunal; international judicial power which the tribunal was exercising; international punishment that was imposed and executed by international authority. The tribunal would not be exercising governmental authority of the United States but the

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179 (1980) (holding that proceedings in a court established by the United States in Berlin was an American court, and not an international tribunal, and that the accused in the matter were for that reason entitled to a jury trial); and *see also* Hirota v. McArthur, 338 U.S. 197 (1949) (holding that an American court cannot review, affirm, set aside, or annul the judgment of the international military tribunal set up by General McArthur, as agent of the Allied Powers, to try Japanese war criminals). *See also* Stoelting, *supra* note 109, at 281-82; Wedgwood, *supra* note 152, at 126-27.

[64] Roth, *supra* note 128, at 30; and *see also* Wedgwood, *supra* note 152, at 124-25.

[65] L. HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION, 270. Oxford: Clarendon Press/New York: Oxford Univ. Press (2nd ed. 1996); and *see also* Wedgwood, *supra* note 152, at 121.

[66] HENKIN, *supra* note 160, at 270.

> authority of the international community, of a group of nations of which the United States was but one, and acting in the same capacity as other states, not as the territorial sovereign.[67]

For this very reason the (highly prejudiced) opinion of John Bolton that the ICC regime is "inconsistent with, and constitutes a stealth approach to eroding, American standards of structural constitutionalism"[68] is conspicuously unfounded. His critique was based on the supposedly vague and ambiguous jurisdiction provisions of the ICC—which is clearly refuted by the precise designation in the ICC Statute of the Court's jurisdiction and well-defined circumscription of crimes. Kenneth Roth on one occasion pointed out that "the crimes [within the jurisdiction of the ICC] are not only largely codified in international treaties that the United States has already ratified, but they bear ... a striking resemblance to the Pentagon military manuals."[69]

Ilia Levitine noted that "the strength of objections based on the US Constitution to an international criminal court has declined over the course of time," and that if one evaluates the ICC on "a macro level of constitutional values, and not some technical aspects of American constitutional criminal procedure," the ICC "passes the highest test of constitutionality."[70]

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[67] *Id*., at 269.

[68] John Bolton, *Reject and Oppose the International Criminal Court*, in TOWARD AN INTERNATIONAL CRIMINAL COURT? 37, 38 (Project Director) Alton Frye. New York: Council on Foreign Relations (1999).

[69] Kenneth Roth, *Toward an International Criminal Court? A Debate*, in 14 EMORY INT'L L. REV. 159, at 173 (2000); and *see* Everett, *supra* note 156, at 141-47.

[70] Levitine, *supra* note 156, at 47; and *see also* Kenneth Roth, *Endorse the International Criminal Court*, in TOWARD AN INTERNATIONAL CRIMINAL COURT? 19, 30 (Project Director) Alton Frye. New York: Council on Foreign Relations (1999).

It might be noted in conclusion that the "constitutional issues" raised by American skeptics were never placed in issue by the U.S. delegation in New York and in Rome. Nor were any of those issues a consideration that prompted some states to vote against adoption of the ICC Statute or to abstain when the final vote was called for. It is fair to say that provisions in the ICC Statute with constitutional implications for some states were adopted by consensus.

(b) *Jurisdictional Regime of the ICC*

Having separated the wheat from the chaff, American concerns regarding the ICC Statute as approved in Rome was finally reduced to the jurisdictional regime of the ICC as it will apply to the nationals of non-Party States.

Much of the discourse centered upon the question of universal jurisdiction: the rule of customary international law proclaiming that crimes which are universally condemned may be punished by any state having custody of the offender, irrespective of the place where the offence was committed or the nationality of the accused.[71] It is generally agreed by publicists that all the crimes within the

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[71] OPPENHEIM'S INTERNATIONAL LAW (9th ed. by Robert Jennings & Arthur Watts), 469-70. Harlow (U.K.): Longmans (1992); M. CHERIF BASSIOUNI, 2 INTERNATIONAL CRIMINAL LAW, 31-33. Dobbs Ferry, N.Y.: Transnat'l Publ. (1986); LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS, 102-16. Dordrecht/Boston/London: Marinus Nijhoff (1992); Sharon A. Williams, *Preconditions for the Exercise of Jurisdiction*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 329, 332-33 (ed.) Otto Triffterer. Baden-Baden: Nomos Verlagsgesellschaft (1999); Michael P. Scharf, *The ICC's Jurisdicition Over the Nationals of Non-Party States*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 213, 215 (eds.) Sarah B. Sewall & Carl Kaysen. Lanham/Boulder/New York/Oxford: Rowman & Littlefield (2000). T.B. Murray, *The Present Position of International Criminal Justice*, 36 GROTIUS TRANSACTIONS 191, 194-95 (1950); Christopher L. Blakesley, *United States Jurisdiction on Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1139-41 (1982); Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign*

jurisdiction of the ICC are subject to universal jurisdiction, and applying the principle of universal jurisdiction to prosecutions in the ICC would mean that the power of the Court to exercise jurisdiction in any particular case is not dependent on ratification of the ICC Statute by the state of which the perpetrator is a national.

No wonder, therefore, that spokespersons for the United States who opposed the Rome model for the establishment and functioning of the ICC included in their condemnation trashing of the international-law principle of universal jurisdiction. In Rome, a U.S. representative expressed his delegation's objection to "language [which] effectively incorporates universal jurisdiction for the crime of genocide" and

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Violators of International Law Under the FSIA and the Act of State Doctrine, 23 VA. J. INT'L L. 191, 211-15 (1983); Jeffrey Alan McCredie, *Contemporary Uses of Force Against Terrorism: The United States Response to Achillo Lauro—Questions of Jurisdiction and its Exercise*, 16 GA. J. INT'L & COMP. L. 435, 439 (1986); Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 788 (1986); M.Cherif Bassiouni, *"Crimes Against Humanity": The Need for a Specialized Convention*, 31 COLUM. J. INT'L L. 457, 481-82 (1994); Hans Corell, *Nuremberg and the Development of an International Criminal Court*, 149 MIL. L. REV. 87, 90 (Summer 1995); Theodor Meron, *International Criminalization of Internal Conflicts*, in A. J. I. L. 554, 576 (1995); Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 L. & CONT. PROBS. 153, 165-66 (Fall 1996); Jordan J. Paust, *Suing Karadη̃i□*, 10 LEIDEN J. INT'L L. 91, 96 (1997); Beth van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2278-80 (1997); Matthew Lippman, *Crimes Against Humanity*, 17 B. C. THIRD WORLD L.J. 171, 238-49 (1997); Bryan F. MacPherson, *Building an International Criminal Court for the Twenty-First Century*, 12 CONN. J. INT'L L. 1, 3-4 (1998); Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 321 (1998); Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations*, 39 VA. J. INT'L L. 425, 433-36 (1999); Henry T. King & Theodore C. Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE WESTERN J. INT'L L. 47, 53-57 (1999).

for crimes against humanity.[72] Subsequent to the Rome Conference, Ambassador Scheffer therefore lamented "the dangerous drift of Article 12 [of the ICC Statute] toward universal jurisdiction over nonparty states."[73] Senator Jesse Helms's response to the outcome of the Rome Conference included the following assessment:[74]

> Well, the International Criminal Court declares that the American people are under its jurisdiction—no matter what the US government says. The delegates in Rome included a form of "universal jurisdiction" in the court statute, which means that, even if the US never signs the treaty, or if the Senate refuses to ratify it, the countries participating in this court will still contend that American soldiers and citizens are within the jurisdiction of the court.
>
> That is an outrage—and will have grave consequences for our relations with every country that signs and ratifies this treaty. ...
>
> The International Court is a threat to US national interests ... and it is our responsibility to slay it before it grows to devour us.[75]

A major problem that confronted the American critics of universal jurisdiction is the fact that the principle of this jurisdictional regime has been endorsed on many occasions by American courts. According to Jordan Paust, universal jurisdiction over international crimes has been recognized in the United States "since the dawn of ...

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[72] Delegation of the United States, Intervention on Bureau Proposal of July 10, 1998 (on file with author); and *see* Williams, *supra* note 166, at 338.

[73] David J. Scheffer, *The United States and the International Criminal Court*, 93 A.J.I.L. 12, 20 (1999).

[74] Jesse Helms, *We Must Slay This Monster: Voting Against the International Criminal Court is not Enough. The US Should Try to Bring It Down*, in FINANCIAL TIMES, July 31, 1998, at 18.

[75] The *Financial Times* published four letters in its edition of August 4, 1998 opposing the steps proposed by Senator Helms to "slay" the ICC.

[its] history."[76] The United States has certainly since early times recognized the power of its courts to prosecute persons for acts of piracy,[77] and by participating in the Nuremberg and Tokyo Trials, it has recognized the validity of universal jurisdiction with respect to at least war crimes and crimes against humanity.[78] American courts often refer with approval to the principle of universality with regard to crimes other than piracy.[79] The *American Restatement of Law* is quite explicit in this regard:[80]

> A state has jurisdiction to define and prescribe punishment for certain offences

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[76] Paust, *Federal Jurisdiction*, *supra* note 166, at 211.

[77] *See*, for example, United States v. Smith, 18 U.S. (5 Wheat.) 153, 162 (1820) ("... the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence [of piracy] against any person whatsoever, with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment"); United States v. La Jeune Eugenie, 26 Fed. Cas. 832, 843 (CCD. Mass., 1822) ("... no one can doubt, that vessels and property in the possession of pirates may be lawfully seized on the high sea by any person, and brought in for adjudication.").

[78] Demjanjuk v. Petrovsky, 776 F.2d 571, 583 (6^{th} Cir. 1985).

[79] *See*, for example, Rivand v. United States, 375 F.2d 882, 885-86 (5th Cir. 1967) (conspiracy); Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (torture); United States v. Layton, 509 F. Supp. 212 (ND Cal. 1981) (terrorism); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (terrorism); Demjanjuk v. Petrovsky, *supra* note 173, at 581-83 (crimes against humanity); United States v. Yunis, 681 F. Supp. 896, 900-01 (D.D.C. 1988) (aircraft piracy and hostage taking).

[80] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1988); and *see* BeAnnal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 371 (E.D. La. 1997).

recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction ... is present.

Ambassador David Scheffer sought to overcome this difficulty by assuming that the exercise of universal jurisdiction is strictly to be confined to national criminal justice systems and is therefore out of place in international tribunals established by treaty and in respect of States not Parties to that treaty.[81] However, here again he is clearly barking up the wrong tree: the Nuremberg Tribunals, as well as the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, have legitimized their jurisdictional regime on the basis of universal jurisdiction.[82]

In the *Hostage Case*, the U.S. Military Tribunal encapsulated the jurisdictional principle as follows:

> An international crime is ... an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances.[83]=

In *The Hadamar Trial*, the U.S. Military Commission subscribed to:

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[81] David J. Scheffer, *The United States and the International Criminal Court*, 93 A.J.I.L. 12, 16-17 (1999); and *see also* David Scheffer, *The International Criminal Court: The Challenge to Jurisdiction*, AMERICAN SOCIETY OF INTERNATIONAL LAW: PROCEEDINGS OF THE 93RD ANNUAL MEETING (MARCH 24-27 1999) 68, 71 (1999).

[82] *See* Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEORGETOWN L.J. 381, 407 (2000).

[83] United States v. Wilhelm List & Others, 11 TRIALS OF THE WAR CRIMES BEFORE THE NUEREMBERG MILITARY TRIBUNALS, OCTOBER 1946-APRIL 1949 757, 1241. Washington D.C.: Gov. Printing Office (1950).

> the general doctrine recently expounded and called "universality of jurisdiction over war crimes," which has the support of the United Nations War Crimes Commission and according to which every independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished.[84]

In the *Trial of Lothar Eisenträger & others*, the Commission echoed this view:

> A war crime ... is not a crime against the law or criminal code of any nation, but a crime against the *jus gentium*. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments to the effect that only a sovereign of the *locus criminis* has jurisdiction and that only the *lex loci* can be applied, are therefore without foundation.[85]

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

> That under the general doctrine called Universality of Jurisdiction over war crimes, every independent state has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed.[86]

More recently, the International Criminal Tribunal for the Former Yugoslavia also emphatically endorsed the principle of universal jurisdiction. In the case against

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[84] The Hadamar Trial (Alfons Klein & Others), 1 L. REP. TRIALS WAR CRIMES 46, 53 (U.S. Mil. Comm., Wiesbaden 1945).

[85] Trial of Lothar Eisentrager & Others, 14 L. REP. TRIALS WAR CRIMES 8, 15 (U.S. Mil. Comm., Shanghai 1947).

[86] The Almedo Trial (Otto Sandrock & Others), 1 L. REP. TRIALS WAR CRIMES 35, 42 (Almedo, Netherlands 1945); and *see also* The Zyklon B. Case (Bruno Tesch & Others), 1 L. REP. TRIALS WAR CRIMES 93, 103 (Hamburg 1946).

Duško Tadić, the Trial Chamber observed:[87]

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

This statement of the law was confirmed in the Appeals Chamber, where the Court went on to say: "Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity."[88]

In *Prosecutor v. Anto Furundžija*, the International Criminal Tribunal for the Former Yugoslavia endorsed the principle of universal jurisdiction in the case of torture:[89]

> ... it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on

[87] Prosecutor v. Tadic (Jurisdiction) (Trial Chamber), 105 I.L.R. 420, para. 42 (at 441) (1997).

[88] Prosecutor v. Tadic (Jurisdiction) (Appeals Chamber), 105 I.L.R. 453, para. 58 (at 483); and *see also id*., at par. 57 (at 481-83) (the Court endorsing the principle of universal jurisdiction as enunciated in *Wagener* and *Eichmann*) .

[89] Prosecutor v. Anto Furundžija, 38 I.L.M. 317, par. 156 (1999).

the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*,[90] and echoed by the USA court in *Demjanjuk*,[91] "it is the universal character of the crimes in question i.e. international crimes which vest in every State the authority to try and punish those who participate in their commission."

The International Court of Justice also subscribed to the principle of universal jurisdiction, and more in particular with regard to genocide. In *Bosnia and Herzegovina v. Yugoslavia*, it referred to a passage in the *Case on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[92] emphasizing the universal character of the crime of genocide to make the point:[93]

> It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.

One need not dwell upon attempts of spokespersons for the United States to discredit the principle of universal jurisdiction, because in the end the jurisdictional regime of

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[90] Attorney-General of Israel v. Eichmann, 36 I.L.R. 277 (Sup. Ct. of Israel 1962).

[91] Demjanjuk v. Petrovsky, *supra* note 173.

[92] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28, 1951).

[93] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 1996 (II) I.C.J 593, par. 31 (at 615-16) (11 July 1996).

the ICC was not based on universal jurisdiction. In terms of Article 12 of the ICC Statute, the Court can exercise jurisdiction *ratione territorium* and jurisdiction *ratione personae* if the state on whose territory the crime was committed or the state of which the suspect is a national has either ratified the ICC Statute or has agreed on an *ad hoc basis* to the exercise of jurisdiction by the Court in the particular case under investigation.

The ICC's jurisdictional regime is thus not based on universal jurisdiction at all.[94] According to Hafner *et al.*,[95] Article 12 is founded upon classical bases of jurisdiction that have become undisputed in international law, namely, on the one hand, the legitimate competence of states to prosecute their own nationals for crimes committed anywhere in the world (the nationality principle), and on the other, the equally salient entitlement of states to prosecute the nationals of any other country for crimes committed in the territory of the prosecuting state (the territorial principle).[96] The jurisdictional principle of nationality and territoriality is not dependent on the consent of, respectively, the territorial or the national State: "Nationality and territoriality are each an individual and sufficient basis for jurisdiction" and "[i]t is within the sovereign power of a state to allow an international body to exercise jurisdiction in the same way in which that state may exercise jurisdiction."[97] The latter proposition is in conformity with the basis upon which the Nuremberg tribunal based the legitimacy of its jurisdiction:

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[94] Gerhard Hafner, Kristen Boon, Anne Rübesame & Jonathan Huston, *A Response to the American View as Presented by Ruth Wedgwood*, 10 EUR. J. INT'L L. 108, 116-17 (1999); and *see also* Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 160 (1999).

[95] Hafner et al, *supra* note 189, at 117.

[96] *See also* Williams, *supra* note 166, at 339-40.

[97] Hafner et al, *supra* note 189, at 117; and *see also* Williams, *supra* note 166, at 340-41; Scharf, *supra* note 166, at 225-29 (confirming the competence of states to delegate their jurisdictional powers based on the principle of territoriality).

> The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.[98]

A distinction must accordingly be made between the jurisdiction of the ICC *ratione personae* and *ratione territorium* on the one hand, and the duty of States Parties to cooperate with the Court.[99] This distinction escaped the notice of apologists for the American critique of Article 12 of the ICC Statute—as is also evidenced by the fallacious proposition that the ICC's jurisdictional regime violates the *Vienna Convention of the Law of Treaties* by making provisions of the ICC Statute binding on Third Party States.[100] The ICC Statute provides a forum for the prosecution of *individuals* suspected of having committed acts of genocide, crimes against humanity, or war crimes; it does not place any obligations upon States not Parties to the ICC Statute, unless such states have consented to cooperate with the Court.

As a final, almost desperate attempt to render the jurisdictional regime of the ICC suspect, Ambassador Scheffer argued that a state can only delegate its territorial jurisdiction to another State with the consent of the state of nationality of the accused.[101] He referred in this regard to the *European Convention on the Transfer of*

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[98] TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 178, at 218.

[99] *See* Williams, *supra* note 166, at 335, 341.

[100] Scheffer, *The International Criminal Court*, *supra* note 176, at 70; and *see* the Vienna Convention on the Law of Treaties, 1969, art. 34, U.N. Doc. A/CONF.39/27 (1969), 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969) and 63 A. J. I. L. 875 (1969).

[101] Scheffer, *The International Criminal Court*, *supra* note 176, at 70-71.

Proceedings in Criminal Matters, 1972.[102] The Convention regulates the reverse of extradition: the perpetrator committed a crime in State A (the territorial state) and then takes refuge in State B (the custodian state); instead of requesting the extradition of the perpetrator, the territorial state requests and authorizes the custodian state to prosecute the offender. In most cases, the fugitive is a national of the custodian state, but that is not necessarily the case. Nothing would prevent the custodian state in the circumstances envisaged by the Convention to prosecute an offender who is the national of a third state; nor would the consent of the national state in such instances be required for the custodian state to exercise jurisdiction as requested and authorized by the territorial state.[103]

It is quite evident that the United States, by seeking to place its own citizens above the law to be applied by the ICC, attempted to attain the unattainable. The reasoning tendered to substantiate its position, and eventually to discredit the jurisdictional regime decided upon in Rome, is rationally indefensible and morally corrupt.

5. CONCRETE AMERICAN RESPONSES TO THE OUTCOME OF THE ROME CONFERENCE

Following the Rome Conference, the Clinton administration persisted in its efforts to exclude the jurisdiction of the ICC in respect of American nationals. Inasmuch as the *Rules of Procedure and Evidence* were thought to be a viable tool for securing American exceptionalism, Secretary of State Madeleine Albright on one occasion referred to a "procedural fix" to overcome the United States' "long-standing concern about the jurisdictional reach" of the ICC. She held out the promise that if the American demands were to be accommodated, the United States would be enabled "at a minimum to be a 'good neighbor' to the court."[104]

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[102] European Convention on the Transfer of Proceedings in Criminal Matters, E.T.S. No. 73.

[103] *See* Scharf, *supra* note 166, at 227-28.

[104] *U.S. Offers a "Procedural Fix" to Link With War-Crimes Court*, in THE DESERT NEWS, at A04 (Salt Lake City, UT)–FIND THE DATE

Certain members of the Republican Party was less accommodating and initiated efforts to "destroy the monster" which they perceived the ICC to be. Senator Jesse Helms (R-NC) on one occasion depicted the ICC as "a threat to US national interests," adding that "it is our responsibility to slay it before it grows to devour us" and to that end proposing the following intent:[105]

> Because this court has such wide-ranging implications for the US, even if we are never a party to the treaty, I intend to seek assurances from the Clinton administration that:
>
> The US will never vote in the Security Council to refer a case to the court.
>
> The US will provide no assistance whatsoever to the court, either in funding, in-kind contributions, or other legal assistance.
>
> The US will not extradite [*sic*!] any individual to the court or, directly or indirectly, refer a case to the court.
>
> The US will include in all of its bilateral extradition treaties a provision prohibiting the treaty partner from extraditing [*sic*!] US citizens to this court.
>
> The US will renegotiate every one of its status-of-forces agreements to include a provision that prohibits a treaty partner from extraditing [*sic*!] US soldiers to this court, and not station forces in any country that refuses to accept such prohibition.
>
> The US will not permit a US soldier to participate in any Nato, UN or other international peacekeeping mission, until it has reached agreement with all Nato allies and the UN that no US soldier will be subject to the jurisdiction of this court.

John Bolton, Assistant Secretary of State for International Organization Affairs in the Regan Administration, was equally vicious in his condemnation of the ICC and particularly cunning in the promise to destroy it. Writing in *The National Interest*, he proclaimed:

> ... whether the ICC survives and flourishes depends in a large measure on the

[105] *Supra* the text accompanying note 169.

> United States. We should therefore ignore it in our official posture, and attempt to isolate it through our diplomacy, in order to prevent it from acquiring any further legitimacy or resources.[106]

It strikes one that the reasons advanced by the Helms/Bolton camp for their somewhat squeamish condemnation of the ICC are—to say the least—unconvincing. They are for the most part confined to sweeping generalities, such as the assumption that the ICC will be "overbearing and unaccountable" or "powerless and ineffectual."[107] Their fears of frivolous prosecutions of American servicemen and government officials are clearly without foundation and have in fact been convincingly refuted by almost every analyst of the ICC Statute.

Strong opposition of Senator Helms to the ICC actually preceded the Rome conference[108] and his influence in devising and formulating U.S. policy in respect of the ICC has been significant.[109] In June 2000, he set proceedings in motion in the form of proposed legislation that was clearly designed to frustrate the effective functioning of the ICC.

The 2000-2001 Foreign Relations Authorization Act contains a provision which prohibits any U.S. funds from being utilized by the United Nations for any ICC expenditures until such time as the Senate has given its advice and consent for ratification of the ICC Statute by the United States.[110]

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[106] Bolton, *supra* note 124, at 71.

[107] *Id*., at 66.

[108] *See* King & Theofrastous, *supra* note 166, at 79-81.

[109] *Ibid*; and *see also* Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 85, 90 (eds.) Sarah B. Sewall & Carl Kaysen. Lanham/Boulder/New York/Oxford: Rowman & Littlefield (2000).

[110] Section 1000(a)(7) of Public Law 106-113, 113 Stat. 1501A-460.

In June, 2000, while the Preparatory Commission was in session to consider the then pending proposals for a "procedural fix" that would ensure American exceptionalism, a Bill "to protect United States military personnel and other elected and appointed officials of the United States Government against criminal prosecution by an international criminal court to which the United States is not a party" was introduced in the Senate by Senator Jesse Helms (R-NC)[111] and in the House of Representatives by Representative Tom DeLay (R-TX)[112] which, if enacted, would mandate the following official action:

$ No government agency or entity of the United States, including any court, may cooperate with the ICC in matters such as arrest, surrender and transit to the ICC of suspects, seizure of property, forfeiture of assets, executing of searches and seizures, service of warrants, or taking of evidence;

$ Agents of the ICC are to be precluded from conducting within the United States or any territory subject to the jurisdiction of the United States any investigative activity relating to a preliminary inquiry, investigation, prosecution, or other proceedings at the ICC;

$ The United States must secure, through the Security Council of the United Nations, permanent immunity for American personnel from ICC jurisdiction, or make other arrangements with individual states protecting U.S. personnel from being surrendered to the ICC, before the United States can participate in any assessed United Nations peacekeeping operation;

$ No classified national security information may be transmitted directly or indirectly to the ICC;

$ No country that has ratified the ICC Statute can receive U.S. military assistance, except for NATO countries and "major NATO allies"

[111] 1999 CONG. U.S. S. 2726. 106th CONGRESS, 2d Session (June 14, 2000).

[112] 1999 CONG. U.S. HR. 4654, 106th CONGRESS, 2d Session (June 14, 2000).

(Australia, Egypt, Israel, Japan, the Republic of Korea, and New Zealand);

$ The President of the United States may waive the denial of U.S. military aid in respect of States Parties to the ICC Statute who have entered into an agreement with the United States protecting U.S. personnel from being surrendered to the ICC for prosecution in that Court;

$ The President of the United States is authorized to use all means necessary and appropriate to bring about the release from captivity of U.S. or Allied personnel detained or imprisoned against their will by or on behalf of the ICC;

$ The President of the United States is instructed to analyze U.S. status-of-forces agreements and alliance command agreements, and develop plans to achieve increased protection for U.S. military personnel from prosecution in the ICC.

It strikes one that the Bill was founded on several misrepresentations, for example the allegation that "Americans prosecuted by the International Criminal Court will, under the Rome Statute, be denied many of the procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, including, among others, the right to trial by jury, the right not to be compelled to provide self-incriminating testimony, and the right to confront and cross-examine all witnesses for the prosecution."[113] The fact is that the U.S. Constitution does not guarantee a right to jury trials to American citizens in all criminal cases,[114] the ICC Statute expressly guarantees the right of every accused "[n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence";[115] and the ICC Statute also

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[113] U.S. S. 2726, par. (6); U.S. HR. 4654, par. (6).

[114] *See supra*, par. D.1.

[115] ICC Statute, *supra* note 99, art. 67(1)(g).

expressly guarantees the right of an accused to examine[116] the witnesses against him or her.[117]

When President Clinton on December 31, 2000 issued instructions for the ICC Statute to be signed by the United States, Senator Jessie Helms issued the following press release:[118]

> President Clinton's decision to sign the Rome treaty establishing an International Criminal Court in his final days in office is as outrageous as it is inexplicable.
>
> Two years ago, the President refused to sign the Rome Treaty, citing the threat the Court posed to American service members and officials. At the time, his chief negotiator Ambassador David Scheffer told Congress: "The [Rome] treaty purports to establish an arrangement whereby United States armed forces operating overseas could be conceivably prosecuted by the International Criminal Court, even if the United States has not agreed to be bound by the treaty. Not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations ..."
>
> Nothing—I repeat, nothing—has changed since then to justify U.S. signature. To the contrary, for two years, the Administration has tried in vain to secure additional protections for American citizens, but was rebuffed at every turn by our so-called allies. The Court still claims today, as it did two years ago, the jurisdiction to indict, try and imprison American citizens, whether or not the U.S. agrees to be bound by the treaty. By signing the President has effectively given his approval to this unprecedented assault on American sovereignty.
>
> Today's action is blatant attempt by a lame-duck President to tic the hands of his

[116] The right to examine includes the right to cross-examine a witness.

[117] ICC Statute, *supra* note 99, art. 67(1)(e). Measures inserted in the ICC Statute to protect victims and witnesses "shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." *Id.*, art. 68(1).

[118] F/k/a/ Federal Document Clearing House, Inc., Dec. 31, 2000.

successor. Well I have a message for the outgoing President. This decision will not stand. I will make reversing this decision, and protecting America's fighting men and women from the jurisdiction of this international kangaroo court, one of my highest priorities in the new Congress.

> Earlier this year, Senate Armed Services Committee Chairman John Warner and I introduced the American Service Members' Protection Act, along with most of the Republican leadership and relevant committee chairmen in both houses of Congress. Our effort was publicly endorsed last month by a bipartisan group of former senior U.S. officials, including among others, Bush Defense Secretary-designate Don Rumsfeld.

> Come January 20th, as Chairman of the Senate Foreign Relations Committee, I will work with Senator Warner, Secretary Rumsfeld and others, in the incoming Bush Administration to deal decisively with the threat posed by this Court, and to ensure once and for all that no American is ever tried by this global Star Chamber.

The problem that confronts the anti-ICC Republican group is that the signing of the ICC Statute by the American government requires of the signatory state "to refrain from acts which would defeat the object and purpose of the treaty."[119] This obligation remains intact "until it [the signatory state] shall have made its intention clear not to become a party to the treaty."[120] In order to set this latter provision in motion, Representative Ron Paul (R-TX) and a number of colleagues in Congress on February 8, 2001 submitted in the House of Representatives House Concurrent Resolution 23 expressing "the sense of Congress that President George W. Bush should declare to all nations that the United States does not intend to assent to or ratify the International Criminal Court Treaty ... and the signature of President Clinton to that treaty should not be construed otherwise." Needless to say, such a declaration almost immediately after the signing of the ICC Statute by the American government and without any intervening act or circumstance that might have changed the state of affairs which prevailed when the ICC Statute was signed would signify, and will be interpreted as, profound ill-will on the part of the United States in

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[119] Vienna Convention on the Law of Treaties, *supra* note 195, art. 18.

[120] *Id*., art. 18(a).

its international relations.

To add injury to insult, the Bush administration scaled down American representation in the Preparatory Commission entrusted with the drafting of instruments dealing certain outstanding matters to one person (she only attended—without active participation—sessions devoted to the crime of aggression). On the positive side, however, President Bush has decided to retain the position of ambassador-at large for war-crime issues and appointed Pierre-Richard Prosper (a former Prosecutor in the International Tribunal for Rwanda) to the post.

5. Concluding Observations

Attempts of spokespersons for the United States to discredit the jurisdictional regime of the ICC are clearly without foundation. The competence of states to prosecute American citizens for acts of genocide, crimes against humanity and war crimes, based on the principle of universal jurisdiction, is not the invention of the Rome Conference but is, on the contrary, deeply rooted in customary international law and has been recognized and applied as such by American courts. The crimes within the jurisdiction of the ICC are not fabrications of the ICC Statute but derive from well-established rules of customary international law. The jurisdiction of the ICC did not drop out of the blue but is based on universally recognized principles of nationality and territoriality.

There are furthermore adequate safeguards built into the ICC system of criminal justice to protect the nationals of all states against frivolous investigations and prosecutions, including judicial control of action taken by the Prosecutor *proprio motu*, the principle of complementarity, and supervision by the Assembly of States Parties of implementation of the ICC Statute. The possibility of an American citizen ever being prosecuted in the ICC is extremely remote and perhaps indeed non-existent.

This raises the question as to why the foreign policy entrepreneurs of Washington D.C. would rather see the future Idi Amins, Pol Pots and Pinochets go Scot free than to sacrifice American exceptionalism for the sake of a viable system of international criminal justice.

In this writer's respectful opinion it all goes back to the *Nicaragua Case* of 1985[121] and the outrage of the Regan administration at being condemned for its violation of the rules of international law protecting the sovereignty of states. In consequence of that judgment the United States seemed set on not subjecting itself, and now also its citizens, to the jurisdiction of an international tribunal, and furthermore to set itself above international law.

The United Nations Organization was founded in 1945 with a view, primarily, of substituting collective intervention under Security Council control for unilateral state action as a means of upholding humane principles of co-existence in the political structures of particular countries of the world. The United States has an unfortunate history of not abiding by that rule.

American defiance of international comity within the United Nations regime appears patently from the speech of Senator Helms in the Security Council of the United Nations on January 20, 2000, which included the following passages:[122]

> In the United States during the 1980's, we called this the Reagan Doctrine. In some cases, America has assisted freedom-fighters around the world who are seeking to overthrow corrupt regimes.
>
> We have provided weaponry, training and intelligence. And in other cases, the United States has intervened directly.
>
> And in other cases, such as in Central and Eastern Europe, we supported peaceful opposition movements with moral, financial and covert forms of support.
>
> But in each case, it was America's clear intention to help bring down communist regimes that were oppressing their peoples, and thereby, replace the dictators with democratic governments.

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[121] *See supra*, par. 1.A.3.

[122] *Reprinted in* THE NEW YORK TIMES, <http://www.nytimes.com> (January 21, 2000).

> The democratic expansion of freedom in the last decade of the 20th century is a direct result of those policies.
>
> In none of those cases, however, did the United States ask for, or receive, the approval of the United Nations to legitimize its actions. And it's a fanciful notion that free peoples need to seek approval of an international body, some of whose members are totalitarian dictatorships, to lend support to nations struggling to break the chains of tyranny and claim their inalienable God-given rights.
>
> The United Nations ... has no power to grant or decline legitimacy to such actions.
>
> They are inherently legitimate.

The "Reagan Doctrine" was decisively condemned by the International Court of Justice (ICJ) in the *Nicaragua Case* referred to above.[123] The International Criminal Court is at least in part designed to deal with the tyrants of the world in a manner that would in the long run render humanitarian intervention through the agency of the Security Council is otherwise obsolete.

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[123] *Supra* notes 53.

FOURTH LECTURE

Kommentar [j1]:

RATIFICATION OF THE
CONVENTION ON THE RIGHTS OF THE CHILD

The Convention on the Rights of the Child (CRC)[1] places all kinds of obligations on States Parties to the Convention to ensure its effective implementation at the municipal levels: recognize the inherent right to life of every child and ensure "to a maximum extent possible" the survival and development of the child (sec. 6); implement the right from birth of a child to a name and a nationality (sec. 7); combat the illicit transfer and non-return of children from abroad (sec. 11); respect the right of the child to freedom of thought, conscience and religion (sec. 14); ensure the access of children to information (sec. 17); protect the child against all forms of physical violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (sec. 19), from economic exploitation (sec. 32), and from all forms of sexual abuse (sec. 34); secure access of all children to health care services (sec. 24) and a standard of living adequate for the child's physical, mental, spiritual, moral and social development (sec. 27); provide compulsory primary education free of charge to all children and make secondary education available on the basis of capacity by every appropriate means (sec. 28); and much, much more. The convention proclaims, most importantly, that in all of this "the best interests of the child shall be a primary consideration" (sec. 3).

The United States is one of only two countries in the World that have not ratified the CRC, the other country being Somalia. I argue in this lecture that given the state of American law pertaining to children, the United States cannot ratify the CRC.

1. EQUAL PROTECTION AND NON-DISCRIMINATION

[1] Convention on the Rights of the Child, G.A. Res. 44/25 of Nov. 20, 1989, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3 (hereafter "CRC").

The CRC right at the outset instructs States Parties to "respect and ensure" the rights set forth in the Convention to each child "without discrimination of any kind irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."[2]

Several States Parties experienced problems with the generality of the non-discrimination decree and added reservations pertinent to this provision. Reservations entered by the Bahamas and Cook Islands were based on fears that the provision might imply the conferment of nationality of those countries upon a child who does not otherwise qualify for citizenship.[3] Belgium entered a declaration stating that non-discrimination on grounds of national origin must not be taken to imply "the obligation for States automatically to guarantee to foreigners the same rights as their nationals."

Perhaps more telling were declarations and reservations attached to the instruments of ratification of a large number of Muslim States, mostly couched in general and sweeping terms seeking to exclude the binding effect of all provisions in the CRC that are "incompatible with the laws of Islamic Sharia."[4] Several European

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[2] *Id.*, art. 2(1).

[3] The Cook Islands reservation also mentions permanent residency in this regard. *See also* Reservation (4) of Singapore which also reserves the right of those countries to regulate entry into, stay within and departure from its territory and conferment of citizenship, without express reference to art. 2 of the CRC. A reservation entered by the Cook Islands in regard to the entry into, stay in and departure from the country is attached to art.10 of the CRC (requiring States Parties to handle applications for the reunification of a child with his or her parents "in a positive, humane and expeditious manner"). Reservations entered by Monaco, Switzerland, Tunisia and the United Arab Emirates based on the granting of nationality concerns refer to art. 7 of the CRC (affording to a child the right to acquire a nationality) and not to art. 3.

[4] Declaration submitted by Afghanistan; and *see also* the declaration submitted

countries, including Austria, Denmark, Finland, Germany, Ireland, Italy, The Netherlands, Norway, Portugal, Slovakia (mentioning only Qatar) and Sweden, lodged objections to these reservations, because they (or some of them) were either too general and unspecified and/or seen to constitute violations of Article 19 of the *Vienna Convention on the Law of Treaties* which precludes reservations "incompatible with the object and purpose of the treaty."[5]

The Syrian Arab Republic was slightly more specific in drafting its reservations to CRC provisions. It protested those provisions "which are not in conformity with the Syrian Arab legislation and with the Islamic Shariah's principles, in particular the content of article (14) related to the Right of the Child to the Freedom of Religion, and articles 20 and 21 concerning adoption." Germany, among others, on September 21, 1994 objected to the reservation "owing to its indefinite nature," and Syria subsequently (on May 6, 1996) deposited a communication with the Secretary-General of the United Nations explaining its reservation in more detail: Syrian law does not recognize the system of adoption and its reservation to Articles 20 and 21 means "that approval of the Convention should not in any way be interpreted as recognizing or permitting the system of adoption to which reference is made in these two articles";[6] and its reservation to Article 14 of the Convention

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by Algeria and Djibouti, and reservations entered by Brunei Darussalam, Indonesia (objecting to provisions in the CRC "going beyond the Constitution", which in art. 29(1) proclaims that "the State is based upon belief in the One, Supreme God"), Iran, Iraq, Jordan, Kuwait, Malaysia (accepting certain provisions "only if they are in conformity with the Constitution, which in art. 3(1) proclaims that "Islam is the religion of the Federation"), Maldives, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, Tunisia, and the United Arab Emirates.

[5] Vienna Convention on the Law of Treaties, art. 19(c), U.N. Doc. A/CONF.39/27 (1969), 1155 U.N.T.S. 331.

[6] The communication explains that Syrian law does make provision for the protection and assistance of those deprived for whatever reason of their family environment and for alternative care through foster placements and *kafalah*, in care centers, etc.

applies only to "religion and do not concern those relating to thought and conscience."[7]

For the most part, though, one is left in the dark by the declarations and reservations of predominantly Moslem States as to the impact of Islamic law on specific provisions regulating the different rights of the child, including the principle of non-discrimination fundamental to the protection of all of those rights.

The principle of non-discrimination may especially be implicated in plural societies that include diverse ethnic populations. Canada entered a reservation to Article 21 (dealing with adoptions) to fully accommodate "customary forms of care among aboriginal peoples in Canada," and in a statement of understanding interpreted its obligation to take legislative, administrative and other measures to implement the rights enunciated in the CRC, as mandated by Article 4, to be conditioned by the right to self-determination of ethnic, religious or linguistic minorities "or persons of indigenous origin" as regulated in Article 30. Pluralistic arrangements to accommodate indigenous laws and practices of Aborigines probably also prompted a reservation by New Zealand "to continue to distinguish as it considers appropriate in its law and practice between persons according to the nature of their authority to be in New Zealand ..." South Africa did not enter similar (or any other) reservations, understandings or declarations.

As will appear more fully from our analysis in Paragraph B of the religious rights of children, international law is based on the presupposition that a child's interests are best served within a family environment and under parental care and control. Admittedly, domestic practices within the family circle are to a large extent based on traditions determined by ethnic or religious association. That, too, must be respected by the repositories of political power. A salient principle of contemporary international law thus proclaims the right to self-determination of

[7] Syrian concerns derived from the possible conflicts between this right and the right of parents and guardians to ensure the religious education of their children, the right of a child to choose a religion where he or she has "the mental and legal capacity to do so," and the maintenance of public order or the principles of Shariah.

peoples; and peoples—the beneficiaries of this right—have been identified as national or ethnic, religious or linguistic minorities within a political society.[8]

Article 30 of the CRC affords to children the right to self-determination as defined in contemporary international law. It provides:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

France and Turkey entered reservations to this provision, seemingly prompted by a certain animosity toward sectional group formations within their respective countries.[9] Oman entered a reservation to record its position denying a child the

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[8] *See* International Covenant on Civil and Political Rights, art. 27, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967) (hereafter "ICCPR"). As to the right to self-determination in general, *see* JOHAN D. VAN DER VYVER, LEUVEN LECTURES OF RELIGIOUS INSTITUTIONS, RELIGIOUS COMMUNITIES AND RIGHTS, 67-81 (2004); Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 395-416 (1991); Johan D. van der Vyver, *Self-Determination of the Peoples of Quebec*, 10 J. TRANSNAT'L L. & POL'Y 1, 13-26 (2000); Johan D. van der Vyver, *Self-Determination and the Right to Secession of Religious Minorities under International Law*, in PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE 251, 258-71 (eds.) Peter G. Dachin & Elizabeth A. Cole (2002); J.D. van der Vyver, *Cultural Identity as a Constitutional Rights in South Africa*, 14 STELLENBOSCH L. REV. 51, 52-62 (2003); Johan D. van der Vyver, *The Right to Self-Determination and Its Enforcement*, 10 ILSA J. INT'L & COMP. L. 421, 421-30 (2004).

[9] The French reservation refers to Article 2 of the Constitution of the French Republic of October 4, 1958, which among other things proclaims French to be the official language of the Republic, and Turkey signified that it would interpret

right to profess his own religion or belief.

At the international level, the United Nations *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* excludes practices of ethnic, religious and linguistic communities that violate the national laws of a country and are contrary to international standards.[10] It is submitted that the national-law limitation is to be conditioned by the international-standards criterion: it presupposes municipal regulation that remains within the confines of international standards and does not place undue restrictions upon the group interests of minorities.

Current state practice does not uphold the limitations inherent in the right to self-determination of social communities dictated by the international-standards criterion to the letter. For example, gender discrimination is condemned in almost all of the international human rights conventions and covenants, yet religious institutions that discriminate against women on gender grounds have thus far, successfully, claimed a sovereign right to conduct their affairs within the sphere of their internal household according to the dictates of their faith. And perhaps rightly so! Does one really want the State to compel the Roman Catholic Church (and others) to ordain women as priests (or as part of their clergy)? The practice of female genital mutilation (FGM), on the other hand, can not be justified on basis of the right to self-determination of peoples.[11]

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the right to self-determination according to "the letter and spirit" of its Constitution, which in turn emphasizes national solidarity and loyalty to "the nationalism of Atatürk" (art. 2) and proclaims the Turkish State "with its territory and nation" to be an "indivisible entity"(art. 3).

[10] *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, art. 4.1, G.A. Res.47/136 of Dec. 18, 1992, 47 U.N. GAOR Supp. (No. 49), at 210, U.N. Doc. A/RES/47/135 (1992).

[11] *See*, for example, the United Nations *Declaration on the Elimination of Violence Against Women*, art. 2(a), G.A. Res. 48/104 of Dec. 20, 1993, 48 U.N. GAOR Supp. (No. 49) vol. I at 217, U.N. Doc. A/48/49 (1994) (mentioning FGM as an instance of violence against women).

This raises the question as to the appropriate criterion for separating those violations of international human rights standards that do, and those that do not, exceed the limits of the right to self-determination. There are no clear answers to this question. It would seem, though, that those customs and traditions of a social community that threaten the life or violate the physical integrity of members of the group will clearly not be tolerated under pretension of a right to self-determination.

The United States, too, harbors religious and indigenous groups and have by and large upheld the right to self-determination of such groups. In 1998, the United Nations Special Rapporteur on Religious Freedom, Prof. Abdelfattah Amor of Tunisia, conducted an informal investigation in the United States into compliance in this country with the subject-matter of his brief.[12] Although the state of religious freedom in the United States is by and large satisfactory, the Special Rapporteur found causes for concern in this regard in respect of members of the Arab community being singles out for special scrutiny at airports (which is not a matter of self-determination) and insensitivity of American authorities to the spiritual values of Native Americans (which does implicate the right of Native Americans as a people to self-determination).[13]

Ratification of the CRC by the United States would have more serious equal protection and non-discrimination repercussions at quite a different level.

On December 16, 1977, a juvenile, Terry Roach was sentenced to death by a criminal court in South Carolina for the rape and murder of a 14 year old girl and

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[12] The visit to the United States was "informal" because the American government declined to invite Prof. Armor to conduct an investigation in the United States. He came to the country as the guest of several NGOs and was offered the facilities of a number of Law Schools to conduct an *in loco* investigation, including those of Emory University.

[13] Report Submitted by Mr. Abdelfattah Amor, Special Rapporteur in accordance with Commission on Human Rights Resolution 1998/18, U.N. Doc. E/CN.4/1999/58/Add.1, Addendum (9 Dec. 1998).

murder of her 17 year old boyfriend; and at more or less the same time another juvenile, Jay Pinkerton, was sentences to death in Texas on charges of murder and attempted rape. Roach and Pinkerton were both 17 years old at the time the crimes were committed. Complaints were lodged on their behalf before the Inter-American Commission of Human Rights, based on the submission that the execution of persons who were juveniles at the time of the offence violated the *American Declaration of the Rights and Duties of man* of 1948.[14]

The Commission concluded at the time that there was a rule of international law with the force of *ius cogens* applying to Member States of the OAS which prohibits the execution of children.[15] However, the Commission was convinced by the United States "that there does now not exist a norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty"—thought the Commission opined that a rule to that effect was emerging.[16]

But the Commission went on to hold that the arrangements in the United States as to juvenile executions violated the norm of equal justice for all as laid down in Article II of the Declaration.[17] The different arrangements applying in the states of

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[14] The United States has not ratified the *American Convention on Human Rights* of 1969 and is therefore not subject to the jurisdiction of the Inter-American Court of Human Rights. The laws and practices of the United States (it being a Member State of the Organization of American States) can however be judged by the Inter-American Commission of Human Rights, applying the norms laid down in the 1948 Declaration. Findings of the Commission are not binding.

[15] *Roach & Pinkerton v. United States of America*, par. 56, Res. No. 3/87, Case No. 9647 (United States) (Sept. 22, 1987).

[16] *Id*., par. 60.

[17] *American Declaration of the Rights and Duties of Man*, art. II, OAS Res XXX, adopted by the Ninth International Conference of American States (March 30-May 2, 1948), Bogota, OAS Off. Rec. OEA/Ser.L/V/I.4 Rev. (1965): "All persons are equal before the law and have the rights and duties established in this

the United States in regard to the death penalty was the basis of this finding. Those arguments make imposition of the death penalty for the same crime dependent on the place where the crime was committed, with perhaps only the side of a river where the act took place as the fortuitous divide between a penalty of life or death.[18] The Commission summarized its view as follows:

> For the federal Government of the United States to leave the issue of the application of the death penalty to juveniles to the discretion of State officials results in a patchwork scheme of legislation which makes the severity of the punishment dependent, not, primarily, on the nature of the crime committed, but on the location where it was committed. Ceding to state legislatures the determination of whether a juvenile may be executed is not of the same category as granting states the discretion to determine the age of majority for purposes of purchasing alcoholic beverages or consenting to matrimony. The failure of the federal Government to preempt the states as regard this most fundamental right—the right to life— results in a pattern of legislative arbitrariness throughout the United States which results in arbitrary deprivation of life and inequality before the law, contrary to Articles I and II of the American Declaration of the Rights and Duties of Man, respectively.[19]

One might add that Roach and Pinkerton were executed while their case was pending before the Inter-American Commission of Human Rights. That, in the opinion of the Commission, constituted a violation of the right of the applicants to life and to equal protection of the laws.

The Commission subsequently found that a rule of customary international law had in the mean time been established pin-pointing the age upon which a person may be exposed to the death penalty at 18 years.[20] And, as everyone knows, the U.S.

Declaration, without distinction as to race, sex, language, creed or any other factor."

[18] *Roach & Pinkerton v. United States of America, supra* note 39, at par. 62.

[19] *Id*., at par. 63.

[20] *Michael Dominique v. United States of America*, Report No. 62/02, Case No. 12.285, par. 64, 83, 85 (Oct. 22, 2002).

Supreme Court has recently in the case of *Roper v. Simmons* decided that sentencing a person to death for a crime committed while the perpetrator was under the age of 18 years is unconstitutional in the United States.[21]

Roper represents a giant step forward in bringing the American criminal justice system up to international standards of justice, but does not resolve the equal protection/non-discrimination dilemma that still remains an obstacle to ratification by the United States of the CRC. The great diversity at the states level of rules regulating the prosecution of juveniles for serious crimes as though they were adults may be cited in this context.

The problem confronting the United States derives from the fact that its federal Bill of Rights has been confined to the protection of civil rights only, to the exclusion of the most fundamental natural rights of the individual, such as the right to life and to human dignity. Legal aspect of these rights can be regulated almost at will by the state legislatures. The American federal system and more precisely, the sovereign powers of the states, are commonly held out as an excuse for inequalities in the protection of the law afforded in regard to some of the most fundamental human rights. But in international law, the United States constitutes a single entity and it is consequently required to uphold the customary-law norm of equal protection in regard to all fundamental rights and freedoms within its entire territorial domain. The U.S. Supreme Court indeed possesses wide powers to read those fundamental rights and freedoms into the general language of the Bill of Rights—as most recently evidenced by its judgment in *Roper*. The federal legislature, on the other hand, cannot to the same extent impose uniformity on the whole country in matters within the exclusive jurisdiction of the states.

Ratification of the CRC by the United States is therefore exclusively—so it would seem—dependent on intervention by the U.S. Supreme Court to recognize and to proclaim the inherent injustices of institutions that differentiate and discriminate against juveniles on a state-specific, regional basis. The United States as a matter of course invariably add a so-called "federalism clause" to its instruments of ratification of human rights treaties, leaving implementation of matters within the

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[21] *Roper v. Simmons*, 161 L. Ed. 2d 1 (2005).

jurisdiction of states exclusively to state legislatures.[22] In the present context a "federalism reservation" would not be advisable. The CRC provision demanding of States Parties to take measures to secure the rights enumerated in the CRC "to each child within its jurisdiction without discrimination of any kind"[23] is so fundamental to the entire Convention that a ratification seeking to exclude this demand would most certainly be "incompatible with the object and purpose" of the CRC and thus fall foul of the *Vienna Convention on the Law of Treaties*.[24]

2. RELIGIOUS RIGHTS OF THE CHILD

Several provisions of the CRC deal with religious rights and freedom of opinion of a child. It requires of States Parties to ensure the right of a child who is capable of forming his or her own opinion to express those views freely in all matters affecting the child, and demands that due weight be given to the views of the child in accordance with his or her age and maturity.[25] Every child is furthermore entitled to enjoy freedom of thought, conscience and religion.[26] The child is to be protected against all forms of discrimination or punishment on basis of, among other things, his or her expressed opinions or the beliefs of his or her parents, legal guardian or family members.[27] States Parties to the Convention are instructed to secure and to respect the rights and freedoms of the child without discrimination of any kind based on, among other things, the religion or political or other opinion of

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[22] *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AJIL 341, 341 (1995).

[23] CRC, *supra* note 1, art. 2(1).

[24] Vienna Convention on the Law of Treaties, *supra* note 15, art. 19(c).

[25] CRC, *supra* note 1, art. 12(1).

[26] *Id*., art. 14(1).

[27] *Id*., art. 2(2).

the child or that of his or her parents or legal guardian.[28]

Article 14 of the CRC provides:

> 1. States Parties shall respect the right of the child to freedom of though, conscience and religion.
> 2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
> 3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Several Muslim States entered reservations to this provision. Leaving aside those States which repudiated (unspecified) provisions in the CRC that are in conflict with (unspecified) pre- and proscriptions of Islamic law (Afghanistan, Brunei Darussalam, Djibouti, Iran, Kuwait, Mauritania, Qatar and Saudi Arabia) or of the state constitution with an Islamic bias (Indonesia, Malaysia and Tunisia), and those that entered (unspecified) reservations to Article 14 insofar as its provisions are in conflict with the dictates of *Shari'a* (Maldives, Morocco and the United Arab Emirates), other Muslim States which gave some indication of their religiously-based concerns in some instances protested the right of a child to choose a religion or belief (Jordan and Oman). Algeria recorded that Islam is its state religion and that a child's education must accord with the father's religion. Egypt, Jordan and Syria do not recognize the system of adoption provided for in the CRC.

Other reservations to Article 14 reflect concerns for parental rights. The Holy See entered a reservation to Article 14 (which is in essence really an understanding) to record that it interprets this provision (and certain others) "in a way which safeguards the primary and inalienable rights of parents." A declaration appended to the instrument of ratification of Kiribati is to the same effect, but adds that the rights proclaimed in this provision (and certain others) "shall be exercised ... in accordance with the Kiribati customs and traditions regarding the place of the child

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[28] *Id*., art. 2(1).

within and outside the family." A Polish declaration is in essence the same, but of course referring to "Polish traditions and customs." Singapore added a declaration to its instrument of ratification to Article 14 (and certain other provisions) noting its understanding that those rights will be exercised "with respect for the authority of parents, schools and other persons who are entrusted with the care of the child and the best interests of the child and in accordance with the customs, values and religions of Singapore's multi-racial and multi-religious society regarding the place of the child within and outside the family." The Syrian Arab Republic, in response to objections raised by Germany to its initial reservations, also emphasized the right of parents or legal guardians in regard to the religious education of children in their care. The Netherlands and Syria emphasized that a child wishing to adopt a religion or belief of his or her own choice should be capable of making such a choice, taking into consideration his or her age or maturity.

It is submitted that these concerns have been taken care of, and their substance should be applied within the confines of, Article 14(2) of the CRC, calling for respect of the rights and duties of parents or legal guardians "to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child." International law overall places a high premium on family values and parental interests. The *Covenant on Civil and Political Rights* recognizes the family as "the natural and fundamental group unit" of society and proclaims that it must as such be protected by society and the State.[29] The *Covenant on Economic, Social and Cultural Rights* in similar vein promises "the widest possible protection and assistance ... to the family, which is the natural and fundamental group unit of society, particularly ... while it is responsible for the care and education of dependent children."[30] The *United Nations Guidelines for the Prevention of Juvenile Delinquency* (The Riyadh Guidelines) proclaims that "[e]very society should place a high priority on the needs and well-being of the

[29] ICCPR, *supra* note 18, art. 23(1).

[30] International Covenant on Economic, Social and Cultural Rights, art.10(1), 993 U.N.T.S. 3, *reprinted in* 6 I.L.M. 360 (1967) (hereafter "ICESCR").

family and of all its members,"[31] and calls on governments to "establish policies that are conducive to the bringing up of children in stable and settled family environments."[32]

The *Universal Declaration of Human Rights* deals with the rights of a child in the context of education only. It affords to parents a prior right to choose the kind of education to be given to their children.[33] It is reasonable to assume that the parents' choice to send their children to a religious school is included in this prior right, as would be the parents' preference as to the kind of religious education their offspring is to receive. In its education clauses, the *Covenant on Economic, Social and Cultural Rights* upholds the liberty of parents or guardians to choose the schools for their children other than those within the public education system, and expressly includes in that liberty a competence of the parents to ensure the religious and moral education of their children in conformity with their own convictions.[34] It sanctions the establishment of independent schools, subject only to the condition that such schools comply with general educational policies stipulated in the Covenant and uphold minimum standards layed down by the State.[35] The *Covenant on Civil and Political Rights* calls on States Parties "to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own

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[31] United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), art. 11, G.A. Res. 45/112 of Dec. 14, 1990, U.N. GAOR Supp. (No. 49) at 200 (Annex), U.N. Doc. A/45/49.

[32] *Id*., art. 13.

[33] Universal Declaration of Human Rights, art. 26(3), G.A. Res. 217A (III) of 10 Dec. 1948 (hereafter "UDHR").

[34] ICESCR, *supra* note 54, art. art. 13(3).

[35] *Id*., art. 13(4).

convictions."[36]

The Government of the United States has been under pressure, orchestrated by the so-called religious right, not to ratify the CRC because the Convention supposedly undermines the authority of parents. In view of the accommodation of parental interests and competencies in the CRC and other international instruments, these concerns appear to be unfounded.

3. JUVENILE JUSTICE

In September 2002, a 12 year old South African girl prevailed on two strangers to kill her grandmother, a business women of Pietermaritzburg, Radha Govender (59 years old), with whom the girl was staying at the time. Those two strangers, Sipho Hadebe and Vusimuzi Tshabalala, were each sentenced to 25 years imprisonment for the murder of Ms. Govender. Thereafter the girl was brought to trial.[37] In sentencing her, Swain, J. considered the options: imprisonment, correctional supervision and home-based supervision. He decided on the latter course. Sentencing her was postponed by the trial court for 36 months under stringent conditions. The Supreme Court of Appeals decided that by not sentencing her, the trial court was too lenient, and imposed a sentence of seven years' imprisonment, suspended for five years under much the same conditions as those upon which the suspension of sentencing were made conditional by the trial court.[38] For the period of seven years, the girl was placed under house arrest, in the care and custody of her mother and subject to stringent conditions: she was to continue with her secondary school education (at the time of her appearance in court, she was 14 years old and in the ninth grade) and was to be permitted to participate in school activities; she has to attend a program of the National Institute for Crime

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[36] ICCPR, *supra* note 18, art. 18(4).

[37] *State v. P.*, Case No. CC 155/2003, Pietermaritzburg High Court (Dec. 29, 2003).

[38] *Director of Public Prosecutions, Kwa-Zulu-Natal v. P*, Case No. 363/2005 (1 Dec. 2005).

Prevention and Rehabilitation of Offenders (NICRO) focused on life skills and therapeutic courses and undergo regular support therapy; she is to receive medical and dental treatment as required; and, upon attaining the age of 15, she has to render 120 hours per year of community service. A correctional officer was instructed to visit her at least four times per week at irregular intervals to ensure compliance with the terms of the girl's confinement and to submit quarterly reports to the Court.

The Court chose this course of action based on the best interests of the child criterion, in terms of which emphasis in the sentencing of juvenile offenders must always be on rehabilitation (rather than deterrence or prevention) and their reintegration into society. It also considered international instruments, including the CRC, dealing with juvenile justice issues. The South African Constitution underscores this approach by providing that every child has the right "not to be detained except as a measure of last resort, in which case ... the child may be detained only for the shortest appropriate period of time,"[39] and by instructing courts of law to consider international law when interpreting the constitutional bill of rights.[40]

It might be noted that the Supreme Court of Appeals could find no particular extenuating circumstance beyond the age factor in this case. The girl persistently denied the allegations against her and showed no remorse; she drugged the grandmother before the event by putting sleeping tablets in her tea; she witnessed the strangling of the deceased and insisted that the perpetrators also cut the victim's throat to make sure she was dead; she invited her 6 year old brother to enter the room where the crime was committed (with the murdered woman still there); she permitted the perpetrators to ransack the deceased's home and to take valuables from the house as a reward for their deed, and also promised sexual favors to one of the killers; she tried to fake an alibi; and there was no clear motive for the murder, except, possibly, that she had been reprimanded by the deceased for

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[39] S.A. Const., *supra* note 4, sec. 28(1)(g).

[40] *Id*., art. 39(1)(b).

regularly running op an enormous telephone bill to call her 20 year old boyfriend.

In November, 2001, a 12 year old American boy, Christopher Pittman, shot and killed his grandparents, Joe Pittman (66 years of age) and Joy Pittman (62 years of age). On March 22, 2005, when he was 15 years of age, Christopher was convicted by a jury in Charleston, South Carolina of the dual murders and sentenced to 30 years in prison on each one of the two charges. Christopher was tried as though he was an adult, and 30 years imprisonment is the minimum sentence prescribed for murder. The Court ordered that the two sentences are to run concurrently. Christopher will serve the first two years of his sentence in a prison for juveniles, and when he turns 17 he will be transferred to an adult penitentiary.

Closer scrutiny of the facts in the case will reveal that the accused at the time of the crime on a regular basis used an anti-depression drug, Zoloft, which, if taken by youngsters, could according to expert evidence create an inclination to commit suicide and a tendency toward violent acts. The jury rejected a plea of "temporary insanity" based on this evidence, holding that in view of his conduct at the time of the offence and thereafter the accused was capable of distinguishing between the right and wrong of his act. The question of reduced culpability seemingly did not feature in the case.

Evidence was also produced to show that Christopher had a boisterous life history. He grew up in central Florida in the care of his father after the mother left them (the mother being the daughter of the murdered couple). At one stage he ran away from home, and after an attempted suicide he ended up in a psychiatric hospital. He subsequently moved in with his maternal grandparents (the deceased) in South Carolina. The day before the killings, he was involved in a brawl on the school bus with a fellow student, provoking a strong reprimand from the grandparents. Except for the last-mentioned bit of evidence, which was considered as a possible motive for the murders, the rest of the background history did not seem to feature in the verdict or the sentence.

The American practice of trying a juvenile as an adult, emphasis in the penal policy of the United States on the nature of the crime and not so much on the culpability of the accused, the institution of minimum sentences for juvenile offenders, and the age upon which juveniles are treated as adults for purposes of detention, constitute elements of the American criminal justice system that are at odds with international standards.

All of the states constituting the United States make provision for prosecuting juveniles as adults. Different rules apply in different states as to the offences for which this can be done, the procedure to be followed in such cases (in some states a juvenile court decides whether a juvenile offender is to be tried as an adult, while this occurs automatically in other states in cases of certain serious offences), and the age upon which a juvenile may be prosecuted as an adult. At the end of 2002, altogether 23 states, including South Caroline, had no minimum age upon which a juvenile could be transferred for trial from the juvenile court to a regular criminal court, while in other states the minimum age that applied in this regard varied between the ages of 10 and 15.[41]

The most common age restriction for trying a juvenile as an adult is 14 years, but in states such as Indiana, South Dakota and Vermont the minimum age is as low as 10 years. A decision to try a juvenile offender as an adult is almost exclusively based on the nature of the crime and in disregard of the (reduced) culpability of the accused. If a juvenile is tried as an adult, it is accepted without further ado that he or she possesses the same capability to form a criminal intent as an adult, and minimum sentences applying to adult offenders will mostly also be imposed. Although accountability is supposed to count for something when it comes to sentencing the juvenile prosecuted as an adult, in actual practice this in many cases seems to be fiction rather than truth.

It should also be emphasized that the sentence imposed in the case of Pittman is not unusual within the United States. In dismissing an appeal against the sentence, the Court of General Sessions of South Carolina[42] cited instances where a 13 year old defendant—the ages cited here are all those of the convicted persons at the time the crime was committed—received a sentence of 100 years imprisonment without the

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[41] Details supplied by the National Center for Juvenile Justice, http//www.ncjj.servehttp.com/NCJJWebsite/pdf/transferbulletin.pdf

[42] *South Carolina v. Pittman*, 2005 WL 831970 (S.C.Gen.Sess.) (April 11, 2005).

option of parole,[43] where a 15 year old defendant was sentenced to life imprisonment without parole,[44] where a defendant between the age of 14 and 15 received a prison sentence of 99½ years,[45] where a 13 year old received a mandatory life sentence,[46] and where a 16 year old defendant received life without parole plus 60 years.[47]

We have already referred to the territorially-based inequality of treatment in the juvenile criminal justice system of the United States as a seemingly insurmountable obstacle to ratification of the CRC. The case of Christopher Pittman highlights many other internationally unacceptable facets of the American criminal law and procedure applying to juveniles.

The CRC altogether prohibit capital punishment and life imprisonment for juvenile offenders,[48] and further provides that "detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."[49] The *United Nations Standard Minimum Rules for the Administration of Justice* (The Beijing Rules) likewise provides that—

> (a) ...
> (b) Restrictions on the personal liberty of the juvenile shall be imposed only after

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[43] *Hawkins v. Hargett*, 200 F.3d 1279 (10th Cir. 1999).

[44] *Harris v. Wright*, 93 F.3d 581 (9th Cir. 1996); and *see also State v. Pilcher*, 655 So.2d 636 (La.App. 1995).

[45] *State v. Ira*, 132 N.M. 8, 43 P.3d 359 (2002).

[46] State v. Green, 348 N.C. 588, 502 S.E.2d. 819 (1998).

[47] *State* v. Taylor, 1996 WL 580997 (Tenn. Crim. App. 1996).

[48] CRC, *supra* note 1, art. 37(a).

[49] *Id.*, art. 37(b).

> careful consideration and shall be limited to the possible minimum;
> (c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;
> (d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.[50]

The Beijing Rules furthermore prohibit capital punishment and corporal punishment for crimes committed by juveniles.[51]

Returning then to the American system of juvenile justice, legal reform is obstructed in this country by several contingencies of current practice. The United States is probably unique in the world in that penal policy is here an election campaign issue and therefore decisively influenced by largely uninformed, highly prejudiced and morally debased popular pressures. Election campaigns of the 1990s were particularly prone to "hard on crime" sentiments, including the deterrence fiction of harsh punishments in cases of juvenile offenders.

There is furthermore a strong body of opinion in the United States hostile toward the salience of international standards as feasible directives of the legal idea. And, to make things worst, policy making in the United States almost entirely ignores the input of academic discourse and scholarly writings. In the latter respect, the United States stands in stark contrast the German tradition and that of other European countries. There, the work of academic writers has a decided impact on state policies.

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[50] United Nations Standard Minimum Rules for the Administration of Justice (The Beijing Rules), art. 17, G.A. Res. 40/33 of Nov. 29, 1985, 40 U.N. GAOR Supp. (No. 53) at 206 (Annex), U.N. Doc. A/40/53; and *see also* United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, art. 2, G.A. Res. 45/113 of Dec. 14, 1990, U.N. GAOR Supp. (No. 49) at 204 (Annex), U.N. Doc. A/45/39.

[51] Beijing Rules, *supra* note 88, art. 17(2) and (3).

4. ENFORCEMENT PROCEDURES

The CRC makes provision for a reporting procedure, calling on States Parties to give account of measures taken by them to give effect to its provisions. Reports are due within two years of entry into force of the CRC for the State Party concerned and thereafter every five years.[52] The Committee on the Rights of the Child may make suggestions and general recommendations to encourage compliance with and implementation of the CRC.[53] The primary responsibility vests in States Parties to "respect and ensure" the rights of the child set forth in the CRC.[54]

Enforcement of state obligations to oversee protective measures and to provide facilities, amenities and services pertinent to the best interests of the child is perceived as a problem in several jurisdictions, especially if compliance with such obligations is made conditional upon available resources. Deciding on state expenditures from available resources is commonly perceived as a prerogative of the executive government (though the allocation of funds must be approved by the legislature) and it would constitute a serious violation of the separation of powers—the argument goes—if a court of law were to dictate to the treasury how the available resources are to be allocated. This argument loses credibility in countries where a certain preferential allocation of scarce resources derives from a constitutional duty of the State to provide.

The enforcement of economic, social and cultural rights in cases where the State is under a constitutional obligation to provide the services, facilities or support for their meaningful enjoyment is nevertheless problematic.

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[52] CRC, *supra* note 1, art. 44.

[53] *Id*., art. 45.

[54] *See id*., art. 2.

5. CONCLUSION

The American criminal justice system applying to juveniles is the antithesis of contemporary standards of international law. Prosecuting juveniles as adults, and adhering to a penal policy for juvenile offenders that remains insensitive to the best interests of the child, seem to me to be an insurmountable obstacle that should preclude ratification of the CRC by the United States. The problem is insurmountable for the foreseeable future because (a) if the federal legislature were to step in with legislation seeking to bring American law up to the generally accepted standards of penology, the US Supreme Court would be duty-bound to invalidate the legislation as an infringement of the sovereign powers of the states; and (b) the US Supreme Court cannot invalidate cruel and inhuman punishments unless those punishments are also found to be "unusual" within the United States, and every single state in the United States currently permit the prosecution of juveniles as adults.

Nor would a "federalism reservation" be appropriate to uphold the states' competence to punish juveniles on a state-specific unequal basis and without regard for the best interest of the child. The norm of equal treatment and supremacy of the best interests of the child in all matters affecting the child are so fundamental to the entire CRC regime, that upholding current state policies and practices pertinent to juvenile offenders under a general "federalism reservation" would surely be incompatible with the object and purpose of the CRC and therefore fall foul of the *Vienna Convention on the Law of Treaties*.

On the other hand, though, ratification of the CRC by the United States could perhaps in the long run bear fruit. The CRC regime is not set on *forcing* States Parties to uphold the principles of the Convention. Its only enforcement mechanism is a reporting procedure. State Party reports serve two extremely useful purposes: (a) they compel States Parties periodically to take a close look at their own legal institutions pertinent to the rights of the child and in view of all CRC provisions; and (b) they provide an agenda for a friendly, diplomatic, dialogue between the Committee for the Rights of the Child and a State Party representative on matters emanating from the State Party report. In this way, the rights of the child remain in contention and the subject of ongoing reflection, deliberation, and—it is to be hoped—eventual reform.

FIFTH LECTURE

PROSECUTING OFFENSES AGAINST THE LAW OF NATIONS IN THE UNITED STATES

In 1986, the United States (somewhat belatedly) ratified the Convention on the Prevention and Punishment of the Crime of Genocide. It subjected its ratification instrument to a package of reservations, understandings and declarations (RUDs)[1] which prompted one analyst to say that ratification of the Convention by the U.S. Senate was merely "a symbolic act,"[2] while another opined that the Senate, by insisting on the so-called Sovereignty Package reflected in the RUDs, was determined to "reduce the convention to nothing more than a symbol of opposition to genocide"[3]—or in the words of Jordan Paust, "to gut the treaty of any meaningful effect."[4]

in the package of RUDs made the entering into force of the ratification instrument dependent on the enactment of implementation legislation, which did occur in 1988

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[1] *See* 132/15 CONG. REC. S1377-78 (daily ed. Feb. 19, 1986). As to the package of RUDs, *see* Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away With It*, 11 MICH. J. INT'L L. 90 (1989-90); Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. L. 415, 482-88 (1998).

[2] LAWRENCE J. LE BLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION, 144. Durham/London: Duke Univ. Press (1991); and *see also id*., at 238.

[3] *Id*., at 241.

[4] Paust, *supra* note 1, at 94; and *see also* Samantha Power, *The United States and Genocide Law: A History of Ambivalence*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 165, 166 (eds.) Sarah B. Sewall & Carl Kaysen. Lanham/Boulder/New York/Oxford: Rowman & Littlefield (2000) (noting that the American RUDs "significantly weakened the Convention").

when the Genocide Convention Implementation Act(the Proxmire Act)[5] became law. The Act, among other things, restricts jurisdiction of federal courts of the United States to instances of genocide committed in the United States, and to acts of genocide committed by an American A Declaration included citizen abroad. Its ultimate effect is therefore to preclude the prosecution in the United States of foreign nationals who have committed acts of genocide in a foreign country, thereby precluding the exercise of universal jurisdiction by American courts in respect of prosecutions under the Proxmire Act, and possibly rendering the United States a safe haven for foreign perpetrators of genocide.[6]

This raises the following problem: Can an alien who committed genocide in a foreign country, while for that reason not being subject to the jurisdiction of an American court under the Genocide Convention Implementation Act, nevertheless be brought to trial in a federal court on charges founded on the law of nations? Can Congress, by enacting implementation legislation in regard to a treaty entered into by the United States, exclude the jurisdiction of federal courts to prosecute someone for an offence against the law of nations dealing with the same subject-matter regulated by the treaty? Consider the following hypothetical:[7]

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[5] Genocide Convention Implementation Act, 102 Stat. 3045 (1988), 18 U.S.C.A., §§ 1091-93.

[6] *See* Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations*, 39 VA. J. INT'L L. 425, 462, 464-65 (1999).

[7] This is indeed only a hypothetical since the judgment on which it is based, was reversed in subsequent proceedings. *See* IN RE SURRENDER OF NTAKIRUTIMANA, 988 F. Supp. 1038 (S.D. Tex., 1997), superceded by IN RE SURRENDER OF NTAKIRUTIMANA, No. Civ. A.L.-98-43, 1998 WL 655708 (S.D. Tex., Aug. 6, 1998), and denial of a writ for *habeas corpus* confirmed in NTAKIRUTIMANA v. RENO, 184 F.3d 419 (5th Cir., 1999). Ntakirutimana was therefore in the end surrendered to the ICTR and was subsequently convicted of the crime of genocide. PROSECUTOR v. ELIZAPHAN NTAKIRUTIMANA & GÉRARD NTAKIRUTIMANA, Case No. ICTR-96-10-T & ICTR-96-17-T (21 Febr. 2003). He

Elizaphan Ntakirutimana is wanted by the International Criminal Tribunal for Rwanda (ICTR) for crimes committed in that country as part of the genocidal onslaught of Hutu against the Tutsi. Ntakirutimana, a Pastor of the Seventh Day Adventist Church, found his way to Texas, where he was detained. He could not be extradited to Rwanda under any extradition treaty that might exist, because the ICTR is not part of the criminal justice system of Rwanda. Special legislation was therefore enacted in the United States to authorize the surrender of persons wanted for prosecution in the *ad hoc* criminal tribunals.[8] The United States (on January 24, 1995) had entered into an *Agreement on Surrender of Persons between the Government of the United States and the Tribunal* [for Rwanda] and sought to surrender Ntakirutimana to the ICTR pursuant to that agreement, as sanctioned by the subsequent legislation. The Federal District Court would have nothing of it. Since the Agreement was not entered into in accordance with the constitutional treaty procedures, requiring approval of an international treaty by (a two-thirds majority of) the Senate, it was unenforceable and indeed unconstitutional. The Court ordered the release from custody of the suspect.[9]

Because Ntakirutimana is not an American citizen and the criminal acts of which he is suspected have not been committed in the United States, he cannot be prosecuted in the United States under the Genocide Convention Implementation Act. The question therefore arises whether the United States is precluded by its own legislation from assuming universal jurisdiction to prosecute acts of genocide *as offences against the law of nations* committed by persons in the position of Ntakirutimana.

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was released on December 6, 2006 after having completed his sentence, thereby becoming the first person convicted by the *ad hoc* tribunals to be released. He died on January 2007 at the age of 83.

[8] *See* the National Defense Authorization Act for the Fiscal Year 1996, § 1342, Public Law 104-106 of February 10, 1996, 110 Stat. 486 (1996).

[9] But *see supra* note 7.

The first section of this essay is devoted to scrutinizing the Constitutional provisions that have a bearing on the problem at hand, in particular Article VI, Clause [2] proclaiming treaties entered into by the United States to be the supreme law of the land, and Article I, Section (8), Clause [10] authorizing Congress "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." It will be argued that Article VI, Clause [2] in principle renders treaties self-executing in the United States, but that this general rule is subject to a number of exceptions; and as far as Article I, Section (8), Clause [10] is concerned, that the power of Congress to define and punish offences against the law of nations will not preclude the prosecution of such offences in the United States in cases where Congress has not defined the offence, provided only that the offence has been defined with sufficient clarity in international law.

In the second section, the liability of persons for international crimes under the rules of international law will be considered. It will be argued that states cannot through a treaty arrangement *per se* render their nationals, other than those acting as organs of the state, criminally liable for offences stipulated in the treaty, but that charges based on customary-law offences can indeed be brought against persons acting in their private capacity.

The third section looks into the liability of persons for international crimes under the municipal law of the United States. It would seem that treaty-based crimes require implementation legislation, but that is not the case as far as offences against the law of nations are concerned. The law of nations constitute part of the common law of the United States and have been incorporated into the municipal law of the United States in virtue of Article I, Section (8), Clause [10] of the Constitution.

The fourth section considers the power of American courts to exercise universal jurisdiction in respect of offences against the law of nations. The power of federal courts in this regard derives from Article I, Section (8), Clause [10] of the Constitution. It is also important to note that the United States is quite unique in having afforded to federal courts the competence to exercise universal jurisdiction in civil matters.

The fifth section seeks to define "the law of nations" and to identify international crimes that would qualify as "offences against the law of nations." It will be argued that for purposes of Article I, Section (8), Clause [10], "the law of nations" is to be confined to customary international law with the force of *ius cogens*. Looking at the jurisprudence founded on universal jurisdiction and the Alien Tort Statute, quite an impressive list of offences have thus far been identified by American courts as deriving from the law of nations.

The final section will seek to answer the question whether or not the legislature can limit or obstruct the constitutional competence of federal courts or military tribunals to prosecute offences against the law of nations. There is merit in the argument that it can not do so without constitutional amendment.

1. CONSTITUTIONAL DIRECTIVES

Article VI, Clause [2] of the Constitution of the United States proclaims that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

In terms of Article I, Section (8), Clause [10] of the Constitution, Congress has been given the power "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."

(a). *Article VI, Clause [2]*

The Constitution, by proclaiming that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land,"[10] in principle renders international treaties self-executing in the United States.[11]

There are, however, several exceptions to the rule. According to the *Restatement (Third) of the Foreign Relations Law of the United States*, an international agreement entered into by the United States will not be self-executing:

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[10] Constitution of the United States, Art. VI, cl. [2].

[11] FOSTER v. NEILSON, 27 U.S. (2 Pet.) 253, 314 (1829).

- if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation;

- if the Senate in giving consent to a treaty, or Congress by resolution, requires implementation legislation;

- if implementation legislation is constitutionally required.[12]

Crime-creating treaties as a matter of course place upon states parties the obligation to criminalize in their respective national criminal justice systems the offences stipulated in the Convention. The Convention on the Prevention and Punishment of the Crime of Genocide thus provides:

> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.[13]

The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment provides in similar vein:

> 1. Each State Party shall ensure that all acts of torture are offences under its

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[12] Restatement (Third) of the Foreign Relations Law of the United States, § 111(4); *and see* PEOPLE OF SAIPEN v. UNITED STATES DEPT. OF INTERIOR, 502 F.2d 90, 97 (9th Cir., 1974) (mentioning, from a different perspective the following elements to be considered: "The purpose of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-term social consequences of self- or non-self-execution").

[13] Convention on the Prevention and Punishment of the Crime of Genocide, 1948, art. V, G.A. Res. 270 of 9 Dec. 1948, 3 U.N. GAOR, Part 1, at 174, U.N. Doc. A/810; 78 U.N.T.S. 277 (1948) (hereafter "Genocide Convention").

> criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
>
> 2. Each State Party shall make the offences punishable by appropriate penalties which take into account their grave nature.[14]

Provisions such as these are fairly commonly interpreted in the United States as reflecting an intention by drafters of the Convention that its provisions will not be self-executing, because the Convention itself makes provision for implementation legislation.[15] However, the question whether or not a treaty is self-executing is not governed by international law but by the constitutional law of each State. The Genocide Convention only requires the enactment of "necessary legislation," and implementation legislation is not necessary in cases where the substantive Convention provisions are self-executing. The Torture Convention similarly places an obligation on States Parties to "ensure" that the offences stipulated in the Convention are rendered punishable in their municipal criminal justice systems, and in cases where the Convention is self-executing under the constitutional law of the state concerned, no further legislative action is called for.

The prohibition of genocide and torture are today in any event part of customary international law, so that the vital question to be considered regarding those crimes

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[14] Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 4, 1984, G.A. Res. 39/46 of 10 Dec. 1984, 39 U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/51, at 197, *reprinted in* 23 I.L.M. 1027 (1984), as modified (24 I.L.M. 535 (1985)).

[15] In *Foster v. Neilson*, the U.S. Supreme Court held that certain grants of land regulated in a treaty between the United States and Spain were not self-executing because the (English) text of the treaty provided that "all grants of land ... shall be ratified and confirmed to the person in possession of the lands ..." FOSTER v. NEILSON, 27 U.S. (2 Pet.) 253, 314 (1829). This finding was subsequently reversed on basis of the Spanish text of the treaty, which provided that the grants "shall remain ratified and confirmed ..." UNITED STATES v. PERCHEMAN, 32 U.S. (7 Pet.) 51, 88-89 (1833).

is no longer whether or not crime-creating treaties are self-executing but whether or not customary international law is part and parcel of the municipal law of the state.

The question whether or not the Senate or Congress can lawfully declare that an international treaty which would otherwise be self-executing must be rendered enforceable through implementation legislation (as stated in (b) above) is controversial.[16] If a treaty is by its very nature self-executing and is rendered self-executing in virtue of the constitutional decree proclaiming it to be part of the supreme law of the land, then it would surely not be within the power of the legislature, or any branch thereof, to decide otherwise.[17] However, debating the matter further does not come within the scope of the present survey.

The rule rendering an international treaty non-self-executing in the United States "if implementation legislation is constitutionally required" merits closer scrutiny.

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[16] *See* Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 669-70 (1986).

[17] Jordan J. Paust, *Customary International Law and Human Rights Treaties* are *Law of the United States*, 20 Mich. J. Int'l L. 301, 324 (1999) (stating that "[a] mere declaration of the president, even with full consent of the Senate, cannot alter a constitutional command," and maintaining that declarations attached to the ratification instruments of human rights treaties with intent to render those treaties non-self-executing in the United States are for that reason null,and void). It has also been argued that reservations inconsistent with the objects and purposes of a treaty are null and void. *Id*., at 322-23. A decision as to the self-executing status of a treaty is furthermore for the courts to decide, and individuals can be severely prejudiced by the President and Senate usurping that function of the courts. FROLOVA v. UNION OF SOVIET SOCIALIST REPUBLICS, 761 F.2d 370, 373 (7th Cir., 1985) (holding that the question whether a treaty is self-executing is "an issue for judicial interpretation"); *and see* David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 67-68 (1978); Lori Fisler Damrosch, *The Role of the Senate Concerning "Self-Executing" and "Non-Self-Executing Treaties*, 67 CHI-KENT L. REV. 515, 527 (1991).

It has been held that if a treaty ratified by the United States deals with a subject matter listed in the Constitution as falling within the powers of Congress,[18] the provisions of the treaty that overlap with those powers shall not be self-executing.[19] The reason for this position is obvious: If the Constitution affords to Congress the power to legislate on x, y and z, the Executive (with consent of the Senate) cannot usurp that power by incorporating rules of law pertinent to x, y or z into the municipal law of the United States. In such cases, implementation legislation enacted by Congress is constitutionally required.

It is perhaps also worth noting, as an aside, that in cases where an international treaty is self-executing in the United States and the treaty provisions are contradicted by an American law, the following rules apply:

(a) The Constitution is the ultimate supreme law of the land. In case of a conflict between a treaty provision and the Constitution, the constitutional provision must therefore be upheld.[20]

(b) A self-executing treaty is equal in status with federal law. In case of a conflict between a treaty provision and a federal statute, the one later in date will prevail;[21]

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[18] Constitution of the United States, Art. I, § 8.

[19] EDWARDS v. CARTER, 580 F. 2d 1055, 1058 (D.C. Cir., 1922); Iwasawa, *supra* note 16, at 675-76.

[20] Restatement (Third) of the Foreign Relations Law of the United States, §§ 115(3), 302(2), 721; *and see* REID v. COVERT, 354 U.S. 1, 16-17 (1957).

[21] Restatement (Third) of the Foreign Relations Law of the United States, § 115(2); *and see* FONG YUE TUNG v. UNITED STATES, 149 U.S. 698, 720 (1893); UNITED STATES v. DION, 476 U.S. 734, 738 (1986); WHITNEY v. ROBERTSON, 124 U.S. 190 (1988); UNITED SHOE MACH. CO. v. DUPLESSIS SHOE MACH. CO., 155 F. 842, 845-46 (1st Cir., 1907); GENERAL ELECTRIC CO. v. ROBERTSON, 21 F. 2d 214, 215-16 (D. Md. 1927); COOK v. UNITED STATES, 288 U.S. 102, 118-19

(c) A self-executing treaty is superior to state law. In case of a conflict between a treaty provision and a state law, the treaty provision will prevail irrespective of the date on which that law was enacted (before or after the treaty provision became binding on the United States).[22]

(b) *Article I, Section (8), Clause [10]*

The language chosen by the Founders to designate the power of Congress "to define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations" was not exactly elegant or precise. If Congress, literally, were to punish piracies and felonies committed on the high seas, or offences against the law of nations, one would expect that to be done by means of impeachment proceedings. However, since earliest times it was assumed that the competence to bring perpetrators of the concerned crimes to justice was not the business of the federal legislature but vested in federal courts, and in some instances in military tribunals.

This was indeed confirmed by The Judiciary Act of 1789, under which the federal court system was established. Section 11 afforded to circuit courts "exclusive cognizance of all crimes and offences cognizable under the authority of the United States."[23] Article I, Section (8), Clause [10] was the only provision in the Constitution that referred to criminal offences and it is reasonable to assume that

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(1933); Iwasawa, *supra* note 16, at 688.

[22] Restatement (Third) of the Foreign Relations Law of the United States, §§ 111(1); *and see* NIELSON v. JOHNSON, 279 U.S. 47, 52 (1929); UNITED STATES v. PINK, 315 U.S. 203, 230-31 (1942); Iwasawa, *supra* note 16, at 688.

[23] The Judiciary Act, art. 11, 1 Stat. 73 (1789); *and see* Quincy Wright, *Treaties and the Constitutional Separation of Powers in the United States*, 12 A.J.I.L. 64, 84 note 89 (1918). The section afforded concurrent jurisdiction to circuit courts with district courts "of the crimes and offences cognizable therein."

drafters of Article 11 intended those offences to be prosecuted by federal courts.[24]

Article I, Section (8), Clause [10], according to Jordan Paust, merely afforded to Congress "a concurrent power to define and punish offences against international law, not an exclusive power at the expense of the treaty power and that of the judiciary, which are also constitutionally based."[25]

An original draft of the concerned provision in The Judiciary Act referred to "offences cognizable under the authority of the United States *and defined by the laws of the same*."[26] Omission of the restrictive phrase emphasized in this citation was proposed in and adopted by the Senate, and it is again reasonable to assume that prosecuting offences against the law of nations in the United States was therefore considered not to be dependent on circumscription by Congress of the same. Omission of the phrase prompted Charles Warren to conclude:

> The only rational meaning that can be given to this action striking out the restrictive words is, that Congress did not intend to limit criminal jurisdiction to crimes specifically defined by it.[27]

Robert Palmer concluded, more precisely, that "[a]llowing the judiciary to punish offences under the law of nations without prior congressional definition was

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[24] Edwin D. Dickenson, *The Law of Nations as Part of the National Law of the United States*, 101 UNIV. PA. L. REV. 26, 46-47 (1952); *and see* ZAMORA-TREVINO v. BARTON, 727 F. Supp. 589, 591 (D. Kan., 1989) (proclaiming that international law is a matter of federal law).

[25] Paust, *supra* note 1, at 103.

[26] Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 73 (1923). Emphasis added to the text of the original draft.

[27] *Id.*

congruent with constitutional original intent."[28]

This was indeed confirmed by the U.S. Supreme Court when it decided that the constitutional instruction for Congress *to define* piracies and felonies on the high seas and offences against the law of nations does not entail an obligation on the part of Congress to define such offences or to enact laws that would incorporate the offence in question into the criminal justice system of the United States, provided only that, "by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law," the crime to be punished is "defined in international law with reasonable certainty."[29]

Congress thus has the power to define offences against the law of nations, it is not compelled to do so; and offences under the law of nations can be punished in the United States in cases where Congress has not defined the same, provided only that the offence concerned is circumscribed in international law with sufficient clarity to permit its enforcement in a court of law in compliance with the legal certainty prong of the principle of legality as required by the norms of criminal justice. In a totally different context, the U.S. Supreme Court on one occasion defined the norm of legal certainty as censuring a criminal statute that was "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[30]

Several problems currently obscure the full implications of the constitutional provision under consideration, particularly that component of Article I, Section (8), Clause [10] relating to offences against the law of nations. For example, which crimes would qualify as "offences against the law of nations", and can the legislature obstruct the constitutional competence of federal courts or military

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[28] Robert C. Palmer, *The Federal Common Law of Crime*, 4 L. & HIST. REV. 267, 276 (1986).

[29] UNITED STATES v. SMITH, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

[30] CONNALLY v. GENERAL CONSTR. CO., 269 U.S. 385, 391 (1926).

tribunals to prosecute offences against the law of nations by redefining those offences?

It should be noted at the outset that a clear understanding of the power of federal courts (in general) and military tribunals (in the case of war crimes) to prosecute and inflict punishments for offences against the law of nations has been obscured by imprecise formulations in some judgments and academic writings; and in particular by not always clearly distinguishing between customary international law (norms of international law deriving from generally observed state practice founded on *opinio iuris ex necessitate*) and treaty law (norms of international law deriving from a treaty between two or more subjects of international law), or between customary international law (a distinct branch of international law) and the common law (that part of the national law of a state without a codified system of law which has not been reduced to statutory enactment).[31]

It is also useful to distinguish between customary international law (a distinct branch of international law alongside treaty law), and international customary law (rules of law that have come to be observed as a matter of custom on a global scale and which are not confined to the norms of international law—a "world law" as Professor Harold Berman prefers to call it).[32]

It has been argued that the constitutional provision affording to Congress the power

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[31] Perhaps most confusing was a judgment suggesting that "international law" is made up of the law of nations (which presumably includes treaty law and customary international law) and private international law or the conflict of laws. HILTON v. GUYOT, 159 U.S. 113, 165 (1894).

[32] Harold J. Berman, *World Law*, in 18 FORDHAM INT'L L.J. 1617 (1995): Harold J. Berman, *World Law*, in 64 KOERS 379 (1999); Harold J. Berman, *Integrative Jurisprudence and World Law*, in THEORIE DES RECHTS UND DER GESELLSCHAFT: FESTSCHRIFT FÜR WERNER KRAWIETZ ZUM 70. GEBURTSTAG, 3. Berlin: Duncker & Humblot (2003); and *see also* the collection of essays in GLOBAL LAW WITHOUT A STATE (ed.) Gunther Teubner. Aldershot/Brookfield/Singapore/Sydney: Dartmouth (1997).

to define and punish offences against the law of nations rendered those offences non-self-executing in the United States. A comment contained in the *Restatement (Third) of the Foreign Relations Law of the United States* accordingly proclaims that "it has been assumed that an international crime (e.g. genocide) or requiring states parties to punish certain actions (e.g. hijacking) could not itself become part of the criminal law of the United States, but would require Congress to enact an appropriate statute before an individual could be tried or punished for the offense."[33] This "assumption" may be supported in regard to common-law offences and treaty-based crimes, but is not correct as far as felonies against the law of nations are concerned, which indisputably includes the crime of genocide and most likely also hijacking.

And at least this much is clear: Statutory law must as far as possible be construed in conformity with the law of nations.[34]

2. LIABILITY FOR INTERNATIONAL CRIMES UNDER THE RULES OF AMERICAN LAW

The question here is intimately related to the rules applying to the incorporation of international law as part of the municipal law of the United States (that is, without the need for implementation legislation). One must in this regard again distinguish between treaty law and customary international law; and a clear distinction between international law and the common law is perhaps also called for, since offences against the law of nations are sometimes confused with common law crimes.

(a) *Common-Law Crimes*

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[33] Restatement (Third) of the Foreign Relations Law of the United States, Comment (i) (at 47-48).

[34] *See*, for example, TALBOT v. SEEMAN, 5 U.S. (1 Cranch) 1, 43 (1801) (referring to "usages of nations"); MURRAY v. SCHOONER CHARMING BETSY, 6 U.S. (2 Cranch) 64, 118 (1804); BROWN v. UNITED STATES, 12 U.S. (8 Cranch) 110, 125 (1814).

The common law comprises part of the municipal law of states that do not have a codified system of law. It is sometimes denoted as the "unwritten law", or the law developed by judicial precedent. However, judicial precedent is not exclusively the source of the common law but may serve to identify and to clarify norms of the common law.[35]

The common law is that part of the municipal law of a state with an un-codified system of law which is not part of the statutory law ("statutory law" here in the widest sense to include the written decrees of competent law-creating authorities at all levels of the political structures of a legal community). The common law must not be confused with customary international law, which constitutes a distinct branch of international law.[36] The distinction between common law and customary international law remains valid in cases where customary international law is incorporated into the municipal law of a country as part of its common law—which also applies to the United States.[37]

In *United States v. Hudson & Goodwin* (1812), the U.S. Supreme Court decided that circuit courts cannot exercise common-law jurisdiction in criminal cases.[38] It

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[35] *See*, for example, COMMONWEALTH v. MOCHAN, 110 A. 2d 788, 790 (S.C., Pa., 1955) ("It is of little importance that there is no precedent in our reports which decides the question here involved. The test is not whether precedents can be found in the books but whether the alleged crimes have been prosecuted and the offenders punished under the common law").

[36] Although the law of nations is often depicted as part of the common law, customary international law—by virtue of the special constitutional status of "the law of nations"—has been considered to be more than mere common law. JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS, 249. Durham, N.C.: Carolina Press (2000).

[37] *See*, for example, TALBOT v. JANSON, 3 U.S. (3 Dall.) 133, 161 (1795) (Iredell, J. speaking of "the common law, of which the law of nations is a part").

[38] UNITED STATES v. HUDSON & GOODWIN, 11 U.S. (7 Cranch) 31, 32-33 (1812);

must be emphasized that this applies to the common law and not to the law of nations.[39]

It will be recalled that an original draft of the Judiciary Act of 1789 contained a phrase requiring Congress to define offences against the law of nations, but that the clause was deliberately omitted from the final draft.[40] In commenting on this eventuality, Charles Warren observed that had the U.S. Supreme Court taken cognizance of this bit of legislative history, its decision in *Hudson* would probably have gone the other way.[41] Bearing in mind that in its proper context "offences cognizable under the authority of the United States" refer to those specified in Article I, Section (8), Clause [10]—that is offences against the law of nations and not common-law crimes—it is evident that Warren's comment is slightly off the mark.

It might be noted in passing that while common-law crimes cannot be prosecuted in federal Courts, there are some States that have retained common-law crimes, notably Florida, Michigan, Virginia and Washington.[42] There is a general tendency in the United States to require statutory codification of common-law crimes.[43] This

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and *see also* UNITED STATES v. COOLIDGE, 14 U.S. (1 Wheat.) 415 (1816).

[39] Paust, *supra* note 17, at 309.

[40] *Supra*, the text accompanying note 26.

[41] Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 73 (1923).

[42] *See* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESS: CASES AND MATERIALS, 293. Gaithersburg, N.Y.: Aspen (7th ed., 2001); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, 20-21. N.Y./San Francisco: Matthew Bender (1995).

[43] A note in the Columbia Law Review of 1947 noted that "a majority of the states retain to some degree the common law of offences." Note, 47 COLUM. L. REV. 1332, 1332 (1947). But even then, a large majority of prosecutions under

tendency cannot derogate from the constitutional disposition of crimes against the law of nations.

(b) *Treaty-based Crimes*

In the United States there is authority for the proposition that, since treaties are as a general rule self-executing, the subjects of American law can be held criminally liable, as a matter of municipal law, for conduct that violates a treaty obligation of the United States.

The authority most commonly cited in this regard is the instructions given to the jury by judges who presided in the *Trial of Gideon Henfield* (1793).[44] The United States had entered into treaties with all belligerent powers in the Napoleonic War proclaiming its neutrality, and the accused participated in action by private citizens of the United States that constituted a violation of those treaties. Chief Justice John Jay, having asserted that the laws of the United States comprise all treaties made under the authority of the United States, the laws of nations (customary international law), and the Constitution and statutes of the United States,[45] went on to say to the jury:

> That the United States are in a state of neutrality relative to all powers at war, and that it is their duty, their interest, and their disposition to maintain it: that, therefore, they who commit, and aid and abet hostilities against these powers, or either of them, offend against the laws of the United States, and ought to be punished.[46]

Judge Wilson (speaking also for Iredell and Peters, JJ.) at a later stage of the

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the common law were confined to petty offences. *Id*., at 1334.

[44] TRIAL OF GIDEON HENFIELD, 11 Fed. Cas. 1099 (Case No. 6,360) (1793), *reprinted in* WHARTON, STATE TRIALS OF THE UNITED STATES, 49. New York: Burt Franklin (1970).

[45] *Id*., F. Cas., at 1100-01; WHARTON'S at 52.

[46] *Id*., F. Cas., at 1104; WHARTON'S, at 56.

proceedings, while reiterating these sentiments, explained that the laws of the United States in this context included not only the law of nations but also international treaties entered into by the United States.[47]

Henfield does not stand on solid ground: for one thing, the concerned treaties, though defining all kinds of obligations emanating from the relationships of neutrality, did not attach criminal sanctions to violations of any of those obligations. One could also perhaps argue that punishment for the violation of treaty obligations was sanctioned by the law of nations, though judge Wilson clearly also referred to the treaty law in this regard and it is furthermore highly unlikely that retributory action for the violation of treaty obligations extended beyond the confines of state liability. Not surprisingly, therefore, legislation was enacted in the United States in 1794[48] to afford backing to the neutrality treaties by making their violation by private citizens punishable in the United States.[49]

Although suggestions were made from time to time that criminal liability of private citizens could derive from treaties,[50] there is on the other hand express authority for

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[47] *Id*., F. Cas., at 1120; WHARTON'S, at 84-85.

[48] *An Act in Addition to the Act for the Punishment of Certain Crimes Against the United States*, 1 Stat. 381, c. 50 (June 5, 1794).

[49] THE THREE FRIENDS, 166 U.S. 1, 53 (1697) (noting, with reference to the *Trial of Henfield*, that the legislation of 1794 was enacted "in view of controversy over that position").

[50] *See*, for example, MORRIS v. UNITED STATES, 161 F. 672, 675 (8th Cir., 1908) (stating that "[t]here are no crimes or offences cognizable in the federal courts, outside of maritime or international law *or treaties*, except such as are created and defined by acts of Congress".) (Emphasis added). In *Talbot v. Janson* it was said: "That *prima facie* all pirates and trespasses committed against the general law of nations, are inquirable, and may be proceeded against in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it." TALBOT v. JANSON, 2 U.S. (3 Dall.)

not affording self-executing status to treaty provisions that create specific offences. In *The Over the Top*, District Judge Thomas put it thus:

> It is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose no treaty is self-executing. Congress may be under a duty to enact that which has been agreed upon by treaty,[51]

Quincy Wright noted many years ago that crime-creating treaties are "by nature" self-executing, but then went on to say: "[S]ince criminal jurisdiction of federal courts are entirely statutory, treaty crimes must be incorporated by an Act of Congress before they become cognizable in federal courts."[52] This assessment of the law of criminal procedure is misleading. Although the jurisdiction of federal courts is indeed founded exclusively on statute and treaty-based crimes are seemingly not self-executing in the United States, the very Act that regulates the jurisdiction of federal courts rendered offences against the law of nations self-executing—as we shall establish in the following paragraph in greater detail. The fact therefore that "criminal jurisdiction of federal courts is entirely statutory" is not in itself a sound basis for ruling out the enforcement of international criminal law by those courts.

(c) *International Customary-Law Crimes*

American courts have from the outset proceeded on the assumption that Congress is not obligated by the wording of Article I, Section (8), Clause [10] of the Constitution to define offences against the law of nations, provided only that those offences have been defined with sufficient clarity in customary international law.

133, 159-60 (1795). Reference here to "some treaty" refers to the exemption and not to the general rule of universal jurisdiction subscribed to in this citation.

[51] THE OVER THE TOP: SCHROEDER v. BISSELL, 5 F.2d 838, 845 (D. Conn., 1925); *and see* Quincy Wright, *Treaties and the Constitutional Separation of Powers in the United States*, 12 A.J.I.L. 64, 83 (1918) (stating that treaties require implementation legislation").

[52] Wright, *supra* note 67, at 83-84.

Courts of the United States have since the country's earliest history recognized "the law of nations" as a source of criminal proscription that can be enforced by American courts without the further sanction of legislation.[53]

Ex Parte Quirin is particularly instructive in this regard. In that case the Court noted that the U.S. Supreme Court has "[f]rom the very beginning of its history ... recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals."[54] The defining powers of Congress stipulated in Article I, Section (8), Clause [10] was there confined to making rules for the government of the Armed Forces, and sanctioning the jurisdiction of military tribunals. Congress did not specify the offences to be tried by such tribunals but left it up to the tribunals "to try persons for offences which, according

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[53] *See*, for example, TRIAL OF GIDEON HENFIELD, 11 Fed. Cas. 1099, 1102, 1107-08, 1120 (1793), *reprinted in* WHARTON, STATE TRIALS OF THE UNITED STATES, 49. New York: Burt Franklin (1970); REPUBLICA v. DE LONGCHAMPS, 1 U.S. (1 Dall.) 111, 114 (1784); ROSS *ET AL* v. RILLENHOUSE, 2 U.S. (2 Dall.) 160, 162 (1792); TALBOT v. JANSON, 2 U.S. (3 Dall.) 133, 160 (1795); UNITED STATES v. ORTEGA, 24 U.S. (11 Wheat.) 467 (1826); UNITED STATES v. SMITH, 18 U.S. (5 Wheat.) 153, 161 (1820).

[53] THE OVER THE TOP: SCHROEDER v. BISSELL, 5 F.2d 838, 845 (D. Conn., 1925); *and see* Quincy Wright, *Treaties and the Constitutional Separation of Powers in the United States*, 12 A.J.I.L. 64, 83 (1918) (stating that treaties require implementation legislation").

[53] Wright, *supra* note 67, at 83-84.

[54] EX PARTE QUIRIN, 317 U.S. 1, 27-28 (1942).

[55] *Id*., at 28.

to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals."[55] The Court went on to say:

> It is no objection that Congress in providing for the trial of such offences has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. An Act of Congress punishing "the crime of piracy, as defined by the law of nations" is an appropriate exercise of its constitutional authority, Art. I, § 8, cl. 10, "to define and punish" the offense, since it has adopted by reference the sufficiently precise definition of international law. ... Congress had the choice of crystallizing in permanent form and in minute detail every offence against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.[56]

There seems to be general agreement, as far as judicial precedents are concerned, that this is indeed the case. It has thus often been said that the law of nations forms part of the law of the United States.[57] *Henfield's Case* is instructive in this regard. Judge John Jay more precisely included in the laws of the United States, (a) all treaties made under the authority of the United States, (b) the law of nations, and

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[56] *Id*., at 29.

[57] *See*, for example, UNITED STATES v. RAVARA, 2 U.S. (2 Dall.) 297, 199 n.* (C.C.D., Pa., 1793); CAPERTON v. BOWYER, 81 U.S. (14 Wall.) 216, 226 (1871); HENFIELD'S CASE, 11 F. CAS. 1099, 1102, 1117 (C.C. D.PA., 1793); HILTON v. GUYOT, 159 U.S. 113, 163 (1894); FILARTIGA v. PEÑA-IRALA, 630 F.2d 876, 886 (2nd Cir., 1980); UNITED STATES v. THE ADRIANDE, 24 F. Cas. 851, 856 (D.C. D.Pa., 1812); LAREAU v. MANSON, 507 F. Supp. 1188 n. 9 (D.C. D.Conn., 1980) (referring to customary international law as part of the law of the United States); and *see also* REPUBLICA v. DE LONGCHAMPS, 1 U.S. (1 Dall.) 111, 114, 116 (1784) (stating that the law of nations "in its full extent" is part of the municipal law of Pennsylvania).

(c) the Constitution and statutes of the United States.[58] *Henfield's Case* has been interpreted as having been founded on the premise that the law of nations is self-executing in the United States.[59]

The power of courts martial to uphold the norms of admiralty that has become part of the law of nations appears from a judgment of the U.S. Supreme Court in the case of *Dynes v. Hoover*. The Court there asserted that in cases where the substance of crimes "are not given in terms or by definition," courts martial shall nevertheless have jurisdiction "of such crimes as are not specified, but which have been recognised to be crimes and offences by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea."[60]

A Reporter's Note in the *Restatement (Third) of the American Foreign Relations Law* proclaiming, with reference to Article I, Section (8), Clause [10], that "[c]riminal law to implement the foreign relations of the United States is wholly statutory," is—to say the least—misleading. If the author intended to suggest that Article I, Section (8), Clause [10] affords statutory backing for the prosecution of offences against the law of nations in the United States, then so be it; but this must not be taken to rule out the prosecution of offences against the law of nations in cases where the offences have not been defined in municipal statutes.

It should be emphasized, though, that Congress must speak to the issue. Though not required to define the offence against the law of nations if the offence is already adequately defined in international law sources, Congress must designate a

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[58] HENFIELD'S CASE, 11 F. Cas. 1099, 1100-11 (C.C. D.Pa., 1793); and *see also* WAITE v. THE ANTELOPE, 28 F. Cas. 1341, 1341 (D.C. D. S.Ca., 1807) (distinguishing between treaties and the law of nations).

[59] THE THREE FRIENDS, 166 U.S. 1, 53 (1896).

[60] DYNES v. HOOVER, 61 U.S. (20 How.) 65, 82 (1857).

tribunal with jurisdiction to prosecute the offence.[61] As far as punishments are concerned, those outlined in the Judiciary Act—"whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months"[62]—are no longer applicable in this day and age, and were probably never intended to apply to felonies on the high seas and offences against the law of nations. In American jurisprudence, *nulla poena sine lege* only seems to require criminalization of the unlawful act (*nulla peona sine crimes*) and not necessarily a precise circumscription of punishments applicable to a particular offence.[63] International law leaves the type and gravity of punishment to be imposed for offences against the law of nations almost entirely in the discretion of the presiding judge(s).[64] It has indeed been held in the United States that in the event of an infringement of the law of nations, "the degree of punishment to be inflicted, upon conviction," rests "in the breast of the court."65

61 *See* Palmer, *supra* note 28, at 275-76.

62 The Judiciary Act of 1789, sec. 11, 1 Stat. 73 (1789).

63 *See* SCHARF & HANSEN v. UNITED STATES, 156 U.S. 51, 88 (1895) (stating that *nullum crimen, nullum poena sine lege* means that "[u]nless there be a violation of law pronounced, and this by a constant and responsible tribunal, there is no crime, and can be no punishment"); UNITED STATES v. WALKER, 514 F. Supp. 294, 316 (E.D. La. 1981) (holding that a person can only be convicted and punished for acts committed "if the state beforehand has made the commission of those acts a crime and authorized punishment to be imposed …").

64 Jordan J. Paust, *Its No Defense*: *Nullum Crimen, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657, 664 (1997).

65 UNITED STATES v. LIDDLE, 26 F.Cas. 936, 938 (2 Wash. C.C. 1808). This case concerned an infringement of article 28 of An Act for the Punishment of Certain Crimes against the United States of April 30, 1790 (1 Stat. 112, 118), which rendered it a crime to "assault, strike, wound, [or] imprison … an ambassador or other public minister, … or in any other manner infract the law of nations…). The defendant was convicted of an infraction of the law of nations. Note, though, that Article 28 did prescribe certain punishments and it is quite possible that the

3. UNIVERSAL JURISDICTION TO PROSECUTE OFFENCES AGAINST THE LAW OF NATIONS

Applying the self-executing status of the law of nations to criminal sanctions under that branch of international law is intimately related to the power of American courts to exercise universal jurisdiction over offences against the law of nations.

In the United States, the competence of federal courts to exercise universal jurisdiction is guaranteed by Article I, Section (8), Clause [10] of the Constitution.

According to Jordan Paust, universal jurisdiction over international crimes has been recognized in the United States "since the dawn of ... [its] history."[66] The United States has certainly since early times recognized the power of its courts to prosecute persons for acts of piracy,[67] and by participating in the Nuremberg and

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discretion of the court may have been intended to be exercised within the confines of the prescribed sentences.

[66] Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 211 (1983); *and see See* King & Theofrastous, *supra* note 38, at 56; Ruth Wedgwood, *The Constitution and the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 119, 125-26 (eds.) Sarah B. Sewall & Carl Kaysen. Lanham/Boulder/New York/Oxford: Rowman & Littlefield (2000).

[67] *See*, for example, UNITED STATES v. SMITH, 18 U.S. (5 Wheat.) 153, 162 (1820) ("... the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence [of piracy] against any person whatsoever, with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment"); UNITED STATES v. LA JEUNE EUGENIE, 26 Fed. Cas. 832, 843 (C.C.D., Mass., 1822) ("... no one can doubt, that vessels and property in the possession of pirates may be lawfully seized on the high sea by any person, and

Tokyo Trials, it has recognized the validity of universal jurisdiction with respect to at least war crimes and crimes against humanity.[68] American courts often refer with approval to the principle of universality with regard to crimes other than piracy.[69] The *American Restatement of Law* is quite explicit in this regard:

> A state has jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction ... is present.[70]

The principle of universal jurisdiction was directly in issue in the case of *Demjanjuk v. Petrovsky*.[71] Israel sought the extradition from the United States of Demjanjuk to stand trial in that country for war crimes and crimes against humanity committed by him as a Nazi official in Poland. Demjanjuk opposed the

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brought in for adjudication."); THE MARIANNA FLORA, 24 U.S. (11 Wheat.) 1, 40-41 (1826); UNITED STATES v. BRIG. MALEK ADHEL, 43 U.S. (2 How.) 210, 232 (1844) (noting that pirates are deemed *hostis humani generis*); THE AMBROSE LIGHT, 25 F. Rep. 408, 423-28 (D.C. S.D. New York, 1885); *and see* Dickenson, *supra* note 24, at 29-30.

[68] DEMJANJUK v. PETROVSKY, 776 F.2d 582, 583 (6th Cir., 1985).

[69] *See*, for example, RIVAND v. UNITED STATES, 375 F.2d 882, 885-86 (5th Cir., 1967) (conspiracy); FILARTIGA v. PEÑA-IRALA, 630 F.2d 876, 890 (2d Cir., 1980) (torture); UNITED STATES v. LAYTON, 509 F. Supp. 212, at 216-23 (N.D. Cal., 1981) (terrorism); TEL-OREN v. LIBYAN ARAB REPUBLIC, 726 F.2d 774, 781 (D.C. Cir., 1984) (terrorism); DEMJANJUK v. PETROVSKY, 776 F.2d 582, 582-83 (6th Cir., 1985) (crimes against humanity); UNITED STATES v. YUNIS, 681 F. Supp. 896, 900-01 (D. D.C., 1988), 924 F.2d 1086, 1092 (C.A. D.C.C., 1991) (aircraft piracy and hostage taking).

[70] Restatement (Third) of Foreign Relations Law of the United States, § 404; *and see* BEANNAL v. FREEPORT-MCMORAN, INC., 969 F. Supp. 362, 371 (E.D. La., 1997).

[71] DEMJANJUK v. PETROVSKY, 776 F.2d 582 (6th Cir., 1985).

application *inter alia* on the grounds that Israel had no jurisdiction to prosecute crimes committed outside its geographical boundaries. Having asserted that international law recognized universal jurisdiction over certain crimes,[72] the Court decided that the fact that Demjanjuk was to be charged with having committed the criminal acts in Poland did not deprive Israel of authority to bring him to trial.[73]

Federal courts have also asserted jurisdiction in cases of aircraft high-jacking that occurred beyond the national borders of the United States. The prosecution in *United States v. Rezaq* related to high-jacking of a flight of Airegypt from Athens (Greece) to Cairo (Egypt) in which an Israeli and American citizen were killed by the hijackers. The jurisdiction of the Court could therefore be based on the passive personality principle, but the Court also stated that "[t]he justification for universal jurisdiction over hijackers is clear."[74] Jurisdiction in the case of *United States v. Yunis*[75] for air piracy derived solely from the principle of universal jurisdiction since American citizens were not victims of the high-jacking. In the appeal case, the Court noted that "[a]ircraft hijacking may well be one of the few crimes so clearly condemned under the law of nations that states may assert universal jurisdiction to bring offenders to justice, even when the state has no territorial

[72] *Id*., at 582.

[73] It might be noted that Demjanjuk was acquitted in Israel for lack of evidence identifying him as the person who committed the atrocities in Poland. He returned to the United States and was deprived by American authorities of his permanent resident status. No other country has come forward thus far to offer him an abode.

[74] UNITED STATES v. REZAQ, 899 F. Supp. 697 (D.D.C., 1995), confirmed in UNITED STATES v. REZAQ, 134 F.3rd 1121 (D.C.C., 1998).

[75] UNITED STATES v. YUNIS, 681 F. Supp. 896, 900-01 (D. D.C., 1988), 924 F.2d 1086, 1092 (C.A. D.C.C., 1991). BEANNAL v. FREEPORT-MCMORAN, INC., 969 F. Supp. 362, 371 (E.D. La., 1997).

connection to the hijacking and its citizens are not involved."[76]

Douglass Cassel maintained that American courts can only exercise universal jurisdiction over torture and certain forms of international terrorism but not over genocide, war crimes or crimes against humanity.[77] This is clearly not the case. Being reminded again that the constitutional power of Congress to define and punish offences against the law of nations does not require legislation defining those offences if they are already adequately defined in international law,[78] federal courts must be taken to have universal jurisdiction over all customary law offences that are thus defined with adequate precision in international law. Genocide, war crimes and crimes against humanity are clearly defined in international law to permit their prosecution under the relevant rules of American constitutional law.

It has been said that courts in the United States would not readily assert extra-territorial jurisdiction in criminal cases, absent a clear congressional directive.[79] Limitations to the exercise of jurisdiction are in general based on considerations of reasonableness, including a link of the criminal activity to the territory of the United States, or a connection based on residence or economic activity.[80] The stigma that attaches to perpetrators of crimes subject to universal jurisdiction as *hostis humani generis* should suffice to establish such a link to the territory.

In the United States, the principle of universal jurisdiction has also been made

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[76] UNITED STATES, v. YUNIS, 924 F.2d 1086, 1092 (C.A. D.C., 1991).

[77] Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421, 432 (2000-02).

[78] *Supra*, the text accompanying note 29.

[79] *Id*., at 1091; *and see* UNITED STATES v. BOWMAN, 260 U.S. 94, 98 (1922); FOLEY BROS. INC. v. FILARDO, 336 U.S. 281, 285 (1949).

[80] Restatement (Third) of Foreign Relations Law of the United States, § 403.

applicable to civil actions. In terms of the Alien Tort Claims Act, included in the Judiciary Act of 1789, federal courts have been granted original jurisdiction in civil actions by an alien for a tort committed in violation of the "law of nations" (customary international law) or a treaty ratified by the United States.[81] The Torture Victim Protection Act of 1992 explicitly affords an action for damages to victims of torture suffered at the hands of any person acting under actual or apparent authority, or color of law, of any foreign nation.[82] The right to claim damages is here not confined to aliens but is also afforded to American citizens who had been exposed to torture by officials of a foreign State. Alien tort cases are currently regulated by the Alien Tort Statute of 2004, which affords to federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States..."[83]

In *Kadic v. Karadῆi□*, the Court held that rape, torture and summary executions committed by an individual as part of genocide are actionable as "violations of the law of nations" under the Alien Tort Claims Act (and therefore as a crime under customary international law) "without regard to state action."[84] The Court also stated that the liability of private persons for war crimes, having been recognized since World War I and confirmed by the Nuremberg trials after World War II, has become "an important aspect of international law."[85]

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[81] 28 U.S.C., § 1350.

[82] Torture Victim Protection Act, Pub. L. No. 102-2561, 106 Stat. 73 (March 12, 1992), 28 U.S.C., § 1350 note. The Act also affords an action for damages based on extra-judicial killings.

[83] 28 U.S.C.A., § 1350 (2004).

[84] KADI□ v. KARADῆI□, 70 F.3d 232, 244 (2d Cir., 1995).

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

4. OFFENCES AGAINST THE LAW OF NATIONS DEFINED

Ius gentium (the law of nations) derived its first practical prominence from a problem that confronted the Roman Empire: What law to apply to foreigners (*peregrini*) within the empire. The Roman civil law (*ius civile*) applied to Roman citizens (*Latini*) only. The *praetor* was an official who instructed the judge (*iudex*)—who initially was a lay person—as to the rule of law to be applied in a particular case, and while the *praetor urbanis* fulfilled this function in civil disputes between Roman citizens, deriving the applicable rule of law from the *ius civile*, the *praetor peregrinus*, who officiated in disputes between a citizen and a foreigner, or between a foreign plaintiff and defendant, could not base his instructions to the *iudex* on the Roman civil law. He consequently based his instruction on the *ius gentium*—the "law common to all the nations whom the Romans had the means of observing."[86]

According to the classical Roman jurist, Gaius, the *ius gentium* was non other than the *ius naturale* (natural law) of which Greek philosophers had spoken.[87] However, Ulpian disagreed. He distinguished between *ius naturale* and *ius gentium*: while the former comprised the law *quod natura omnia animalia docuit* (which nature has taught to all animals) and therefore applied to both humans and

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[86] JUSTINIAN, DIGEST Bk. 1, Ch. 1, Par. 9; and *see also* JUSTINIAN, INSTITUTES, Bk. 1, Ch. 2, Par. 1. In *Henfield's Case*, Wilson, J. likewise assumed that "law of nations" denotes the law of nature "when applied to states or political societies." HENFIELD'S CASE, 11 F. Cas. 1099, 1107 (C.C. D.Pa., 1793); and *see also* PRIZE CASES, 67 U.S. (2 Black) 635, 670 (1863).

[87] JUSTINIAN, DIGEST Bk. 1, Ch. 1, Par. 9; and *see also* JUSTINIAN, INSTITUTES, Bk. 1, Ch. 2, Par. 1. In *Henfield's Case*, Wilson, J. likewise assumed that "law of nations" denotes the law of nature "when applied to states or political societies." HENFIELD'S CASE, 11 F. Cas. 1099, 1107 (C.C. D.Pa., 1793); and *see also* PRIZE CASES, 67 U.S. (2 Black) 635, 670 (1863).

animals,[88] *ius gentium* denoted *quo gentes humanae utuntur* (that which all human persons observe) and thus applied to human persons only.[89] Slavery and warfare were, for example, unnatural and therefore not ordained by natural law, but was nevertheless sanctioned by the law of nations because those institutions had come to be observed by all nations.[90]

It is fair to conclude that the law of nations as defined and applied in classical Roman law denoted international customary law (a world law) and not customary international law (a distinct branch of international law). The emphasis shifted to the latter meaning of the term through the jurisprudence of the celebrated Dutch jurist, Hugo de Groot (Grotius) (1583-1645). In his famous work on *The Law of War and Peace*, Grotius applied the concept of *ius gentium* to the law regulating inter-state relations. The rules of natural law, said Grotius, can be deduced *a priori* (independent of human experience) from the typical reasonable and social nature of the human person, and can be confirmed *a posteriori* (in hindsight) by uncovering principles observed by all civilized peoples.[91] The method *a posteriori* based on the *communis consensus gentium* is the only means of establishing the rules of the law of nations.[92]

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[88] JUSTINIAN, DIGEST Bk. 1, Ch. 1, Par. 1. 3; and *see also* JUSTINIAN, INSTITUTES, Bk. 1, Ch. 2, *pr*.

[89] JUSTINIAN, DIGEST Bk. 1, Ch. 1, Par. 1. 4.

[90] JUSTINIAN, INSTITUTES, Bk. 1, Ch. 2, Par. 2; *and see* THE ANTELOPE, 23 U.S. (10 Wheat.) 66, 90 (1825) (speaking of the "natural law of nations" and holding that slavery was not contrary to that law since it was practiced by all civilized nations); UNITED STATES v. DARNAUD, 25 F. Cas. 754, 760 (C.C.E.D., Pa., 1855) (noting that while piracy violates the "universal law of the sea," slavery is of a different character since it is practiced by civilized nations).

[91] GROTIUS, DE IURE BELLI AC PACIS LIBRI TRES, Bk. 1, Ch. 1, Par. 12.1. (1626); and *see also id.*, Prol. 39 and 40; Bk. I, Ch.2, Par. 2.

Formatiert: Französisch (Frankreich)

[92] Id., Prol. 46; and *see also id.*, Prol. 17 and 40; Bk. 1, Ch. 1, Par. 14.2 in regard

It is evident that the American constitutional concept of “law of nations” ties in with the meaning attributed to that concept by Grotius.[93] However, the exact meaning of “law of nations” has not always been entirely clear. Some judgments equated “law of nations” with international law.[94]

Judgments proclaiming that international law constitutes part of the law of the land[95] seem to make the same point as those stating that the law of nations is included in the laws of the United States.[96] In one judgment it was said:

> The laws of the United States are found in the Constitution, the acts of Congress

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to the epistemological basis of *ius gentium*.

[93] See, for example, THE ANTELOPE, 23 U.S. (10 Wheat.) 66, 90 (1825) (“The law of nations may be defined as a collection of rules deduced from natural reason, as that is interpreted by those who adopt them, and resting in usage, or established by compact, for regulating the intercourse of nations with each other”).

[94] *See*, for example, WARE v. HYLTON, 3 U.S. (3 Dall.) 199, 127 (1796); UNITED STATES v. DARNAUD, 25 Fed. Cas. 754, 760 (C.C.E.D., Pa., 1855).

[95] *See*, for example, NEW YORK LIFE INS. CO. v. HENDREN, 92 U.S. 286, 387-88 (1875); FERNANDEZ v. WILKINSON, 505 F. Supp. 787, 798 (D.C. D. Kan., 1980); DEMJANJUK v. PETROVSKY, 776 F.2d 582 (6th Cir., 1985); LAKER AIRWAYS v. SABENA, BELGIAN WORLD AIRLINES, 731 F.2d 909, 951 n. 159 (D.C. Cir., 1984); DISTRICT OF COLUMBIA v. INTERNATIONAL DISTRIBUTING CORP., 331 F. 2d 817, 820 n. 4 (D.C. Cir., 1964); AHMED v. WIGEN, 726 F. Supp. 389, 414 (E.D.N.Y., 1989) (citing DEMJANJUK, *supra*); UNITED STATES v. CREWS, 605 F. Supp. 730, 734 n. 1 (S.D. Fla., 1985); BANCO NACIONAL DE CUBA v. SABBATINO, 193 F. Supp. 375, 381-82 (S.D.N.Y., 1981) (referring to Art. I, § 8, cl. [10]); SIDERMAN DE BLANK v. REPUBLIC OF ARGENTINA, 965 F.2d 699, 715 (9th Cir., 1992) (noting that customary international law rests on the consent of states).

[96] *Supra*, the text accompanying note 73.

> made in accordance therewith, treaties made by authority of the United States, the law of maritime, and international law, as these may be interpreted and construed by the courts of the United States.[97]

"International law", by its mention alongside "treaties made by authority of the United States," was here meant to denote customary international law. In *Henfield's Case*, Wilson, J. again used "law of nations" as including "national treaties".[98]

It should be clear to everyone that "the law of nations" within the meaning of Article I, Section (8), Clause [10] was intended to denote what is today more commonly known as customary international law. In order to establish its substance, resort must be had to the "customs and usages of civilized nations,"[99]

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[97] WARREN COUNTY v. SOUTHERN SURETY CO., 34 F.2d 168, 170 (E.D. Pa., 1929).

[98] HENFIELD'S CASE, 11 F. Cas. 1099, 1107 (C.C. D.Pa., 1793).

[99] PAQUETE HABANA, 175 U.S. 672, 700 (1900); and *see also id.*, at 694, 700-01, 708 (referring to "general assent/consent of civilized nations"); THE ANTELOPE, 23 U.S. (10 Wheat.) 66, 115 (1825) (referring to "long usage and general acquiescence"); *id*., at 121 (requiring "general consent"); JOHNSON v. TWENTY-ONE BALES, 13 Fed. Cas. 855, 861 (Cir. Ct., N.Y., 1814) (proclaiming that the laws of war require "the sanction of the civilized world to invest them with the force and authority of laws"); RHODE ISLAND v. MASSACHUSETTS, 39 U.S. (14 Pet.) 210, 225 (1840) (speaking of "those great and fundamental doctrines of international law, which, by common consent of mankind, are the basis of intercourse of the civilized world"); PRIZE CASES, 67 U.S. (2 Black) 635, 670 (1863) (founding it on "the common consent as well as the common sense of the world"); THE SCOTIA, 81 U.S. (14 Wall.) 170, 187 (1871) (resting it "upon the common consent of civilized communities"); DOOLEY v. UNITED STATES, 182 U.S. 222, 230-31 (1901) (citing Halleck for holding that the law of nations derives from "usages of the world"); LOPES v. REEDEREI RICHARD SCHRODER, 225 F. Supp. 292, 296 n.19 (1963) (basing it on the "common consent of

and that in turn "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[100] To qualify as a publicist whose works may serve as an authoritative source of the customs and usages of "civilized nations," the jurists and commentators must be ones "who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subject of which they treat."[101]

Offences against the law of nations that have been identified by American courts thus far include piracy,[102] torture,[103] violations of the laws of war,[104] the slave

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nations").

[100] UNITED STATES v. SMITH, 18 U.S. (5 Wheat.) 153, 160-61 (1820); and *see also* REPUBLICA v. DE LONGCHAMPS, 1 U.S. (1 Dall.) 111, 116 (1784) (referring to "the practice of different nations, and the authority of writers"); FREMONT v. UNITED STATES, 58 U.S. 542, 557 (1854); MOULTREE v. HUNT, 23 N.Y. 394, 396 (1861); HILTON v. GUYOT, 159 U.S. 113, 163 (1894) (referring to "judicial decisions, ... the works of jurists and commentators, and ... the acts and usages of civilized nations"); DOOLEY v. UNITED STATES, 182 U.S. 222, 230-31 (1901) (citing Halleck); LOPES v. REEDEREI RICHARD SCHRODER, 225 F. Supp. 292, 295 (E.D. Pa., 1963); NGUYEN DA YEN v. KISSINGER, 528 F.2d 1194, 1201 n. 13 (9th Cir., 1975); FILARTIGA v. PEÑA-IRALA, 630 F.2d 876, 880 (2nd Cir., 1980).

[101] PAQUETE HABANA, 175 U.S. 672, 700 (1900); and *see also* FILARTIGA v. PEÑA-IRALA, 630 F.2d 876, 880-81 (2nd Cir., 1980).

[102] UNITED STATES v. SMITH, 18 U.S. (5 Wheat.) 153, 161 (1820); FILARTIGA v. PEÑA-IRALA, 630 F.2d 876, 880 (2nd Cir., 1980); KADIC v. KARADῆI□, 70 F.3d 232, 239 (2d Cir., 1995).

[103] FILARTIGA v. PEÑA-IRALA, 630 F.2d 876 (2d Cir. 1980); IN RE ESTATE OF FERDINAND E. MARCOS HUMAN RIGHTS LITIGATION, 976 F.2d 493, 499-500 (9th Cir., 1992).

[104] EX PARTE QUIRIN, 317 U.S. 1, 27-28, 29-30 (1942); IN RE YAMASHITA, 327

trade,[105] arbitrary detentions,[106] acts designed to intimidate, coerce, harass, or bring into disrepute diplomatic and consular representatives,[107] and counterfeiting notes of foreign countries.[108]

In identifying such offences, guidance may also be had from judgments under the Alien Tort Statute (ATS), which grants to federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[109] Prior to 2004, civil actions by aliens founded on violations of "the law of nations" were regulated by the Alien Tort Claims Act of 1789. Actions entertained by the courts were, for example, based on torture,[110]

U.S. 1, 7 (1946); KADIC v. KARADῆI□, 70 F.3d 232, 239 (2d Cir., 1995) (referring to "certain war crimes"); DOE v. UNOCAL CORPORATION, 2004 WL. 2402875, 6 (9th Cir., 2004).

[105] CHARGE TO GRAND JURY, 30 Fed. Cas. 1026, 1030 (C.C., Ga., 1859); KADIC v. KARADῆI□, 70 F.3d 232, 239 (2d Cir., 1995); DOE v. UNOCAL CORPORATION, 2004 WL. 2402875, 6 (9th Cir., 2004)..

[106] FORTI v. SUAREZ-MASON, 672 F. Supp. 1531, at 1541 (N.D. Cal., 1987); FERNANDEZ v. WILKINSON, 505 F. Supp. 787, 798 (D.C. D. Kan., 1980).

[107] FREND v. UNITED STATES, 100 F.2d 691, 692-93 (C.A. D.C., 1938); and see Dickenson, *supra* note 24, at 30.

[108] UNITED STATES v. ARJONA, 120 U.S. 479, 484 (1887).

[109] 28 U.S.C.A., § 1350 (2004).

[110] FILARTIGA v. PEÑA-IRALA, 630 F.2d 876 (2d Cir., 1980); SIDERMAN DE BLANK v. REPUBLIC OF ARGENTINA, 965 F.2d 699, 717 (9th Cir., 1992) (proclaiming that "the right to be free from torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*").

genocide, war crimes, torture and summary executions,[111] forced labor,[112] and grave human rights abuses.[113]

It should be noted, though, that the U.S. Supreme Court in *Sosa v. Alvarez-Machain*, more recently adopted a conservative line to the concept of "law of nations" for purposes of ATS on the assumption that "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations."[114] Those probably included "offences against ambassadors," "violations of safe conduct," and "prize captures and piracy", these being the only ones that were "definite and actionable."[115] Though American courts are not precluded from recognizing [new] causes of action based on "the present-day law of nations,"[116] they "should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted."[117] Noting among other things that the ATS might implicate the foreign relations of the United States and raises separation of powers concerns between the judiciary on the one hand, and the legislative and executive branches "in managing foreign affairs" on the other, the Court concluded that federal courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations."[118] Acting upon this directive, the

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[111] KADIC v. KARADῆI□, 70 F.3d 232 (2d Cir., 1996).

[112] DOE v. UNOCAL CORP., 110 F. Supp. 2d 1294 (C.D. Cal., 2000).

[113] WIWA v. ROYAL DUTCH PETROLEUM COMPANY, 226 F.3d 88 (2d Cir., 2000).

[114] SOSA v. ALVAREZ-MACHAIN, 124 S. Ct. 2739, 2759 (2004).

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[115] *Id*.

[116] *Id*., at 2761.

[117] *Id*., at 2765.

[118] *Id*., at 2763.

District Court of New York recently dismissed an action brought against 35 bank institutions for having supported the apartheid regime of South Africa by doing business with the South African government of yesteryear.[119]

The law of nations is furthermore subject to “organic growth,”[120] and is as such a progressive system of law: “Its principles are expanded and liberalized by the spirit of the age and country in which we live.”[121] It was accordingly decided that courts of law must interpret international law not as it was in 1789, but as it evolved and exists among the nations of the world today.”[122]

Whatever uncertainties might have attended the definition of some of the crimes against humanity in the past—genocide and war crimes have in any event been properly defined for many years—those uncertainties have now been remedied by the Statute of the International Criminal Court, 1998.[123] It is important to note that the definitions of crimes in the ICC Statute, with only one exception, were adopted by general agreement and can therefore without question be accepted as reflective of customary international law.[124] Insofar as some delegations who voted against

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[119] In re: South African Apartheid Legislation, 346 F. Supp. 2d 538 (S.D.N.Y., 2004).

[120] Romero v. International Term, Operating Co., 358 U.S. 354, 360 (1959); Lopes v. Reederei Richard Schroder, 225 F. Supp. 202, 275-95 (1963).

[121] Bergman v. De Sieyes, 71 F. Supp. 334, 337 (S.D.N.Y., 1946).

Formatiert: Französisch (Frankreich)

[122] Filartiga v. Peña-Irala, 630 F.2d 876, 881 (2nd Cir., 1980). Note that in *Filartiga*, “law of nations” was equated to “international law.” *Id*.

Formatiert: Französisch (Frankreich)

[123] Statute of the International Criminal Court, art. 7 (crimes against humanity), U.N. Doc. A/Conf.183/9 (17 July 1998), *reprinted in* 37 I.L.M. 1002 (1998) (hereafter “ICC Statute”); and *see also id.*, art. 6 (genocide), art. 8 (war crimes).

[124] It was decided to only include crimes under customary international law

adoption of the ICC Statute or abstained in the final vote based their concerns on the subject-matter jurisdiction of the ICC, their position was not founded on what went into the ICC Statute, but on what was *not* included, for example the crime of aggression[125] (Sudan, speaking on behalf of the Arab Group of States),[126] terrorism (Sri Lanka, Turkey), international drug trafficking (Trinidad and Tobago), and the threat or use of chemical and biological weapons (Singapore) and of nuclear weapons (Mexico and Sudan).

The one exception concerned was the war crime founded on the resettlement of populations in occupied territories, which prompted the negative vote of Israel at the Rome Conference.[127] Inclusion in the ICC Statute of war crimes committed in armed conflicts not of an international character was also mentioned by Turkey as a reason for its abstention.

For the most part, therefore, the crimes as defined in the ICC Statute must be accepted as a clear codification of offences against the law of nations. Nor ought the current American opposition to the ICC regime[128] prevent federal courts from

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within the subject-matter jurisdiction of the ICC.

[125] Aggression has been conditionally included in the subject-matter jurisdiction of the ICC, subject to agreement being reached on the crime of aggression and the conditions under which it can be prosecuted in the ICC. *See* ICC Statute, *supra* note 134, art. 5.

[126] Note, though, that Egypt and Jordan did accept the ICC Statute "as a package".

[127] The Israeli argument that this crime was not one under customary international law was supported by (probably) only the United States, but the U.S. delegation did not base its negative vote on the inclusion of that war crime in the ICC Statute.

[128] *See* JOHAN D. VAN DER VYVER, THE INTERNATIONAL CRIMINAL COURT: AMERICAN RESPONSES TO THE ROME CONFERENCE AND THE ROLE OF THE EUROPEAN UNION, Institut für Rechtspolitik an der Universität Trier (2003).

prosecuting those crimes under the authority of Article I, Section (8), Clause [10] of the Constitution of the United States. The United States delegation after all formed part of the body of states that adopted those definitions by general agreement.[129]

Some analysts have lamented the fact that the *actus reus* of some of the crimes within the jurisdiction of the ICC are not confined to empirical fact-finding with precise specificity, but require the adjudicator to evaluate a situation with a certain degree of flexibility.[130] For example, the extensive destruction and appropriation of property is a war crime if carried out unlawfully and wantonly and it is shown that such destruction and appropriation was "not justified by military necessity";[131] the launching of an armed attack causing incidental loss of life or injury to civilians, or damage to civilian objects, or widespread, long-term and severe damage to the natural environment, becomes a war crime if the person responsible for launching the attack did so with knowledge that the attack causing such collateral deaths, injuries or damage would be "clearly excessive in relation to the concrete and direct overall military advantage anticipated";[132] destroying or seizing

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[129] American opposition to the ICC Statute in essence derived from insistence by the United States on "American exceptionalism" and the fact that the Rome Conference refused to render American nationals immune from prosecution in the ICC, and not on the substantive jurisdictional provisions of the ICC Statute.

[130] *See*, for example, Alfred P. Rubin, *The International Criminal Court: Possibilities for Prosecutorial Abuse*, 64.1 L. & CONT. PROBLS. 153, 155 (2001); Madeline Morris, *Judgment without Democracy*, THE WASHINGTON POST, A.19 (July 24, 2002); and *see also* Elements of Crimes, General Introduction, para. 4, in *Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/INF/3/Add.2 (6 July 2000) (referring to "elements involving value judgments").

[131] ICC Statute, *supra* note 134, art. 8(2)(a)(iv).

[132] *Id.*, art. 8(2)(b)(iv).

enemy property is only permissible in times of war if such destruction or seizure is "imperatively demanded by the necessities of war."[133] However, value judgments of this kind are normal appendices of adjudication and do not detract one inch from the accepted standards of legal certainty.

5. CONGRESSIONAL DEFINITION OF OFFENCES AGAINST THE LAW OF NATIONS

It is importance to distinguish between the prosecution of offences in the United States under its municipal legal system, applying American criminal law, and prosecution of offences in American courts under auspices of international law, applying the law of nations. Components of the law of nations may indeed be incorporated into the municipal criminal law of the United States, as was indeed done through the agency of the Genocide Convention Implementation Act.[134]

An argument can be made for concluding that prosecutions under American law for international crimes require some from of implementation legislation, though in the case of adequately defined offences against the law of nations without the need for redefining those offences. In *United States v. Smith*,[135] the Court had to consider the constitutionality of a statute of 1819 that rendered punishable any persons "who commit the crime of piracy, as defined by the law of nations,"[136] and commenting on this case, the Court in *Ex parte Quirin* noted that prosecutions under the statute were not precluded merely because Congress did not see fit to define "piracy" but required courts of law to apply the definition current in the law of nations.[137] The

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[133] *Id.*, art. 8(2)(b)(xiii); and *see also id.*, art 8(2)(d)(xii).

[134] Genocide Convention Implementation Act, 102 Stat. 3045 (1988), 18 U.S.C.A., §§ 1091-93.

[135] UNITED STATES v. SMITH, 18 U.S. (5 Wheat.) 153 (1820).

[136] An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy, sec. 5, 3 Stat. 510 (March 3, 1819).

[137] *Supra*, the text accompanying note 72.

crime of piracy "as defined by the law of nations" was nevertheless incorporated into the municipal criminal law of the United States.

There is also ample authority for holding that crimes against the law of nations, and even some treaty-based crimes, can be prosecuted in the United States, in virtue of Article I, Section (8), Clause [10] and Article VI, Clause [2] (respectively) without any express reference to the specific offence in American statutory law. Jordan Paust thus argued that domestic legislation was not required in order to prosecute treaty-based acts of genocide in the United States.[138]

Which brings us back to the hypothetical founded on the case against The Reverend Elizaphan Ntakirutimana. The Genocide Convention Implementation Act has expressly been enacted for the prosecution of American nationals (the active personality principle), or an alien who committed the crime of genocide within the United States (the territoriality principle). Had Ntakirutimana been an American citizen, or had the acts been committed in the United States, his prosecution in the United States would arguably have had to be conducted under the auspices, and within the confines, of the Genocide Convention Implementation Act. But since that is not the case, he can only be prosecuted, under the rubric of universal jurisdiction, for his unlawful deeds as offences against the law of nations (customary international law).

Universal jurisdiction essentially applies only (a) to offences against the law of nations, (b) committed by an alien, (c) beyond the national borders of the forum state. If the perpetrator is an American national, jurisdiction derives from the active personality principle; and if the offence was committed within the United States, then jurisdiction will be founded on the territoriality principle.

Although the principle of universal jurisdiction is based in international law, the power to exercise universal jurisdiction is regulated by the municipal criminal procedure of a particular state. When exercising universal jurisdiction, a municipal court (granted that power by the national criminal justice system) applies the law of nations and not the national law of the country to which it belongs.

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[138] Paust, *supra* note 1, at 103-04.

The substantive law to be applied when courts of law exercise universal jurisdiction is not the law of the land, it is the law of nations (customary international law). That body of law is not created, amended or abrogated by the United States, though being a member of the international community of States its conduct does count in the formation of, and changes to, that law.[139]

The substance of offences against the law of nations is therefore in the final analysis not for the United States to decide. The law of nations is founded on "[t]he practice of every nation in the universe; and consequently the opinion of the world."[140] In one of the early judgments where mention was made of the law of nations, Sir William Scott was cited with approval as saying that "legal standards of morality ... must be found in the law of nations, as fixed and evidenced by general, and ancient, and admitted practice, by treaties, and by the general tenor of laws and ordinances, and the formal transactions of civilized states."[141]

The U.S. Supreme Court subsequently confirmed the obvious: "Undoubtedly, no single nation can change the law of the sea" [as part of the law of nations];[142] and likewise, "No particular nation can increase or diminish the list of offences punishable by the law of nations."[143] And as to the abrogation of a norm of the law

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[139] As to the sources of customary international law, *see* in general, Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, in 12 MICH. J. INT'L L. 59, 59-77 (1990).

[140] UNITED STATES v. ROBINS, 27 F. Cas. 825, 861 (D.C. D. So. Car., 1797).

[141] THE ANTELOPE, 23 U.S. (10 Wheat.) 66, 119 (1825).

[142] THE SCOTIA, 81 U.S. (14 Wall.) 170, 187-88 (1871).

[143] THE ANTELOPE, 23 U.S. (10 Wheat.) 66, 99 (1825); and *see also* MILLER v. SCHOONER SHIP RESOLUTION, 2 U.S. (2 Dall.) 1, 4 (1781) ("The municipal law of a country cannot change the law of nations, so as to bind the subjects of another nation. ... The municipal laws of a country can only bind its own subjects") . *See contra*, NEW

of nations, it has been decided that "a general, and not a universal, denunciation of the practice, is sufficient to make it cease to be a part of the law of nations."[144]

Nor can the American legislature render obsolete the competence of American courts to exercise universal jurisdiction for the prosecution of offences against the law of nations through municipal legislation that deals only partially with the same international crime. The United States cannot prescribe or alter the definitions of the offences subject to universal jurisdiction, because their disposition as offences against the law of nations and the elements constituting those offences are grounded on the *communis consensus gentium* and not on the legislative predilections of a single national State.

A federal court in the United States did therefore have the competence to exercise universal jurisdiction for the prosecution of The Reverend Ntakirutimana, based on acts of genocide committed by him in Rwanda, even though the Genocide Convention Implementation Act did not make allowance for this to be done, and irrespective of whether or not that charges preferred against him complied with the definition of genocide contained in the Act.

6. EPILOGUE

One might have thought that the originalists have become an endangered species—though I would hasten to add that interpretations of the Religion Clauses of the First Amendment have always attracted a fair share of original intent construction. The resurrection of original intent proponents in recent years within the ranks of Supreme Court justices clearly belied the above assumption.

YORK LIFE INS. CO. v. HENDERSON, 92 U.S. 286, 287-88 (1975) (holding that international law can be modified as the government sees fit); LAKER AIRWAYS v. SABENA, BELGIAN WORLD AIRLINES, 731 F.2d 909, 951 n. 159 (D.C. Cir., 1984) (stating that international law can be overridden by national law). This might well apply to international law reflected in treaties entered into by the United States, but not to rules of customary international law.

[144] THE ANTELOPE, 23 U.S. (10 Wheat.) 66, 75 (1825).

It is surprising, nevertheless, to find that some of the contemporary proponents of original intent construction of the American Constitution are also noted for a decidedly hostile attitude toward international law.[145]

An in-depth analysis of the drafting history of the American Constitution led Edwin Dickenson some years ago to confirm:

> The Law of Nations was a constituent part of English common law. Under the new dispensation, it would become a constituent part of the national law of the United States of America.[146]

And as far as the theme of this essay is concerned, Dickenson concluded:

> Against the background provided by the records and debates in the Convention, and in the light of what we know now about the legislative history of the Judiciary Act, it is clear enough that these provisions were intended to embrace offences against the Law of Nations as part of a national common law in respect to crimes.[147]

Jordan Paust likewise found that "[t]he Founders clearly expected that the customary law of nations was binding, was supreme law, created (among others) private rights, and would be applicable in United States federal courts."[148]

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[145] *See*, for example, Scalia, J. lamenting the fact that in the recent Supreme Court decision proclaiming juvenile executions to be a cruel and unusual punishment, "the views of other countries and the so-called international community take center stage." ROPER v. SIMMONS, 161 L. Ed. 2d 1 (2005) (Scalia, J., dissenting).

[146] Edwin D. Dickenson, *The Law of Nations as Part of the National Law of the United States*, 101 UNIV. PA. L. REV. 26, 46 (1952).

[147] *Id*., at 47.

[148] Jordan J. Paust, *Customary International Law and Human Rights Treaties* are *Law of the United States*, 20 MICH. J. INT'L L. 301 (1999).

This essay contains, what might seem to some, disproportionate references to early judgments pertinent to the power of Congress to define and punish offences against the law of nations. That was done deliberately, because since the infancy of basic rules of statutory interpretation it has been accepted that contemporaneous expositions constitute a primary source for uncovering a legislative intent. Those judgments confirm that right from the outset, the law of nations was considered to be part of the law of the land. In one of its earliest judgments, the U.S. Supreme Court thus proclaimed:

> The law of nations, or of nature and reason, is ... enforced ... by the municipal law of the country; which latter may, I conceive, facilitate or improve the execution of its decisions, by any means they shall think best, provided the great universal law remains unaltered.[149]

There is a further characteristic element of the American Constitution that has a bearing on the subject under investigation: the fact that the Bill of Rights was for the most part, or at least to a substantial extent, drafted in general, and at times sweeping, language; one might even say, formulations that are not normally desirable in the drafting of legal documents. This feature of the Constitution is generally applauded exactly because it makes allowance for adaptations over time in constitutional construction to adjust principles of the basic law to changing circumstances;[150] to avoid historical stagnation in the application of the Constitution dictated by having to uphold the prevailing insights and contingencies of bygone times. This, surely, is indicative of an original intent of the Founders to keep up with the times by means of "translating the majestic generalities of the Bill of Rights ... into concrete restraints of official dealing with the problems of the

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[149] ROSS v. RITTENHOUSE, 2 U.S. (2 Dall.) 110, 162 (Pa., 1792).

[150] *See*, for example, BERNARD SCHWARTZ, THE NEW RIGHTS AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK, 264. Boston: Northeastern Univ. Press (1990) ("The outstanding feature of the Constitution is thus its plastic nature. Its key provisions are malleable and must be construed to meet changing needs of a different period").

[Twenty First] Century."[151]

Proponents of originalism have admitted this much. Justice Scalia, for one, defined "originalism" as purporting to establish the meaning of the Constitution in 1789, but in doing so seeking guidance from collateral sources, such as the text of the Constitution itself and its overall structure, contemporaneous understanding of the provision to be interpreted, the *status quo* at the time of its enactment, and so on.[152] One must leave scope, said he, for giving the Constitution "evolutionary content" in view of changing circumstances[153]——and because of this concession he called himself a "faint-hearted origanalist." Even Judge Bork, who seemed to be an uncompromising originalist,[154] in one of his judgments defined the task of a judge as being "to discern how the framers' values, defined in the context of the world they knew, apply to the world we know."[155]

But keeping up with the times as mandated by the Constitution also implicates the international standards of propriety reflected in contemporary dictates of the law of nations. Offences against the law of nations to be punished in the United States are not confined to those that were recognized as such at the time the Constitution was

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[151] BD. OF EDUC. v. BARNETTE, 319 U.S. 624, 639 (1943).

[152] Antonin Scalia, *Originalism: The Lesser Evil*, 57 UNIV. CIN. L. REV. 849, 851-52 (1988-89).

[153] *Id*., at 864.

[154] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW. N.Y.: Free Press/London: Collier Macmillan (1990) (taking revisionist theorists to task for assuming "that judges have legitimate authority to impose their moral philosophy upon a citizenry that disagrees" (at 252) and commending "[t]he judge who takes as his guide the original understanding of the principles stated in the Constitution" (at 257)).

[155] OLLMAN v. EVANS, 750 F.2d 970, 995 (D.C. Cir., 1984) (Bork, J., concurring).

drafted and the Judiciary Act became law, but included the ones that are today recognized as such. Keeping up with the law of nations, in a word, was part of the Drafters' original intent.

Offences against the law of nations are not merely part of customary international law, they fall into the category of customary-law proscriptions that apply as norms of *ius cogens*. Citing the work of David Klein,[156] the U.S. Supreme Court not so long ago endorsed the view that *ius cogens* "embraces customary laws considered binding on all States" and "is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations."[157] It is trite law that treaty provisions which contravene a rule of *ius cogens* are null and void.[158] So, too, should laws and practices which have fallen behind the clearly defined norms of the law of nations.

It is within the power of the U.S. Supreme Court, while upholding constitutional directives incorporating law-of-nations standards into the constitutional structure of the United States, to decide accordingly.

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[156] David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 350-51 (1988).

[157] SIDERMAN DE BLANK v. REPUBLIC OF ARGENTINA, 965 F.2d 699, 714 (9th Cir., 1992).

[158] *Id*., at 715-16.

SIXTH LECTURE
THE WAR IN IRAQ

The propriety of taking up arms as a means of resolving international disputes has in recent times attracted attention on two distinct fronts. On the one hand, there have been efforts of the Preparatory Commission for the International Criminal Court to define the crime of aggression for purposes of the exercise of jurisdiction *ratione materiae* by the newly established International Criminal Court (ICC). On the empirical level, the question as to the legality of the air strikes by NATO forces in Kosovo, the military action of the United States in Afghanistan, and the invasion of Iraq by an American/United Kingdom/Australian/Polish consortium could serve as a useful guide to putting the prevailing rules of international humanitarian law regulating the legality of armed conflicts to the test. Fundamental to both is the question of how to isolate instances of belligerency that fall within the scope of a 'just war'.

This article will explore these issues as a matter of international law, recording the provisions of the Charter of the United Nations (UN Charter) regulating armed conflicts; questioning the legitimacy of particular instances of armed intervention that fall outside the scope of the UN Charter provisions (anticipatory self-defence, humanitarian intervention and wars of liberation); and evaluating from a purely legal perspective, the recent instances of military action initiated by the United States (Kosovo, Afghanistan and Iraq). It will then go on to take stock of the current state of affairs in coming to grips with the essence of the crime of aggression for ICC jurisdictional purposes; outline aspects of the American reaction to the ICC régime pertinent to the crime of aggression; and seek to uncover American foreign policy in regard to the role of the United States in (supposedly) preserving international peace and security. The article will finally attempt to show that the United States is setting itself above the law and claims a legitimate right to do so because of its current status as the only super power in the world.

1. PROSCRIPTION OF INTERNATIONAL ARMED INTERVENTIONS

International law is absolutely opposed to the acquisition of a territory through conquest and has come to frown upon the use of force as a means of settling international disputes. High contracting parties to the *Pact of Paris* of 1928 condemned recourse to war for the solution of international controversies and undertook to settle all disputes, without exception, by pacific means.[1] The United Nations was established in 1945 'to save succeeding generations from the scourge of war' and to that end, to unite the strength of its members 'to maintain international peace and security' and to ensure 'that armed force shall not be used, save in the common interest.'[2] It called on member states to settle their international disputes by peaceful means 'in such a manner that international peace and

[1] Treaty Providing for the Renunciation of War as an Instrument of National Policy 1928 arts 1-2 LNTS 57, 46 Stat 2343, TS 796 reprinted in 2 *Bevans* 732.

[2] Charter of the United Nations Preamble 1976 *YBUN* 1043, 59 Stat 1031, TS 993 reprinted in 3 *Bevans* 1153 (hereafter UN Charter).

security, and justice, are not endangered.'[3] It recorded in article 2(4) of the UN Charter, a commitment of all member states to refrain from the threat or use of force against the territorial integrity or political independence of any state, 'or in any other manner inconsistent with the Purposes of the United Nations.'[4] Those purposes include a resolve:

To maintain international peace and security, and to that end: to take effective collective measures ... for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means ... adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[5]

In terms of the UN Charter, 'parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'[6]

Armed intervention is authorised by the UN Charter in two instances only:

Collective armed intervention under auspices of the Security Council as a means of putting an end to a situation that constitutes a threat to the peace, a breach of the peace, or an act of aggression;[7] and

- Individual or collective self-defence in cases where an armed attack occurs against a member state of the United Nations.[8]

- Military action has only been sanctioned by the Security Council on two occasions: the Korean War (1950-1953), and the Gulf War (1991).

Article 52 of the UN Charter upholds respect for 'regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as

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[3] *Id* art 2(3).

[4] *Id* art 2(4).

[5] *Id* art 1(1)

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[6] *Id* art 33.

[7] *Id* art 42.

[8] *Id* art 51. In cases of collective self-defence, the state for whose benefit this right is used must declare itself to be the victim of an armed attack. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America): Merits* 1986 ICJ Rep 13 at 103 par 196. The victim state must furthermore request the assistance of the other state or states participating in its collective defence. *Id* at 105 par 199.

are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.' The regional arrangements under Article 52 must be distinguished from Security Council enforcement action through regional arrangements or agencies as provided for in Article 53 of the UN Charter. Some analysts, for example Jordan Paust, regard regional arrangements for the maintenance of international peace and security (as per Article 52) as including the use of force and therefore as a distinct instance of permissible armed intervention under the UN Charter.[9] It is submitted that regional arrangements that involves armed conflict are confined to self-defence pacts, and the UN Charter provision must therefore not be seen as authorizing the use of armed force by regional organizations where any of their number have not been exposed to an armed attack.

Peacekeeping missions by the United Nations must be distinguished from action authorised by the Security Council under chapter VII of the UN Charter to counteract a situation that constitutes a threat to the peace, a breach of the peace or an act of aggression, and from the authorisation and utilisation by the Security Council of regional arrangements or agencies for the purpose of enforcement action as provided for in chapter VIII of the UN Charter. Peacekeeping operations have been defined as 'actions involving the use of military personnel in situations of international armed conflict on the basis of the consent of all parties concerned and without resort to armed force except for self-defence.'[10] Their aim is to prevent hostilities from breaking out or to relieve tensions after the cessation of hostilities.[11] Peacekeeping missions will not be undertaken while an armed conflict is being waged, and they essentially preclude the use of force except in self-defence.

The Charter foundation of peacekeeping operations of the United Nations has been a matter of dispute.[12] The International Court of Justice (ICJ) based their validity on article 14 of the UN Charter, which authorises the General Assembly to recommend 'measures for the peaceful adjustment of any situation, regardless of its origin, which it deems likely to impair the general welfare or friendly relations among nations ...'.[13] The legality of peacekeeping missions is, in any event, no longer in dispute.

[9] Jordan J Paust 'Use of armed force against terrorists in Afghanistan, Iraq, and beyond' (2002) 35 *Cornell Int'l LJ* 534, at 545-46.

[10] Erik Suy 'United Nations peacekeeping system' in Rudolf L Bindschedler *et al Encyclopedia of public international law vol 4* (2000) 1143 col 2.

[11] See Michael Cottier 'Other serious violations of the laws and customs applicable in international armed conflicts, article 8(2)(b)(iii)' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 187at 191-2.

[12] *Id* at 259-60.

[13] Advisory Opinion of 20 July 1962 on *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* 1962 ICJ Rep 151, 163-65, 172.

2. Legality of Armed Responses that Exceed the Charter Provisions

The question next to be considered is whether or not the UN Charter deals comprehensively with the question of legally permissible armed interventions: are there situations not mentioned in the UN Charter in which a resort to military action would be legal, or at least legitimate, under the rules of international law?

The General Assembly of the United Nations itself may be cited in support of the proposition that the UN Charter does not deal comprehensively with all instances of lawful armed intervention. For example, in 1950, when the Cold War was still in its infancy, the General Assembly adopted the *Uniting for Peace Resolution*, which provides:

> ... if the Security Council, because of lack of unanimity of the Permanent Members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or an act of aggression the use of armed force when necessary, to maintain or restore international peace and security.[14]

And as will appear more fully hereafter, the United Nations has also recognised the legitimacy of an armed struggle against colonial rule, foreign domination and a racist régime, even though wars of liberation are not mentioned in the UN Charter.

The legality of armed conflicts not covered by the relevant Charter provisions has been debated on several fronts notably, anticipatory self-defence measures; humanitarian intervention; and wars of liberation.

(a) *Anticipatory Self-Defence*

Article 51 of the UN Charter authorises individual and collective self-defence 'if an armed attack occurs.' Would, therefore, pre-emptive strikes by a country under the threat of attack be lawful?

It stands to reason that a state need not wait for the other side to strike the first blow if it is abundantly clear and absolutely certain that an armed attack is imminent. But, as proclaimed in regard to *The Caroline* by US Secretary of State Webster in a diplomatic communique of 6 August 1842 to his British counterpart, pre-emptive action must be confined to cases in which the 'necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.'[15] Anticipatory self-defence

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[14] GA res 377 (V) (A) of 3.11.1950, 5 UN GAOR Supp (No 20) at 10 UN Doc A/1775 (1950).

[15] *The Caroline* in (1906) 2 *Moore Digest of International Law* 412; Lori F Damrosch,

must therefore remain confined to 'situations in which the imminence of an attack is so clear and the danger so great that defensive action is essential for self-preservation.'[16]

In its *National Security Strategy* of September 2002, the George Bush administration proclaimed that it would act, as a matter of common sense and self-defence, 'against emerging threats' constituted by the stated resolve of 'our enemies' that they are seeking weapons of mass destruction.[17] International law clearly does not permit an armed attack based on such 'emerging threats'.

(b) *HumanitarianIntervention*

The question whether or not the UN Charter provisions deal comprehensively with legally permissible armed interventions has mostly been debated in the context of state responsibility for injury to aliens (State A takes military action against State B to rescue citizens of State A who have fallen victim to severe atrocities committed by State B)[18] and humanitarian intervention (State A takes military action against State B to protect the citizens of State B against severe atrocities committed by the powers that be of State B).[19]

Arguments in support of the continued legality, or the moral legitimacy, of humanitarian intervention have been wide-ranging[20] and can perhaps be classified into the following

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Louis Henkin, Richard Crawford Pugh, Oscar Schachter & Hans Smit *International law: Cases and materials* (2001) 922-3. Jordan Paust n 9 above at 535 n 6 has pointed out that The Caroline incident was not actually a matter of pre-emptive self-defence since it occurred in the process of continual attacks on the government of Canada by insurgents.

[16] Oscar Schachter 'The right of states to use armed force' (1984) 82 *Mich L Rev* 1620 at 1634.

[17] *The National Security Strategy of the United States of America, September 2002*, at 4 http://www.whitehouse.gov/nsc/nss/pdf

[18] For example, in December 1989 United States' troops invaded Panama 'to protect the lives of American citizens in Panama'. See Marian Nash Leich 'Contemporary practice of the United States relating to international law' (1990) 84 *AJI L* 536 at 546-9 (note that spokespersons for the American government assumed, with obscure reasoning, that the right to protect American citizens in a foreign country is a component of the right to self-defence as ordained by art 51 of the UN Charter).

[19] For example, the invasion of Uganda in 1979 by Tanzanian forces to rescue the peoples of Uganda from the brutal reign of terror of President Idi Amin. See UD Umozurike 'Tanzania's intervention in Uganda' (1982) 20 *Archiv des Völkerrechts* 301 at 312-13.

[20] See Richard B Lillich 'A United States policy of humanitarian intervention' in Donald P Kommers & Gilburt D Loescher (eds) *Human rights and American foreign policy*

categories:

- The **literalist approach**, represented by Julius Stone (1907-1985), maintains that article 2(4) of the UN Charter does not forbid the threat or use of force *simpliciter*, but only the threat or use of force for specific unlawful purposes, namely 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations;' and since humanitarian intervention does not seek to change territorial borders of the state under attack, or to challenge the political independence of that state, it falls outside the scope of the Charter proscription.[21] Furthermore, one cannot, according to Stone, reconcile a blanket prohibition of the threat or use of force with the provisions of article 2(3) of the UN Charter, which calls upon member states of the United Nations to settle international disputes by peaceful means and in such a manner that international peace, 'and justice,' are not endangered.[22]

- The **flexible and teleological approach**,[23] represented by Michael Reisman, argues that the prohibition of the threat or use of force must be read in conjunction with the overarching human rights concerns of the United Nations as recorded in several provisions of the UN Charter[24] and of which humanitarian intervention is a logical extension.[25]

- The **emergency mechanism argument**, represented by Richard Baxter[26] and Richard Lillich,[27] bases the justification for humanitarian intervention on a

(1979) 278 at 288-9.

[21] J Stone *Aggression and world order* (1958) 95. See also Jordan J Paust 'Use of armed force against terrorists in Afghanistan, Iraq, and beyond' (2002) 35 *Cornell Int'l LJ* 534 at 536. See *contra*, Oscar Schachter 'The right of states to use armed force' (1984) 82 *Mich L Rev* 1620 at 1633.

[22] Stone n 21 above at 95, 98-101.

[23] See Ian Brownlie 'Humanitarian intervention' in John Norton Moore (ed) *Law and civil war in the modern world* (1974) 217, 218.

[24] UN Charter n 2 above Preamble and arts 1, 55, 56.

[25] Michael Reisman 'Humanitarian intervention to protect the Ibos' in R Lillich (ed) *Humanitarian intervention and the United Nations* (1973) 177-8.

[26] Richard Baxter in Lillich n 25 above at 53, 54: '... it is almost as if we were thrown back on customary international law by a breakdown of the Charter system'.

[27] Lillich n 20 above at 289. See also Richard B Lillich 'Forcible self-help by states to protect human rights' (1967) 53 *Iowa L Rev* 325, 335, 345-51; Richard B Lillich 'Humanitarian intervention: A reply to Ian Brownlie and a plea for constructive

> necessity deriving from the imperfections of the Security Council, resulting from the veto power of the permanent members and the (then) prevailing Cold War, to execute its primary function of maintaining international peace and security: there is a need for humanitarian intervention exactly because the Security Council has been immobilised by the veto power of the permanent members. This presupposes that humanitarian intervention is to be 'deactivated' should the Security Council ever begin to function smoothly.

There are a number of prominent international lawyers, on the other hand, who maintain that humanitarian intervention is decidedly illegal but might in special circumstances derive a certain morally-based justification. Richard Falk, for example, argues that the legitimacy, if not the legality, of retaliation – and the same, it is submitted, would apply to humanitarian intervention – derives from the 'acceptability' of the use of force in the special circumstances that prompted its use:[28]

The assumption underlying such an approach is that the primary role of international law is to help governments plan *how* to act, rather than to permit some third-party judge to determine whether contested action is legal or not. In fact the function of the third-party judge can be performed properly only by attempting to assess *in what respects* and *to what extent* the governmental actor "violated" community norms of a presumptive nature.[29]

The moral appeal of the use of force 'would tend to mitigate or even overcome any perceived "illegality"' of such action.[30]

Ian Brownlie likewise proceeded on the assumption that humanitarian intervention is illegal,[31] though it might be morally defensible in certain circumstances. To proclaim humanitarian intervention lawful if confined to those circumstances, would still leave its application open to abuse.[32] Referring to euthanasia as presenting an analogous dilemma,

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alternatives' in *Law and civil war in the modern world* n 23 above at 229, 230.

[28] Richard Falk 'The Beirut raid and the international law of retaliation' (1969) 63 *AJIL* 415 at 425, arguing that 'certain behavior might be "acceptable" though not legal'.

[29] *Id* at 442.

[30] *Id* at 439 also proclaiming that '[a] rule of conduct isolated from context is often too abstract to guide choice of action'. See too Wolfgang G Friedman 'Comment' in *Law and civil war in the modern world* n 23 above at 574, 578-79 where he maintains that concepts such as humanitarian intervention have 'at best attained the level of accepted international morality rather than law'.

[31] Brownlie n 23 above at 226.

[32] *Id* at 223, 225; and see also Ian Brownlie 'Thoughts on kind-hearted gunmen' in Lillich n 25 above at 139, 147-48; Oscar Schachter 'The right of states to use armed force' (1984) 82 *Mich L Rev* 1620 at 1629.

Brownlie argues that one's responses to instances where humanitarian intervention would be justified by 'higher considerations of public policy and moral choice',[33] should be conditioned by 'moderation' while leaving the principle of its illegality intact: 'Moderation in application does not necessarily display a legislative intent to cancel the principle so applied.'[34]

(c) Wars of Liberation

The legitimacy of wars of liberation against colonial rule, foreign domination and racist régimes have also been acknowledged by no other than the General Assembly of the United Nations itself.

The 1968 (Teheran) World Conference on Human Rights[35] adopted a *Resolution on Human Rights in Armed Conflicts*, which not only set the proceedings in motion that culminated in the 1977 Protocols to the Geneva Conventions of 12 August 1949,[36] but also called for the protection as prisoners of war or political prisoners of captives from among the ranks of those who struggle against minority racist and colonial regimes.[37] This Resolution sparked a series of annual General Assembly resolutions on Respect for Human Rights in Armed Conflicts, which on the one hand called for the full protection of civilians and combatants in conflicts which arise from the struggle of peoples under colonial and foreign rule for liberation and self-determination and for the better application of existing humanitarian conventions and rules to such conflicts,[38] and on the other hand supported the effort of the

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[33] Brownlie n 23 above at 146.

[34] *Id* at 147-48.

[35] The World Conference was designed to take stock of the state of human rights in the world twenty years after the adoption of the Universal Declaration of Human Rights.

[36] Resolution XXIII of 12 May 1968 in Final Act of the International Conference on Human Rights, Teheran 22 April to 13 May 1968, 18 UN Doc A/Conf 32/41 (1968) noting that the Geneva Conventions of 1949 were not sufficiently broad in scope to cover all armed conflicts and calling for the adoption of new rules of international law relating to armed conflicts.

[37] *Ibid*.

[38] GA res 2444 (XXIII) of 19 Dec 1968 in 23 UN GAOR Supp (No 18) at 50, UN Doc A/7218 (1968); and see also GA res 2597 (XXIV) of 16 Dec 1969 in 24 UN GAOR Supp (No 30) at 62, UN Doc A/7630 (1969); GA res 2674 (XXV) of 9 Dec 1970 par 4 in 25 UN GAOR Supp (No 28) at 75, UN Doc A/8028 (1970) calling for the treatment as prisoners of war of participants in resistance movements and freedom fighters in Southern Africa and territories under colonial and alien domination and foreign occupation, struggling for their liberation and self-determination; GA res 2852 (XXVI) of 20 Dec 1971 in 26 UN GAOR Supp (No 29) at 90, UN Doc A/8429 (1971).

Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (from which the 1977 Protocols emerged).[39] The General Assembly of the United Nations has time and time again recognised the legitimacy of the struggle of peoples under colonial rule, foreign domination or a racist regime,[40] adding in a series of subsequent resolutions that the 'legitimate struggle' includes the armed struggle of liberation movements.[41]

3. RECENT ARMED CONFLICTS

Applying the above norms to recent international armed conflicts initiated by the United States (Kosovo, Afghanistan and Iraq) is complex because international humanitarian law always seems to lag behind the times: perceptions and rules in any given set of conventions are drafted on the basis of past experiences and with little scope for adaptability to unprecedented contingencies that might in future times emerge from ingenuities of the criminal mind. The Geneva Conventions of 12 August 1949 were informed by experiences derived from World War II; the 1977 Protocols made certain adjustments to deal with guerilla-type conflicts that had become a primary method of belligerency in the post-War

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[39] GA res 2853 (XXVI) of 20 Dec 1971 in 26 UN GAOR Supp (No 29) at 91, UN Doc A/8429 (1971); GA res 3032 (XXVII) of 18 Dec 1972 in 27 UN GAOR Supp (No 30) at 117, UN Doc A/8730 (1972); GA res 3102 (XXVIII) of 12 Dec 1973 in 28 UN GAOR Supp (No 30) at 141, UN Doc A/9030 (1973); GA res 3319 (XXIX) of 14 Dec 1974 in 29 UN GAOR Supp (No 31) at 147, UN Doc A/9631 (1974); GA res 3500 (XXX) of 15 Dec 1975 in 30 UN GAOR Supp (No 34) at 141, UN Doc A/10034 (1975); GA res 31/19 of 24 Nov 1976 in 31 UN GAOR Supp (No 39) at 180, UN Doc A/31/39 (1976); GA res 32/44 of 8 Dec 1977 in 32 UN GAOR Supp (No 45) at 207, UN Doc A/32/45 (1977) commending the Diplomatic Conference for the conclusion of its work on the 1977 Protocols.

[40] See, for example, GA res 3163 (XXVIII) of 14 Dec 1973 par 5 28 UN GAOR Supp (No 30) at 5, UN Doc A/9030 (1973) proclaiming the legitimacy of the struggle of the people under colonial and alien domination to exercise their right to self-determination and independence 'by all necessary means'; GA res 3411 (XXX) of 10 Dec 1975 par G5 (at 38) 30 UN GAOR Supp (No 34) at 36, UN Doc A/10034 (1975) proclaiming the legitimacy of the struggle against a racist regime 'by all means possible'; GA res 35/206A of 16 Dec 1980 par 1 35 UN GAOR Supp (No 48) at 29, UN Doc A/35/48 (1980); GA res 36/172A of 17 Dec 1981 par 13 36 UN GAOR Supp (No 51) at 38, UN Doc A/36/51 (1981); and see also SC res 437 (1980) of 13 June 1980 in 35 UN SCOR (Res & Dec) at 18 par 4, UN Doc S/Inf/36 (1980) proclaiming the legitimacy of the struggle of the South African people for the elimination of apartheid; and see Stephen M Schwebel 'Wars of liberation – as fought in UN organs' in Moore n 21above at 218.

[41] See, for example, GA res 37/69A of 9 Dec 1982 par 16, 37 UN GAOR Supp (No 51) at 28, UN Doc A/37/51 (1982); GA res 38/39A of 5 Dec 1983 par 4 38 UN GAOR Supp (No 47) at 36, UN Doc A/38/47 (1983).

years – but again somewhat belatedly, because even as the Protocols were being crafted other forms of militancy (particularly terrorism as a mechanism of armed conflict) had become 'fashionable'.

(a) *Kosovo*

In the wake of untold atrocities committed by government agencies in the former Yugoslavia against Kosovar Albanians as a means of 'ethnic cleansing' of the region, forces of the North Atlantic Treaty Organization (NATO) began a bombing campaign in Kosovo in which thirteen of the nineteen NATO countries participated. The hostilities lasted from 24 March to 9 June 1999. The NATO intervention was widely applauded, but also sharply condemned. Central to the dispute was the legal basis for affording legality, or at least legitimacy, to the air strikes.[42]

The North Atlantic Treaty is essentially a collective self-defence pact.[43] It was devised by the member states to 'maintain and develop their individual and collective capacity to resist armed attack,'[44] and to act when 'the territorial integrity, political independence or security of any of the Parties is threatened.'[45] Legitimation of the bombing campaign in Kosovo can, in a word, not be based on the North Atlantic Treaty as such.

It strikes one as odd that proponents of the military campaign emphasised the goals to be achieved by the military action rather than its basis in international law. NATO's stated objectives were encapsulated in five points: an end to the killing by Yugoslav army and police forces in Kosovo; the withdrawal of those forces from the province; the deployment of a NATO-led international force in Kosovo; the return of all refugees; and a political settlement for Kosovo.[46] When announcing the air strikes against Serbian targets, President Bill Clinton of the United States proclaimed that the campaign had three objectives:

> First, to demonstrate the seriousness of NATO's opposition to aggression and its support for peace; second, to deter President Miloševi from continuing and escalating his attacks on helpless civilians by imposing a price for those attacks; and third, if necessary, to damage Serbia's capacity to wage war against Kosovo

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[42] See the commendable collection of editorial comments on NATO's Kosovo Intervention published in (1999) 93 *AJIL* 824-862.

[43] North Atlantic Treaty art 5 34 UNTS 243: 'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all'.

[44] *Id* art 3.

[45] *Id* art 4.

[46] See Christine M Chinkin 'Kosovo: A "good" or "bad" war ?' (1999) 93 *AJIL* 841 n 2.

in the future by seriously diminishing its military capabilities.[47]

Only two NATO countries (Belgium and Germany) based the legality of the campaign on humanitarian intervention. There is indeed wide support among publicists for holding that this is the only possible basis upon which either legality or legitimacy of the air strikes could possibly be based.[48] Condemnation of, or support for, the military action in Kosovo therefore in the final analysis depended on the view preferred by individual analysts in regard to the ultimate question as to whether or not humanitarian intervention remained lawful under the current rules of international law; and if not, whether the resort to arms might or might not derive legitimacy from the humanitarian objectives it sets out to promote.

It is perhaps important to note that the Security Council did, after the event, sanction implementation of the stated objectives of the Kosovo campaign,[49] without denouncing the NATO military action and endorsing the Interim Agreement for Peace and Self-Government in Kosovo of 7 June 1999 (the Rambouillet Accord).[50] By approving the Kosovo settlement, argues Professor Lou Henkin, the Security Council has 'effectively ratified the NATO action and [given] it the Council's blessing.'[51] This, in turn, can be seen as endorsement by the Security Council of humanitarian intervention in comparable circumstances.

The NATO action and Security Council response, according to Professor Henkin, may reflect a step toward a change in the law; part of 'the quest for developing "a form of collective intervention" beyond the veto-bound Security Council.'[52] If Kosovo is to be the

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[47]'Remarks announcing air strikes against Serbian targets in the Federal Republic of Yugoslavia (Serbia and Montenegro)'(1999) 35/12, 24 March *Weekly Compilation of Presidential Documents* 513, 514; see also 'Address to the nation on airstrikes against Serbian targets in the Federal Republic of Yugoslavia (Serbia and Montenegro)' (1999) 35/12, 24 March *Weekly Compilation of Presidential Documents* 516, 517; Ruth Wedgwood 'NATO's campaign in Yugoslavia' (1999) 93 *AJIL* 829.

[48]See Richard B Bilder 'Kosovo and the "New Interventionism": promise or peril?' (1999) 9 *J Transnat'l L & Pol'y* 153. Note, however, that Jordan Paust bases the legality of the air strikes on (his interpretation of) Article 52 of the UN Charter. Paust n 9 above at 546-47; and see the text accompanying n 9 above.

[49]SC res 1244 of 10 June 1999 54 UN SCOR (Res & Dec) at 32 (1999).

[50]Interim Agreement for Peace and Self-Government in Kosovo UN Doc S/1999/648 (7 June 1999).

[51]Louis Henkin 'Kosovo and the law of humanitarian intervention' (1999) 93 *AJIL* 824, 826.

[52]*Id* at 828.

guide, humanitarian intervention must only be resorted to in response to the most extreme cases of horrendous human right violations, and ought always to be executed by multi-national action.

(b) *Afghanistan*

The terrorist attacks of 11 September 2001 were proclaimed by American President, George W Bush, to be an act of war. Speaking at Camp David shortly after those destructive acts, the president said: 'We're at war. There has been an act of war declared upon America by terrorists, and we will respond accordingly.'[53]

Terrorism can be defined[54] as acts of violence;[55] deliberately aimed at civilian targets;[56] with a view (mostly) to promoting a preconceived political objective;[57] by means of

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[53] 'Remarks in a meeting with the national security team and an exchange with reporters at Camp David, Maryland' (2001) 15 Sept *Weekly Compilation of Presidential Documents* 1319, 1320.

[54] See JD van der Vyver 'State sponsored terror violence' (1988) 4 *SAJHR* 55, 59-60; Ingrid Detter de Lupis *The law of war* (1987) 19-23.

[55] Carlos Marighella *Minimanual of the urban guerilla* (1971) 103 refers to the following strategies of terror: 'Bank assaults, ambushes, desertions and diverting of arms, the rescue of prisoners, executions, kidnaping, sabotage, terrorism, and the war of nerves.' Yonah Alexander 'Terrorism and the media: Some considerations' in Yonah Alexander, David Carlton & Paul Wilkinson (eds) *Terrorism: Theory and practice* (1979) 159, refers to the terrorist's 'instruments of psychological and physical force – including intimidation, coercion, repression, and, ultimately, destruction of lives and property'.

[56] Mario 'n Mushat 'The Soviet concept of guerilla warfare' in (1981) 7 *SAYIL* 1 at 4 singles out civilians and civilian objects and 'the suffering of innocent people' as the main targets of a terrorist.

[57] Many writers emphasise the political nature of a terrorist's objective. Yonah Alexander n 55 above at 159, refers to terrorism as 'an expedient tactical and strategic tool of politics in the struggle for power within and among nations ...'. David Carlton 'The future of political substate violence' in *Terrorism: Theory and practice* n 53 at 201, includes in the concept of a terrorist 'any perpetrator of substate violence whose motives are broadly of a political character'. However, terrorism need not be politically motivated and might be resorted to by ordinary criminals and psychopaths. See Grant Wardlaw *Political terrorism: Theory, tactics and counter-measures* (1982) 8-9. It might furthermore be motivated by either social or political grievances. FC Pedersen 'Comment: Controlling international terrorism: An analysis of unilateral force and proposals for multilateral co-operation' (1976) 8 *Toledo L Rev* 209 cited by TM Kühn 'Terrorism and the right of self-defence' (1980) 6 *SAYIL* 42.

intimidating the target of such violence (which need not be, and seldom is, the victims themselves);[58] to submit to the demands of the perpetrators;[59] out of fear emanating from the threat or actual abhorrence of the act.[60]

The typical terrorists are fanatically devoted to the objective which they seek to promote, and act from an inflated sense of self-righteousness. They are prompted by the feeling of 'misery, frustration, grievance and despair'[61] because of their inability to achieve their objective by regular or lawful means, or through the medium of an armed struggle conducted in accordance with the laws and customs of war. The victims of their violent acts are seldom the person or institution whose attention they seek to attract through their deeds. In some cases they are quite prepared to sacrifice their own lives for the cause and in the process of executing the act of violence. They might even be intent on doing so as a strategy for success and/or with a view to adding personal martyrdom to their cause.

Terrorism in all its manifestations is a crime and ought never to go unpunished. In the preamble to a Resolution of 1985 on Measures to Prevent International Terrorism, the General Assembly of the United Nations reaffirmed 'the legitimacy of the struggle, in particular of national liberation movements, against colonial and racist regimes and other forms of alien domination,'[62] thereby suggesting that the armed operations of liberation

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[58] Abraham H Miller 'Hostage negotiations and the concept of transference' in *Terrorism: Theory and practice* n 55 above at 155 says: 'Terrorism by definition is an act that seeks to influence a population significantly larger than the immediate target.' See also Wardlaw n 57 above at 10.

[59] John Baylis 'Revolutionary warfare' in John Baylis, Ken Booth, John Garnett & Phil Williams (eds) *Contemporary strategies: Theory and politics* (1975) 132, 137 says: 'Intimidation and terrorism are used not only to publicize the move, to demoralize the government, and to polarize society but also at times to ensure that people have no alternative but compliance, unless and until the government is able to protect them.'

[60] The distinguishing feature of terrorism, said Wardlaw n 57 above at 10, is 'the *design* to create anxiety'. See also Lawrence Freedman 'Terrorism and strategy' in Lawrence Freedman *et al* (eds) *Terrorism and international order* (1986) 56; CJ Botha 'Clausewitz's "Kleinkrieg" and Mao's "fishes in the water": Mushkat in proper conceptual perspective' (1982) 8 *SAYIL* 141 at 147 depicts terrorism as 'a combination of threats and the actual use of terror to create a psychological effect'; TP Thornton 'Terror as a weapon of political agitation' in Harry Eckst'in (ed) *Internal war* (1964) 73 maintains that terrorism is characterised by 'its high symbolic content'; and see in general Wardlaw n 57 above at 8-10.

[61] See the Long Title of GA res 40/61 of 9 Dec 1985 40 UN GAOR Supp (No 53) at 301, UN Doc A/40/53 (1985).

[62] GA res 40/61 of 9 Dec 1985 40 UN GAOR Supp (No 53) at 301, UN Doc A/40/53

movements ought not to be perceived as acts of terrorism.[63] That, too, is unfortunate, since terrorism is terrorism is terrorism, and the fact that acts of terror are included in the military strategy of liberation armies does not change the essential character or criminality of those deeds. Nor does the end justify the means. One is reminded here of the truism attributed to Justice Louis D Brandeis (1856-1941):

One can never be sure of ends – political, social, economic. There must always be doubt and difference of opinion; one can be 51 per cent sure. There is not the same margin of doubt as to means. Here fundamentals do not change; centuries of thought have established standards. Lying and sneaking are always bad, no matter what the ends.[64]

The vital question raised by the American response to 11 September, is whether terrorism as such can be classified as an armed conflict.

'Armed conflict' has been said to exist 'whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'[65] This would suggest that international armed conflicts are confined to 'armed force between States.' That is in two respects not entirely correct:

- If an organised armed group engaged in protracted armed violence against a governmental authority, or against another organised group, were to include insurgents from another state, the hostilities would constitute an international armed conflict;[66] and

- Wars of liberation, which may in some instances actually be armed conflicts not of an international character, are regulated by Protocol I to the Geneva Conventions of 12 August 1949 and have thus been made subject to the rules pertaining to

(1985).

[63] See Richard Falk 'The Beirut raid and the international law of retaliation' (1969) 63 *AJIL* 415 at 425 arguing that the use of terror as an instrument of change derived a certain legitimacy to the extent that its use received the endorsement of international instruments.

[64] Quoted in AT Mason *Brandeis: A free man's life* (1956) 569.

[65] *Prosecutor v Duško Tadi (Jurisdiction) (Appeals Chamber)* case IT-94-1-AR72 105 Intl LRep 453 par 70.

[66] See *Prosecutor v Alfred Musema* case ICTR-96-13-T par 248 (27 Jan 1999) noting that an armed conflict will only qualify as one not of an international character if the 'hostilities break out between armed forces or organized armed groups within the territory of a single State'.

international armed conflicts.[67]

In the *Celebici case*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) stated that civil unrest and terrorism do not constitute armed conflicts, absent the 'protracted extent of the armed violence' and the 'extent of organisation of the parties involved' required for violent conduct to qualify as an armed conflict not of an international character.[68]

Terrorism as such is not an armed conflict *per se*; but this must not be taken to mean that resort to acts of terror committed as a strategy of war by an organised armed group engaged in protracted armed violence against governmental armed forces, or against the armed forces of another armed group not aligned with any government, would disqualify the armed struggle from being an armed conflict.

Terrorism has indeed in this day and age become a potent means of combat – at both the national and international levels. Militant efforts to bring about political change, or to retain the constitutional *status quo*, in regions such as Northern Ireland, Kashmir, and the Basque regions of Spain, resistance strategies in Palestine, and the armed struggle of the past of peoples in Africa subject to colonial rule or a racist regime, have all included acts of terror violence.

The terrorist attack of 11 September was clearly not part of an armed conflict. Calling it that was perhaps done in the moment of shock and anger, and probably to lay the foundation for military action by the United States under auspices of the self-defence provisions of article 51 of the UN Charter.

This does not mean that the armed attack against Afghanistan violated the norms of international law. The UN Security Council in Resolution 1368 of 12 September 2001, while strongly condemning the terrorist attack of September 11, recognized 'the inherent right to individual and collective self-defence in accordance with the Charter.' The United States was fully justified, after its preceding ultimatum was disregarded, to take up arms against the country that harbored and afforded an abode to the terrorist network (al-Queda) responsible for the 11 September acts of terror – especially as further terrorist attacks against American targets remained an imminent and on-going threat.[69]

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[67] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977 par 1(4) UN Doc A/32/144, 1125 UNTS 3; (1977) 16 *ILM* 1391.

[68] *Prosecutor v Zejnil Delali□ & Others* (the *Celebici case*) case IT-96-21-T par 184 (16 Nov 1998); and see also Andreas Zimmermann 'Preliminary remarks on par 2(c)-(f) and par 3: War crimes committed in armed conflicts not of an international character' in *Commentary on the Rome Statute of the International Criminal Court* n 11 above at 262, 276.

[69] See *contra* Paust n 9 above at 538-9 arguing that those responsible for the September

Perhaps the military response does not fit neatly into the rather restrictive language of article 51: Can the terrorist action of 11 September be classified as an 'armed attack'? Is defensive action not confined to armed responses to an armed attack executed by the military forces of another state? Is anticipatory defensive action included in the language of article 51 authorising 'individual or collective self-defence if an armed attack occurs ...'?

Military response to international terrorism was clearly not within the contemplation of drafters of the UN Charter way back in 1945. The United States and other nations that might find themselves in a similar predicament cannot be expected simply to sit back and let the atrocities be, merely because the Charter does not make provision for measures that would be suitable for meeting the challenges of a new era. Provided the action taken does not run counter to an express prohibition in the Charter, and meets with general approval by the international community of states – that is, the action taken is legitimate – then the 'innovation of international law' acquires the attributes of legality – that is, a new rule of international law is created. That, indeed, is how international law evolves. The formation of a new norm of international law would not result if the action taken were to violate an express prohibition of international law, and/or provoke general condemnation by a cross-section of the countries of the world.

(c) *Iraq*

The legal basis for the invasion of Iraq by the United States/United Kingdom/Australian/Polish forces remains a mystery. At least three different reasons for taking up arms against Iraq have been advanced by apologists for what clearly seems to be an act of aggression:

- to enforce Security Council resolutions for the disarming of Iraq;
- to protect the United States and its allies, as a matter of self-defence, from an armed attack; and
- to overthrow the régime of Saddam Hussein and liberate the Iraqi people from tyrannical rule.

Hostilities in the Gulf War were terminated in terms of a cease-fire resolution adopted by the Security Council on 3 April 1991.[70] The resolution made provision for the destruction, removal or rendering harmless, under international supervision, of all chemical and

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11 attacks – bin Laden and others – as well as heads of state directly involved in ongoing processes of attack on the United States are lawful military targets under art 51 of the UN Charter, but not the Taliban government as such merely on the ground that it harbored terrorists or has been unable to control their criminal conduct.

[70] SC res 687 of 3 April 1991 56 UN SCOR (Res & Dec) at 11, UN Doc S/Inf/47 (1991).

biological weapons and of all ballistic missiles with a range greater than 150 kilo meters,[71] and for the appointment of a team of weapons inspectors to carry out on site inspections to see that this was done.[72] It is today a matter of history that Saddam Hussein in the following years obstructed the weapons inspectors in executing their functions and eventually denied them access to Iraq altogether. The Bush administration at one stage maintained that since Saddam Hussein had violated the cease-fire conditions, the United States was at liberty to resume hostilities as a continuation of the Gulf War.

The truth of the matter is, though, that the Gulf War was a Security Council operation, that the cease-fire conditions were laid down by the Security Council, and that only the Security Council has authority to decide what steps are to be taken to respond to the breach of the cease-fire conditions by Iraq. The Security Council decided to uphold article 41 sanctions against Iraq and has not authorised an article 42 military response to the cease-fire violations.[73] The United States cannot substitute its own preferences for those decided upon by the Security Council.

The self-defence argument likewise rests on a shaky foundation. Iraq has not launched an attack against the United States or any of its allies. Nor has an armed attack been imminent so as to justify anticipatory defensive action against Iraq. Sweeping allegations that Saddam Hussein upheld alliances with al-Queda, based exclusively—it would seem—on the fact that an al-Queda official had received medical treatment in Iraq, are just not good enough to bring the American/British/Australian/Polish offensive within even the most sweeping and extensive interpretation of article 51 of the UN Charter.

Nor has the alliance based its claim to the legitimacy of toppling the régime of Saddam Hussein on humanitarian intervention. Many people will agree that the world would be a better place without Saddam Hussein and the kind of dictatorial and intolerant rule he represented. But this is a matter for the Iraqi people to resolve. There can be no doubt that the Iraqi government must, as a matter of great urgency, be disarmed of biological and chemical weapons and long-range ballistic missiles, but that is a matter for the Security Council to control. The Security Council was in the process of doing just that when its efforts to establish compliance by Iraq with Security Council demands were interrupted—not by Iraq, but by the American/British/Australian aggression—and at a time when no evidence had been found that Iraq did in fact possess weapons of mass destruction or any of the kinds of armament stipulated in the cease-fire resolution (at the time of the invasion, Iraq was in the process of destroying its ballistic missiles which exceeded the 150 kilo meter range).

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[71] *Id* par 8.

[72] *Id* par 9.

[73] See *contra* Paust n 9 above at 556 maintaining that references made in SC res 1141 (2002) to SC res 678 (1990), amount to recognition by the Security Council of the continuing validity of the latter resolution's authorisation of the use of all necessary means to restore peace and security in Iraq.

It was clear from the outset that the United States was going to take up arms against Iraq, no matter what. President Bush was persuaded by Prime Minister Tony Blair and Secretary of State Colin Powell to seek Security Council sanction for an armed attack. However, President Bush made it clear that he was not seeking Security Council approval of military action against Iraq, but would afford the Security Council an opportunity to go along with the invasion of Iraq which was going to take place in any event. France, for one, made it clear that it would veto authorisation of an armed attack while the weapons inspectors were still in the process of assessing compliance or non-compliance by Iraq with the Security Council resolutions to disarm. The United States was nevertheless going to put the matter to a vote in the Security Council hoping that a majority of the members would support its militant resolve, thereby achieving at least the moral high ground for the invasion which, in the mind of President Bush, was then already a foregone conclusion. When it became evident that the United States did not have the support of a majority of Security Council members, President Bush declared war against Iraq without calling for a vote in the Security Council.

4. Legality/Legitimacy of the War in Iraq Revisited

Speculations are rife as to the true reasons behind the armed attack on Iraq: obtaining control of the oil fields of Iraq; revenging an attempt attributed to Saddam Hussein to assassinate President Bush snr.; expressing the profound anger of the American people flowing from 11 September; with a view to the President's chances for re-election, diverting public attention from the declining American economy and/or exploiting the traditional popularity in the United States of a president-at-war.

Whatever the true reasons behind the war might have been, the question remains whether or not the aggressive policies of the United States could and should be taken to have afforded embryonic life to a new category of legally permissible armed interventions.

(a) *Armed Intervention for the Toppling of a Repressive Régime*

Fears have been expressed that 'international law is no longer defined in opposition to force,' and indeed 'not only legitimates, but has begun to require, the use of force against those the international community deems barbarians.'[74] Reflecting on recent (pre-Iraqi) instances of military action in which the United States participated – those sanctioned by the UN Charter as well as those falling outside the Charter provisions – David Westbrook, seeks to detect state practice affording legality to hostilities conducted with 'international support, or at least explicit acquiescence',[75] and referred to as 'armed interventions by civilized countries ... into barbaric situations'[76] – civilisation being defined as 'stable liberal

[74] David A Westbrook 'Law through war' (2000) 48 *Buff L Rev* 299 at 302.

[75] *Id* at 333.

[76] *Id* at 321

modernity,'[77] and 'barbaric' countries (Somalia, Bosnia, Cambodia, East Timor and the like) being depicted as 'those places where people have vested identities in groups that can be militarily mobilized, and where such people have not only been mobilized, they have been deployed and are killing.'[78]

Westbrook does not explicitly refer to humanitarian intervention, but his circumscription of collective armed interventions by 'civilized countries' to bring an end to 'barbaric' group-related homicides seem to fit that particular manifestation of a 'just war'. This leaves the war in Iraq out in the cold.

(b) *The Reagan doctrine*

Perhaps the most extreme position claiming legality for military action to bring 'barbarism' to its knees – one that does not seek compliance with the UN Charter or the approval or acquiescence of the international community of states as required by David Westbrook – is represented by the so-called 'Reagan doctrine' as explained by Senator Jesse Helms (R-NC) to the Security Council of the United Nations on 20 January 2000:

> In the United States during the 1980's, we called this the Reagan Doctrine. In some cases, America has assisted freedom-fighters around the world who are seeking to overthrow corrupt regimes.
>
> We have provided weaponry, training and intelligence. And in other cases, the United States has intervened directly.
>
> And in other cases, such as in Central and Eastern Europe, we supported peaceful opposition movements with moral, financial and covert forms of support.
>
> But in each case, it was America's clear intention to help bring down communist regimes that were oppressing their peoples, and thereby, replace the dictators with democratic governments.
>
> The democratic expansion of freedom in the last decade of the 20th century is a direct result of those policies.
>
> In none of those cases, however, did the United States ask for, or receive, the approval of the United Nations to legitimize its actions. And it's a fanciful notion that free peoples need to seek approval of an international body, some of whose members are totalitarian dictatorships, to lend support to nations struggling to break the chains of tyranny and claim their inalienable God-given rights.
>
> The United Nations ... has no power to grant or decline legitimacy to such actions.

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[77] *Id* at 322.

[78] *Id* at 342.

They are inherently legitimate.[79]

One need not dwell on the propriety of such instances of unilateral interventions, except perhaps to be reminded of the truism that international support could serve as the guide for distinguishing between military operations conducted under the banner of a morally defensible norm, and those prompted merely by considerations of the belligerent's own national interests.[80] The 'Reagan doctrine' was in any event decisively condemned by the ICJ in the *Nicaragua case*.[81] It was there decided that the provision of weapons or logistical or other support to rebel forces seeking to overthrow their own government constituted an 'armed attack' and would amount to the threat or use of force, or intervention in the internal affairs of other states, in violation of international law.[82] The *Nicaragua case* is also authority for the proposition that being involved in 'indirect aggression' – the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another state – is a violation of a rule of customary international law.[83]

At its best, the war in Iraq may be seen as a revival of the Reagan Doctrine: the self-assumed mission of the United States to topple governments—without the sanction of the United Nations and by military force if necessary—that do not find favour with the American powers that be. This is illegal under the current norms of international law. The United Nations, and not the United States, has been charged with promoting the basic human rights and fundamental freedoms of all the peoples of the world and is the sole institution with authority to take action for the maintenance of international peace and security. Implementing sanctions, and taking armed action, as a means of dealing with a threat to the peace, a breach of the peace or the act of aggression were deliberately subjected to tedious procedures centred upon the veto power of the five Super Powers, exactly so that those retributory actions will not lightly be undertaken. The difficulty of obtaining the required support for the exercise of those powers must not be taken to legitimise unilateral action in cases where the formalities have not or cannot be complied with.

And there is a further good reason for this. True altruism is seldom the driving force in international relations. States act exclusively in (the often distorted image of) their own self-interest. Whatever concerns might exist in the United States about the repression of the Kurdish minority or the Shiite community in Iraq, those concerns were not the driving force that prompted Washington DC to go to war. If any particular faction of the Iraqi

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[79] Reprinted in *The New York Times* 21 January 2000 <http://www.nytimes.com> .

[80] See Westbrook n 72 above at 333.

[81] *Military and Paramilitary Activities in and Against Nicaragua* n 8 above.

[82] *Id* at 103 par 196.

[83] *Id* at 103 par 195.

community were to be better off after the war, this would be entirely fortuitous. The invading forces will, of course, pose as the liberator of dissident indigenous groups within the target country and exploit the strategic assistance they might derive from groups with grievances against the régime to be toppled. Their primary concern, however, is to win the war and to promote the self-serving objective which from the outset motivated the resort to arms against Iraq.

5. THE SOLE-SUPER-POWER SYNDROME

When the proceedings that culminated in the establishment of the ICC were still in their infancy, the United States came out in full support of its establishment. The Foreign Relations Authorisation Act, Fiscal Year 1994 and 1995, recorded as follows the 'Sense of the Senate on the Establishment of an International Criminal Court':

> (1) the establishment of an international criminal court with jurisdiction over crimes of an international character would greatly strengthen the international rule of law;
> (2) such a court would thereby serve the interests of the United States and the world community; and
> (3) the United States delegation should make every effort to advance this proposal at the United Nations.[84]

However, it soon emerged that the United States would place considerations of national self-interest above all else. Speaking at the Commonwealth Club in San Francisco California, on 13 May 1998, the Ambassador at Large for War Crime Issues of the United States (and later head of the American delegation at the Rome Conference) said quite bluntly: 'The US delegation has been and will continue to be guided by our paramount duty: to protect and advance US interests.'[85]

The American perception of its own national self-interest was encapsulated by Ambassador

[84] Foreign Relations Authorization Act, Fiscal Year 1994 and 1995, § 517(b) HR 2333 103rd Cong, 108 Stat 382 469 (1994). The Senate did add that it would not ratify a treaty establishing the court 'which permits representatives of any terrorist organization, including but not limited to the Palestine Liberation Organization, or citizens, nationals or residents of any country listed by the Secretary of State ... as having repeatedly provided support for acts of international terrorism, to sit in judgment on American citizens' (§ 518), or one that would not guarantee that the court would take no action infringing upon or diminishing the rights of American citizens under the First and Fourth Amendments to the Constitution of the United States, as interpreted by the United States (§ 519).

[85] David J Scheffer 'Seeking accountability for war crimes: Past, present and future' <http://www.state.gov/www/policy_remarks/1998/980513_scheffer_war_crimes.html>; and see Samantha Power 'The United States and the genocide law: A history of ambivalence' in Sarah B Sewall & Carl Kaysen (eds) *The United States and the International Criminal Court* (2000) 165 at 172.

Scheffer in an interview with the *Washington Post*: 'Any arrangement by which a UN-sponsored tribunal could assert jurisdiction to prosecute Americans would be political poison in Congress.'[86] Affording immunity for American nationals from prosecutions in the ICC was the primary concern of and driving force behind participation of the United States in the norm-creating proceedings for the establishment of a permanent international criminal court. The United States insisted on '100% guarantees' that no American will ever be prosecuted in the ICC, and Secretary of State in the Clinton administration, Madeleine Albright, on one occasion promised that the United States would be enabled 'at a minimum to be a "good neighbour" to the court' if the American demands were to be accommodated.[87]

The arguments in support of 'American exceptionalism' advanced by David Scheffer on many occasions, amount to the following: The United States, being the only remaining super power in the world, has become the major/only peace-keeping force of our times;[88] and the American government does not want to place its troops at risk of prosecution in an

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[86] Thomas W Lippman 'Ambassador to the darkest areas of human conflict' *Washington Post* 18 November 1997 A19.

[87] 'US offers a "procedural fix" to link with war-crimes court' *The Desert News* 6 May 2000 A04.

[88] See also Ruth Wedgwood 'Improve the International Criminal Court' in Alton Frye (ed) *Toward an International Criminal Court*? (1999) 53, 66; Ruth Wedgwood 'The International Criminal Court: An American view' (1999) 10 *Eur Int'l L* 93, 101-02 ; Ruth Wedgwood 'The United States and the International Criminal Court: Achieving a wider consensus through the "Ithaca Package"' (1999) 32 *Cornell Int'l LJ* 535 at 537-38; Marten Zwanenburg 'The Statute of the International Criminal Court and the United States: Peacekeeping under fire?' (1999) 10 *Eur J Int'l L* 124 at 126-27; Marten Zwanenburg 'The Statute of the International Criminal Court and the United States: Peace without justice?' (1999) 12 *Leiden J Int'l L* 1 at 6; Marcella David 'Grotius repudiated: The American objections to the International Criminal Court and the commitment to international law' (1999) 20 *Mich J Int'l L* 337 at 357; Sharon A Williams 'Preconditions to the exercise of jurisdiction' in *Commentary on the Rome Statute of the International Criminal Court* n 11 above at 329, 336; Lawrence Weschler 'Exceptional cases in Rome: The United States and the struggle for an ICC' in *The United States and the International Criminal Court* n 85 above at 85, 91-92; Peter Melanczuk 'The International Criminal Court and landmines: What are the consequences of leaving the US behind?' (2000) 11 *Eur J Int'l L* 77 at 80-81; Morten Bergsmo 'Occasional remarks on certain state concerns about the jurisdictional reach of the International Criminal Court and their possible implications for the relationship between the court and the Security Council'(2000) 69 *Nordic J Int'l L* 87at 102-03; John Washburn 'The International Criminal Court arrives – the US position: status and prospects' (2002) 25 *Fordham Int'l LJ* 873 at 881-82; Hans-Peter Kaul 'Preconditions to the exercise of jurisdiction' in Antonio Cassese, Paola Gaeta, John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A commentary* (2002) 583 at 601.

international criminal tribunal for acts committed while engaged in peace-keeping missions abroad. In an address at the University of Oklahoma College of Law, delivered on 24 February 1998, David Scheffer thus explained:

> ... no other country shoulders the burden of international security as does the United States. In the post-Cold War world, the US military is called upon to defend our national security from a wide range of threats; to carry out mandates from the Security Council; to fulfil our commitments to NATO; to help defend our allies and friends; to achieve humanitarian objectives, including the protection of human rights; to combat international terrorism; to rescue Americans and others in danger; and to prevent the proliferation or use of weapons of mass destruction. Many other governments participate in our military alliances and a larger number of governments participate in the UN and other multinational peacekeeping operations, such as SFOR in Bosnia. It is in our collective interests that the personnel of our militaries and civilian commands be able to fulfil their many legitimate responsibilities without unjustified exposure to criminal legal proceedings. The permanent court must not be manipulated for political purposes to handcuff governments taking risks to promote international peace and security and to save human lives. Otherwise, the permanent court would undermine the efforts to confront genocide, crimes against humanity, and war crimes.[89]

Justice Richard Goldstone, former prosecutor in the International Criminal Tribunals for the Former Yugoslavia and International Tribunal for Rwanda, in a press interview at the Rome Conference gave short shrift to this reasoning: 'I really have difficulty understanding that policy', he said: 'What the US is saying is, "In order to be peacekeepers ... we have to commit war crimes." That's what the policy boils down to.'[90] To fulfil the role of guardian of international peace and security, the United States, in a word, insists on being above the law.

The Bush administration has been more outspoken and blatant about a distinct aspect of American exceptionalism than any of its predecessors: the United States will abide by the rules of international law only to the extent as compliance therewith is perceived by its leadership to be in America's interests. Here, the rule of law does not apply. The United States, acting in blatant defiance of the Third Geneva Convention of 12 August 1949, thus refused to afford prisoner-of-war status to Taliban (and al-Queda) combatants being held in Guantánamo Naval Base (a part of Cuba in American possession under a long-term lease). Since these captives are being held on foreign soil, they have no constitutional rights—according to American jurisprudence—that can be vindicated in an American court. By the same token, two American citizens (Jose Padilla and Yaser Hamdi) suspected of

[89] David J Scheffer Address at Univ of Oklahoma College of Law (24 February 1998) on file with the author; and see also David J Scheffer 'US policy on international criminal tribunals' (1998) 13 *Am U Int'l L Rev* 1389 at 1399; David J Scheffer 'The United States and the International Criminal Court' (1999) 93 *AJIL* 12 at 18-19.

[90] 'Goldstone: US stance contradictory' (1998) 3/17 June *Terra Viva* 7; and see also Zwanenburg 'Peacekeeping under fire?' n 88 above at 142; Zwanenburg 'Peace without justice?' n 88 above at 7; Melanczuk n 88 above at 82.

collaborating with the al-Queda terrorist network, have been proclaimed by the American President to be 'enemy combatants', thereby rendering their indefinite detention beyond judicial scrutiny, and depriving them of all due process protections under the American Constitution.[91]

There is nothing, really, anyone can do about American defiance of international law. As noted by Richard Goldstone and Jonathan Bass, 'power and justice are ... uneasy partners.'[92] Louis Sohn observed in this regard:

Although the law ideally treats all parties equally, it is well known that the legal enforcement system is less effective against those who are powerful than with respect to those who are poor and weak.[93]

Consider, for example, the following: The offensive against Iraq (2003) clearly occurred in violation of *ius contra bellum*, and as such constituted an act of aggression. The only body that can impose punitive action against a state for acts of aggression is the Security Council acting pursuant to its chapter VII powers. The United States can, and most certainly will, veto a decision of the Security Council that an act of aggression has occurred. The crime of aggression (committed by individuals responsible for the planning, ordering or execution of an act of aggression) cannot, as yet, be prosecuted in the ICC. The Security Council can establish an *ad hoc* tribunal to prosecute that crime, but here, again, the United States would most certainly exercise its veto to prevent that from happening.

As the only remaining super power, the United States is insisting on assuming the role allocated to the United Nations Organisation in 1945 as the ultimate guardian of international peace and security. The fact that under the Reagan doctrine the United States is assuming the role of 'peace-keeper' well beyond the confines of a threat to the peace, a breach of the peace, or an act of aggression, is, in foreign-relations reasoning, neither here nor there.

The United States is acting under the sufferance of power. Its superior strength, its

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[91] See *Hamdi* v *Rumsfeld* 316 F 3d 450 (4th Cir 2003); *Padilla* v *Bush* 233 F Supp 2d 564 (SDNY 2002). Similarities between the powers of the American President as Commander in Chief of the American Defence Force and those of a police officer under the South African Terrorism Act of 1967 (now repealed) should not pass unnoticed.

[92] Richard J Goldstone & Gary Jonathan Bass 'Lessons from the International Criminal Tribunals' *The United States and the International Criminal Court* n 85 above 51 at 58.

[93] Louis B Sohn 'The new international law: Protection of the rights of individuals rather than states' (1982) 32 *Am U L Rev* 1, 12; and see also Abraham Chayes & Ana-Marie Slaughter 'The ICC and the future of the global legal system' in *The United States and the International Criminal Court* n 85 above 297, 245 noting that '[t]he balance between power and equal treatment remains to be struck'.

unchallengeable potency, the command of military might places the United States above the law.

6. American Imperialism

American critique of the ICC régime is at a first glance baffling. If, for example, an American service member is on reasonable grounds suspected of having committed a war crime (and provided the other, rather restrictive, conditions for the exercise of jurisdiction by the ICC have been met), the prosecutor must notify all states (not only states parties to the ICC Statute) that would normally exercise jurisdiction over the crime concerned (which will essentially include the state of which the suspect is a national) of this fact,[94] and those states then have standing in the ICC to challenge the investigation going forward on the ground that they are investigating or prosecuting the case or have investigated or prosecuted the case.[95] The United States has been more diligent than most other countries in investigating and prosecuting members of its own armed forces who have violated the norms of humanitarian law.[96] Why, then, all the fuss?

Perhaps the ultimate answer comes from a comment of John Bolton, US Under-Secretary of State for Arms Control:

> ... the main concern is not that the Prosecutor will indict the isolated US soldiers who may violate our own laws and values, and their own military training and doctrine, by allegedly committing a war crime. The main concern should be for the president, the cabinet officers who comprise the National Security Council, and other senior civilian and military leaders responsible for our defence and foreign policy. They are the potential targets of the politically unaccountable Prosecutor created in Rome.[97]

Why would this leadership be at risk? They would surely not order the commission of genocide, or crimes against humanity, or, in the case of war crimes, invite command responsibility for ordering or failing to control the criminal conduct of troops under their

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[94] ICC Statute art 18(1).

[95] *Id* art 19(2)(b).

[96] Jordan Paust 'My Lai and Vietnam: Norms, myths and leader responsibility' (1972) 57 *Mil L Rev* 99 at 118 speaks of 'the American commitment to international law demonstrated in the long history of condemnations and prosecutions of even our own soldiers and civilians'. See also Zwanenburg, *Peace without justice?* n 88 above at 3; Ruth Wedgwood 'The Constitution and the ICC' in *The United States and the International Criminal Court* n 85 above at 119 120.

[97] John Bolton 'Courting danger: What's wrong with the International Criminal Court' (Winter 1998/99) *The National Interest* 62, 63; and see also Lee A Casey 'The case against the International Criminal Court' (2002) 25 *Fordham Int'l LJ* 840 at 866.

command.[98]

Here, the answer may be found in the comments on the ICC Statute by James Rubin, Department of State representative in the US delegation at the Rome Conference. In his rather squeamish response to the Rome Conference, Rubin included in the 'overly broad scope of crimes covered', a reference to 'inclusion of the crime of aggression [in the ICC Statute], despite the drafter's failure to define the crime.'[99]

Aggression perpetrated by individuals is included in the subject-matter jurisdiction of the ICC,[100] but the exercise of jurisdiction for that crime has been made conditional upon agreement being reached on the definition of that crime and the conditions under which the court shall exercise such jurisdiction.[101] The matter was considered in a Working Group of the post-Rome Preparatory Commission (1998-2002), and although great progress was made, finality had not been reached by the time the Preparatory Commission's life-span came to an end. The Assembly of States Parties at its inaugural meeting (3-10 September 2002) established a Special Working Group on the Crime of Aggression to continue the work.[102]

Perhaps the major problem that confronts the Working Group on the Crime of Aggression is translating what in essence is an act of state into individual liability. This is a matter that has troubled adjudicators for a long time. For example, referring to a declaration made by Roosevelt, Churchill and Chiang Kai-Shek at the Cairo Conference of December 1943, stating that '[t]he Three Allies are fighting this war to restrain and punish the aggression of Japan,' Justice Röling (The Netherlands) in his separate opinion in the *Tokyo Trial* of Japanese war criminals said: 'One wonders whether such punishment has any bearing upon judicial activity of a tribunal with regard to individual responsibility';[103] and in his

[98] See ICC Statute art 28(1).

[99] Department of State daily press briefing (20 July 1998) by James P Rubin; and for a critical analysis of the press briefing see David n 88 above at 354-57; and see further Madeline Morris 'Judgment without democracy' *The Washington Post* 24 July 2002 A19.

[100] ICC Statute art 1(d).

[101] *Id* art 1(2).

[102] See Draft Resolution of the Assembly of States Parties on the Continuity of Work in respect of the Crime of Aggression par 2 in *Report of the Preparatory Commission for the International Criminal Court, Part II Proposal for a Provision on the Crime of Aggression* UN Doc PCNICC/2002/2/Add2 (24 July 2002).

[103] The Tokyo Judgment, Extracts of the Opinion of Mr Justice Röling (The Netherlands) and Mr Justice Pal (India) in 2 *The International Military Tribunal for the Far East, 26 April 1946 - 12 November 1948* (eds) BVA Röling & CF Rüter, reprinted in Benjamin

dissenting judgment in the same case, Justice Rahadbinod Pal (India) rejected the argument that Article 43 of the Regulations attached to the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land[104]—instructing an Occupying Power to take all the measures in its power to restore and ensure, as far as possible, public order and safety (*l'ordre et la vie publics*)—afforded to victors 'the right and power ... to make law declaring aggressive war a crime for individuals.'[105] It is perhaps also telling that those war criminals convicted in the Trial of the Major War Criminals at Nuremberg for crimes against the peace, and not principally for conventional war crimes (Rudolf Hess, Walter Funk, Karl Dönitz, Erich Raeder, and Constantin von Neurath), escaped the ultimate penalty and were sentenced to imprisonment.[106]

Currently, there seems to be general agreement that aggression is a leadership crime, but who is to be held responsible for a decision to go to war in a democracy where decisions of state are taken by a wide range of institutions consisting of a large number of representative dignitaries? There is a growing consensus in ICC circles that prosecutions for the crime of aggression should be confined to those who are in a position 'effectively' to exercise control over, or to direct, the political or military action of a state.[107] Effectively exercising control of political or military action was intended to exclude the liability for the crime of aggression of persons who merely act in an 'official capacity', or who are no more than symbolic representatives of government.

Final incorporation of the crime of aggression in the subject-matter jurisdiction of the ICC can only occur at the Review Conference that must take place (not earlier than) seven years as from 1 July 2002. Incorporating the definition of aggression into the ICC Statute must take place in accordance with the procedures prescribed in the ICC Statute for its amendment.[108] States that have ratified the ICC Statute at the date of the Review Conference can avoid the prosecution of their nationals for the crime of aggression, or in respect of acts of aggression committed on their national territory, by not accepting the relevant amendment of the ICC Statute. Why, again, may one ask, is the possible inclusion of the crime of aggression in seven years time in the subject-matter jurisdiction of the ICC

Ferencz, 1 *An International Criminal Court: A Step Toward World Peace* 507 at 520.

[104] Convention (No IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, 1907, art 43, 36 Stat 2277, UST 539, reprinted in 1 (1908) *Bevans* 631 and 2 *AJIL* (Supp) 90.

[105] Ferencz n107 above 527 at 536; and see Elizabeth S Kopelman 'Ideology and international law: The dissent of the Indian Justice at the Tokyo War Crimes Trial" 23 (1990-91) *NY Univ J Int'l L & Pol* 373 at 410-11 414-17.

[106] See separate opinion of Mr. Justice Röling, in Ferencz 107 above at 522.

[107] See Draft Resolution of the Assembly of States Parties n 106 above par 1.

[108] *Ibid*.

of such concern to the United States as to prompt an offensive program of action on its part to oppose, and if possible to destroy, the ICC?

If one considers the ICC critique, the super-power syndrome and revival of the Reagan doctrine, it all does make sense. The United States is set on committing acts of aggression if considered expedient for the promotion of American interests. Those interests are not merely served by toppling repressive régimes *per se*, but it would be in the national interest of the United States to have governments in place that would sing to its tune in regions of the world that are of strategic importance to the United States; and the war in Iraq has demonstrated that the United States will take up arms, in violation of *ius contra bellum*, if that is what it takes to achieve this objective.

For that reason alone, the United States upholds, and in 1996 even strengthened,[109] the trade embargo of Cuba imposed in 1962 (following the demise of the Soviet Union and the end of the Cold War, the national security concerns that were initially advanced to justify the embargo have lost all credibility); for the same reason, the Reagan administration conducted or supported military campaigns in Nicaragua (in the 1980s), Grenada (1983) and Panama (1988) whose governments were hostile toward US dominance in the region; earlier, the Nixon administration supported the South African military action of the 1970s in Angola (with its oil resources) to topple the régime of President dos Santos (with strong leanings toward China and Cuba) and to put the American-friendly Jonas Savimbi in power; and the George W Bush administration has now embarked on a massive campaign to bend the powers that be in the (oil-rich) Middle Eastern countries (Iraq, Syria and Iran) to its will.

On the other hand, in spite of upholding a most repressive system of government, Saudi Arabia has nothing to fear as long as it maintains friendly relations with the United States and continues to provide a foothold for American military forces in the Middle East; and in spite of committing crimes against humanity and being responsible for serious violations of human rights, Mr Robert Mugabe will remain secure from American intervention as long as Zimbabwe is of no strategic value to the United States.

7. Concluding Remarks

Two comments will suffice in response to the demonstration of might in American foreign policy:

- Typically, brute force and instilling fear of reprisals are the strategy of dominance resorted to by persons in authority who cannot muster support for a preferred programme of action through the moral appeal of their cause; and

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[109] Cuban Liberty and Democratic Solidarity (Libertad) Act (the Helms-Burton Act) 22 USCA §§ 6021-42, 6061-67, 6081-91 (1996); and see Antonio R Zamora 'Real estate investment in Cuba: Back to the future" (1997) 11 *Fla J Int'l L* 539 at 547-51; Klinton W Alexander 'The Helms-Burton Act and the WTO challenge: making a case for the United States under the Gatt National Security Exception' (1997) 11 *Fla J Int'l L* 559 at 563-66.

- Unassailable power in political confrontation or armed conflict invites acts of terror violence as a strategy of ideological rivalry.

American imperialism—a variant of neo-colonialism—is not aimed at ruling the world or any part thereof beyond the national borders of the United States. Nor is it inspired by humanitarian concerns or a desire to impose American democracy or any variety thereof on communities subject to a dictatorship or group-related discrimination. Where the target country singled out by the United States for diplomatic pressure, economic sanctions or military intervention happens to be in the grip of undemocratic rule, a denial of basic freedoms or sectional repression, those contingencies of unbecoming governmental practices will be exploited to afford a cloak of legitimacy to the American offensive, and to substantiate the widely held perception in the United States that American self-interests coincide with the best interest of the international community of states. However, the promotion of human rights and substituting democracy for authoritarian rule are not the true incentive for the decision by Washington DC to take action.

American aggression is almost exclusively founded on considerations of national self-interest; and here the economic prosperity and military superiority of the United States reign supreme. The United States has become dangerously dependent on the Middle East for its energy resources, and has demonstrated its preparedness to take military action, in violation of international law, to rid the region of governments that seem hostile to the dominance of its 'way of life' and to intimidate others to give in to its demands. National security considerations are served by disarming countries not within the enclave of its Western allies of weapons of mass destruction, while stock-piling these same weapons for its own self-defence purposes and as a warning to the others that may want to challenge its military strengths.

In all of this, the United States will, if needs be, go it alone and without regard for the rule of law. Dumbarton Oaks is conveniently forgotten. Collective action under the auspices of the United Nations for the maintenance of international peace and security falls by the way-side.

The United States has entertained a long-standing belief—as Woodrow Wilson put it in his Declaration of War Against Germany in of 3 April 1917—that '[t]he world must be made safe for democracy.'[110] Those words were spoken in the context of democracies having been placed in peril due to political expansionism and greed. They nevertheless express a noble cause worth pursuing in its own right, provided it is done through persuasion and not coercion, and least of all through the use of armed force. American allies should perhaps engage in a similar commitment to convince the United States that its national interests are best served by abandoning American exceptionalism and submitting itself, as a member of the international community of states, to the demands of trans-national comity and the

[110] Address delivered to a joint session of Congress, April 3, 1917, reprinted in *The Public Papers of Woodrow Wilson*, (eds) RS Baker & WE Dodd , vol 1 (1927) *War and peace* at 6, 14.

dictates of international law.