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Genocide: The legal basis for universal jurisdiction

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UNIVERSAL JURISDICTION

The duty of states to enact and enforce legislation

Chapter Seven

(The legal basis for universal jurisdiction)

Genocide and ancillary crimes of genocide, such as conspiracy, direct and public incitement, attempt and complicity, are subject to universal jurisdiction. This principle was recognized by states before the adoption of the Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and is now widely accepted. Moreover, there is increasing support for the view that states may not harbour a person in their territory or under their jurisdiction suspected of genocide, but instead that they *must* either exercise jurisdiction over persons suspected of having done so abroad, to extradite them to a state able and willing to do so or surrender such persons to an international criminal court with jurisdiction over the crime and suspect. To the extent that this rule may not yet be fully recognized as customary international law with respect to genocide, Amnesty International believes that general principles of law, logic and morality dictate that states should implement this rule.

I. DEFINITION

Genocide is defined in Article II of the Genocide Convention in the following terms:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial 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.”¹

¹ Convention for the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, G.A. Res. 260 A (III) of 9 December 1948, *entered into force* 12 January 1951, Art. II. Article 6 of the Rome Statute, Article 4 (2) of the Statute of the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal Statute) and Article 2 (2) of the Statute of the International Criminal Tribunal for Rwanda (Rwanda Tribunal Statute) incorporate identical definitions of the crime of genocide.

Article III provides that in addition to genocide, the following ancillary crimes of genocide are also punishable:

- “(b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.”²

² Genocide Convention, Art. III (b) – (c). Article 4 (3) of the Yugoslav Tribunal Statute and Article 2 (3) of the Rwanda Tribunal Statute incorporate identical definitions of the ancillary crimes of genocide. Article 25 of the Rome Statute largely incorporates these definitions of these crimes.

These provisions of the Genocide Convention, which has a large number of ratifications, reflect customary law.³ In 1951, the International Court of Justice stated that “the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation” and noted “the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’”.⁴ Indeed, the prohibition of genocide is now considered to be *jus cogens*.⁵ As

³ As of 1 September 2001, 132 states had ratified the Genocide Convention (Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Canada, Chile, China, Colombia, Costa Rica, Côte d’Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Federal Republic of Yugoslavia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Honduras, Hungary, Iceland, India, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Jordan, Kazakhstan, Lao People’s Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Malaysia, Maldives, Mali, Mexico, Monaco, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Macedonia (the former Yugoslav Republic of), Norway, Pakistan, Panama, Papua New Guinea, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Seychelles, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Togo, Tonga, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United Republic of Tanzania, United States, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen and Zimbabwe and three states had signed, but not yet ratified, it (Bolivia, Dominican Republic and Paraguay).

⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Rep. 1951, 23. See also Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Armed Conflicts: A Positivist View*, 93 Am. J. Int’l L. 302, 309 (2000) (concluding that “the traditional triad of sources clearly confirms that individual criminal responsibility for genocide is part and parcel of international law”) (footnote omitted).

⁵ *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Further requests for the indication of provisional measures, Order of 13 September 1993, ICJ Rep. (separate opinion of *Ad Hoc* Judge Elihu Lauterpacht, nominated by Bosnia and Herzegovina), para. 100 (“[T]he prohibition of genocide . . . has generally been accepted as having the status not of an ordinary rule of law but of *jus cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*.”); *ibid.* (dissenting opinion of *Ad Hoc* Judge Kreća, nominated by the Federal Republic of Yugoslavia), para. 101 (“The norm prohibiting genocide, as a norm of *jus cogens*, establishes obligations of a State toward the international community as a whole, hence by its very nature it is the concern of all States. As a norm of *jus cogens* it does not have, nor could it possibly have, a limited territorial application with the effect of excluding its application in any part of the international community. In other words, the norm prohibiting

such, it is a peremptory norm of general international law which, as recognized in Article 53 of the Vienna Convention of the Law of Treaties (1969), cannot be modified or revoked by treaty (see discussion in Chapter Three, Section I.A).

genocide as a universal norm binds States in all parts of the world.”).

National courts have reached the same conclusion. *Nulyarimma v. Thompson*, [1999] FCA 1192 (Federal Court of Australia 1 September 1999) (*obtainable from* http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/1192.html), (opinion by Whitlam, J.), para. 36 (“It is accepted by all parties that under customary international law there is an international crime of genocide, which has acquired the status of *jus cogens* or a peremptory norm.”); (Merkel, J.), para. 81 (“It was also common ground between the parties, correctly in my view, that : . . . the prohibition of genocide is a peremptory norm of customary international law (*jus cogens*) giving rise to non derogable obligations *erga omnes* that is, enforcement obligations owed by each nation State to the international community as a whole . . .”).

Moreover, the International Court of Justice has expressly stated that the prohibition of genocide is an obligation *erga omnes*.⁶ National courts have reached the same conclusion.⁷ The legal obligation *erga omnes* owed to the international community as a whole with respect to the prohibition of genocide provides added - but not essential - support for the view that any state may fulfill that obligation by exercising universal jurisdiction over persons suspected of committing such crimes when other states are unable or unwilling to take effective steps to repress these crimes.⁸ Of course, as demonstrated in this

⁶ *Barcelona Traction, Light and Power Company Ltd.*, Judgment, 1972 ICJ Rep., para. 34; *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, Order of 11 July 1996, 1996 ICJ Rep (obtainable from <http://www.icj-cij.org>), para. 31 (“It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.”).

Thus, the full Court rejected the more narrowly conceived view of the obligation as territorially limited, which had been advanced in a dissenting opinion by an *Ad Hoc* Judge three years earlier. See *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Further requests for the indication of provisional measures, Order of 13 September 1993, ICJ Rep. (dissenting opinion of *Ad Hoc* Judge Kre_a, nominated by the Federal Republic of Yugoslavia), para. 101 (“As an absolutely binding norm prohibiting genocide, it binds all subjects of international law even without any conventional obligation. To that effect, and only to that effect, the concrete norm is of universal applicability (a norm *erga omnes*), and hence ‘non-territoriality’ as another pole of limited territorial application may be taken as an element of the very being of a cogent norm of genocide prohibition.”). Although the question of judicial or adjudicative universal jurisdiction over individuals suspected of the crime of genocide was not directly in issue in this case, Judge Kre_a claimed that prescriptive and enforcement jurisdiction were territorially limited, indicating that “[i]f this were not the case, norm[s] on territorial integrity and sovereignty, also having the character of *jus cogens* would be violated.” *Ibid.* Similarly, his comment that the Genocide Convention did not contain the principle of universal repression was addressed to the entirely different question whether there was an extraterritorial obligation of prevention. *Ibid.*, para. 102.

⁷ *Nulyarimma v. Thompson*, *supra*, n. 5, (Merkel, J.), para. 81 (“It was also common ground between the parties, correctly in my view, that . . . the prohibition of genocide is a peremptory norm of customary international law (*jus cogens*) giving rise to non derogable obligations *erga omnes* that is, enforcement obligations owed by each nation State to the international community as a whole . . .”).

⁸ As the Belgian *juge d’instruction* (investigating magistrate) in the *Pinochet* case stated:

“The struggle against impunity of persons responsible for crimes under international law is, therefore, a responsibility of all states. National authorities have, at least, the right to take such measures as are necessary for the prosecution and punishment of crimes against humanity.

. . . .

[W]e find that, as a matter of customary law, or even more strongly as a matter of *jus cogens*, universal jurisdiction over crimes against humanity exists, authorizing national judicial authorities to prosecute and punish

memorandum, states may exercise universal jurisdiction over ordinary crimes under national law that do not contrary to *jus cogens* prohibitions or involve *erga omnes* obligations.

II. UNIVERSAL JURISDICTION OVER GENOCIDE UNDER CUSTOMARY INTERNATIONAL LAW

the perpetrators in all circumstances.”

English translation in *In re Pinochet*, 93 Am. J. Int'l L. 700, 702, 703 (1999).

Article VI of the Genocide Convention expressly requires that states parties in whose territory persons responsible for genocide and ancillary crimes of genocide are found to bring them to justice in their own courts or to surrender them to an international penal tribunal with jurisdiction.⁹ However, Article VI does not preclude any state, whether a party to the Convention or not, from exercising universal jurisdiction or other forms of extraterritorial jurisdiction over persons suspected of genocide.

Indeed, the logic of the obligations imposed on states parties by the Convention as a whole may well require that they exercise such jurisdiction when territorial states fail to fulfill their responsibilities under the Convention to bring those responsible for this crime to justice.

A. Permissive universal jurisdiction

Customary international law permits national courts to exercise universal jurisdiction over genocide, whether the courts are in a state party to the Convention or in a non-state party.

⁹ Article VI states:

“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

There is overwhelming support by scholars and other experts for the view that genocide is a crime under customary international law over which any state may exercise universal jurisdiction.¹⁰ In

¹⁰ Doede Ackers, *Background Paper, National Adjudication of International Crimes: A Seminar on Universal Jurisdiction over Serious Violations of Human Rights and Humanitarian Law* 17 (Noordwijkerhout, The Netherlands 9–11 May 1997); Hans W. Baade, *The Eichmann Trial: Some Procedural Legal Aspects*, 1961 Duke L.J. 400, 418; M. Cherif Bassiouni, *Crimes against Humanity in International Law* 235, 234-235 (Dordrecht/London/Boston: Kluwer Law International 2d ed.1999) (“universal jurisdiction may be applied to the crime [of genocide] under international law”); Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in M. Cherif Bassiouni, ed., *2 International Criminal Law: Procedures and Enforcement Mechanisms* 33, 77 n. 241 (Ardsley, New York: Transnational Publishers, Inc. 1999); A.R. Carnegie, *Jurisdiction over Violations of the Laws and Customs of War*, 39 Brit. Y.B. Int’l L. 402, 424 (stating that where a war crime also constitutes genocide, universal jurisdiction may be exercised “where there is a right to exercise jurisdiction over the offence by reason of the fact that it is an act of genocide”); Cassel, Douglass, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 New Eng. L. Rev. 421, 426–427 (2001) (“Customary international law permits states to exercise universal jurisdiction over genocide . . .”); Lori Fisler Damrosch, *Enforcing International Law Through No-Forcible Measures*, 269 *Recueil des Cours*, 216, 218 (1997) (“[T]he right approach . . . is to view genocide as having attained the status of a crime entailing universal jurisdiction.”); Nguyen Quoc Dinh, Patrick Daillier & Alain Pellet, *Droit International Public* 632 (Paris: Librairie Général de Droit et de Jurisprudence 5th ed. 1994) (citing *Eichmann* case); Yoram Dinstein, *International Criminal Law*, 20 *Israel L. Rev.* 206, 214 (1985) (stating that there is universal jurisdiction over genocide under customary international law); Drost, 2 *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples – Genocide* 100–102, 102 (“It seems clear that the Article [VI] does not forbid a Contracting Power to exercise jurisdiction in accordance with its national rules on the criminal competence of its domestic courts. General international law does not prohibit a state to punish aliens for acts committed abroad against nationals. . . . [In addition,] no limitations of the law of nations prevents the *forum deprehensionis* [place of arrest] to exercise criminal jurisdiction over aliens for acts committed abroad.”), 131 (“None of these forms of complementary competence additional to the territorial jurisdiction as basic competence of the domestic courts has been excluded under Article VI of the present Convention.”) (Leyden: A.W. Sythoff 1959); Geoff Gilbert, *Crimes Sans Frontières: Jurisdictional Problems in English Law*, 63 Brit. Y.B. Int’l L. 415, 423–424 n. 61 (1992); International Committee of the Red Cross (ICRC), *International Criminal Court: State consent regime v. universal jurisdiction* 2 -3 (1998); 7 (concluding that there was “no doubt” that genocide was subject to universal jurisdiction); Menno T. Kamminga, *Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Human Rights Law and Practice, International Law Association, London Conference 2000, 5 (*Final ILA Report*) (“[I]t is widely agreed that the offence of genocide is subject to universal jurisdiction as a principle of customary international law.”); D. Lasok, *The Eichman Trial*, 11 Int’l & Comp. L. Q. 355, 364 (1962); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 *Am. J. Int’l L.* 554, 569 (1995); Jordan J. Paust, *Congress and Genocide: They’re Not Going to Get Away with It*, 11 *Mich. J. Int’l L.* 90, 92 & n. 2 (1989); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *Yale L. J.* 2539, 2565 (1991) (“The jurisdiction established by the Genocide Convention is not exclusive. Scholars and judicial bodies concur that customary law establishes universal jurisdiction over genocide.”); Kenneth C. Randall, *Universal Jurisdiction under*

July 2000, the International Law Association endorsed the conclusion of its Committee on Human Rights Law and Practice that “[g]ross human rights offences in respect of which states are *entitled* under international customary law to exercise universal jurisdiction include . . . genocide [as defined in Article 6 of the Rome Statute]”.¹¹ The Commission of Experts appointed to investigate the human rights situation in the former Yugoslavia concluded that universal jurisdiction over genocide existed under international law.¹² Such conclusions are fully borne out by the state practice discussed in the following chapter.

One distinguished British writer, writing in 1992, before the recent revival of criminal investigations and prosecutions in national courts for genocide based on universal jurisdiction and at a time when studies of contemporary state practice, such as legislation, were not generally available, expressed doubts about whether customary international law permits universal jurisdiction over genocide.¹³

International Law, 66 *Tex. L. Rev.* 785, 835-837 (1988); *Restatement (Third) of the Foreign Relations Law of the United States*, § 404 (“A state has jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern, such as . . . genocide”) and § 404, reporter’s note 1 (“Universal jurisdiction to punish genocide is widely accepted as a principle of customary law.”) (1987); Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 163-164 (Oxford: Clarendon Press 2nd ed. 2001) (“Apart from the Genocide Convention, it is likely that genocide carries universal jurisdiction under customary international law.”); Nehemiah Robinson, *The Genocide Convention: A Commentary* 82-85 (1960); Nigel Rodley, *Treatment of Prisoners under International Law* 195 (Oxford: Clarendon Press 2d ed. 1999)(reiterating position in first edition):(“[W]hile the Convention *requires* only jurisdiction by the state in which the genocide was committed, and also envisages a future international penal jurisdiction, it is reasonably certain that international law *permits* the exercise of jurisdiction on a universal basis.”); Brigitte Stern, *La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et aut Rwanda*, 40 *Ger. Y.B. Int’l L.* 280, 286 (1997); Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Duty to Extradite or Prosecute*, 12 *N.Y. Int’l L. Rev.* 1, 26 (1999) (“The convention establishes universal jurisdiction over genocide.”); Rüdiger Wolfrum, *The Decentralized Prosecution of International Offences through National Courts*, 24 *Israel Y.B. Int’l Hum. Rts* 183 (1995); *see also* Octavio Colmenares Vargas, *El Delito de Genocidio* (Mexico 1951).

¹¹ International Law Association, Res. 9/2000, adopted at the 69th Conference, London, 25-29 July 2000. For the text of the relevant parts of this resolution, see footnote 6, Introduction.

¹² Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674 (Annex), 27 May 1994, para. 42 (stating, in the context of an internal armed conflict, that there was universal jurisdiction over genocide).

¹³ Rosalyn Higgins, *Problems and Processes: International Law and How We Use It* 62 (Oxford: Oxford

University Press 1992) . She noted that “the fact that an act is a violation of international law does not of itself give rise to universal jurisdiction”. *Ibid.* She also stated that the fact that genocide was identified as an international crime in the International Law Commission’s Draft Articles on State Responsibility was insufficient to give rise to universal jurisdiction. *Ibid.* Both observations are, of course, correct, but the case for the existence of a customary international law rule permitting national courts to exercise universal jurisdiction over genocide rests on other grounds, including the extensive evidence discussed in this memorandum of state practice, such as legislation and criminal investigations and prosecutions.

B. The intent of the drafters not to exclude other forms of jurisdiction

The travaux préparatoires. Although the framers of the Genocide Convention in 1948 did not expressly extend the scope of obligatory jurisdiction under Article VI of that treaty beyond territorial jurisdiction and the jurisdiction of an international criminal court, the *travaux préparatoires* indicates that the framers did not intend Article VI to *prevent* states parties to the Convention from continuing to exercise extraterritorial jurisdiction, such as active or passive personality jurisdiction – or even universal jurisdiction – over genocide in their “pragmatic compromise” on this issue.¹⁴

A thorough review of the *travaux préparatoires* (only the highlights of which can be mentioned here) indicates that the drafters excluded an express *aut dedere aut judicare* universal jurisdiction obligation, but at the end of the day did not intend to exclude any existing permissive extraterritorial jurisdiction possessed by states over conduct amounting to genocide, such as universal jurisdiction. Such proposals by Saudi Arabia, the Secretariat and Iran imposing an express *aut dedere aut judicare* obligation were rejected.

In 1946, Saudi Arabia submitted a draft convention on genocide to the General Assembly, Article IV of which stated: “Acts of genocide shall be prosecuted and punished by any State regardless of the place of commission of the offence or of the nationality of the offender, in conformity with the laws of the country prosecuting.”¹⁵ No decision was taken on the Saudi Arabian proposal and the preparation of a draft convention was entrusted to the Secretariat.

¹⁴ According to William A. Schabas, the leading contemporary commentator on the Genocide Convention, who has written the most comprehensive study of the Convention so far, Article VI “was a pragmatic compromise reflecting the state of the law at the time the Convention was adopted” and “[a]lthough universal jurisdiction, and the related concept of *aut dedere aut judicare*, had long been recognized for certain crimes, committed by individual outlaws, few in 1948 wanted to extend it to crimes which would, as a general rule, involve State complicity.” William A. Schabas, *Genocide in International Law* 548 (Cambridge: Cambridge University Press 2000).

¹⁵ U.N. Doc. A/C.6/86 (1946), Art. IV.

Article VII (the original version of Article VI of the Genocide Convention) of the draft convention prepared by Rafael Lempkin, Vespasian Pella and Henri Donnedieu de Vabres provided: “[Universal Enforcement of Municipal Criminal Law] The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed.”¹⁶ The Ad Hoc Committee voted against the Secretariat’s provision by 4 against, 2 in favour and 1 abstention.¹⁷ It replaced this language in the Ad Hoc Committee’s draft convention submitted to the Sixth Committee of the General Assembly with a new draft Article VII reading: “Persons charged with genocide or any of the other acts enumerated in Article IV shall be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal.”¹⁸

Nevertheless, in a carefully crafted compromise, the drafters did not rule out permissive extraterritorial jurisdiction over genocide under any internationally recognized principle. Although the impetus for the compromise was pressure to permit states to exercise active personality jurisdiction (particularly to avoid extraditing nationals to territorial states) and passive personality jurisdiction, the final wording ensures that states parties may exercise any form of extraterritorial jurisdiction not prohibited by customary international law. Many states supported an Indian proposal to include a specific statement that nothing in Article VI (it had been renumbered) would affect the right of a state to try its own nationals for acts committed abroad or a statement of clarification to that effect. As the Indian delegate explained during the course of the debate, he had originally suggested deleting Article VI since he felt that Article VI as it stood was redundant to the extent it required territorial states to act, given the obligation on all states in Article I to prevent and punish genocide and it “would rule out the possibility that persons charged with genocide could be tried by any tribunal other than that of the State in the territory of which the act was committed.”¹⁹ Since the majority of states wished to retain Article VI, he made his proposal

“designed to safeguard the extra-territorial jurisdiction of States, which was a recognized principle of international law. It had been stated that article VI would not affect that principle, but Mr. Sundaram considered that the provisions of articles V and VI were so worded as to rule out the jurisdiction of any courts other than those of the State in which the act of genocide was committed. That legal point was liable to be raised by the persons charged with genocide in

¹⁶ U.N. Doc. E/447 (1947), Art. VII.

¹⁷ Ad Hoc Committee on Genocide, Report of the Committee and Draft Convention Drawn up by the Committee, U.N. Doc. E/794, 24 May 1948, 32-33.

¹⁸ *Ibid.*, 29.

¹⁹ U.N. G.A.O.R. 3rd Sess. Part I, 132nd mtg., 1 December 1948, 695.

order to avoid punishment. It was not sufficient, therefore, for the members of the Committee tacitly to agree that the provisions of article VI would not rule out the extra-territorial jurisdiction of States; some clear statement to that effect should be made.

In order to conform to the will of the Committee, the representative of India had agreed to withdraw his proposal for the addition of a new paragraph to article VI and had requested its insertion in the report in the form of an interpretation. India intended to make it quite clear when acceding to the convention, that *it preserved the right to exercise its extra-territorial jurisdiction notwithstanding the provisions of article VI.*²⁰

However, Sweden insisted that the clarifying statement expressly recognize the passive personality principle.²¹ The Belgian delegate stated that the purpose of Article VI

²⁰ *Ibid.*, 695-696 (emphasis supplied).

²¹ Sweden noted that

“jurisdiction of a State over its own nationals was not the only case which should be considered. If the crime of genocide had been committed against nationals of one State on territory of another state, and if the perpetrators of the crime were arrested in the territory of the State of which the victims were nationals, that State would undoubtedly have the right to punish the criminals within its own borders and should not be compelled to return the criminals to the other State for punishment.”

U.N. G.A.O.R. 3rd Sess. Part I, 130th mtg., 30 November 1948, 674.

“was to impose on the State in the territory of which the act was committed the obligation to bring the persons concerned to trial, but *there was no intention to exclude the possibility of trial by any other competent tribunal*. He agreed that something should be done to make the purpose of the article quite clear, but he felt that *the text proposed by the Indian delegation did not cover all possible cases, as had been pointed out by the representative of Sweden*. He had therefore suggested that the correct interpretation of the article should be included in the Committee’s report.”²²

The Swedish delegate subsequently agreed to withdraw its proposed addition to India’s proposed amendment to Article VI and instead to have a statement with regard to the Indian amendment included in the Sixth Committee’s report, adding that he “felt that *other exceptional cases should also be made the subject of comment there*.”²³ The United States objected to the Indian and Swedish proposals.²⁴

However, instead of drafting an exclusive list of all forms of extraterritorial jurisdiction not affected by Article VI, the Sixth Committee agreed after a debate to an open-ended compromise statement not ruling out any form of extraterritorial jurisdiction. The first version read:

“Article VI contemplates exclusively the obligation of the State in whose territory acts of genocide have been committed. Thus, in particular, this article does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State.”²⁵

The USSR recognized that the compromise statement “could be taken to imply that universal punishment might be admissible in certain circumstances and urged that it be rejected.”²⁶ The Egyptian delegate also recognized the open-ended nature of the compromise statement.²⁷ The delegate of the United Kingdom stated that

²² U.N. G.A.O.R. 3rd Sess. Part I, 130th mtg., 30 November 1948, 680 (emphasis supplied).

²³ U.N. G.A.O.R. 3rd Sess. Part I, 130th mtg., 30 November 1948, 682 (emphasis supplied).

²⁴ The United States delegate said that “the Committee had made a mistake in agreeing to the insertion of the original Indian amendment in the report as an interpretation of Article VI. Once one interpretation was introduced, others would naturally be submitted and he did not think that the Committee should make the further mistake of adopting the additional interpretation submitted by the representative of Sweden. U.N. G.A.O.R. 3rd Sess. Part I, 132nd mtg., 1 December 1948, 694.

²⁵ U.N. Doc. A/C.6/314 (1948). The delegate of Siam considered that the word “exclusively” was too strong and that “only” could be substituted. India agreed to the proposed change.

²⁶ U.N. G.A.O.R. 3rd Sess. Part I, 132nd mtg., 1 December 1948, 698.

²⁷ U.N. G.A.O.R. 3rd Sess. Part I, 132nd mtg., 1 December 1948, 699 (stating that the compromise proposal

“would seemingly admit the existence of several competencies: among others, that of the State where the crime had been committed; that of the State of which the victim was a national; and that of the State of which the victim was a national.”). An attempt at clarification by the Belgian delegate does not appear to be correct. *Ibid.*

“[t]he main purpose of article VI, in his view, was to establish the obligation of a State, in the territory of which an act of genocide was committed, to endeavour to bring the criminal to trial. Difficulties had arisen during the discussion through efforts to specify what considerations, other than territorial jurisdiction, were to be applied in bringing to trial persons charged with genocide. *The article was not intended to rule out extra-territoriality. Jurisdiction with respect to crimes was a subject which would be better left to the accepted principles of international law.*”²⁸

The Brazilian delegate agreed that Article VI was limited to imposing an obligation on the territorial state.²⁹

The final text of the compromise statement reads:

“The first part of article VI contemplates the obligation of the State in whose territory acts of genocide have been committed. Thus, *in particular*, it does not affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside the State.”³⁰

At the time the Sixth Committee adopted the final text of the Convention for submission to the General Assembly in plenary session for adoption, the Brazilian delegate regretted the Committee’s rejection of the *aut dedere aut judicare* universal jurisdiction obligation. He emphasized

“that his delegation could interpret the first part of article VI only as entailing a minimum obligation for States to punish crimes of genocide committed in their territory; *it did not exclude*

²⁸ U.N. G.A.O.R. 3rd Sess. Part I, 132nd mtg., 1 December 1948, 700 (emphasis supplied). The United Kingdom delegate added, “The revised text of the Swedish proposal was based on the assumption that article VI was not intended to rule out other courts which might be competent, and the Indian statement already adopted specified, in particular, that the jurisdiction of a State of which the person charged with genocide was a national, was not ruled out.” *Ibid.*

²⁹ The Brazilian delegate explained that
 “when article VI had been adopted, many delegations had interpreted it in the same way as was done in the revised Swedish proposal. Article VI was not intended to solve questions of conflicting competence in regard to the trial of persons charged with genocide Its purpose was merely to establish the obligation of the State in which an act of genocide was committed.”
 U.N. G.A.O.R. 3rd Sess. Part I, 132nd mtg., 1 December 1948, 700.

³⁰ U.N. Doc. A/C.6/313 (1948) (emphasis supplied). The Indian delegate explained that
 “[t]he proposed text made it clear that article VI did not contemplate exclusively the obligation of the State in whose territory acts of genocide had been committed, and consequently did not rule out the competence of the State in cases such as those described by the delegate of Sweden.”
 U.N. G.A.O.R. 3rd Sess. Part I, 132nd mtg., 1 December 1948, 697.

domestic legislative provisions providing for other cases coming within the general competence of the tribunals of the country concerned.”³¹

³¹ U.N. G.A.O.R. 3rd Sess. Part I, 133rd mtg., 2 December 1948, 709 (emphasis supplied).

The use of the term “in particular” - a standard technique in drafting treaties and legislation to ensure that examples are illustrative, not exclusive - makes clear that states other than the territorial state may exercise jurisdiction over persons suspected of genocide and that other forms of extraterritorial jurisdiction were not excluded by Article VI. Commentators have reached the same conclusion.³² Four states (Algeria, Burma, Morocco and Philippines) demonstrated that they agreed with this was the effect of the statement by making reservations to Article VI stating that it did not permit other states to exercise jurisdiction over genocide committed in their territory.³³ Australia, Greece and Norway objected to these reservations.³⁴ Perhaps even more telling is the large number of states parties to the Genocide Convention that have enacted legislation permitting the exercise of universal jurisdiction over genocide, as well as the national courts in these states that have exercised such jurisdiction, as documented in Chapter Eight.

³² Eric David, *Principes de Droit des Conflits Armes* 666 (Bruxelles 2ème ed. 1999) (“The words ‘in particular’ were intended to reserve other forms of extraterritorial jurisdiction than active personality jurisdiction . . .”) (English translation by Amnesty International) (“*Le mot ‘notamment’ visait à réserver d’autres compétences extra-territoriales que la compétence personnelle active . . .*”). William A. Schabas has noted that Article VI does not explicitly mention non-territorial bases of jurisdiction: “Article VI says trials should be held by the courts of the territory where the crime took place, but does not explicitly address whether there are other options. These may include prosecution by the State of nationality of the offender, or of the victim, or any State prepared to see that justice is done.” Schabas, *supra*, 346.

³³ *Algeria*: “The Democratic and Popular Republic of Algeria declares that no provision of article VI of the said Convention shall be interpreted as depriving its tribunals of jurisdiction in cases of genocide or other acts enumerated in article III which have been committed in its territory or as conferring such jurisdiction on foreign tribunals.” *Burma (Myanmar)*: “(1) With reference to article VI, the Union of Burma makes the reservation that nothing contained in the said Article shall be construed as depriving the Courts and Tribunals of the Union of jurisdiction or as giving foreign Courts and tribunals jurisdiction over any cases of genocide or any of the other acts enumerated in article III committed within the Union territory.” *Morocco*: “With reference to article VI, the Government of His Majesty the King considers that Moroccan courts and tribunals alone have jurisdiction with respect to acts of genocide committed within the territory of the Kingdom of Morocco.” *The Philippines*: “3. With reference to articles VI and IX of the Convention, the Philippine Government takes the position that nothing contained in said articles shall be construed as depriving Philippine courts of jurisdiction over all cases of genocide committed within Philippine territory save only in those cases where the Philippine Government consents to have the decision of the Philippine courts reviewed by either of the international tribunals referred to in said articles. . . .”

As one commentator pointed out, “Whatever the legal effect of these reservations, the fact that these countries felt obliged to make them is further evidence that Article VI does not affect the general jurisdictional rights and obligations of other states.” Steven, *supra*, n. 10, 458 n. 145.

³⁴ *Australia*: “The Australian Government does not accept any of the reservations contained . . . in the instrument of ratification of the Republic of the Philippines.” *Greece*: “We further declare that we have not accepted and do not accept any reservation which has already been made or which may hereafter be made by the countries signatory to this instrument or by countries which have acceded or may hereafter accede thereto.” *Norway*: “The Norwegian Government does not accept the reservations made to the Convention by the Government of the Philippines at the time of ratification.”

The pragmatic compromise. The results of this pragmatic compromise on the wording of Article VI can be briefly summarized as follows:

- An express *aut dedere aut judicare* universal jurisdiction obligation in Article VI on states parties was rejected;
- Territorial states parties were required in Article VI to exercise jurisdiction over persons suspected of committing genocide in their territory or to surrender them to an international criminal court; and
- No express reference to any form of universal jurisdiction was included in Article VI, but states parties were required under Article VII to honour requests for extradition and these requests were not limited to states exercising territorial jurisdiction.
- Article VI did not exclude any form of permissive extraterritorial jurisdiction states could otherwise exercise under international and national law.
- Other obligations in other articles in the Convention, including Articles I and VII, remained unaffected.

The assessment of the majority of commentators. As one of the leading commentators on the Genocide Convention has stated:

“On the basis of Article VI, the States are thus obliged to punish persons charged with the commission of acts coming under the Convention insofar as they were committed in their territory. They could, however, provide for punishment of other persons (provided no extradition request is pending) since the rule of the competence of the State where a crime was committed is not an exclusive one either in domestic or in international law.”³⁵

Similarly, Sir Nigel Rodley, the UN Special Rapporteur on torture, has explained:

³⁵ Robinson, *supra*, n. 10, 84.

“The Genocide Convention does not refer specifically to universality of jurisdiction. It requires trial ‘by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction’ over the offence. While the absence of reference to other bases of jurisdiction is regrettable (not even jurisdiction on the basis of nationality is mentioned), it should not be assumed that the Convention purported to exclude other bases of jurisdiction, including universality, at least on a permissive basis.”³⁶

³⁶ Rodley, *supra*, n. 10, 123 (reiterating position in first edition).

Other authorities have reached the same conclusion that Article VI does not prevent states parties from exercising universal jurisdiction over genocide.³⁷ As *Ad Hoc* Judge Elihu Lauterpacht of

³⁷ Ackers, *supra*, n. 10, 17; Baade, *supra*, n. 10, 418; Blakesley, *supra*, n. 10, 77 n. 241; David, *supra*, n. 32, 666 (stating that the contention that Article VI limits states parties to territorial jurisdiction over genocide “would deprive the Convention of a large part of its authority and usefulness. In reality, that restriction [in Article VI] does not mean that other states may not take cognizance of the violation: it simply confers a *priority* of jurisdiction to the Court of the State where the crime was committed, but it does not exclude the jurisdiction of other States.”) (citing *travaux préparatoires*, emphasis in original) (“*Ce serait priver la Convention d’une grande partie de sa portée et de son utilité. En réalité, cette restriction ne signifie pas que d’autres Etats ne peuvent connaître de l’infraction : elle confère simplement une compétence prioritaire au tribunal de l’Etat où le crime a été commis, mais elle n’exclut pas la compétence d’autres Etats.*”); Drost, *supra*, n. 10, 100–102 (1959) (“It seems clear that the Article [VI] does not forbid a Contracting Power to exercise jurisdiction with its national rules on the criminal competence of its domestic courts.”), 130–131 (“[T]here exists no general rule of international law limiting the scope of material, personal or geographical competence of criminal jurisdiction to be exercised by national courts. . . . [T]he Sixth Committee did not want to limit the normal exercise of domestic jurisdiction in any way or degree. . . . If it was intended to lay down that the perpetrators of genocide whatever their nationality must be tried and punished in the country where they committed their crimes, the provision under consideration [Article VI] together with the duty of extradition contained in the subsequent Article VII would have made sense. But such was not the idea at all. The fundamental *forum loci delicti commissi* [court in the place where the crime was committed] was not to be considered exclusively competent in cases of genocide. . . . By way of exception – and the crime of genocide surely must be considered exceptional in this respect – the principle of universal repression is applied to crimes which have been committed neither by nor against nationals nor against public interests nor on the territory of the state whose courts are considered competent nevertheless to exercise criminal jurisdiction by reason of the international concern of the crime or the international interest of its repression. None of these forms of complementary competence [active or passive personality, protective or universal jurisdiction] has been excluded under Article VI of the Convention.”); Meron, *International Criminalization of Internal Atrocities*, *supra*, n. 10, 569 (“[i]t is increasingly recognized by leading commentators that the crime of genocide (despite the absence of a provision on universal jurisdiction in the Genocide Convention) may also be cause for prosecution by any state.”) (footnotes omitted); Orentlicher, *supra*, n. 10, 2565 (“The jurisdiction established by the Genocide Convention is not exclusive.”); Randall, *supra*, n. 10, 785, 835–837 (Article VI “does not mean that the parties have deprived themselves of the customary right to exercise universal jurisdiction over the same acts”); Ratner & Abrams, *supra*, pp. 142–143, 142 (concluding that at the time the Convention was drafted, “most member states appear to have interpreted the territorial state’s jurisdiction as non-exclusive and, in particular, did not regard the Convention as precluding states from exercising jurisdiction based on the nationality and passive personality principles.”); Michael P. Scharf, *The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 *Law & Contemp. Probs* 67, 86 (2000) (“Genocide . . . is now universally recognized as a crime under international law over which a state may exercise universal jurisdiction. . . . While some might argue that Article VI demonstrates that genocide is not a universal jurisdiction crime, the article has been interpreted as merely establishing the minimum jurisdictional obligation for states in which genocide occurs.”); *Restatement (Third) of*

the International Court of Justice has stated, the purpose of the confirmation in Article I of the Genocide Convention that genocide “is a crime under international law” is “to permit parties, within the domestic legislation 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”.³⁸ Moreover, as documented in Chapter Eight, Section II, extensive state practice, in the form of legislation and court judgments, confirm that states may exercise universal jurisdiction over genocide.

C. The minority view that the Genocide Convention prohibits the exercise of universal jurisdiction

Foreign Relations Law, § 702, reporter’s note 3(1986) (“Genocide is also one of the offenses subject to universal jurisdiction.”); Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Armed Conflicts: A Positivist View*, 93 Am. J. Int’l L. 302, 314 (2000) (“[A]s evidenced by national trials, the establishment of universal jurisdiction for genocide . . . even if committed by aliens against aliens abroad, seems almost universally to be considered permissible, although the Genocide Convention is silent on the matter.”); Wolfrum, *supra*, n. 10, 183 (Article VI “does not, however, preclude the prosecution of the crime of genocide by other States”).

³⁸ *Case concerning the application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Further requests for the indication of provisional measures, Order of 13 September 1993, ICJ Rep. (separate opinion of *Ad Hoc* Judge Elihu Lauterpacht), para. 110.

Only a few authorities have ever suggested that Article VI actually *prevents* states parties to the Genocide Convention from exercising universal jurisdiction over genocide.³⁹ Nevertheless, as indicated above, the *travaux préparatoires* and the overwhelming weight of authority indicate that Article VI does not limit the extraterritorial jurisdiction, including universal jurisdiction, of states under customary international law. One of the leading authorities on universal jurisdiction has pointed out the absurdity of the contrary contention:

“It is anomalous to argue that General Assembly resolutions affirming the Nuremberg principles, declaring genocide to be an international crime, and creating a convention to

³⁹ A British writer, who agreed that there is universal jurisdiction over the crime of genocide under customary international law, has claimed, however, that states parties to the Genocide Convention decided to limit their customary international law jurisdiction under Article VI when ratifying the Convention. J.E.S. Fawcett, *The Eichmann Case*, 38 Brit. Y.B. Int'l L. 181, 206 (1962) (concluding based on the failure of the drafters to include universal jurisdiction in Article VI that “the exercise of jurisdiction envisaged in Article VI is, for the contracting parties, exclusive of any other”).

Another British author has expressed doubts about whether there is universal jurisdiction over genocide. David Freestone, *International cooperation against terrorism and the development of international law principles of jurisdiction*, in Rosalyn Higgins & Maurice Flory, *Terrorism and International Law* 43, 62 n. 10 (London and New York: Routledge 1997) (contending that the conclusion of the Israeli District Court of Jerusalem that there was universal jurisdiction over genocide was “probably mistaken”, on the ground that Article VI of the Genocide Convention provided for territorial jurisdiction). The International Law Commission, although initially taking the same view as Fawcett, subsequently incorporated in Article 8 of the Draft Code of Crimes the principle of universal jurisdiction over genocide as defined in Article 17 of that Code. 1996 ILC Report, Commentary to Article 8, *see also* Commentary to Article 9.

A leading expert on international criminal law, Roger S. Clark, writing in 1988, before the revival of criminal investigations and prosecutions in national courts of persons suspected of genocide and at a time when up-to-date studies of state practice were not generally available, is another sceptic. He criticized the conclusions of the District Court of Jerusalem and the Supreme Court of Israel in the *Eichmann* case that Article VI of the Genocide Convention did not preclude states parties from exercising jurisdiction over conduct amounting to genocide, but, at the same time, said that the evidence on this point was “far from conclusive” and that the question was “a close one”:

“Obviously a nice question of weighing some far from conclusive evidence is involved. I, personally, would come out the other way from the Israeli Courts on the basis of the wording of Article 6 and my reading of the preparatory work - but the question is a close one.”

Roger S. Clark, *Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg*, 57 Nordic J. Int'l L. 49, 54 (1988). His argument that the preparatory work does not support the view that Article VI does not exclude universal jurisdiction over genocide appears to be based on the early rejection of an express reference to universal jurisdiction and the defeat of the Iranian proposal for including an *aut dedere aut judicare* obligation, as well as his conclusion that the words “in particular” in the Sixth Committee’s report to the General Assembly were “a thin reed on which to base an argument”. *Ibid.*, 53. For another view of the drafting history, see Section II.B of this Chapter. Moreover, the term, “in particular”, is a standard technique in drafting to indicate that examples are illustrative, not exclusive.

outlaw genocide have deprived the parties of their customary law right to prosecute genocide under the universality principle. That argument also leads to the dubious conclusion that non parties have a more expansive right to prosecute genocide – the customary law right to exercise universal jurisdiction – than do parties to the Genocide Convention.”⁴⁰

Indeed, taken to its logical conclusion, states parties wishing to exercise universal jurisdiction would have to denounce the Convention and reratify it with a reservation. Moreover, although Article VI of the Genocide Convention does not itself expressly *require* states parties to exercise any jurisdiction other than territorial jurisdiction, it *permits* them to surrender suspects to an international criminal court with jurisdiction.

D. The duty to prosecute or extradite

Could a state party to the Genocide Convention, consistent with its undertaking in Article I “to prevent and punish” genocide, offer refuge to persons suspected of genocide abroad? Could it do so under customary international law? Would such behaviour be consistent with a state’s obligations as a member of the international community to respect and implement international law? To ask such questions is almost to answer them.

⁴⁰ Randall, *supra*, n. 10, 836. See also David, *supra*, n. 32, 666.

Indeed, there has been increasing support in recent years, as evidenced by jurisprudence of the International Court of Justice, resolutions of the Security Council and the General Assembly and scholarly authority, for the principle that all states are not merely *permitted* to exercise universal jurisdiction over genocide, but also have *an international duty* not to shield persons found in their territory suspected of genocide, but instead *must* either exercise jurisdiction, extradite suspects to states able and willing to fulfil this obligation or surrender them to an international court. This interpretation takes into account the full scope of obligations undertaken by states parties to the Genocide Convention itself, as well as the duty not to grant asylum to persons responsible for crimes against humanity, which include genocide.⁴¹

In Article I, the states parties “confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”. Article I does not contain any territorial limitation. Article VII *requires* states parties to comply with extradition requests by other states, whether they are parties to the Genocide Convention or not and without limiting the obligation to requests from territorial states.⁴² It would be contrary to these undertakings if states parties were to harbour a person suspected of genocide abroad without opening criminal investigations and, if there was sufficient admissible evidence, prosecuting that person, simply on the ground that no other state had requested the suspect’s extradition or that extradition was not possible because the requesting state could not afford a fair trial.

Although the drafters of the Genocide Convention declined to incorporate an express *aut dedere aut judicare* obligation in Article VI of that convention, in 1996, the International Court of Justice explained that there are no territorial limitations to the obligation of all states to prevent and punish genocide. After noting that half a century before it had recognized the universal nature of the crime, the Court declared that “[i]t follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court noted that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.”⁴³

⁴¹ This interpretation of the obligations of states parties is developed in Steven, *supra*, n. 10.

⁴² Article VII provides in part: “The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.”

⁴³ *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment of 11 July 1996, Int’l Ct. Justice, para. 31.

This conclusion of the International Court of Justice is reinforced by the Security Council call upon all states to prosecute persons found within their territory against whom there was sufficient evidence that they were responsible for genocide in Rwanda or to surrender them to the Rwanda Tribunal. In 1995, the Security Council in Resolution 978 urged all states – not just states parties to the Genocide Convention –

As *Ad Hoc* Judge Elihu Lauterpacht explained in a separate opinion in the same case: “The duty to ‘prevent’ genocide is a duty that rests upon all parties and is a duty owed by each party to every other.” *Ibid.* (separate opinion), para. 86.

“to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts [which include genocide] within the jurisdiction of the International Tribunal for Rwanda.”⁴⁴

Trial Chamber 1 of the Rwanda Tribunal in 1999 called upon all states to exercise universal jurisdiction over genocide.⁴⁵

The Security Council has also called upon all parties to the conflict in the Democratic Republic of the Congo, which has both international and non-international dimensions, to bring those responsible for genocide to justice.⁴⁶

⁴⁴ S.C. Res. 978 (1995) of 27 February 1995. Since the phrase “appropriate national authorities” is not limited to Rwandan authorities, it is clear that the Security Council envisaged prosecution by the courts of other states, which would necessarily have included prosecutions based on universal jurisdiction.

⁴⁵ It stated in the context of approving a request to withdraw an indictment, that “the Tribunal wishes to emphasize, in line with the General Assembly and the Security Council of the United Nations, that it encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law”

Prosecutor v. Ntuyahaga, Decision on the Prosecutor’s Motion to Withdraw the Indictment, Case No. ICTR-98-40-T (Trial Chamber I, 18 March 1999). The Trial Chamber also noted that “the Tribunal does not have exclusive jurisdiction over crimes included in its mandate and that its criminal proceedings are complementary to those of national jurisdictions.” *Ibid.*

⁴⁶ On 24 February 2000, the Security Council in Resolution 1291 (2000) called on “all parties to the conflict in the Democratic Republic of the Congo . . . to refrain from or cease any support to, or association with, those suspected of genocide . . . , and to bring to justice those responsible, and facilitate measures in accordance with international law to ensure accountability for violations of international humanitarian law.”

Since the conflict includes a rebellion by certain of the parties against the government and since some of the other parties are foreign states, the Security Council necessarily was calling upon those foreign states to exercise universal jurisdiction over war crimes in a non-international armed conflict. *See also* S.C. Res. 1304 (2000) of 16 June 2000.

The General Assembly on several occasions has called upon all states to bring to justice those responsible for crimes under international law, including genocide, in Rwanda in 1994, citing, in particular, obligations of states parties under the Genocide Convention.⁴⁷ There is not the slightest suggestion in these General Assembly resolutions that the obligation to bring those responsible for genocide to justice is limited to the territorial state, Rwanda, or that it is limiting its appeal to states to the obligation to extradite persons suspected of genocide. As a leading scholar has observed:

“[T]he Genocide Convention is only one source, among others, of the obligation to repress this act, and the UN General Assembly has remained silent on the jurisdiction reserved by the Convention to the State on the territory of which the acts of genocide have been committed. The generality of the expressions used by the General Assembly as to the obligation of repression, combined with this silence concerning the “territoriality” of the Convention, leads one to think that for acts of genocide, all States can and must exercise universal jurisdiction following the example of what the General Assembly has already said in the past concerning the repression of war crimes *and* against humanity.”⁴⁸

⁴⁷ G.A. Res. 49/206 of 23 Dec. 1994, paras 4 (“Reaffirms that all persons who commit or authorize genocide . . . are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international principles of due process[.]”) and 6 (“Requests States that have given refuge to persons involved in . . . acts of genocide to take the necessary steps, in cooperation with the International Tribunal for Rwanda, to ensure that they do not escape justice[.]”); GA. Res. 50/2000, of 22 Dec. 1995, Preamble, para. 6 (“Recalling the obligations of all States to punish all persons who commit or authorize genocide . . . and, pursuant to Security Council resolution 978 (1995) of 27 February 1995, to exert every effort, without delay, to bring those responsible to justice in accordance with international due principles of due process, and to honour their obligations under international law in this regard, particularly under the Convention on the Prevention and Punishment of the Crime of Genocide[.]”) and paras 6 (“Reaffirms that all persons who commit or authorize genocide . . . are individually responsible and accountable for those violations[.]”) and 7 (“Urges all States, pursuant to Security Council resolution 978 (1995), to exert, without delay, every effort, including arrest and detention, in order to bring those responsible to justice in accordance with international principles of due process, and also urges States to honour their obligations under international law in this regard, particularly under the Convention on the Prevention and Punishment of the Crime of Genocide[.]”); G.A. Res. 51/114 of 12 Dec. 1996, para. 4 (“Reaffirms that all persons who committed or authorized acts of genocide . . . are individually responsible and accountable for those violations, and that the international community must exert every effort, in cooperation with national and international tribunals, to bring those responsible to justice, in accordance with international principles of due process[.]”); G.A. Res. 54/188 of 29 February 2000, para. 3 (“Reaffirms that all persons who committed or authorized acts of genocide . . . are individually responsible and accountable for those violations[.]”).

⁴⁸ David, *supra*, n. 32, 668 (“[L]a Convention sur le génocide n’est plus qu’une source, parmi d’autres, de

Other authorities have reached the same conclusion.⁴⁹

l'obligation de réprimer ce fait, et l'A.G. des N.U. rest muette sur la compétence réservée par la Convention à l'Etat sur le territoire duquel les faits de génocide ont été commis. L généralité des expressions utilisées par l'A.G. quant à l'obligation d répression, combinée avec ce silence sur la 'territorialité' de la Convention, conduit à penser que pour des faits de génocide, tous les Etats peuvent et doivent exercer une compétence universelle à l'instar de ce que l'A.G. avait déjà dit dans le passé pour la répression des crimes de guerre et des crimes contre l'humanité.'") (emphasis in the original, footnote omitted) (English translation by Amnesty International).

⁴⁹ Association of the Bar of the City of New York, Committees on International Human Rights and Inter-American Affairs, *The English Patient or the Spanish Prisoner? Reflections on the Pinochet Prosecution, Jurisdiction and the International Criminal Court*, 55 *Bar Record* 205, 222-223 (2000); Steven, *supra*, n. 10, 460-461.

The International Law Commission has incorporated an *aut dedere aut judicare* obligation with respect to genocide in Article 9 of the 1996 Draft Code of Crimes. It explained, “It would be contrary to the interests of the international community as a whole to permit a State to confer immunity on an individual who was responsible for a crime under international law such as genocide.”⁵⁰ It also reasoned that “a more effective jurisdictional regime” than in the Genocide Convention “was necessary to give meaning to the prohibition of genocide as one of the most serious crimes under international law which had such tragic consequences for humanity and endangered international peace and security.”⁵¹ Principle 5 of the Van Boven–Bassiouni Principles provides that “States shall incorporate within their domestic law appropriate provisions providing for universal jurisdiction over crimes under international law and appropriate legislation to facilitate extradition or surrender of offenders to other States and to international bodies”.⁵²

This approach is consistent with the duty of states not to grant asylum to persons suspected of committing crimes against humanity (which include genocide), who have committed serious non-political crimes or who are guilty of acts contrary to the purposes and principles of the UN.⁵³

⁵⁰ 1996 Draft Code of Crimes, Commentary to Article 9, para. 4.

⁵¹ 1996 Draft Code of Crimes, Commentary to Article 8, para. 8.

⁵² UN Commission on Human Rights Independent Expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law (Final Draft), 18 January 2000 (Van Boven-Bassiouni Principles), U.N. Doc. E/CN.4/2000/62/Rev.1 (2000), 5.

⁵³ Universal Declaration of Human Rights, Art. 14 (2); 1951 Convention relating to the Status of Refugees, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of 14 December 1950, adopted on 28 July 1951, Art. 1 (F); Declaration on Territorial Asylum, U.N.G.A. Res. 2312, 22 U.N. G.A.O.R. Supp. (No.16) at 81, U.N. Doc. A/67/16/16 (1967) of 14 December 1967, Art. 1 (2); UN Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (1973 UN Principles of International Co-operation), adopted by the General Assembly in Resolution 3074 (XXVIII) of 3 December 1973, Principle 7; Inter-American Commission on Human Rights, Organization of American States, *Asylum and International Crimes*, 20 October 2000. For the text of these provisions, see Chapter Three, Section I.C above.