Berkeley Journal of International Law

Volume 21 | Issue 1 Article 4

2003

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By
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There is a dramatic disparity between the circumstances of the accusers and of the accused that might discredit our work if we should falter, in even minor matters, in being fair and temperate.[1]

I.
INTRODUCTION

The end of the Cold War allowed deep-seated ethnic and religious tensions, previously contained by the conflict, to rise to the surface in many regions of the world.[2] Ironically, more bloodshed rather than less seemed to herald the new era as full-scale genocidal campaigns began in Europe and Africa. As former U.N. Secretary General Boutros Boutros-Ghali characterized the post-Cold War era, "[w]e have entered a time of global transition marked by uniquely contradictory trends."[3] In Eastern Europe, nationalist and ethnic identities, previously suppressed by the ruling communist regimes, reasserted themselves as the Soviet Union receded.[4] In the Socialist Federal Republic of Yugoslavia, internal conflict resulted almost immediately in "widespread violations of international

1. Justice Robert Jackson, Opening Remarks of the International Military Tribunal Sitting at Nuremberg, Germany (Nov. 21, 1945) *in* THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, London 1946, at 51 [hereinafter Jackson Opening Remarks].

2. Although Samuel Huntington's ultimate thesis that the world is destined for conflict along predominantly cultural lines seems overly simplistic, his work accurately recognizes that over the past decade "multiple communal conflicts have superseded the single superpower conflict." *See* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS 272 (1997); *see also* ROGER A. COATE, U.S. POLICY AND THE FUTURE OF THE UNITED NATIONS 6 (Roger A. Coate ed., 1994) ("[A]lthough the liberal democratic and economic values of the West have prevailed over fascism and communism, long-repressed forces of ethnic identity, religious fundamentalism, and militant nationalism threaten to destroy peace at flashpoints around the world.").

3. BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE: PREVENTIVE DIPLOMACY, PEACEMAKING AND PEACE-KEEPING 41 (2d ed. 1995).

4. *See* James Gow, *Shared Sovereignty, Enhanced Security: Lessons from the Cold War, in* STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS 151, 165 (Sohail H. Hashmi ed., 1997) ("[W]hile the communists professed to transcend ethnic identities so that both majority and minority national groups would disappear, this did not happen. For the most part, the communist regimes managed only to suppress national problems . . .").

humanitarian law."[5] Three years later, beginning in April 1994, Hutu extremists began a systematic campaign of terror and violence that killed an estimated 500,000 to 800,000 Tutsis and Hutu moderates in a period of 100 days.[6] With the rise of these internal conflicts, the international community sought new means of vindicating the humanitarian wrongs it had been unable to prevent. The U.N. Security Council for the first time in its history established international criminal tribunals, first for the crimes committed in the former Yugoslavia[7] and subsequently for those in Rwanda,[8] in the hope of creating a system of international criminal responsibility based on the rule of law.[9]

Yet, the attempted formulation of such aspirations into a working system of criminal justice raises difficult questions that must be answered carefully to preserve the legitimacy of the proceedings. For example, critics have argued that the two tribunals have been inconsistent in their sentencing of perpetrators of like crimes, apparently relying on different sentencing methodologies.[10] The problem of sentencing alone raises concerns of fairness and consistency, which are central to the legitimacy of applying international criminal law. These problems of legitimacy are not unique to international tribunals, however, and become particularly profound when national courts exercise jurisdiction over crimes committed outside their territory when neither the perpetrators nor their victims are nationals.[11] The trend toward prosecution and adjudication of international crimes by national courts may increase in the coming years in light of the sheer number of culpable perpetrators compared to the resources of international tribunals. Indeed, during the past decade several countries undertook aggressive new domestic initiatives to legislate and prosecute extraterritorial

5. 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 21 (1995).

6. *See* United Nations, Report of the Independent Inquiry Into the Actions of the United Nations During the 1994 Genocide in Rwanda (Dec. 15, 1999), available at http://www.un.org/News/ossg/rwanda-report.htm; Alan J. Kuperman, *Rwanda in Retrospect*, FOREIGN AFFAIRS, Jan.-Feb. 2000, at 94, 101 (arguing that approximately 500,000 Tutsis and an additional 10,000 to 100,000 Hutus were killed, as calculated by his comparison of pre-genocide census figures and post-genocide identification of survivors by aid organizations); *see also* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 176 (2d ed., 2001) (estimating that genocidal violence killed between 500,000 and 1,000,000).

7. S.C. Res. 808, U.N. SCOR, 48th Sess., Res. & Decisions 1993, at 28, U.N. Doc. S/RES/808 (1993).

8. S.C. Res. 955, U.N. SCOR, 49th Sess., Res. & Decisions 1994, at 15, U.N. Doc. S/RES/955 (1994).

9. *See* Bartram S. Brown, *The International Criminal Tribunal for the Former Yugoslavia*, *in* 3 INTERNATIONAL CRIMINAL LAW 489 (2nd ed. 1999).

10. Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Sentencing*, 87 VA. L. REV. 415, 501 (2001) ("[T]he Tribunals . . . have discretion over most aspects of international sentencing, and they have done little over the past seven years to clarify the standards by which they impose sentences.").

11. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 270 (Martinus Nijhoff Publishers 1991) (1915) ("[T]hese cases present special problems that bear on the fairness and propriety of the judicial proceedings in a State removed from the site of the crime and having no link of nationality to the accused.").

atrocities committed by non-resident aliens. Most notable of these countries, perhaps, is Belgium.

In 1993, Belgium enacted legislation authorizing its national courts to try offenses arising under the 1949 Geneva Conventions and Additional Protocols I and II regardless of where committed.[12] The Belgian legislature subsequently amended the law in 1999 to add jurisdiction over acts of genocide and crimes against humanity.[13] Belgium's legislation conferring universal jurisdiction is arguably the broadest state effort to date to enforce international humanitarian law in its domestic courts.[14] It has proceeded to use this legislative authority aggressively to pursue a wide variety of alleged perpetrators of international crimes. For instance, a Belgian jury in 2001 convicted two Roman Catholic nuns, Sisters Gertrude and Maria Kisito, on June 8, 2001 for complicity in the commission of genocide in Rwanda.[15] It also began a criminal investigation of Israeli Prime Minister Ariel Sharon regarding his activities in Lebanon in 1982.[16]

Not surprisingly, Belgium's aggressive use of its national legislative authority is controversial. The Democratic Republic of the Congo initiated a case before the International Court of Justice (ICJ), arguing that Belgium had violated its sovereign domestic jurisdiction by issuing an arrest warrant for a government official.[17] On February 14, 2002, the ICJ held that Belgium's actions violated Congo's sovereignty and long-established principles of diplomatic immunity.[18] Apparently influenced by this decision, the Belgium Court of Appeals subsequently dismissed the indictment against Ariel Sharon on June 26, 2002, holding that "suspects had to be on Belgian soil to be investigated and tried."[19] Thus, whether Belgium's zeal has advanced the cause of justice or ultimately will hinder the development of international criminal law remains debatable.

This Article will consider the increasing national activism in prosecuting violators of international humanitarian law, particularly Belgium's aggressive use of its courts, and the concerns of legitimacy raised by a nation's unchecked invocation of universal jurisdiction. These concerns regarding the legitimate reach of a nation's courts stem from the incomplete theoretical development of universal jurisdiction, the linchpin of international criminal law. In the headlong

12. Law of 16 June 1993, 2 Codes Belge (Bruylant), at 240/5 (62d Supp. 1996).

13. *See* Loi relative à la repression des violations graves de droit international humanitaire, Art. 3 §§ A-B (1999), *published in* Moniteur Belge, Mar. 23, 1999.

14. Stefaan Smis & Kim Van der Borght, Introductory Note, *Introduction to* Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 38 I.L.M. 918 (1999), *available at* http://www.asil.org/ilm/smis.htm (last visited Oct. 4, 2002) (labeling the Belgian act as "one of the most progressive of its kind").

15. *See Special Report: Judging Genocide*, THE ECONOMIST, June 16, 2001, at 23-24.

16. CNN, *Sharon Hearings Begin in Belgium*, (Nov. 28, 2001) *at* http://www.cnn.com/2001/WORLD/europe/11/28/sharon.belgium/ [hereinafter *Sharon Hearings*].

17. Case Concerning the Arrest Warrant of 11 April 2002 (Congo v. Belg.), 2002 I.C.J. No. 121, at 4 (Feb. 14).

18. *Id.* at 29.

19. Keith B. Richburg, *Belgian Court Dismisses Sharon War Crimes Case: Israeli Leader Accused in 1982 Massacre*, WASH. POST, June 27, 2002, at A24.

rush to give practice to justice, few have paused to consider the full theoretical intricacies of applying this jurisdictional principle. As one commentator noted, "[u]niversal jurisdiction as a concept has been under-theorized for, until quite recently, it was seldom invoked."[20] "Under-theorization" of the core principle on which the international criminal system rests stymies the development of a "fair and temperate" system to govern the invocation of universal jurisdiction as the basis for prosecuting humanity's worst offenders. In the hope of promoting this development, this article primarily will explore the concept of universal jurisdiction as being integrally related to evolving notions of state sovereignty. Particularly, it will argue that the assertion of universal jurisdiction, as the basis for the prosecution and trial of war criminals, is merely a form of intervention into another state's domestic jurisdiction, which must be exercised with great caution.

In Part II, I will explore a model for conceptualizing state sovereignty by reference to the legal philosophy of property, which presupposes control over a territory with the corresponding right to exclude others. I will argue that, as international humanitarian law has eroded the Westphalian model under which states possessed the absolute right to non-interference, the analogy of property as a "bundle of sticks" provides a useful framework for appreciating the present balance between state sovereignty and the international legal order. Inherent within this balance is the notion that states increasingly are subject to international validation of their governance. A nation's violation of the most basic norms of international law results in a corresponding transfer of a limited portion of its sovereignty to the international community, which in turn may exercise the domestic jurisdiction previously reserved exclusively for that nation.

Part III will examine the principle of universal jurisdiction, arguing that its proper assertion rests upon a determination that the territorial state in which an international crime has been committed has ceded a portion of its sovereignty to the international community. This examination will begin with a brief overview of universal jurisdiction's roots in the crime of piracy as a demonstration of its foundation in the idea of *terra nullius*. I will argue that the concept of *terra nullius* remains the conceptual core of universal jurisdiction. The fact that certain heinous crimes, such as genocide or crimes against humanity, occur is indicative that the territorial state has ceded some of its "sovereign sticks" to the international community. In effect, the state becomes analogous to *terra nullius* for purposes of criminal jurisdiction.

Part IV will reflect the heightened concerns that attend a nation's invocation of universal jurisdiction as its sole basis for prosecuting perpetrators of international offenses. These concerns center primarily on the nation's self-appointment to the role of agent acting on behalf of the international community. I will argue that each self-appointed agent should examine carefully its fitness for assuming the prosecutorial mantle, perhaps abstaining from prosecu-

20. Leila Nadya Sadat, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 244 (2001).

tion if its past colonial history contributed to the circumstances resulting in international crimes, such as Belgium's colonial past in Rwanda, or if the particular circumstances do not warrant assumption of another state's jurisdiction. I will conclude by suggesting that nations invoking universal jurisdiction should adhere rigorously to international legal principles, regardless of their domestic law to the contrary.

II.
THE EVOLVING NATURE OF STATE SOVEREIGNTY

In recent decades, international law has recognized that intervention into a state's domestic jurisdiction is permissible under some circumstances. Therefore, state sovereignty, which for centuries was conceptualized as "the absolute power of the State to rule,"[21] has become delimited by recognition that the state may be responsible for its breach of certain international obligations. Among these obligations, a state must provide for the general safety of the human person and may not permit widespread violations against its citizens, such as the commission of genocide, slavery, and apartheid.[22] Though state responsibility and individual criminal responsibility are separate concepts under international law,[23] a state that undertakes the prosecution of a foreign citizen for crimes committed in a foreign state assumes that state's domestic jurisdiction. Therefore, the valid assertion of universal jurisdiction as the sole basis for the prosecution of international crimes requires a conclusion that the state of the perpetrator's nationality, or of the crime's commission, either has breached or failed to enforce its international obligations to such a degree that partial assumption of its domestic jurisdiction is permissible.

The next section will address the concept of sovereignty as it exists under international law today. I propose a model for understanding the current boundaries of state sovereignty derived by analogy to the theory of property law. By considering sovereignty as a form of property right, one may understand more clearly the fluctuation of authority between the sovereign state and the international community.

A. Sovereignty as a "Bundle of Sticks": An Analogy to Property Law

The concept of sovereignty is analogous to the idea of private property.[24] Both ideas have developed from the expectation of deriving certain advantages from physical things. As the English legal philosopher Jeremy Bentham explained, property "is a mere conception of the mind" that "consists in an established expectation. . . . of being able to draw such or such an advantage from the

21. KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 5 (2001).
22. *Id.* at 7 (citing Art. 19, §3(c) of the Draft Articles on State Responsibility).
23. *Id.* at 9.
24. Friedrich Kratochwil, *Sovereignty as Dominium: Is There a Right of Humanitarian Intervention?*, *in* BEYOND WESTHPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION 21, 22 (Gene M. Lyons & Michael Mastanduno eds., 1995) (hereinafter BEYOND WESTPHALIA).

thing possessed."[25] This expectation has developed and exists only as a product of law.[26] An owner of a thing has rights in that thing that the rest of the world respects through non-interference. The concept of state sovereignty fulfills a similar expectation, as each state expects as a matter of legal right that other states will not interfere in its domestic affairs.

Although circumstances in which an individual or entity maintains control over territory, resources or people through force is certainly imaginable, the development of any efficient society is possible only through the recognition of the right to exercise control through law. As Bentham discussed:

> There have been from the beginning, and there always will be, circumstances in which a man may secure himself, by his own means, in the enjoyment of certain things. But the catalogue of these cases is very limited. The savage who has killed a deer may hope to keep it for himself, so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rivals; but that is all. How miserable and precarious is such a possession! If we suppose the least agreement among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given but that of law.[27]

Thus, for Bentham the beginning of the idea of property marks the beginning of law itself as an alternative to control solely through force. The law thus originated from historical behavioral norms that recognized mutual rights of exclusive control over the ground on which they sat and the things in their possession.

The concept of sovereignty developed in an analogous manner. The Treaty of Westphalia, signed in 1648, begat the idea of the modern state. It was the product of the evolution of thought following centuries of conflict between secular and church interests. These tensions eventually culminated in the Thirty Years' War, which was actually a series of conflicts between Europe's Catholic and Protestant monarchs beginning in 1618.[28] These conflicts came to an end with the Treaty of Westphalia, which paved the way for modern statehood by recognizing the sovereign equality of monarchs.[29] More accurately, "the concept of sovereignty was then integrated into theories of international relations through a set of ideas that evolved with the end of the moral authority of the church over the secular rulers of Europe."[30]

Sovereignty thereby emerged as the constitutional norm governing Europe.[31] Although the treaty's provisions "did not include the words *sovereign state*, all of the essential provisions for the practice of sovereignty were pre-

25. JEREMY BENTHAM, THEORY OF LEGISLATION: PRINCIPLES OF THE CIVIL CODE 111-13 (Ogden ed., 1931).

26. *Id.*

27. *Id* at 112-113.

28. KITTICHAISAREE, *supra* note 21, at 4.

29. *Id.* at 4-5.

30. Gene M. Lyons & Michael Mastanduno, *Introduction: International Intervention, State Sovereignty, and the Future of International Society*, *in* BEYOND WESTPHALIA, *supra* note 24, at 1, 5.

31. *See* Daniel Philpott, *Ideas and the Evolution of Sovereignty*, *in* STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS 15, 28 (Sohail H. Hashmi ed., 1997) (discussing the Treaty of Westphalia as the culmination of sovereign statehood, labeling the treaty "Europe's governing constitution").

sent."[32] The treaty respected each state's choice of religious practice by incorporating the principle that the ruling monarch was the exclusive, legitimate authority within his or her territory and could act within that territory without interference from other powers. After Westphalia, nations party to the treaty began "to respect one another's sovereignty."[33] Thus, by the exercise of positive law the nations of Europe effectively created a new legal norm recognizing each member's "rights" of "territorial integrity, autonomy, and noninterference."[34]

The rights inherent in sovereignty mirror those traditionally constituting property under most systems. Traditionally, a property owner's rights were similarly inviolable. Blackstone, for example, elaborated on the tort of trespass as follows:

> For the right of meum and tuum [mine and thine] or property, in lands being once established, it follows, as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry, therefore, thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression.[35]

The property rights of exclusive occupation and control over land necessarily include the corollary right of noninterference. Indeed, the United States Supreme Court has consistently recognized the right to exclude others as "one of the most essential sticks in the bundle of rights . . . [of] property."[36] Thus, the Anglo-American system of law effectively has recognized that property is the equivalent of sovereignty within a particular society. As one commentator has written, "[p]roperty is sovereignty, or rather, thousands of little sovereignties parceled out among the members of society."[37]

The sovereignty of property within society, however, always has been delimited by the police power of the state.[38] Conversely, the police power of the state also has been limited to the extent that private boundaries are recognized as inherent to property rights. In other words, "[n]either property nor police power is an absolute right; each evolves contextually and over time."[39] All legal regimes have faced the challenge of striking the proper balance between the police power and absolute property rights. The American legal analogy that correlates property to a "bundle of sticks," envisioning a number of distinct rights in some identifiable thing, is useful for conceptualizing the balance between the individual right to non-interference and the proper extent of police power. Rights may

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32. *Id.* at 30 (emphasis in original).

33. *Id.* at 28-29.

34. Kratochwil, *supra* note 24, at 34.

35. 3 WILLIAM BLACKSTONE, COMMENTARIES 575-76 (Ehrlich ed., 1959).

36. Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

37. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 972 (2000).

38. *See, e.g.*, Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857 (2000) (discussing the limitations placed on property through the police powers of a state).

39. *Id.* at 908-09 (quoting Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1012 n.78 (1997)).

be transferred or taken from the possessor's bundle of sticks and given to others or even assumed by the overarching regime.

This analogy is useful for understanding the theoretical limits of state sovereignty.[40] It recognizes *ipso facto* that sovereignty is not unlimited.[41] Rather, sovereignty is an amalgamation of numerous rights held by an "owner," which in the international system is the *de jure* government of a nation. This amalgamation of rights includes the right of a state to exercise extensive control over its physical territory and over individuals within its borders. However, sovereignty necessarily implies a certain respect and recognition of a state's neighbors and their equivalent rights within their territory. This model of sovereignty as a "bundle of sticks" allows for an analysis of the balance between the sovereign rights of the state and the collective rights of the international community to exert legal authority in that same state.

The next section will examine the dichotomy that has emerged since the end of the Cold War between the continuing importance of state sovereignty and the increasing cohesiveness of the international community as a collective entity.[42] I will review the international community's response to Iraq's invasion of Kuwait as an example of the changing balance between the absoluteness of state sovereignty and the expanding assertiveness of the international community in enforcing certain universal norms.

B. New Levels of International Cooperation: Reaffirmation of State Inviolability

The competition and political tensions between the United States and the Soviet Union dominated international affairs between 1945 and 1985.[43] The two nations' "ideological polarization . . . [had] precluded agreement on whether human-rights norms embodied" the principles of equality, political freedom, and the right to representative government.[44] The end of the Cold War, however, dramatically altered "the landscape of international relations."[45] The Soviet Union receded from Eastern Europe and became the Russian Federation, Yugoslavia essentially disintegrated, Czechoslovakia divided into two separate countries, Germany was reunited into one country, and the regional conflicts between

40. *See* Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age*, 18 U. PA. J. INT'L ECON. L. 745, 755 (1997) (arguing that sovereignty, conceptualized as a "bundle" of sovereign sticks, "facilitates a more accurate understanding of an international legal order populated by many different actors wielding differing degrees of power and control."); The Rt. Hon. The Lord Geoffrey Howe of Aberavon, *The Role of Law in International Affairs*, 55 U. PITT. L. REV. 277, 283-84 (1994) (employing the analogy of a "bundle of sticks" to modern notions of sovereignty).

41. Kratochwil, *supra* note 24, at 25

42. *See* Gene M. Lyons & Michael Mastanduno, *State Sovereignty and International Intervention: Reflections on the Present and Prospects for the Future*, *in* BEYOND WESTPHALIA, *supra* note 24 at 250, 252.

43. *See* AMOS A. JORDAN, ET AL., AMERICAN NATIONAL SECURITY 337-39 (5th ed. 1999).

44. Gregory H. Fox, *New Approaches to International Human Rights*, *in* STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS, *supra* note 31 at 105, 126-27.

45. Robert H. Jackson, *International Community Beyond the Cold War*, *in* BEYOND WESTPHALIA, *supra* note 23, at 59.

the United States and Russia ceased as relations between the countries improved.[46] The political restructuring of the world created the possibility for unprecedented international cooperation among states and the enforcement of international norms.

When Iraq invaded Kuwait on August 2, 1990, a new international consensus affirmed the inviolability of the Kuwaiti state's territory. The U.N. Security Council met on the day of the invasion, condemned Iraq's violation of Kuwaiti sovereignty, and demanded it "withdraw immediately and unconditionally."[47] Iraq refused to comply. The Security Council then gave Iraq a "final opportunity" to withdraw by January 15, 1991, at which time the U.N. member states were authorized to use "all necessary means" to force Iraq's compliance and "to restore international peace and security to the region."[48] When Iraq again refused to comply with the Security Council's demand, an international coalition led by the United States forced Iraq to withdraw from Kuwait.[49]

The success of the collective action against Iraq reinvigorated the United Nations and gave a renewed sense of importance to its founding principles. The maintenance of peace and international security through fostering the "principle of sovereign equality" of states was the central reason for the United Nations' existence.[50] The drafters of the U.N. Charter believed that maintenance of peace was ensured best through firm recognition and enforcement of the principle of non-intervention.[51]

As Article 2(4) states: "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[52] Article 2(7) further reflects that the principle of non-intervention must be adhered to not only by member states but also by the United Nations itself: "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter. . . ."[53]

The only exception provided in the Charter to the rule of non-intervention was in cases where a state committed a "breach of the peace" or "act of aggres-

46. *Id.*

47. S.C. Res. 660, U.N. SCOR , 45th Sess., Res. & Decisions 1990, at 19, U.N. Doc. S/RES/660 (1990) (adopted by a vote of 14-0, with Yemen abstaining).

48. S.C. Res. 678, U.N. SCOR, 45th Sess., Res. & Decisions 1990, at 27, U.N. Doc. S/RES/678 (1990).

49. *See, generally,* L. FREEDMAN, THE GULF CONFLICT, 1990-1991: DIPLOMACY AND WAR IN THE NEW WORLD ORDER (1993).

50. U.N. CHARTER art. 2, para. 1.

51. *See also* Carsten F. Ronnfeldt & Henrik Thune, *Conflicting Global Orders: The Principle of Non-Intervention and Human Rights*, 29, 30 *in* SOVEREIGN INTERVENTION (Anthony McDermott ed., 1999) ("The principle of non-intervention is the logical corollary of state sovereignty based on the political idea that, within a given territory, there is a supreme political authority with a formal right to rule and regulate the life of its citizens without interference from external actors.").

52. U.N. CHARTER art. 2, para. 4.

53. U.N. CHARTER art. 2, para. 7.

sion" that threatened "international peace and security."[54] The condemnation of the Iraqi invasion and the Security Council's subsequent authorization of force constituted a renewed commitment to the enforcement of the territorial independence of states and the principle of non-intervention. Although a state's right to exclude other nations from its territory and to prevent interference in its domestic affairs has remained a central tenet of the international system,[55] these rights do have boundaries. As the next section will demonstrate, the continuing development of international humanitarian principles represents such a limit on the right to non-intervention.

C. Human Rights and the "Normative Revolution" of Sovereignty

Since the end of the Cold War, international law has come to recognize the permissibility of intervention in circumstances other than in response to a nation's external acts of aggression. This growth has focused primarily on the violation of basic human-rights norms as a basis for intervention. As discussed, during the Cold War the ideological polarization between communist and democratic countries "precluded agreement on whether human-rights norms embodied such liberal values, other values, or no values at all."[56] Since then, the current consensus indicates that a state's violation of its citizens' most basic rights may permit intervention into its affairs. Indeed, "international law today recognizes, as a matter of practice, the legitimacy of collective forcible humanitarian intervention, that is, of military measures authorized by the Security Council for the purpose of remedying serious human rights violations."[57]

Although this concept is not uncontroversial, most commentators agree that intervention into a sovereign state's internal affairs is possible when the government is committing serious human rights abuses against its people.[58] The exact boundary, however, between a state's right to non-interference in its domestic affairs and the international community's permissible intervention remains uncertain.

Without question, the intervening entity or state must exercise great caution before concluding that intervention is necessary to avert humanitarian wrongs. At the very least, it always should consider the following controlling principles. The definition of a state based on physical territory remains the "dominant norm" of the international system.[59] Therefore, the emphasis must remain on "serious" violations of humanitarian rights, as non-intervention remains the

54. U.N. CHARTER art. 39.

55. *See generally* Jack Donnelly, *State Sovereignty and International Intervention: The Case of Human Rights*, *in* BEYOND WESTPHALIA, *supra* note 24 at 115, 116-18.

56. Fox, *supra* note 44, at 126-27.

57. Fernando R. Tesón, *Changing Perceptions of Domestic Jurisdiction and Intervention*, *in* BEYOND SOVEREIGNTY: COLLECTIVELY DEFENDING DEMOCRACY IN THE AMERICAS 29, 29 (Tom Farer ed., 1996).

58. *See generally* RATNER & ABRAMS, *supra* note 6, at 7 (discussing the Nuremberg Tribunal as a "springboard for the development of [an] international human rights law [that considers] . . . a government's treatment of its citizens [to be] . . . appropriate for general international regulation.").

59. Fox, *supra* note 44, at 129.

"preemptive international norm, and intervention is what requires justification."[60] Intervention thus is permissible only if a government is violating clearly established international obligations, such as committing genocidal acts.[61] Furthermore, the crisis should be so serious that no less intrusive option, such as diplomacy, the implementation of sanctions, or other means, exists.[62] Finally, the intervention should receive "some form of collective legitimization" from the international community.[63] As sovereignty arises from the mutual recognition that states give to one another,[64] it is not within the power of one state to act contrary to the system of mutual recognition by unilateral intervention.

Though somewhat helpful, the ambiguity in even these limited guidelines indicates that the balance between sovereignty and the collective authority of the international community remains uncertain. Unquestionably, a "normative revolution is taking place with regard to the rights and responsibilities inherent in claims to sovereignty."[65] In view of this revolution, however, a new model for understanding sovereignty and its limits must precede the formulation of coherent and beneficial norms of practice. The model of sovereignty based on the analogy to property law's "bundle of sticks" provides a framework for the conceptual balancing of state interests with permissible intervention. The model recognizes that sovereignty is a legal concept that "must be defined in relation to the entire body of international law, against which such claims are measured."[66]

Recent international legal theory supports this view of sovereignty as an "allocation of decision-making authority between national and international legal regimes."[67] A state's total "bundle" of sovereign rights remains extensive, as sovereignty remains the preemptive international norm. Nonetheless, the international legal regime requires all states to maintain a minimum standard of observation of human rights. By the existence of this minimum standard, international law imposes obligations which a state must meet continuously in order to maintain legitimacy under the international system:

> [A state's] rights and obligations come into play when a state, or at least certain actions of a state, has been found to be illegitimate within the framework of the New Sovereignty. That is, when a state violates human rights or cannot meet its obligations *vis-à-vis* its citizens, those citizens have a right to ask for and receive assistance and the international community has a right and obligation to respond in a manner most befitting the particular situation, which may involve ignoring the sovereignty of the state in favour [sic] of the sovereignty of individuals and groups.[68]

When a state instigates or acquiesces in the commission of serious violations of international humanitarian norms, it exceeds its allocation of authority as a mat-

60. Jackson, *supra* note 45, at 80.
61. Kratochwil, *supra* note 24, at 39-40.
62. *Id.* at 40.
63. *Id.*
64. *Id.* at 40-41.
65. KURT MILLS, HUMAN RIGHTS IN THE EMERGING GLOBAL ORDER: A NEW SOVEREIGNTY? 165 (1998).
66. Fox, *supra* note 44, at 114.
67. *Id.* at 107.
68. MILLS, *supra* note 65, at 163-64.

ter of law. International law thus places conditions on a state's sovereign right to non-interference to the extent the state must meet its human rights obligations or face military intervention or trial of its nationals by foreign tribunals.[69]

The assessment that a government has maintained a minimally legitimate domestic regime, however, does not require a finding that the "will of the people" is the source of the government's authority.[70] An international law model that prohibits a state from slaughtering its people en masse or from allowing them to be slaughtered, though more liberal than in the past, does not indicate that democratic institutions are the legal norm. Instead, the standard is that of a "reasonable state" that is subject to an international norm of civilized behavior.[71] This norm recognizes that a state's sovereign rights with regard to the internal treatment of its population are not absolute and, by implication, states are subject to international oversight.

The recognition of sovereignty as a bounded legal norm leads to the further conclusion that sovereignty is not static within a nation, but is transferable. When a state exceeds its authority through commission of human-rights violations, the state cedes its sovereign stick representing its right to non-interference.[72] It cannot exclude other states acting collectively on behalf of the international community.[73] This transference of sovereignty to the international community, however, is temporary and less than total,[74] as the international community does not assume "permanent supervisory authority."[75] Instead, it acquires only the temporary authority to assert protection over the victimized segment of the state's population as it attempts to reform the national institutions according to a minimally acceptable international model.[76]

This idea of sovereignty as transferable authority has historical precedent. The next section briefly will examine some historical occasions when sovereignty has fluctuated between states.

D. The "Transference" of Sovereignty Between States

As discussed, debate continues about the extent to which new limits have been placed upon state sovereignty as a result of post-Cold War developments in international law.[77] An understanding of the "institution" of sovereignty within

69. *See* RATNER & ABRAMS, *supra* note 6, at 12 (International human rights norms "are usually formulated as obligations upon states, whether to refrain from certain conduct or to provide remedies in case of their commission.").

70. *See* William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467, 469-74 (2001).

71. *See* J.L. BRIERLY, THE LAW OF NATIONS 279-80 (Sir Humphrey Waldock ed., 6th ed. 1963) (discussing minimal treatment that international law requires nations to give to aliens).

72. *See* Taylor, *supra* note 40, at 755.

73. *See* Kratochwil, *supra* note 24, at 40 (discussing the requirement that intervention into a state's domestic affairs be preceded by "collective legitimization").

74. Taylor, *supra* note 40, at 759.

75. Fox, *supra* note 44, at 125.

76. *See id.* at 126-27 (noting that the "international model . . . does not speak to every aspect of the political process").

77. *See, e.g.*, Jackson, *supra* note 45, at 61 ("The centrality of sovereignty in international relations is frequently questioned nowadays, but it is impossible to ignore.").

the international system, however, is crucial to the formulation of reasoned exceptions permitting intervention.[78] The core "rights" of a state include the right to territorial integrity and autonomy, as well as non-interference in its domestic affairs.[79] These rights emanate from the essence of a state as a legal person having a defined territory, a permanent population, a form of government, and the capacity to participate in international relations.[80] The qualifications for statehood, and attendant embodiment of sovereignty, apply regardless of the nature of the government ruling the territory. Once the parameters for statehood come into existence, sovereignty follows automatically.[81]

Yet, the sovereignty of a new state must have a source.[82] When the United States Supreme Court considered the source of the United States' sovereignty, it held that "the investment of the federal government did not depend upon the affirmative grants of the Constitution."[83] In other words, the states were not the source of the United States' federal sovereignty. The states themselves had never possessed international powers, and therefore they could not have transmitted those powers to the national government. Instead, "[a]s a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."[84] Sovereignty, as the political will governing a society, always has existed somewhere and "is never held in suspense."[85] At some theoretical instant, therefore, sovereignty over the territory and people of the American colonies passed in its entirety from Great Britain to a new state, the United States of America.

Sovereignty is thus dynamic and fluid, flowing at times from one country to another by some event of political restructuring within the international community of states. If sovereignty can pass from one state to another, it conceivably can flow from a state to the international community, or vice versa. Perhaps the most illustrative example of this is the transfer of German sovereignty at the end of World War II. Although actually an example of a state-to-state transfer, the defeat of Nazi Germany is a unique example of sovereignty passing from one state to several collectively. With the German government's unconditional

78. *See* Kratochwil, *supra* note 24, at 22.

79. *Id.* at 34.

80. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

81. Jackson, *supra* note 45, at 61 ("[T]he moment any colony ceases to be a dependency of a (foreign) state it simultaneously and automatically becomes a subject of international law. In other words, as soon as constitutional independence occurs, the international law of sovereignty and non-intervention simultaneously takes effect.").

82. *Cf.* Juergen Schwarze, *Towards a European Foreign Policy—Legal Aspects*, *in* TOWARDS A EUROPEAN FOREIGN POLICY 69, 71 (J.K. De Vree, et al. eds., 1987) ("The legal capacity of a nation state is original, not derived from anyone").

83. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936).

84. *Id.* at 316.

85. *Id.* at 317.

surrender on May 8, 1945,[86] the Allied powers destroyed Germany as a sovereign nation and it "ceased to exist as a state in the sense of international law."[87] As the Berlin Declaration of June 5, 1945 declared:

> The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority.[88]

Thus, the Berlin Declaration recognized the transfer of all sovereign rights possessed by Germany to the United States, the Soviet Union, Britain, and France, acting in concert. The Berlin Declaration itself, however, merely formalized that which already had occurred through the Allies' military occupation. At the instant marking Germany's complete defeat, its sovereignty as a state passed, theoretically, to the victors.[89]

As shown by the historical record, this transfer of sovereignty was the jurisdictional basis for the Allies' trials of the German war criminals at Nuremberg.[90] An element of Germany's sovereignty, one stick in the bundle, was to maintain a system of criminal justice over its citizens, which included the legislation of offenses, as well as the prosecution and punishment of offenders. Upon Germany's unconditional surrender, "the sovereignty of Germany was being 'held in trust by the condominium of the occupying powers.'"[91] The Allies assumed "whatever jurisdiction Germany would have had over the specific offenses."[92] Therefore, the Allies' primary authority to act at Nuremberg derived from their assumption of German sovereignty, permitting prosecution of the Nazi war criminals on the traditional bases of nationality and territorial jurisdiction.[93]

However, on another level, the proceedings at Nuremberg proceeded pursuant to an invocation, at least impliedly, of a concept of jurisdiction transcending sovereignty. Justice Robert Jackson, in his opening statement at Nuremberg, argued that the charges against the Nazi war criminals were being brought on behalf of civilization itself due to the unprecedented extent and number of atroc-

86. G.S.P. FREEMAN-GRENVILLE, CHRONOLOGY OF WORLD HISTORY: A CALENDAR OF PRINCIPAL EVENTS FROM 3000 B.C. TO A.D. 1973 606 (1975).

87. Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518, 519 (1945).

88. Declaration regarding Germany by the United States of America and the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, and the Provisional Government of the French Repbulic, June 5, 1945, 60 Stat. 1649, 1650.

89. *See* Kelsen, *supra* note 87, at 524.

90. *See* Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 342 (2001).

91. Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, n.86 (1999) (quoting George Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 20, 22 (1947)).

92. Morris, *supra* note 90, at 343 (quoting Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 805-06 (1988)).

93. *See also* RATNER & ABRAMS, *supra* note 6, at 164 ("[I]n many cases, jurisdiction . . . turned on the territorial or nationality principles, and the jurisdiction of the Allied occupation tribunals also derived from Germany's residual jurisdiction.").

ities committed by the Nazis.[94] As Jackson stated, "the wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated."[95] Scholars have relied upon Jackson's characterization of the Nuremberg proceedings as the first modern assertion of universal jurisdiction over war crimes.[96]

Although Nuremberg has served as the leading precedent for the application of universal jurisdiction over a limited category of particularly atrocious international crimes, Jackson probably argued indirectly for a higher principle of jurisdiction not because the tribunal lacked other bases of jurisdiction, but in order to soften the appearance of "victor's justice." This concern was apparent throughout his opening statement, as indicated when he said, "[w]e must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow."[97] This formulation of universal jurisdiction, however, clearly operated as a secondary basis to the more traditional principle of jurisdiction arising from state sovereignty. In all likelihood, he did not envision future prosecutions relying on the concept of universal jurisdiction as a sole basis for the prescription and adjudication of war crimes.

Universal jurisdiction, as it develops, certainly has the potential to operate more broadly than Jackson likely envisioned. Yet, for it to retain legitimacy as a "fair and temperate" basis for the prosecution of war criminals, it must evolve in a manner consistent with furthering humanity's interests in justice while simultaneously respecting the continuing importance of state sovereignty. The Nuremberg precedent demonstrates that universal jurisdiction is a form of intervention into the domestic jurisdiction of a state. The fact that the modern beginning of universal jurisdiction arose from circumstances in which the sovereign authority of one nation was transferred to several illuminates the reach of this jurisdictional basis. As Part III will argue, for the exercise of universal jurisdiction to be valid, a correlative finding that a state's sovereignty has passed in part to the international community must occur. Part III begins with a brief look at universal jurisdiction's conceptual beginning.

III.
A THEORY OF INTERNATIONAL CRIMES SUBJECT TO UNIVERSAL JURISDICTION

A. The Origin of Universal Jurisdiction

The historical roots of universal jurisdiction originated with the construction of legal norms designed to further the pursuit and punishment of pirates. By some accounts, piracy has been deemed an international crime permitting the

94. Jackson Opening Remarks, *supra* note 1.

95. *Id.*

96. *See, e.g.*, Henry T. King, Jr., *Universal Jurisdiction: Myths, Realities, Prospects, War Crimes and Crimes Against Humanity: The Nuremberg Precedent*, 35 NEW ENG. L. REV. 281 (2001).

97. Jackson Opening Remarks, *supra* note 1.

exercise of universal jurisdiction since the 1600s.[98] Those seafaring marauders, who murdered and looted indiscriminately, only to flee from justice across the high seas, were declared by civilized nations as *hostis humani generis*, or the "enemy of all mankind."[99] Any state that was able to capture such villains could try and punish them under their domestic own laws without objection from the international community.[100] Nations soon expanded this "universal" authority to provide for the seizure of slave traders on the high seas by British naval vessels.[101] Thereafter, the Nuremberg Tribunal's efforts to punish the German perpetrators of mass crimes again enlarged the scope of universal jurisdiction. For purposes of this discussion, piracy remains the best illustration of the development of universal jurisdiction.

The act of piracy, by its very nature, demonstrates the considerations embodied in the conceptual core of universal jurisdiction. Technological advances in shipbuilding and navigation in the fifteenth and sixteenth centuries transformed piracy from a matter within the purview of coastal state authorities to a matter of international concern.[102] Making use of these new technologies, pirates launched attacks from and on the high seas against the vessels and citizens of many nations, and then fled across the open seas.[103] Through their utilization of international waters, they thus operated beyond the territorial reach of any single nation. For this reason, nations predicated their formulation of universal jurisdiction over piracy on the notion that the crime usually was committed in *terra nullius*, such as on the high seas where no nation exercised territorial control.[104]

The transnational aspect of piracy is the most significant factor in justifying the exercise of universal jurisdiction over it.[105] Further, piracy is a useful basis for understanding the exercise of universal jurisdiction over war crimes because both pirates and war criminals take advantage of the absence of legitimate criminal justice systems that can or will prosecute and punish their actions.[106] The

98. M. Cherif Bassiouni, *Sources and Theories of International Criminal Law*, *in* 1 INTERNATIONAL CRIMINAL LAW 83 (2d ed. 1999).

99. United States v. Smith, 18 U.S. (5 Wheat.) 153, 156 (1820) ("[P]irates being hostes humani generis, are punishable in the tribunals of all nations. All nations are engaged in a league against them for the mutual defence and safety of all.").

100. *See* ALFRED P. RUBIN, ETHICS AND AUTHORITY IN INTERNATIONAL LAW (1997) (providing an extensive examination of piracy in relation to the conceptual development of universal jurisdiction, questioning its application due to the lack of positive precedent).

101. SCHACHTER, *supra* note 11, at 262.

102. *See generally* DAVID CORDINGLY, UNDER THE BLACK FLAG: THE ROMANCE AND THE REALITY OF LIFE AMONG THE PIRATES 158-60 (1997) (discussing the seaworthiness and speed of ships employed by historical pirates).

103. *See* 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, 81 (Winter 2001) (noting that "pirates can quickly flee across the seas, making pursuit by the authorities of particular victim states difficult.").

104. *See* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 354 (2000).

105. *See* Bassiouni, *supra* note 98, at 138.

106. *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 803-04 (1988) (noting that "war crimes and crimes against humanity are analogous to piracy in that they are typically committed in locations where they will not be prevented or punished easily.").

assertion of universal jurisdiction over war criminals is usually tied to the unlikelihood of prosecution by the states where the crime occurred, "either because the perpetrators remain in power or influence, or . . . because a post-genocide social and political *modus vivendi* is built upon forgetting the crimes of the past."[107] As the power controlling the territory will not prosecute, other states must exercise universal jurisdiction in order to bring the perpetrators to justice.[108] Like the pirate, the war criminal intends to take advantage of the absence of a legitimate criminal justice system that can or will prosecute and punish his actions. In the absence of a minimally competent criminal enforcement regime, the state thus ceases to act like a true sovereign and its territory, as a legal matter, becomes analogous to *terra nullius*.

The next section further explores the prevailing idea that universal jurisdiction applies to all wrongs in a limited category of crimes labeled by treaty and customary international law as "heinous." It will further argue that without an analysis of sovereignty and a finding of *terra nullius*, the justification for asserting jurisdiction over a crime solely because it is "heinous" is erroneous and suffers from circular reasoning.

B. The Attachment of "Heinous" to Crime: Without an Analysis of Sovereignty, A Circular Basis for the Assertion of Jurisdiction

The basis for the assertion of universal jurisdiction does not rest on the criminal *per se*, whether pirate or *genocidaire*, the "heinous" nature of the crimes committed, or even with the perpetrator's subjective feeling of impunity in the absence of potential domestic prosecution.[109] Rather, it rests on an assessment of sovereignty. Many commentators and jurists incorrectly seek to divorce the assertion of universal jurisdiction from principles of state sovereignty.[110] They assert that the basis for universal jurisdiction arises from the "heinous" nature of the crime itself.[111] The basis for this reasoning is that every state has condemned certain violations of international law and may punish the perpetrators for their commission.[112]

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107. SCHABAS, GENOCIDE, *supra* note 104, at 354.

108. *Id.* ("[I]t is often said that universal jurisdiction must be a *sine qua non* if those responsible for genocide are to be brought to book.").

109. Scharf, *supra* note 103, at 83 ("As regards both piratical acts and war crimes there is often no well-organized police or judicial system at the place where the acts are committed, and both the pirate and the war criminal take advantage of this fact, hoping thereby to commit their crimes with impunity.").

110. *See, e.g.*, Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT'L L.J. 286, 322 (1999) ("The criterion for application of the principle of universal jurisdiction must accordingly be sought in the heinous nature of the crime (of which its dimensions are an element) and not so much in the absence of territorial jurisdiction of nation states with regard to the locality of the crime.").

111. *See, e.g.*, United States v. Yunis, 681 F. Supp. 896, 900 (D.D.C.), *rev'd on other grounds*, 859 F.2d 953 (D.C. Cir. 1988) ("The crucial question for purposes of defendant's motion is how crimes are classified as 'heinous' and whether aircraft piracy and hostage taking fit into this category.").

112. *See* William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129, 154 (2000).

Though appealing in its vindication of the interests of justice, this rationale does not acknowledge the original justification for asserting jurisdiction over pirates, i.e., states prosecuted them wherever found because they operated in *terra nullius*. Establishment of jurisdiction over a category of crimes simply because of their "heinous" nature reflects an inadequate appreciation of universal jurisdiction's conceptual foundation. Doing so is comparable to a state answering the question, "Why do we have jurisdiction over this crime?," by responding "well, because the crime is so bad." This reasoning is flawed and lacks a sound foundational basis for the assertion of jurisdiction. Inevitably, such a lack of foundation will result in inconsistent application that could undermine the credibility, and thus the legitimacy, of the theory of universal jurisdiction.

Therefore, the legitimate assertion of universal jurisdiction must begin with the state itself, which remains the "foundation-stone" of the international system, both politically and legally.[113] The assertion of universal jurisdiction is a product of positive law created by states. Whether through the operation of multilateral treaties or as a product of customary international law, the international community has prescribed certain crimes as being subject to universal jurisdiction.[114] The core reason that states may prescribe certain crimes as being subject to universal jurisdiction arises from the nature of the crimes being beyond any single state's capacity to punish the perpetrators. In other words, universal jurisdiction arises not because the crimes are "heinous" but because they are committed in *terra nullius*.

States have the authority to exercise "sovereignty over its territory and general authority over its nationals."[115] With the rights that accompany this internal sovereignty, a state also acquires obligations to its citizenry. These obligations include the duty to provide a system for the codification, prosecution and punishment of crimes.[116] This of course does not mean that, in order to be a legitimate state, every criminal must be found and punished; international law does

113. BOUTROS-GHALI, *supra* note 3, ¶ 17, at 44 ("The foundation-stone . . . is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress.").

114. *See generally* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 122 (1995) (though not mentioning universal jurisdiction *per se*, Franck notes that "states collectively have the authority to determine minimum standards of conduct [including prohibition of genocide and aggravated denials of political rights], from which none may deviate for long without endangering their membership in the [international] club.").

115. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206.

116. *See* Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT'L L.J. 241, 271-72 (2001):

> When crimes for which individuals may be held accountable under international law are committed, the State under whose jurisdiction the crime occurred incurs international responsibility. The State is responsible under international law for all internationally wrongful acts or *omissions* of its organs as these wrongs constitute acts of the State. The unlawful conduct of individuals acting in private capacity, however, does not in itself constitute an act of the State under international law. The State can be held responsible if the State—through its legislative, administrative, or judicial activities—supported, assisted, consented to, or *failed to punish* the acts committed by the individual.

not demand the impossible. Yet, at some level a state that does not possess an effective and functioning system of criminal enforcement may be deemed to have ceded some portion of its sovereignty.[117] When war crimes occur, or are even possible, a legal conclusion follows that the legitimate functioning of a state has diminished or ceased. Often because the national authorities either ordered or condoned the commission of the crimes, the perpetrators of such atrocities are "immune *de facto* and/or *de jure* from criminal prosecution and punishment under their legal system."[118] At this point a portion of the domestic state's sovereignty is conceptually transferred, as a matter of law, to the international community and the state's territory becomes for purposes of law *terra nullius.*

Contrary to the general scholarship on the subject,[119] the criterion for the application of universal jurisdiction must parallel the *terra nullius* justification for the historical prosecution of piracy. Otherwise, the prosecution of war crimes lacks the legitimacy conferred by a sound conceptual framework. The act of torture offers a good example for contrasting the ideas of *terra nullis* and the "heinous" nature of the crime. Torture is a horrible act whether committed by non-state actors or by state officials. Yet, only official acts of torture are crimes subject to universal jurisdiction. As the 1984 Convention Against Torture defines the crime:

> For the purposes of this Convention, the term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*[120]

> The consequences arising out of the commission of war crimes and crimes against humanity gives rise to secondary obligations in the field of State responsibility. The State responsible for such crimes is under obligation to provide full reparation vis-à-vis to the victims of the breaches. The reparation includes restitutio in integrum and compensation for both material and moral damage. *Additionally, the State has the obligation to punish the individuals that committed the crimes.* This obligation is independent of the obligation to prevent the initial breach and survives the violation of it.

(Citations omitted) (Emphasis added).

117. This seems a logical expansion based on the prevailing scholarship recognizing that the humanitarian obligations every state owes to its people impose limits on its sovereignty. *See, e.g.,* Mills, *supra* note 65, at 163-64 ("[W]hen a state violates human rights or cannot meet its obligations *vis-à-vis* its citizens, those citizens have a right to ask for and receive assistance and the international community has a right and obligation to respond in a manner most befitting the particular situation, which may involve ignoring the sovereignty of the state in favour [sic] of the sovereignty of individuals and groups.").

118. KITTICHAISAREE, *supra* note 20, at 6.

119. *See* van der Vyver, *supra* note 110.

120. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, 1465 U.N.T.S. 85 (emphasis added).

Over 120 nations are party to the Convention Against Torture.[121] The majority of nations, therefore, do not consider private, non-official criminal acts that inflict severe pain and suffering for the purpose of intimidation or coercion to be an international crime. Private acts of torture, of course, may constitute an element of a greater wrong resulting in international criminal liability, such as "crimes against humanity" when committed secondary to a "widespread or systematic attack against any civilian population."[122] However, an additional element such as the requirement of a "widespread or systematic attack" is necessary to transform the crime into one of international concern. Torture, in itself, is an international crime only when committed by persons acting in an official capacity.[123] From the torture victim's perspective, however, the status of the perpetrator hardly would seem to change the degree of suffering. So, if the "heinous" nature of the crime is the determinant for the assertion of universal jurisdiction, then private, criminal acts of torture should subject the perpetrators to prosecution wherever they may be captured. But this is not the case. The "heinous" nature of the crime, therefore, must invoke other considerations.

Since an act of torture is not "heinous" unto itself, that depending on the actor committing it, the international condemnation of the act is the result of a value determination concerning the legitimate functioning of government within its own territory. International law prohibits governments from torturing their own citizens.[124] The international criminalization of torture thus is a delimitation of state sovereignty. A state that permits or is incapable of preventing its public officials from engaging in acts of torture has ceased operating to some degree as a legitimate sovereign and, thus, loses a portion of its sovereign right to non-interference in its affairs.[125] In other words, some of its "sovereign sticks" have been ceded to the international community and other states may intervene to try crimes committed within the offending state's borders. Therefore, the conceptual foundation of universal jurisdiction remains centered on a determination of the legal status of a territorial sovereign as a minimally competent and legitimate criminal enforcement regime.

The international community's right to intervene in a state's domestic affairs varies depending on the extent to which the governing regime maintains legitimate control over its territory. Rwanda, from April to July 1994, is an example of the near or total breakdown of normal state functions. Sub-national interests were able to operate with impunity, at which point Rwanda's sovereign

121. *See* U.N. website *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty12.asp

122. *See* S.C. Res. 955, *supra* note 8, art. 3.

123. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987), comment a, reporter's notes 1. *See also* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1984) (concluding that acts of torture committed by state officials violates established norms of international human rights law).

124. *See Filartiga*, 630 F.2d at 884.

125. *See* Ronnfeldt & Thune, *supra* note 51, at 40 (advancing an "idea of state sovereignty, which asserts that a state's external sovereign rights vis-à-vis other states should be conditional on the state's carrying out its duties towards its own population.").

control reached its nadir.[126] If it could have acted quickly enough, the international community would have been justified in intervening with military force to stop the genocide.

Rwanda subsequently has begun to operate a functioning legal system, regaining its sovereign right to exercise control over its territory and nationals. Nevertheless, Rwanda decided to appeal to the Security Council to create an international tribunal to try the major perpetrators of the genocide. Though Rwanda may have done this solely to regain credibility,[127] that the government felt it lacked the capacity to handle the matter indicated that it had yet to reacquire its full sovereignty as a state. Yugoslavia and Nazi Germany are examples of an otherwise functioning state failing to maintain minimally acceptable systems of justice. The failure to maintain a minimally competent system of criminal justice, either through inability or refusal, results in the ceding of a portion of that state's sovereignty to the international community. This state failure is thus the justification for the legitimate exercise of universal jurisdiction.

Having deconstructed the "heinous" nature of international crimes as the principal rationale for universal jurisdiction, the next section will attempt to show the proper place of "heinous" as a factor indicating that sovereignty has passed from a particular state to the international community.

C. "Heinous" Crimes As An Insufficient Basis for Jurisdiction: The Need for A Reassessment of Sovereignty

Now that the breakdown of a state's criminal justice system has been demonstrated to be the basis for the exercise of universal jurisdiction, the question becomes one of establishing a threshold at which a state can be deemed to have lost some portion of its otherwise complete sovereignty. Both the criminal actor and the nature of the crime now become material as barometers gauging when sovereignty has passed from its natural vessel, the state, to the international community. The "heinous" nature of certain crimes indicates that the state's government has failed in its obligations to adequately protect its citizens, and therefore the international community is justified in intervening. The diminution of state sovereignty is serious and requires clear evidence that the state cannot or will not meet its international obligations. Such evidence arises when open and obvious violations of a narrow classification of crimes are committed.

126. *See* Boutros Boutros-Ghali, *Introduction* to THE UNITED NATIONS BLUE BOOK SERIES, vol. X, THE UNITED NATIONS AND RWANDA: 1993-1996 37-49 (1996) ; *see also* RATNER & ABRAMS, *supra* note 6, at 176 ("[T]he destruction from the civil conflict and the flight of the former government left Rwanda without a functioning judicial system.").

127. SCHABAS, GENOCIDE, *supra* note 104, at 345:

> Where a domestic judicial system operates in an effective manner, it may be quite capable of dealing appropriately with the crimes of the past. But sometimes, a domestic judicial system will be operational yet require, for its own credibility, that some international trials be held to deal with major cases. Rwanda chose this approach when, in 1994, it requested that the Security Council establish an international criminal court.

This limited classification of crimes recognizes certain fundamental norms of customary international law, often referred to as *jus cogens* or peremptory norms.[128] By definition, a peremptory norm is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[129] Although this definition is from the Vienna Convention on the Law of Treaties, its meaning is synonymous under customary international law.[130] Peremptory norms thus guarantee the protection of interests important to the international community.[131]

The number of crimes considered to be *jus cogens* violations remains restricted to the most serious crimes that affect the international community. Nations have recognized many peremptory norms in multilateral treaties that define their violation as international crimes, including torture,[132] piracy,[133] genocide,[134] crimes against humanity,[135] aggression,[136] slavery and slave-related practices,[137] and war crimes.[138] Similarly, the *Restatement (Third) of the Foreign Relations Law of the United States* has recognized the permissibility of universal jurisdiction over "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism."[139] Under customary international law, these crimes have acquired the status of *jus cogens* because they are so horrible they threaten "the peace and security of mankind, and the conduct or its result is shocking to the conscience of humanity."[140] A *jus cogens* norm imposes obligations on all nations. Scholars frequently refer to this concept as an obligation *erga omnes*, or duty flowing to all states.[141] Thus, whether labeled *jus cogens* or a peremptory norm, the compelling nature of the principle is the same. A state that incites, permits, or engages in the commission of genocide, crimes against humanity, or other crimes of similar magnitude,

128. Vienna Convention on the Law of Treaties, May 23, 1969, art.53, 1155 U.N.T.S. 351.

129. *Id.*

130. *See* Bassiouni, *supra* note 98, at 40-41 (discussing meaning of *jus cogens*).

131. *Id.* at 210 ("This means that in certain serious international matters the rights of the international community must not be violated or ignored in the practice of states.") (citing Barcelona Traction, Light and Power Co. Ltd. Case (Spain v. Belg.), 1970 I.C.J. 3 (Feb. 5) , at 3).

132. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 120.

133. *See* Convention on the Law of the Sea, Dec. 10, 1982, art. 105, 1833 U.N.T.S 397.

134. Bassiouni, *supra* note 98, at 67.

135. *Id.* at 70.

136. *Id.* at 62.

137. *Id.* at 79.

138. *Id.* at 70.

139. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

140. Bassiouni, *supra* note 98, at 42.

141. *See id.* at 44.

commits violations of *jus cogens* norms.[142] As the Vienna Convention reflects, such derogation is impermissible.[143]

Based on the proposed theory of sovereignty, any state that derogates from these essential norms abdicates a portion of its sovereignty by operation of law. The effect is the same when a state loses the power to prevent the occurrence of such crimes within its territory. States have an obligation to prevent their citizens from violating peremptory norms and must maintain an effective system for the prevention and punishment of such transgressions within their borders.[144] Thus, the occurrence of continuous or multiple violations of peremptory norms, *ipso facto*, demonstrates the absence of a fully competent sovereign. A finding of state action, therefore, is not essential for the exercise of universal jurisdiction, though some crimes may require it as an additional element.

When violations of a *jus cogens* norm occur, a state no longer possesses its full sovereignty. The state's otherwise exclusive right to exercise criminal jurisdiction over its citizens transfers to the international community, and any state that acquires custody of an individual perpetrator of such crimes may try and punish the offender. Thus, the determination that a particular act constitutes an international crime permitting the exercise of universal jurisdiction should rely on a conclusion that the crime's commission resulted secondary to the territorial state's partial loss of sovereignty. An a priori assessment of the authoritative capacity of the territorial sovereign potentially can resolve some otherwise unsettled questions affecting the application of universal jurisdiction in practice. By way of example, the next section will seek to add clarity to the somewhat nebulous definition of crimes against humanity, by showing that the element of "widespread and systematic" actually envisions a determination as to the legal sovereign status of a state in which such crimes have been committed.

142. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones" genocide, slavery, forced disappearances, torture, arbitrary detention, systematic racial discrimination, or "a consistent pattern of gross violations of internationally recognized human rights.").

143. *Supra* note 128, art. 53.

144. *See* Kevin A. Bove, *Attribution Issues in State Responsibility*, 84 AM. SOC'Y INT'L L. PROC. 51, 54-55 (1990) (discussing the International Court of Justice's decision in the Iran Hostage Case (U.S. v. Iran), 1980 I.C.J. 3, in which the ICJ held that Iran was responsible for its failure to end the hostage crisis as it had a clear and affirmative duty to protect foreign embassies within its territory). *See also* MILLS, *supra* note 65, at 163-64 (1998):

> [R]ights and obligations come into play when a state, or at least certain actions of a state, has been found to be illegitimate within the framework of the New Sovereignty. That is, when a state violates human rights or cannot meet its obligations *vis a vis* its citizens, those citizens have a right to ask for and receive assistance and the international community has a right and obligation to respond in a manner most befitting the particular situation, which may involve ignoring the sovereignty of the state in favour [sic] of the sovereignty of individuals and groups.

D. *Crimes Against Humanity: "Widespread and Systematic" as the Element Indicating a Transference of Authority to the International Community*

The balance between sovereignty and the permissible assertion of universal jurisdiction over a limited category of crimes has permeated the contemporary development of international criminal law. The definition of "crimes against humanity," for example, has developed rapidly within the last decade. The most significant, recent development regarding the crime's definition resulted in the elimination of the anachronistic element that crimes against humanity could occur only within the context of a war.[145] However, when the label of "crimes against humanity" attaches to an act has not been conclusively established. As one scholar has noted, the "dividing line between crimes against humanity under international criminal law . . . and violations of human rights" that are subject to domestic proceedings has remained unclear."[146] Greater focus on universal jurisdiction's theoretical underpinnings may clarify the proper allocation of authority between the international and domestic legal regimes in regard to internationalizing crimes against humanity.

The International Military Tribunal at Nuremberg first recognized the crime in 1945 and defined it by inclusion of a war-nexus element.[147] The Tribunal introduced the idea of crimes against humanity from a concern that "under the traditional formulation of war crimes, many of the defining acts of the Nazis would go unpunished."[148] This formulation of the crime was a novel innovation which recognized the primacy of international law by criminalizing certain acts "whether or not [they were] in violation of the domestic law" of Germany.[149] In defining the crime, however, the proponents attached a war-nexus element to it in order to justify the extension of international jurisdiction over crimes committed exclusively within the territorial jurisdiction of Germany.[150] The war-nexus requirement represented a compromise that balanced state sovereignty against matters of international concern.[151] Under this construction, crimes against humanity could occur only within the context of a war.

145. *See, e.g.,* Prosecutor v. Tadic, ICTY, Case No. IT-94-1-AR72, ¶ 141 (Decision on the Defence's Motion For Interlocutory Appeal on Jurisdiction, Oct. 2, 1995).

146. KITTICHAISAREE, *supra* note 21, at 99.

147. *See* Agreement for the Prosecution and punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 279 (defining a crime against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, *before or during the war* . . . whether or not in violation of the domestic law of the country where perpetrated.") (emphasis added); *see also* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 34-35 (2001) (discussing the political considerations behind the Allies' inclusion of a war-nexus element in crimes against humanity).

148. *See* Van Schaack, *supra* note 91, at 789 (citations omitted).

149. *Id.* at 791.

150. *Id.*

151. *See* Van Schaak, *supra* note 91, at 791-92.

The development of crimes against humanity did not gain new impetus until the atrocities of the early 1990's occurred in Yugoslavia and Rwanda.[152] In 1994, for example, the Security Council adopted Resolution 955 establishing the International Criminal Tribunal for Rwanda to try crimes committed during the Rwandan genocide.[153] In Resolution 955, the Security Council completely eliminated any war-connection element with regard to "crimes against humanity" and defined the wrong as follows:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
>
> Murder;
> Extermination;
> Enslavement;
> Deportation;
> Imprisonment;
> Torture;
> Rape;
> Persecutions on political, racial and religious grounds;
> Other inhumane acts.[154]

With its modern reformulation of crimes against humanity, the Security Council was building on work performed by the International Law Commission ("ILC"), which had replaced the element of an international conflict with a requirement that inhumane acts were committed "in a systematic manner or on a mass scale."[155] Thus, the Security Council replaced the war-nexus requirement with a "mass-scale" element, which permitted the distinction between ordinary municipal crimes and crimes against humanity.[156]

Regrettably, the ILC further refined the definition in the 1996 Draft Code of Offences Against the Peace and Security of Mankind by criminalizing the previously enumerated acts as crimes against humanity "when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group."[157] The ILC's attempted clarification could lead future tribunals to place excess emphasis on the government connection, notwithstanding the disjunctive including private organizations and groups.[158] However, the reformulation of the "mass-scale" requirement through the phrase "widespread or systematic attack" more succinctly achieved the es-

152. *See* Nancy Amoury Combs, *International Criminal Jurisprudence Comes of Age: The Substance and Procedure of an Emerging Discipline*, 42 HARV. INT'L L.J. 555, 559-60 (2001) (discussing the rapid development of international criminal law, emphasizing crimes against humanity, that emerged in the 1990s).

153. *See* S.C. Res. 955, *supra* note 8.

154. *Id.* at art. 3.

155. *Draft Code of Crimes Against the Peace and Security of Mankind*, [1991] 2 Y.B. INT'L L. COMM'N 103, U.N. Doc. A/CN.4/SER.A/1991/Add.1, art. 21.

156. *See* Van Schaak, *supra* note 91, at 823-24.

157. *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 51st Sess., Supp. No. 10, at 93-94, U.N. Doc. A/51/10 (1996).

158. *See The Rome Statute of the International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 1998 Session, at 5, U.N. Doc. A/CONF./83/9 (1998) (incorporating the "widespread or systematic" language of the ICTR.

sence of the boundary between a matter of internal, domestic concern and a crime permitting universal jurisdiction.

As the International Criminal Tribunal for Rwanda explained, the term "widespread" means "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims."[159] It further defined the term "systematic" as meaning "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources."[160] As interpreted, the "widespread or systematic" requirement has captured the essence of the crime. If crime is being committed on a massive scale or pursuant to a well-financed and systematic policy, then the territorial state has breached or failed to meet the minimum standard of state responsibility for preventing serious atrocities. Crime committed in a "systematic" manner against a targeted segment of a civilian population is sufficient in itself to trigger international jurisdiction. The utilization of "widespread or systematic" benefits from its simplicity of language and adequately captures the essence of the judgment that tribunals inevitably must make prior to finding jurisdiction. If violent crimes of the nature delineated in (a) through (i) of Resolution 955 are occurring on a widespread or systematic basis, it follows that the government is causing, condoning, or is unable to prevent the acts.

The phrase "widespread or systematic," however, likely concerned the ILC for its perceived lack of practical guidance in application. Unfortunately, no bright line can be drawn as to when an attack on a particular segment of a society has become sufficiently "widespread or systematic" to meet the modern conceptualization of the crime. It may always be necessary, at least into the foreseeable future, to make this determination on a case-by-case basis due to the inherently theoretical nature underlying the crime. The "widespread or systematic" requirement demarcates the line between domestic crime handled internally by a sovereign state's criminal justice system and a matter of such consequence that the international community, or any agent thereof, may assert universal jurisdiction over it.

The phrase "widespread or systematic" further establishes an objective criterion that evinces the subjective, frequently internalized, awareness on the part of the perpetrator that he or she can act with impunity in the commission of a crime.[161] The perpetrator gains this awareness, or *mens rea*, when the targeting of a particular segment of society has become so "widespread or systematic" that the perpetrator feels free to act in the absence of any likely prosecution by the territorial government. Even a single act against an individual victim can

The manner in which the future ICC will interpret and apply this provision, however, remains uncertain).

159. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, ICTR T. Ch. I, ¶¶ 579-81 (2 Sept. 1998); *see also* Kittichaisaree, *supra* note 21, at 96 (citations omitted).

160. *See* Prosecutor v. Akayesu, *supra* note 159, ¶¶579-81.

161. *See* RATNER & ABRAMS, *supra* note 6, at 62 (discussing the *mens rea* of an accused regarding the attack on a civilian population, that the accused must be aware of the widespread or systematic nature of the attack in order to be found guilty).

qualify as a crime against humanity if a link exists between the act and the widespread or systematic attack against a civilian population.[162] The perpetrator's subjective awareness arises from the government's perceived lack of power to prevent the commission of systematic crimes against an identifiable group or its acquiescence to and even encouragement of such crimes. At that point, a legal determination may follow that the state itself has "broken down"; it follows that some portion of the state's sovereignty has passed to the international community as a whole. Again, some of the state's sovereign sticks, those representing its criminal enforcement jurisdiction, have passed to or are shared with the international community of states.

Having developed the balance between the international community and the limitations on state sovereignty as the basis for universal jurisdiction, Part III will look at the issue from the position of the prosecuting nation. As a state's sovereignty transfers to the international community when certain "heinous" crimes are committed within the state, a particular nation that assumes the authority to prosecute essentially acts as the agent of the international community. It therefore must exercise restraint in its determinations as to which perpetrators and which crimes to prosecute consistent with its representative capacity.

IV.
THE PROSECUTION OF WAR CRIMINALS BY NATIONAL COURTS

A. *The Prosecuting State As The Agent Of The International Community.*

Throughout this paper, the term "international community" represents the collectivity of all states. Although itself an abstract term, "international community" is now a well-accepted phrase and logically recognizes that states collectively make international law.[163] As states can make law only through collective efforts, whether through multilateral conventions or custom and practice, "it is axiomatic that every [s]tate is as such a member of the international community."[164] Thus, the right to exercise universal jurisdiction belongs truly to the international community acting collectively and not the respective, individual states. When an individual state undertakes the prosecution of a perpetrator pursuant to an assertion of universal jurisdiction, that state acts as the *de facto* agent for the international community.[165]

This agent, however, is normally self-appointed and therefore not subject to direct control by any internationally constituted body. This frequently opens the prosecuting national tribunal to criticism that the trial either is politically motivated or constitutes an act of "judicial imperialism."[166] Both of these accusations can undermine the legitimacy of the process. Unfortunately, considering

162. KITTICHAISAREE, *supra* note 21, at 97.

163. *See* James R. Crawford, *Responsibility to the International Community as a Whole*, 8 IND. J. GLOBAL LEGAL STUD. 303, 314 (2001).

164. *Id.*

165. Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399, 403 (2001).

166. *See id.* at 416.

the enormous effort and potential expense in collecting evidence, gathering witnesses, and trying accused perpetrators of horrific crimes committed extraterritorially, the motivation for almost every such national proceeding likely would have some foundation in politics or arise from a sense of judicial, and most likely Western, superiority. Even those countries having the best intentions cannot escape such charges completely.

The next section will continue with a short examination of Belgium's controversial exercise of universal jurisdiction over the past few years, beginning with its conviction of two Rwandan nuns, to explore whether its courts appreciate the limitations on Belgium's authority to invoke universal jurisdiction.

B. Belgium's Trial and Conviction of Two Rwandan Nuns

On June 8, 2001, a Belgian jury convicted Sisters Maria Kisito and Gertrude, two Benedictine nuns, for complicity in the commission of genocide.[167] The jury found that the nuns forced approximately 7,000 Tutsis, who had sought shelter at the Sovu convent compound, to leave, with the knowledge that armed Hutu militia were waiting to kill the Tutsis.[168] They subsequently provided gasoline to the militiamen to enable them to burn down a barn in which 500 additional Tutsis had hidden.[169] Some evidence further suggested that the nuns provided vehicles, additional information and support to the Hutu militia in furtherance of killing Tutsis.[170] The nuns were sentenced to prison terms of 12 and 15 years.[171] Reportedly, this was the first occasion that a jury of citizens from one nation judged defendants accused of committing war crimes in another country.[172] The nuns were convicted pursuant to Belgium's 1999 law that provided Belgian courts with the authority under domestic law to exercise universal jurisdiction over genocide and crimes against humanity.[173]

At first impression, Belgium's exercise of universal jurisdiction to bring justice to perpetrators who furthered brutal acts of genocide appears completely impartial, noble, and inspiring. However, Belgium's colonial past in Africa potentially undermines the legitimacy of its efforts in prosecuting these and other accused perpetrators of the Rwandan genocide. Belgium acquired the territory of Rwanda from Germany after WWI and administered it as a protectorate under both the League of Nations and the U.N.[174] Germany had maintained a system of indirect rule, relying on the system of governance already in existence.[175] This pre-colonial system had been controlled predominantly by the Tutsis, who

167. *Special Report: Judging Genocide, supra* note 15, at 24; Linda M. Keller, *Belgian Jury to Decide Case Concerning Rwandan Genocide by May 2001*, AMERICAN SOCIETY OF INTERNATIONAL LAW INSIGHTS, *at* http://www.asil.org/insights/insigh72.htm, (last visited on October 13, 2001).
168. *Special Report: Judging Genocide, supra* note 15, at 24.
169. *Id.*
170. Keller, *supra* note 167.
171. *Special Report: Judging Genocide, supra* note 15, at 24.
172. *Id.*
173. *See* Keller, *supra* note 167, at 2.
174. Boutros-Ghali, *supra* note 126, at 7-8.
175. *Id.*

occupied the higher positions within the social system.[176] Social mobility, however, was possible and successful Hutus could become assimilated as Tutsis.[177] When Belgium acquired control of the territory, its administrators required that individuals specify their ethnicity on identity cards.[178] The identity cards gave the Tutsi dominated social structure a legal permanence, effectively eliminating any social mobility previously enjoyed by the Hutus.[179] The Tutsis were favored both in the educational system and in the civil administration established by the Belgians.[180] At the time, the Tutsis accounted for only approximately 17 percent of the population, with Hutus constituting the overwhelming majority.[181]

The identity-card system implemented by the Belgians later served as a tool for the Hutus in their genocidal campaign, permitting the identification of Tutsis.[182] By establishing a rigid hierarchy based on ethnicity, and effectively excluding the overwhelming-majority ethnic group from social advancement, the Belgians created a situation that was ripe with the potential for a disastrous ethnic conflict. In 1959, due to additional pressures secondary to the decolonization movement, the situation exploded when a Hutu uprising resulted in the deaths of hundreds of Tutsis and the displacement of thousands more.[183] These tensions continued through the years, erupting into periodic violence, until the Rwandan genocide in 1994 claimed the lives of as many as one million people.[184]

In light of this history, Belgium's recent zeal for prosecuting war criminals on the basis of universal jurisdiction could be criticized as being motivated by a desire to improve its own national legacy. Belgium's colonial legacy in Rwanda could diminish the propriety of Belgium's self-appointment to the role of prosecutor. Yet, the unfortunate fact is that at the present time the international community lacks a sufficiently constituted body with the authority to prosecute and try war criminals. Even a fully supported International Criminal Court could not try more than a small fraction of the total number of war-crimes perpetrators in such conflicts.[185] If national courts do not undertake the role of the prosecutor, then the undesirable alternative may be that perpetrators will escape all punishment.[186] This obviously is unsatisfactory. Until the establishment of a permanent, supranational court that has sufficient authority to rise above politics but that also can foster continuing respect for respective states' sovereignty national

176. *Id.* at 7.
177. *Id.*
178. *Id.* at 8.
179. *Id.*
180. *Id.*
181. *See* Kuperman, *supra* note 6, at 95.
182. *See* Jose E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 388-89 (1999) (citing ALAIN DESTEXHE, RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY 47 (Alison Marschner trans., New York University Press 1995)).
183. BOUTROS-GHALI, *supra* note 126, at 8.
184. *Id.* at 37.
185. Broomhall, *supra* note 165, at 408.
186. *See id.* at 409.

courts should continue their work in investigating war crimes and punishing their perpetrators.[187] National courts, however, always should consider the theoretical source of their authority to prosecute crimes under universal jurisdiction. These courts can avoid undesirable political ramifications and the appearance of impropriety only through objective self-scrutiny of their authority and the appropriateness of their assumption of the prosecutorial mantle on behalf of the international community.[188]

The next section will summarize some practical concerns and considerations arising from the nature of a nation's self-appointment to the role of international prosecutor. It will explore briefly the very real danger to international relations which nations may cause when they indiscriminately invoke universal jurisdiction. This danger results mainly from the fact that nations focus solely on the "heinous" crime without an objective, accompanying determination that the wrongs alleged indicate the breakdown of another sovereign state.

C. The Self-Appointed Agent for the International Community: Practical Concerns and other Considerations

Problems and criticism inevitably result when national courts undertake the prosecution of war crimes, primarily because the development of universal jurisdiction is still in its theoretical infancy.[189] National efforts to prosecute war crimes began in earnest relatively recently, resulting in an unprecedented assertion of universal jurisdiction that departs from the more traditional bases of territoriality or nationality. The indiscriminate invocation of universal jurisdiction, however, has the potential to cause substantial tears in the fabric of international relations. Any government invariably considers another state's exercise of external jurisdiction over its territory and nationals as a threat to its sovereignty.[190] As Bruce Broomhall has commented:

> Concerns about the potentially real consequences of universal jurisdiction proceedings on interstate relations are not trivial. It would be one thing for France to prosecute a former head of state of Haiti before its domestic courts, and quite another for the Marshall Islands to prosecute a former President of the United States.[191]

These potential problems ultimately arise because nations self-appoint themselves as an agent for the international community when they invoke universal

187. *See, e.g.*, Lt. Col. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with The Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001) (criticizing the perceived structural flaws with the present treaty providing for the International Criminal Court).

188. *Cf.* Dan Smith, *Sovereignty in the Age of Intervention*, *in* SOVEREIGN INTERVENTION 13, 23 (Anthony McDermott ed., 1999) (arguing that it "is a mistake to go very far with this analogy between national societies and international society". . . . as "acting in the name of international law necessarily politicizes humanitarianism.").

189. *See, generally*, Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 563 (1995) (discussing, for instance, that "the penal element of international humanitarian law is still rudimentary").

190. *See* Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383, 389-90 (2001).

191. Broomhall, *supra* note 165, at 418.

jurisdiction. As discussed, when a state condones or loses the ability to prevent the widespread commission of crimes such as genocide, crimes against humanity, official torture, or similar "heinous" offenses, a portion of its total sovereign "bundle" passes to the international community as a whole. Unfortunately, with few historical exceptions such as Nuremberg, the ICTY and the ICTR, the international community has lacked the political consensus to establish effective enforcement mechanisms for trying war criminals.[192] The international community generally remains too diffuse and decentralized to present a consistent and unified effort in war-crimes prosecution.[193]

For the same reasons, no internationally agreed upon mechanism currently exists for the appointment of a particular nation most suitable for the prosecution of an identifiable set of war-crimes perpetrators. However, when individual nations act pursuant to universal jurisdiction, in theory they are acting pursuant to an implied mandate from the collective international community. If states do not consider the theoretical limits of their authority, those initiating prosecutions could foment increased tension in international relations that would outweigh the benefits of individual justice. The idea of reasonableness as a limitation on the exercise of jurisdiction thus takes on special importance when universal jurisdiction is the sole basis for extraterritorial prosecution.[194] A state should commence such a prosecution only after an objective self-determination that it can appropriately represent the interests of the international community.

Any nation acting pursuant to an assertion of universal jurisdiction should gauge whether the accused perpetrator's acts were so egregious, or were secondary to a conflict so awful, that a general international consensus of condemnation of those acts could be expected or assumed. Most recent national prosecutions pursuant to universal jurisdiction have not given much consideration to the presence of any international consensus. Belgium's institution of proceedings against Ariel Sharon[195] and its issuance of an arrest warrant for the Democratic Republic of the Congo's Abdulaye Yerodia Ndombasi,[196] for instance, indicate that its courts have recognized few if any theoretical, or practical, constraints on their authority. In the former proceeding, Belgium until recently was investigating the present, democratically elected leader of Israel for war crimes. Although Israel's handling of conflict with its neighbors certainly

192. *See* Randall, *supra* note 106, at 829, n.251 ("At present, domestic jurisdiction to prosecute international crimes is particularly important, because 'mankind has not yet proved mature enough to have set up an international criminal court.'") (quoting Feller, *Jurisdiction Over Offenses with a Foreign Element*, *in* 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 5, 41 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973)).

193. *See* Brown, *supra* note 190, at 383-84 ("Universal jurisdiction is a functional doctrine based on the need to remedy, in some small measure, the inability of the decentralized international system to enforce even its most fundamental laws.").

194. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (listing several factors for evaluating the reasonableness of the exercise of jurisdiction, including the importance of the regulation to the international community and the extent to which the assertion of jurisdiction is consistent with the traditions of the international system).

195. *See Sharon Hearings*, *supra* note 16.

196. *See* Case Concerning the Arrest Warrant of August 11 April 2000 (Congo v. Belg.), 2002 I.C.J. No. 121 (Feb. 14), at 4.

has been controversial, it remains highly questionable whether a legal conclusion that a portion of Israel's sovereignty transferred to the international community could follow from commission of the alleged crimes. As discussed, such a finding should precede the exercise of universal jurisdiction over any perpetrator. Otherwise, legal action violates the sovereignty of the territorial state or state of the accused.

Belgium further had resolved to arrest Yerodia on the spot if he entered its territory. Yerodia was Congo's Minister of Foreign Affairs when Belgium issued its arrest warrant and recently held the position of Minister of Education.[197] The arrest warrant alleged that during Congo's civil war Yerodia, who then was the Principal Private Secretary to the president, made televised statements in which he called for the continued massacre and persecution of the country's Tutsis.[198] In response to Belgium's arrest warrant, Congo filed and proceeded on an application to the International Court of Justice arguing that Belgium's actions violated the principle of sovereign equality, the principle that a state may not exercise jurisdiction over another state, and principles of diplomatic immunity.[199] Although the charges against Yerodia of inciting genocide certainly would constitute a crime of international concern,[200] Belgium likely did not consider whether Yerodia's outrages were such that it should conclude that Congo's sovereignty had ceded in part to the international community or that its assumption of jurisdiction on behalf of the international community was proper. On February 14, 2002, the ICJ ruled against Belgium for its unilateral assumption of the authority to prosecute Yerodia on the basis of universal jurisdiction.[201] Although the majority of the ICJ in the *Arrest Warrant* case did not expound in any detail on universal jurisdiction, it did conclude that Belgium's attempted exercise of jurisdiction violated long-established principles of diplomatic immunity.[202]

The ICJ's ruling against Belgium ultimately may discourage the principled use and development of universal jurisdiction. Rather than advancing the cause of international justice, Belgium's zeal may have retarded it. If international law is ever to take precedence over international politics, restraint in the use of universal jurisdiction will be necessary. The ICJ's rejection of Belgium's overzealous attempt to rely on this principle demonstrates the delicate balance at issue between the prosecution of international criminals and mutual respect for sovereignty. The *Arrest Warrant* case thus raises the question whether the international community truly can cooperate sufficiently for the development of any principle of law as profound as the concept of universal jurisdiction.

197. *Id.* at 4.
198. *Id.* at 25.
199. *Id.* at 4.
200. *See* Prosecutor v. Akayesu, ICTR-96-4-T, ICTR T. Ch. I, ¶¶ 579-81 (1998).
201. Case Concerning the Arrest Warrant, 2002 I.C.J. No. 121.
202. *Id.* at 26.

V.
CONCLUSION

The assertion of universal jurisdiction by one nation over another's citizens for crimes committed in the latter's territory is an abrogation of that state's sovereignty and constitutes a limited exception to the principle of non-intervention. Though conceptually permissible when serious violations of international humanitarian norms are systematically occurring, the assumption of another state's domestic criminal jurisdiction involves many theoretical nuances and complexities. This is the very reason that a sound theoretical appreciation of universal jurisdiction vis-à-vis the sovereign rights of states to exercise exclusive domestic jurisdiction over crimes within their territory is so crucial. This paper sought to develop the theoretical balance between the use of universal jurisdiction and the continuing importance of state sovereignty and its general inviolability. The analogy of sovereignty to property law as a "bundle of sticks" was proposed as a means of conceptualizing this balance. Though the "owner" of a state's sovereignty possesses numerous rights, the international community has imposed some limits on those rights. When crimes of the magnitude of genocide, crimes against humanity, and others in this limited category are capable of perpetration in a state, the international community may claim for itself some portion of that state's sovereignty and may exercise jurisdiction to bring the perpetrators to justice.

Unfortunately, the international community still depends on individual nations for the general enforcement of humanitarian norms. The respective nations thus act as self-appointed agents in the pursuit and prosecution of international offenders. But the potential for disruption within the international order, and the resulting ramifications for international peace and security, are greater than often appreciated. For when nations assume the authority to prosecute pursuant to universal jurisdiction they, in essence, make a legal determination that another state has abdicated some portion of its sovereignty. That is a serious conclusion. Due to the "under-theorization" of universal jurisdiction, most nations probably do not appreciate the full import of their actions. As a result, the potential for international disruption greatly increases.

Unquestionably, the concept of universal jurisdiction remains in its theoretical and practical infancy. Its emergence into a respected and legitimate basis for the prosecution of major offenders of humanitarian law will depend largely on individual nations. National prosecutorial efforts should exercise restraint in selecting which criminals to pursue and maintain strict adherence to principles that foster substantive and procedural fairness. Otherwise, international consensus will judge the judges, and the result will be that universal jurisdiction becomes discredited and again falls into disuse. Such a tragedy would greatly undermine the efforts of the international community to build a more just and peaceful global order. Far worse, however, would be the betrayal of the victims in whose name the principle of universal jurisdiction is invoked.