Holbrooke, Richard (1998). *To End a War.* New York: Random House.

Kiernan, Ben (1996). *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975–79.* New Haven, Conn.: Yale University Press.

Kuper, Leo (1977). *The Pity of it All: Polarization of Racial and Ethnic Relations.* Minneapolis: University of Minnesota Press.

Kuper, Leo (1985). *The Prevention of Genocide.* New Haven, Conn.: Yale University Press.

LeBlanc, Lawrence (1991). *The United States and the Genocide Convention.* Durham, N.C.: Duke University Press.

Lemkin, Raphael (1944). *Axis Rule in Occupied Europe.* Washington, D.C.: Carnegie Endowment for International Peace.

Ponchaud, Francois (1978). *Cambodia: Year Zero.* New York: Holt, Reinhart and Winston.

Power, Samantha (2002). *A Problem from Hell: America and the Age of Genocide.* London: Harper Collins Publishers.

Riemer, Neal, ed. (2000). *Protection against Genocide.* Westport, Conn.: Praeger Publishers.

Robinson, Nehemiah (1960). *The Genocide Convention: A Commentary.* New York: The American Jewish Committee.

Ronayne, Peter (2001). *Never Again? The United States and the Prevention and Punishment of Genocide since the Holocaust.* New York: Rowman and Littlefield.

Shawcross, William (1979). *Sideshow: Kissinger, Nixon, and the Destruction of Cambodia.* New York: Simon and Schuster.

Zimmerman, Warren (1996). *Origins of a Catastrophe: Yugoslavia and Its Destroyers.* New York: Times Books.

Lawrence J. LeBlanc

Universal Jurisdiction

Like every concept, *jurisdiction* may have different meanings. The word comes from Latin roots: *jus* or *juris* means "law," and *dicere* means "to say" or "to read." Therefore, "jurisdiction" can be understood to mean; "to say the law" and, as a derivative, "the power to say the law." Presently, jurisdiction is understood as the legislative, adjudicative, and executive power that provides, respectively, the competence to prescribe, adjudicate, or execute the law. In particular, it refers to the territorial competence of courts. Jurisdiction in criminal matters may be considered either as substantial or procedural law.

Prescriptive jurisdiction basically depends upon the enactment of laws by individual states, or by the state's adoption of international conventions. In the case of genocide, most states have become parties to the 1948 Genocide Convention, and the majority of states have incorporated the convention into their internal legal order. No international convention yet exists on crimes against humanity, except for where they may be found within the conventions that create international criminal tribunals. Executive power, in criminal law, is one of the forces (such as the police) that is permitted to intervene to enforce a search or arrest warrant. In principle, no state is allowed to exercise executive power on the territory in other states. The courts within a particular state exercise adjudicative jurisdiction, which is the authority to render a decision on a case.

Adjudicative Jurisdiction

Adjudicative jurisdiction can be discussed on a material, personal or territorial level. With genocide, the material jurisdiction is given by the crime itself, which has been largely uniformly understood and defined worldwide since the 1948 Genocide Convention. On the personal level, there is an onus in criminal law that every natural person over a certain age can be prosecuted for a crime, which is committed within the boundaries of a state's borders. For personal jurisdiction, therefore, it is more a question of defining the exceptions than of defining the rule. For instance, there are exceptions for some persons under a certain age; persons eligible for or having been granted immunities; or persons of a certain status, such as military persons serving duty in foreign states, when the state they serve has signed specific conventions with the state in which they committed the act.

The most controversial question debated in recent years is the extent the courts of a particular state can adjudicate crimes which have been committed outside the territory of that state. In criminal law there are different means of jurisdiction over an accused; but the means are not recognized equally by all states. The most easily recognizable and applicable basis of jurisdiction is the *territorial principle,* whereby persons may be tried and punished for crimes committed on the territory of the state that seeks to prosecute them. Further, persons may be prosecuted by their state of nationality for a crime no matter on which territory they commit it. This is called the *active personality principle.* In the first means of claiming jurisdiction, the primary interest of a state is to maintain law and order in its territory, which is the most basic duty and prerogative of states. In the second case, states may be interested in maintaining a certain level of morality among their citizens, even when those citizens act abroad. More controversial is the right for states to adjudicate crimes that have been committed abroad by foreigners but against their own citizens. This is the *passive personality principle.* Normally, it should be in fact the duty of the state where the crime has been committed, or even the state

of the nationality of the author of the crime, to prosecute the person who has committed the crime. Yet, most states still maintain the prerogative to exercise the passive personality principle, if only to avoid a denial of justice if the territorial or the national states do not proceed against the author of the crime.

Universal Jurisdiction

One even more controversial issue is whether states are allowed to judge foreign persons who have committed crimes abroad against other foreigners. In this case, the state doing the judging has no connecting link with the persons or the crimes, except for the fact that the suspects are possibly present on their territory. This principle is usually known as the *universality principle,* or as *universal jurisdiction.*

One view is that this principle is recognized when states expressly or tacitly allow other states to proceed against their own citizens, or permit another state to prosecute individuals for crimes that have been committed on their own territory. In such cases, jurisdiction may be transferred to another state through ad hoc agreements, bilateral treaties, or through multilateral treaties. Customary law may also allow the application of this principle, as is historically the case with piracy. Universal jurisdiction, therefore, is not new. During the Middle Ages, it was primarily applied by small states in Europe when they were fighting gangs of international thieves.

Among the many multilateral treaties which allow adjudicative jurisdiction to be delegated in such a way, are those intended to fight transnational criminality such as terrorism, narcotics, or in certain fields of international humanitarian law and human rights (torture, for example). Indeed, states consider that serious transnational crimes and criminals can only be dealt with by promoting transnational accountability and mutual assistance in criminal matters, including allowing all the states party to certain treaties to prosecute the criminals where they can catch them.

Of course, this kind of jurisdiction implies that states agree on the definition of the crimes that can be prosecuted, and that they trust each other's respective legal systems. At the very least, the states must agree that the possible evil of the prosecution by dubious foreign judicial systems is matched by the necessity to severely repress certain crimes and criminals. It is a matter of weighing the need for crime control against a possible lack of procedural guarantees.

One other view, more naturalist, and which believes in the existence of a legislative power above the individual states, is that universal jurisdiction applies to crimes that affect the international community and are against international law, and are therefore crimes against mankind. Those who commit such crimes are considered to be enemies of the whole human family (*hostes humani generic*), and should be prosecuted wherever they are. In this view, the international community as a whole delegates to individual states the task of judging certain crimes and some criminals of common concern.

The *Lotus* Case, 1927

The ambit (sphere) of the jurisdiction of states in criminal law has been dealt with by numerous specific international treaties, yet no general treaty provides for a comprehensive solution of the jurisdiction of states in criminal cases. The most comprehensive and authoritative opinion to date was issued by the Permanent International Court of Justice in the *Lotus* Case of 1927.

In this case, the court had to deal with a case of collision between two ships, one French (*Lotus*) and one Turkish (*Boz-Kourt*), in the Mediterranean high seas, which caused loss of life among the Turkish sailors. On the arrival of the *Lotus* in Constantinople, the French lieutenant and officer on the bridge at the time of the collision was arrested and prosecuted by the Turkish authorities on a charge of homicide by negligence. The Turks invoked Article 6 of the Turkish Penal Code, which gave the Turkish courts jurisdiction, on the request of the injured parties, to prosecute foreigners accused of having committed crimes against Turkish nationals. The French government protested against the arrest, and the two states agreed to consult the Permanent Court of International Justice to determine whether Turkey had acted in conflict with the principles of international law by asserting criminal jurisdiction over the French officer. France alleged that Turkey had to find support in international law before asserting its extraterritorial jurisdiction, whereas Turkey alleged that it had jurisdiction unless it was forbidden by international law.

In its judgment, the court decided with the thinnest majority that Turkey had not infringed international law. It ruled, instead, that France had not proven its claim that international law provided a restriction of adjudicative jurisdiction. As president of the court Max Huber clearly stated: "restrictions upon the independence of States cannot be presumed." Where international law does not provide otherwise, states are free to adjudicate cases as long as their executive power is not exercised outside its territory:

> far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their terri-

> tory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

According to this case, states would be free to adjudicate cases of genocide committed abroad, even by foreigners against foreigners, as long as third-party states cannot prove that this extraterritorial jurisdiction is prohibited. The burden of proof that a state acts in contradiction to international law, at least as far as its jurisdiction is concerned, lies on the plaintiff state. Both treaties and the development of customary law (as evidence of a general practice accepted as law) are, of course, the best sources from which to discover whether individual states use a recognized principle of jurisdiction or if they trespass the limits and interfere with other states' internal and domestic affairs.

The Nuremberg Statute and the Post–WWII Prosecutions

The Nuremberg Statute of 1945, provided the first express prohibition of crimes against humanity. The term genocide has also been used in several indictments by national courts that have judged Nazis after the end of the war.

Yet, the Nuremberg Statute was only applicable to the crimes committed by the Nazis and their allies, although those crimes may have been committed on non-German territory. In addition, it has been argued that the jurisdiction of the Allies to judge the Nazis for the core crimes of aggression, war crimes, and crimes against humanity either stemmed from Germany's surrender to the Allies, and therefore from the jurisdiction of Germany itself to judge its own nationals, or was derived from the fact of Germany's occupation.

The 1948 Genocide Convention

The clearest ambit of the adjudicative jurisdiction of states for crimes of genocide is provided by Article 6 of the 1948 Genocide Convention, which states that:

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

The question to be raised is whether states that are parties to this convention allow themselves to prosecute persons who have committed or participated to a genocide in a third country, whether or not such persons are nationals of the state that wants to prosecute them. The text of Article 6 does not say whether the term "shall be tried," provides for compulsory territorial jurisdiction or whether a state may, on the basis of customary international law, bring someone accused of genocide before its own courts on the basis of either extraterritorial jurisdiction or universal jurisdiction.

As a matter of fact, the preparatory work of the treaty shows that the authors of the working draft clearly contemplated universal jurisdiction. Yet, an historical analysis of the Convention leads to the conclusion that most states, at the start of the cold war, clearly wanted to avoid such a broad interpretation. The Soviet representative at the conference, for instance, stated "no exception should be made in the case of genocide to the principle of the territorial jurisdiction of states, which alone was compatible with the principle of national sovereignty." According to the Egyptian representative, "it would be very dangerous if statesmen could be tried by the courts of countries with a political ideology different from that of their own country." This opinion was also shared by the American representative, who thought that prosecution for crimes committed outside the territory of a state could only be allowed with the consent of the territorial state. The representatives of some countries, including Burma, Algeria, and Morocco, even made formal declarations according to which no crime of genocide committed on their territory could be judged by state courts other than their own.

The jurisdiction of an international penal tribunal was agreed upon as a compromise between the states that wanted to limit jurisdiction to the territorial principle and those that wanted to broaden its meaning.

The preparatory work of a treaty merely provides a "supplementary means of interpretation," to be used only when ordinary interpretation leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable. Besides, the 1948 Genocide Convention is more than fifty years old and the jurisdiction of states to prosecute crimes of genocide must be reviewed according to the evolution undergone by customary law in the time since it was first written. Indeed, the very restrictive approach of Article VI has been criticized by some authorities, who sometimes base their opinion on the specific nature of the crime considered. This can be seen in the work of the International Law Commission (2000); the American Law Institute, in its *Restatement of the Foreign Relations Law of the United States* (1987); and the International Court of Justice (ICJ), in the *Genocide* case (1993). It is similarly apparent in the opinions handed down by individual judges in the *Arrest Warrant* case (2002) as well as in the work of the International Criminal Tribunal of Former Yugoslavia (ICTY), for example in the

Tadic case (1995). This view is also shared by a considerable number of academics and authors, who propose that the crime of genocide, or even crimes against humanity, should be prosecuted on the basis of universal jurisdiction.

For these authorities and authors, Article VI of the 1948 Genocide Convention, by obliging states to prosecute crimes of genocide committed on their territory, does not prevent states from prosecuting them if they are committed in third countries. They also generally insist on the fact that genocide is a crime of concern not only for individual states but for the international community as a whole.

International law is created by states, however, and not by "authorities" or by doctrine. It is therefore necessary to verify whether the evolution of the practice of the states and their *opinio juris* expressed since 1948 can match the evolution of the doctrine. As a matter of fact, it is hard to find many cases of prosecutions for acts of genocide outside the territorial state where the acts have been committed.

The Eichmann and Demjanjuk Cases in Israel

In 1961 Adolf Eichmann was abducted in Argentina by Israeli agents and taken to Israel, where he was prosecuted and condemned for his participation in the genocide committed by the Nazis. Argentina strongly protested the abduction, although its opposition to the judgment itself was less vocal. In any case, the German authorities clearly agreed that Eichmann, a German citizen having committed crimes in Germany, should be prosecuted by Israel. The German authorities probably did not feel that they were acting in accordance with customary law. It is likely, instead, that they approved Eichmann's prosecution in Israel for political reasons and because they did not want to hamper the repression of Nazis.

On the other hand, the Israeli courts did not rely on Germany to assert their competence to judge Eichmann. Instead, they acted on two different grounds. The first was an invocation of the passive personality principle, whereby the state of Israel asserted its legitimacy to judge acts that had been committed against Jews even before the state of Israel existed. The second ground underlying the Israeli courts' claim of jurisdiction was a reference to a mix of international morality and law:

> [T]hese crimes constitute acts which damage vital interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct

The reasoning of the Israeli court was that a crime can be defined by the "international community", and that states are empowered to serve as "executive agents" of that international community, as long as the instruments under international law are not enacted and in force.

What is interesting about the Eichmann case is not the declarations of the Israeli courts, but the fact that most other states did not react negatively against the application of universal jurisdiction by Israel for its prosecution of a case of genocide. Even Argentina, which did protest harshly against the abduction of Eichmann from its territory, did not go so far as to lodge a formal complaint against the judgment of the Israeli courts.

Another case concerning the Nazi genocide occurred in 1986, when a U.S. court agreed to extradite John Demjanjuk, alleged to have been a camp warden in Treblinka. By agreeing to the extradition, the United States recognized the jurisdiction of Israeli courts to judge Demjanjuk, who had become a naturalized U.S. citizen after the end of World War II. Demjanjuk was tried in Israel and acquitted on the merits of the case. However, neither the Eichmann case nor the Demjanjuk case can be considered as setting a precedent for other states.

Other Relevant Examples

The jurisdiction of states to judge acts of genocide that have been committed in other states has been considered in various cases arising out of the genocide in Rwanda, which occurred in 1994. Overall, however, the invocation of universal jurisdiction has been rather heterogeneous and ambiguous.

In 1994, for instance, Austria put the former commander of a Serbian military unit, Dusko Cvjetkovic, on trial for acts of genocide committed in the former Yugoslavia. The defense protested that Austria did not have jurisdiction, but the Appeals Court justified the Austrian court's right to conduct the trial in the following terms:

> Article VI of the Genocide Convention, which provides that persons charged with genocide or any of the acts enumerated in Article III shall be tried by a competent tribunal of the State where the act was committed, or by such international penal tribunal as may have jurisdiction with re-

> spect to those Contracting Parties which shall have accepted its jurisdiction, is based on the fundamental assumption that there is a functioning criminal justice system in the locus delicti (which would make the extradition of a suspect legally possible). Otherwise—since at the time of the adoption of the Genocide Convention there was no international criminal court—the outcome would be diametrically opposed to the intention of its drafters, and a person suspected of genocide or any of the acts enumerated in Article III could not be prosecuted because the criminal justice in the locus delicti is not functioning and the international criminal court is not in place (or its jurisdiction has not been accepted by the State concerned) (Reydams, 2003).

Cvjetkovic was tried in Austria, and a jury acquitted him of all charges.

In 1996 in France, the Appeal Court of Nîmes expressly rejected the French assertion of jurisdiction in the case Wanceslas Munyeshyaka, stating that Article VI of the Genocide Convention did not allow the application of universal jurisdiction for cases of genocide. This judgement was overruled by the French Supreme Court, but only on the very technical ground that alternative justifications for claiming jurisdiction were available: France could invoke either the Torture Convention of 1984, or it could base its jurisdictional claim on a specific law, based on UN Security Resolution 955, which had been adopted in France in response to the genocide in Rwanda.

In Switzerland, Fulgence Niyonteze, former mayor of Mushubati, Rwanda, was tried in 1997 by the military courts for his participation in the genocide. Although the prosecutor had indicted Niyonteze for murder, grave breaches of international humanitarian law, genocide, and crimes against humanity, the Swiss court refused to judge him for genocide or for crimes against humanity because Switzerland was not, at the time of the trial, a signatory to the 1948 Genocide Convention and had incorporated no provision for genocide or crimes against humanity in its domestic laws. The court did, however, convict Niyonteze for murder, incitement to murder, and grave breaches of the Geneva Conventions arising from his participation in the internal conflict of Rwanda.

The Military Court of Appeal dismissed the judgement of the Swiss court on indictment of murder and incitement to murder, retaining only the conviction regarding grave breaches of the Geneva Conventions. Unlike the Genocide Convention, the Geneva Conventions expressly provide for the possibility to judge a person on the basis of universal jurisdiction.

In 1998 a German court sentenced a Serb named Nikola Jorgic to life imprisonment for acts of genocide, basing its claim to jurisdiction on the German Criminal Code, which provided for universal jurisdiction in cases of genocide. Interestingly, the Higher Court expressly mentioned "the generally accepted non-exclusive interpretation of Article VI of the 1948 Genocide Convention" to assert that there is no prohibition of universal jurisdiction under international law regarding the prosecution of acts of genocide. The Federal Supreme Court confirmed that a hypothetical norm forbidding the application of universal jurisdiction would be contrary to the rule prohibiting genocide, which is a peremptory (*jus cogens*) norm. In a later case, Maksim Sokolovic (1999), the Federal Supreme Court even dropped the requirement that a special link exist between the accused person and Germany in order to prosecute him for genocide on the basis of universal jurisdiction.

In 2001 four Rwandese were prosecuted in Belgium for having participated in the Rwandan genocide in the Butare province. However, Belgium applied universal jurisdiction in order to judge them for war crimes only. They were not charged with crimes against humanity or genocide, apparently because universal jurisdiction for these crimes had only recently (in 1999) been added to the 1993 Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 1993. In this case, as in the French and Swiss trials, the Republic of Rwanda never challenged the assertion of universal jurisdiction.

In fact, in many cases where universal jurisdiction has been used to judge suspects of the genocide in Rwanda, the prosecuting states have either indicted and sentenced the accused on the basis of national provisions of humanitarian law, or they have enacted a special law on the implementation of the status of the International Criminal Tribunal for Rwanda. Indeed, the states that applied universal jurisdiction for acts of genocide committed in Rwanda were encouraged to do so by the international community, and especially by the UN Security Council. Therefore, it is difficult to draw definitive conclusions on the general acceptance by states of the universal jurisdiction for the crime of genocide.

Legislative Practice of States

Some states have implemented legislation that allows the prosecution of crimes of genocide and crimes against humanity according to universal jurisdiction. For example, Australia, Belgium, Canada, Germany, The Netherlands, Spain and, to some extent, Argentina, Ethiopia, and Venezuela allow for judging these crimes

even if they have been committed abroad. Switzerland, which only became a party to the Genocide Convention in 2000, expressly enacted a law providing for universal jurisdiction for the crime of genocide by including the following passage in the Message of the Council of Ministers:

> with the view of the "jus cogens aspect" of the prohibition of genocide as well as of its effects "erga omnes," there is no doubt that the prosecution of the crime of genocide must be based, in international law, on universal jurisdiction. Therefore, States may—and even must—prosecute or extradite foreign nationals or their own nationals who are suspect of having committed an act of genocide, even if the act has not been committed on their territory. This does not constitute a violation of the principle of non-intervention in other States' internal affairs.

Unfortunately, there has been no instance in which, at the time of becoming party to the Genocide Convention, a state has made a formal declaration on the question of the extent of jurisdiction as provided for by Article VI. The reaction of the international community to such an interpretation would provide good evidence of the state of customary law on this matter.

In all the cases where states adopted universal jurisdiction into their own legislation, customary law was consolidated. The states also put themselves in a situation where they cannot deny other states the right to prosecute one of their nationals for crimes of genocide. On the other hand, the huge majority of states seem neither to have implemented the Genocide Convention into their own legal system, nor to have extended their own jurisdiction for genocide to universality. Most recently, some states have shown a strong opposition against extraterritorial jurisdiction and against states that allow themselves, by law, to exercise such jurisdiction. Others became aware of the excesses universal jurisdiction could trigger and so downplayed its importance. The Belgian legislation on universal jurisdiction and its application by investigating judges and courts was notably the focal point of heated debate in doctrinal and political circles.

Universal Jurisdiction and the International Criminal Court

These developments, which may give the appearance that customary law could have evolved towards a more permissive jurisdiction, at least as far as a crime of genocide is concerned, have to be reconsidered since the Rome Statute of the International Criminal Court (ICC) was adopted in 1999.

The Rome Statute provides for the jurisdiction of the ICC for crimes of genocide and for crimes against humanity, with the definition of genocide being the same as under the 1948 Genocide Convention. Therefore, it is argued, states that are party to both the Genocide Convention and the Rome Statute wished to favor either the territorial or the active personality principle on the one hand, or the jurisdiction of the ICC on the other. With the emergence of the ICC, the first justification of the exercise of universal jurisdiction by a state—the Israeli explanation that the competence of its own courts derived from the fact that there was no international court allowed at that time to prosecute international crimes, in particular genocide—would now be invalidated.

Yet, the ICC only has jurisdiction when a crime has been committed on the territory of a state party to the Rome Statute or by a national of a state party to the Statute. Therefore, it is argued that universal jurisdiction could still be applied by states that are parties to both the 1948 Genocide Convention and to the Rome Statute when the crime which is prosecuted has been committed on the territory of states—and by a national of states—which are not parties to the Rome statute.

Cases Heard before the International Court of Justice

The question of the admissible extension of a state's criminal jurisdiction could have been laid to rest by the International Court of Justice (ICJ) in the case of the Arrest Warrant of April 11, 2000, issued by the Democratic Republic of Congo (DRC) against Belgium. In this case, an investigating judge of Belgium issued an arrest warrant for grave breaches of international humanitarian law against the Minister of Foreign Affairs for DRC President Laurent Desire Kabila. Belgium had no connecting point with the case, except that the plaintiffs were residing in Belgium. The DRC had two main points of contention about the arrest warrant. The first was that Belgium had applied extraterritorial jurisdiction to events that had taken place in the DRC, and therefore had violated its territorial authority and the principle of sovereign equality among all members of the United Nations. The other was that Belgium had violated customary law regarding the diplomatic immunity of Ministers of Foreign Affairs while still holding office.

Unfortunately for the sake of international law, Congo later abandoned its claim that the *in absentia* proceedings against its minister was an exorbitant exercise of Belgium's jurisdiction. Moreover, the court could save its reasoning on universal jurisdiction because it found, by thirteen votes to three, that Congo was right to complain on the basis of the sovereign immunity argument.

In another case, the Republic of the Congo filed an application on December 2002 to the ICJ, instituting proceedings against France. The application sought to annul the investigations and prosecution measures taken by a French investigating judge following a complaint concerning crimes against humanity and torture allegedly committed in the Congo by Congolese officials against individuals of Congolese nationality. Among the individuals targeted by the French measures were the President of the Republic of the Congo, the Congolese Minister of the Interior, and some generals, including the Inspector-General of the Congolese Armed Forces and the Commander of the Presidential Guard. France is a party to the 1984 Torture Convention, and it has implemented a provision in its Criminal Procedure Code expressly allowing for universal jurisdiction in its courts in cases of torture. Congo, however, is not a party to the Torture Convention. It therefore considers that the issuing of the arrest warrant against Congolese authorities is a violation of its sovereignty. In its complaint, the Congo complained that

> by attributing itself universal jurisdiction in criminal matters and by arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed by him in connection with the exercise of his powers for the maintenance of public order in his country [France violated] the principle that a State may not, in breach of the principle of sovereign equality among all Members of the United Nations (. . .) exercise its authority on the territory of another State.

In this case, the question of immunity could allow the court to avoid rendering a judgment on the merits of universal jurisdiction, at least as far as the Congolese president and minister of the interior are concerned. It would be difficult, however, to see how the court could avoid making a decision on universal jurisdiction in the case of the generals, who most probably do not qualify for any claim of immunity. Therefore, the question to be decided by the court is whether states are allowed to prosecute a person on the basis of universal jurisdiction when the territorial state or the state of the nationality of the author of the alleged crime is not a party to a convention that provides for universal jurisdiction.

Some Practical Considerations

Even if the ICJ allows France to prosecute actors of crimes against humanity on the basis of universal jurisdiction in the *Congo v. France* case, it is unlikely that national courts will rush to judge cases committed abroad by foreigners against foreigners. Indeed, many obstacles still remain.

One of the most obvious obstacles is the difficulty for states to allocate important human and financial resources to investigate cases, to prosecute, judge, and possibly imprison persons who perhaps disturbed the morale and security of the community of nations, but who did not specifically endanger the public order of the State where the arrest was carried out. For this reason, states more likely will be tempted to deny the entrance onto their territory of persons suspected of having committed acts of genocide, or, if such persons are found on their territory, to extradite them rather than to judge them.

It is also very difficult for states to judge cases of genocide or crimes against humanity committed outside their borders. Such states could face grave political problems. In addition, the difficulty of gathering evidence would force the prosecuting state to rely on assistance from the territorial States, which are not likely to provide assistance if they deny the jurisdiction of the prosecuting state. Finally, cultural and linguistic differences between the state of judgment and the persons to be judged present further obstacles. With all these elements in mind, it would appear to be highly preferable that each state be encouraged to judge the acts of genocide or crimes against humanity, which have been committed on its territory. This could be encouraged through assistance from the international community, or by allowing the International Criminal Court to judge such cases.

SEE ALSO Eichmann Trials; Extradition; Immunity; National Prosecutions; Pinochet, Augusto; War Crimes

BIBLIOGRAPHY

Bassiouni, M. Cherif (2001). "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice." *Virginia Journal of International Law* 42:1–100.

Benavides, Luis (2001). "The Universal Jurisdiction Principle: Nature and Scope." *Anuario Mexicano de Derecho Internacional* 1:19–96.

Cassese, Antonio and Myriam Delmas-Marty, eds, (2002). *Juridictions nationales et crimes internationaux.* Paris: Presse Universitaire de France.

Guillaume, Gilbert (2003). "La compétence universelle: du code de Justinien à l'affaire Yerodia." In *La Cour internationale de justice à l'aube du XXIe siècle. Le regard d'un juge,* ed. Gilbert Guillaume. Paris: Pedone.

Henzelin, Marc (2000). *Le Principe de l'universalité en droit pénal international.* Bruxelles: Bruylant.

Henzelin, Marc (2002). "La compétence pénale universelle: une question non résolue par l'arrêt Yerodia." *Revue Générale de Droit International Public* 106:819–854.

Macedo, Steve, ed. (2004). *Universal Jurisdiction.* Philadelphia: University of Pennsylvania Press.

Randall, Kenneth (1988). "Universal Jurisdiction under International Law." *Texas Law Review* 66:785–841.

Reydams. Luc. (2003). "Belgium's First Application of Universal Jurisdiction: the Butare Four Case." *Journal of International Criminal Justice* 1:428–436.

Reydams, Luc. (2003). *Universal Jurisdiction.* Oxford, U.K.: Oxford University Press.

Sassoli, Marco (2002). "Le génocide rwandais, la justice militaire suisse et le droit international." *Revue Suisse de Droit International & Européen* 12:151–178.

Schabas, William (2003). "National Courts Finally Begin to Prosecute Genocide, the Crime of Crimes." *Journal of International Criminal Justice* 1:39–63.

Stern, Brigitte (2003). "Le génocide rwandais face aux autorités françaises." In *La répression internationale du génocide rwandais,* ed. Laurence Burgorgue-Larsen. Bruxelles: Bruylant.

CASE LAW

Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, 15 February 2002; reprinted in *International Legal Materials* 41(2003):536.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, Order on Further Requests for the Indication of Provisional Measures, 13 September 1993, (1993) International Court of Justice Reports: 325; reprinted in *International Legal Materials* 32 (1993):1601–1613.

Lotus (France vs. Turkey), 1927 Permanent Court of International Justice Reports, series A, no. 10, p. 4.

Prosecutor v. Tadic (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, reprinted in *International Legal Materials* 35(1996):35–73.

Marc Henzelin

Utilitarian Genocide

The pioneer genocide scholar Vahakn Dadrian introduced the concept of "utilitarian genocide" in a landmark 1975 article, "A Typology of Genocide." He identified five "ideal types" of genocide, based mainly on the primary objective of the perpetrator:

- cultural genocide, aiming at assimilation;
- latent genocide, a by-product of war;
- retributive genocide, localized punishment;
- utilitarian genocide, to obtain wealth;
- optimal genocide, aiming at total obliteration;

As examples of utilitarian genocides, Dadrian cited the atrocities committed against Moors and Jews in the course of dispossesing them of businesses during the Spanish Inquisition, the forced removal and "decimation" of the Cherokees in the U.S. southern state of Georgia in 1829, and the ongoing enslavement and killing of Indians in Brazil.

Even though some contemporary scholars use expressions such as "economically motivated" or "developmental genocide" instead of the actual term *utilitarian genocide,* there is broad agreement that (1) these terms basically cover systematic persecution and mass killings in order to obtain and/or monopolize access to land and to resources like gold or lumber; (2) generally, this type of genocide has been committed by European settlers or their descendants, with direct or indirect state authorization, against indigenous peoples in the Americas, Africa, and Australia; and (3), utilitarian motives are often mixed with or bolstered by racism and dehumanizing images.

Most scholars also agree that the destruction of indigenous peoples still continues, especially in Latin America. A case in point is the nearly total extermination of the Aché (Guayaki) Indians in Paraguay during the 1970s.

The subsequent scholars who have adopted either the term *utilitarian genocide* or its basic propositions include Irving Louis Horowitz, who in 1976 noted that "the conduct of classic colonialism was invariably linked with genocide" (pp. 19B20). Helen Fein, in 1984 used the synonym *developmental genocide,* that is, "instrumental acts to rid of peoples outside their [the colonizer's] universe of obligations who stood in the way of economic exploitation" (p. 5), and in 1987, Roger Smith observed that "the basic proposition contained in utilitarian genocide is that some persons must die so that others may live" (p. 25). In 1990 Frank Chalk and Kurt Jonassohn included genocide "to acquire economic wealth" in their typology of four types of genocide based on the primary motive of the perpetrator.

Even though the term *utilitarian genocide* is relatively new, it has long been acknowledged that utilitarian motives have played an important part in the destruction of groups, particularly in the New World. In his classic account of Spanish policy towards the Native population of the Americas, *The Tears of the Indians,* Dominican cleric Bartolomé de Las Casas wrote about two stages of *extirpation*: "the first whereof was a bloody, unjust, and cruel war they made upon them, a second by cutting off all that so much as sought to recover their liberty, as some of the stouter sort did intend. . . . That which led the Spaniards to these unsanctified impieties was the desire of Gold" (pp. 3B4).

SEE ALSO Amazon Region; Genocide; Indigenous Peoples

BIBLIOGRAPHY

Chalk, F. and K. Jonassohn (1995). *The History and Sociology of Genocide.* New Haven, Conn.: Yale University Press.

Dadrian, Vahakn (1975). "A Typology of Genocide." *International Review of Modern Sociology* 5:201B212.