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The Universality Principle and War Crimes

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I

ONE OF THE MOST FUNDAMENTAL TENETS of international law is that it determines the permissible limits of the jurisdiction of States.¹ While issues relating to the exercise of State jurisdiction may extend to every aspect of human conduct, the crux of the matter is criminal jurisdiction.² Criminal jurisdiction is vested in a given State only when there exists between that State and either the specific offense or the alleged offender a legitimate link, that is to say, a link which is legitimate in the eyes of international law. In the absence of such a legitimate link, the State is not entitled to assert criminal jurisdiction.

Five principles have emerged in international law as legitimate bases for the exercise of the criminal jurisdiction of States over alleged offenders.

- *Territoriality*, namely, the fact that the offense was committed within the territory of the State asserting jurisdiction (including ships and aircraft registered therein). Although this is ostensibly the simplest base of criminal jurisdiction, it must be appreciated that the question of whether an offense actually takes place within the territory is not always easily answered. Above

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all, it is difficult to determine when an act committed outside—yet having effects inside—the territory comes within the scope of legitimate criminal jurisdiction.³

- *Nationality of the alleged offender* (or “active personality”), namely, the fact that the person charged with the offense is a national of the State asserting jurisdiction. In most instances in which criminal jurisdiction is exercised by a State, the circumstances would satisfy both the territoriality and the active personality principles, inasmuch as the criminal act is perpetrated by a national within the geographic confines of the home country. Hence, the real need for invoking the active personality principle *per se* arises chiefly when the offense is committed by a national extraterritorially. The active personality principle usually also covers non-nationals serving the State in different capacities (such as members of the diplomatic service or of the armed forces), and at times it is even extended to permanent residents.

- *Nationality of the victim of the offense* (or “passive personality”), namely, the fact that—irrespective of the *situs* of the offense and the nationality of the perpetrator—the victim is a national, or conceivably even a permanent resident, of the State asserting jurisdiction. Strong opposition has often been expressed against the passive personality principle when standing alone, *viz.*, when a national of State A is prosecuted by State B for criminal activity affecting nationals of State B carried out within the boundaries of State A (or even State C).⁴ All the same, in at least some settings the passive personality principle is too well entrenched in State practice today to be seriously contested.⁵

- *Protection of certain vital national interests of the State*, namely, authorizing a State to exercise criminal jurisdiction irrespective of location or nationality (even when the alleged offenders are foreigners and they acted extraterritorially). The “protective” principle is circumscribed to acts against the national security of a State; counterfeiting its currency, national emblems, seals or stamps; forgery, fraud or perjury committed in connection with official documents, especially passports and visa permits; and improper use of or insult to the national flag.⁶

- *Universality*, namely, “the authority of the State to punish certain crimes wherever and by whom[soever] committed.”⁷ This authority, which is vested in every State regardless of territory and nationality, is limited to the exercise of jurisdiction over *delicta juris gentium* (i.e., acts defined as crimes by international law). The view that the universality principle encompasses “common crimes such as murder,” although shared by several scholars, is not in conformity with customary international law.⁸ Had the universality principle been applicable to a broad range of ordinary crimes, there would be no *raison*

d'être for the other bases of jurisdiction. After all, universal jurisdiction's "limitless scope renders all other forms of jurisdiction superfluous."⁹ The universality principle must be looked upon as an exceptional measure granting the State special extraterritorial powers. It is limited to specific offenses defined by international law, and it must be exercised strictly in accordance with limitations imposed by that law.

Actually, the universality principle does not apply in an automatic fashion to all international offenses, although there seems to be a presumption today in favor of such application.¹⁰ A prime example of an international treaty, which defines an international offense yet explicitly adheres to the territoriality—rather than the universality—principle, is that of Article 6 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.¹¹

II

The universality principle is strongly rooted in customary international criminal law. The incontrovertible "prototype"¹² is the age-old law for the suppression of piracy (currently codified in Article 105 of the 1982 United Nations Convention on the Law of the Sea).¹³ Over the last few decades, universal criminal jurisdiction has been extended to numerous other offenses by conventional international law (see *infra*), and in at least some instances the extension has in all likelihood already crystallized into generally binding custom.

The proposition that belligerent States are accorded an international legal right to prosecute members of the enemy armed forces charged with war crimes has long been doctrinally recognized;¹⁴ and was authoritatively restated in the early part of the twentieth century.¹⁵ It was reaffirmed in connection with the horrendous war crimes of World War II, even prior to the postwar trials.¹⁶ These trials have had a salutary impact on the progressive development of international law in general (e.g., insofar as the evolution of the separate concept of crimes against humanity is concerned).¹⁷ One of their invaluable achievements is that the postwar trials removed any plausible doubt that might have lingered about the practice of States confronted with war crimes. The trials established, first and foremost, that all belligerents into whose hands war criminals have fallen can exercise concurrent jurisdiction.¹⁸ The trials further demonstrated that belligerent States have jurisdiction over war crimes perpetrated by enemy civilians as much as by members of the enemy armed forces.¹⁹ Additionally, the trials made it plain that a belligerent State is entitled to bring to justice not only enemy nationals but also nationals of allied or

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neutral States,²⁰ and that it can even assume jurisdiction over war crimes committed before its own entry into the war.²¹ The corollary is that neutral States can equally prosecute belligerent war criminals.²²

In the *Eichmann* trial, the Israel Supreme Court—which unequivocally endorsed the application of the universality principle to war crimes²³—arrived at the conclusion that “no importance attaches to the fact that the State of Israel did not exist when the offenses [including war crimes] were committed.”²⁴ This position has been reinforced by the judgment of the United States Court of Appeals (Sixth Circuit) in the *Demjanjuk* case of 1985:

Further, the fact that the State of Israel was not in existence when Demjanjuk allegedly committed the offenses is no bar to Israel’s exercising jurisdiction under the universality principle. When proceeding on that jurisdictional premise, neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations. This being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.²⁵

The extension of the purview of jurisdiction over war crimes of all stripes is perfectly justifiable. The import of bringing the universality principle to bear upon war crimes is that all States without exception—rather than merely belligerent States—are possessed of the power to mete out justice to any war criminal and that they can ignore the geographic, temporal, or national dimensions of the offense.²⁶ While some scholars continue what may be called a rear-guard action against acceptance of the universality principle as appertaining to war crimes,²⁷ by now it must be abundantly clear that the issue has been settled in customary international law.²⁸ Patently, war crimes can be assimilated to piracy in the frame of reference of universality of jurisdiction.²⁹

The four Geneva Conventions of 1949 for the Protection of War Victims include a common stipulation governing “grave breaches” of these instruments:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.³⁰

In accordance with Article 85(5) of the 1977 Additional Protocol I to the Geneva Conventions, the grave breaches referred to (as well as those supplemented by the Protocol itself) “shall be regarded as war crimes.”³¹

In the opinion of the present writer, the text of the common clause of the Geneva Conventions constitutes a pellucid expression of the universality principle. True, this is not unanimously avowed. One eminent scholar argues, “The view that the 1949 Geneva Conventions provide for universal jurisdiction, though sometimes asserted, is probably incorrect.”³² But surely, the correct interpretation of the Geneva text is the one offered by Hans-Heinrich Jeschek:

According to the Geneva Conventions of 1949, signatory States are not only empowered to punish war crimes, but also are obliged to do so, unless the accused is extradited to another signatory State (*aut dedere aut punire*). The duty to punish attaches not only to the States to which the accused owes his allegiance or to the injured State, but to all the signatory States; this duty even extends to neutrals in an armed conflict, and it exists without regard to the nationality of the perpetrator or victim or to the place where the crime took place. Hence the Geneva Conventions provide universal jurisdiction for the punishment of war crimes coupled with a duty to prosecute, since the goal is the protection of common and universal interests.³³

It is sometimes contended that only more serious war crimes (like the grave breaches of the Geneva Conventions)—rather than war crimes of a technical nature—activate the universality principle.³⁴ But this is a misconception. The correct view is that technical violations of the laws of war simply do not constitute war crimes.³⁵ Once violations of the laws of war qualify as war crimes, all come under the sway of the universality principle.

In 1996, the International Law Commission defined War Crimes in Article 20 of its Draft Code of Crimes against the Peace and Security of Mankind.³⁶ Although, in part, the definition may give rise to debate,³⁷ it mostly consists of grave breaches of the Geneva Conventions and Protocol.³⁸ Article 8 of the Draft Code³⁹ “establishes the principle of the concurrent jurisdiction of the national courts of all States parties to the present Code based on the principle of universal jurisdiction” for crimes set out in Article 20.⁴⁰

III

The universality principle embraces solely offenses established and defined by international law, with a view to protecting the interests of the international

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community in its entirety. It must not be confused with the protective principle, which applies to the national interests of individual States. Both principles admittedly lead to a similar outcome: States may assert criminal jurisdiction over foreigners acting extraterritorially. Nevertheless, the two principles proceed from radically different points of departure. One principle is designed to protect the single State against those trying to subvert its vital interests. That single State, which is the only one affected, is exclusively allowed to take action—no other State can invoke jurisdiction on its behalf (although any State may act on the ground of territoriality or active personality where appropriate). The second principle is equally protective, but it lends its aegis to the collectivity of States (the “family of nations”). “It is founded upon the accused’s attack upon the international order as a whole.”⁴¹ All States are supposed to have a stake in suppressing *delicta juris gentium*, and all are simultaneously endowed with the authority to exercise criminal jurisdiction. Consequently, as a rule, there cannot be a genuine overlap between the universality principle and the protective principle. The present writer disagrees with the reliance on the protective principle—as an auxiliary base of extraterritorial jurisdiction, side by side with the universality principle—by the District Court of Jerusalem (with the approval of the Israel Supreme Court), in the context of genocide, in the *Eichmann* trial.⁴² However, even if mass-scale genocide directed at the entire Jewish people can be exceptionally construed as impinging upon the vital interests of the State of Israel (albeit perpetrated before the birth of the State), thereby triggering the protective principle, only the universality principle is apposite to war crimes.

There is no similar disconnection between the universality principle, on the one hand, and the territoriality, active personality, or passive personality principles, on the other. Universality postulates the irrelevance of either territory or nationality (of the victim as well as the offender). Still, if the territorial State or the State of nationality—when actually asserting criminal jurisdiction—prefers to act as such without invoking the universality principle, nothing prevents it from doing so. International law enables any State to turn a blind eye to the territorial or national link once universality is vouchsafed, but there is no compulsion to do so. When a State prosecutes members of its own armed forces who have committed war crimes, it benefits from an incontrovertible advantage if it acts in the name of the active personality principle rather than the universality principle. The trial can then be predicated solely on the domestic military penal code and need not take into account the limitations imposed on the State when availing itself of the special powers emanating from the universality principle.⁴³ By contrast, if the State

wishes to prosecute enemy soldiers as war criminals, it has no alternative but to act within the framework of the universality principle (unless the victims are its own nationals or the crimes were committed on its territory).

IV

When the universality principle is applicable, the outcome is concurrent jurisdiction of all States. If all States acquire jurisdiction, all can exercise it. Evidently, “[c]oncurrent jurisdiction is no obstacle to the exercise of jurisdiction by any single-state.”⁴⁴ Yet, when (as in the above-quoted text of the Geneva Conventions) the universality principle is couched in a binding language, amounting to a duty—rather than in a permissive manner simply creating a right—the potential competition engendered by the multiplicity of choices of forum must be addressed. Hence, the duty incurred under the Geneva Conventions and other instruments is generally represented in optional terms: either to render or to prosecute the accused.⁴⁵ Normally, the Latin formula is adduced: *aut dedere aut judicare*. The alleged offender can be rendered to another State (principally through the mechanism of extradition) for the exercise of foreign jurisdiction.⁴⁶ Still, when no such rendition takes place (because extradition is either not sought or denied, or for whatever other reason), there is a manifest duty to proceed with the exercise of local jurisdiction. The main thing is that one State or another will exercise its concurrent jurisdiction, so that an offender does not go scot-free.

All too often (perhaps especially where war crimes are concerned), there are problems with both alternatives, *judicare* and *dedere*. States may be reluctant or even unable to institute judicial proceedings themselves. In Theodor Meron’s words:

Universal jurisdiction over war crimes means that all states have the right under international law to exercise criminal jurisdiction over the offenders. Most states do not have the necessary resources or interest to prosecute offenders when the state itself was not involved in the situation in question. Many states also do not have national laws in place that allow them to prosecute offenders.⁴⁷

At the same time, extradition—if sought—is frequently frustrated for technical or other reasons.⁴⁸

As against the all-too-familiar factual situation where no country is overeager to prosecute war criminals, it is necessary to pose the reverse state of affairs (however rare) wherein several countries vie to lay hands on the accused, each desirous of exercising in practice its respective (concurrent)

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jurisdiction. The question is whether any particular State, by dint of being more closely linked to the case at hand, has a better claim and therefore priority.

No general rule regulating this matter has evolved in general international law. It is noteworthy, however, that no less than ten conventions pertaining to international criminal law have established a hierarchy formula in which a measure of priority is conferred on certain States (without negating the jurisdiction of others). The trail-blazing provision appears in Article 4 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, which reads:

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:

- (a) when the offence is committed on board an aircraft registered in that State;
- (b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
- (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

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

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.⁴⁹

What is the correct interpretation of Article 4?⁵⁰ In effect, the drafters of the Convention set forth that every State has a right (and indeed a duty) to exercise jurisdiction over the offense of aircraft hijacking. All the same, a double-tiered structure of jurisdiction is constructed. There are three preferred States with primary jurisdiction: the State of registration of the aircraft, the State where the aircraft lands with the offender still on board, and the State of the operator of the aircraft when it is on lease.⁵¹ The expectation is that in the natural order of things, one of the three preferred States will be able and willing

to exercise jurisdiction over the offender. However, should this not come to pass owing to failure of extradition, whichever State has the hijacker in its hands is entitled and required to prosecute him, in keeping with the maxim *aut dedere aut judicare*.

The double-tiered structure of jurisdiction (with different lists of preferred States, as the subject matter dictates) is also adopted in the following conventions pertaining to international criminal law:

- Article 5 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.⁵² Here there are four preferred States: the State of territoriality plus the three States enumerated in the Hague Convention.

- Article 3 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.⁵³ The three preferred States are the State of territoriality (explicitly including ships and aircraft registered therein), the State of nationality, and the State of passive personality (determined by virtue of function rather than strict nationality).

- Article 5 of the 1979 International Convention against the Taking of Hostages.⁵⁴ The four preferred States are the first two listed in the 1973 Convention (plus a discretionary jurisdiction over habitual residents who are stateless), the target State, and (where the State considers it appropriate) the passive personality State (based on the nationality of the victim).

- Article 8 of the 1980 Convention on the Physical Protection of Nuclear Material.⁵⁵ The two preferred States are the first two indicated in the 1973 Convention (without reference to stateless persons). There is also a specific reference in another paragraph to the State of export or import.

- Article 5 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵⁶ The three preferred States are again the first two catalogued in the 1973 Convention (without provision for stateless persons), and the last of the 1979 Convention.

- Article 6 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.⁵⁷ The three preferred States are the flag State of a ship, the State of territoriality, and the State of nationality. Three other States are on a lesser standing, but still preferred in relation to the rest: the State of stateless habitual residents, the State of passive personality (based on nationality), and the target State. The interests of the flag State in case of several requests for extradition are particularly accentuated in Article 11(5).⁵⁸ The priority claim of the flag State to exercise jurisdiction is still not absolute, but it should have greater weight.⁵⁹

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- Article 4 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁶⁰ The two preferred States are the State of territoriality and the State of the vessel flying its flag or the aircraft registered in it. A lesser status is bestowed on the State of nationality or habitual residence (irrespective of statelessness) and two additional special cases.

- Article 9 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.⁶¹ The two preferred States are the first two enumerated in the 1979 Convention.

- Article 10 of the 1994 Convention on the Safety of United Nations and Associated Personnel.⁶² The two preferred States are the first two listed in the 1973 Convention. The 1988 Maritime Convention formula of three semi-preferred States is also repeated.

In all, notwithstanding inevitable variations in the multifarious instruments, the fundamental approach is the same. Whereas some preferred States are endowed with primary jurisdiction—with no mandatory priority—what emerges in the final analysis is universal jurisdiction.⁶³ It goes without saying that none of the conventions cited is germane to the issue of war crimes. Still, in future practice the nonbinding preference scheme may be looked upon with favor in that setting too. As for the choice of the States with a preferred status, judging by the trend highlighted in the conventions, it is probably safe to prognosticate that the three States to be generally deemed most closely connected to war crimes would be: the State of territoriality (including ships and aircraft registered therein), the State of active personality, and the State of passive personality.

V

Concurrent jurisdiction of all States over war criminals—in consequence of the universality principle—means not only that the judicial authorities of each State separately can sit in judgment over alleged offenders, but that any combination of States can set up an international penal tribunal with a view to carrying out the same mission on a multinational level. Thus, in the 1945 London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (initially adopted by the four big powers—the United States, the USSR, the United Kingdom and France—and later acceded to by many other Allied nations), an International Military Tribunal was established.⁶⁴ Pursuant to Article 6 of the Tribunal's Charter, it had jurisdiction over war crimes as well as crimes against peace and humanity.⁶⁵

Following a celebrated trial conducted at Nuremberg, the 1946 Judgment proclaimed that in creating the International Military Tribunal the Contracting Parties to the London Agreement had “done together what any one of them might have done singly.”⁶⁶ In other words, given the umbrella of the universality principle, either the United States or any other country could have prosecuted Nazi war criminals while acting alone. In joining forces, the Contracting Parties to the London Agreement merely pooled together their resources, avoided competition and conflict, and ensured that justice would be done.

This is also the best rationalization for the creation by the UN Security Council, in Resolution 827 (1993), of the International Criminal Tribunal for the Former Yugoslavia,⁶⁷ with subject-matter jurisdiction, *inter alia*, over grave breaches of the Geneva Conventions and violations of the laws and customs of war (Articles 2-3 of the Tribunal’s Statute).⁶⁸ The legitimacy of the establishment of the Tribunal by fiat of the Security Council has been called into question by some commentators against the background of the UN Charter.⁶⁹ The Appeals Chamber of the Tribunal rejected at some length a challenge to its jurisdiction on that score.⁷⁰ Without getting into this complex issue, which is beyond the scope of the present paper, it must be perceived that irrespective of the range of powers allocated in the UN Charter, the establishment by the Security Council of an international penal tribunal with jurisdiction over war crimes is sanctioned by the universality principle. The Member States of the United Nations have done together what each of them might have done singly. No doubt, universal jurisdiction “is not synonymous with centralised jurisdiction,” but the two are not mutually exclusive either.⁷¹

When an international penal tribunal is installed for the trial of war criminals, a problem that immediately comes to mind is whether the ordinary option of *aut dedere aut judicare* endures and whether the international tribunal has a status merely resembling that of an ordinary foreign court (with the same loose guidelines of preference in extradition discussed *supra*). Article 9 of the Statute of the Yugoslav Tribunal addresses the issue head on, and while confirming the concurrent jurisdiction of national courts, decrees that the Tribunal “shall have primacy over national courts” and that the Tribunal may formally request the latter to defer to its competence.⁷²

The notion of primacy of an international tribunal over national courts was assailed by the defense in the *Tadić* case. The Appeals Chamber of the Yugoslav Tribunal held that when an international penal tribunal is created, “it *must* be endowed with primacy over national courts,” for otherwise stratagems may be used to defeat the purpose of diligently prosecuting international

offenders.⁷³ The Tribunal's explanation is conspicuously valid; indeed, perhaps the primacy concept should be construed within the ambit of that explanation. Intervention by an international penal tribunal in national proceedings (when a State wishes to exercise jurisdiction over a person in its custody) should not be undertaken unless there is reason to suspect that otherwise international justice is liable to be obstructed. In essence, this was also the opinion expressed by several Permanent Members of the Security Council in the course of its debates.⁷⁴

This brings up a related issue. One of the most salient human rights recognized by contemporary international law is freedom from double jeopardy: no one can be retried for an offense for which he has already been finally convicted or acquitted by a competent court.⁷⁵ The pleas of *autrefois acquit* or *autrefois convict* are universally accepted as effectively barring further prosecution for the same offence.

Under Article 86 of Geneva Convention III, the principle of *non bis in idem* applies to prisoners of war, who may not "be punished more than once for the same act or on the same charge."⁷⁶ This provision, which covers the prosecution of war criminals, is applicable when double jeopardy is derived from the operation of judicial authorities in the territory of a single State. But what about transboundary retrials of war criminals (or other international offenders)? The matter seems to be unsettled in customary international law.⁷⁷ However, this writer believes that the concept of *non bis in idem* should apply in principle to attempts by courts of several States to prosecute the same person for the same offense—while invoking the universality principle—no less than it does to parallel attempts by courts of an individual State. There is in fact doctrinal support for the position that a State ought to have no criminal jurisdiction over persons who have already been prosecuted elsewhere for the same offense.⁷⁸

A vexing issue arises, however, in the singular context of concurrent jurisdiction over war crimes (and other international offenses). There may be a disquieting apprehension that the judicial authorities of a particular State who view the acts of the alleged offender with leniency (owing to ethnic, political, ideological or religious motivations) would go through the motions of a sham trial and either acquit him or impose on him—after conviction—a nominal sentence, thereby thwarting the administration of justice. If justice is to be done (and especially appear to be done), this apprehension must be dispelled.

Article 10 of the Yugoslav Statute handles this matter with finesse.⁷⁹ In paragraph 1 it pronounces that no person shall be tried before a national court

for criminal acts for which he has already been tried by the International Tribunal. Paragraph 2 provides:

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

- (a) the act for which he or she was tried was characterized as an ordinary crime; or
- (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Paragraph 3 adds that in imposing a penalty the International Tribunal shall take into account any sentence served by a convicted person as a result of an earlier national trial.

Attention should be drawn to the fact that apart from the scenario of spurious or biased national proceedings, the text of the Yugoslav Tribunal's Statute also permits retrial if the original prosecution related to ordinary crimes. This is quite sensible. As indicated by the International Law Commission, should an individual be tried by a national court for a "lesser crime" (that is, national rather than international), the prior decision of that court should not immunize him from subsequent international proceedings expected to "encompass the full extent of his criminal conduct."⁸⁰

The *non bis in idem* formula—used in the Yugoslav Tribunal's Statute—was replicated in the 1994 Statute of the International Tribunal for Rwanda;⁸¹ it was followed by the International Law Commission (the same year) in Article 42 of the Draft Statute for an International Criminal Court.⁸² However, the formula does not come to grips with the prospect of a trial by a national court of State A subsequent to a trial for the same offense by a national court of State B. The International Law Commission, in Article 12 of its 1996 Draft Code of Crimes against the Peace and Security of Mankind, after reiterating the same formula in regard to international proceedings, goes on to specify that retrial by a national court of another State is allowed if that other State is the territorial State or was the main victim of the crime.⁸³ This is a most unsatisfactory solution to the dilemma, applying as it does even in the absence of any claim that the previous proceedings entailed a travesty of justice or that they were other than impartial. This writer is convinced that the same formula ought to

apply to retrial by the national courts of another State as by an international tribunal.

VI

There are three dimensions to the criminal jurisdiction of States under international law: jurisdiction to prescribe (i.e., to legislate), jurisdiction to adjudicate (i.e., to put on trial), and jurisdiction to enforce (i.e., to punish).⁸⁴ The need to distinguish between the three facets of jurisdiction becomes prominent when the principle of universality is invoked, as in the case of war crimes.

Jurisdiction to Prescribe. *Ex hypothesi*, once the universality principle applies, no State is vested with jurisdiction to prescribe in the full sense of the term. The major premise underlying the universality principle is that the forbidden acts are *delicta juris gentium*, meaning that they have been criminalized by international law. The State “must ensure that its legislation does not extend the definition of the offense beyond the limits of international law.”⁸⁵ It must be fully appreciated that only acts branded as war crimes by international law are subject to universal jurisdiction. Therefore, the domestic legal system is not free to add its own versions of putative war crimes to the list prescribed (and proscribed) by international law. Should the domestic legal system label as “war crimes” acts not deemed war crimes by international law, the universality principle would not be in effect. Only war crimes *juris gentium* can sustain a claim to universal jurisdiction.

Jurisdiction to prescribe in the context of the universality principle has to be understood in a different sense. Every State has a right—and indeed a duty—to enact any enabling legislation required to lay the foundation for the domestic prosecution and punishment of international offenders. Such enabling legislation is ordained by each of the four Geneva Conventions of 1949: “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.”⁸⁶

Jurisdiction to Adjudicate. Jurisdiction to adjudicate in criminal matters means the prosecution and trial of offenders. Traditionally, jurisdiction to adjudicate has been treated as “ancillary to jurisdiction to prescribe.”⁸⁷ However, in the case of the universality principle, every State is vested with jurisdiction to

adjudicate notwithstanding the absence of jurisdiction to prescribe in the full sense of the term.

When a State exercises its universal criminal jurisdiction to adjudicate by sitting in trial over war criminals, it must of course comply with all the standards of due process of law, as demanded by international law.⁸⁸ The duty devolving on a State in the absence of *dedere* is consequently only one of *judicare* rather than *punire*. It is entirely possible that indictment of an alleged offender will end in acquittal.

The prosecutorial authorities in the State wherein the alleged offender happens to be present must have discretion in assessing the case at hand: much depends on where the witnesses and the rest of the evidence are. It is important not to prosecute hastily, lest there be acquittal and the principle *non bis in idem* apply. To be sure, the alleged offender may benefit from a potential gap in the system if the prosecutorial authorities in the State where he is present lack enough evidence to indict, yet another State (which does have enough evidence) fails to request extradition. Such a turn of events, characterized by neither *dedere* nor *judicare*, would produce a fiasco.

Can a State exercise criminal jurisdiction over war criminals *in absentia*? “[L]iterally hundreds of war crimes cases” were tried in France and Belgium after both world wars in the absence of the accused.⁸⁹ Article 12 of the Charter of the International Military Tribunal (sitting at Nuremberg) expressly allowed the Tribunal to take proceedings against a person in his absence.⁹⁰ Bormann, who was not in custody, was indicted accordingly, and the Tribunal issued a special Order making it possible to go on with his trial;⁹¹ ultimately Bormann was convicted and sentenced to death.⁹² A fictitious assertion of criminal jurisdiction over war crimes is apparently permissible. However, since Bormann has never been caught, his sentence only exposed the futility of *in absentia* proceedings. It is not clear what advantages are to be gained from such an academic exercise if the accused is not within grasp. In any event, the Nuremberg precedent was not followed in the case of the Yugoslav Tribunal, which does not possess jurisdiction to try persons *in absentia*.⁹³

Jurisdiction to Enforce. Jurisdiction to enforce in the domain of war crimes means, primarily, punishment of persons convicted and sentenced by a competent court. Usually, trials of war criminals are held and sentences served within the boundaries of the same country. Yet, by agreement a State may keep in its prison facilities offenders convicted and sentenced by an international tribunal,⁹⁴ or even by a national court of a foreign country.⁹⁵

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Jurisdiction to enforce also relates to preventive and other coercive measures taken by a State with a view to the suppression of war crimes. Under the universality principle, every State is empowered to take these steps against international offenders. However, the empowerment is embedded in the assumption that the State is acting within its territory (including vessels and aircraft registered therein) or on the high seas. The universality principle does not authorize a State to take coercive action within the territory of another State without the latter's consent. Differently put, the police of one State are not allowed to enter the territory of another (absent consent) in order to arrest an individual, "not even to enforce law that is subject to universal jurisdiction."⁹⁶

It is true that in egregious circumstances there have been occasions in which enforcement measures were carried out within the territory of another State without its consent. The abduction of Eichmann from Argentina for trial in Israel is a leading example. But it must be borne in mind that the crimes he perpetrated were staggering and that in realistic terms abduction "was the only means of obtaining physical jurisdiction over" him.⁹⁷ Security Council Resolution 138 (1960), which resolved the dispute over the abduction—and which declared (quite disingenuously) that "if repeated," the acts affecting the sovereignty of a Member State may endanger international peace and security—did not fail to note "the concern of people in all countries that Eichmann should be brought to appropriate justice for the crimes of which he is accused."⁹⁸ The Eichmann precedent must be considered overall as a rare exception rather than the rule: the rule of enforcement is and remains based on respect for the sovereignty of foreign States.

Notes

1. See 1(1) OPPENHEIM, INTERNATIONAL LAW 456 (Jennings & Watts eds., 9th ed. 1992).
2. As the Permanent Court of International Justice stated, "this might be the outcome of the close connection which for a long time existed between the conception of supreme criminal jurisdiction and that of the state, and also by the especial importance of criminal jurisdiction from the point of view of the individual." S.S. *Lotus* (1927), 2 WORLD COURT REPORTS 36 (Hudson ed., 1935).
3. The effects doctrine dominated the opinion of the majority of the Court in the *Lotus Case*, *id.* at 38–39.
4. See, e.g., the dissenting opinion of Judge John Bassett Moore in the *Lotus Case*, *id.* at 82.
5. See, e.g., Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, art. 4(b), 20 U.S.T. 2941, T.I.A.S. No. 6763, 704 U.N.T.S. 219, 2 I.L.M. 1042, 1963 U.N. JURID. Y.B. 136, 137.

6. For a full discussion, see Dinstein, *The Extra-Territorial Jurisdiction of States: The Protective Principle*, 65(2) ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 305–315 (1993).
7. Schachter, *International Law in Theory and Practice. General Course in Public International Law*, 178 RECUEIL DES COURS 9, 262 (1982).
8. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 304 (4th ed. 1990) (for quotation).
9. Gilbert, *Crimes Sans Frontières: Jurisdictional Problems in English Law*, 63 BRIT. Y.B. INT'L L. 415, 424 (1992).
10. See THE AMERICAN LAW INSTITUTE, 1 RESTATEMENT OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES 257, §401 (3rd ed. 1987) [hereinafter RESTATEMENT].
11. Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the U.N. General Assembly on Dec. 9, 1948, 78 U.N.T.S. 277, reprinted in *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 231, 232–233 (Schindler & Toman eds., 3d ed. 1988).
12. See Schachter, *supra* note 7, at 262.
13. United Nations Convention on the Law of the Sea, 1982, Official Text 34 (1983), U.N. Doc. A/CONF.62/122.
14. See DE VATTTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW*, bk. III, ch. VIII, §141; vol. 3, p. 280 (Fenwick trans., Classics of International Law ed., 1993).
15. See 2 OPPENHEIM, *INTERNATIONAL LAW* 309–310 (2d ed. 1912).
16. See, e.g., Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177, 218 (1945).
17. See Dinstein, *Crimes against Humanity*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY, ESSAYS IN HONOUR OF K. SKUBISZEWSKI* 891–908 (Makarczyk ed., 1996).
18. See, e.g., Hostages Case (U.S. v. List et al.), 11 T.W.C. 1230, 1241 (U.S. Mil. Trib., 1948).
19. See Brand, *The War Crimes Trials and the Laws of War*, 26 BRIT. Y.B. INT'L L. 414, 414 (1949).
20. See MCDUGAL & FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 716–717 (1994).
21. See Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 160 n. 4 (1972–1973).
22. See Baxter, *The Municipal and International Law Basis of Jurisdiction over War Crimes*, 28 BRIT. Y.B. INT'L L. 382, 392 (1951).
23. Attorney-General v. Eichmann, 36 I.L.R. 277, 300–302 (Isr. S. Ct., 1962). See also Green, *The Maxim Nullum Crimen Sine Lege and the Eichmann Trial*, 38 BRIT. Y.B. INT'L L. 457 (1962).
24. *Id.* at 304.
25. Demjanjuk v. Petrovsky, 776 F.2d 571, 582–583 (6th Cir. 1985).
26. See MCDUGAL & FELICIANO, *supra* note 20, at 718.
27. See, e.g., Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 53 BRIT. Y.B. INT'L L. 1, 12 (1982).
28. See Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 800–815 (1988).

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29. Even those maintaining that universal jurisdiction is not as widespread as suggested in this paper do not challenge its current attachment to war crimes. Some scholars sum up the position as follows: "There are probably today only two clear-cut cases of universal jurisdiction, namely the crime of piracy *jure gentium*, and war crimes." STARKE, *INTERNATIONAL LAW* 212 (Shearer ed., 11th ed. 1994).

30. Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, art. 49 (second para.), 75 U.N.T.S. 31, reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 11, at 373, 391; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, art. 50 (second para.), 75 U.N.T.S. 85, reprinted in *id.* at 401, 418; Geneva Convention III Relative to the Treatment of Prisoners of War, 1949, art. 129 (second para.), 75 U.N.T.S. 135 reprinted in *id.* at 423, 476; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 1949, art. 146 (second para.), 75 U.N.T.S. 287, reprinted in *id.* at 495, 547.

31. Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, 76 I.L.M. 1391 (1977), reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 11, at 621, 672.

32. Bowett, *supra* note 27, at 12.

33. Jeschek, *War Crimes*, 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 294, 297 (Bernhardt ed., 1982).

34. See Carnegie, *Jurisdiction over Violations of the Law and Customs of War*, 39 *BRIT. Y.B. INT'L L.* 402, 423 (1963).

35. See Dinstein, *The Distinctions between War Crimes and Crimes against Peace*, in *WAR CRIMES IN INTERNATIONAL LAW* 1, 3-4 (Dinstein & Tabory eds., 1996).

36. Report of the International Law Commission, 48th Session (1996), 110-112 (U.N. Doc. A/51/10, mimeographed) (Text).

37. See Rosenstock, *The Forty-Eighth Session of the International Law Commission*, 91 *AM. J. INT'L L.* 365, 370 (1997).

38. See Report of the International Law Commission, 48th Session, *supra* note 36, at 114-115 (Commentary).

39. *Id.* at 42 (Text).

40. *Id.* at 45 (Commentary).

41. Mann, *The Doctrine of Jurisdiction in International Law*, 111 *RECUEIL DES COURS* 9, 95 (1964).

42. *Attorney-General v. Eichmann*, *supra* note 23, at 18, 54 (D. Ct., 1961), 304 (S. Ct.).

43. Thus, charges by U.S. authorities against American personnel relating to the commission of war crimes in Vietnam "were actually brought not on the basis of international law but of the law of the United States and the Uniform Code of Military Justice." Green, *War Crimes, Crimes against Humanity, and Command Responsibility*, *NAVAL WAR C. REV.*, Spring 1997, at 26, 40.

44. Shachor-Landau, *Extraterritorial Penal Jurisdiction and Extradition*, 29 *INT'L & COMP. L.Q.* 274, 285 (1980).

45. The option "either to surrender or to punish" a culprit first appears in GROTIUS, *DE JURE BELLI AC PACIS*, bk. II, ch. XXI, §IV; translation, vol. 2, at 528 (Kelsey trans., *Classics of International Law* ed., 1984).

46. On the distinctions between extradition and other procedures (deportation and exclusion), see SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 76-93 (1971).

47. Meron, *International Criminalization of Internal Atrocities*, 89 *AM. J. INT'L L.* 554, 573-574 (1995).

48. See van den Wyngaert, *The Suppression of War Crimes under Additional Protocol I*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD, ESSAYS IN HONOUR OF F. KALSHOVEN 197, 204–205 (Delissen & Tanja eds., 1991).
49. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133 (1971), 1970 U.N. JURID. Y.B. 131.
50. For a full treatment of the subject, see Dinstein, *Criminal Jurisdiction over Aircraft Hijacking*, 7 ISR. L. REV. 195–206 (1972).
51. The choice of the three preferred States is debatable. See *id.* at 203–204.
52. Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 10 I.L.M. 1151 (1971), 1971 U.N. JURID. Y.B. 143, 145.
53. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the U.N. General Assembly, Dec. 14, 1973, T.I.A.S. No. 8532, 13 I.L.M. 41 (1977), 1973 U.N. JURID. Y.B. 75, 76.
54. International Convention against the Taking of Hostages, adopted by the U.N. General Assembly, Dec. 17, 1979, 18 I.L.M. 1456 (1979), 1979 U.N. JURID. Y.B. 124, 125.
55. Convention on the Physical Protection of Nuclear Material, 1980, reprinted in INTERNATIONAL CRIMINAL LAW, A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS 55, 57–58 (van den Wyngaert & Stessens eds., 1996).
56. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the U.N. General Assembly, Dec. 10, 1984, 24 I.L.M. 535 (1985), 1984 U.N. JURID. Y.B. 135, 136.
57. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, 27 I.L.M. 672, 675–676 (1988).
58. *Id.* at 679.
59. See Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 302–303 (1988) (on the priority claim of the flag State).
60. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, 28 I.L.M. 497, 503–504 (1989).
61. International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989, 29 I.L.M. 91, 94 (1990).
62. Convention on the Safety of United Nations and Associated Personnel, 1994, 34 I.L.M. 485, 488–489 (1995).
63. See LAMBERT, TERRORISM AND HOSTAGES IN INTERNATIONAL LAW—A COMMENTARY ON THE HOSTAGES CONVENTION 140–165 (1990).
64. London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 1945, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 11, at 911, 912.
65. *Id.* at 913, 914.
66. Judgment, 1 T.M.W.C. 171, 218 (Int'l Mil. Trib., 1946).
67. S.C. Res. 827 (1993), 32 I.L.M. 1203, 1204 (1993).
68. Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (1993), *id.* at 1159, 1171–1172.
69. See, e.g., Arangio-Ruiz, *The Establishment of the International Criminal Tribunal for the Former Territory of Yugoslavia and the Doctrine of Implied Powers of the United Nations*, in DAI TRIBUNALI PENALI INTERNAZIONALI AD HOC A UNA CORTE PERMANENTE 31–45 (1996).

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70. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Appeals Chamber, *The Prosecutor v. Tadić*, Jurisdiction (Oct. 2, 1995) 8 (IT-94-1-AR72), 35 I.L.M. 32, 41–45 (1996).
71. See Fox, *The Objection to Transfer of Criminal Jurisdiction to the UN Tribunal*, 46 INT'L & COMP. L.Q. 434, 437 (1997) (for quotation).
72. Secretary-General's Report, *supra* note 68, at 1177.
73. *The Prosecutor v. Tadić*, *supra* note 70, at 52.
74. Shraga & Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 EURO. J. INT'L L. 360, 371-372 (1994).
75. See Article 14(7) of the 1966 International Covenant on Civil and Political Rights, adopted by the U.N. General Assembly, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), 1966 U.N. JURID. Y.B. 178, 183. As observed by the Trial Chamber of the Yugoslav Tribunal in the *Tadić* case, "this provision is generally applied so as to cover only a double prosecution within the same State." International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Trial Chamber, *The Prosecutor v. Tadić*, Decision on the Defence Motion on the Principle of *non bis in idem* (Nov. 14, 1995) 8 (IT-94-1-T, mimeographed).
76. Geneva Convention III, *supra* note 30, at 460.
77. See Paust, *It's No Defense: Nullum Crimen, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657, 662 (1997).
78. See Boss, *The Extraterritorial Jurisdiction of States*, Revised Draft Resolution, Article 8(6), 65(1) ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 148, 151 (1993).
79. Secretary-General's Report, *supra* note 68, at 1177.
80. Report of the International Law Commission, 48th Session, *supra* note 36, at 69.
81. The provisions of Articles 9 (concurrent jurisdiction) and 10 (*non bis in idem*) of the Yugoslav Tribunal's Statute are replicated in Articles 8 and 9 of the Statute of the International Tribunal for Rwanda, established by the Security Council in Resolution 955 (1994), 33 I.L.M. 1600, 1605–1606 (1994). The latter Statute does not deal, however, with war crimes.
82. Report of the International Law Commission, 46th Session, (1994) II(2) Y.B.I.L.C. 1, 57.
83. Report of the International Law Commission, 48th Session, *supra* note 36, at 66.
84. For the three categories of jurisdiction, see 1 RESTATEMENT, *supra* note 10, at 232 (§401).
85. Green, *The German Federal Republic and the Exercise of Criminal Jurisdiction*, 43 U. TORONTO L.J. 207, 212 (1993).
86. Geneva Convention I, art. 49 (first para.); Geneva Convention II, art. 50 (first para.); Geneva Convention III, art. 129 (first para.); Geneva Convention IV, art. 146 (first para.), *supra* note 30, at 391, 418, 475–476 & 546–547.
87. 1 RESTATEMENT, *supra* note 10, at 304.
88. Essential rules pertaining to judicial proceedings against persons charged with war crimes are incorporated in Article 99 of Geneva Convention III, *supra* note 30, at 463-464. For the application of these rules to prisoners of war accused of war crimes, see COMMENTARY, III GENEVA CONVENTION 415–416 (de Preux ed., 1960).
89. See LEVIE, *TERRORISM IN WAR—THE LAW OF WAR CRIMES* 35, 433 (1993).
90. London Agreement, *supra* note 64, at 915.
91. Order of the Tribunal regarding Notice to Defendant Bormann, 1 T.M.W.C. 102, 102 (Int'l Mil. Trib., 1945).
92. International Military Tribunal, Judgment, *supra* note 66, at 340–341, 367.

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93. See Guillaume, *The Future of International Judicial Institutions*, 44 INT'L & COMP. L.Q. 848, 857 (1995).

94. See Article 27 of the Statute of the Yugoslav Tribunal, Secretary-General's Report, *supra* note 68, at 1188.

95. If a trial for war crimes is conducted by a Detaining Power holding a prisoner of war, his transfer to another Power will additionally be governed by Article 12 of Geneva Convention III, *supra* note 30, at 434–435.

96. Henkin, *International Law: Politics, Values and Functions. General Course on Public International Law*, 216 RECUEIL DES COURS 9, 313 (1989).

97. Silving, *In re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307, 338 (1961).

98. S.C. Res. 138 (1960), 4 UNITED NATIONS RESOLUTIONS, SERIES II: RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 14, 14 (Djonovich ed., 1989).