ARRESTING IMPUNITY: THE CASE FOR UNIVERSAL JURISDICTION IN BRINGING WAR CRIMINALS TO ACCOUNTABILITY

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I

INTRODUCTION

The war criminal sickens the conscience of civilized society.[1] War crimes are repulsive, heinous acts. War carried out under the most civilized laws of armed conflict is horrible, but its horrors are greatly exacerbated by those brutal acts of plunder, torture, rape, and murder that humanitarian laws of war forbid. Such vile acts affect not only those against whom they are perpetrated; they appall and offend all of humanity.

Since war criminals often operate with the knowledge and assistance of local political and legal authorities, domestic law does little to deter these actors. Prevention and punishment of war crimes thus become legal concerns and moral obligations, not just for those governments in whose territory crimes occurred, but for all states. Indeed, the effective prosecution and punishment of war criminals remain essential to the prevention of such crimes, the protection of human rights and fundamental freedoms, and the promotion of international peace and security.[2]

The horrors perpetrated in the former Yugoslavia during 1991-94 furnish a tragic case in point. This civil war left 250,000 persons dead, 2 million displaced, and an entire population scarred for life. But the most grotesque and enduring features of the Bosnian tragedy are the thousands of egregious acts perpetrated as war crimes by all sides against one another, but mainly by

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1. Throughout this analysis, the term "war crimes" denotes not only the violations of the laws and customs of war, but also "crimes against the peace, crimes against humanity, and genocide as those concepts have been defined since the end of the Second World War." *See* 2 L. OPPENHEIM, INTERNATIONAL LAW §§ 252-53 (9th ed. 1993); Charter of the International Military Tribunal, art. VI, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; *see also* Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, 78 U.N.T.S. 277 (defining genocide as killing and other acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group"); Quincy Wright, *War Criminals*, 39 AM. J. INT'L L. 257, 261 (1945).

2. *See* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *adopted* Nov. 26, 1968, preamble, 754 U.N.T.S. 73, 74-75 (entered into force Nov. 11, 1970), *reprinted in* 8 I.L.M. 68 (1969).

Bosnian Serbs against Bosnian Muslims. Although sinisterly disguised by the innocuous term "ethnic cleansing," these vile acts were revealed to the world in reports of concentration camps and summary executions of thousands of civilians. They were evidenced by the scores of mass graves unearthed throughout Bosnia, and personified by the hundreds, if not thousands, of women raped by their ethnic rivals and impregnated as a means of furthering genocide.

The international community was sufficiently revolted by the Serbs' premeditated policy of ethnic cleansing and its attendant genocidal atrocities that the U.N. Commission of Human Rights dispatched a Special Rapporteur in August 1992 to undertake investigations into the matter.[3] In October 1992, the United Nations Security Council asked the Secretary-General to establish a Commission of Experts to begin investigations of alleged war crimes.[4] An interim report of the appointed Commission found that mass killings, torture, rape, and other crimes had been committed in the former Yugoslavia. This finding impelled the Security Council to establish an international tribunal to prosecute the offenders.[5] On May 25, 1993, the Security Council, acting under Chapter VII of the U.N. Charter, established a tribunal and simultaneously adopted its constitutive statute.[6] Pursuant to Article 15 of that statute, on February 11, 1994, the eleven judges of the new International Criminal Tribunal for the Former Yugoslavia ("ICTFY") adopted rules of procedure and evidence to be used in the prosecution of war criminals in the former Yugoslavia.[7] Since then, an independent prosecutor has conducted investigations of persons alleged to have committed serious violations of international humanitarian law within the territory of the former Yugoslavia since 1991. As of August 1, 1997, indictments have been brought against seventy-five persons accused of committing vile war crimes. Of those indicted, however, only nine have been taken into custody for trial. The remaining sixty-six still are free.[8]

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3. *See* Report of the Special Rapporteur to the Commission on Human Rights of 28 August 1992, U.N. ESCOR, 1st Spec. Sess., Agenda Item 3, U.N. Doc. E/CN.4/1992/S-1/9 (1992); Report of the Special Rapporteur to the Commission on Human Rights of 27 October 1992, U.N. ESCOR, 1st Spec. Sess., Agenda Item 3, U.N. Doc. ECN.4/1992/S-1/10 (1992); Report of the Special Rapporteur to the Commission of Human Rights to the Forty Seventh Session of the General Assembly of 17 November 1992, U.N. GAOR, 47th Sess., Annex, Agenda Item 97(C), U.N. SCOR, 47th Sess., Annex, U.N. Doc. A/47/666-S/24809 (1992); Report of the Special Rapporteur to the Commission on Human Rights, U.N. ESCOR, 49th Sess., Agenda Item 27, U.N. Doc. E/CN.4/1993/50 (1993).

4. *See* S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., at 1, U.N. Doc. S/RES/780 (1992). On the work of the Commission, see M. Cherif Bassiouni, *The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia* (Occasional Paper #2, 1996, International Human Rights Law Institute, DePaul University).

5. *See* S.C. Res. 808, U.N. SCOR, 48th Sess., 3175 mtg., at 1, U.N. Doc. S/RES/808 (1993).

6. Statute of the International Tribunal, S.C Res. 827, U.N. SCOR 48th Sess., 3217 mtg., at 1, U.N. Doc. S/RES/827 (1993).

7. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence, U.N. Doc. IT/32, *adopted* Feb. 11, 1994 (entered into force Mar. 14, 1994), *reprinted in* 33 I.L.M. 484 (1994).

8. On October 6, 1997, ten Bosnian Croats indicted on charges of war crimes surrendered to the ICTFY, presumably because they believed that financial and personnel resources available to the Tribunal were insufficient for an effective prosecution. *See* Lee Hockstader, *10 Croats Surrender to War*

The fact that sixty-six indicted war criminals remain at large in the former Yugoslavia hardly satisfies the cause of justice or the demands of procedural fairness. Nor does it contribute to the international protection of human rights. Sufficient evidence was gathered to convince the Prosecutor for the ICTFY that these individuals did indeed perpetrate war crimes against other persons, and they should therefore be tried for those heinous acts in a court of law. These men nonetheless remain free, some openly engaged in post-conflict politics in Bosnia, and apparently not troubled by the international indictments or concerned about being arrested for trial, much less being punished. The NATO-led force in Bosnia has been reluctant to detain suspects whose whereabouts are known, for fear that arrests of political leaders would destabilize the uneasy peace. Impunity is subverting the processes of law and justice. The need arises, therefore, to resort to more responsible, more effective ways of bringing these alleged offenders to trial. Should any of the indicted persons ever leave the former Yugoslavia, universal jurisdiction can furnish a lawful means for concerned governments to effect that justice.

This article explores the legal nature of and rationale for using universal jurisdiction as a basis for prosecuting persons indicted by international tribunals as war criminals and criminals against humanity, but who remain free and at large. Part II examines the legal character of the acts for which these persons have been indicted in order to clarify their criminality under international law. Part III briefly assesses the general nature of jurisdiction under international law, with a view to setting out the lawful implications for governments that seek to prosecute individuals in their courts. The thrust of the analysis comes in Part IV, which examines the philosophical rationale and legal underpinnings for universal jurisdiction and explains the particular relevance it has for bringing to trial persons accused of war crimes and crimes against humanity. Finally, the article proffers, for reflective consideration, some conclusions on the nature of war crimes and the need for universal jurisdiction.

II

THE UNLAWFUL NATURE OF WAR CRIMES

International codification and consensus since the Second World War have confirmed war crimes as international criminal acts, thus permitting states to define and punish those extraterritorial crimes wherever, and by whomever, they are committed. Governments have seen fit to allocate to the international community legal competence to deal with designated crimes of an international character, perpetrated by certain persons, during a specified time period, in a

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Crimes Tribunal, WASH. POST, Oct. 7, 1997, at A11, col.1. Of the 75 persons indicted, one has been prosecuted, one pled guilty, five are on trial, and twelve are being held in custody awaiting trial. *See id.* On July 10, 1997, British commandos in Bosnia seized one fugitive and shot a second to death when he forcibly resisted arrest. *See* Stacy Sullivan, *War Crimes: Bosnia's Most Wanted*, NEWSWEEK, July 21, 1997, at 41.

given territory. In this respect, legal competence to deal with war crimes recently has been set out in the Statute of the International Tribunal for prosecuting persons accused of war crimes in the former Yugoslavia.

In particular, the Statute stipulates jurisdiction over certain criminal subject matter. Building upon the legal foundation and precedent laid in 1945 by the International Military Tribunal at Nuremberg[9] and the Article VI provisions of its Charter,[10] the Statute for the ICTFY articulates four groups of offenses for which persons may be prosecuted as war criminals under modern international law. These offenses include (1) grave breaches of the four Geneva Conventions of 1949,[11] (2) violations of the laws or customs of war, (3) acts of genocide, and (4) crimes against humanity. Each group of these war crimes merits closer examination.

A. Grave Breaches of the 1949 Geneva Conventions

Perhaps the clearest articulation of these offenses is found in the four Geneva Conventions of 1949, in particular the common Article (50/51/130/147) of those instruments.[12] This provision defines the "grave breaches" of interna-

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9. *See* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, *supra* note 1; *see also* 13 Dep't of State Bull. at 222 (1945). For treatment of the relevance of the Nuremberg Court for the International Tribunal for war crimes in Bosnia, see Christopher C. Joyner, *Enforcing Human Rights Standards in the Former Yugoslavia: The Case for an International War Crimes Tribunal*, 22 DENVER J. INT'L L. & POL'Y 235, 237-55 (1994).

10. Key among the Nuremberg Charter's central provisions was its Article VI, which defined the jurisdiction of the court in these terms:

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
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> (a) Crimes against the Peace: namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
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> (b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but shall not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, town or villages, or devastation not justified by military necessity;
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> (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
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> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan ….

Charter of the International Military Tribunal, *supra* note 1, art. VI.

11. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. No. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter 1949 Geneva Conventions].

12. As defined in the four 1949 Geneva Conventions, certain "grave breaches" are crimes commit-

tional humanitarian law that states are required to punish.[13] Common Article 50/51/130/147 also prescribes minimum rules applicable to situations of armed conflict not international in character.

The Statute of the ICTFY incorporates the essential language of this common "grave breaches" provision into its Article 2, as it gives the Tribunal lawful authority to prosecute persons "committing or ordering to be committed" certain acts. Thus, commission of any of the following acts is generally considered to be, without qualification, a war crime:

(a) willful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) willfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.[14]

Two notable improvements are made in Article 2 of the 1993 Statute over the 1949 Geneva Conventions. First, in paragraph (b), "biological experiments" were specified as a form of prohibited "inhuman treatment." Second, the language in the provision was adjusted to replace the notion of "protected persons" with a specific designation of "civilians." In this way, grave breaches of the laws of war can be found under the Statute when they are committed against civilians, irrespective of whether the conflict is legally interpreted to be an internal or an international war.

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ted against persons or property protected by the conventions and include:

(i) Willful killing, torture or inhuman treatment of protected persons;

(ii) Willfully causing great suffering or serious injury to body or health of protected persons;

(iii) Taking of hostages and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;

(iv) Unlawful deportation or transfer or unlawful confinement of a protected person;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; and,

(vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial prescribed in the Geneva Conventions.

1949 Geneva Conventions, *supra* note 11, common arts. 50/51/130/147, respectively.

13. *See id*. common art. 3.

14. Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., Annex at 36, U.N. Doc. S/25704 (1993); Statute of the International Tribunal, *supra* note 6, art. 2. Compare the language cited in common articles 50/51/130/147 of the four 1949 Geneva Conventions in note 11, *supra*.

B. Violations of the Laws or Customs of War

Another important part of international humanitarian law is found in the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, and in the regulations annexed thereto. As prescribed in the Statute of the ICTFY, persons may be prosecuted for violating the laws or customs of war (as derived from the Hague Regulations), including, but not restricted to the following:

> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
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> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) attack or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
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> (d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works or art and science;
>
> (e) plunder of public or private property.[15]

These provisions originate from Articles 23-28 of the 1907 Hague Regulations and have been generally accepted under international law as war crimes. They are specifically aimed at punishing persons who have engaged in indiscriminate bombardment of civilian population centers without military need or justification.

In sum, the relevant rules of customary international law bridge lacunae where the 1949 Geneva Conventions might not aptly apply. That is, certain war crimes might be committed that are not "grave breaches," nor genocide, nor breaches of the 1954 Hague Convention.

C. Acts of Genocide

The 1948 Convention on the Prevention and Punishment of Genocide,[16] when applied to the concept of "ethnic cleansing" committed within the territory of the former Yugoslavia, spells out actions prosecutable by the Yugoslav Tribunal that are clearly considered to be war crimes. The Statute for the ICTFY provides in its Article 4 that the Tribunal will prosecute persons accused of genocide, which is defined as any of the following acts when they are "committed with intent to destroy, in whole or in part, a national, ethnical, ra-

15. Statute of the International Tribunal, *supra* note 6, art. 3; *see* Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, 36 Stat. 2277, 2295, especially arts. 23, 25, 27, and 28 [hereinafter Hague Convention IV].

16. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). The crime of genocide is conceptually derivative of the crimes against humanity prosecuted by the International Military Tribunal at Nuremberg and the War Crimes Court for the Yugoslavia. The General Assembly resolution, adopted unanimously on December 11, 1946, affirmed the "principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal." Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95, U.N. GAOR, U.N. Doc. A/64/Add Sess. 1, pt. 2, 55th Plen. Mtg. at 188 (1946).

cial or religious group, as such":

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.[17]

These provisions, then, enumerate various acts of genocide that specifically qualify as war crimes prosecutable by the Tribunal. In paragraph 3 of its Article 4, the Statute goes on to stipulate that the following actions shall be punishable: "(a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity to commit genocide."[18] Much is known about the incredible violence directed specifically by the Serbs against the Muslim population in Bosnia and Herzegovina—violence that was motivated principally by the desire to destroy the Muslims' ethnic, cultural, and religious heritage.[19] Specific inclusion in the Statute for the ICTFY's prosecution of the crime of genocide is intended to redress such gross violations of international humanitarian law.

The Genocide Convention does not obligate parties to prosecute all offenders in their custody, nor does it explicitly address the prosecution of all such offenders irrespective of their location. Under Article 6 of the Genocide Convention, parties are obligated only to exercise domestic jurisdiction pursuant to the territorial principle, with offenders possibly being tried by a competent tribunal of the state where the offense was committed, or by an international penal tribunal that may have jurisdiction.

Despite this, genocide has come to be regarded a gross crime under customary international law, giving rise to universal jurisdiction over this crime to the same degree as over war crimes and crimes against humanity. Indeed, genocide was treated as an offense against the law of nations even before the Genocide Convention was drafted. The General Assembly adopted resolutions in 1946 affirming the Nuremberg principles[20] and declaring genocide to be an international crime.[21] Every state thus has the customary legal right to exercise universal jurisdiction to prosecute offenders for committing genocide, wherever

17. Statute of the International Tribunal, *supra* note 6, at 37, art. 4, ¶ 2.

18. *Id*. at 37-38, art. 4, ¶ 3. It is noteworthy that these paragraphs in Article 4 of the Tribunal's Statute were transposed verbatim from Articles II and III, respectively, of the 1948 Genocide Convention.

19. *See generally* Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), *reproduced as* Annex to Letter Dated May 24, 1994 from the Secretary-General to the President of the Security Council, U.N. SCOR, 49th Sess., Annex at 3, U.N. Doc. S/1994/674 (27 May 1994).

20. *See* Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, *supra* note 16, at 188.

21. *See* The Crime of Genocide, G.A. Res. 96, U.N. GAOR, U.N. Doc. A/64, Sess. 1, pt. 2, 55th Plen. Mtg. at 188 (1946).

and by whomever committed. The Genocide Convention does not derogate from that obligation. Parties to the anti-genocide instrument have merely obligated themselves to prosecute offenses specifically committed within their territory.

D. Crimes Against Humanity

The International Criminal Tribunal for the former Yugoslavia is charged with prosecuting crimes against humanity. These most egregious of war crimes are committed on a massive scale, in a systematic manner, cause acute revulsion, and make necessary a direct international response. There clearly exists international jurisdiction over cases that allege crimes against humanity, and no statutory limitations are acceptable.[22] Such acts as criminal conduct have their origins in the 1945 Nuremberg Charter.[23] Crimes against humanity are directed at any civilian population, and are prohibited in armed conflict, regardless of its international or internal character. The ICTFY's Statute acknowledges this critical point in its Article 5, and enumerates eight categories of specific acts to be regarded as crimes against humanity: murder; extermination; enslavement; deportation; imprisonment; torture; rape; and persecution on political, racial, and religious grounds.[24] A ninth category, "other inhumane acts," was included to make the list potentially all-inclusive.[25]

Crimes against humanity derive from Article VI of the 1945 Nuremberg Charter.[26] Two new acts were specifically designated as crimes against humanity in the Statute governing war crimes in the former Yugoslavia: torture and rape. The condemnation of acts of torture finds expression in the 1984 Convention Against Torture,[27] which now is in force and accepted as a peremptory norm in human rights law. The crime of rape, the criminality of which largely was overlooked in past wars, took on great urgency with the reported massive sexual assaults against women in Bosnia and Herzegovina during 1992 and 1993.[28] By designating rape as a specific crime against humanity, the act's gross

22. This is provided for in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, *supra* note 2. *See generally* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 508-10 (1992).

23. *See* Nuremberg Charter, art. VI, ¶ (c), *reprinted in* note 10, *supra*.

24. *See* Statute of the International Tribunal, *supra* note 6, at 38, art. 5.

25. *See id*.

26. *See supra* note 10.

27. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., 93d Plen. Mtg., Supp. (No. 51) at 197 (entered into force June 28, 1987).

28. *See* Final Report of the Commission of Experts, *supra* note 19, at 55-60. In late 1992/early 1993, the European Community sent a special mission headed by Dame Ann Warburton to investigate the treatment of Muslim women in the former Yugoslavia. This mission found that the number of women raped might range from 10,000-60,000, and that rape was used by the Serbs as a premeditated strategy to terrorize Muslim populations and to force them to leave their homes. *See* European Community Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia: Report to European Community Foreign Ministers, U.N. SCOR, 48th Sess., U.N. Doc. S/25240 (3 Feb. 1993), Annex I, at 2; M. Cherif Bassiouni, *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia* (Occasional Paper #1, 1996, International Human Rights Law Institute, DePaul University).

criminality has been spotlighted as a war crime in international law, and international concern has been directly focused on the need to punish perpetrators.

A final point merits mention. The ICTFY will not specifically address crimes against the peace, that is, it will not prosecute persons accused of participation in planning and waging of a war of aggression. Although acts associated with this offense were tried at Nuremberg,[29] proving such allegations would be protracted and extraordinarily difficult in the case of the former Yugoslavia. The essential difficulty is in securing access to official government documents, which neither the Serbian nor Croatian governments are willing to release. Such persons will not automatically escape prosecution, however, since individual criminal responsibility is acknowledged for planning gross violations of international humanitarian law, as discussed below.

E. Personal Jurisdiction and Accountability

Fundamental to punishing war crimes is the principle of individual criminal responsibility. The Statute of the ICTFY addresses this concern in Article 7, as it asserts that "[a] person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime."[30] The ICTFY thus confronts the principle that individuals may be held criminally liable under international law, even though their conduct might have been considered valid or even mandated by domestic law.

To enforce the laws of war only against ordinary soldiers and officers of low or mid-level rank is not enough. Although "superior orders" is not an adequate defense against a charge of violating the laws of war, justice still demands that culpability applies all along the chain of command. Accountability under international law must reach up to military elites and civilian government officials, and in the Yugoslav case it does so. As set by the Nuremberg precedent and provided for in Article 7 of the ICTFY's Statute,

> [t]he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
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> The fact that any of the [criminal] acts … of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[31]

All persons who participated in the planning, preparation, or execution of serious violations of international humanitarian law share in the commission of the crime and are therefore individually responsible. The ICTFY also holds that the principal responsibility for war crimes pursuant to orders fall to those in authority who gave the orders. There can be no peace without justice, and

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29. *See* Nuremberg Charter, Art. VI, ¶ (a), reprinted in note 10, *supra*.
30. Statute of the International Tribunal, *supra* note 6, at 38, art. 7, ¶ 1.
31. *Id*. ¶¶ 2 & 3.

no justice without accountability for war crimes.

Why should individuals be held accountable for crimes that occur in the confusion of war and conflict? War crimes stem from the fundamental fact that responsible government control is wanting in the areas where they occur.[32] Often these crimes are perpetrated in areas beyond the actual sovereign control of any authoritative government. War crimes and crimes against humanity flourish in situations where criminals can attack and escape. Perpetrators commit their horrific crimes then flee, leaving few, if any, witnesses. The enforcement of humanitarian law in such a situation is difficult, if not completely lacking. War crimes and crimes against humanity are often perpetrated when a country lacks an adequate judicial system, often because of chaotic conditions or irresponsible leadership during times of armed conflict. In addition, if military forces are not educated with respect to the laws of war and the humanitarian limits on legitimate violence in pursuit of military objectives, violations can easily occur due to overzealousness rather than deliberate planning. Often no well organized police exist in the states where these crimes are committed, and perpetrators can therefore hope to commit their crimes with impunity.[33]

War crimes flourish in direct proportion to the dearth of political order and the deficiency of law enforcement. Persons can often perpetrate these crimes because the conditions in which they operate afford them impunity from the forces of law and order. Such conditions, which affect few places in times of peace and stability, are exacerbated by the chaotic, confused conditions created by war. Accordingly, war crimes and other serious depredations of human rights increase when countries are in upheaval and political conditions are unstable.[34]

War crimes are not restricted to times of war, however. Nor may they be committed only by military personnel. These crimes thrive whenever military conditions permit civilians the opportunity to commit various crimes with reasonable chances for impunity. A regular soldier might become a war criminal, but so too might a civilian turn to committing crimes against humanity. Put tersely, the essence of war crime involves the use of violence without public cause or legal justification.

Criminal activities that take place during times of war and military occupation often involve hostile acts by individuals without the authority or sanction of their government. These are not legitimate acts of war and are consequently punishable according to the nature of the offense committed. During war, looting and burning a civilian house are acts of robbery and unlawful destruction of property. Killing an enemy or a civilian, except perhaps under circumstances of self defense, would both be acts of murder. The perpetrators of such deeds are committing unlawful acts. They are robbers and murders, and should

32. Obviously, a government may systematically direct its soldiers to commit war crimes, but such a government would be termed irresponsible in this framework.

33. *See* Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CALIF. L. REV. 177, 194 (1945).

34. *See id*.

be punished accordingly, whether they are soldiers in uniform, partisan militia, or marauding civilians.[35]

III

JURISDICTION UNDER INTERNATIONAL LAW

Jurisdiction is the critical legal issue underpinning the prosecution of war criminals in a state's courts.[36] A state must establish proper jurisdiction to assert judicial and penal authority over such offenders, especially if they are not citizens of that state and the crimes they committed were not committed in that state or against citizens of that state. The issue of jurisdiction thus can act to delimit permissible legal responses by concerned governments to war crimes. Since the Nuremberg Trials following the Second World War, however, the legal status of those acts mentioned in Part II above has been agreed upon as war crimes under international law, and those acts have been expressly prohibited.

Legally defined, jurisdiction is "the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and nonjudicially."[37] Jurisdiction involves a state's legitimate assertion of authority to affect its legal interests, and applies to law-making activities, judicial processes, or enforcement means.[38] A state may not assert its authority over all persons or things under its control. Similarly, a state may not extend its power beyond the limits of national jurisdiction without authoritative legal bases. International law limits the ability of a state to apply its statutes extraterritorially.[39] Thus, international legal principles maintain that domestic jurisdiction rests on reconciling a state's interest in a particular offense with other states' interests in that offense.[40]

Traditionally, a state may not prosecute a criminal seized beyond its borders unless it has lawful jurisdiction over the committed act. The jurisdiction to prescribe must exist before the jurisdiction to adjudicate and enforce. Extraterritorial jurisdiction, therefore, involves a two-step process. First, it must be determined whether a domestic law exists that covers the offensive act. Second, it must be ascertained whether a sovereign state may, under international law, prescribe such conduct extraterritorially.[41] In this connection, each time a state acts with respect to a person, its authority to do so must be based on one

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35. *See* H. W. HALLECK, INTERNATIONAL LAW 386-87 (1861).

36. *See* Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145 (1972/73).

37. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. IV (Jurisdiction and Judgments) introductory note (1987) [hereinafter RESTATEMENT (THIRD)].

38. *See id.* § 401; *see also* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 244-49 (1985).

39. *See* RESTATEMENT (THIRD), *supra* note 37, §§ 401-403.

40. *See* Edwin D. Dickinson, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 443-47 (Supp. 1935) (work conducted for Harvard Research in International Law).

41. The First Circuit Court of Appeals put it well when it posited that "a state does not have jurisdiction to enforce a rule of law enacted by it unless it has jurisdiction to prescribe the conduct in question." United States v. Smith, 680 F. 2d 255, 257 (1st Cir. 1982) (citing Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967)).

of five principles: (1) the territoriality principle, which applies when an offense occurs within the territory of the prosecuting state;[42] (2) the nationality principle, which admits jurisdiction when the offender is a national or resident of the prosecuting state;[43] (3) the protective principle, which permits jurisdiction where an extraterritorial act threatens interests that are vital to the integrity of the prosecuting state;[44] (4) the passive personality principle, which recognizes jurisdiction where the victim is a national of the prosecuting state;[45] and (5) the

42. The territorial principle determines jurisdiction according to location of the crime. A state may punish crimes committed within its territory. Of all jurisdictional principles for extradition, the territorial principle remains most universally accepted.

The territorial principle has been further refined into subjective and objective territorial views. *See* Dickinson, *supra* note 40, at 484-508; Christopher L. Blakesley, *United States Extradition Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1118-19, 1123 (1982).

Subjective territorial jurisdiction is used to justify legislation punishing criminal conduct that commences within a state and is completed abroad. A state retains the right to punish the perpetrator of a crime that terminates elsewhere when the intent to commit that crime was formulated within that state. The subjective variety, then, would extend jurisdiction over offenses committed outside a state's borders, albeit an essential element of the crime must have occurred within that state itself. *See, e.g.*, People v. Botkin, 132 Cal. 231, 64 P. 286 (1901) (granting jurisdiction over a California defendant who mailed poisonous candy to a Delaware recipient who died after eating the candy.)

The objective territorial view, on the other hand, includes offenses that commence outside a state's territory, but are completed within it. Also known as the "effects doctrine," objective territorial jurisdiction may also be justified when certain crimes generate serious repercussions, or "effects," within the state. *See, e.g.*, S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7, 1927) (characterizing the death of Turkish nationals on the high seas as having repercussions upon Turkey); *see also* United States v. King, 552 F. 2d. 833, 851-52 (9th Cir. 1976), *cert.* denied, 430 U.S. 966 (1977) (prosecuting a defendant for unlawful distribution in Japan of heroin that was intended for importation into the United States).

43. The nationality principle, which is universally accepted, allows a state to prescribe laws that bind its nationals, regardless of where the national is or where the offense occurs. A state's jurisdiction effectively extends to its citizens and actions they take beyond the territorial jurisdiction of the state. The link between a state and its nationals generates reciprocal rights and obligations. The state is expected to protect its citizens when they are abroad, but when an individual's conduct harms the interests of his or her state, that state may punish that conduct regardless of where it occurred. In sum, the link between an individual and the state is a personal one, irrespective of location. As the U.S. Supreme Court observed in *Blackmer v. United States*, "[j]urisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction *in personam*, as he is personally bound to take notice of the laws that are applicable to him and to obey them." 284 U.S. 421, 438 (1932).

44. The protective principle concerns acts abroad that are deemed prejudicial to the security interests of a state. Under the protective principle, a state may exercise jurisdiction over certain acts that take place outside its territory, if such acts threaten the security, territorial integrity, or political independence of the state. Importantly, the protective principle permits states to prosecute nationals of other states for their conduct outside the offended state. *See, e.g.*, United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968) (holding that false statements on an immigration visa before a U.S. consul in Canada had a sufficiently adverse impact on U.S. interests to warrant exercising jurisdiction over the defendant).

45. The passive personality principle gives a state extraterritorial jurisdiction over offenses committed against its nationals wherever the crime takes place. That is, acts committed by an alien against nationals of a state abroad accord that state jurisdiction in the matter. Jurisdiction therefore becomes based on the nationality of the victim of a crime. The passive personality principle has not been widely used, largely because it is controversial and often conflicts with the territorial principle. The passive personality notion implies that persons carry the protection of their state's law with them beyond the territorial jurisdiction of their own state. This assertion challenges the fundamental premise of sovereign jurisdiction of a state over its own territory, which obviously undercuts the fundamental principle of territorial sovereignty. *See., e.g.*, United States v. Benitez, 741 F.2d. 1312 (11th Cir. 1984) (convicting a foreign defendant national in a U.S. court for conspiracy to murder, assault, and rob U.S.

trators made subject to universal jurisdiction by any government who could apprehend the offenders. Today, the preeminent international offenses subject to universal jurisdiction are war crimes, including crimes against the peace, crimes against humanity, and genocide. Importantly, however, no specific precedent existed for subjecting these offenses to the universality principle, although analogues existed between war crimes and the crimes of piracy, slave trading, and brigandage, for which universal jurisdiction was already accepted.[50]

Several factors suggest the feasibility of applying universal jurisdiction to bring contemporary war criminals to justice. First, war crimes are often committed in locations where they cannot be prevented or punished easily. This suggests the necessity of extending universal jurisdiction, not only to ensure prosecution for these heinous acts, but also to serve as viable means for deterring similar crimes in the future.

Second, war crimes in the current era are typically committed within the territory of a particular state caught up in internal conflict. The motivations for war crimes in these situations are not usually state or public purposes. Rather, they are committed for private gain, personal revenge, and generic hatred, of-

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1932) (work conducted for Harvard Research on International Law); *Bonnet's Trial*, 15 STATE TRIALS (Howell) 1231, 1235 (Am. Vice Adm. 1718). *See generally* B.H. DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY (1980); ALFRED P. RUBIN, THE LAW OF PIRACY (1988). The most recent international codification of the law of the sea outlaws piracy on the high seas and prescribes universal jurisdiction as an appropriate means of apprehending the offenders. *See* 1982 United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF. 62/L2 (entered into force Nov. 16, 1994), *in* The Law of the Sea, U.N. Sales No. E. 83.V.5 (1983), arts. 103-107, especially 105 (providing that "every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and size the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed").

49. Slavery and the trading of slaves violate the fundamental rights of persons to individual liberty and freedom and are therefore considered to be offenses against all humankind. As such, slavery has been formally prohibited in a number of international instruments. *See* Slavery Convention, done Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253; Protocol Amending the Slavery Convention, done Dec. 7, 1953, 7 U.S.T. 479., T.I.A.S. No. 3532, 182 U.N.T.S. 51; Supplementary Convention of the Abolition of Slavery, the Slave Trade and Institutions and Practices Similarly to Slavery, done Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 3. For discussion, see M. Cherif Bassiouni & Ved Nanda, *Slavery and Slave Trade: Steps Towards Its Eradication*, 12 SANTA CLARA LAW. 424 (1972). The slave trade is also outlawed and made prosecutable by universal jurisdiction in the 1982 United Nations Convention on the Law of the Sea, *supra* note 48, art. 110.

50. Willard Cowles argues convincingly that war crimes have their origins in the law evolving from brigandage. As a group, he observes, brigands form

> a loose, self-constitutive armed organization[s], for the primary purposes of protecting [themselves] from law enforcement agencies, and obtaining loot by armed violence….
>
> ….
>
> The resulting association is a small, loose, degenerate society, the members having little or no sense of allegiance to any State….
>
> Acts of violence are the natural consequence of such a situation.… Discipline is usually unenforced, especially during raids, and heinous crimes of robbery and lust are correctly associated with them. They commit murder and arson, and destroy property on an extensive scale for the sheer sake of destruction. They capture persons for purposes of ransom, and they do not hesitate to kill their captives as object lessons to pecunious relatives, friends, or governments.

Cowles, *supra* note 33, at 184.

ten involving cruel, inhumane savagery. No lawful justification can support their plan, purpose, or execution.

Third, war crimes involve violent and predatory actions that descend to the level of gross bestiality. Such crimes are far more serious than piracy or slave trading, the oldest offenses subjected to universal jurisdiction. War crimes involve conspiracy, rebellion, and assaults not only against the innocent victim, but also against the world community. The perpetration of these offenses amount to the rejection of civilized society. They offend the law of civilized states and have therefore been declared crimes against universal law. Not only do such acts of savage inhumanity imperil the peace and security of the state in which they were committed, they also threaten the peace and security of other states in the world community as a whole. Such odious and dangerous offenses must be regarded as crimes of international concern.

The universality principle stems from the notion that any state could have the legal competence and jurisdictional authority to define and punish particular offenses, regardless of whether that state had any direct connection with the specific offenses at issue. War crimes are international criminal offenses. That is, in the view of the International Military Tribunal at Nuremberg, "[a]n international crime is … an act *universally recognized* as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances."[51] Jurisdiction over these crimes must be international as well.

The atrocities committed during the Second World War, underscored by the Nuremberg precedent, focused attention on the development of international criminal law. This growth has taken several forms, including specification of war crimes and crimes against humanity as international offenses in a number of multilateral conventions. Preeminent among these are the international law principles contained in the International Military Tribunal at Nuremberg.[52] Those principles include recognition of the individual liability for

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51. 11 TRIALS OF WAR CRIMINALS 1241 (1946-1949) (emphasis added).

52. On November 21, 1947, the United Nations General Assembly adopted Resolution 177 (II), which affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal." As subsequently formulated by the U.N. International Law Commission, the text of these principles are as follows:

> Principle I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.
>
> Principle II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
>
> Principle III. The fact that a person who committed an act which constitutes a crime under international law acted as a Head of State or responsible Government official does not relieve him from responsibility under international law.
>
> Principle IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.
>
> Principle V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

war crimes, crimes against the peace, and crimes against humanity, which are aptly affirmed as crimes *jure gentium*. International condemnation of war crimes as offenses of global concern implies the right of all states to prosecute all offenders, just as the world legal order previously permitted every state to prosecute pirates and slave traders.

The development of international criminal law suggests an evolving hierarchy of international norms. Such a hierarchy recognizes the existence of certain norms fundamental to the world community. The search for international norms has elevated prohibitions against the offenses of war crimes and crimes against humanity to the apex of the normative pyramid. Every state may prosecute violations of modern fundamental norms of international law, especially those relating to war crimes and crimes against humanity.[53] The concerted forces of international criminal law expressly implies the right of all states to prosecute such offenses. Indeed, if only a few fundamental norms bind all states in every circumstance, the argument can be made that any government may exercise universal jurisdiction over state officials and other persons who violate those norms. Those who commit war crimes are the contemporary *hostis humani generis*. Doctrinal developments in international criminal law also bolster support for the right of every state to prosecute those offenses.

The international legal norms of *erga omnes* and *jus cogens* lend support to the role that universal jurisdiction can play in obtaining jurisdiction over war crimes offenders.[54] Obligations *erga omnes* are literally obligations that "apply to all." Obligations owed by a state to the international community as a whole are the concern of all states. All states have a legal interest in their protection, and these are therefore obligations *erga omnes*.[55]

War crimes qualify as *delicta juris gentium*, crimes under international law. These offenses threaten to subvert "the very foundations of the enlightened international community as a whole."[56] It is this overarching threat that gives each member of that community the right to apply its domestic criminal law to such offenders, even though the offenses were committed outside the state's

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> Principle VI. The crimes hereinafter set out are punishable as crimes under international law: [crimes against peace, war crimes and crimes against humanity are thereafter defined substantially as they appear in Article 6 of the Charter of the International Military Tribunal at Nuremberg].
>
> Principle VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

Report of the International Law Commission Covering its Second Session, GAOR, 5th Sess. Supp. (No. 12) U.N. Doc. A/1316, Pt III, at 11-14 (1950).

53. This clearly was the legal rationale taken by Israel in the *Eichmann Case*, involving the kidnaping from Argentina and trial in Israel of Hitler's chief executioner of the final solution. *See* Attorney General of Israel v. Eichmann, 36 Int'l L. Rep. 277 (Sup. Ct. Israel 1962).

54. *See* Randall, *supra* note 47, at 829-31.

55. For a useful discussion of *erga omnes*, see SCHACHTER, *supra* note 38, at 195-201.

56. S.Z. Feller, *Jurisdiction over Offenses with a Foreign Element*, *in* 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 5, 32-33 (M. Cherif Bassiouni & Ved Nanda eds., 1973).

territorial frontiers and the offender has no special link to that state.[57] It is this same threat that compels obligation by every government to bring war criminals to justice, by means of an international tribunal in the Hague, or in their own national courts if necessary.

The norm of *jus cogens* connotes compelling law. As an international concept, *jus cogens* refers to peremptory norms or principles from which there can be no derogation, and which may thus work to invalidate a treaty or agreement between states should there be inconsistency with any such principles or norms.[58] That is, if an international agreement that advocated perpetration of war crimes were consummated between states, its lawfulness would be rendered null and void on grounds of *jus cogens*, that is, that its provisions violated peremptory norms protecting the customary legal protections of innocent civilians under international humanitarian law.

International law has traditionally distinguished the *erga omnes* and *jus cogens* doctrines from universal jurisdiction, as both the former principles pertain to state responsibility, while the latter concerns violations of individual responsibility.[59] These doctrines however, can be made in subsidiary fashion to support the right of governments to exercise universal jurisdiction over individual offenders. That is, when committed by individual persons, violations of *erga omnes* obligations and peremptory norms may be punishable under the principle of universal jurisdiction.

The jurisdictional right to prosecute such individual offenders correlates to the idea that violations of fundamental obligations offend all states. Clearly, violations of *erga omnes* and *jus cogens* norms affect all states, whether perpetrated by the governments of states or individuals. While arguably ambiguous, this situation invites support for a kind of *actio popularis*, which would enable any government to vindicate rights common to all.[60] In this manner, the *erga omnes* and *jus cogens* doctrines can be used to buttress the right of universal jurisdiction by all states to prosecute those who commit war crimes.

This expansion of universal jurisdiction reflects international efforts to curtail and redress gross violations of fundamental human rights. The stipulation of international crimes, obligations *erga omnes*, and peremptory norms clearly indicates that war crimes and crimes against humanity are universally repulsive, uniformly condemned, and subject to universal prosecution by any government, anywhere, at any time. If there is to be a modern world legal order concerned with global peace and human dignity, international law can provide for no less.

War crimes have emerged as modern crimes *jure gentium*, offenses against

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57. *See id*.

58. *See* ROBERT L. BLEDSOE & BOLESLAW A. BOCZEK, THE INTERNATIONAL LAW DICTIONARY 15-16 (1987).

59. *See* CHRISTOS L. ROZAKIS, THE CONCEPT OF *JUS COGENS* IN THE LAW OF TREATIES (1976); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 110-43 (1973); N.G. Onuf & Richard K. Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 DENVER J. INT'L L. & POL'Y 187 (1974).

60. *See* SCHACHTER, *supra* note 38, at 195-201.

the law of nations, over which every state has universal jurisdiction. The universality principle provides every state with possible jurisdiction over a limited category of offenses generally recognized as universal crimes, irrespective of the location of the offense and the nationalities of the perpetrator or the victim. Although international bases for jurisdiction demand a legal nexus between the prosecuting state and the offense, the principle of universal jurisdiction assumes that all states have an interest in exercising jurisdiction to punish persons committing offenses that states universally have condemned. Offenders are considered to be the enemies of all humanity, and may therefore be apprehended, tried, and punished by any member of the international community of states.[61]

A government that captures an indicted war criminal either may extradite him to the state where the offense was committed, or to an international tribunal established to try such offenders, or retain him for trial under its own legal processes. The latter alternative is lawfully furnished under the universality principle. A capturing state probably would not have any previous connections to the crimes that were committed, but could claim jurisdiction on ground the accused offenders had committed crimes that were "universally recognized" under international treaty law. War criminals, as criminals against humanity, can be made subject to the authority of any state that captures them. Every state under international law thus retains permissible jurisdiction to punish war criminals, regardless of the nationality of the victim or the offender, or the place where the offense was committed.

V

THE BALANCE SHEET

States have the right to punish not only violations of international law that cause injuries against themselves or their nationals, but also offenses that do not directly affect them when those offenses are serious enough. In punishing war criminals, governments should not be expressly concerned about the nationality of the victim or the perpetrator, or restricted by precise limits of territorial jurisdiction. Rather, the courts of one state should be permitted to try persons for war crimes committed in another state. War crimes and war criminals should know no boundaries. They are the enemies of all humankind, and must be treated as such. While protected by due process of law, the war criminal, whether civilian or military, is not protected by the usages of civilized warfare. He is subject to trial and punishment by a detaining state, whether or not that state was a belligerent in the conflict. Neither the territorial principle nor the nationality principle govern in the case of war crimes. Jurisdiction over war crimes has no territorial basis and may be exercised without reference to *locus delicti*.[62]

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61. *See id.* at 262; M. Cherif Bassiouni, *Theories of Jurisdiction and Their Application in Extradition Law and Practice*, 5 CAL. W. INT'L L. J. 1, 54-55 (1974).

62. *See* J.L. Brierly, *The Nature of War Crimes Jurisdiction*, THE NORSEMAN NO. 3 (May-June

War crimes are not merely violations against the law or criminal codes of any individual state. They are far more severe, as they reach the level of crimes against the law of nations. The laws and protections for civilians during war are of universal application and do not depend upon national law or boundaries for their applicability. War crimes are so harmful and murderous that they tear at the roots of civilized society. War criminals are criminals against humanity; they are the enemies of all people. War criminals must therefore be held subject to punishment by any and every state on account of the barbaric, inhumane acts they have committed. A war criminal properly should be deemed *hostis humani generis*. The acts committed are so odious and evil that they offend the conscience of the human spirit and the very sensibilities of international law. The offenses of the war criminal are so vile and debased that they impugn the very essence of the law of all nations.

VI

CONCLUSION

One viable means to enhance the prospects for bringing indicted war criminals to justice is to promote widespread adoption of the principle of universality as the legal basis for prosecutorial jurisdiction. The principle of universal jurisdiction recognizes that certain acts are so heinous and widely condemned that any state may prosecute an offender once custody is obtained. Such crimes—piracy, slave trading, attacking diplomats, hijacking aircraft, violating the laws of war, committing crimes against humanity, and carrying out genocide—are of universal concern to states. A person accused of such a crime can be arrested and tried by any state without concern for the nationality of the accused. The principle of universal jurisdiction does not require establishment of any link between the criminal and the prosecuting state. All that is required is universal condemnation of the offense. War crimes are universally condemned offenses.

War criminals commit offenses that are acutely reprehensible acts. These offenses often promote private goals, but may be government-sponsored as well. Since these offenses undermine and destabilize the international order, they are concerns of the world's legal system, rather than the sole province of individual governments. States thus have an equal and universal interest in apprehending and punishing war criminals. Such offenders may be lawfully captured in any state and brought for trial in the courts of any nation. Indeed, several developments of international legal doctrine intimate that the world community has accepted the lawful right for all states to prosecute war criminals. These developments include the evolution of international criminal law, the *erga omnes* and *jus cogens* doctrines, and the generally universal condemnation of these offenses.

1944), at 2.

In the developing process of international law, major war crimes have become crimes of universal jurisdiction. The evidence for this kind of jurisdiction stems from the weight of authority from jurists and international tribunals since the Second World War. Indeed, the fact that these crimes have been codified as crimes of universal jurisdiction through agreement involving nearly every state underscores the universality of that jurisdiction. Put tersely, war crimes are crimes *ex jure gentium* and thus susceptible to prosecution in the courts of all states. Should any of the persons indicted by the prosecutor of the ICTFY for war crimes committed in Bosnia attempt to leave the former Yugoslavia, they will be subject to lawful seizure, arrest, trial and prosecution, and punishment by any state they visit. Similarly, they would be subject to extradition to the ICTFY in the Hague for trial and prosecution.

Governments have jurisdiction to try and punish any war criminal unless prohibited from doing so by international law. The origin of the law governing war crimes is in the law of brigandage, and the jurisdiction assumed by state practice in trying offenses against the laws of war has been personal or universal jurisdiction, not territorial. The jurisdiction exercised over war crimes has been broad and similar to that historically exercised against the pirate and the slave trader.

Universal jurisdiction provides the authoritative power under international law to try war criminals who otherwise might go unpunished. Admittedly, the state whose nationals were directly affected by the crimes has a primary interest. But all civilized states share a very real interest in the prosecution and punishment of war crimes. Indeed, the unpunished war criminal is a menace to the social and political order. He is a symbol of prostituted impunity, of justice denied. Moreover, an offense against the laws of war, and the law of humanity, is a matter of general interest and concern. The conscience of the entire civilized world should be outraged by the barbarities of war crimes, in particular acts of genocide and crimes against humanity, and the perpetrators should be brought to justice. That surely should be the case for those persons indicted for committing war crimes against innocent civilians in the former Yugoslavia. Universal jurisdiction furnishes a legal means to bring these persons to justice, if they should ever leave former Yugoslavia, and the political will by concerned governments can be marshaled to make it happen.