Is International Criminal Law Universal?

Alfred P. Rubin
Is International Criminal Law “Universal”?

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With agreement on a Statute for an International Criminal Court,1 it is past time to reconsider the role of criminal law in any legal order and the implications of what seems to be an assumption of “universal jurisdiction” over accused “criminals” in the international legal order.

I. LEGAL ORDERS

A. Civil and Criminal Law

There is no necessary reason for dividing law into criminal and civil law phases, but it has been so divided ever since centralized authority assumed responsibility for ordering society. Civil law is made available by the state to individuals as a matter of individual, private discretion. Criminal law reflects the needs of society; the “criminal” behaves in a way that society itself must notice regardless of individual discretion. Thus, at least in Anglo-American municipal legal orders, a criminal trial features the state versus the accused; an individual cannot normally refuse to participate in a prosecution and the prosecutor is an officer of the state.2

To add to the linguistic confusion, the same phrase, “civil law,” is also used to mean the legal orders derived from Roman Law conceptions of the legislature as the repository of society’s values and judges as mere administrators of this law. In this us-

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2 The distinction is not as firm as many commentators might desire. For example, there are times when the United States government uses what it calls a “civil” process and calls fines “civil” penalties, distinguishing them from “criminal” penalties. Compare 16 USC § 1858 (1994) imposing “civil” penalties of up to one hundred thousand dollars for violation of the Magnuson Act of 1976, with 16 USC § 1859 (1994), imposing “criminal” penalties of up to one hundred thousand dollars for essentially the same acts. If those acts are accompanied by a threat or use of force, the “criminal” fine can go up to two hundred thousand dollars and a jail sentence may be imposed.
age, "civil law" is not the same as "common law" in its "civil law" phases. In the Anglo-American system, "judges," not legislators, are the repositories of community values, and their interpretations of legislation are frequently regarded as persuasive to other judges, legislators, and lawyers of the community's intent imperfectly or incompletely expressed by the lay-legislature. But these matters are better left aside for now.³

In a private civil matter in the Anglo-American system, the injured individual might well decide not to seek his or her legal remedy, but to rely on social or other pressures for "satisfaction." "Justice" to the injured individual (including corporations and perhaps other "legal persons") constitutes "satisfaction" in the moral or economic or other normative order. This sort of justice can be achieved sometimes by notoriety, public opinion, private payment, or other action or inaction that the injured individual is willing to consider as settling the moral or other debt. Once the debt is settled, if the terms of the settlement permit it, the injured individual can decide whether to proceed further using the legal order. The relationship among the various normative orders is another complex matter better left aside for now.⁴

To some people, voluntary payment to "rectify" the situation might seem morally inadequate, even if sometimes morally or

³ One of many valuable introductions to different legal orders is H. Patrick Glenn, *Legal Traditions of the World* (Oxford 2000).

⁴ For an analysis of the interplay of morality, comity, and positive law in a municipal law context, see Robert C. Ellickson, *Order Without Law* 280–86 (Harvard 1991). My own proposal to clarify thought by identifying some of the different normative orders at play when questions of international law were raised was written without the advantage of having first read Ellickson's book. See generally Alfred P. Rubin, *Enforcing the Rules of International Law*, 34 Harv Intl L J 149 (1993). See *Festskrift till Jacob W.F. Sundberg* 267 (Juristförlaget 1993) for a slightly revised version.

The point that laws often conflict is not particularly original. See Patrick O'Brian, *Master & Commander* 318–19 (Norton 1990) [Stephen Maturin to Jack Aubrey]:

I am coming to believe that laws are the prime cause of unhappiness. It is not merely a case of born under one law, required another to obey . . . it is born under half a dozen, required another fifty to obey. There are parallel sets of laws in different keys that have nothing to do with one another and that are even downright contradictory. . . . [T]he moral law, the civil, military, common laws, the code of honour, custom, the rules of practical life, of civility, of amorous conversation, gallantry, to say nothing of Christianity for those that practice it. All sometimes, indeed generally, at variance; none in an entirely harmonious relation to the rest; and a man is perpetually required to choose one rather than another, perhaps (in his particular case) its contrary.

⁵ The word is from a translation of Aristotle. See Aristotle, *Nichomachean Ethics* V.ii.31 (Stephanus 1131a, first sentence), in Ernest Barker (ed and transl), *The Politics of
“comity” compelled or state influenced. To those people, “justice” cannot be achieved unless the legal order is involved; a state-sponsored tribunal's determination of the existence of a “legal” debt and an assessment of that debt seems to indicate society's condemnation of the injurious behavior as well as moral satisfaction to the injured party. To achieve that end, the societies with which most readers of this Article are familiar provide “civil” and other non-criminal “legal” remedies and elaborate procedures by which an injured individual can call them to his/her aid. Of course, in some cases, the injured individual is disappointed by the result of such a procedure and conceives the legal remedy, even if involving “rectificatory damages,” as “unjust” or incomplete. But with the exhaustion of the remedies made available through society’s tribunals, society regards its legal role in the matter as exhausted.

The international legal order has been organized by history and political pressures basically in this Anglo-American civil law pattern. There is no discrete international legislature. If a state is injured it can forego recourse or seek recourse through moral or other non-legal means. If the state that believes itself injured does seek recourse by the means made available to it in the international legal order, it must look not only to the means normally accepted in the moral order, such as reprisal and “just” war, but also to its own positive law commitments. They include the prohibition in the United Nations Charter on the use of force against the territorial integrity or political independence of any state. It should be noted that not all states in the world are members of the United Nations, thus not all are bound directly by the positive law of the Charter. But the International Court of Justice has held that this provision of the Charter codifies a rule

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Aristotle, Appendix II, 363 (Oxford 1962) (“Another kind of particular justice is that concerned with the rectification of transactions between individuals.”).


7 Charter of the United Nations Art 2(4), 59 Stat 1031, Treaty Ser No 993 (1945) (“U.N. Charter”) (“All 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.”). The purposes of the United Nations are set out in Article 1 of its Charter.
of law that has become binding on all, even non-U.N. members, by "custom as evidence of a practice accepted as law." 8

Should a state choose to avail itself of "legal" remedies—as distinct from "moral" or "political" or "economic" or other remedies—under the international legal order as comprised today, whatever recourse it has must follow the civil claims pattern.

The state can legally seek a peaceful, non-judicial remedy, too: settlement of one sort or another. The procedures set out in the positive law of the United Nations Charter are not limited to its listing of negotiation, enquiry, mediation, arbitration, judicial settlement, and recourse to regional organizations. 9 If the state that considers itself injured by another's violation of international law is not satisfied with the peaceful means the international legal order makes available to it, then, as a matter of positive law, the state must simply suffer the evil it feels has been visited upon it.

Other remedies exist in various normative orders. For example, according to Judeo-Christian-Muslim tradition, in the divine law order the remedy for evil is evil in return, either now or after death. 10 In the true "natural law" order, the remedy includes the predictable reactions of others to an exercise of discretion, even if morally and legally justifiable. For example, if a state breaks its word even in a morally or legally defensible situation, as when a state cannot pay a contract debt because of unanticipated starvation or plague demanding the resources otherwise earmarked for transfer to a creditor, other states will regard the defaulting state's word as unreliable whether or not agreeing with its moral evaluations. The moral order, and surely other orders, might give the defaulting state some sense of relief. But in international life,

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8 Statute of the International Court of Justice, Art 38(1)(b), 59 Stat 1055, Treaty Ser No 993 (1945) ("ICJ Statute") (defining the sources of international law to include "custom as evidence of a practice accepted as law"). The holding by the Court itself that this provision is applicable to the terms of the United Nations Charter forbidding some uses of force is in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, 1986 ICJ 14, 99 ¶ 188 ("Nicaragua II"). Whether the Court's logic or perception of international "practice" or the role of "law" in whatever practice exists is wholly persuasive, I must leave to each observer to decide for him/herself.

9 The U.N. Charter, a treaty that is binding on the Members of the United Nations as such, adds "or other peaceful means of their own choice" to this listing of modes of peaceful settlement of international disputes. U.N. Charter at Art 33 (cited in note 7).

10 See, for example, Joshua 9:20 King James Bible ("This we will do to them; we will even let them live, lest wrath be upon us, because of the oath which we sware unto them."); Galatians 6:7 King James Bible ("[F]or whatsoever a man soweth, that shall he also reap."). There are many variations on this theme throughout the Jewish, Christian, and Muslim holy writings.
as in private life, no single state (or individual) can determine its own remedy if that "remedy" involves another. Everybody "judges" his/her own case, but nobody has the legal authority to be such a "judge" as far as a colleague or antagonist is concerned.

The result of this system has been to leave each state the arbiter of its own behavior and the world a competitive place filled with disagreements. In the memorable language of Leo Gross, all states "autointerpret" the law—but it is frequently forgotten that by Gross's analysis, none has the legal power, the authority, to "autodetermine" international law.\footnote{11 See Leo Gross, States as Organs of International Law and the Problem of Autointerpretation, in Alfred P. Rubin, ed, Selected Essays on International Law and Organization 167, 186–88 (Transnational 1993).}

B. Non-Interference

This result is not surprising to those who have examined the practice of states and contemplated the functioning of governments and the role of democracy in many states. Many commentators perceive the reluctance, possibly the inability, of states to determine the government of others without the pejorative label "colonialist" being attached to them, and the political and moral opprobrium (moral remedies) that follow. Unless there is genocide or there are mass expulsions, the natural law remedies also flow of either chaos in uncontrollable territory or of the waste of the dominant state's own resources in trying to control a people bent upon behavior the potentially controlling state reprehends.\footnote{12 Examples abound, from the fact that Spain won just about every land battle in the successful revolt of the Netherlands in the late 16th century, through Israel's inability to control the Palestinian populace of the West Bank and the NATO action in Kosovo. In the Kosovo example, the resulting choice faced by NATO was either the detaching of Kosovo from the Republic of Yugoslavia or NATO forces assuming the role of law-makers and law-enforcers. NATO denies that it intends its troops to assume either role. See, for example, Eric Pianin, Hill Aims At Clinton Foreign Policy; Senate Sets Date for Kosovo Withdrawal, Cuts Colombia Aid, Wash Post A1 (May 10, 2000).}

Thus, there has arisen a practice of non-interference possibly reaching the point of being part of the unwritten "constitution" of international society.\footnote{13 See Brad R. Roth, Governmental Illegitimacy in International Law 51–55 (Oxford 1999).} Indeed, to states that regard themselves...
as legally bound by the terms of the United Nations Charter or other treaties focusing on the subject, the rule of non-interference except in cases in which international peace and security are threatened is binding as treaty, in other words, positive law.\textsuperscript{14} But that positive law is only one factor out of many considered when states make decisions to use force. In light of many events in the Western Hemisphere involving military action by the United States in the territory of other states that are members of the Organization of American States ("OAS"), such as Panama and Grenada, one is also left to wonder at the "bindingness" of Article 15 of the Charter of the OAS.\textsuperscript{15}

Leaving aside the interesting question of why the positive commitments of states are "binding" (an issue which highlights the "natural law" and perhaps the "moral law" roots of modern "positivism," but does not thereby incorporate the "moral law" into substantive rules of positive law absent some act of adoption by human legislators) and who interprets those commitments, attempts are made by many states to expand their own authority—to make their interpretations of positive international law binding on others. One way states do this is by asserting an authority to "autodetermine" the law not only for themselves, but for others as well. These states even purport to argue that our Western form of government, liberal democracy (to give it a label with which not all would agree, but which should be generally understood), is binding on all, and that forcible interference in the affairs of other states is justified in law to assure the domi-

\textsuperscript{14} See, for example, U.N. Charter at Art 2(4) (cited in note 7); id at Art 2(7):

Nothing 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; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

The enforcement measures referred to are those undertaken by the U.N. Security Council when confronted with a "threat to the peace, breach of the peace, or act of aggression." Id at Art 39. Many problems exist in trying to interpret these phrases and to apply them to the actions of the Security Council nominally taken under the authority of Chapter VII.

\textsuperscript{15} Article 18 of the Charter of the OAS states that:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

OAS Charter, Art 18, 119 UN Treaty Ser 3 (1948).
nance of liberal democracy in a second state. This purported rule of "law" is applied only by larger states to smaller ones, and not applied by any to states able militarily or politically to resist the imposition upon them of any government or form of government. Some scholars have attempted to substitute a concept of "legitimacy" for this positive law prohibition. Until these purported rules of law are applied to Russian activities in Chechnya and Chechen activities in Russia, or Chinese activities in Tibet, I will remain skeptical that this practice represents international "law" by any of law's usual definitions.

Another attack on the constitutional independence of states by some of the bigger and stronger has been the assertion of a "will of the international community" to make "criminal" at "international law" some particularly morally vile acts of persons in smaller or weaker states, occasionally including even those smaller states' constitutional authorities. This attempt has achieved some success in both the municipal law of some states and in the setting up of some "international" tribunals. There are so many problems with this approach that one is left to wonder at the patent political success it has so far achieved, and to wonder why anybody will be surprised when the attempt ultimately fails. This point will be more fully discussed in the subsequent sections of this Article. It might be helpful at this point merely to point out that the international community must include many states, like China, India, and the United States, which formally reject the practice of labeling some acts as universally criminal.

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17 See, for example, Thomas M. Franck, The Power of Legitimacy Among Nations 150 (Oxford 1990) ("Legitimacy is the generic label we have placed on factors that affect our willingness to comply voluntarily with commands.").


19 The late and much lamented Professor Edward Wise points out in The International Criminal Court: A Budget of Paradoxes, 8 Tulane J Intl & Comp L 261, 268 n 34 (2000), that a tabulation by population rather than by the number of states adhering to the Rome Statute shows a bit more than half rejecting the International Criminal Court.
and that the United States and many others reject the notion that even their own internal "community" determinations of "criminal law" are universally valid absent some positive action by a properly authorized legislature.\textsuperscript{20} Thus, there appear to be substantial philosophical reasons for rejecting the transfer of moral or other convictions to "law," and convictions of municipal criminal law to international law. Nonetheless, the movement in that direction appears to have achieved considerable political success.

II. "CRIMES" UNDER INTERNATIONAL LAW

Jurisdiction is usually broken down into three phases: jurisdiction to prescribe,\textsuperscript{21} jurisdiction to enforce\textsuperscript{22} and jurisdiction to adjudicate.\textsuperscript{23} The question now is whether a universal jurisdiction

\textsuperscript{20} In the United States, for example, "common law crimes" have not been prosecuted in federal courts since the early 19th century. See United States v Hudson and Goodwin 11 US (7 Cranch) 32, 33 (1812) ("Certain implied powers must necessarily result to our Courts . . . but all exercise of criminal law cases we are of opinion is not within their implied powers."). In United States v Coolidge, 14 US (1 Wheaton) 415, 417 (1816), Justice Joseph Story tried unsuccessfully to retain the authority in the courts (meaning judges like himself) to define and punish common law crimes. In the United Kingdom, "common law crimes" remain, but new ones have only very rarely been asserted since the codification of 1678. See Sir Matthew Hale, Pleas of the Crown: A Methodical Summary (1678) (Professional Books 1982). In continental Europe, the Latin maxims nullum crimen sine lege ("no crime without 'law'") and nulla poena sine lege ("no punishment without 'law'") seem widely accepted, though in this case the Latin word lege should be interpreted to relate to "statute" or "legislation" rather than the more amorphous "law." Compare Anselm Feuerbach, Lehrbuch des gemeinen in Deutschland gültigen Peinlichen Rechts, § 20 (1801). This passage of Feuerbach's is frequently mentioned as the first use of the Latin phrases, but the idea clearly predates Feuerbach's book. See, for example, Jeremy Bentham, A Fragment on Government 110 (1960) (Wilfrid Harrison and Basil Blackwell, eds). I am grateful to Marcus Hanke of the Faculty of Law at Salzburg University and to Dr. Michael Macnair, Tutor in Law at St. Hugh's College, Oxford, for information concerning these phrases. Again, the widespread assertions of certainty with regard to words and phrases that are certainly uncertain in both history and modern usage makes further discussion of these topics matters for full-length books rather than footnotes. In private correspondence, Professor Jacob Sundberg (Jurisprudence, University of Stockholm) has told me that the phrases trace back at least to 2 Grotius, De iure Belli ac Pacis, ch XX (De Poena) (1625). I have not been able to find the passages there, but believe that Grotius's views would fit in well with Feuerbach's and Bentham's assertions.


\textsuperscript{22} Id at §§ 431–33.

\textsuperscript{23} Id at §§ 421–23. Section 404 asserts that universal jurisdiction, or jurisdiction to define and punish offenses such as piracy, the slave trade, and others, exists as a subset of jurisdiction to prescribe. Id at § 404. The conclusions of the Restatement do not seem to follow from its premises, but this is not the place for a detailed critique. I have attempted a detailed examination of the international law relating to piracy elsewhere, and addressed
to prescribe has been exercised in such a way that universal jurisdiction to adjudicate can be practiced with international criminal law prescriptions as the law to be enforced. Yet another tack has been to assert that the positive law can define various "crimes" at international law by the normal treaty processes, and that traditional restrictions on jurisdiction to enforce might even continue to exist, but that there exists a universal jurisdiction to adjudicate offenses so prescribed. These assertions also fail the usual tests at every stage. Let us look closely at a few notorious examples.

A. Genocide

The positive law with regard to "genocide" (certainly a morally horrific practice) specifically restricts jurisdiction to adjudicate to the "State in the territory of which the act was committed, or . . . such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Even the acts themselves that constitute "genocide" under the Convention are set out in terms of such generality that it is difficult to believe they were ever intended or could be used as the basis for criminal trials. The Convention itself acknowledges this when it provides that "[t]he Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention." While it is certainly possible to interpret all this language to mean that the international community in general (including non-parties to the Convention) has agreed to submit cases of "genocide"—as given essential elements by yet other international agreements—to an international penal tribunal without the discretionary act of acceptance apparently envisaged by the Convention, there are many whose hearts are just as gentle who would nonetheless disagree.

\[24\] Note that the adjudication of a criminal prescription is not the same as the exercise of jurisdiction to enforce. Jurisdiction to enforce involves the arrest of an accused, thus the exercise of police authority.


\[26\] Id at Art 5.
B. "Grave Breaches" of the 1949 Geneva Conventions

Similarly, the "grave breaches" provisions of the 1949 Geneva Conventions relative to Armed Conflict\textsuperscript{27} contain identical articles setting out in general terms the acts which each party then undertakes to define and punish. The key articles begin identically by requiring each High Contracting Party to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following article."\textsuperscript{28} The list of "grave breaches" defined in the next succeeding article of each Convention includes "willful killing . . . unlawful deportation or transfer," etc., without noting that immemorial practice privileges soldiers in armed conflict to engage in "willful killing" of the enemy, and without defining the body of law used to determine the "unlawful"-ness of the prohibited acts.\textsuperscript{29} Item by item the list of "grave breaches" seems seriously flawed.

Things get worse. The Conventions require each High Contracting Party to:

\begin{quote}
search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and . . . bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party con-
\end{quote}


Is INTERNATIONAL CRIMINAL LAW "UNIVERSAL"?

cerned, provided such High Contracting Party has made out a *prima facie* case.\(^{30}\)

Again, the problems of interpretation have proved in practice to be insuperable. To mention only a few: Who sits in judgment on the provisions of the domestic "legislation" apparently required of the Parties? And if that legislation does not pass muster in the opinion of another Party or an international tribunal, what happens then? Does the disagreeing party have "standing" to raise the issue? What does "concerned" mean—that is, who is "another High Contracting Party *concerned*"? Must a state capturing an alleged villain hold a trial if it cannot make out a *prima facie* case? It is no surprise that in the more than fifty years the Conventions have been in force, there have been no trials under their terms, and no handings over.

C. Torture

Like the other Conventions examined, the Torture Convention\(^ {31}\) refers to each state party for defining and administering the law relating to "torture" as defined in the Convention: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its *jurisdiction*"\(^ {32}\) and "Each State Party shall ensure that all acts of torture are offenses under its criminal law . . . . Each State Party shall make these offenses punishable by appropriate penalties which take into account their grave nature."\(^ {33}\) Distinctions among jurisdiction to prescribe, to enforce, and to adjudicate are not mentioned by name, although "jurisdiction" is repeatedly mentioned. But such distinctions are implied. For example, aside from the provisions quoted above, there is a separate article requiring states to:

*take such measures as may be necessary to establish its jurisdiction over the offenses referred to . . . .*


\(^{31}\) Convention Against Torture and Other Cruel, Inhuman and Other Degrading Treatment or Punishment, UN Doc A/139/51 (1984), reprinted in 23 ILM 1027 (1984), as modified, 24 ILM 535 (1985) ("Torture Convention").

\(^{32}\) Id at Art 2, reprinted in 23 ILM at 1028.

\(^{33}\) Id at Art 4, reprinted in 23 ILM at 1028.
(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
(b) When the alleged offender is a national of that State;
(c) When the victim is a national of that State if that State considers it appropriate.  

Clearly, jurisdiction to prescribe based on territory and nationality of the actor conforms to international law regarding the extent of a state's prescriptive jurisdiction. The third item, when the victim is a national of the prescribing state, seems to be based on the dubious "passive personality" idea, and is limited by the prescribing state's notion of appropriateness, thus putting the extent of prescriptive jurisdiction back into the realm of assertion and denial typical of international law as it develops.

The Torture Convention also requires a state party to "take such measures as may be necessary to establish its jurisdiction over [torture] in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him." The provisions relating to extradition show the same weaknesses already apparent in the "grave breaches" provisions of the 1949 Geneva Conventions discussed above. They provide for extradition to a state with jurisdiction to prescribe on the bases quoted in the Conventions above, and require a party not extraditing an accused to submit the case to its own authorities "for the purpose of prosecution." Where and how it is supposed to get the evidence necessary for a conviction, and to allow the defendant to defend him/herself when that exculpatory evidence

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34 Id at Art 5(1), reprinted in 23 ILM at 1028.
36 For a general discussion of this phase of developing assertions, see Michael Byers, Custom, Power and the Power of Rules (Cambridge 1999). See especially id at 159, where Byers notes the views of Akehurst and D'Amato. The topic is filled with disagreement among scholars although none seems to have articulated it better than Gross, The Problem of Autointerpretation at 167 (cited in note 11). See also J. Shand Watson, Theory and Reality in the International Protection of Human Rights 203-38 (Transnational 1999) for an eloquent discussion of "domestic" versus "international" jurisdiction in light of Article 2(7) of the U.N. Charter. That provision expressly withholds from the Organization the authority to "intervene in matters which are essentially within the domestic jurisdiction of any state." U.N. Charter at Art 2(7) (cited in note 7).
38 See Part I B above.
is likely to be highly classified by whatever authority the defendant purports to represent, are left unresolved. Without going into further detail, it seems apparent that the Convention is based upon traditional notions of jurisdiction to prescribe and to enforce, and assertions regarding universal jurisdiction relate at best only to jurisdiction to adjudicate, which is not likely ever to be exercised without serious dissent.

D. Jurisdiction “Erga Omnes”

There have in fact been a few extensions of national criminal jurisdiction to cover some of the acts of foreigners abroad. The International Court of Justice (“ICJ”) in dicta has referred to crimes “erga omnes” in an attempt to assert a general “standing” to complain of the failure of other states to prosecute alleged offenders against the supposed international law. But the issue of “universal jurisdiction” and offenses “erga omnes” were not in fact argued in the Barcelona case. The decision was in fact to deny “standing” to the petitioner. The decisions of the tribunal under its own Statute cannot apply to non-parties or to other cases involving even those very parties. Even if the “erga omnes” model of the international legal order were binding on others and were a rule applied in the particular case and were binding on the parties to that case, “judicial decisions” in general are viewed as “subsidiary means for the determination of rules of law.” Thus the Barcelona decision would not establish binding rules of law, but would only have to be considered along with other evidence of the law. For all these reasons, it is very difficult to attribute much legal effect to this language. In practice, states have only

40 “Against everyone.”
42 Id at ¶ 37, reprinted in 9 ILM at 260.
43 See ICJ Statute at Art 59 (cited in note 8) (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”). This provision sets out the usual res judicata rule of municipal tribunals of last instance. It seems to be regarded by many as a denial of the usual municipal law rule of stare decisis, by which a tribunal lower on the constitutional totem pole than the pronouncing tribunal is bound to accept as law the pronouncements of the senior. See, for example, William W. Bishop, Jr., International Law Cases and Materials 39 (Little, Brown 3rd ed 1971). But if any municipal or international tribunals are bound to accept the rulings of the ICJ in matters of international law, it is by municipal law or treaty. Municipal law varies from state to state and there is no such general treaty, so the logic behind the view that Article 59 relates to stare decisis is not clear.
44 ICJ Statute at Art 38(1)(d) (cited in note 8).
45 Id.
rarely exercised this jurisdiction "erga omnes." It is to jurisdiction *erga omnes* we now turn.

III. JURISDICTION

"Jurisdiction" is a legal authority and in current practice seems to divide itself into at least three separate types: jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce. The simplest listing of jurisdiction to prescribe is probably that set out in the dissent of Judge John Bassett Moore in the *Lotus Case* before the Permanent Court of International Justice. In that dissent, Judge Moore listed the acknowledged bases of jurisdiction to prescribe as including territoriality, nationality of the actor, effects, "universality," and "passive personality." But it seems clear that he was speaking only of jurisdiction to prescribe because in the *Lotus Case* itself, M. Demons, the accused criminal (under Turkish law), was actually arrested within Turkish territory, thus satisfying the territorial requirement of

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46 See note 22.
47 See *Lotus Case*, 1927 P C I J (ser A) No 10 at 65–94 (Moore dissenting).
48 One application of the effects test appears in American antitrust law. See *Hartford Fire Insurance Co v California*, 509 US 764, 798 (1993) (holding that exercise of jurisdiction over a foreign insurer was appropriate because of its "express purpose to affect United States commerce and the substantial nature of the effect produced"). Another example is the "objective territoriality" rules that might hold a murderer who shoots his victim across a jurisdictional border accountable in both his and the victim's territorial jurisdictions. See *United States v Aluminum Co of America*, 148 F2d 416, 443 (2d Cir 1945) (holding that a state may impose liability for conduct outside its borders if it has consequences within its borders).
49 Municipal laws criminalizing "piracy" are frequently given as examples of "universal" prescriptive jurisdiction, but it is not at all clear that they fit that category, and Moore's mention of "piracy" in this context is based on some dubious opinions by publicists who appear to have had other things in mind. See Rubin, *The Law of Piracy* at 348–49 n 111a (cited in note 23).
50 Passive personality jurisdiction is based on the nationality of the victim. This is a basis for jurisdiction to prescribe that seems until recently to have been accepted only as a basis for jurisdiction to adjudicate, while being nearly universally rejected as a basis for jurisdiction to prescribe except in polemical contexts. See, for example, the opinion by Judge Barrington Parker in *United States v Yunis*, 681 F Supp 896, 901–02 (D DC 1988). Judge Parker's opinion was implicitly overruled on this point when the case was appealed, as the affirmation specifically grounded its jurisdictional holding on American constitutional law, not international law. See *United States v Yunis*, 924 F2d 1086, 1092 (DC Cir 1991). One case apparently upholding a "universal" jurisdiction to prescribe was the *Hamadei* case, which involved a Lebanese political activist implicated in the hijacking of an American civil aircraft and the killing of an American captive in Lebanon. See David Kennedy, Torsten Stein, and Alfred P. Rubin, *The Extradition of Mohammed Hamadei*, 31 Harv Intl L J 5, 35 (1990). Hamadei was tried and convicted under German law in Germany although there was no apparent German connection with the "crime." The United States objected to the German action on many levels.
jurisdiction to enforce. A Turkish vessel, the *Boz Kourt*, had been sunk due to the asserted negligence of the accused, thus giving Turkey an obvious interest in the case and satisfying the normal conditions for the presumed jurisdiction to adjudicate.

Jurisdiction to enforce involves the power to arrest a suspect. In a criminal context, the issue arises in piracy cases where the military or police vessel of one state purports to arrest a vessel of a different state or of no state at all on the high seas.\(^5\) Such arrests are permitted by the positive law of the 1958/1982 Law of the Sea Conventions' provisions regarding "piracy"\(^6\) but have apparently never been exercised. A rule of international law restricting jurisdiction to enforce to the territory of the enforcing state has been widely acknowledged.\(^7\)

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\(^5\) In the Yunis case, the United States at first pretended that the capture of Yunis, which occurred in a Cypriot vessel, had occurred "on the high seas" as if Yunis had been clinging to driftwood. See Yunis, 924 F2d at 1089 (cited in note 50). Yunis was convicted in the United States in 1989 for his role in an Amal Militia (Lebanese) seizure of a Jordanian aircraft in 1985. To vest jurisdiction in the United States, the statute under which he was convicted required the presence of Americans on board the foreign aircraft seized abroad. See Hostage Taking Act, 18 USC § 1203 (1994). It seems noteworthy that the legislation itself does not distinguish between jurisdiction to prescribe, to adjudicate, or to enforce. It also seems significant that Judge Parker asserted that three Americans had been on board the aircraft; in the decision on appeal, only two were assertedly aboard the aircraft. They are not identified and were apparently released as soon as Yunis discovered their presence. Whether the American statute really envisaged United States jurisdiction to prescribe or to adjudicate in cases in which the United States involvement was minimal and incidental is highly questionable. If it did, then the United States would be hard put to deny the jurisdiction to prescribe and adjudicate of the Government of Afghanistan (say) if there were any disguised Afghan (or non-Afghan Muslim?) agent on board an American aircraft hijacked by an American CIA agent for what the United States considers reasons of state. For a hint of the complications, see Michael Pugh, Legal Aspects of the Rainbow Warrior Affair, 36 Intl & Comp L Q 655, 660-63 (1987). There seems to be much that is doubtful in the Yunis case.


\(^7\) "It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another without the latter's consent." Restatement (Third) of Foreign Relations Law § 432 comment b (1987). See also id at §§ 471-72. The leading case in the United States is probably Blackmer v United States, 284 US 421, 439 (1932) (discussing how diplomatic relations with friendly nations permit the United States to provide subpoenas to its citizens living abroad). It is rarely cited today, although the Walsh Act, 28 USC §§ 1783-84 (1994), American legislation allowing process to be transmitted by American Consular officials overseas to American nationals or residents, has been updated and is still effective. Those interested in more recent examples of the complications created by ignoring the issues while attempting to abide by the positive law as long as doing so is convenient to the "enforcing" power might refer to the following ephemera: Alfred P. Rubin, Letter to Editor, The Best Way to Noriega Is Through the Canal, NY Times A26 (June 10, 1989); Alfred P. Rubin, Noriega and American Criminal Law, Christian Science Monitor 18 (Oct 30, 1989); Alfred P. Rubin, But
Now, it appears to be the dominant conception of international lawyers concerned with such things that "universal jurisdiction" refers to jurisdiction to adjudicate. There have been no attempts to send arresting officials into the territory or vessels of a foreign state other than those which the sending state has sought to excuse on other grounds. Thus it is difficult to say that jurisdiction to enforce is expanding.

IV. ADJUDICATION AND CHOICE OF LAW

The problem then becomes one of identifying the prescription for which adjudication is sought. There are two purported solutions to this problem: (1) To regard the exercise of universal jurisdiction to adjudicate as applying to a set of acts whose criminality is provided by "international law"; and (2) to regard the exercise of universal jurisdiction to adjudicate as incorporating a universal jurisdiction to prescribe. In the former case, a sort of choice of law approach is adopted and applied to criminal law by a state's tribunal, referring to international law as the source of the criminal prescription to be applied. In the latter case, each state can prescribe its own jurisdiction to adjudicate its own substantive prescriptions; international law supplies only restrictions on any state's otherwise universal jurisdiction to prescribe.

The first case, that of a presumed international criminal law, is the most commonly adopted. It is also the weaker. As noted above in the cases of "piracy," "genocide," "torture" and "grave breaches" of the 1949 Geneva Conventions relating to the laws of war, the Conventions purporting to define the "crimes" in fact do not define them but leave to states the responsibility of defining them. But if states define the crimes, that definition must apply directly only to those within the state's jurisdiction to prescribe. Many states define crimes that other states deny, or prescribe


54 The Noriega and Yunis examples are only two of many in which the arresting state has sought to justify its action on other grounds than the extension of its jurisdiction to enforce.

55 See Rome Statute at Arts 5-10 (cited in note 1). While it is possible to see the International Criminal Court as a creature of the positive law only, it is also possible to interpret at least Article 10 as an acknowledgment by the parties to the Statute that the "laws" they have agreed to are already part of general international law. See id at Art 10 ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.").
categories of crime that seem inappropriate to others. The obvious example is Iran’s uttering a “Fatwa” authorizing the killing by anybody of Salman Rushdie for his assertedly criminal act. The “Fatwa” does not seem an overreaching of a transnational Muslim “divine law” order or of Iran’s jurisdiction to prescribe, at least as far as devout Shiite Muslims are concerned. The countries dominated by Islamic thought apparently represent about one fifth of the world’s population. After all, proponents of the Fatwa may argue, by writing a book treating the Prophet Mohammed as somewhat less than divinely inspired, Rushdie jeopardized the eternal souls of all the young people in the world—not only the young Muslims, but all those who might otherwise have become Muslims and thus saved their souls from eternal damnation. His act was worse than murder because the soul of an innocent victim of a murderer is eternally safe or lost depending on the former life of the victim, not on the act of the murderer. To those who hold such beliefs, Rushdie’s victims may lose eternal bliss because of Rushdie’s actions.

How is it to be determined now that we non-Muslims are right and Muslims are wrong about God’s plan for the world? Expanding the dilemma by analogy, it is clear that for any state to prescribe punishment of a person beyond that state’s jurisdiction to prescribe as determined by international law is inconsistent with the “sovereign equality” of states under which other states may determine that the identical act is innocent—not worthy of attention, much less punishment. Indeed, even in theological terms, it is possible for a non-Muslim, or even for a Muslim, to argue that the true will of God is unknowable to human beings. Thus, for any human being, Ayatollah or not, to purport to pronounce a judgment that is supposed to reflect divine law is itself blasphemous. God will punish Rushdie, if he is deemed worthy of punishment by God. Human beings should be concerned with their own souls, not translate into human law rules aimed at safeguarding the souls of others under a “divine law” rationale. Under Judeo-Christian-Muslim concepts, unless holy war is envisaged as God’s eternal plan for mankind, human law should fix the framework in which human beings are free to follow divine law commands as they individually perceive them; they should not attempt to translate divine law commands into human law terms and provide human punishments for their violation.

Another argument against the assumption that human legislators know what “international criminal law” prescribes is in the
near-universal adoption of the Latin maxim "nullem crimen sine lege" noted above. The revival of "common law crimes" seems implicit in the notion that judges can determine what "international criminal law" forbids or permits to individuals. And if national legislators are to define crimes against international law, their legislative conclusions are restricted to the jurisdiction to prescribe that the international legal order allows to the constitutional order under which they have the authority to participate in a legislative process. By purporting to legislate "international criminal law," the legislators would seem to be arrogating to themselves an authority to "autodetermine" the law for others as well as for themselves, rather than to autointerpret it.

This "universal prescription" approach was common in the late eighteenth century, when the European conception of international law as a law between states (jus inter gentes) was being differentiated from the conventional wisdom under which there was a "law of nations" (jus gentium) consisting of the municipal law rules common to all "civilized" peoples. It explains the use of "law of nations" language in some of the early American cases, and a great deal of the confusion about the interpretation of Article I, Section 8, clause 10 of the Constitution of 1787, under which Congress is given the power to define and punish "offenses against the law of nations." As was pointed out in the Constitutional Convention in Philadelphia at the time, this provision makes no sense if the "law of nations" is determined by the municipal law of other states. If it is to be determined by the positive law of the new United States as well, it can have no necessary relationship to the laws of others. The approach had been questioned by at least one British Admiralty judge by 1650, and the phrase "international law" suggested as a proper replacement

56 See note 20.
57 This evolution is a major subject of Rubin, Ethics and Authority in International Law (cited in note 23). The evolution and interplay of conceptions is much too vast for condensation in a footnote.
58 See Murray v Schooner Charming Betsy, 6 US (2 Cranch) 64, 67 (1804); Respublica v De Longchamps, 1 US (1 Dallas) 111, 111–17 (1784). See also Rubin, Ethics and Authority in International Law at 80, 94–95 (cited in note 23) (discussing Chief Justice Marshall's view that congressional acts should be construed so as not to violate the law of nations).
for the phrase “law of nations” by Jeremy Bentham in 1780, 1786 or 1789.61

From this brief survey it is possible to conclude that extensions of jurisdiction to prescribe in the criminal law area are unlikely to survive close examination. And if this extension of jurisdiction to prescribe is unlikely to survive, so is jurisdiction to adjudicate in criminal matters. After all, what is to be the prescription whose application is being adjudicated? Whence comes the authority of any national tribunal to apply such a prescription, or of any national legislature to prescribe the application of such a prescription by tribunals subordinate to that legislature? Moral outrage is surely not enough, because the remedies for moral defaults are different from the remedies for legal defaults, and not less effective in general—although perhaps they are less effective with regard to individual villains and less satisfactory to constituencies that believe that their moral outrage gives them legal authority to enforce their moral convictions by means of the positive law of their legal order and impose those convictions on others.

This then raises the second possibility: that states will feel free to prescribe rules of criminal law and then adjudicate in all matters subject to such limitations on their jurisdiction to prescribe and adjudicate that international law puts on them. Those limitations will be evidenced in protests and practices.

The principal problem with that approach is that in the international arena all states are the sovereign equals of all others. Not only is this “constitutional rule” evidenced in the practice of states apparently accepted by them as law, but it is set out in the positive law of the United Nations Charter. Thus, if we “civilized” states have the authority to apply our interpretations of international law to non-nationals acting against other non-nationals abroad, leaving aside the question of passive personal-


62 See Rome Statute at Art 38(1)(b) (cited in note 1) (defining “international law” as including “[i]nternational custom, as evidence of a general practice accepted as law”). Volumes have been written to interpret this definition. See, for starters, Anthony A. D’Amato, *The Concept of Custom in International Law* 21–40 (Cornell 1971); Byers, *Custom, Power* at 139 (cited in note 36).

63 See U.N. Charter at Art 2(1) (cited in note 7) (“The Organization is based on the principle of the sovereign equality of all its Members.”).
ity jurisdiction, who is to determine which states are "civilized"? We may act by our own perceptions and apply them within our own jurisdiction to prescribe and adjudicate, but if we apply them to others, like revolutionaries or Muslims, how do we argue that the international legal order prevents their applying their prescriptions to us?

This analysis raises fundamental issues regarding the generality that is presumed to be part of the definition of "law." If the same rules do not apply to us as apply to them, and we have the authority to perceive, interpret and apply the rules, then we are asserting a universal authority equivalent to that of the Roman Empire in the Mediterranean at the time of Jesus or, more pertinently, of the Concert of Europe in the mid-19th century. I rather doubt that that is what we have in mind.

CONCLUSION

It would thus appear that the only basis for asserting a trend towards universal jurisdiction in some cases relates to an argued universal jurisdiction to adjudicate. It should also be clear that there is great disagreement as to what norms are to be adjudicated, particularly in the "criminal law" context.

There might be something of a trend towards states claiming universal jurisdiction to adjudicate their own norms, or at least their own norms of choice of law (which can refer the tribunal to the substantive norms of a foreign legal order). But such adjudications raise many other problems—to too many to be dealt with in this Article. Those problems would involve at least the refusal of powerful states to allow the identical jurisdiction to the legal orders of its less politically influential sovereign equals: other states. It is hard to imagine the United States, for example, allowing Muamar Qaddafi's Libya the same jurisdiction to adjudicate that the United States has asserted for itself with regard to Libyan governmental agents in the Lockerbie incident, or allow-

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64 See text accompanying note 50.
65 See, for one example of too many, the diplomacy surrounding the creation of an independent Bulgaria and the preservation of a reduced Turkish Empire, set out at length in R.W. Seton-Watson, Disraeli, Gladstone, and the Eastern Question (Frank Cass 1962). The highlight of the affair was a conference in Berlin in 1878 which was dominated by British statesmanship.
ing the Cuban legal order to examine, for the purpose of eventual prosecution, the American CIA agents allegedly involved in admitted attempts on the well-being of Fidel Castro; or allowing Chile to assert jurisdiction over American agents involved in the internal turmoil in Chile that resulted in the regime of Augusto Pinochet, a regime which many people have considered unspeakable. As to an international tribunal's jurisdiction to adjudicate, as set out for some particular atrocities for the International Criminal Court and similar international tribunals it should suffice to note that they are established by positive law; their jurisdiction rests on the consent of the legal orders over which they exercise jurisdiction to adjudicate. To the degree that they try to exceed that jurisdiction, there are obvious practical difficulties. If they do not try to exceed their jurisdiction achieved by means of the positive law, they might work in the legal order, at great expense to the moral, political and other normative orders involved.

It thus appears that whatever trends might exist with regard to the expansion of international or municipal jurisdiction, they relate only to jurisdiction to adjudicate. And they have already begun to encroach on fundamental postulates of the international legal order, like the equality of states under the law, legal prohibitions on intervention in the internal affairs of other states except for cases involving self-defense, and notions of autointer-

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68 For documents related to attempts by Spain to expand its jurisdiction to adjudicate to cover events in Chile during the Pinochet years, see The Criminal Procedures Against Chilean and Argentinian Repressors in Spain, available online at <http://www.derechos.net/marga/papers/spain.html> (visited Feb 24, 2001) [on file with U Chi Legal F]. How Spain can assert the jurisdiction necessary to support such an adjudication while at the same time refusing to try Spaniards involved in the atrocities of the Franco administration in Spain itself requires a flexibility of mind of which I find myself incapable. How might Spain react if Chile uttered the extradition requests necessary to achieve jurisdiction to enforce over those Spaniards? Presumably it would refuse such extradition on the ground that the extradition treaty did not require the extradition of Spanish nationals by Spain. The United States rejected this argument when it requested extradition of Chileans involved in a political murder in Washington. See Alfred P. Rubin, Why US Should Drop the Chilean Extradition Case, Christian Science Monitor 23 (June 27, 1979).

69 See Rome Statute (cited in note 1); text accompanying note 55.

70 Such as the Rwanda Tribunal in Arusha and the International Tribunal for the Former Yugoslavia in The Hague.

71 See works cited in note 18.

72 This raises yet another problem, since the traditional definitions of self-defense no longer seem to describe the situations in which self-defense is accepted today. A worthy suggestion has been made to interpret the "self-defense" provision of the U.N. Charter (Article 51) as including a sub-concept of "rectification." See Jeffrey Sheehan, The Entebbe Raid: The Principle of Self-Help in International Law as Justification for State Use of Armed Force, 1 Fletcher F World Aff 135, 144–46 (1977).
pretation and autodetermination. Thus it can be predicted that states that dominate in economic, military, political, and other areas will continue to regard their moral insights as binding on their neighbors (as they always have), while smaller or weaker states will resent the imposition of “foreign” values on their law-making authority—their jurisdiction to prescribe. Since the legal power of states or other legal orders that are in other ways weak can be manifested in many ways, it is doubted that these attempts to expand municipal jurisdiction to prescribe or adjudicate, even in the guise of states purporting to speak for the “international community,” will be successful for long or achieve the results sought.

73 See, for example, the victory of North Korea over the United States in the Pueblo incident, Alfred P. Rubin, Some Legal Implications of the Pueblo Incident, 18 Intl & Comp L Q 961 (1969), or the partial inability of the United States to impose its version of “justice” on Iran after the hostages crisis of 1980. Alfred P. Rubin, The Hostages Incident: The United States and Iran, 1982 YB World Aff 213, 239–40.