THE U.S. V. THE RED CROSS: CUSTOMARY INTERNATIONAL HUMANITARIAN LAW AND UNIVERSAL JURISDICTION

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I. INTRODUCTION

In 1995, the International Committee for the Red Cross ("ICRC" or "Committee") embarked on a momentous project to document and codify customary international humanitarian law. Using a broad methodological approach to the formation of customary international humanitarian law, the ICRC concluded that there exist 161 rules applicable during international and non-international armed conflict that are of customary nature. The Study presented a challenge to the United States' enduring rejection of the applicability of certain provisions of the 1977 Additional Protocols I and II. Those are the legal, and multilateral, milestones that extended the protections of the laws of armed conflict to non-state actors engaged in untraditional warfare.

Between the close of the Second World War and 1977, most wars were fought either between non-state actors and states (i.e., wars of liberation) or within states (i.e., civil war and unrest). The state-centric character of international law was ill-equipped to regulate this non-traditional combat. In response, states re-convened between 1972 and 1973 to legislate new provisions to supplement the meager lexicon governing non-international armed conflict afforded by the Geneva Convention's Common Article 3. These advancements constitute the Additional Protocols.

The ICRC's *Customary International Humanitarian Law Study* ("Study") asserts that its documentation of state practice, coupled with obligations, which states deem to be legally binding, form a corpus of customary law that arguably challenges some of the U.S.'s outstanding protests. Published in 2005, amidst the U.S.'s Global War on Terror—which promised to incapacitate an enemy lacking a

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national identity and national borders—the Study was received hostilely by the U.S. Administration. State Department Legal Adviser John B. Bellinger III and Defense Department General Counsel William J. Haynes II admonished the Study's findings, asserting that the ICRC's methodological approach to the formation of customary international law lacked rigor and precision. The ICRC, they argued, was excessively reliant on the verbal and written commitment of states at the expense of their actual behavior. As such, an untold number of the rules it identifies lack the binding character constitutive of customary law, and international law more generally.

The discord between the U.S. and the ICRC reflects a methodological divergence in approaches to the formation of customary international law. Whereas traditional custom—reliant on state operational practice—represents the law's descriptive accuracy, the modern approach— which looks to the trajectory of the collective will of states—reflects its prescriptive appeal. The U.S. vividly demonstrates this divergence in its examination of four customary rules proffered by the ICRC. Among its illustrative case studies, the U.S. takes issue with Rule 157, that states have the right to vest universal jurisdiction in their national courts over war crimes.

This paper shows that while the modern approach to custom is superior for the determination of customary human rights and humanitarian law, the methodological approach does not presuppose a particular outcome. To the contrary, while the ICRC was correct to apply the modern approach in its Study, its analysis, based upon its evidentiary findings, was imprecise. Therefore, its conclusion, regarding the customary status of universal jurisdiction, is arguably incorrect.

To demonstrate this case, the article uses the U.S.-ICRC debate as a backdrop and begins by unpacking the U.S.'s critique of the ICRC's Study. It then briefly explores the traditional and modern approaches to the formation of customary international law. Next, it makes a normative argument for the application of the modern approach to customary human rights and humanitarian law. The following sections demonstrate how, even using the proper methodological approach, the ICRC's analysis is partly flawed, thereby undermining the applicable scope of universal jurisdiction to war crimes as asserted by Rule 157. The paper concludes by drawing lessons, from this debate and case study, about the proper approach to customary international humanitarian law.

II. THE UNITED STATES VERSUS THE INTERNATIONAL COMMITTEE OF THE RED CROSS

In 1995, the ICRC began a comprehensive study to examine those laws of war applicable in international and non-international armed conflict.[1] The ICRC's

1. Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to US Comments*, 89 INT'L. REV. RED CROSS 473 (2007) (noting that the Intergovernmental Group of Experts for the Protection of War Victims recommended that the ICRC, in collaboration with experts in international humanitarian law ("IHL"), prepare a report on the customary rules of IHL applicable in

purpose was two-fold: first, to identify those Geneva treaty provisions that are binding on non-party states and territories,[2] and second, to supplement the meager detail available for the regulation of non-international armed conflict.[3] In its *Customary International Humanitarian Law Study*, completed over ten years and reliant on research from more than fifty countries, and archives from nearly forty recent armed conflicts, the ICRC identified 161 rules to be of customary nature.[4]

The ICRC used a classic approach developed by the International Court of Justice ("ICJ") to determine the existence of a general customary international law.[5] Customary international law generally requires the presence of two elements, state practice and *opinio juris*, or the belief that such practice is a legal obligation, as opposed to one reflecting morality, reciprocity, courtesy, or otherwise.[6] Accordingly, the ICRC relied both on verbal and physical acts of states as constitutive of state practice so long as they represent official practice.[7] Though classical in its approach to establishing that a rule is of customary nature, the ICRC did not require that *opinio juris* be demonstrated as a distinct and separate element. Instead, it found that "more often than not, one and the same act reflects practice and legal conviction."[8] So long as the practice is sufficiently dense, *opinio juris* can be found within that practice and therefore its existence did not need to be demonstrated separately.[9] Significantly, the ICRC did not assert that treaty ratification as a practice also represented legal conviction in what it describes as a "cautious approach."[10]

In its response to the ICRC Study, the U.S. government took particular issue with this methodological approach. While the U.S. acknowledged "the same action may serve as evidence both of state practice and *opinio juris*," it insists

international and non-international armed conflict. The 26th International Conference of the Red Cross and Red Crescent endorsed this recommendation in Geneva, which took place Dec. 3–7, 1995.).

2. JEAN-MARIE HENCKAERTS ET AL., CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES xxxvi (2005) [hereinafter VOLUME I].

3. *Id*. at xxxv ("Additional Protocol II usefully supplements Common Article 3, but it is still less detailed than the rules governing international armed conflicts contained in Additional Protocol I. Additional Protocol II contains a mere 15 substantive articles, whereas Additional Protocol I has more than 80.").

4. Henckaerts, *supra* note 1, at 476–77.

5. VOLUME I, *supra* note 2, at xxxviii.

6. *Id*.

7. *Id*. at xxxix. For a detailed discussion of the ICRC's criteria for selecting relevant state practice, *see id*. at xxxviii-xl.

8. *Id*. at xlvi.

9. *Id*.

10. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L. REV. RED CROSS 175, 183 (2005) ("The study took the cautious approach that widespread ratification is only an indication and has to be assessed in relation to other elements of practice, in particular the practice of States not party to the treaty in question.").

opinio juris cannot be inferred by practice but must be "assessed separately."[11] The U.S.'s concerns reflect its cautionary approach to the relationship between multilateral treaties and customary law.[12] It chided the ICRC's approach, insisting that *opinio juris* cannot be established by mere recitation of treaty provisions, which may "as easily . . . reflect policy considerations as legal considerations."[13] The U.S. explains that to show that a rule is customary, the ICRC must be able to prove that a state is legally obliged to observe a rule even in the absence of a related treaty.[14] The ICRC, however, did not consider a widely ratified treaty as definitive but instead only as indicative of custom in the context of broader state practice.

In regards to assessing practice, the U.S. government accepted the ICRC's methodological approach but found the humanitarian organization's application insufficiently rigorous. The U.S. argued that the ICRC did not establish sufficient density of practice in many cases;[15] that it gave undue weight to the statements of non-governmental organizations;[16] that it failed to give more weight to negative practice in several cases; and that it erroneously relied upon state documents and proclamations, namely upon military manuals and non-binding general assembly resolutions.[17] The government argues that while these materials may serve as an indicator of *opinio juris*, they cannot replace the veracity of operational practice.[18] Finally, the U.S. admonished the ICRC for equating the state practice of specially affected states with that of relatively lesser-affected states.[19]

Relying heavily upon the ICJ's decision in *Military and Paramilitary Activities in and Against Nicaragua*,[20] and *North Sea Continental Shelf*,[21] the ICRC agreed with the U.S. that the quantity of states is less relevant than their qualitative value. Accordingly, the quantitative support for a rule is less significant in the case where all specially affected states offered support. In cases where specially affected states opposed a provision, the quantitative value of state support is

11. John B. Bellinger III & William J. Haynes II, *A U.S. Government Response to the International Committee of the Red Cross Study* Customary International Humanitarian Law, 89 INT'L. REV. RED CROSS 443, 446 (2007).

12. *Id*. (noting that at the time of drafting, the Additional Protocols reflected far-reaching principles that reflected the aspiration of states and not what they believed to be a legal obligation captured in international customary law).

13. *Id*. at 447.

14. *Id*.

15. *Id*. at 444.

16. *Id*. at 445.

17. *Id*.

18. *Id*.

19. *Id*. The specially affected state doctrine reflects a principle derived from *North Sea Continental Shelf*, which held that practice "must include that of states whose interests are specially affected." North Sea Continental Shelf (Den./Ger./Neth.), 1969 I.C.J. 3, ¶ 73 (Feb. 20).

20. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

21. North Sea Continental Shelf (Den./Ger./Neth.), 1969 I.C.J. 3 (Feb. 20).

arguably inconsequential.[22] Still, the ICRC held that in the realm of warfare, all states have an interest in humanitarian provisions and therefore their practice must also be given due weight, thereby diminishing the role of specially affected states in the determination of customary international humanitarian law.[23]

The ICRC also held that state practice must be sufficiently similar among states, but not necessarily identical. The Committee found that contrary practice did not undermine the existence of a customary rule so long as other states condemned the practice or the government itself denied it, thereby negating its official nature. Significantly, the ICRC afforded great weight to verbal state practice even in the face of repeated violations. In the case that a state wished to change an existing rule of customary international law, it would "have to do so through [its] *official* practice and claim to be acting *as of* right."[24]

Where the ICRC insisted on general adherence and practice to reflect a rule's customary nature, the U.S. insists upon detail and specificity. Even in the formulation of its rules, the U.S. notes that the ICRC failed to state rules with sufficient precision to reflect state practice and treaty obligations.[25] The U.S.'s stringent standards reflect a traditional approach to the formation of customary law wherein, absent treaty law, binding rules are based on actual, not verbal, state practice, and demonstrable *opinion juris*.[26] In contrast, the ICRC accepts that a legal principle can become customary when it achieves general support from the international community as a collective whole. Like the holding in *Nicaragua*, it assumes that state behavior conforms with custom and that non-conformity reflects a breach rather than a seed for a new rule.[27] The methodological divergence evidenced by the U.S. and the ICRC reflects the two schools of thought underlying the formation of customary international law: traditional and modern.

22. VOLUME I, *supra* note 2, at xliv ("[I]f 'specially affected States' do not accept the practice, it cannot mature into a rule of customary international law, even though unanimity is not required as explained.").

23. *Id*. at xlv.

24. *Id*. at xliv.

25. Bellinger & Haynes, *supra* note 11, at 447 ("Thus, many rules are stated in a way that renders them overbroad or unconditional, even though State practice and treaty language on the issue reflect different, and sometimes substantially narrower, propositions.").

26. Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 667 (1986) ("Political scientists of the 'realist school' have expressed similar conclusions: power and national interest, not law, determine government conduct. For the most part, the writings of recent Secretaries of State, as well as international relations theorists and political scientists, ignore the subject altogether. International law is thus relegated to the dustbin of idealism.").

27. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 186 (June 27).

III. APPROACHES TO CUSTOMARY INTERNATIONAL LAW: TRADITIONAL AND MODERN

International law's three primary sources are treaties, customary law, and general principles of international law.[28] The establishment of customary, or tacit consent, [29] is based on two elements: practice and *opinio juris*.[30] The philosophical underpinnings of the two approaches to identifying whether a principle has achieved customary status reflect the emphasis placed on each and/or both of these elements.[31]

A. Traditional Custom

The two schools of thought, traditional and modern, respectively align with law's descriptive accuracy and its prescriptive appeal.[32] Traditional custom emphasizes state practice and is driven by the law's descriptive accuracy. Descriptive law generally describes what the law is or has been. It supposedly corresponds to reality and therefore, is the content of international law.[33] It can be appealing in international law, where a hierarchal enforcement system is underdeveloped at best or unavailable at worst.[34] Descriptive law represents a deductive method to identify customary law, meaning that the law must be inferred from examples of practice and facts alone.[35] Emphasizing the evidentiary significance of state practice, adherents argue that the international community intended that custom reflect practice, and not that practice reflect custom.[36] This formulation assumes that the practice of states is to be considered as an aggregate. Accordingly, practice should perfectly reflect existing customary law as well as any shifts it may undergo.[37]

Resultant from the emphasis on state practice, traditional custom develops slowly.[38] It requires courts to ascertain custom by examining many years of state practice and to find that a rule becomes customary international law when it

28. Statute of the International Court of Justice, art. 38, June 26, 1945, 3 T.I.A.S. 1179 [hereinafter "Statute ICJ"].

29. EMER DE VATTEL, THE LAW OF NATIONS 78 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008).

30. Statute ICJ, *supra* note 28, art. 38(1)(b) (defining "international custom, as evidence of a general principle accepted as law").

31. BIRGIT SCHLÜTTER, DEVELOPMENTS IN CUSTOMARY INTERNATIONAL LAW: THEORY AND THE PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL AD HOC CRIMINAL TRIBUNALS FOR RWANDA AND YUGOSLAVIA 36–37 (2010).

32. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758 (2001).

33. *Id*. at 762.

34. *Id*.

35. SCHLÜTTER, *supra* note 31, at 16.

36. Trimble, *supra* note 26, at 709.

37. *Id*. at 711.

38. Roberts, *supra* note 32, at 759; *see also* Katherine N. Guernsey, *The North Sea Continental Shelf Cases*, 27 OHIO N.U. L. REV. 141, 143 (2000).

reflects both uniform state practice over a long period of time, as well as a conscious acceptance among states that the practice reflects a principle of law.[39]

Traditionalists therefore, consider treaty law to be more legitimate and binding than newly-minted or controversial customary rules.[40] This school of thought has found support among scholars and jurists alike.[41] Among said supporters is Sir Robert Jennings who diverged from his colleagues in deciding *Nicaragua*. He took issue with the validity of the ICJ's jurisdiction, which he argued could not exist in the face of a U.S. multilateral treaty reservation. Jennings disagreed that customary international law could be applied in lieu of the relevant treaties where it could not be demonstrated that the treaty either codified existing customary law or alternatively, that the treaty had given rise to a new rule.[42]

This approach conceives of states as active lawmakers who bind themselves only by explicit consent in ways that do not impede their sovereignty.[43] The Permanent Court of International Justice's decision in *The Case of S.S. Lotus* captured this sentiment well when it held:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions on the independence of States cannot therefore be presumed.[44]

This passage in *Lotus* arguably stands for the proposition that international law is regulative and not constitutive of state rights.[45] Coupled with a later passage

39. *See* Gregory J. Kerwin, *The Role of the United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 877 (1983); Benjamin Langille, *It's "Instant Custom": How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT'L & COMP. L. REV. 145, 147 (2003).

40. Trimble, *supra* note 26, at 669 (noting that treaty and customary law are not equally authoritative and that "the relevance and true role of international law in the world, lies in national political traditions and structures that support the domestic implementation of the two types of international law.").

41. *See* Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 301, 303-04 (1999) ("[S]tates create international norms by reaching consent on the content of a rule. If a state later changes its mind, there must be another—this time nonconsensual—rule that prevents the state from unilaterally withdrawing its consent.").

42. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 530 (June 27) ("I am unable, however, to agree with the Court's persuasion that, whilst accepting the pertinence of the reservation, it can, nevertheless, decide on the Nicaraguan Application by applying general customary law, as it were in lieu of recourse to the relevant multilateral treaties."). The U.N. Charter neither codified existing law nor did it, in the intervening years, generate a new rule.

43. Trimble, *supra* note 26, at 667–68.

44. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, ¶ 44 (Sept. 7).

45. *See* LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 13 (2003).

in *Lotus*,[46] it also suggests that a state's rights cannot be circumscribed unless there exists a customary prohibition on such right.[47] These propositions however do not distinguish modernists from traditionalists as there is no formulation of customary law that presumes consent on the part of states.[48] The distinction between modern and traditional custom is not found here but rather in the methods used to identify custom and the sources upon which commentators can rely.

Due to its insistence on the preeminence of operational state practice, at its extreme, traditional custom risks standing in as an apology for state behavior because it accepts principles as legally binding insofar as they reflect the national interests of states.[49] It is an undemocratic proposition because it suggests that only those states with the means to act can shape binding and applicable law. At its core, this violates the premise that states are as equal to one another as are the persons within each of those states to one another. As opposed to those who believe that "[a] dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom,"[50] traditionalists advocate that power indeed produces difference.

B. Modern Custom

If it can be crudely summarized that traditionalists are committed to state sovereignty, then it can be similarly summarized that modernists are committed to human rights because of their emphasis on the equality of states and the law's normative thrust.[51] Modern custom espouses the theoretical equality of states and therefore accepts the notion that each state equally contributes to the formation of international law regardless of its available means and resources. Like their traditional counterparts, modernists acknowledge the limitations inherent to an international community lacking a compulsory adjudication system, but argue that the necessary treatment for said lack is to be derived from procedural norms.[52] Modern custom insists that the legitimating force of customary law flows from a commitment to democratic process.[53]

46. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, ¶ 49 (Sept. 7).

47. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14) **(**Van Der Wyngaert, J., dissenting).

48. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 269 ("[I]n international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited . . . .").

49. David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL., 335, 335 (2000) ("Either international law has been too far from politics and must move closer to become effective, or it has become dangerously intermingled with politics and must assert its autonomy to remain potent.").

50. VATTEL, *supra* note 29, at 75.

51. Roberts, *supra* note 32, at 762–63.

52. *Id*. at 762.

53. *Id*. ("Legal rules are more likely to engender respect in a decentralized system, possibly even when the outcome is less favorable, if they result from a process perceived as legitimate.").

As such, the modern approach emphasizes *opinio juris*, to which all states can contribute equally regardless of their disparate power. It relies on a deductive approach that accepts that legal norms can be derived from general propositions absent actual facts and practice.[54] This includes reliance upon the attitudes of states found in multilateral treaties, general assembly resolutions, and state declarations.[55] Unlike traditionalists who rely on a more precise approach,[56] modernists derive *opinio juris* from general practice, or previous determinations of the ICJ, or other international tribunals.[57]

Due to the accessibility of such statements and the speed with which consensus can be established or a precedent deduced, modern custom can also develop quickly and, even, instantly.[58] As put by Professor Theodor Meron, "[t]he modern approach . . . relies principally on loosely defined *opinio juris* and/or inference from the widespread ratification of treaties or support for resolutions and other 'soft law' instruments; thus, it is more flexible and open to the relatively rapid acceptance of new norms."[59] Taken to its extreme, the modern approach is divorced from reality for it lacks an immediate connection to state behavior, will, or interest.[60]

IV. THE NORMATIVE CASE FOR THE MODERN APPROACH TO CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

Notwithstanding the potential shortcomings inherent to each approach, the modern approach to custom is superior in evaluating international human rights and humanitarian law due to their specialized nature, the character of an international society as a collective whole, and the unreliability of operational state practice. Each of these observations implicates the formation of customary international humanitarian law. Consider first that human rights and humanitarian law are universal in scope and constitute non-reciprocal rights. These characteristics distinguish humanitarian and human rights treaty provisions from discrete contractual rights, and they should therefore be evaluated with greater flexibility. Additionally, in the face of rapid globalization, it is anachronistic and inaccurate to accept that the international community is no more than the aggregate

54. *Id*. at 763.

55. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 175 (June 27) ("The Court does not consider that . . . it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States reservation.").

56. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 9 (7th ed. 2008) (describing the establishment of *opinio juris* by showing "positive evidence of the recognition of the validity of the rules in question in the practice of states").

57. *Id*. at 8–9.

58. *See* Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?* 5 INDIAN J. INT'L L. 23, 35-40 (1965).

59. Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 817 (2005); *see generally* Langille, *supra* note 39.

60. Kennedy, *supra* note 49, at 102, *as quoted in* Roberts, *supra* note 32 at 767 (explaining that international law "has been too far from politics and must move closer to become effective . . . .").

of approximately two hundred states. Instead, as it concerns human rights and humanitarian law in particular, international society must be evaluated as a collective whole, wherein all states are affected by human rights and humanitarian law violations. Accordingly, this diminishes the value of specially affected states in the assessment of customary international humanitarian law. Finally, a strict reliance on operational state practice in armed conflict neither reflects the law as it is, has been, or should be. As such, the words of states as well as what can be deduced from their support of "soft law" instruments should be afforded more weight in the formation of customary international humanitarian law.

A. Human Rights and Humanitarian Law Constitute Specialized Regimes that can be Interpreted with Greater Flexibility

Human rights and humanitarian law constitute a specialized regime, or what is often referred to as a self-contained regime. The Permanent Court of International Justice coined the term of art in its adjudication of *S.S. Wimbledon*.[61] There, the court applied this concept in order to resolve a matter of treaty interpretation concerning the relationship between "two sets of primary international obligations."[62] In its 2006 Study, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," the International Law Commission ("ILC") found that such specialized treaty regimes are not exceptional. Rather they constitute a series of systems and sub-systems that resolve conflicts differently than would general international law. Citing the ICJ's decision in *Nicaragua*, the ILC explains that within a specialized regime, a state may only resort to remedies made available within their own regime of accountability "that [make] other ways of reaction inappropriate."[63]

1. Human Rights and Humanitarian Law Represent Non-Reciprocal and Universal Interests

Significantly, human rights treaties do not create reciprocal obligations between state parties but instead create obligations between states and individuals to whom they owe a duty.[64] More generally, human rights obligations serve an

61. S.S. Wimbledon (U.K. v. Ger.), 1923 P.C.I.J. (ser. A) No. 1, ¶ 32 (Aug. 17).

62. Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L L. 483, 491 (2006).

63. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Rep. of the Int'l Law Comm'n, 58th sess., May 1–June 9, July 3–Aug. 11, 2006, ¶ 125, U.N. Doc. A/CN.4/L.682 (April 13, 2006).

64. Başak Çali, *Specialized Rules of Treaty Interpretation: Human Rights*, *in* THE OXFORD GUIDE TO TREATIES, 524–48 (Duncan Hollis ed., 2012). *But see* Simma & Pulkowski, *supra* note 62, at 527. ("While human rights have an objective, public-law-like, perhaps even constitutional, character, technically, they nonetheless formally remain 'reciprocal engagements between contracting States.' It is crucial to distinguish between reciprocity as a formal characteristic of a norm on the one hand, and reciprocity as a substantive *do-ut-des* relationship on the other. Human rights treaties do not involve such a substantive exchange, since their ultimate beneficiaries are individuals under the jurisdiction of the state undertaking the obligation. However, since human rights remain 'mutual, bilateral

interconnected network, which benefits from its collective enforcement.[65] The treaty context also carves out a specialized treatment of human rights and humanitarian law. While Article 60 of the Vienna Convention on the Law of Treaties ("VCLT") states that a material breach of a treaty will be grounds for another party to suspend its compliance with the treaty in whole or in part, subsection 5 makes clear that this does not apply to provisions relating to the protection of human persons "contained in treaties of a humanitarian character."[66] The VCLT, which otherwise applies trans-substantively, asserts that failure by one party to observe humanitarian treaty provisions, in particular, does not release another party from observing its duties.[67]

Specialization, however, does not isolate a treaty regime from general international law. Just as "[s]ocial systems cannot exist in splendid isolation from their environment," specialized regimes share a relationship with general international law at least at the level of interpretation.[68] In its decision concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ endorsed this position and added that the universal character of, and the extensive participation in establishing, multilateral treaties gives rise to "greater flexibility in the international practice concerning multilateral conventions."[69] Therefore, the principles of a Convention can be binding on states even without a conventional obligation since its purpose is purely humanizing and civilizing and no single state incurs any advantages or disadvantages by being a party to it. Instead, all states share a common interest in compliance.[70]

2. A Human Rights or Humanitarian Treaty Provision Can Develop Quickly and Need Not 'Harden'

The specialized regime governing human rights and humanitarian law together with their universal and non-reciprocal character informs how relevant treaty provisions should be interpreted. While a contractual treaty provision, of bilateral character, should harden into customary law, the generalizable nature of human rights and humanitarian law need not crystallize to be binding upon all other states. Accordingly, custom can develop over a short period of time and

undertakings' owed to the other state parties to the respective convention, there is no compelling systematic reason why states should be precluded from bilateral enforcement of human rights.").

65. Simma & Pulkowski, *supra* note 62, at 527 ("Unlike international treaties of the classical kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement.'" (quoting Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 239 (1978)).

66. Vienna Convention on the Law of Treaties art. 60, May 23, 1969, 1155 U.N.T.S. 331.

67. *Id*. art. 58.

68. Simma & Pulkowski, *supra* note 62, at 492.

69. Reservations to Convention on Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 21 (May 28).

70. *Id*. at 23.

opinio juris can be inferred from state practice so long as such practice is sufficiently dense.

Oppenheim's proposition that a treaty must either be a derogation, or an affirmation, of underlying custom suggests that a treaty provision cannot become custom until it "hardens."[71] This view reflects the notion that treaties are contracts and all contracts must be restrictively evaluated.[72] The restrictive view, however, confuses the provisions that can be generalized and that are intended to be universally applicable with strict entitlement rights. Whereas reciprocal rights between two or more states reflect particular interests that should be evaluated like contractual terms, a universal right can be more flexibly evaluated. Significantly, at the time of writing, Oppenheim commented that it is not clear whether or not slavery was acceptable. Shortly thereafter, the ILC found that the prohibition on the slave trade was "'one of the most obvious and best settled rules of jus cogens' in that even new treaties could not derogate from it,"[73] thereby casting doubt on such a restrictive approach to the determination of customary humanitarian law.

The ICJ in *North Sea* adopted the restrictive approach where it stated that state support for a treaty provision does not satisfy *opinio juris*, which must be demonstrated separately in order to affirm a principle's existence as customary law. The problem is that this does not accurately apply to human rights and humanitarian law. Professor Anthony D'Amato points out that the article in question in *North Sea* represents the right to a specific title, and therefore, as noted by the ICJ, cannot be altered by implicit consent.[74] In contrast, those rights that are generalizable are intended to reach beyond their parties and can apply to them almost instantly.[75]

Professor Jonathan Charney agrees that while technical and narrow treaty provisions may not be applicable to third parties, the same is not true for those generalizable rules regarding human rights obligations.[76] Charney echoes D'Amato's concern that a specific rule, one that "requires highly technical methods of implementation . . . [and] require[s] the specificity of an international agreement, as contrasted with more generalized obligations that are possible to implement as custom" is less likely to give rise to a customary law.[77] In the case that a rule could not be established absent an international institution or treaty, it is

71. Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1132 (1982).

72. *Id*. ("This is more a statement of a conclusion than a reason, a conclusion that follows from equating treaties with contracts and then taking a restrictive view of contracts.").

73. *Id*. at 1133.

74. *Id*. at 1143.

75. *Id*. at 1144.

76. Jonathan Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971, 983 (1986) ("[I]t is difficult to merge a generalized principle. . . into international law without the . . . detail that must be negotiated individually. The same is not true for most of the Vienna Convention's rules relating to international agreements; nor . . . in the case of human rights obligations.").

77. *Id*.

not eligible to become a customary law.[78] In contrast, "[a]n agreement which addresses generalized interests and aspirations of the international community may be more likely to produce new law than an agreement which focuses on specific state interests."[79]

The notion that generalizable interests may represent aspirations common to the international community is resonant with the Joint Separate Opinion in the ICJ's 2002 *Arrest Warrant* decision ("Joint Separate Opinion").[80] There, the ICJ deliberated whether the Democratic Republic of the Congo's incumbent foreign affairs minister was immune from prosecution under Belgium's universal jurisdiction statute from war crimes and crimes against humanity. Without discussing the legality of universal jurisdiction, the Court found the minister immune under customary international law. Justices Higgins, Kooijmans, and Buergenthal took issue with the Court's scope of inquiry and held that it could not deliberate the application of immunity without determining whether or not Belgium had a right to exercise universal jurisdiction. In their Joint Separate Opinion they found that there indeed exists such a right, as indicated by a trend to prosecute those offenses that are universally offensive.[81]

The three Justices emphasized that human rights are of general and global concern. Since they represent interests that are not specific to any state, the recognition of human rights as customary law is a palatable trend. Consider their discussion on multilateral treaties:

> The series of multilateral treaties with their special jurisdictional provisions reflect a determination by the international community that those engaged in war crimes, hijacking, hostage taking, torture should not go unpunished. Although crimes against humanity are not yet the object of a distinct convention, a comparable international indignation at such acts is not to be doubted.[82]

The Justices infer from the series of multilateral treaties a particular trend that bends towards the arc of justice. This leads them to conclude that similar indignation cannot be doubted where crimes of humanity are concerned notwithstanding the lack of a treaty articulating such consensual repugnance.

Justice Higgins, Kooijmans, and Buerguenthal recognize that this is not a unilateral trend, but rather one that reflects a balancing of interests in consideration of other general international law.[83] They write that while there is a discernible

78. *Id*. ("Furthermore, if international institutions are required to be used or established, customary law is inappropriate.").

79. *Id*.

80. *See* Arrest Warrant 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 837 (Feb. 14) **(**Higgins J., Kooijmans, J., and Buergenthal, J., dissenting).

81. *Id*. ¶ 51.

82. *Id*.

83. *Id*. ¶ 75 ("These trends reflect a balancing of interests. On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference.").

global trend that rejects immunity for human rights violators, "the law of privileges and immunities . . . retains its importance since immunities are granted to high state officials to guarantee the proper functioning of the network of mutual inter-state relations, which is of paramount importance for a well-ordered and harmonious international system."[84]

Even in their final analysis, however, the Justices do not distinguish between sovereignty and human rights. Instead, they ascribe value to sovereignty insofar as it promotes international harmony and stability, thus suggesting that political actors, including states, should celebrate, rather than shun, the law's prescriptive force. Accordingly, treaty provisions, which represent generalizable interests, like humanitarian and human rights provisions do, need not harden into custom over a long period of time. Relatedly, *opinio juris* can be inferred from sufficiently dense state practice when establishing the existence of a customary international humanitarian law.

B. International Society is a Collective Whole, Not a Sum of Its Parts, Thereby Diminishing the Significance of Specially Affected States upon the Formation of Customary International Humanitarian Law

International society is a collective whole as opposed to a sum of its parts. The community of nations, or the whole, has particular concerns distinct from each of its states, or its individual parts. This is particularly true as it concerns matters, like humanitarian ones, that constitute common interests. The manner in which a war is fought and regulated is of concern to all nations individually and collectively, regardless of direct participation. A state's non-participation in armed conflict does not diminish its potential participation in one in the near or long-term future. Accordingly, while some states may have more experience with armed conflict or human rights challenges, this does not make them "specially affected" insofar as the formation of custom is concerned. This significantly diminishes the consideration of specially affected states in the formation of customary international humanitarian law and heightens the value of soft-law considerations.

1. The World is an Aggregate Whole and Not a Sum of its Parts

At the turn of the nineteenth century, it may have been sound to conceive of the international community as the aggregate of its many states. Then, those existent states amounted to a little more than forty in number.[85] Their under-developed collective identity reflected their nascent form.[86] Less sophisticated forms of technology limited the ability to communicate rapidly. In light of these historic circumstances, it is reasonable to think that their unspoken consensus

84. *Id*.

85. *See* PHILLIP MARTIN, ECONOMIC INTEGRATION AND MIGRATION: THE MEXICO-U.S. CASE 3 (2003), *available at* http://www.wider.unu.edu/publications/working-papers/discussion-papers/2003/en_GB/dp2003-35/ ("There were 190 recognized nation-states in 2000, up from 43 in 1900, and each has a system of passports to distinguish citizens from foreigners, border controls to inspect persons who want to enter, and policies that affect the settlement and integration of noncitizens.").

86. *Id*.

would develop as the result of strict observance to aggregated state practice over a long period of time.

However, those few nations have grown to number nearly two hundred states in the twenty-first century.[87] New states have entered the community of nations accepting, as a matter of precondition, those customary rules upheld by the palpable collective body.[88] Technology in the twenty-first century has made instantaneous communication possible, not just between heads of state, but among and between individual units comprising the global population. Rapid communication has not only facilitated the flow of ideas but goods, capital, and labor as well.[89] Globalization has birthed global markets,[90] global environmental conditions,[91] global public health concerns,[92] and in so doing has established a collective form. The impact of rapid news sharing, together with the collective form of international society, makes practice less controlling and the possibility for rapid formation of customary law more possible. Communication technology has enabled an expedited consensus-formation process. Rapid communication—together with a collective international society—have developed the capacity to espouse a global attitude without having to patiently witness the evolutionary process reflect those preferences.[93]

The lack of a hierarchal order with effective executive powers does not diminish international society's collective character.[94] To the contrary, even powerful states, that presumably prefer diplomacy to law, depend on the order afforded by law.[95] The extent to which states desire law and "[t]he amount and kind of law which the international community will achieve will depend, of course, on the degree of homogeneity of the political system and the degree of common or

87. *Id*.

88. *See* RULES OF PROCEDURE OF THE GENERAL ASSEMBLY R. 136, U.N. Doc. A/520/Rev.15 (1985), *available at* http://www.un.org/en/ga/about/ropga/adms.shtml ("If the Security Council recommends the applicant State for membership, the General Assembly shall consider whether the applicant is a peace-loving State and is able and willing to carry out the obligations contained in the Charter and shall decide, by a two-thirds majority of the members present and voting, upon its application for membership.").

89. *See* Arnulf Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 HARV. INT'L L.J. 475, 548 (2010).

90. *See* AKIRA IRIYE, GLOBAL COMMUNITY: THE ROLE OF INTERNATIONAL ORGANIZATIONS IN THE MAKING OF THE CONTEMPORARY WORLD 18 (2002).

91. *Id*. at 177–79.

92. *See* STEFAN ELBE, SECURITY AND GLOBAL HEALTH: TOWARD THE MEDICALIZATION OF INSECURITY 30 (2010).

93. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 12-13 (2d ed. 1979). I borrow the term "attitude" from Louis Henkin, who acknowledges its existence and uses it throughout his treatise.

94. *Id*. at 24 ("In a society of sovereign states, in the absence of an effective legislature representing all competing interests and able to accommodate them, nations must be free to pursue their interests, to work out reasonable accommodations with other. What is called for is the flexibility of diplomacy, not the strait jacket of law.").

95. *Id*. at 15 (noting the law formalizes relationships between states, regulates them, and predicts the consequences of their behavior).

reciprocal interest."[96] Such integrated concerns are most pronounced in regard to human rights and humanitarian law because of their non-reciprocal nature. Consider that adherence to law of a normative character often works to enhance the collective benefit of all states without detriment to any single state.

The Higgins-Kooijmans-Buergenthal Joint Separate Opinion in *Arrest Warrant* articulated this when it noted that certain states can act as "agents for the international community" to prosecute those offenses that are "damaging to the interests of all."[97] Significantly, the Justices note, this is a "vertical notion of the authority of action," which "is significantly different from the horizontal system of international law envisaged in the *Lotus* case."[98] Accordingly, international society shares certain humanitarian values and interests as a collective whole, distinct from the interest from any one state, or group of states.

2. The Significance of Specially Affected States is Diminished in the Assessment of Customary International Humanitarian Law

International society's collective character diminishes the impact of any one state upon the formation of customary international humanitarian law. Instead, its position towards humanitarian provisions can be evaluated as a psychological element among states, regardless of their practice. The ICJ articulated the concept of specially affected states in its *North Sea Continental Shelf* decision.[99] *North Sea* reflects the textbook approach to establishing whether or not a treaty provision reflects, or gives rise, to customary law. The Restatement Third summarizes *North Sea* as saying that "a treaty rule might become 'a general rule of international law' if there were 'a very widespread and representative participation in the convention . . . provided it includes that of states whose interests were particularly affected.'"[100] However, there, the ICJ addressed a specific right to entitlement as it concerned a geographical coast specific to only three parties.[101] No other state has the potential to share that specific interest.

In contrast, even those states that are not engaged in armed conflict have the potential to become involved in such conflict in the short or long-term future. Although humanitarian law specially affects all states, the doctrine remains relevant. As acknowledged by the ICRC, a state's persistent objection to a

96. *Id*. at 30.

97. Arrest Warrant 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶¶ 51, 61 (Feb. 14) (Higgins J., Kooijmans, J., and Buergenthal, J., dissenting).

98. *Id*. ¶ 51.

99. North Sea Continental Shelf (Den./Ger./Neth.), 1969 I.C.J. 3, ¶ 74 (Feb. 20).

100. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102 (1997); *see also* Craig L. Carr and Gary L. Scott, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71, 72 (1996) (reformulating this concept and suggesting a three-pronged model for the determination of whether a treaty provision has attained customary status. The authors proffer that a generalizable treaty provision evident in multilateral treaties can attain customary status if there are (1) a sufficient number of states engaged in the practice; (2) that those states most affected by the practice are among them; and (3) that the treaty provision is not subject to reservations.).

101. North Sea Continental Shelf (Den./Ger./Neth.), 1969 I.C.J. 3, 5–6 (Feb. 20).

developing norm that specifically affects them can frustrate the crystallization of such a norm.[102] Otherwise, the attitude of all states is considerably influential.

North Sea also stood for the proposition that in the absence of protest, a practice becomes binding customary law so long as it is evidenced by uniformity among states and acceptance that it is binding upon third states.[103] Even though it was not certain whether the "acquiescence stemmed from a consciousness of a clear legal duty—as distinguished from a recognition of the reasonableness of the claim made,"[104] the ICJ considered that the lack of protest among states constituted meaningful *opinio juris*. Accordingly, practice is not just found in the practice of states, but also in their attitudinal response to the behavior of other states.

Moreover, the degree of uniformity in practice need only be general and not exact. *North Sea* draws upon the Court's *Asylum* case to make this claim.[105] In *Asylum*, the ICJ rejected Colombia's argument that the Montevideo Convention of 1933 on Political Asylum codified existing custom for several reasons, including the fact that general uniformity could not be demonstrated among the Latin American states.[106] Notably, the ICJ in *Asylum* distinguished universal adherence to a rule from general uniformity in practice.[107] J.L. Brierly also captures this where he expounds that with regard to the uniformity of practice, the difference "is not one between uncertainty and certainty in formulation, but merely between a greater and a less degree of uncertainty."[108]

Stated differently, state practice by a handful of powerful states does not necessarily trump the will of international society. Sir Hersch Lauterpacht, former member of the ILC, and ICJ jurist, cautioned against such excessive deference to the practice and will of states because the force of international law is "grounded in a factor superior to and independent of the will of states—a factor which gives validity to the law created by the will of states. That superior source is the

102. Major Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space*, 48 A.F. L. REV. 1, 69 (2000); *see also* Jean-Marie Henckaerts, *Customary International Humanitarian Law: Taking Stock of the ICRC Study*, 78 NORDIC J. INT'L L. 435, 449 (2010).

103. HERSCH LAUTERPACHT, INTERNATIONAL LAW 64 (1970).

104. *Id*.

105. *Id*. ("The Party which relies on a custom . . . must prove that this custom is established in such a manner that it has become binding on the other Party . . . that the rule invoked . . . is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.").

106. Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 277 (Nov. 20) (noting that other reasons included the limited number of states that endorsed the Convention and the fact that the Convention in question merely modified an earlier Convention).

107. *Id*. ("The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offense.").

108. J. L. BRIERLY, THE LAW OF NATIONS 62 (Sir Humphrey Waldock ed., 1963).

objective fact of the existence of an interdependent community of states."[109] Oscar Schachter adds that if commitment to descriptive law is taken to its extreme, powerful states would have unfettered latitude to define the rules for themselves risking acceptance of international society as an "'anarchical order of power' in which might makes right,"[110] thereby rendering meaningless the preferences of the collective whole.

In their 1999 address to the American Society of International Law, Bruno Simma and Andreas L. Paulus attempt to reconcile the traditional approach with the normative underpinnings of human rights. They argue that adherents to law's descriptive accuracy acknowledge that there are substantive limits on the influence of power alone because excessive discretion risks the loss of political authority, and consequently, political influence.[111] Moreover, they posit that as other actors assume greater importance in shaping international norms, the exclusivity afforded to the will of states in norm creation will conversely shrink.[112] Simma and Paulus acknowledge the potential of the law's transformative force, so long as the claim is not surrendered to "normativity and the prescriptive force of law."[113] Such surrender is not possible given that state attitudes, even as a collective whole, reflect a balancing of state interests that is not subsumed by normative values. Therefore, the value of specially affected states is diminished, and the value of soft-law instruments is heightened in the formation of customary international humanitarian law.

C. Operational Practice is an Unreliable Source of Customary International Humanitarian Law

In its response to the ICRC, the U.S. argues that nothing can outweigh actual state practice in the assessment of customary international law.[114] It contends that its own military manuals, which the ICRC had cited as evidence of international custom, neither reflect *opinio juris*[115] nor state practice[116] because they represent a mix of policy and law. However, strict operational state practice is an unreliable source of customary law for at least two reasons. First, operational practices are neither widely available nor plainly known. Second, in cases where a global value is at stake, consistent practice alone cannot undermine a rule's customary nature.

109. LAUTERPACHT, *supra* note 103, at 58.

110. Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 119 (1986).

111. Simma & Paulus, *supra* note 41, at 305.

112. *Id*. at 307.

113. *Id*.

114. Bellinger & Haynes, *supra* note 11, at 445.

115. *Id*. at 447 ("States often include guidance in their military manuals for policy, rather than legal, reasons. For example, the United States long has stated that it will apply the rules in its manuals whether the conflict is characterized as international or non-international, but this clearly is not intended to indicate that it is bound to do so as a matter of law in non-international conflicts.").

116. *Id*. at 445 ("Although manuals may provide important indications of State behavior and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations.").

In its discussions on the customary law applicable to internal conflicts, the International Criminal Tribunal on Yugoslavia ("ICTY") largely ignored battlefield practices and relied on verbal statements, declarations, and resolutions.[117] The ICTY explained that examination of state practice:

> [I]s rendered extremely difficult by the fact that not only is access to the theater of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse to it is has to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments.[118]

In addition to the logistical restraints impeding perfect knowledge of battlefield operations, states often engage in practices that they believe are illegal. To accept that such engagement is evidentiary of a customary rule's waning force would lead to absurd results in light of the unlimited possibilities of war's gruesome horrors.[119] Professor Schachter suggests that in order to determine whether or not a rule maintains its customary force, observers should search for consensus regarding a rule's fundamental character. He explains, "[w]hen a principle is repeatedly and unanimously declared to be a basic legal rule from which no derogation is allowed, even numerous violations do not become state practice constitutive of a new rule."[120]

The case of torture is particularly illustrative here. During the Global War on Terror ("GWOT") states systematically exerted force, described as torture, to persons in their custody.[121] If observers were to accept these operational practices as controlling, they would have to accept that such widespread practice did not breach the customary prohibition[122] of torture, but rather, constituted the seed for a new international customary rule. Ostensibly the new rule would make permissible the use of torture during unconventional warfare when combatants, by virtue of their unlawful conduct, voluntarily forfeit the law's protection.[123] This conclusion, however, is inconsistent with the fact that, despite the widespread practice of torture, the international community has not adjusted its collective

117. Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 239 (1996).

118. *Id*. at 240.

119. Schachter, *supra* note 110, at 130 ("This argument is no more convincing than the assertion that if a large number of rapes and murders are not punished, the criminal laws are supplanted and legal restraints disappear for everyone.").

120. *Id*. at 131.

121. *See* Lisa Hajjar, *American Torture: The Price Paid, The Lessons Learned*, 39 MIDDLE E. REP. (2009), *available at* http://www.merip.org/mer/mer251/american-torture.

122. *See* Questions Relating to Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment at 3 (July 20, 2012), *available at* http://www.icj-cij.org/docket/files/144/17064.pdf (explaining that the "[p]rohibition of torture is part of customary international law and a preemptory norm (*jus cogens*)"); Regina v. Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147, 156 (H.L.) (describing the ban on torture as *jus cogens*).

123. *See* FRANCIS LIEBER, GUERRILLA PARTIES: CONSIDERED WITH REFERENCE TO THE LAWS AND USAGES OF WAR 18 (1862).

admonition and prohibition on the use of torture. This is evidenced by the numerous state-led lawsuits filed against alleged torturers,[124] as well as states condemning the use of torture.[125]

This underscores the presumption raised in *Nicaragua* that states conform with customary law unless they explicitly express otherwise.[126] Accordingly, if during the course of said practice, states explicitly defended the use of torture and other states acquiesced to its use, then observers should accept that a seed for a new rule has been planted. On the other hand, if during the course of torture, no state defended its use and other states objected to it, then the practice must be viewed as a breach of customary law thereby affirming its validity and application.

From this example, we can draw four principles. First, there is a presumption that states comport with international customary law. Second, strict reliance on operational state practice is an inadequate source of customary international law. Third, to accurately determine the enduring legitimacy of customary law, observers must afford due weight to state declarations, resolutions, and statements during the course of said practices. Finally, observers must account for the negative practice of states that can be interpreted as acquiescence.

Customary international humanitarian law, in particular, is an attitudinal position that reflects obligatory norms that have shaped practice as opposed to habitual norms that have come to represent legal obligations. Due to the specialized nature of the human rights and humanitarian legal regime, together with the international community's character as a collective whole, and because of the unreliability of operational state practice, this is especially true where morally loaded norms are at issue. Therefore, customary rules can develop quickly without

124. Hajjar, *supra* note 121 ("In 2005, an Italian court issued indictments for 22 CIA agents who had kidnapped Hassan Mustafa Osama Nasr (aka Abu Omar) in Milan in February 2003 and transported him to Egypt for torture. In 2007, a German court issued arrest warrants for 13 CIA agents involved in the December 2003 kidnapping of Khaled El-Masri, a German citizen, from Macedonia. He was transported to Afghanistan where he was tortured and held incommunicado for months . . . . in an attempt to avoid public acknowledgment . . . [the CIA] dumped him in a remote area in Albania, from which he eventually made it back to Germany.").

125. *Id*. (including the Canadian government apologizing to and paying $10 million to Maher Arrar, a Canadian-Syrian national who the U.S. rendered to Syria where he endured ten months of torture and in the U.K., the controversy over Binyam Mohammed, a Guantanamo Bay detainee who was subject to systematic torture, led to intense public controversy, and to the first criminal investigation against British intelligence agents for their collusion in CIA torture); *see also* Jay C. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (August 1, 2020), http://dspace.wrlc.org/doc/bitstream /2041/70964/00355_020801_001display.pdf (demonstrating that, though the U.S. did not condemn the use of torture, it went to great lengths to distinguish its treatment of and policy towards detainees from torture: "for an act to constitute torture . . . it must inflict pain that is difficult to endure. Physical pain amounting torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture . . . it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.").

126. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

waiting decades for the law to harden; the influence of specially affected states is significantly diminished; the value of soft-law instruments is heightened; *opinio juris* and state practice can be deduced from the same event or articulation[127] and can be reflected by the reaction, or the lack thereof, of the international community; and, in some cases, they can develop instantly from multilateral treaty provisions. These are not absolute rules; instead they reflect a rebuttable presumption of sorts. They are general assumptions in the approach to the customary human rights and humanitarian rules that are still open to challenge based on the specific nature—permissive, operational, or obligatory—of the rule in question.

Under this formulation, the U.S. approach to establishing customary law is rigid and inadequate. It does not consider the proper approach to the formation of custom with distinct consideration for the nature of human rights and humanitarian law. In contrast, the ICRC approach, which leans towards, but is not necessarily modern, is more appropriate. It has the capacity to interpret developing customary norms based on a balance of *opinio juris* and state practice. The ICRC avoids paralysis in its approach by not affording undue weight to operational state practice and by deriving *opinio juris* and state practice from the same incident or act. In the words of Jean-Marie Henckaerts, co-author of the ICRC Study, there is no mathematical standard to establish customary law.[128]

V. RULE 157: STATES HAVE THE RIGHT TO VEST UNIVERSAL JURISDICTION IN THEIR NATIONAL COURTS OVER WAR CRIMES

Notwithstanding the ICRC's correct methodological approach, its analysis as to Rule 157—which explains that states have the right to vest universal jurisdiction in their national courts over war crimes[129]—is not immune from critique. The ICRC's failure to properly distinguish war crimes from grave breaches makes debatable whether the evidence it collated reflects no more than state adherence to treaty obligations. Moreover, the ICRC does not adequately account for state protest to universal jurisdiction up to the time of writing. Finally, the intervening developments between 2005 and 2011 demonstrate a regressive trend that also puts the ICRC's findings into question. While these findings do not negate the right to vest universal jurisdiction as a customary right, they do signify that the customary rule should be more attenuated and precise.

To examine the ICRC's analysis of universal jurisdiction, this section will begin by unpacking the U.S. critique of the ICRC's analysis. It will then show

127. *See* INTERNATIONAL LAW ASSOCIATION, COMMITTEE ON FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW, LONDON CONFERENCE (2000) ("[M]ost members of the Committee agreed that, where practice exists which satisfies the conditions set out in Part II and is not covered by one of the exceptions discussed in Section 17, it is not necessary to prove the existence of an *opinio juris*.").

128. Skype Interview with Jean Marie Henckaerts, Legal Advisor to ICRC (Nov. 11, 2011) [hereinafter Henckaerts Interview]; *see also* Jean-Marie Henckaerts, *Customary International Humanitarian Law: Taking Stock of the ICRC Study*, 78 NORDIC J. INT'L L. 435, 449 (2010).

129. *Id*.

how the distinction between the treaty provision giving rise to universal jurisdiction and the universality principle's customary form supports the ICRC's definition of universal jurisdiction as a permissive right.

Next, it will explore the implications of the ICRC's failure to adequately demonstrate the distinction between grave breaches and war crimes upon its conclusions. Finally, it will examine how state protests before and since the publication of the Study undermine the scope and meaning of universal jurisdiction as asserted by Rule 157.

Universal jurisdiction is one of the seven bases for jurisdiction identified in legal doctrine.[130] Unlike the other bases for jurisdiction, which establish a direct link between a state and the right to prosecute an individual, universal criminal jurisdiction is based solely on the nature of the crime. It "is the ability of the court of any state to try persons for crimes committed outside its territory that are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests."[131] Former U.N. High Commissioner on Human Rights Mary Robinson explained that the principle of such jurisdiction

> [I]s based on the notion that certain crimes are so harmful to international interests that the states are entitled—and even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or victim.[132]

Although closely related, it is distinct from the treaty provision obligating states to extradite or prosecute ("*aut dedere aut judicare*") someone alleged to have committed a war crime.[133] According to the ICRC, *aut dedere aut judicare* stands for the proposition that states are not to provide safe haven to criminal suspects. Accordingly, states are required to either surrender the person to an international criminal court or a national court with the capacity to prosecute such crimes. Where it fails to do so, it must prosecute the alleged in its national courts presumably pursuant to universal jurisdiction.[134] In contrast, the ICRC contends,

130. REYDAMS, *supra* note 45, at 21–22 ("Doctrine identifies up to seven principles: (1) the principle of territoriality, (2) the principle of the nationality of the offender (or active personality principle), (3) the principle of the nationality of the victim (or passive personality principle), (4) the principle of the flag, (5) the principle of protection, (6) the principle of universality, and (7) the representation principle.").

131. AMNESTY INT'L, UNIVERSAL JURISDICTION: UN GENERAL ASSEMBLY SHOULD SUPPORT THIS ESSENTIAL INTERNATIONAL JUSTICE TOOL, 10 (Oct. 2010) [hereinafter JUSTICE TOOL], *available at* http://www.amnesty.org/en/library/asset/IOR53/015/2010/en/72ab4ccf-4407-42d3-8cfb-46ad6aada059/ior530152010en.pdf.

132. STEPHEN MACEDO, ET AL., THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (2001), *available at* http://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

133. AMNESTY INT'L, INTERNATIONAL LAW COMMISSION: THE OBLIGATION TO EXTRADITE OR PROSECUTE (AUT DEDERE AUT JUDICARE) 8 (Feb. 2009) [hereinafter EXTRADITE OR PROSECUTE], *available at* http://www.amnesty.org/ar/library/asset/IOR40/001/2009/en/a4761626-f20a-11dd-855f-392123cb5f06/ior400012009en.pdf.

134. *Id*.

universal jurisdiction in customary law is a permissive right to prosecute a heinous crime in a state's national courts irrespective of an extradition request.[135]

The U.S. argues that three methodological errors undermine the ICRC's conclusion that states can exercise universal jurisdiction in their national courts as a matter of custom: (1) the lack of uniformity over the definition of war crimes across states; (2) the failure of state practice cited to establish either an accepted definition of universal jurisdiction or the existence of "pure" universal jurisdiction; and (3) insufficient state practice of prosecutions not connected to the forum state.[136] The U.S.'s overarching concern reflects its belief that the state practice and *opinio juris* collated by the ICRC reflects a treaty rule and not a distinct customary law.[137] The treaty provision, *aut dedere aut judicare*, provides that a state that has the ability to establish custody of a suspect accused of committing a serious violation of humanitarian law in international armed conflict must hand over or try the accused as a matter of duty. It is derived from dozens of multilateral treaties.[138] The Geneva Conventions—as laid out in Common Article 49 of the First Geneva Convention ("GCI"), Article 50 of the Second Geneva Convention ("GCII"), Article 129 of the Third Geneva Convention ("GCIII"), and Article 146 ("GCIV") of the Fourth Geneva Convention—provide that High Contracting Parties have an obligation to prosecute, but not extradite persons, within their territory suspected of committing grave breaches.[139]

Accordingly, the U.S. Government tries to illustrate that the ICRC's evidence of state practice and *opinio juris* simply reflects compliance with the Geneva Conventions. The authors write:

> The nine cases in which States claimed jurisdiction based on customary rights come from only six States . . . . The practice of six States is very weak evidence of the existence of a norm of customary international law . . . . Indeed in many of these cases, States were prosecuting acts that were committed before the Geneva Conventions were adopted, but that

135. Henckaerts, *supra* note 1, at 476 ("Permissive rules . . . are supported by acts that recognize the right to behave in a given way but that do not, however, require such behaviour . . . . [Rule 157] is such a rule.").

136. Bellinger & Haynes, *supra* note 11, at 466-67.

137. *Id*. at 469-70.

138. *See* REYDAMS, *supra* note 45, at 44-47 (explaining that before World War II, only three of the one hundred international instruments with penal characteristics established a universality principle. In contrast, post-World War II "[s]ome two dozen treaties [were] adopted to criminalize certain conduct and establish a form of universal repression."). Articles 5 (obligation to establish jurisdiction), 7 (obligation to extradite or prosecute), and 8 (extradition) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reflect the three clauses establishing the *aut dedere aut judicare* principle in the two dozen treaties mentioned in REYDAMS, *supra* note 45.

139. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Conventions].

> ultimately were considered grave breaches in the Conventions. Thus, although the prosecuting States were not in a position to rely on their treaty obligations as a basis for their prosecutions, the acts at issue effectively were grave breaches.[140]

The U.S. Government's emphasis that the criminal violations amounted to grave breaches, as opposed to a broader category of war crimes, highlights its contention with Rule 156, "Definition of War Crimes," of the Study upon which Rule 157 is reliant. The authors allege that Rule 156 lacks precision and is therefore unreliable as a customary rule. They explain:

> These acts include grave breaches of the Geneva Conventions and A[dditional] P[rotocol] I, other crimes prosecuted as 'war crimes' after World War II and included in the Rome Statute, serious violations of Common Article 3 of the Geneva Conventions, and several other acts deemed 'war crimes' by 'customary law developed since 1977,' some of which are included in the Rome Statute and some of which are not.[141]

Rule 156 coupled with Rule 157 establish that certain serious violations of humanitarian law constitute war crimes to which international criminal liability inheres whether committed in international or non-international armed conflict.[142] This is particularly troubling to the U.S., which has not ratified the Geneva Convention's 1977 Additional Protocols.[143] The Additional Protocols expand the applicable scope of laws of war, and their attendant protections afforded to civilians, combatants, prisoners, and the wounded, to those armed conflicts not of an international character;[144] they characterize wars of national liberation as international in character;[145] they reduce the stringent standards requisite upon combatants to distinguish themselves from civilians;[146] and they expand those violations considered war crimes.[147]

Whereas the ICRC includes these violations and others in its litany of war crimes enumerated in Rule 156 over which third party states can establish criminal

140. Bellinger & Haynes, *supra* note 11, at 469-70.

141. *Id*. at 466.

142. VOLUME I, *supra* note 2, at 599-600 ("These violations are not listed in the Statute of the International Criminal Court as war crimes. However, State practice recognizes their serious nature and, as a result, a court would have sufficient basis to conclude that such acts in a non-international armed conflict are war crimes.").

143. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, *available at* http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P [hereinafter Protocol I]; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, *available at* http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P [hereinafter Protocol II].

144. *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 129-31 (2010).

145. Protocol I, *supra* note 143, art. 1(4).

146. *Id*. art. 44(3).

147. SOLIS, *supra* note 144, at 123-30; *see also* Protocol I, *supra* note 143, art. 85(2)-(5).

jurisdiction per Rule 157, the U.S. insists that those violations to which international criminal liability is attached are limited to categories established by treaty, which include, but are not limited to, grave breaches identified in the four Geneva Conventions. The violations common to all four Geneva Conventions are "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health."[148]

As such, the U.S. objection to the ICRC analysis can be summarized: the ICRC's evidence on state practice and *opinio juris* regarding the prosecution of war crimes reflects inconsistent compliance with a treaty provision and is not demonstrative of a new customary law. In order to examine whether the ICRC correctly evaluated the customary status of the state right to vest national legislation over universal jurisdiction for war crimes, I will divide my inquiry into three broad categories: (1) Has an existing treaty provision found in several multilateral treaties attained customary status and if so, is its customary form distinct from its treaty articulation?; (2) How does, or does not, the state practice and *opinio juris* documented by the ICRC demonstrate the waning relevance of the distinction between grave breaches and war crimes more generally?; and (3) What do trends in state practice leading up to the ICRC's 2005 compendium of customary international humanitarian law, as well as since the Study's completion, indicate about the right to vest universal jurisdiction in national courts over war crimes as a customary rule?

A. Treaty Provision versus Customary Rule

Customary law, a form of tacit consent, must be distinct from treaty law, a form of explicit consent, in order to apply to non-party third states.[149] The customary rule need not be as precise as the treaty provision from which it developed. Henckaerts agrees with this proposition and explains, "custom is not like treaty law. It need not be stated verbatim and is therefore not incontrovertible. The rule can be read more broadly."[150] He explains that Rule 157 suggests that universal jurisdiction as captured in Rule 157 is a permissive right available to states to try persons suspected of committing the war crimes enumerated in Rule 156 where a presence link to the prosecuting state is neither necessary nor dispositive of the rule's existence.[151]

148. DAVID LUBAN, JULIE R. O'SULLIVAN & DAVID P. STEWART, INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 1047 (2010).

149. *See* Simma, *supra* note 41, at 305 (stating that a binding treaty provision represents explicit consent while customary law reflects tacit consent. For that reason, treaties are binding on contracting parties only while custom is binding on all parties because of habitual conduct based on an objective factual determination.).

150. Henckaerts Interview, *supra* note 128.

151. *Id*.; VOLUME I, *supra* note 2, at 605-06 ("Practice is not uniform with respect to whether the principle of universal jurisdiction requires a particular link to the prosecuting State. The requirement that some connection exist between the accused and the prosecuting State, in particular that the accused be present in the territory or has fallen into the hands of the prosecuting State, is reflected in the military

While the U.S. takes specific issue with Rule 157's non-definitive nature, academic literature supports the notion that customary law cannot be as specific as treaty law.[152] Instead, it is observed as a general restatement that is molded by judicial interpretation. As described by Professor Theodor Meron in his discussion of the ICTY's *Prosecutor v. Milutinović* case, "[c]ustomary law evolves through interpretation and application. Here the science of the law blends with judicial culture of caution and restraint."[153] Professor Schachter cautions that while all rules can be made to conform with a particular outcome, it is wrong to assume that they are without a core meaning.[154]

Despite its purported fluidity, the core meaning of Rule 157 is intact: states have a right to try a suspect for a heinous offense committed abroad with no link to another form of jurisdiction. This reflects, but is not identical to, the *aut dedere aut judicare* principle captured in several multilateral treaties, which the Study cites as evidence of state practice.[155] That treaty provision arguably makes prosecution a duty. In its earliest iteration, the principle of *aut dedere aut judicare* only established an obligation to prosecute when a "request for extradition has been received and denied."[156] A distinction can therefore be made between the treaty rule mandating prosecution where extradition is requested and denied, and a permissive rule, as 157 is meant to be, where no request has been made and a third-party state takes it upon itself to prosecute a crime on behalf of the international

manuals, legislation and case-law of many States. There is also legislation and case-law, however, that does not require such a link. The Geneva Conventions do not require such a link either.").

152. *See* Hiram E. Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT'L L. 973, 979-80 (1995) (explaining that treaties are more conclusive, not universally binding); Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101, 104 (1987) ("Customary rules, however, are not static. They change in content depending upon the amplitude of new vectors [i.e., state interests].").

153. Meron, *supra* note 59, at 826.

154. Schachter, *supra* note 110, at 119-20 (explaining that customary rules "are not free of ambiguity and they may call for factual appraisals as to which reasonable persons can differ. One cannot expect them to be applied by computers.").

155. *See* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME II: PRACTICE 3883-87 (2005) [hereinafter VOLUME II] (discussing Article VI of the 1948 Genocide Convention; Article 49 of Geneva Convention I, Article 50 of Geneva Convention II, Article 129 of Geneva Convention III, and Article 146 of Geneva Convention IV; Article 28 of the 1948 Hague Convention; Article 85(1) of Additional Protocol I; Article 10 of the 1994 Convention on the Safety of UN Personnel; Article IV of the 1994 Inter-American Convention on the Forced Disappearance of Persons; Article 15(2) of the 1994 Inter-American Convention on the Forced Disappearance of Persons; Article 14 of the 1996 Amended Protocol II to the Convention on Chemical Weapons; Article 9 of the 1997 Ottawa Convention; Preamble to the 1998 International Criminal Court Statute; Article 12 of the International Criminal Court Statute; Article 13 of the 1998 International Criminal Court Statute; and Article 16(1) of the 1999 Second Protocol to the 1954 Hague Convention).

156. REYDAMS, *supra* note 45, at 44-45 (stating that this is in specific reference to Article 9 of the International Convention for the Suppression of Counterfeiting Currency which mandates that the "obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence.").

community. This distinction is deliberate and explicit, as evidenced by Henckaert's insistence that:

> Rule 157 is not reflected anywhere in a treaty, unlike other rules, [it] has not been codified, [and] there is no parallel in treaty law. . . . Since this rule . . . [is a] right, no one [will be] chided for failure to prosecute and failure to legislate because it is only a right to do so.[157]

He continues that while there exists insufficient evidence to demonstrate that there exists an obligation to prosecute, there is enough to demonstrate that there exists a right to do so.[158] This emphasizes the rule's permissive nature, which, unlike other customary norms, is demonstrated by highlighting the lack of protest to the exercise of such jurisdiction.

The Study's author explains that the number of cases brought by states reflects this permissive right where there was no objection to the exercise of universal jurisdiction even where no state expressed a desire to prosecute the accused.[159] ICJ Judge Van der Wyngaert interprets the *Lotus* dictum in paragraphs 18-19 as supporting the concept of permissive rules in her dissenting opinion in *Arrest Warrant.* The dictum declares that while states cannot exercise their jurisdiction in another state, it does not follow that:

> [I]nternational law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law . . . . 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 territory, 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.[160]

In her analysis, Van der Wyngaert distinguishes permissive and enforcement jurisdiction. Whereas permissive jurisdiction is the right to establish jurisdiction to try the crime, enforcement jurisdiction is the right to enforce that decision in another state. She interprets the *Lotus* dictum as affording permissive jurisdiction to State A to prosecute offenses committed in State B, but not to supplant the judicial system in State B. While sovereignty precludes the exercise of enforcement jurisdiction, she states "there is *no prohibition* under international law to enact legislation allowing it to investigate and prosecute war crimes and crimes against humanity committed abroad."[161]

157. Henckaerts Interview, *supra* note 128.

158. *Id*.

159. *Id*.

160. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, ¶ 46 (Sept. 7).

161. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 51 (Feb. 14) (Van Der Wyngaert, J., dissenting) (emphasis added).

The U.S. also raises the issue of pure universal jurisdiction, or the right to prosecute a suspect in absentia when a search within its territory produces no results.[162] It claims that state practice is insufficient to support the claim that failure to demonstrate that pure universal jurisdiction has attained customary status undermines the ICRC's findings. This objection, however, is arguably a red herring given that the U.S. has not limited its protests to universal jurisdiction only when it has been established in absentia.[163] In fact, the issue of pure universal jurisdiction is a distinct inquiry and has no bearing on the customary norm articulated in Rule 157.

The ICRC's rule establishes that universal jurisdiction exists when no link between the harm alleged and the forum state exists, regardless of the presence of the accused in the forum state.[164] Presence of the accused within the forum state does not undermine the meaning of universal jurisdiction, although it may put the status of pure universal jurisdiction into question. Henckaerts clarifies that the ICRC did not attach an element of absentia to the definitional scope of universal jurisdiction. Instead, the principle represents "the lowest common denominator" of a jurisdictional basis that is complementary to other bases of criminal jurisdiction where a link to a forum state exists.[165] The ICRC thus negatively defines universal jurisdiction as jurisdiction over a crime where no other basis of jurisdiction exists.[166]

The ICRC's definition is not unique. The Institut de Droit International ("IDI") has also defined the jurisdiction as one unlike any existing basis for jurisdiction for which the essence is an "absence of link between the crime and the prosecuting State."[167] "Mere presence," the IDI continues, does not "furnish such a link."[168] Professor Theodor Meron agrees with this definition of universal jurisdiction and explains:

> There is no reason why universal jurisdiction should not also be acknowledged in cases where the duty to prosecute and or extradite is unclear, but the right to prosecute when offenses are committed by aliens in foreign countries is recognized. Indeed, the true meaning of universal jurisdiction is that international law permits any state to apply

162. Bellinger & Haynes, *supra* note 11, at 466; *see also* Arrest Warrant 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 31 (Feb. 14) (Higgins J., Kooijmans, J., and Buergenthal, J., dissenting) ("[A] different interpretation is given in the Pictet Commentary: *Geneva Convention for the Ameliorization on the Condition of the Wounded and Sick in Armed Forces in the Field*, 1952, which contends that this obligation was understood as being an obligation upon States parties to search for offenders who may be on their territory. Is it a true example of universality, if the obligation to search is restricted to the own territory? Does the obligation to search imply a permission to prosecute *in absentia*, if the search had no result?").

163. *See* discussion *infra*.

164. VOLUME I, *supra* note 2, at 605-06.

165. *Id*.

166. *Id*. at 604-05.

167. Sienho Yee, *Universal Jurisdiction: Concept, Logic, and Reality*, 10 CHINESE J. INT'L L. 503, 505 (2011).

168. *Id*. at 514.

> its law to certain offenses even in the absence of territorial, nationality, or other accepted contacts with the offender or the victim.[169]

Wolfgang Kaleck, a German human rights attorney responsible for bringing several universal jurisdiction cases within European national courts—most notably the 2004 case against Rumsfeld and company—attributes the presence requirement to logistical purposes and not any restrictive rule upon states in their exercise of universal jurisdiction. He comments:

> [I]n the long run, it is difficult to start an investigation when there is no link in the country. [This is b]ecause you have to work technically and what can you do when there is no link at all . . . . With the presence requirement that has to be enforced and has to be taken more seriously by the government [which is necessary for the discovery process] so as a policy goal we should adopt this practice to ensure success.[170]

Kaleck's observation highlights that while presence has become a technical prerequisite domestically, it does not preclude a broader universality principle.[171] However, the fact that other governments do not take a warrant seriously unless presence is established also suggests that as the presence requirement develops as an expectation among other states, it may become a requirement in customary international law. The Joint Separate Opinion contemplates this possibility, but insists that great care has been taken to avoid excluding other grounds of voluntary jurisdiction during the drafting of relevant treaty provisions.[172] They conclude that as regards pure universal jurisdiction, state practice is neutral.[173] Regardless, it is a separate issue and does not have bearing on the ICRC's finding in Rule 157.

In its customary form, universal jurisdiction is a permissive right. Therefore, its strength as a customary rule is derived from acquiescence among states to a state's decision to exercise said jurisdiction. Additionally, while the presence requirement has emerged as a domestic law requirement for the sake of logistics and international comity, it neither precludes the exercise of a more pure universal jurisdiction nor is it dispositive of a right to establish universal jurisdiction. These factors help demonstrate the futility of the U.S.'s assertion that insufficient practice

169. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 570 (1995) [hereinafter Meron Internal Atrocities].

170. Skype Interview with Wolfgang Kaleck, Human Rights Attorney (Nov. 6, 2011) [hereinafter Kaleck Interview].

171. *Id*.; *see also* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 55 (Feb. 14) (Van den Wyngaert, J., dissenting) (explaining that Justice Van den Wyngaert agrees and attributes the requirement of the offender's presence in the exercise of universal jurisdiction to domestic law, which is not necessarily an expression of *opinio juris* required by international law. She explains whereas presence may be required in domestic law, there is nothing in international law that similarly makes it prerequisite.).

172. Arrest Warrant of 11 April 2000, 2002 I.C.J. ¶ 51 (Higgins, J., concurring) ("See Article 4 (3), Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Article 5 (3), International Convention against Taking of Hostages, 1979; Article 5 (3), Convention against Torture; Article 9, Statute of the International Criminal Tribunal for the former Yugoslavia; and Article 19, Rome Statute of the International Criminal Court.").

173. *Id*. ¶ 45.

of pure universal jurisdiction undermines its customary nature. As a permissive rule, a principle's customary force is evidenced by the lack of protest to its invocation. While the ICRC's determination that states have the right to vest universal jurisdiction as a matter of customary right is sound, the same cannot be said for its analysis on those heinous crimes to which international criminal liability inheres.

B. Grave Breaches versus War Crimes

The universality principle in customary law encompasses a very broad definition of war crimes that includes those violations of laws and customs of war both in international ("IAC") and non-international armed conflict ("NIAC"). This effectively collapses grave breaches, which can be committed only in IACs,[174] with a broader set of war crimes that can be committed in both international and non-international conflict into a single category. The U.S. claims that those states exercising universal jurisdiction are merely complying with the "extradite or prosecute" treaty obligation pertaining to IACs. Accordingly, the prosecutable crimes in those cases are limited to grave breaches with few exceptions. To establish the veracity of Rule 157, the ICRC should be able to demonstrate either the indistinguishable character of grave breaches and war crimes, and/or that state practice sufficiently criminalizes war crimes in national legislation or jurisprudence. In Henckaerts' words, "[i]f we only found support for grave breaches that would not have been sufficient because it is a treaty obligation. So we had to look for legislation that goes beyond grave breaches that gives the states the right to vest national jurisdiction."[175]

1. Distinct Legal Regimes

Grave breaches are defined in Geneva Convention Common Article (50/51/130/147) as well as API Article 11 and 85.[176] Historically, they have been defined as "a limited set of particularly serious violations of the Geneva Conventions of 1949 that gave rise to special obligations of the States Parties for the enactment and enforcement of domestic criminal law."[177] The *travaux préparatoires* of the Conventions demonstrate that state plenipotentiaries deliberately distinguished the concept of grave breaches from war crimes in order to ensure greater uniformity across states. Whereas war crimes had diverse

174. This takes for granted the U.S.'s objections to the inclusion of grave breaches listed under Article 85(1) of Additional Protocol I, in particular its criminalization of offenses committed against protected persons as listed in Article 44 of the Additional Protocol I. It also raises questions about the nature of armed conflict listed in Article 1(4), which is also an unsettled area of law.

175. Henckaerts Interview, *supra* note 128.

176. Int'l Comm. of the Red Cross, *How "Grave Breaches" are Defined in the Geneva Conventions and Additional Protocols* (last updated Jan. 10, 2012), *available at* http://www.icrc.org /eng/resources/documents/misc/5zmgf9.htm.

177. Marko Divac Öberg, *The Absorption of Grave Breaches into War Crimes*, 91 INT'L. REV. RED CROSS 163, 163 (2009).

domestic meaning, a grave breach draws its meaning from international consensus as enshrined in the Conventions and their Additional Protocols.[178]

Unlike war crimes to which international criminal liability inhered, grave breaches necessitated national legislation to establish liability. The Conventions considered these violations so serious that states had a treaty obligation to enact penal legislation, prosecute, or extradite them.[179] Non-grave breaches of the Conventions are sanctioned in national law by discretion. They amount to war crimes if they are serious enough.

Significantly, Article 85(5) of Additional Protocol I described grave breaches of the Geneva Conventions and their Additional Protocols as war crimes,[180] thereby attaching to grave breaches criminal consequences in international law.[181] Among the reasons for maintaining a distinction between the treaty provision and customary law, however, is that within the confines of domestic law, states are not obligated to prosecute war crimes but have a duty to prosecute or hand over a person accused of a grave breach.[182] In his comprehensive article on the matter, Marko Divac Öberg argues that thirty years since the legislation of the concept of grave breaches, the "war crimes concept is the more dynamic of the two, to the point that one may wonder whether grave breaches will disappear from international law."[183] Nonetheless, he continues, "[t]oday, grave breaches provisions, at least those of the 1949 generation, remains privileged as tried and true black-letter law, compared with the nebulous customary law origins of war crimes."[184]

The preference for the black-letter character of grave breaches is evidenced in the jurisprudence and law of international criminal tribunals as well. Consider that the Statute of the International Criminal Tribunal of Rwanda ("ICTR") does not make mention of grave breaches because of the uncontested nature of the Rwandan conflict as one of a non-international character.[185] The Statute establishes that prosecutable crimes include crimes against humanity, genocide, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, but not grave breaches.[186]

In contrast, the dissolution of the Yugoslav Republic and the attendant state and non-state violence meted out within and between the various ethnic groups and nascent states characterized the conflict as both international and non-international.

178. *Id*. at 165-66.

179. *Id*. at 165.

180. Protocol I, *supra* note 143, art. 85(5) ("Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.").

181. Öberg, *supra* note 177, at 167.

182. *Id*. at 181.

183. *Id*. at 164.

184. *Id*. at 182.

185. *See* Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994).

186. *See id*. arts. 2-4.

Accordingly, the Statute of the ICTY[187] includes both grave breaches and war crimes as possible offenses. It also distinguishes grave breaches from war crimes in Article 2 and Article 3 respectively.[188]

In *Prosecutor v. Tadic*,[189] the Appeals Chamber went to painstaking efforts to characterize the conflict as an IAC, and therefore prosecute the defendant under Article 2 grave breaches.[190] To do so, it had to distinguish its legal reasoning from the ICJ's findings in *Nicaragua* where it applied the "effective control" test to determine whether or not U.S. intervention made the conflict tantamount to an IAC.[191] The Appeals Chamber found that the Trial Chamber erred "in so far as it acquitted the Appellant on the sole ground that the grave breaches regime of the Geneva Conventions of 1949 did not apply,"[192] and held Tadic to be guilty of grave breaches.[193]

Significantly, in the series of cases that followed, the ICTY abandoned this practice and analyzed the violations under a NIAC legal regime. The strategic shift reflected a desire to pursue a less cumbersome approach to establishing liability for war crimes. Justice Richard Goldstone, who served as the ICTY's first chief prosecutor, explained that after the appeals decision, the court no longer referred to grave breaches. Instead, it charged defendants with ordinary war crimes which apply to international and non-international armed conflicts. Further, the court had the additional obligation and burden to demonstrate that an international armed conflict existed.[194] Using an Article 3 analysis, the ICTY established liability for both grave breaches and war crimes. On the one hand, this affirms that the distinct legal regimes between international and non-international armed conflict is of enduring relevance. On the other, it also highlights how grave

187. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (Sep. 2009), *available at* http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

188. *Id*. arts. 2-3.

189. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment in the Appeals Chamber, ¶¶ 84, 115, 170 (July 15, 1999).

190. *Id*. ¶ 84 ("It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.").

191. *Id*. ¶ 115 ("The 'effective control' test enunciated by the International Court of Justice was regarded as correct and upheld by Trial Chamber II in the Judgment. The Appeals Chamber, with respect, does not hold the *Nicaragua* test to be persuasive. There are two grounds supporting this conclusion."); *see also id*. ¶ 124 ("The 'effective control' test propounded by the International Court of Justice as an exclusive and all-embracing test is at variance with international judicial and State practice: such practice has envisaged State responsibility in circumstances where a lower degree of control than that demanded by the Nicaragua test was exercised.").

192. *Id*. ¶ 170.

193. *Id*. ¶ 171.

194. Telephone Interview with Richard Goldstone, Chief Prosecutor, Int'l Crim. Trib. for the Former Yugoslavia (Nov. 9, 2011).

breaches can be subsumed by a broader category of war crimes thereby diminishing the demarcation between the distinct war crimes categories.

A U.S. amendment to its penal code defining war crimes also contributes to this steady evisceration process. In 2006, U.S. lawmakers amended 18 U.S.C. § 2441 and defined certain violations of Common Article 3 to the Geneva Conventions as grave breaches.[195] This is striking since the violations listed in the Common Article do not amount to grave breaches under the Conventions as grave breaches are defined only in IACs, and Common Article 3 applies only in NIACs. Additionally, those prohibitions listed in the U.S. Code include torture, cruel or inhuman treatment, performing biological experiments, murder, mutilating or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages,[196] and are therefore broader than the list of grave breaches common to the four Geneva Conventions.[197] It is not clear why the U.S. would object to the inclusion of other war crimes committed in NIAC as grave breaches but redefine the aforementioned crimes as grave breaches in its domestic law.[198] Regardless, the U.S. state practice arguably contributes to the waning relevance of the distinction between war crimes established by treaty and those established by custom.

Notwithstanding these interesting developments, grave breaches continue to constitute a distinct legal regime that is not easily collapsed with a broader category of war crimes because of the nuances within the 1949 and 1977 generations of grave breaches. Consider the establishment of the International Criminal Court ("ICC"). The Rome Statute distinguishes between war crimes, Article 8(2)(b), and grave breaches, Article 8(2)(a).[199] Though the inclusion of all grave breaches as war crimes indicates an acceptance that grave breaches can exist outside of the strict confines of IAC, the distinction between those grave breaches remains a matter of controversy. Of particular note is the fact that the drafters included grave breaches pursuant to Additional Protocol I under the war crimes section rather than the section listing grave breaches.[200] Indeed, this categorization demonstrates the enduring objections to the Additional Protocols as controlling law and, similarly, the outstanding distinctions between grave breaches and war

195. *See* War Crimes, 18 U.S.C. § 2441 (2006) ("(c)(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict of an international character.").

196. *Id*. § 2441(d).

197. LUBAN ET AL., *supra* note 148 (listing the grave breaches common to the four Geneva Conventions as: "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health").

198. *See* R. Jeffrey Smith, *War Crimes Act Changes Would Reduce Threat Of Prosecution*, WASH. POST, Aug. 9, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/08/08/AR2006080801276.html; *see also* Bellinger & Haynes, *supra* note 11, at 443. It is of note that Congress amended the federal law in 2006 in an effort to retroactively protect U.S. soldiers from liability whereas the Government drafted its response to the ICRC in 2005.

199. *See* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), 2187 U.N.T.S. 90.

200. Öberg, *supra* note 177, at 167.

crimes. Still, a strong argument can be made that certain practices, including U.S. national legislation and ICTY jurisprudence, constitute trends indicative of a fading distinction between the two categories.

2. National Legislation and Jurisprudence

While wholly reasonable to draft a customary rule characterized by ambiguity to be shaped by judicial tribunals and academics, the distinction between grave breaches and war crimes merited more discrete treatment in the 2005 Study. The ICRC does not demonstrate how its evidence of state practice makes the distinctions between the two categories irrelevant. Contrary to the U.S.'s contention that the national legislation does not suffice to demonstrate *opinio juris* in support of Rule 157, the legislation is demonstrative of *opinio juris* as well as state practice.

The problem, however, is that the national legislation cited is vast, encompassing both narrow jurisdiction over grave breaches pursuant to an existing treaty obligation as well as broad jurisdiction over crimes irrespective of their character as a grave breach or a general war crime. The spectrum of criminal categories includes ordinary crimes, such as murder, rape assault and abduction; and, certain crimes under international law such as war crimes, crimes against humanity, genocide, and torture.[201] Moreover, the overwhelming majority of examples cited in the Study refer only to jurisdiction over grave breaches or crimes otherwise established in treaty law.[202] Only a handful of states have statutes with broad application.[203] Belarus is one such state and its statute reads:

> The Criminal Code of Belarus [1999] provides for universal jurisdiction for the crimes of genocide, crimes against humanity, the use of prohibited means and methods of warfare, violations of the laws and customs of war and grave breaches of IHL, which are included in the special section of the Code, as well as for offences under treaties to which Belarus is a party.[204]

Jurisprudence evidencing an indistinguishable approach to war crimes irrespective of their treaty or customary nature can suffice to disregard the distinctions made between them in national legislation. The ICRC cites thirty-one cases where universal jurisdiction was invoked, as demonstrated in the chart below, listing national case law as evidence of state practice. Of those, only twelve involved claims for violations of laws and customs of war beyond the scope of

201. *See* JUSTICE TOOL, *supra* note 131, at 12.

202. *See generally* VOLUME II, *supra* note 155, at 3888-3912.

203. *Id*. at 3896, 3904-3911 (Belarus, Luxembourg, Netherlands, Sri Lanka, Sweden, Switzerland, United Kingdom).

204. *Id*. at 3896.

grave breaches.[205] Notably, twenty of all listed cases involved cases emerging from World War II, the conflict in Yugoslavia, and the conflict in Rwanda.[206]

CASE	STATE (YEAR)	CRIME (IAC OR NIAC)
The Four from Butare	Belgium (2001)	Grave breaches, and AP II and CA3 (NIAC)
Djajić	Germany (1997)	Geneva Convention ("GC") and grave breaches regime
Jorgić	Germany (1997)	GC, Genocide (IAC)
Kusljić	Germany (1999)	Tried Bosnian nationals for grave breaches art. 146 and 147 of GC IV
Sokolović	Germany (1999)	Grave breaches regime (IAC)
Javor	France (1996)	Dismissed case for lack of treaty obligation or link to France
Munyeshyaka	France (1996)	Prosecution of a Rwandan priest accused of an alleged role for massacres in Kigali. Court of Cassation overruled dismissal for lack of jurisdiction citing that France was obligated to try persons pursuant to Law of Cooperation with the ICTR 1996 (NIAC)
Grabež	Switzerland (1997)	GCIII, GCIV, API, APII, customary war crimes
Niyonteze	Switzerland (1999)	National crimes, did not recognize genocide and crimes against humanity (NIAC)
Musema	Switzerland (1997)	Agreed to surrender detainee of Rwandan nationality to ICTR (NIAC)
Eichmann	Israel (1961)	Genocide, customary law
Demjanjuk	U.S. (1985)	Affirmed Israel's right to try accused

205. *Id*. at 3913-26 (Pinochet, Demjanjuk, Niyonteze, Musema, Grabež, Hissène Haberé, Knesević, Eichmann, Kusljić, Munyeshyaka, Four from Butare, and Cvjetokovic).

206. *Id*. at 3913-26 (Rwanda: Four from Butare, Niyonteze, Munyeshyaka, Musema; Yugoslavia: Sarić, Javor, Djajić, Jorgić, Sokolović, Kusljić, Knesević, Grabež; WWII: Demjanjuk, Altstötter, Sawoniuk, Kuroda, Rohrig and Others, Ahlbrecht, Eichmann, Finta, Polyukhovich).

Yousef	U.S. (2003)	Dismissed suit, terrorism not customary, no basis for universal jurisdiction ("UJ")
Altstötter (The Justice Trial)	U.S. (1947)	U.S. Military Tribunal at Nuremberg affirmed validity of universality principle
Sarić	Denmark (1994)	GCIII and GC IV, torture (IAC)
Rohrig and Others	Netherlands (1950)	Upheld jurisdiction established in Ahlbrecht by way of amendment
Ahlbrecht	Netherlands (1947)	War crimes and crimes against Humanity committed during WWII
Knesević	Netherlands (1997)	Bosnian Serbs, interpreted Art. 3 of the Act to give Dutch courts competence to try war crimes (including grave breaches and CA3)
Sawoniuk	UK (1999)	UK War Crimes Act of 1991, territorial link
Pinochet	UK (1999)	Torture, *jus cogens*
Finta	Canada (1989)	WWII, war crimes and crimes against humanity, (IAC)
Polyukhovich	Australia (1991)	Customary war crimes, WWII, IAC
Cvjetković	Austria (1994)	Art. 6 Genocide Convention
Schwammberger	Argentina (1989)	Genocide
Cavallo extradition case	Mexico (2001)	Obliged to comply with extradition request by Spain & based principle on UJ
Kuroda	Phillippines (1949)	WWII, prosecute Japanese in the Philippines
Hissène Haberé	Senegal	Dismissed for lack of jurisdiction, internal conflict

These cases certainly demonstrate that there is general support for a jurisdiction to try persons even in the absence of a traditional link to the forum state. They do not demonstrate, however, that such jurisdiction extends to a broad category of war crimes as captured by Rule 157. State practice seems to indicate a willingness by states to prosecute those crimes, which are considered an affront to humanity *in toto*. However, it is inescapable that such broad condemnation is only established in cases where the international community has articulated its collective approbation through the U.N. Security Council, (i.e., ICTY, ICTR) or atop the platform afforded to victors of war (i.e., Nuremberg, Tokyo). As such, it

may have been more appropriate to find that universal jurisdiction exists as a customary right over those crimes condemned by the international community regardless of their treaty- or customary-based status.

i. Broader Political Context: Trends before 2005

The ICRC's enthusiasm to find that states have the right to vest universal jurisdiction in their national legislation over war crimes is understandable in light of the political context at the time of writing. The establishment of the ICTY in 1993, the ICTR in 1994, and the ICC in 2002 marks a dramatic acceleration of international criminal law's development, unseen since the criminal tribunals following the Second World War.[207] The "atrocities in the former Yugoslavia and Rwanda shocked the conscience of the people everywhere, triggering within a short space of time, several major legal developments," namely the promulgation of the ICTY and ICTR Statutes under Chapter VII authority as well as the adoption of a treaty-based statute for an International Law Commission.[208] The indelible impact of the tribunals and the ICC on the ICRC is evidenced by their reference in the Study more than 170 times before the Study began its treatment of implementation and enforcement of humanitarian law.[209]

Notwithstanding the decade's unprecedented events, a few notable gaps undermine the ICRC's analysis. Namely, the Study failed to assess properly the impact of the ICJ's *Arrest Warrant* decision and the impact of universal jurisdiction cases against United States officials in Belgium and Germany, respectively, prior to 2005.

a. Arrest Warrant (Democratic Republic of the Congo v. Belgium)

In 2000, a Belgian investigating magistrate issued an arrest warrant in absentia to Abdulaye Yerodia Ndombsai, an incumbent Foreign Affairs Minister of the Democratic Republic of the Congo. The warrant alleged that he had committed grave breaches of the Geneva Conventions and their Additional Protocols as well as crimes against humanity. In response, the Congo brought suit against Belgium in the ICJ challenging the arrest warrant's validity. The ICJ restricted its analysis to the immunity due to acting state officials and ruled in favor of the Congo. In a 10-6 vote, the ICJ held that the warrant against Yerodia "failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister of Foreign Affairs of the Congo enjoyed under international law; and that

207. *See* Öberg, *supra* note 177, at 182; Meron Internal Atrocities, *supra* note 169, at 568. Universal jurisdiction developed post-WWII when most violations were prosecuted in international tribunals and courts of the occupying powers of Germany. Most violations were tried in the courts of various Allied States though they were not required to do so by international law at the time. The crimes tried were not even characterized as crimes by any general international treaty at the time. *Id*.

208. Meron Internal Atrocities, *supra* note 169, at 554.

209. Robert Cryer, *Of Custom, Treaties, Scholars, and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 239, 240 (2006).

Belgium must cancel the arrest warrant."[210] The Court found that customary international law of immunities is meant to ensure the effective performance of state officials on behalf of their respective states. The decision was careful to distinguish the concept of juridical immunity from suit from impunity for crimes thereby preserving the possibility that Yerodia can be tried after completing his term in office. While the 2002 ICJ decision did not diminish the legitimacy of universal jurisdiction, it arguably had a chilling effect on its invocation. Consider that the Court's decision, which affirmed the immunity for heads of state regardless of their alleged crimes, indicates cautionary restraint.[211] In effect, the *Arrest Warrant* case worked to resuscitate a discussion of universal jurisdiction's legitimacy, which was taken for granted until then. The Study notes the case in its compendium of state practice, and concludes that nothing in the decision impacts universal jurisdiction's standing as a customary rule.[212] This is odd given that the case's chilling effect also impacts what states deem legally permissible and obligatory. At minimum, the ICJ decision informs the scope of universal jurisdiction, which is arguably more limited than is indicated by Rule 157.

b. Belgium

In 1993, Belgium enacted a law to prosecute grave breaches pursuant to the Geneva Conventions and their Additional Protocols. In 1999, it strengthened the law and expanded it to include genocide and crimes against humanity, even for sitting heads of state.[213] Under Belgian rules, like other civil law countries, private persons can file criminal complaints with the public prosecutor, which the prosecutor must investigate.[214] While the Belgian Prime Minister supported the law when the Court of Cassation held that it can be invoked against an accused in absentia,[215] he did not have the same reaction when plaintiffs brought suit against U.S. officials.

In March 2003, seven Iraqi families filed a criminal case against George Bush and members of his Administration for war crimes stemming from the deaths of

210. Press Release, International Court of Justice, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), I.C.J. Press Release 2002/4 (Feb.14, 2002), *available at* http://www.icj-cij.org/docket/index.php?pr=552&code=cobe&p1=3&p2=3&p3=6&case=121&k=36.

211. *See* Yee, *supra* note 167, at 530 ("The movement for 'pure universal jurisdiction' has been 'trending down' since the conspicuous silence of the ICJ on the legitimacy of that jurisdiction in the *Arrest Warrant* case . . . . The subsequent downtrend may have been in no small measure due to the cautious judgment of that case.").

212. VOLUME I, *supra* note 2, at 606 ("The judgment of the International Court of Justice turned on the question of immunity of heads of State and foreign ministers and therefore no decision was taken on the extent of universal jurisdiction . . . but the majority did not contest the right to try to a suspected war criminal on the basis of universal jurisdiction.").

213. Stephen R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L. L. 888, 891 (2003).

214. *Id*. at 890.

215. *Id*. at 889-90 (referring to the Court of Cassation decision against Ariel Sharon and Yaron Almog for their role in a 1982 attack on a Beirut-based Palestinian refugee camp that resulted in the death of approximately 1,000 civilians).

dozens of Iraqi civilians killed when a U.S. missile penetrated a Baghdad bomb shelter in 1991.[216] The U.S. threatened to relocate NATO headquarters from Brussels if Belgium did not terminate its proceedings. Prime Minister Verhofstadt responded promptly and in April 2003, Belgian parliament amended its law. The amendments significantly reduced the scope of universal jurisdiction by (1) requiring passive or active personality jurisdiction; (2) providing immunity to all acting state officials as well as for all persons on official visits; and (3) restricting the ability to bring suit to prosecutors and not civilians.[217] The amendments left Belgian courts available for human rights cases when (1) the requisite tie to Belgium existed; (2) the other states with links to the crime lacked the capacity to try the cases; and (3) the accused has no immunity.[218] Notably the law's new criteria, that there exist a link between the crime and Belgium, undermine its character as universal jurisdiction even under its broad definition as a negative rule.

c. Germany

In 2004, the Center for Constitutional Rights, along with several cooperating attorneys including Wolfgang Kaleck, filed a case against Donald H. Rumsfeld, then U.S. Secretary of Defense and other U.S. officials, citing mistreatment of detainees at Abu Ghraib and other detention locations in Iraq.[219] Plaintiffs' attorneys explained that German courts treated the complaint seriously until mid-January when news of Rumsfeld's imminent visit to Germany sparked public debate. Rumsfeld threatened to cancel his trip unless German authorities revoked the warrant.[220] Two days before Rumsfeld arrival in Germany for an international security conference, a German court dismissed the case on grounds of complementarity. The prosecutor held that there was no indication that the U.S. would not investigate and prosecute said abuses.[221] Germany's dismissal of the case on political grounds was readily apparent to everyone involved. As put by Kaleck:

> [The warrant] really molested the U.S. and this was communicated to the Germans . . . . It was kind of naive of us, and still kind of naive on the part of the human rights movement, if you deal with such cases you have to deal with politics. Whereas human rights organizations try to pretend that they do not have to deal with politics—you have to deal with politics and [the] reality of power politics to bring such cases, you are not in a powerless legal sphere.[222]

216. Laurie King-Irani, *Does Universal Jurisdiction Have a Local Address? Lessons from the Belgian Experiment*, 229 MIDDLE E. REP. 20, 23-24 (Winter 2003).

217. Ratner, *supra* note 213, at 891.

218. *Id*.

219. Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Role of Political Branches in the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 14 (2011).

220. Kaleck Interview, *supra* note 170.

221. *Id*.

222. *Id*.

Notably, Kaleck and cooperating attorneys attempted to revive the criminal suit in subsequent years in Germany, as well as France. Both were dismissed on similar grounds. Applying the ICRC's own test for identifying the existence of a permissive rule, the protests by the U.S. and the Congo over the application of universal jurisdiction should have raised concerns for the ICRC. Buoyed by a decade rife with contrary evidence, the ICRC may have predicted that the trend, however mired, pointed towards more robust practice. However, in 2011, it is plainly clear that the *Arrest Warrant* case, coupled with the U.S.'s indelible reprimand of those states who dared to challenge its behavior, have had a regressive impact on the application of universal jurisdiction.

ii. Broader Political Context: Trends between 2005 and 2011

Since 2005, Germany and other states have invoked universal jurisdiction to challenge the behavior of powerful states including the U.S., Israel, and China, eliciting fervent protest by those states. The protests translated into meaningful political pressure resulting in the termination of the cases as well as amendment of universal jurisdiction laws. The regressive trend generally resulted in attenuated universal jurisdiction over crimes across several states. These measures serve as evidence of *opinio juris* and state practice, derived from a single act, and informs the status of the customary right to vest universal jurisdiction in national courts. Consider the following cases in Germany, France, Spain, and the United Kingdom, as well as proceedings within the Sixth of Committee of the U.N. General Assembly ("Sixth Committee").

a. Germany

In 2006, the U.S. passed the Military Commissions Act ("MCA"), which retroactively grants immunity to everyone involved in the enhanced interrogation techniques.[223] Kaleck, along with the Center for Constitutional Rights, revived the criminal complaints against Donald Rumsfeld, as well as U.S. Attorney General Gonzalez, John Yoo, and others "accused as the alleged legal 'architects' of the torture program" on the basis that the U.S. has shown itself unable and unwilling to investigate and prosecute.[224] The new complaint included more evidence and detail.[225] Significantly, the attorneys filed it after the resignation of Secretary

223. *German War Crimes Complaint Against Donald Rumsfeld, et al*., CTR. CONST. RTS., http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld,-et-al [hereinafter CCR] (last visited Dec. 2, 2012).

224. Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 MICH. J. INT'L L. 927, 953 (2009).

225. CCR, *supra* note 223 ("The complaint is being filed under the Code of Crimes against International Law ("CCIL"), enacted by Germany in compliance with the Rome Statute creating the International Criminal Court in 2002, which Germany ratified. The CCIL provides for "universal jurisdiction" for war crimes, crimes of genocide and crimes against humanity. It enables the German Federal Prosecutor to investigate and prosecute crimes constituting a violation of the CCIL, irrespective of the location of the defendant or plaintiff, the place where the crime was carried out, or the nationality of the persons involved. No international courts or personal tribunals in Iraq were mandated to conduct investigations and prosecutions of responsible U.S. officials. The United States has refused to join the

Rumsfeld from the helm of the Department of Defense.[226] The German prosecutor dismissed the case in 2007. Citing the Code of Criminal Procedure, he claimed that there was no "legitimizing [domestic] link[age]" to justify German universal jurisdiction over crimes committed extraterritorially and, therefore, there "was not a reasonable likelihood of convicting the suspect in Germany." [227] A group of human rights organizations filed several appeals all to no avail. On April 21, 2009, the Appeal Court Stuttgart issued the final dismissal citing the appeal as "inadmissible." [228]

b. France

Following the German prosecutor's 2007 dismissal of the revived criminal complaint, a French attorney, together with the same group of human rights organizations, filed a criminal complaint against Rumsfeld in France during his private visit in October 2007.[229] The complaint alleged torture and inhumane treatment of detainees in U.S. military custody at Guantanamo Bay and Abu Ghraib.[230] The French Public Prosecutor refused to proceed, on the ground that Rumsfeld was immune under the *Arrest Warrant* case.[231]

In a letter, the French prosecutor explained that under the *Arrest Warrant case*, officials of high rank, such as the Head of State, enjoy immunities from criminal and civil jurisdiction in other states during the exercise of their functions.[232] Although such head of state immunity ceases upon completion of the accused's official function, the prosecutor carefully notes that this is only the case for "acts accomplished before or after the period during which the protected person was occupying his/her post or for acts that, although accomplished during this period, are not related to the functions carried out."[233] Therefore, the charges against Rumsfeld cannot be "dissociated from his functions" while he was the Secretary of Defense.[234] The prosecutor notes that unlike Pinochet, Rumsfeld's

International Criminal Court, thereby foreclosing the option of pursuing a prosecution before it. Iraq has no authority to prosecute. Furthermore, the U.S. gave immunity to all its personnel in Iraq from Iraqi prosecution. All this added to the United States' unquestionable refusal to look at the responsibility of those of the very top of the chain of command and named in the present complaint, and the recent passage of the Military Commissions Act of 2006 . . . aimed at preventing war crimes prosecutions against Americans in the U.S., German courts are seen as a last resort to obtain justice for those victims of abuse and torture while detained by the United States.").

226. *Id*.

227. Kaleck, *supra* note 224, at 949, 953.

228. *Rumsfeld Torture Cases—Criminal Charges Filed*, EUR. CTR. CONST. & HUM. RTS., http://www.ecchr.de/index.php/us_accountability/articles/complaint-against-former-us-secretary-of-defense-donald-rumsfeld.html (last visited Dec. 2, 2012).

229. *Id*.

230. *Id*. (noting the memo signed by Rumsfeld of enhanced interrogation techniques).

231. Letter from Public Prosecutor (*Procureur Général*) to the Paris Court of Appeal to Patrick Baudouin (Feb. 27, 2008), *available at* http://ccrjustice.org/files/Rumsfeld_FrenchCase_%20Prosecutors%20Decision_02_08.pdf.

232. *Id*.

233. *Id*.

234. *Id*.

actions were not marginal to the exercise of his functions as the Secretary of Defense.[235] Moreover, the gravity of those alleged offenses has no bearing upon official immunity so long as they are central, and not marginal, to the exercise of his official functions.[236] The French prosecutor's judgment significantly truncates both the scope of universal jurisdiction as well as the scope of prosecutable offenses based on Head of State immunity.

c. Spain

Spain arguably led the enthusiastic charge of universal jurisdiction's potential benefits when it issued an arrest warrant for Chile's Augusto Pinochet, delivered by the United Kingdom, in 1998.[237] The extradition never came to fruition as the U.K. cancelled the extradition proceedings against Pinochet on humanitarian grounds in 2000. Thereafter, the tide against universal jurisdiction in Spain accelerated in the face of mounting cases filed against Guatemalans and Argentineans under its universal jurisdiction statute.[238] Although the Spanish Supreme Court initially required that there exist a procedural link to national interest to establish universal jurisdiction, in 2005, the Constitutional Tribunal overruled this analysis. Instead, it held that "a link to national interest [was] not required since universal jurisdiction is exclusively based on the substantive nature of grave crimes affecting the entire international community."[239] This robust authority constricted rapidly under intense political pressure when Spain filed criminal suits against Chinese, Israeli, and U.S. officials between 2003 and 2009.[240] In all three cases, the affected home countries protested that Spain's jurisdiction amounted to intervention into the states' internal affairs.[241] Spanish courts dismissed the cases for complementarity.[242]

The Spanish case against three American soldiers for the death of a Spanish journalist in Iraq is of particular note. The Spanish magistrate asserted that the soldiers must have known that the hotel was located in a civilian area occupied only by journalists.[243] The U.S. refused to cooperate with the investigation. A State Department spokesperson stated that "it will be a 'very cold day in hell,' before American soldiers have to answer to Spanish courts."[244] Other Spanish cases sought to investigate whether Spain violated its obligations by allowing U.S.

235. *Id*.

236. *Id*.

237. Langer, *supra* note 219, at 4.

238. Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond*, 35 GA. J. INT'L & COMP. L. 495, 496-97 (2007) (explaining that Spanish courts successfully prosecuted Guatemalan generals for genocide, torture and state sponsored terrorism against the Mayan people between 1978 and 1986, and has also successfully prosecuted Argentineans during the "Dirty War").

239. *Id*. at 510.

240. Langer, *supra* note 219, at 37-40.

241. *Id*.

242. *Id*.

243. Jouet, *supra* note 238, at 526.

244. *Id*. at 527.

planes to travel through Spain on their way to Guantanamo Bay or for CIA operatives who traveled through Spain during extraordinary rendition flights.[245] WikiLeaks cables revealed that the U.S. placed extraordinary pressure upon Spanish courts and judges to drop the case.[246] Universal jurisdiction came to a halt when the investigating magistrate, Baltasar Garzón, indicated that he would investigate alleged violations by Spanish authorities against Basque separatists. The Spanish courts then accused Garzón of overstepping his judicial authority, which constitutes a criminal offense in Spain, thereby ending his decades-long career as a prosecutor.[247] Spanish courts dismissed the cases on grounds of complementarity in 2011.

The cases, and the diplomatic furor they created, also prompted radical amendment to Spain's universal jurisdiction law. In 2009, Spanish legislators amended the law to require that either the accused be in Spanish territory or that there exist another relevant link between Spain and the case. The new law also prohibited Spanish courts from invoking universal jurisdiction if another national court or an international tribunal is investigating the case.[248]

d. United Kingdom

After a series of cases brought against former Israeli officials in the British courts,[249] its Parliament amended the U.K. law to prohibit magistrates from filing

245. Giles Tremlett, *Wikileaks: US Pressured Spain Over CIA Rendition and Guantánamo Torture*, THE GUARDIAN (Dec. 1, 2010, 4:30 PM), http://www.guardian.co.uk/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition; *US Embassy Cables: Spanish Prosecutor Weighs Guantánamo Criminal Against US Officials*, THE GUARDIAN (Dec. 1, 2010, 4:30 PM), http://www.guardian.co.uk/world/us-embassy-cables-documents/200177.

246. Tremlett, *supra* note 245 ("Senator Mel Martinez, a former Republican party chairman, and the U.S. embassy's charge d'affaires visited the Spanish foreign ministry to warn the investigation would have consequences." The U.S. targeted various judges and prosecutors including national court chief prosecutor, Javier Zaragoza. The WikiLeaks cable shows that Zaragoza was a valuable asset to the U.S. government in trying to stop investigations by Prosecutor Garzón who was responsible for the majority of prosecutions under universal jurisdiction in Spanish courts. Zaragoza criticized Garzón as hating Americans and seemed to provide the U.S. government with information that Garzón was already under scrutiny for "his investigation into human rights crimes committed under Spain's former dictator General Francisco Franco."); *see also* Scott Horton, *The Madrid Cables*, HARPER'S MAG.: THE STREAM, (Dec. 1, 2010, 3:51 PM), http://harpers.org/archive/2010/12/hbc-90007836. According to Harper's Magazine, the WikiLeaks cables also showed the U.S. embassy in Madrid was also involved in political pressure against Spanish courts. "These cables show that the U.S. embassy in Madrid had far exceeded this mandate, however, and was actually successfully steering the course of criminal investigations, the selection of judges, and the conduct of prosecutors. Their disclosure has created deep concern about the independence of judges in Spain and the manipulation of the entire criminal justice system by a foreign power." *Id*.

247. *See* Lisa Abend, *Sentencing Spain's 'Superjudge': Why Baltasar Garzón is Being Punished*, TIME, Feb. 10, 2012, http://www.time.com/time/world/article/0,8599,2106537,00.html.

248. Langer, *supra* note 219, at 40 (explaining amended Article 23(4)).

249. Noura Erakat, *Israel versus Universal Jurisdiction: A Battle for International Human Rights Law*, JADALIYYA (Nov. 4, 2010), http://www.jadaliyya.com/pages/index/288/israel-versus-universal-jurisdiction_a-battle-for-.

arrest warrants for universal jurisdiction cases.[250] Since the 2011 amendments went into effect, only a government minister can authorize an arrest warrant.[251] While the amendment further politicizes invocation of universal jurisdiction, it still preserves that states have the permissive right to do so.

e. African Union Challenge in the Sixth Committee

In light of the failed suits against U.S., Israeli, and Chinese officials, African countries—which have borne the brunt of international criminal law's development[252] and therefore, are specially affected—challenged the application of universal jurisdiction. In February 2009, Tanzania, on behalf of the Group of African States, requested the inclusion of an additional agenda item titled "abuse of the principle of universal jurisdiction" in the proceedings of the 63rd Session of the United Nations General Assembly. The General Assembly adopted resolution A/RES/64/117 and mandated (1) that all states submit reports on their scope and application of universal jurisdiction to the Secretary-General by April 2010; and (2) that the Sixth Committee (legal) would consider the issue as part of its discussions on pressing legal issues.[253] While the response to the Secretary-General has been underwhelming, universal jurisdiction has been the subject of heated debate since 2009.[254]

Of the 192 member states asked to submit reports to the Secretary-General, only forty-four states have complied.[255] In its 2010 report on Universal Jurisdiction, Amnesty International demonstrates a gap between the state submissions to the Secretary-General and their actual practice and legislation. The international NGO shows that states knowingly withheld information critical for an authoritative and comprehensive assessment of universal jurisdiction.[256] While this may illustrate shortcomings in the Secretary-General's assessment of the practice, it does not bode well for the status of universal jurisdiction. The lackluster and inaccurate submissions may constitute a state practice unto their own demonstrating a regression away from the robust potential of universal jurisdiction as a tool to end impunity.

250. Danna Harman, *U.K. Moves to Amend Universal Jurisdiction Law*, HAARETZ (Feb. 12, 2010, 1:33 AM), http://www.haaretz.com/print-edition/news/u-k-moves-to-amend-universal-jurisdiction-law-1.328308.

251. Jonny Paul, *U.K. Amends Laws to Protect Israelis from Prosecution*, THE JERUSALEM POST (Sep. 15, 2011, 5:00 PM), http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=238107.

252. *See generally Situations & Cases*, INT'L CRIM. CT., http://www.icc-cpi.int/EN_Menus/ICC /Situations%20and%20Cases/Pages/situations%20and%20cases.aspx (last visited Dec. 2, 2012) (pointing out that of the ICC warrants issued since the tribunal's establishment in 2002, all of them have involved cases emerging from the African continent). Not a single universal jurisdiction case has been invoked in an African national court. *See* Yee, *supra* note 167, at 522.

253. JUSTICE TOOL, *supra* note 131, at 5-6.

254. *See* Yee, *supra* note 167, at 503.

255. JUSTICE TOOL, *supra* note 131, at 5.

256. *Id*.

Within the Sixth Committee, divergent understandings of universal jurisdiction have done little to afford clarity on the matter.[257] It is of considerable significance, however, that not a single state among those who participated in the Sixth Committee discussion questioned the permissible right of universal jurisdiction. In the most recent Sixth Committee meeting in October 2011, participating member states repeatedly and consistently affirmed the critical need for a universal jurisdiction for the sake of a world where the torturer could find no haven, but lamented the lack of a more formulaic approach that would offer predictability.[258] They are primarily concerned with the fact that the tool had gotten into the hands of individuals, of civil society organizations, and other non-state actors. Absent tight regulation, these actions could not be filtered to account for comity.[259] This narrative suited those strong states that feared that universal jurisdiction would become a pathway for the individual to become a full rights-bearing agent under international law. On the other hand, weaker states grew frustrated that such a jurisdiction would only be wielded against the sovereignty of the least-developed states for which sovereignty was tenuous.[260] All parties describe the problem as the "politicization" of universal jurisdiction.[261]

While clarity on the definition of universal jurisdiction will not trump the practice itself, or its availability as customary permissive right, inter-subjective confusion among states will certainly stunt its invocation. Coupled with legislative amendments restricting the scope of universal jurisdiction by requiring a link to the forum state, the trajectory of universal jurisdiction appears to be in regression. In fact, aware of this current down-trend, human rights attorneys are reluctant to

257. Press Release, General Assembly, Principle of 'Universal Jurisdiction' Again Divides Assembly's Legal Committee Delegates; Further Guidance Sought from International Law Commission, U.N. Press Release GA/L/3415 (Oct. 12, 2011), *available at* http://www.un.org/News /Press/docs/2011/gal3415.doc.htm [hereinafter Sixth Committee].

258. *Id*. (providing responses to the principle of "Universal Jurisdiction." For example, the Cuban delegate stated "the principle needed to be discussed to avoid its misuse," and the Sudanese delegate noted "the scope of its application raised legal reservations. Universal jurisdiction was directly linked to the sovereignty of States and the principles of international law.").

259. *Id*. ("Those entities contributing to Section IV of the report raised a variety of issues, including the need for clear rules governing the application of universal jurisdiction to ensure its reasonable exercise; the necessity of considering rights and guarantees that mark the limits of State power, regardless of where a trial is conducted, once the need to exercise universal jurisdiction becomes apparent; the necessity of devising a framework of reference under international law for the principles of universal jurisdiction to specify under what conditions the State is internationally competent to investigate or prosecute extraterritorial offences; and the need to agree on the extent and applicability of universal jurisdiction within an all-inclusive multilateral arrangement, such as the United Nations.").

260. Yee, *supra* note 167, at 510, 522 (noting that not a single case was brought in Africa).

261. Sixth Committee, *supra* note 257 (explaining that it met to deliberate "on its possible misuse and imposition on State sovereignty'). The Delegate from Sudan summed it up well when describing that "[t]he application of the principle was directly linked to the Sovereignty of states," and he noted a double standard in the understanding of the principle and the selectivity of its practice. *Id*.

wield the jurisdictional tool,[262] though they have not disavowed it altogether. Kaleck sums it up when he explains:

> We all know about the limitations of international criminal justice not being able to bring cases against super and regional powers and the only way to hold them to account is to prosecute them in universal jurisdiction—if it is only used against fallen dictators and low level officials, we cannot achieve its purpose . . . it didn't develop like we imagined fifteen years ago but there is some progress. It is important that the U.S. torture policy and our accusations have been taken seriously by the majority of the legal community. Even among governments, they have taken the evidence seriously.[263]

The regressive trend in universal jurisdiction since the Study's publication in 2005 indicates that a more attenuated right to vest universal jurisdiction exists than the Study originally suggested. The precise scope of the right is not as broad or unqualified as the ICRC stated. Instead, the fact that specially affected states, like the African Union as a body, have protested its invocation against sitting heads of states and have emphasized its abuse [264] indicates that the norm may still be in formation. Moreover, it shows that the customary right to vest universal jurisdiction over war crimes is robust only when there exists general international consensus that an act amounts to a crime and that there should be accountability for this crime.

In the early nineties, and on the heels of an aborted intervention to stave off mass murder in Rwanda, the international community responded to internal conflicts with a vengeance.[265] In effect, the global movement to respond to chilling atrocities in the former Yugoslavia and Rwanda ushered in a revival of international criminal law whose jurisdictional boundaries were not policed by sovereign markers.[266] To the contrary, for an intermittent decade, it seemed that human rights and the claims of individual dignity would police sovereignty's borders.

During that time dozens of states opened their national courts to hear claims lacking the traditional jurisdictional links (i.e. active personality, passive personality, territorial, and national interest) in matters concerning those crimes considered an affront to all of humanity.[267] The mounting jurisprudence, and the palpable acquiescence to its exercise, underscored an attitudinal position common to the community of nations that each nation is empowered to act on behalf of the

262. Kaleck Interview, *supra* note 170 ("We are very . . . reluctant to use the tool because the attitude of prosecutorial authorities all over Europe is that they won't allow us to bring a case without a link to the country.").

263. *Id*.

264. LOUISE ARIMATSU, UNIVERSAL JURISDICTION FOR INTERNATIONAL CRIMES: AFRICA'S HOPE FOR JUSTICE? 4-5 (2010), *available at* www.chathamhouse.org.uk.

265. *Id*. at 4.

266. *Id*.

267. *Id*. at 5-6.

global whole to eradicate impunity for heinous crimes.[268] Upon this demonstrable attitudinal position, the ICRC found that states have the right to vest universal jurisdiction in their national courts over war crimes as a matter of customary right.[269]

The ICRC, however, failed to consider that the momentum to which it was bearing witness was context-specific. While national courts opened their doors to hear extra-territorial and extra-national claims, those claims had been rendered non-controversial by the sweeping endorsement of the U.N. Security Council. History and politics together established who, where, and what was an enemy to all humankind, not unlike the historical vectors that made deplorable those Nazi designs for ethno-national purity while condoning the mass murder of Japanese civilians in the name of national security. The "enemy of humankind" reflects a selective humanity, then and now.

As such, the U.S. Government is right to question the status of Rule 157 as a customary rule. Though equipped with antiquated modes for identifying customary international humanitarian law, the U.S. correctly noted that there does not exist sufficient consensus regarding the scope of war crimes to which international criminal liability inheres.

VI. CONCLUSION

While the scope, definition, and application of universal jurisdiction generates ample controversy, its purpose and utility remains uncontested. This speaks to the permissive nature of the rule as characterized by the ICRC. Unlike other rules, which create obligations for, or restrictions upon states, a permissive rule stipulates that no prohibition exists upon state authority. The modern approach to the formation of customary international humanitarian law is particularly appropriate as it concerns permissive rules because of the weight that should be afforded to state attitudes and state protest as opposed to actual state practice alone.

In general, the modern approach is superior in regard to human rights and humanitarian law because of international society's nature as a collective whole rather than an aggregate sum of its parts. It is also superior because of the specialized nature of the human rights and humanitarian legal regimes, and because of the unreliability of operational state practice. As a result, the methods inherent to the modern approach, namely a reliance on soft-law instruments as indicative of *opinio juris*, the flexibility in identifying a customary norm that has not hardened, and a diminished reliance upon the practice of specially affected states, are operative in the assessment of customary international humanitarian law. To this end, the ICRC was correct in its methodological approach in its Study. However, its application of the more accurate approach does not predetermine an accurate outcome.

268. *Id*. at 7.

269. *See* VOLUME I, *supra* note 2, at 604.

As it stands, the ICRC can confidently argue that states possess a right to vest universal jurisdiction in their national courts over those crimes benefitting from universal condemnation irrespective of their international or non-international character. This is distinct from its broader claim as articulated in Rule 157, which suggests that states have a customary right to vest universal jurisdiction over war crimes. As shown here, the approach to customary law does not presuppose a particular outcome. It is worthwhile to also consider whether choosing between the traditional and modern approach is relevant at all. Perhaps using other disciplinary approaches, like sociology or political science, to identify customary law is more appropriate. Whichever approach is ultimately used, this paper attempts to demonstrate, in part, that customary law is not subject to mathematical algorithms and definitive accuracy. To the contrary, customary law is complex and nonetheless, equally binding on the most powerful and weak states alike.