

## TREATMENT OF INTERNATIONAL HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES

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In our day and age, the violation of human rights has become a matter of international concern. This article is focused on the sharing of those concerns by the United States, in particular as manifested by the treatment of human rights violations in the United States. Following introductory observations in Part I highlighting the special commitment of the United States to the protection of international human rights, the article will show, in Part II thereof, that in virtue of Article 6, Clause [2] of the American Constitution (the Supremacy Clause), human rights conventions are in principle self-executing in the United States.<sup>1</sup> However, the United States invariably adds a reservation to its instruments of ratification of such conventions proclaiming that they will not be self-executing in the United States. Incorporating the provisions of human rights conventions ratified by the United States into the country's municipal legal system therefore requires Congressional implementation legislation, which will be exemplified in Part III with reference to the Torture Convention Implementation Act of 1994. Part IV of the article is devoted to the exercise of universal jurisdiction by federal courts, in virtue of Article 1, Section (8), Clause [10] of the Constitution, to bring to justice those responsible for piracies and felonies on the High Seas and offences against the law of nations.<sup>2</sup> In the United States, universal jurisdiction of federal courts is not confined to criminal prosecutions but has also been extended by the Alien Tort Statute to civil actions by foreign victims of a tort that constitutes a violation of the law of nations or of a treaty entered into by the United States.<sup>3</sup> The treatment of human rights violations under the Alien Tort Statute and similar legislation is the subject-matter of Part V of this article. Some concluding observations to evaluate the above manifestations of the American commitment to human rights, notably in view of considerations based on the national interests of the United States and a perception of American exceptionalism, will bring the article to a close in Part VI thereof.

### I. INTRODUCTION

On the international front, the United States may be singled out for its leading role in the establishment of the United Nations Organization and in the

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1. U.S. CONST., art. VI, cl. 2.
2. U.S. CONST., art. I, § 8, cl. 10.
3. Alien Tort Statute, 28 U.S.C.A., § 1350 (2004).

drafting of international instruments for the protection of human rights. During its infancy, the United Nations established the Human Rights Commission to, among other things, draft a human rights charter that will specify the meaning to be attributed in international law to the concepts of human rights and fundamental freedoms. In 1948, the Commission produced the Universal Declaration of Human Rights (UDHR).<sup>4</sup> The Commission was chaired at the time by Eleanor Roosevelt, widow of President Franklin Delano Roosevelt (1882-1945) of the United States. In large part thanks to the efforts of Eleanor Roosevelt, the UDHR was not confined to civil and political rights but also included an impressive list of economic and social rights.<sup>5</sup> Such rights mimicked the “freedom from want” component of her late husband’s State of the Nation Address to Congress of 1941, commonly referred to as his “Four Freedoms” speech,<sup>6</sup> as elaborated in the President’s State of the Nation message of 1944.<sup>7</sup> The rather uncommon phrase used by the President to denote economic and social rights—“freedom from want”—is actually used in the Preamble to the UDHR, alongside freedom of speech and belief, and freedom from fear, as having been proclaimed “as the highest aspiration of the common people.”<sup>8</sup> The UDHR was adopted on December 10, 1948, with forty-eight of the then fifty-six Member States of the United Nations voting in favour of its adoption and with eight abstentions.<sup>9</sup>

When the Obama administration on April 24, 2009 informed the President of the General Assembly of the United Nations of the United States’ candidacy for a seat in the Human Rights Council, it added an Annex to its letter outlining *The Human Rights Commitments and Pledges of the United States*. The Annex recorded a promise of the executive branch to work with the legislative branch “to consider the possible ratification of human rights treaties, including but not limited to the Convention on the Elimination of Discrimination against

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4. Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. GAOR, 3d.Sess., at 71 U.N. Doc. A/810 (1948) (hereafter “UDHR”). Calling the UDHR the *Universal* (instead of the International) Declaration of Human Rights represents a contribution of the French Council Member and Nobel Prize laureate, René Cassin (1887-1976).

5. *Id.*, arts. 21-28.

6. See 87 CONG. REC. H46 (daily ed. Jan. 6, 1941) (statement of President Franklin Delano Roosevelt). (Translating “[F]reedom from want” into “world terms, mean[ing] economic understandings which will secure to every nation a healthy peace-time life for its inhabitants everywhere in the world”).

7. See 90 CONG. REC. H57 (daily ed. Jan. 11, 1944) (statement of President Franklin Delano Roosevelt). Freedom from want denotes that “true individual freedom cannot exist without economic security and independence,” and the rights that clearly belong to this forgotten category, the President proclaimed, include the right to a useful and remunerative job; the right to earn enough to provide adequate food, clothing, and recreation; the right of every farmer to raise and sell his products; the right of every businessman to trade in an atmosphere of freedom from unfair competition and domination by monopolies; the right of every family to a decent home; the right to adequate medical care; the right to protection from economic fears of old age, sickness, accident, and unemployment; and the right to a good education. *Id.*

8. UDHR, *supra* note 4, Preamble.

9. The States that abstained were Saudi Arabia, South Africa, the Soviet Union, four Eastern European States and a Soviet republic whose votes were controlled by the Soviet Union. *Commission on Human Rights 3rd Session, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2008), available at [http://www.un.org/depts/dhl/udhr/docs\\_1948\\_3rd\\_chr.shtml#docList](http://www.un.org/depts/dhl/udhr/docs_1948_3rd_chr.shtml#docList).

Women.”<sup>10</sup>

The commitment of the United States on the international front to promote the observance of human rights had a sound base within the confines of its national laws and practices. The United States can rightly take pride in having initiated, way back in 1789, a system for the protection of human rights principles through the medium of a constitutional bill of rights. Its groundbreaking initiative acquired practical relevance when the U.S. Supreme Court in *Marbury v. Madison* confirmed the competence of courts of law to test, and if need be to invalidate, legislative acts found to be inconsistent with the pertinent constitutional provisions.<sup>11</sup> Within the confines of its constitutional directives, the United States throughout its history has responded quite admirably to international law violations, particularly those that involve transgressions of human rights directives as perceived by and in the United States. America’s ability to respond to violations of international law has been facilitated by several basic norms of the American legal system, including (a) incorporation of international law into the municipal legal system of the United States through implementation legislation, (b) affording American courts universal jurisdiction to adjudicate violations of the law of nations (customary international law),<sup>12</sup> and (c) entrusting federal courts with the power to entertain civil actions for damages based on transgressions of a sub-set of customary international law or of a treaty entered into by the United States.<sup>13</sup>

In virtue of the Supremacy Clause in the Constitution, international treaties, including human rights covenants and conventions ratified by the United States, are as a general rule self-executing in the United States,<sup>14</sup> and accordingly, the United States can in principle take action in its municipal courts against those who violate such covenants and convention. In cases where an international treaty is self-executing in the United States and the treaty provisions are contradicted by American law, according to the Restatement (Third) of the Foreign Relations Law, the following rules apply: (i) The Constitution is the ultimate supreme law of the land: in the event of a conflict between a self-executing treaty provision and the Constitution, the constitutional provision must be upheld;<sup>15</sup> (ii) A self-executing treaty is equal in status with federal law: in the event of a conflict between a treaty provision and a federal statute, the one later in date will prevail;<sup>16</sup> and (iii) A self-executing treaty is superior to state law:

10. U.S. DEP’T OF STATE, U.S. HUMAN RIGHTS COMMITMENTS AND PLEDGES (Apr. 16, 2009), available at <http://www.state.gov/documents/organization/121976.pdf>.

11. See generally *Marbury v. Madison*, 5 U.S. 137 (1803).

12. U.S. CONST., art. VI, cl. 2.

13. Alien Tort Statute, 28 U.S.C. § 1350.

14. See U.S. CONST. art. VI, cl. 2 (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” [emphasis added]).

15. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 115(3), 302(2), 721; see also *Reid v. Covert*, 354 U.S. 1, 16–17 (1957) (“It would be manifestly contrary to the objectives of those who created the Constitution . . . to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.”).

16. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(2); *United States v. Dion*, 476 U.S. 734, 738 (1986); *Cook v. United States*, 288 U.S. 102, 118–19 (1933);

in the event of a conflict between a treaty provision and a state law, the treaty provision will remain in force irrespective of the date on which that state law was enacted (before or after the treaty provision became binding on the United States).<sup>17</sup>

The United States is probably the only country in the world where universal jurisdiction of national courts of law to bring the perpetrators of international crimes to justice is authorized by *the country's constitution*.<sup>18</sup> According to Jordan Paust, universal jurisdiction has been recognized in the United States “since the dawn of . . . [its] history,”<sup>19</sup> and it has been recognized or applied in cases involving, among other things, acts of terrorism,<sup>20</sup> crimes against humanity,<sup>21</sup> and aircraft piracy and hostage taking.<sup>22</sup>

The United States is probably also the only country in the world that afforded to its municipal courts of law universal jurisdiction in a civil action for damages. Under the Alien Tort Claims Act (ATS), included in the Judiciary Act of 1789, federal courts have been granted “original jurisdiction of any civil actions by an alien for a tort only, committed in violation of the law of nations [customary international law] or a treaty of the United States.”<sup>23</sup> Likewise, the Torture Victim Protection Act of 1992 explicitly affords an action for damages to victims of torture (including American nationals) suffered at the hands of any person acting under actual or apparent authority, or colour of law, of any foreign nation.<sup>24</sup> In *Kadić v. Karadžić*, 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 ATS Act (and therefore as a crime under customary international law) “without regard to state action.”<sup>25</sup> 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

Fong Yue Tung v. United States, 149 U.S. 698, 720 (1893); Whitney v. Robertson, 124 U.S. 190, 194-95 (1888); 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); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES, 101-07, 118-19 (2<sup>nd</sup> ed., 2003); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, at 688.

17. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1); 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.

18. U.S. CONST., art. 1, § 8, cl. 10 (affording to Congress the power “To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”); and see Johan D. van der Vyver, *Prosecuting Offences against the Law of Nations in the United States*, 20 EMORY INT'L L. REV. 77-110 (2007).

19. Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism, Non-Immunity for Foreign Violations of International Law under the FSIA and the Acts of State Doctrine*, 23 VA. J. INT'L L. 191, 211 (1983).

20. Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775, 781 (D.C. Cir.1984).

21. Demjanjuk v. Petrovsky, 776 F.2d 571, 581-83 (6<sup>th</sup> Cir. 1985).

22. United States v. Yunis, 681 F.Supp. 896, 900-01 (D.D.C. 1988).

23. 28 U.S.C., § 1350 (2006).

24. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 STAT. 73 (1992), *codified at* 28 U.S.C. § 1350. The Act also affords an action for damages based on extra-judicial killings.

25. Kadić v. Karadžić, 70 F.3d 232, at 244 (2d Cir. 1995).

World War II, has become “an important aspect of international law.”<sup>26</sup>

This Article will concentrate on provisions in the Constitution that render international human rights treaties self-executing in the United States; implementation by the American legislature of international human rights treaties; and the exercise of universal jurisdiction of the country’s federal court as a means of dealing internally with international human rights violations. This Article will show that in the United States responses to international human rights violations can in principle be based on three modalities of the American legal system, namely:

- (a) The enforcement of self-executing provisions of international human rights covenants and conventions that have been ratified by the United States;
- (b) The incorporation of international norms for the protection of human rights into the municipal legal system of the United States by implementation legislation; and
- (c) The exercise of universal jurisdiction by federal courts to bring perpetrators of international human rights violations to justice.

These modalities are indeed not confined to the American legal system, but their implementation is in many respects determined by different law-enforcement rules and political strategies that prevail in different countries. A comparative analysis of their governance will exceed the focus on this article, which is confined to the treatment of international human rights violations in the United States only.

## II. Self-executing Norms of International Human Rights

The Supremacy Clause in the Constitution of the United States, which provides in part that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land,”<sup>27</sup> in principle renders international treaties for supremacy purposes self-executing in the United States;<sup>28</sup> that is to say, the treaty provisions automatically become part of American law and their incorporation into the American legal system does not require implementation legislation.<sup>29</sup>

There are, however, several exceptions to this 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:

- (i) If the agreement manifests an intention that it shall not become effective as

26. *Id.* at 243; and *see also* Jordan J. Paust, *Suing Karadžić*, 10 LEIDEN J. INT’L L. 91, at 97 (1997) (noting that private individuals are liable for violations of international law, “especially with respect to genocide, war crimes, and crimes against humanity”).

27. U.S. CONST. art. VI, cl. 2.

28. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).; and *see* Jordan J. Paust, *Medellín, Avena, the Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT’L L. REV. 301, 315–20 (2008).

29. In countries based on the so-called dualistic system, such as Great Britain, treaties are not self-executing and their substance can only become part of the municipal law of the country through implementation legislation enacted by the national legislature.

domestic law without the enactment of implementing legislation;

(ii) If the Senate in giving consent to a treaty, or Congress by resolution, requires implementation legislation;

(iii) If implementation legislation is constitutionally required.<sup>30</sup>

It has accordingly been decided that if a treaty ratified by the United States deals with a subject matter listed in the Constitution as falling exclusively within the powers of Congress,<sup>31</sup> a treaty that overlap with those powers shall not be self-executing, and implementation legislation is then constitutionally required.<sup>32</sup> The reason for this position is obvious: If the Constitution affords to Congress the exclusive 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. In spite of earlier opinions to the contrary,<sup>33</sup> it has also been held that crime-creating treaties are not self-executing. As succinctly stated by way of *obiter dictum* in one of the earliest judgment, “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.”<sup>34</sup>

The United States has in recent years – somewhat belatedly – ratified a number of international human rights treaties: the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948)<sup>35</sup> in 1986;<sup>36</sup> the *Covenant on Civil and Political Rights* (1966)<sup>37</sup> in 1992;<sup>38</sup> the *Convention against Torture and Other Cruel,*

30. Restatement (Third), *supra* note 15, at § 111(4); and see *People of Saipen v. United States Dept. of Interior*, 502 F.2d 90, 97 (9<sup>th</sup> 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”).

31. U.S. CONST., art. I, § 8.

32. *Edwards v. Carter*, 580 F. 2d 1055, 1058 (D.C. Cir., 1922); JORDAN J. PAUST, JON. M. VAN DYKE & LINDA A. MALONE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.*, 136–49 (3<sup>rd</sup> ed., 2007); Yuji Iwasawa, *supra* note 16, at 675–76.

33. See, for example, *Morris v. United States*, 161 F. 672, 675 (8<sup>th</sup> 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.” 2 U.S. 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.

34. *The Over the Top*, *Schroeder v. Bissell*, 5 F.2d 838, 845 (D. Conn. 1925); see also Quincy Wright, *Treaties and the Constitutional Separation of Powers in the United States*, 12 AM. J. INT’L L. 64, 83–84 (1918) (stating that treaties defining crimes or extending criminal jurisdiction require implementing legislation).

35. *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

36. CONG. REC. S1355-01 (daily ed., Feb. 19, 1986).

37. *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (hereafter “ICCPR”).

38. 138 CONG. REC. S8070 (daily ed., Apr. 2, 1992).

*Inhuman or Degrading Treatment or Punishment* (1984)<sup>39</sup> in 1994;<sup>40</sup> the *Convention on the Elimination of All Forms of Racial Discrimination* (1965)<sup>41</sup> in 1994,<sup>42</sup> and most recently the two Protocols to the *Convention on the Rights of the Child* (2000)<sup>43</sup> in 2002.<sup>44</sup> Those Protocols deal with involvement of children in armed conflict and the sale of children, child prostitution and child pornography.

International human rights covenants and conventions other than crime-creating treaties do not fall within the confines of any of the exceptions that would render them non-self-executing in the United States. However, it is standard practice of the United States to add to its ratification instruments of such covenants and conventions a reservation proclaiming that they will not be self-executing in the United States.<sup>45</sup> In the 1950's, Senator Bricker of Ohio proposed an amendment to the U.S. Constitution that would have rendered all international treaties non-self-executing in the United States and that would even have prevented congressional legislation from implementing human rights treaties. The Bricker Amendment was defeated, but, according to Louis Henkin, its ghost lingered on and was resurrected by the package of Reservations, Understandings and Declarations (RUDs) which left "the Covenant [on Civil and Political Rights] without any life in the United States."<sup>46</sup>

39. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (1984).

40. 36 CONG. REC. S17486 (daily ed., Oct. 27, 1990).

41. International Convention on the Elimination of All Forms of Racial Discrimination, S. Exec. Doc. C., 95-2 (1966), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

42. 140 CONG. REC. S7634 (daily ed., June 24, 1994).

43. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. A/RES/54/263 of 25 May 2000 (entered into force on Jan. 1, 2002); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. A/RES/54/263 of 25 May 2000 (entered into force on Feb. 2, 2002).

44. Convention on Rights of the Child on Involvement of Children in Armed Conflict – Treaty Document No. 106-37A, 148 CONG. REC. 10683 (2002); Convention on Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography – Treaty Document No. 106-37B, 148 CONG. REC. 10683-85 (2002). The Instrument of ratification was deposited with the Secretary-General of the United Nations on December 23, 2002. See U.S. DEPT OF STATE, *Involvement of Children in Armed Conflict* (Dec. 23, 2002), available at <http://2110-2009.state.gov/r/pa/prs/ps/2002/16198.htm>.

45. 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:

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.
4. Every human right's 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."

Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341 (1995).

46. *Id.*, at 349. As to the substance of the RUD's included in the American instruments of ratification of human rights conventions and covenants, see JOHAN D. VAN DER VYVER, IMPLEMENTATION OF INTERNATIONAL LAW IN THE UNITED STATES, 82-86 (2010); see also M. Christian

The ratification policy of the United States also excludes the binding force of international human rights provisions that are in conflict with the Constitution, or deviate from existing laws and practices in the United States.<sup>47</sup> In this regard it might be noted that the American system of human rights protection deviates in two important respects from prevailing international standards. The federal Bill of Rights, firstly, only protects civil and political rights, to the exclusion of natural rights of the individual (such as the right to life and to human dignity), economic, social and cultural rights (such as the right to housing, education and health-care services), and solidarity rights (such as the right to development and to a healthy and clean environment).<sup>48</sup> The protection of those rights is within the jurisdiction of states.<sup>49</sup> Secondly, while international law proclaims inherent human dignity, alongside the equal and inalienable rights of all members of the human family, to be “the foundation of freedom, justice and peace in the world,”<sup>50</sup> the American constitutional system has elevated the First Amendment Freedoms, and notably freedom of speech, to becoming the basic norm (*die Grundnorm*) of the entire system of constitutional protections.<sup>51</sup>

Given the ratification policy of the United States, one, therefore, cannot rely on the Supremacy Clause and the principle rendering international human rights treaties self-executing in the United States for bringing the American system of law in conformity with international standards of human rights protection or for the treatment in the United States of international human rights violations. The international standards proclaimed in the *Universal Declaration of Human Rights* that are not upheld by the United States include the proscription of “cruel, inhuman or degrading punishments,”<sup>52</sup> the principle of equal protection of the laws,<sup>53</sup> and the protection of economic, social and cultural rights.<sup>54</sup> The United

Green, *The “Matroishka” Strategy: US Evasion of the Spirit of the International Covenant on Civil and Political Rights*, 10 *SOU. AFR. J. HUM. RTS.* 357-71 (1994).

47. See Henkin, *supra* note 45.

48. As to the classification of human rights into “generations of rights”, see Johan D. van der Vyver, *The Binding Force of Economic and Social Rights Listed in the Universal Declaration of Human Rights*, 30 *HAMLIN J. PUBL. L. & POL’Y* 125 (2008).

49. By contrast, the South African Constitution, 1996 places on the national state the obligation to “respect, protect, promote and fulfill the rights in the Bill of Rights” (SA Const., sec. 7(2)), and the rights listed in Chapter II of the Constitution include a rich variety of natural, civil and political, economic, social and cultural, and solidarity rights (SA Const., secs. 7-39).

50. UDHR, *supra* note 4, Preamble; ICCPR, *supra* note 37, Preamble; International Covenant on Economic, Social and Cultural Rights, Preamble, adopted Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

51. In American jurisprudence, the basic norm is commonly referred to as “preferred freedoms”, which denote “a scale of constitutional values.” *United States v. Robel*, 389 U.S. 258, 263 (1967). The American notion of “preferred freedoms” is commonly attributed to the footnote remark of Stone, J. in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 note 4 (1937). See W. FRIEDMANN, *LAW AND SOCIAL CHANGE* 17-18 (class notes, Columbia University, 1971). In *Palko v. Connecticut*, Cardozo, J. referred to freedom of thought and speech as “the matrix, the indispensable condition, of nearly every other form of freedom.” *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937). In *Schneider v. State*, Roberts, J., delivering the opinion of the Court, depicted freedom of speech and of the press as “fundamental personal rights and liberties.” *Schneider v. State*, 308 U.S. 147, 161 (1939).

52. UDHR, *supra* note 4, art. 5. The Eighth Amendment, by contrast, prohibits “cruel and unusual punishments.”

53. UDHR, *supra* note 4, art. 7. The equal protection provision of the Fourteenth Amendment



States furthermore does not uphold the internationally proclaimed rights of the child,<sup>55</sup> and declined to accept the obligation placed on States Parties to the *Covenant on Civil and Political Rights* to outlaw “propaganda for war” and the “advocacy of national, racial or religious hatred that constitute incitement or discrimination, hostility or violence.”<sup>56</sup>

### III. IMPLEMENTATION LEGISLATION

In view of the ratification policy of the United States, the treatment of human rights violations is to a large extent dependent on implementation legislation through which the international human rights commitments of the United States are incorporated into the municipal legal system of the country. In this respect it might also be noted that the American implementation legislation is not always precisely in conformity with the prevailing international standards of human right protection.

For example, in 1984, the United Nations adopted the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [hereinafter “Torture Convention”],<sup>57</sup> placing an obligation on States Parties to take “effective legislative, administrative, judicial or other measures to prevent acts of torture” within their respective territories<sup>58</sup> and to incorporate the crime of torture as defined in the Convention into their national criminal justice systems.<sup>59</sup>

The Torture Convention has several outstanding features: (a) Torture is condemned regardless of the circumstances;<sup>60</sup> (b) the Convention follows the principle of compulsory universal application: that is to say, it is made applicable to all countries of the world (and not only to States Parties) so that even acts of torture committed in a non-Party country are punishable in a State Party to the

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applies only within each state and not within the United States of America as a single political entity. The United States has been condemned on several occasions by the Inter-American Commission of Human Rights for not complying with the international norm requiring equal justice for all within its national borders. *See, eg.*, *Roach & Pinkerton v. United States of America*, Res. No. 3/87, Case No. 9647 (United States), OEA/Ser.L/V/II.71. doc. 9 rev. 1 (1986-87), par. 65 (Sept. 22, 1987).

54. UDHR, *supra* note 4, arts. 21-27. The United States declined to ratify the *International Covenant on Civil and Political Rights* which afforded binding force to those economic and social rights.

55. As to the most regrettable state of the American system of juvenile justice, *see* Johan D. van der Vyver, *International Standards for the Promotion and Protection of Children’s Rights*, 15 BUFFALO HUM. RTS. L. REV., 81-108 (2009).

56. ICCPR, *supra* note 37, art. 20; *and see* 138 CONG. REC. S4781-01 (daily ed., April 2, 1992), Reservation 1(1); *see also id.*, Understanding III(2).

57. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (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)) [hereinafter “Torture Convention”]; *and see generally* J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* (1988) [hereinafter “Torture Convention”].

58. BURGERS & DANIELIUS, *supra* note 57, at 178, (citing art. 2, cl. 1).

59. *Id.* at 178, (citing art. 4) (ensuring that each State Party criminalizes acts of torture and attempted torture).

60. *Id.* at 178 (citing art. 2 (2)) (refusing to accept even a state of war or national emergency as justification for any form of torture).

Convention;<sup>61</sup> (c) States Parties are under an obligation not to extradite any person if there are substantial grounds to believe that the person would be in danger of being subjected to torture in the state requesting the extradition;<sup>62</sup> (d) an order of a superior officer or public authority cannot be raised as a defense by a person charged with torture;<sup>63</sup> (e) the Convention itself serves as an extradition treaty among States Parties for purposes of bringing a perpetrator of torture to justice;<sup>64</sup> (f) evidence obtained through torture must be rendered inadmissible in the criminal justice systems of States Parties;<sup>65</sup> (g) the Convention places upon States Parties the obligation to create a public awareness through education and information concerning the prohibition of torture.<sup>66</sup>

“Torture” is defined in the Torture Convention as follows:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>67</sup>

By excluding from the Torture Convention’s definition of torture “pain or suffering arising only from or inherent in, or incidental to, lawful sanctions,”<sup>68</sup> the severe pain or suffering which attends many legitimate punishments – such as imprisonment, corporal punishment, or capital punishment – is removed from the scope of the Convention. The phrase was not intended to exclude or to excuse legally sanctioned punishments that have all the makings of torture *per se*. Use of the word “only” was designed to make that distinction. Corporal punishment and capital punishment, for example, are indeed cruel and inhuman but would not be torture, unless the flogging is excessive and executed over a long period of time, or the execution of a convicted offender is deliberately drawn out so as to add excessive pain or suffering to his or her misery.

The United States ratified the Torture Convention in 1990,<sup>69</sup> and enacted the

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61. *Id.* at 178–79 (citing art. 5) (making torture an extraditable offense within any State Party).

62. *Id.* at 178 (citing art. 3(1)) (establishing that a person who may potentially be tortured shall not be extradited).

63. *See id.* at art. 2(3) (excluding the often used “I was acting under orders” defense).

64. *Id.* at 180 (citing art. 8(2)) (creating a presumptive right of extradition between the States Parties to the Convention even if their individual treaties do not include an extradition clause).

65. *Id.* at 181 (citing art. 15) (excluding from evidence statements of a person that were obtained through torture “except against a person accused of torture as evidence that the statement was made”).

66. *Id.* at 180 (citing art. 10) (requiring educational and informational programs regarding the prohibition against torture for law enforcement, military, medical personnel, or any public official who may come into contact with detained persons).

67. *Id.* at 177–78 (citing art. 1(1)).

68. *Id.*, at 177 (citing art. 1(1)); *see also* 28 U.S.C. § 1350 (3)(b)(1)(2006).

69. 136 CONG. REC. 36, 198 (1990).

Torture Convention Implementation Act with a view to bringing the U.S. criminal code in conformity with the Convention directives.<sup>70</sup> Torture is defined in the Act as: “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”<sup>71</sup>

The American definition of torture differs in several respects from the one contained in the Torture Convention. This applies in the first place to the perpetrator of torture, which in the Torture Convention is confined to “a public official or other person acting in an official capacity or with the consent or acquiescence of a public official or other person acting in an official capacity” and in the Torture Convention Implementation Act in more broader terms to “a person acting under the color of law.” This deviation from the wording of the Torture Convention is fully justified. One must bear in mind, namely, that the Torture Convention, being an international treaty, only addresses the obligations of States and therefore has a limited application to state action only. The customary-law meaning of torture exceeds the confines of the Convention: Insofar as municipal criminal justice systems apply to the criminal conduct of individuals as well as state officials, the prohibition of torture should not be limited to acts of torture committed only by state actors.<sup>72</sup>

Under the Torture Convention Implementation Act, torture is not a special intent crime; or to be more precise, a double special intent crime. Torture as defined in the Torture Convention requires intent to inflict serious physical or mental pain or suffering, plus the further intention to do so for such purposes as (a) obtaining from him or a third person information or a confession, (b) punishing him for an act he or a third person has committed or is suspected of having committed, (c) intimidating or coercing him or a third person, or (d) for any reason based on discrimination of any kind. The purposive element of torture is not included in the definition of torture in the Torture Convention Implementation Act.

Torture as defined in the Torture Convention and in the Torture Convention Implementation Act applies in both instances to severe physical or mental pain or suffering. Drafters of the Torture Convention Implementation Act saw fit to define the mental (not the physical) manifestation of torture. “[S]evere mental pain or suffering” in American law includes:

- (B) The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (C) The threat of imminent death; or

70. Torture Convention Implementation Act, Pub. L. No. 103-236, 108 Stat. 463 (1994).

71. 18 U.S.C. § 2340 (2006).

72. The European Court of Human Rights has decided that the duty of High Contracting States not to expel an alien to a country where he or she would run a serious risk of being subjected to torture or inhuman or degrading treatment also applies if that risk emanates exclusively from private individuals or groups. *See, e.g.,* H L R v. France, 26 Eur. H.R. Rep. 29, 36-41 (1997) (holding that a probability of torture or inhumane treatment at the hands of private individuals, as opposed to a government authority, in defendant’s home country also invokes Article 3 of the Convention).

(D) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.<sup>73</sup>

A person who, under the color of law, intentionally threatens someone within his or her custody with severe pain or suffering also commits torture as defined in the Torture Convention Implementation Act.

Based on this definition and assuming that it also applies to the infliction of severe physical pain, the American Central Intelligence Agency (CIA) used a variety of interrogation techniques on Guantánamo Bay detainees that were, to say the least, highly questionable. On April 16, 2009, four secret Memorandums used by the George W. Bush administration to justify the Guantánamo interrogation techniques were released by the Department of Justice upon the instructions of President Barack Obama. In the first memorandum, dated August 1, 2002, Assistant Attorney General Jay S. Bybee expressed the opinion that the concerned methods of interrogations, including sleep deprivation and the simulation of drowning through water boarding,<sup>74</sup> did not amount to torture, because “[n]ot only must the course of conduct be a predicate act, but also those who use the procedure must actually cause prolonged [physical or] mental harm.” Bybee went on to say: “A defendant acts in good faith when he has an honest belief that his action will not result in severe pain and suffering . . . Good faith may be established by, among other things, the reliance on the advice of experts.”

This reasoning was not persuasive to the Obama administration, or to the rest of the world. Within his first week in office, President Obama issued Executive Orders for the closure “as soon as possible” of detention facilities at Guantánamo Bay,<sup>75</sup> and mandated that detainees in custody or under effective control must be detained “in conformity with all the conditions stipulated in Common Article 3” of the Geneva Conventions of 12 August 1949.<sup>76</sup> The President issued instructions that only lawful methods of interrogation may be used,<sup>77</sup> and nominated a task force “to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captures or apprehended in connection with armed conflicts and

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73. 18 U.S.C. § 2340 (2)(B)–(D).

74. Three detainees have been water boarded at Guantánamo: Khalid Sheikh Mohammed, believed to have masterminded the September 11<sup>th</sup> attack, and al Qaeda leaders Abu Zubaydah and Abd al-Rahim al-Nashiri. These detainees were water boarded 266 times. Abu Zubaydah, believed to be a close associate of Osama bin Laden, was water boarded 83 times in August 2002. In the case of water boarding, the subject is strapped to a board placed at an incline with the subject’s head lower than his feet, a cloth is placed over his face, and water is repeatedly poured over the cloth, penetrating the nose and interrupting breathing, thereby triggering a gag reflex and choking the subject.

75. Exec. Order No. 13492, ¶ 3, 74 Fed. Reg. 16, 4897 (22 Jan. 2009), available at <http://edocket.access.gpo.gov/2009/pdf/E9-1893.pdf>.

76. *Id.*, at ¶ 6.

77. Exec. Order No. 13491, 74 Fed. Reg. 16, 4893 (22 Jan. 2009), available at <http://edocket.access.gpo.gov/2009/pdf/E9-1885.pdf>.

counterterrorism operations.”<sup>78</sup>

Although persons responsible for acts of torture as defined in the Torture Convention can be prosecuted in the United States, President Obama on April 17, 2009, stated publicly that the persons responsible for administering unlawful methods of interrogation at Guantánamo Bay will not be prosecuted. This is understandable, at least as far as the persons actually executing the acts of water boarding are concerned who were given assurances that water boarding was lawful. As far as the public officials of higher rank are concerned, notably those “experts” who advised members of the CIA that their methods of interrogation were lawful, granting a pardon is perhaps less so — though one should have understanding, as a matter of *real politique*, for the new President not wanting to sanction high-ranking officials of the previous regime. It must be realized, though, that persons responsible for ordering, justifying, or executing acts of torture can be prosecuted in certain other countries under the rubric of universal jurisdiction.

The Torture Convention Implementation Act makes provision, in conformity with the Torture Convention, for the exercise of universal jurisdiction by American courts to bring perpetrators of torture committed outside the United States to justice, irrespective of the nationality of the victim or of the alleged offender.<sup>79</sup> The Act was subsequently amended to subject someone who conspires to commit torture to the same penalties as one who has actually committed torture, with the exception of the death penalty.<sup>80</sup>

The above analysis shows that implementation legislation enacted by the United States to incorporate international human rights conventions is not always fully in accord with the Convention provisions. This in itself is not necessarily a bad thing. National States must adapt the international norms to the demands of their municipal legal systems, and in many cases improve the protections dictated by the international convention. Defining “severe mental pain or suffering” in the Torture Convention Implementation Act, and including in that definition “the administration or application . . . of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality” represents a positive contribution of the United States to the refinement of the concept of “torture.” This is of particular significance for purposes of dealing with international human rights violations in the United States.

#### IV. UNIVERSAL JURISDICTION

Article I, Section (8), Clause [10] of the American Constitution afforded to Congress the power “To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”

The language chosen by the Founders was not exactly elegant or precise,

78. Exec. Order No. 13493 ¶ 1(e), 74 Fed. Reg. 16, 4901 (22 Jan. 2009), available at <http://edocket.access.gpo.gov/2009/pdf/E9-1895.pdf>.

79. Torture Convention Implementation Act, *supra* note 70, § 2340A(a)-(b) (declaring that United States Courts will have jurisdiction over both a national of the United States and also people in the United States even if they are not a United States national).

80. USA Patriot Act, Pub. L. No. 107-56, § 811, 115 Stat. 272, 381 (2001).

but it has now been settled 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,<sup>81</sup> and in the case of war crimes in military tribunals.<sup>82</sup> This was indeed confirmed by The Judiciary Act of 1789, under which the federal court system was established. Section 11 of the Act afforded to circuit courts “exclusive cognizance of all crimes and offences cognizable under the authority of the United States.”<sup>83</sup> Clause [10] was the only provision in the Constitution that referred to criminal offences and it is reasonable to assume that drafters of Article 11 intended those offences to be prosecuted by federal courts.<sup>84</sup> It has also been settled 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. If “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,” no further intervention by Congress is required.<sup>85</sup> The “reasonable certainty” prong of this requirement is based on the principle of legality as required by the norms of criminal justice. The principle of legality has been defined by the U.S. Supreme Court in a totally different context 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.”<sup>86</sup>

Article I, Section (8), Clause [10], thus in a word afforded to federal courts universal jurisdiction to prosecute piracies and felonies committed on the high seas and offenses against the law of nations — a phrase which is currently more commonly referred to a customary international law.<sup>87</sup>

Universal jurisdiction has been defined accordingly as “the right of a state to institute legal proceedings and to try the presumed author of an offence, irrespective of the place where the said offence has been committed, the

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81. See, e.g., Edwin D. Dickenson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 46–47 (1952); Johan D. van der Vyver, *Prosecuting Offences against the Law of Nations in the United States*, 20 EMORY INT’L L. REV., 473, 480 (2006).

82. See *Ex parte Quirin*, 317 U.S. 1, 27–28 (1942) (proclaiming that the U.S. Supreme Court has “from the 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”).

83. The Judiciary Act, sec. 11, 1 STAT. 73 (1789); see Quincy Wright, *Treaties and the Constitutional Separation of Powers in the United States*, 12 AJIL 64, 84 n.89 (1918) (noting that the Section afforded concurrent jurisdiction to circuit courts with district courts “of the crimes and offences cognizable therein”); see also Jordan J. Paust, *Congress and Genocide: They’re Not Going to Get Away With It*, 11 MICH. J. INT’L L. 90, 103 (1989–90).

84. Dickenson, *supra* note 81, at 46–47 (1952); see *Zamora-Trevino v. Barton*, 727 F. Supp. 589, at 591 (D. Kan., 1989) (proclaiming that international law is a matter of federal law).

85. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, at 160–61 (1820).

86. *Connally v. General Constr. Co.*, 269 U.S. 385, at 391 (1926).

87. See Johan D. van der Vyver, *Prosecuting Offences against the Law of Nations in the United States*, 20 EMORY INT’L L. REV., 473, 482, 500 (2006).

nationality or the place of residence of its presumed author or of the victim.”<sup>88</sup> Universal jurisdiction to prosecute international crimes amounts to the implementation of international law pertaining to the most heinous crimes under customary international law that can be prosecuted in the municipal courts of any state irrespective of the locality of the crime or the nationality of the perpetrator. In his seminal anthology on war and peace, Grotius (1583-1645) proclaimed:

The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any person whatsoever.<sup>89</sup>

Several international conventions incorporated the principle of universal

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88. Symposium, *Brussels Principles against Immunity and for International Justice*, Principle 13, Brussels Group for International Justice, 149, 157 (2002) (Combating Impunity: Proceedings of the Symposium Held in Brussels from 11 to 13 March 2002); and see OPPENHEIM'S INTERNATIONAL LAW 469-70 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); 2 INTERNATIONAL CRIMINAL LAW 31-33 (M. Cherif Bassiouni ed., 1986); LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 102-16 (1992); LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 109-10 (2002); GERHARD WERLE, VÖLKERSTRAFRECHT 69 (2003); Sharon A. Williams, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 332-33 (Otto Triffterer ed., 1999); Michael P. Scharf, THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 215 Sarah B. Sewall and Carl Kaysen eds., (2000); Christopher Keith Hall, HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN: ESSAYS IN HONOUR OF ASBJØRN EIDE, 112 (Morten Bergsmo ed., 2003); 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 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. TRANSNAT'L L. 457, 481-82 (1994); Hans Corell, *Nuremberg and the Development of an International Criminal Court*, 149 MIL. L. REV. 87, 90 (1995); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 576 (1995); Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS. 153, 165-66 (1996); 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*, 13 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); J.D. van der Vyver, *Universal Jurisdiction in International Criminal Law*, 24 S. AFR. Y.B. INT'L L. 107 (1999); 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 W. J. INT'L L. 47, 53-57 (1999); Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421, 427-28 (2000); Gerhard Erasmus & Gerhard Kemp, *The Application of International Criminal Law Before Domestic Courts in the Light of Recent Developments in International and Constitutional Law*, 27 S. AFR. Y.B. INT'L L. 64, 65-68 (2002).

89. 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 505 (1626).

jurisdiction for prosecution of crimes to which they relate by mandating States Parties to either extradite a suspect in their custody or to assert jurisdiction over the suspect, irrespective of where the crime was committed.<sup>90</sup> Each one of the four Geneva Conventions of 12 August 1949 relating to armed conflicts contains the following provision:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches [of the Convention], and shall bring such persons, regardless of their nationality, before its own 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 the High Contracting Party has made out a prima facie case.<sup>91</sup>

The obligation placed upon States Parties to an international treaty by that treaty to exercise universal jurisdiction to bring perpetrators of crimes specified in the treaty to justice is commonly referred to as “compulsory universal jurisdiction.”<sup>92</sup>

The United States has since early times recognized the power of its courts to prosecute persons for acts of piracy,<sup>93</sup> and by participating in the Nuremberg and

90. See, e.g., the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, art. 4(2), 22 U.S.T. 1641; 10 I.L.M.133 (1971) the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aviation, 1971, art. 5(2), 24 U.S.T. 565; 10 I.L.M. 1151 (1971); The Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, art. 5, G.A. Res. 3068 (XXVIII) of Nov. 30, 1973 (annex), 28 U.N. GAOR Supp. (No. 30), U.N. Doc. A/9030, at 75; 1015 U.N.T.S. 244; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 1973, art. 3(2), 28 U.S.T. 1975, 1035 U.N.T.S. 167 (1977); the International Convention against Taking of Hostages, 1979, art. 5(2), G.A. Res. 146 (XXXIV) of 17 Dec. 1979, 34 U.N. GAOR Supp. (No. 46), U.N. Doc. A/34/46, at 245 (1979); 74 AM. J. INT’L L. 227 (Jan. 1980); 18 I.L.M. 1456 (1979); the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984, art. 5(2), G.A. Res. 39/46 of Dec. 10, 1984, 39 U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/51, at 197; 23 I.L.M. 1027 (1984), as modified (24 I.L.M. 535 (1985)).

91. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1949, art. 49, 6 U.S.T. 3115, 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 1949, art. 50, 6 U.S.T. 3219, 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, 1949, art. 129, 6 U.S.T. 3316, 75 U.N.T.S. 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1949, art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287; and see C.P.M. Cleiren & M.E.M. Tijssen, *Rape and Sexual Assault in the Armed Conflict of the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues*, 5 CR. L. F. 471, 486–87 (1994); Andreas Zimmermann, *Die Schaffung eines ständigen Internationalen Strafgerichtshofes: Perspektiven und Probleme vor der Staatenkonferenz in Rom*, ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 47, 90–91 (1998); 2, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 1879–80 (Gennady M. Danilenko et al. eds., 2002); Hall, *supra* n. 78, at 130–31.

92. See, for example, Mireille Delmas-Marty, *The ICC and the Interaction of International and National Legal Systems*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 1919 (Antonio Cassese, Paolo Gaeta & John R.W.D. Jones eds., 2002).

93. See, e.g., *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. 15,551) (“ . . . no one can doubt, that vessels and



Tokyo trials, it has also recognized the validity of universal jurisdiction with respect to at least war crimes and crimes against humanity.<sup>94</sup> American courts often refer with approval to the principle of universality with regard to crimes other than piracy.<sup>95</sup> The Restatement of Foreign Relations 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.<sup>96</sup>

The principle of universal jurisdiction was directly in issue in the case of *Demjanjuk v. Petrovsky*.<sup>97</sup> 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 in 1943 as a guard at the Sobidór death camp of Nazi Germany in present-day Poland. Demjanjuk opposed the application *inter alia* on the grounds that Israel had no jurisdiction to prosecute crimes committed outside its geographical boundaries and at a time when Israel did not even exist as a State. Having asserted that international law recognized universal jurisdiction over certain crimes,<sup>98</sup> 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. It might be noted that Demjanjuk was acquitted in Israel for lack of evidence identifying him as “Ivan the Terrible” who was responsible for the death of approximately 16 000 people.<sup>99</sup> He returned to the United States and was deprived by American authorities of his permanent resident status. Following a long legal battle to remain in the United States, the U.S. Supreme Court on May 7, 2009 finally denied a stay of his deportation to Germany.<sup>100</sup> John Demjanjuk — a native Ukrainian, 89 years old and described by some as “a sick old man” — arrived in Munich on May 12, 2009 to stand trial in Germany for the crimes he allegedly committed during World War II. His trial

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property in the possession of pirates may be lawfully seized on the high sea by any person, and brought in for adjudication”).

94. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985); see *United States v. Yoosef*, 327 F.3d 56, 103 (2d Cir. 2003) (confirming that universal jurisdiction is permitted over piracy, war crimes and crimes against humanity).

95. See, e.g., *Rivand v. United States*, 375 F.2d 882, at 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, at 216–23 (ND Cal. 1981) (terrorism); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, at 781 (D.C. Cir. 1984) (terrorism); *Demjanjuk*, 776 F.2d at 581–83 (crimes against humanity); *United States v. Yunis*, 681 F. Supp. 896, at 900–01 (D.D.C. 1988), 924 F.2d 1086, at 1092 (D.C. Cir. 1991) (aircraft piracy and hostage taking); PAUST, *supra* note 16, at 420–22.

96. Restatement (Third) of Foreign Relations Law of the United States, § 404; see *BeAnnal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 371 (E.D. La. 1997).

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

98. *Id.*, at 582.

99. *Ivan (John) Demjanjuk v. State of Israel (Special Issue)*, Criminal Appeal 347/88 (1993); see Mordichai Kremnitzer, *The Demjanjuk Case*, 24 ISRAELI Y.B. HUM. RTS 269–95 (1994); Fania Domb, *The Demjanjuk Trial*, 24 ISRAELI Y.B. HUM. RTS 323–41 (1994)

100. *John D. Demjanjuk v. Eric H. Holder Jr., Attorney General*, Appl. 08A978 (May 7, 2009).

before the *Landsgericht* (Provincial Court) of Munich commenced on August 30, 2009, and on May 12, 2011 he was convicted on several serious charges and sentenced to five years in prison.<sup>101</sup> He appealed against his conviction and sentence and died before the appeal could be heard. In German law, a conviction is suspended pending an appeal and Demjanjuk consequently went to his grave without a criminal record.<sup>102</sup>

Federal courts have also asserted jurisdiction in cases of aircraft hijacking that occurred beyond the national borders of the United States. The jurisdiction of a federal court in *United States v. Rezaq* relating to hijacking of a flight of Airegypt from Athens (Greece) to Cairo (Egypt) in which an Israeli and American citizen were killed by the hijackers<sup>103</sup> could be based on the passive personality principle,<sup>104</sup> but the Court also stated that “[t]he justification for universal jurisdiction over hijackers is clear.”<sup>105</sup> Jurisdiction in the case of *United States v. Yunis*<sup>106</sup> for air piracy derived solely from the principle of universal jurisdiction since American citizens were not victims of the hijacking. 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 connection to the hijacking and its citizens are not involved.”<sup>107</sup>

Courts in the United States would not readily assert extra-territorial jurisdiction in criminal cases, absent a clear congressional directive.<sup>108</sup> In *Prosecutor v. Yoosef*, the U.S. Court of Appeals for the Second Circuit proclaimed that the universality principle applies only to “the few near-unique offences uniformly recognized by the ‘civilized nations’ as an offence against the ‘Law of Nations’,”<sup>109</sup> and went on to say:

The historical restriction of universal jurisdiction to piracy, war crimes, and crimes against humanity demonstrates that universal jurisdiction arises under customary international law only where crimes (1) are universally condemned by the community of nations, and (2) by their nature occur either outside of a State or where there is no State capable of punishing, or competent to punish, the

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101. *John Demjanjuk*, *Landsgericht München II, Strafkammer* (Aktenzeichen 1 Ks 115 Js 12496/08); and see Christian Fahl, *Einige materielle und prozessuale Überlegungen zum Fall Demjanjuk*, 3 ZEITSCHRIFT FÜR DAS JURISTISCHE STUDIUM, 229–34 (2011), available at [www.zjs-online.com](http://www.zjs-online.com).

102. See in general, John Demjanjuk, WIKIPEDIA, available at [http://en.wikipedia.org/wiki/John\\_Demjanjuk](http://en.wikipedia.org/wiki/John_Demjanjuk).

103. *United States v. Rezaq*, 899 Fed. Supp. 697 (D.D.C. 1995), *aff'd* *United States v. Rezaq*, 134 F.3rd 1121 (D.C.C. 1998).

104. The passive personality principle affords to the courts of a particular state the competence to exercise criminal jurisdiction over a crime committed outside of the borders of that state if a victim of the crime is a national of that state.

105. *United States v. Rezaq*, 899 Fed. Supp. at 709.

106. *United States v. Yunis*, 681 F. Supp. 896, 900–01 (D.D.C. 1988), 924 F.2d 1086, 1092 (D.C.Cir. 1991).

107. *Id.*, at 1092.

108. *Id.*, at 1091; see *United States v. Bowman*, 260 U.S. 94, at 98 (1922); *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, at 285 (1949).

109. *United States v. Yoosef*, 327 F.3d 56, 103 (2d Cir. 2003).

crime (as in a time of war).<sup>110</sup>

It should be noted, though, that in international law the crimes that can be prosecuted under the rubric of universal jurisdiction in modern time include a much wider spectrum. In *Demjanjuk v. Petrovsky*, the Court defined the current norm that supports, and at the same time confines, its application:

The “universality principle” is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offences.<sup>111</sup>

The criterion for application of the principle of universal jurisdiction must accordingly be sought in the heinous nature of the crime (of which its dimensions are an element) and not so much in the absence of territorial jurisdiction of national states with regard to the locality of the crime.<sup>112</sup> It is today generally accepted that crimes against humanity are subject to universal jurisdiction.<sup>113</sup> The International Law Commission certainly proceeded on the assumption that States Parties “shall take such measures as may be necessary to establish its jurisdiction over” an impressive list of crimes against humanity, “irrespective of where or by whom those crimes were committed.”<sup>114</sup>

A matter that has received special attention in recent years was whether or not acts of terror violence committed beyond the borders of the United States and not involving American nationals as the perpetrators or victims of such atrocities can be prosecuted in the United States under the rubric of universal jurisdiction.<sup>115</sup> In *Prosecutor v. Yoosef*, it was decided that “[t]he indefinite category of ‘terrorism’ is not subject to universal jurisdiction.”<sup>116</sup> Earlier, the District Court for New York cited with approval a passage from the Restatement of Law proclaiming that “universal jurisdiction is increasingly accepted for certain acts of terrorism, such as . . . indiscriminate violent assaults on people at large.”<sup>117</sup>

Limitations to the exercise of universal 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.<sup>118</sup> The fact that perpetrators of crimes subject to universal jurisdiction

110. *Id.*, at 105.

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

112. *Democratic Republic of Congo v. Belgium*, 2002 I.C.J. 3, (separate opinion of Judges Higgins, Kooijmans & Buergenthal), ¶ 46 (Feb. 14).

113. Cleiren & Tijssen, *supra* note 91 **Error! Bookmark not defined.**, 486–87; L.C. Green, “*Grave Breaches*” or *Crimes against Humanity*, 8 U.S.A.F.A CAD. J. LEGAL STUD. 19, 27–28 (1997-98); Zimmermann, *supra* note 81, at 89–90.

114. International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind*, art. 8, read with art. 18, 51 U.N. GAOR Supp. (No. 10) at 14, U.N. Doc. A/51/10 (1996).

115. *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C.Cir. 1991); see *United States v. Bowman*, 260 U.S. 94, 98 (1922); *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

116. *United States v. Yoosef*, 327 F.3d 56, 103 (2d Cir. 2003).

117. *United States v. Osama Bin Laden*, 92 F. Supp. 2d 189, at 222 (SDNY 2000).

118. Restatement (Third), *supra* note 15, at § 403.

are regarded as *hostis humani generis* (the enemy of all mankind)<sup>119</sup> should suffice to establish such a link to the territory. Consider, however, the (initial) approach of the United States to the crime of genocide.

The United States in 1986 ratified the *Convention on the Prevention and Punishment of the Crime of Genocide* subject to a package of RUDs that included two reservations, five understandings, and one declaration.<sup>120</sup> The Declaration made the entering into force of the ratification instrument dependent on the enactment of implementation legislation, which did occur in 1988 when the Genocide Convention Implementation Act (the Proxmire Act) became law.<sup>121</sup>

The reservations required in the one instance specific consent to submitting a dispute involving the Convention to the International Court of Justice,<sup>122</sup> and the other proclaimed the supremacy of the U.S. Constitution over the treaty obligations of the United States.<sup>123</sup> The list of understandings entailed the following directives: “intent to destroy in whole or in part” required by art. II of the Convention must be taken to mean the specific intent to destroy in whole “or in substantial part”; “mental harm” referred to in art. II(b) of the Convention must be restricted to “permanent impairment of mental faculties through drugs, torture, or similar techniques”; the principle of double criminality must apply as a condition of extradition; acts committed in armed conflict without the requirement of specific intent must not be taken to constitute genocide; and participation of the United States in an international penal court as contemplated by Article VI of the Convention will be conditional upon ratification of the concerned treaty by the U.S. Senate.<sup>124</sup>

It has been said that ratification of the Genocide Convention by the U.S. Senate was merely “a symbolic act”<sup>125</sup> and 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”<sup>126</sup> — or in the words of Jordan Paust, “to gut the treaty of any meaningful effect.”<sup>127</sup> In the present context it is of special importance to note that the Genocide Convention Implementation Act excluded the competence of American courts to exercise universal jurisdiction for the prosecution of acts of genocide.<sup>128</sup> It restricted

119. See, for example, *THE CASE OF S.S. LOTUS (FRANCE v. TURKEY)*, 1927 P.C.I.J., Ser. A No. 10 (Judgment No. 9), par. 249 (Sept. 7, 1927) (Moore, J., dissenting, observing that a pirate “is treated as an outlaw, as the enemy of all mankind — *hostis humani generis* — whom any nation may in the interest of all capture and punish”).

120. See 132 CONG. REC. S1337 (daily ed. Feb. 19, 1986) (statement of Sen. Mitchell). As to the package of RUD’s, 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).

121. 102 Stat. 3045 (1988), 18 U.S.C.A., § 1091-93.

122. 132 CONG. REC. (daily ed. Feb. 19, 1986), Reservation (1).

123. *Id.*, Reservation (2).

124. CONG. REC. S1355-01 (daily ed., Feb. 19, 1986).

125. LAWRENCE J. LE BLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION*, 144, 238 (1991).

126. *Id.*, at 241.

127. Paust, *supra* note 120, at 94.

128. The Genocide Convention seemingly does not found its jurisdictional provisions on the

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.<sup>129</sup> Its ultimate effect is therefore seemingly to preclude the prosecution in the United States of foreign nationals who have committed acts of genocide in a foreign country, thereby rendering the United States a safe haven for foreign perpetrators of genocide.<sup>130</sup>

In 2007, Congress enacted, and President George W. Bush signed into law, the Genocide Accountability Act of 2007, which amended the provision excluding the competence of American courts to exercise universal jurisdiction in cases of genocide.<sup>131</sup> Section 2(5) of the Act extended the jurisdiction of American courts to also prosecute an alleged perpetrator of genocide who is brought into, or found in, the United States (irrespective of the nationality or place of residence of that person) “after the conduct required for the offence occurs, . . . even if that conduct occurred outside the United States.”<sup>132</sup> American courts can now exercise universal jurisdiction to bring perpetrators of genocide to justice but, understandably, cannot try them *in absentia*.<sup>133</sup>

Congress has in recent years also extended the competence of American courts to exercise universal jurisdiction to other international crimes, such as the use of child soldiers,<sup>134</sup> and the trafficking in persons.<sup>135</sup>

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principle of universal jurisdiction — at least not as far as prosecutions in the municipal courts of a State Party is concerned. Yet, probably no one would today deny that genocide is a crime under customary international law with the force of *ius cogens* and therefore subject to universal jurisdiction for bringing perpetrators of genocide to justice. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) Provisional Measures*, 1993 I.C.J. 325, par. 110 at 443 (Sept. 13, 1993) (Judge Lauterpacht holding that the definition of “genocide” in Article 1 of the Genocide Convention was intended “to permit parties, within the domestic legislation that they adopt, to assume universal jurisdiction over the crime of genocide — that is to say, even when the acts have been committed outside their respective territories by persons who are not their nationals”); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) Preliminary Objections*, 1996 I.C.J. 595, par. 31 at 616 (July 11, 1996) (the ICJ reiterating that “the obligation each State thus has to prevent and punish the crime of genocide is not territorially limited by the Convention”); and see also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia)*, 1997 I.C.J. 243, par. 35 (at 258) (Dec. 17, 1997).

129. 18 U.S.C.A., § 1091 (d).

130. See Steven, *supra* note 88, at 462, 464–65.

131. Pub. L. No. 110-151; 121 Stat. 1821; see Zachary Pall, *The Genocide Convention Accountability Act and U.S. Law: The Evolution and Lessons of Universal Jurisdiction for Genocide*, 3.1 INTERDISCIPLINARY J. HUM. RTS. 13–34 (2008-2009).

132. 18 U.S.C.A., § 1091, as amended by the Genocide Accountability Act of 2007, § 2(5).

133. *Id.*

134. Child Soldiers Accountability Act, Public Law 110-340, 122 STAT. 3735 (Oct. 3, 2008), 18 U.S.C. § 2442 (affording to American courts jurisdiction if the alleged offender is present in the United States, irrespective of the nationality of the alleged offender”).

135. Trafficking in Persons Accountability Act of 2008, 110<sup>th</sup> Cong. § 1703 (Oct. 2, 2008) (affording to American courts jurisdiction if “an alleged offender is present in the United States, irrespective of the nationality of the alleged offender,” but placing a limitation on the exercise of jurisdiction “if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offence”).

### V. UNIVERSAL JURISDICTION IN CIVIL PROCEEDINGS

In the United States, the principle of universal jurisdiction has also been made applicable to civil actions. Under Alien Tort Statute (ATS), 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.<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup>

In the United States the concept of “the law of nations” has been clouded in controversies, largely in consequence of efforts to restrict the implementation of the ATS. It has come to be accepted that the substance of “the law of nations” must be established in view of the “customs and usages of civilized nations,”<sup>139</sup> which 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.”<sup>140</sup> 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.”<sup>141</sup> Offences against the law of nations that have been identified by American courts thus far include piracy,<sup>142</sup> torture,<sup>143</sup>

136. 28 U.S.C. § 1350.

137. 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.

138. *Id.*

139. *Paquete Habana*, 175 U.S. 672, at 700 (1900); and *see also id.*, at 694, at 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, at 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, at 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, at 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, at 187 (1871) (resting it “upon the common consent of civilized communities”); *Dooley v. United States*, 182 U.S. 222, at 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, at 296 n.19 (1963) (basing it on the “common consent of nations”).

140. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820); *see also Republica v. De Longchamps*, 1 U.S. (1 Dall.) 111, at 116 (1784) (referring to “the practice of different nations, and the authority of writers”); *Fremont v. United States*, 58 U.S. 542, at 557 (1854); *Moultree v. Hunt*, 23 N.Y. 394, at 396 (1861); *Hilton v. Guyot*, 159 U.S. 113, at 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, at 230-31 (1901) (citing Halleck); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, at 295 (1963); *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, at 1201 n. 13 (9<sup>th</sup> Cir., 1975); *Filartiga v. Peña-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

141. *Paquete Habana*, 175 U.S. 672, at 700 (1900); *Filartiga*, 630 F.2d at 880-81.

142. *Smith*, 18 U.S. at 161; *Filartiga*, 630 F.2d at 880; *Kadić v. Karadžić*, 70 F.3d 232, 239 (2d Cir.

violations of the laws of war,<sup>144</sup> the slave trade,<sup>145</sup> arbitrary detentions,<sup>146</sup> acts designed to intimidate, coerce, harass, or bring into disrepute diplomatic and consular representatives,<sup>147</sup> and counterfeiting notes of foreign countries.<sup>148</sup> Actions entertained by American courts under the Alien Tort Claims Act of 1789 were, for example, based on torture,<sup>149</sup> genocide, war crimes, torture and summary executions,<sup>150</sup> forced labor,<sup>151</sup> and grave human rights abuses.<sup>152</sup>

It should be noted, though, that the U.S. Supreme Court in *Sosa v. Alvarez-Machain*, more recently adopted a conservative approach to the concept of “law of nations” for purposes of the 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.”<sup>153</sup> 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.”<sup>154</sup> Though American courts are not precluded from recognizing (new) causes of action based on “the present-day law of nations,”<sup>155</sup> 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.”<sup>156</sup> 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.”<sup>157</sup> Acting upon this directive, the District Court of New York dismissed

1995).

143. *Filartiga*, 630 F.2d at 880; In re Estate of Ferdinand E. Marcos Human Rights Litigation, 976 F.2d 493, at 499–500 (9<sup>th</sup> Cir., 1992).

144. Ex parte Quirin, 317 U.S. 1, at 27–28, 29–30 (1942); In re Yamashita, 327 U.S. 1, at 7 (1946); *Kadić*, 70 F.3d at 239 (referring to “certain war crimes”); *Doe v. Unocal Corporation*, 2004 WL 2402875, 6 (9<sup>th</sup> Cir., 2004).

145. Charge to Grand Jury, 30 Fed. Cas. 1026, at 1030 (C.C., Ga., 1859); *United States v. Haun*, 26 F. Cas. 227 (C.C.S.D. Ala., 1860); *Kadić*, 70 F.3d at 239; *Doe*, 2004 WL 2402875, 6.

146. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, at 1541 (N.D. Cal., 1987); *Fernandez v. Wilkinson*, 505 F. Supp. 787, at 798 (D.C. D. Kan., 1980).

147. *Frend v. United States*, 100 F.2d 691, at 692–93 (C.A. D.C., 1938); see *Dickenson*, *supra* note 81, at 30.

148. *United States v. Arjona*, 120 U.S. 479, at 484 (1887).

149. *Filartiga v. Peña-Irala*, 630 F.2d 876, 880 (2d Cir. 1980); *Siderman de Blank v. Republic of Argentina*, 965 F.2d 699, at 717 (9<sup>th</sup> 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*”).

150. *Kadić*, 70 F.3d at 239.

151. *Doe*, 2004 WL 2402875, 6.

152. *Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88 (2d Cir., 2000).

153. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, at 2759 (2004).

154. *Id.*

155. *Id.*, at 2761.

156. *Id.*, at 2765.

157. *Id.*, at 2763.

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.<sup>158</sup>

The cautious approach of the U.S. Supreme Court to application of the ATS was more recently endorsed in the court's decision in *Kiobel v. Royal Dutch Petroleum Co. & others*,<sup>159</sup> but from a different angle. It was decided that foreign nationals could not sue corporations based in the Netherlands, Great British, and Nigeria in a U.S. federal court under the ATS for aiding and abetting human rights violations committed in Nigeria. The five-judge majority based its decision on the presumption against the extraterritorial application of American law, proclaiming with reference to *Morrison v. National Australia Bank Ltd*, that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."<sup>160</sup> Give "the danger of unwarranted judicial interference in the conduct of foreign policy" which "is magnified in the context of the ATS," the majority endorsed "the need" emphasized in *Sosa*, "for judicial caution in considering which claims could be brought under the ATS."<sup>161</sup> Where, as in this case, the plaintiff and the corporate defendants are not nationals of the United States, and the tortious acts complained of lacked any connection with the United States, "the presumption against extraterritoriality applies to claims under the ATS."<sup>162</sup> "And even where the claims touch and concerns the territory of the United States," the majority concluded, "they must do so with sufficient force to displace the presumption against extraterritorial application" of the ATS.<sup>163</sup>

Justice Breyer, J. (with whom Justices Ginsberg, Sotomayor and Kagan agreed), based his concurring judgment on the jurisdictional reach of American federal courts rather than on the presumption against extraterritoriality. Jurisdiction to adjudicate ATS cases must be founded on (a) the principle of territoriality (the alleged tort occurs on American soil"); (2) the principle of active personality (the defendant is an American national); or (3) considerations of the national interests of the United States ("the defendant's conduct substantially and adversely affects an important American national interest").<sup>164</sup> It is rather surprising that Breyer, J. did not also consider universal jurisdiction as a basis for ATS adjudication but confined his jurisdictional analysis to the key issue as to whether or not "distinct American interests are at issue,"<sup>165</sup> The ATS is after all founded on the application of universal jurisdiction to civil actions for damages. International law require of nations "not to provide safe harbours for their own nationals who commit . . . serious crimes abroad."<sup>166</sup> Justice Breyer emphasized

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158. In re: South African Apartheid Legislation, 346 F. Supp. 2d 538 (S.D.N.Y., 2004).

159. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 185 L.Ed. 2d 671 (2013).

160. *Id.*, at 133 S.Ct. at 1664, citing *Morrison v. National Australia Bank Ltd.*, 561 U.S. \_\_ (2010) (slip op. at 6); see also *Kiobel*, 133 S.Ct., at 1666 (referring to "the presumption against application of [the ATS] to conduct in the territory of another sovereign").

161. *Kiobel*, 133 S.Ct., at 1664.

162. *Id.*, at 1669.

163. *Id.*

164. *Id.*, at 1671; see also *id.*, at 1673; Restatement (Third), *supra* note 15, Section 403.

165. *Id.*, at 1674.

166. *Id.*, at 1675.



in conclusion that the plaintiffs were not American nationals, that the conduct took place in another country, and that the defendants were not engaged in the acts of torture, genocide, or any equivalent crimes as principal perpetrators but were accused of merely aiding and abetting in the commission of those crimes.<sup>167</sup> Although the shares of the defendant companies are traded on the New York Stock Exchange and those companies have an office in New York (owned by an affiliated company), “it would be farfetched” to hold that their “indirect and minimal presence” will suffice “to vindicate a distinct American interest” in the United States for purposes of triggering the jurisdiction of the municipal courts.<sup>168</sup>

Returning, though, to the question of universal jurisdiction which was not at issue in *Kiobel*, it must be emphasized that the U.S. Supreme Court in *Sosa* did not do justice to the fact that the law of nations is subject to “organic growth”<sup>169</sup> 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.”<sup>170</sup> 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.<sup>171</sup> In this regard a final word should therefore be devoted to the Statute of the International Criminal Court (ICC Statute).

It would be fair to conclude that the crimes listed in the ICC Statute reflect contemporary proscriptions of the law of nations. It is important to bear in mind that drafters of the ICC Statute decided to confine the subject-matter jurisdiction of the International Criminal Court (ICC) to customary-law crimes only,<sup>172</sup> that those crimes were meticulously defined in the ICC Statute,<sup>173</sup> and that the definitions of crimes in the ICC Statute, with only one exception,<sup>174</sup> were adopted by general agreement and can therefore without question be accepted as reflective of the *opinion juris ex necessitate*. Insofar as some delegations who voted against adoption of the ICC Statute or abstained in the final vote based their concerns on the subject-matter jurisdiction of the ICC, their concerns were not

167. *Id.*, at 1678.

168. *Id.*

169. *Romero v. International Term, Operating Co.*, 358 U.S. 354, 360 (1959); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 295-96 (1963).

170. *Bergman v. De Sieyes*, 71 F. Supp. 334, at 337 (S.D.N.Y., 1946).

171. *Filartiga v. Peña-Irala*, 630 F.2d 876, 881 (2d Cir. 1980). Note that in *Filartiga*, “law of nations” was equated to “international law”. *Id.*

172. See Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in ROY S. LEE (ed.), *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 79, at 80-81 (1999).

173. 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).

174. Israel voted against adoption of the ICC Statute because of the inclusion of Article 8(2)(b)(viii) (The transfer, directly or indirectly, by an Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside the territory”). 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.

founded on what went into the ICC Statute, but on what was *not* included,<sup>175</sup> for example the crime of aggression<sup>176</sup> (Sudan, speaking on behalf of the Arab Group of States),<sup>177</sup> 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). 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 American opposition to the ICC regime prevent federal courts from accepting those crimes and their definitions as reflective of customary international law. The United States negative vote at the Rome Conference was not based on the subject-matter jurisdiction of the ICC,<sup>178</sup> and the American delegation in fact formed part of the body of States that adopted the definitions of crimes by general agreement.

## VI. CONCLUDING OBSERVATIONS

International relations of the United States have over the years been tainted by a certain exclusive mind-set. First and foremost in this regard is the notion that the United States is something special and should be treated differently within the international arena. 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.

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

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175. Statements made at the final session of the Assembly of the Whole in Rome explaining the vote or abstention of some delegates were recorded in United Nations *Press Release of 17 July 1997*, U.N. Doc. L/ROM/22 (1997); *see also* U.N. Doc. A/CONF.183/ST.9.

176. 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 173, art. 5. General agreement was reached in this regard by the Review Conference that was held in Kampala, Uganda from May 31 to June 11, 2010, but implementation of the Kampala decisions on the crime of aggression will be kept in abeyance and reconsidered after 1 January 2016. *See* Johan D. van der Vyver, *Prosecuting the Crime of Aggression in the International Criminal Court*, 1 UNIV. MIAMI NAT'L SECURITY & ARMED CONFLICT L. REV. 1-52 (2011), available at <http://www.nsac.law.miami.edu/?pageid=51>.

177. Note, though, that Egypt and Jordan did accept the ICC Statute "as a package".

178. 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. *See* VAN DER VYVER, *supra* note 46, at 159-220.

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.

American exceptionalism was the major policy position of the delegation of the United States in proceedings that culminated in the creation of the ICC by the Conference of Diplomatic Plenipotentiaries for the Establishment of an International Criminal Court that was held in Rome on June 15, to July 17, 1998.<sup>179</sup> The American delegation had strict instructions from Washington D.C. to ensure that American nationals will not be subjected to prosecutions in an international criminal court without the consent of the American government.<sup>180</sup> Prior to the Rome Conference, Senator Jesse Helms (R-NC), at the time Chair of the Senate Special Committee on Foreign Relations, in a letter addresses to Secretary of State Madeleine Albright (dated March 26, 1998) promised that any treaty establishing “a permanent U.N. criminal court . . . without a clear U.S. veto . . . will be dead-on-arrival at the Senate Foreign Relations Committee.”<sup>181</sup> For present purposes it will suffice to note that American exceptionalism was decisively rejected by the Rome Conference in what some analysts earmarked as probably the biggest diplomatic defeat the United States has ever suffered. Although the Clinton administration signed (not ratified) the ICC Statute, the Bush administration responded to this defeat by cancelling the signature of the United States and withdrawing from further participation of the United States in proceedings of organs of the ICC.<sup>182</sup>

However, the election of Barack Obama to become the 44th President of the United States brought about radical changes in official governmental policies as far as international cooperation in matters of common interests is concerned. When the Human Rights Council of the United Nations was established in 2006, the George W. Bush administration indicated that it will not seek membership of the Council. In a letter dated April 24, 2009, the United States announced its candidacy for a seat in the Human Rights Council.<sup>183</sup> Annexed to the letter was a

179. 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, 121 States have ratified the Statute.

180. In an interview with *The Washington Post* preceding the Rome Conference, David Scheffer, Ambassador-at-Large for War Crime Issues and leader of the American delegation in proceedings for the establishment of an international criminal court, stated quite bluntly that “[a]ny arrangement by which a UN-sponsored tribunal could assert jurisdiction to prosecute Americans would be political poison in Congress.” See Thomas W. Lippman, *Ambassador to the Darkest Areas of Human Conflict*, THE WASHINGTON POST (Nov. 18, 1997) A19.

181. On file with author; see also David Scheffer, *US Policy on International Criminal Tribunals*, 13 AM. UNIV. INT’L L. REV. 1389, at 1399 (1998); David Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12, at 18–19 (1999).

182. As to the responses of the United States to the outcome of the Rome Conference, 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); Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal justice, and National Self-Righteousness*, 50 EMORY L.J. 775–832 (2001).

183. Letter dated April 22, 2009 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the General Assembly, U.N. Doc. A/63/831 (24 April 2009), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/63/831&lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/63/831&lang=E).

document outlining the commitments and pledges of the United States in respect of human rights.<sup>184</sup> On May 12, 2009, the United States was duly elected to the Council (receiving 167 votes).

The Obama administration has also given early indications of a revised policy toward the ICC. On January 29, 2009, in her first address to (a closed meeting of) the Security Council, newly appointed U.S. Ambassador to the United Nations Susan E. Rice observed: "The International Criminal Court, which has started its first trial this week, looks to become an important and credible instrument for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda, and Darfur."<sup>185</sup> In 2009, the United States under guidance of the Obama administration "re-engaged" with the ICC and has since then fully participated in proceedings of the ICC's Assembly of States Parties. It not only fully participated in the Review Conference that was held in Kampala, Uganda on May 31 to June 11, 2010, but also became the first non-Party State to make pledges for future cooperation with the ICC. Those (two) pledges entailed, firstly, a renewed commitment "to support rule-of-law and capacity building projects which will enhance States' ability to hold accountable those responsible for war crimes, crimes against humanity and genocide"; and secondly, a reaffirmation of "President Obama's recognition on May 25, 2010 that we must renew our commitments and strengthen our capabilities to protect and assist civilians caught in the LRA's wake, to receive those that surrender, and to support efforts to bring the LRA leadership to justice."<sup>186</sup> More recently, Congress adopted the Department of State Reward Program Update and Technical Corrections Act of 2012, which authorized the payment of "a reward to combat transnational organized crime and for information concerning foreign nationals wanted by international criminal tribunals."<sup>187</sup> The assessment of some analysts that the Bush administration's negative attitude toward the ICC regime only deferred the question of American re-engagement with the ICC for another day,<sup>188</sup> and predicting "the likelihood of an eventual warming of U.S. relations with the ICC,"<sup>189</sup> have therefore come to pass.

Needless to say, re-engagement of the United States with the ICC was an essential step toward securing American interests within the international criminal justice system and enhanced the treatment of international human rights violations in the United States. Although the United States, in deference to the principle of sovereign immunity, has taken a conservative stand on applying the

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184. U.S. Human Rights Commitments and Pledges, *available at* <http://www.state.gov/documents/organization/122476.pdf> (24 April 2009).

185. Susan E. Rice, U.S. Permanent Rep. to the United Nations, *Statement Ambassador Susan E. Rice US Permanent Representative Respect International Humanitarian Law Security Council* (Jan. 29, 2009), *available at* <http://usun.state.gov/briefing/statements/2009/january/127018.htm>.

186. *Id.*, ("LRA" denoting the Lord's Resistance Army responsible for violence in northern Uganda).

187. Department of State Reward Program Update and Technical Corrections Act of 2012, 112<sup>th</sup> Congress, 2<sup>nd</sup> Session, S, 2318 (April 19, 2012).

188. BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW*, 182 (2003).

189. *Id.*

constitutional and statutory directives for the exercise of universal jurisdiction in criminal prosecution and civil actions, it remains a driving force within the international community for the promotion and protection of human rights violations occurring within and beyond its national borders.