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Does Security Council resolution 1503 that calls for referral of ICTR and ICTY cases to national jurisdictions (and which was adopted, as were the ICTY and ICTR statutes, pursuant to Chapter 7 of the Charter of the United Nations, expand the jurisdiction of these nations over the relevant crimes? If the language of the resolution is inadequate, can it be done by a more explicit Security Council resolution?

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MEMORANDOM FOR THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

ISSUE: Does Security Council resolution 1503 that calls for referral of ICTR and ICTY cases to national jurisdictions (and which was adopted, as were the ICTY and ICTR statutes, pursuant to Chapter 7 of the Charter of the United Nations, expand the jurisdiction of these nations over the relevant crimes? If the language of the resolution is inadequate, can it be done by a more explicit Security Council resolution?

Prepared by John T. Rotterman
Fall 2004

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I. Introduction and Summary of Conclusions

A. Issues

Does the United Nations Security Council Resolution 1503 expand national jurisdictions to handle crimes committed during the Rwandan genocide? The question presumes that the Security Council has the power to change the domestic law of member nations with its resolutions. To be sure, a given nation's stance on the process of treaty ratification would go directly to the heart of that question. An examination of the policies of each Member State of the United Nations is clearly beyond the scope of this memorandum.

After a brief survey of the relevant historical information, both with respect to the resolutions in question and the genesis of the International Criminal Tribunal for Rwanda (ICTR), an examination will be made as to what would be necessary for a country with a system of treaty ratification like the one employed by the United States to view and implement Security Council Resolutions as domestic law.

Secondly, this memorandum will undertake an investigation of the nature of the power necessary for the United Nations (UN) and specifically the Security Council, to expand the jurisdiction of domestic courts. This memorandum concludes that the Security Council could compel States to make such changes by invoking either its powers under article 7[1] of the UN Charter, or under the implied powers of Article 25[2].

[1] UN CHARTER, ch. 7.

[2]UN CHARTER, art. 25.

B. Summary of Conclusions

1. Security Council resolution 1503 which calls for referral of ICTR and ICTY cases to national jurisdictions (and which was adopted, as were the ICTY and ICTR statutes, pursuant to Chapter 7 of the Charter of the United Nations), does not expand the jurisdiction of these nations over the relevant crimes.

Resolution 1503 simply does not contain language specific enough to expand the jurisdiction of a State over the relevant crimes. Reading the desired effect into the resolution as written strains the capacity of the phrases.

2. The language of the resolution is inadequate, but can it be remedied by a more explicit Security Council resolution.

The Security Council has been given broad powers by the UN Charter. While these powers were effectively checked during the cold war due to the ever present threat of a Soviet veto, they did not cease to exist. In order to facilitate the arrival of justice to Rwanda, the Security Council can craft a resolution which expands the jurisdiction of States to cover the relevant crimes.

Part II: Factual Background

A. The Birth of the ICTR and its role in Rwandan National Courts.[3]

An independent commission (The Commission) of experts convened, under direction of the United Nations (UN) to establish the existence of grave breaches of international humanitarian law.[4] The Commission's findings led to the creation of the

[3] *See generally* Navanethem Pillay, *WAR CRIMES TROBUNALS: THE RECORD AND THE PROSPECTS: The Rwanda Tribunal and its Relationship to National Trials in Rwanda*, 13 Am. U. Int'l L. Rev. 1469 (1998). [Reproduced in accompanying notebook II, at tab 21]

ICTR. Specifically, the commission stated that "there exists overwhelming evidence to prove that acts of genocide against the Tutsi group were perpetrated in by Hutu elements in a concerted, planned and systematic and methodical way."[5] The commission concluded that genocide had taken place and recommended that the Security Council create a tribunal to bring to justice the perpetrators.[6] Resolution 955 of the Security Council made good on the commission's recommendation and created the ICTR.[7] Importantly, even at this early stage, resolution 955 "decides that all States shall cooperate fully with the International Tribunal and its organs…and that consequently all States shall take any measures necessary to under their domestic law to implement the provisions of the present resolution and the Statute."[8] The ICTR was created pursuant to the powers granted to the UN under its own charter.[9]

B. Modernization of Rwandan Local courts[10]

For its new role on the prosecution of those connected to the genocide, the gacaca court system was updated extensively.[11] The government in Rwanda has tried to differentiate the new gacaca courts by calling them either "modernized gacaca," or as

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[4] S.C. Res. 935, U.N. SCOR 3400th mtg.at 2, U.N. Doc. S/RES/935 (1994) [Reproduced in accompanying notebook II, at tab 34]

[5] U.N. Doc. S/1994/1125, at 30. [Reproduced in accompanying notebook II, at tab 36]

[6] *Id*. at 31.

[7] S.C. Res. 955, U.N. SCOR 3453th mtg.at 1, U.N. Doc. S/RES/955 (1994) [Reproduced in accompanying notebook II, at tab 23]

[8] *Id*. at 2.

[9] *See generally* U.N. Charter art. 39, 41, 48. [Reproduced in accompanying notebook II, at tab 17]

[10] *See generally* Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda,* 34 N.Y.U. J. Int'l L & Pol. 355 (2002) [Reproduced in the accompanying notebook I, at tab 16]

[11] L. Danielle Tully, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. Int'l & Comp. L. Rev. 385, 398. (2003). [Reproduced in the Accompanying notebook II, at tab 38]

"gacaca jurisdictions."[12] The complimentarity of gacaca jurisdictions and the ICTR is not complete, as gacaca courts are limited to hearing offenses that fall into categories 2, 3, and 4.[13] These new courts, while not perfect in the implementation of the applicable law, represent the first best effort to achieve real justice in Rwanda.[14]

Even though there exists extensive shared jurisdiction between the gacaca courts and the ICTR, indeed, there have been times when both the same person has been sought by both systems.[15] The statute of the ICTR explicitly gives the tribunal primacy over Rwandan national courts.[16] It reads in relevant part, "The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the…Tribunal for Rwanda may formally request national courts to its competence in accordance with the present Statute…"[17] This notion of a tribunal having primacy over the relevant State courts represents a change from earlier UN doctrine. A 1972 General Assembly resolution asserts "that every State shall have the right to try its own nationals for war crimes or crimes against humanity."[18]

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[12] *Id* at 398. *Citing* Peter Uvin, *The Introduction of a Modernized Gacaca for Judging Suspects of Participation in the Genocide and the Massacres of 1994 in Rwanda* (2000) (unpublished manuscript on file with the *Boston College International & Comparative Law Review* until May, 2004)

[13] Organic law no. 40/2000 at art 2. [Reproduced in accompanying notebook II, at tab 35]

[14] *Supra* note 11 at 414.

[15] See Philip Gourevitch, Justice in Exile, N.Y. Times, June 24, 1996, at A15[Reproduced in the accompanying notebook I, at tab 13]; as cited by Madeline H. Morris, Symposium: *Justice in cataclysmic criminal trials in the wake of mass violence: Article: the trials of concurrent jurisdiction: the case of Rwanda*, 7 Duke J. Comp. & Int'l L. 349, 364. (1997) [Reproduced in the accompanying notebook I, at tab 13].

[16]*Supra* note 7. at Art. 8 §2.

[17]*Id.*

[18] G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 18 at 2., U.N. Doc. A/9018 (1973). [Reproduced in accompanying notebook II, at tab 22]

Even with two venues to try those charged, progress has been slow, delivering what has been called "justice delayed."[19] As it stands now, the ICTR is handling a small fraction of the trials while leaving the lion's share to local Rwandan jurisdictions.[20]

C. Limitations of the ICTR

The ICTR was created with fairly narrow geographical and temporal limitations. Its statute confines its jurisdiction to crimes committed in violation of international humanitarian law in the territory of Rwanda and neighboring States during the period of "1 January 1994 and 31 December 1994."[21] While some have called for the elimination of a territorial connection requirement, and the allowance for the prosecution of all those affiliated with the genocide.[22] That avenue of inquiry is beyond the scope of this memorandum.

The statute of the ICTR also acknowledges and provides for the presence of concurrent jurisdiction.[23] The relevant text reads: "The international Tribunal for Rwanda and national courts shall have concurrent jurisdiction…"[24] Indeed, the Rwandan national court system was rebuilt with an eye towards prosecuting crimes of committed

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[19] Madeline H. Morris, *Symposium: Justice in cataclysmic criminal trials in the wake of mass violence: Article: the trials of concurrent jurisdiction: the case of Rwanda*, 7 Duke J. Comp. & Int'l L. 349, 374. (1997). [Reproduced in accompanying notebook II, at tab 15]

[20] *Id*. at 367

[21] *Supra* note 7, at 1.

[22] Open letter from Avocats sans Frontiers to the U.N. Security Council, regarding the need to expand the jurisdiction of the ICTR. As cited by Shawn Smith, The International Criminal Tribunal for Rwanda: An Analysis on Jurisdiction, 23 T. Marshall L. Rev. 231 (1997), [Reproduced in the accompanying notebook III, at tab 51].

[23] *Supra* note 7. at 8.

[24] Id.

during the aforementioned period of time.[25] These gacaca courts are deeply rooted in the Rwandan system of dispute resolution.[26] The community based system of dispute resolution was extant in pre-colonial Rwanda,[27] and even managed to function during the period when the acts of genocide were being committed.[28]

D. The Completion Strategy of the ICTR

The completion strategy of the ICTR found in a letter from the tribunal's president to the president of the Security Council[29] contains language discussing the transfer, by the prosecutor, to national jurisdictions.[30] At the time of the writing of the completion strategy, 41 persons were earmarked for transfer to other States.[31] It goes on to discuss several difficulties that have arisen, or are likely to arise in the transfer of defendants to other States for trial. In some cases, the laws of a State where a prisoner is present may not include the relevant crimes.[32] In other States, the case may have been effectively closed with the local authorities reluctant to re-open the investigation.[33] Further complicating the situation is that many of the States that have been called upon to

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[25] *Supra* note 11 at 392

[26] *Id.* at 396

[27] *Id.*

[28] *Id.* at 397.

[29] U.N. Doc. S/2004/341 [Reproduced in the accompanying notebook II at tab 20]

[30] *Id.* at §6.

[31] *Id.*

[32] *Id.*

[33] *Id.*

assist the ICTR are less developed countries whose judicial systems are already being stressed attempting to handle purely local cases.[34]

Even transfers to Rwandan control are not without their problems.[35] First, the Rwandan courts are already crowded with cases associated with the genocide.[36] Secondly, the Rwandan courts recognize the death penalty, whereas the ICTR does not.[37] The completion strategy ends the discussion of transfer by stating that the prosecutor "will initiate discussions with States regarding transfer of cases…"[38]

At the very least, there should not be any questions of legality concerning the transfer of indictees to Rwandan courts. This assertion is based on the fact that the Rwandan Constitution does not prohibit retroactive offenses provided that the offenses are considered to be criminal by the international community.[39]

E. Comparisons to the International Criminal Tribunal For Yugoslavia (ICTY)

The completion strategy of the ICTR is very similar to the one employed by the ICTY. Indeed, the resolutions to be discussed are equally applicable to both tribunals.

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[34] *Id.*

[35] *See generally* Brent Wible, *DE-JEOPARDIZING": DOMESTIC PROSECUTIONS FOR INTERNATIONAL CRIMES AND THE NEED FOR TRANSNATIONAL CONVERGENCE,* 31 Denv. J. Int'l L. & Pol'y 265 (2002). [Reproduced in accompanying notebook I, at tab 4]

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] William A. Schabas, *PROSECUTING INTERNATIONAL CRIME: Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems,* 7 Crim. L.F. 523, 536,537 (1996) [Reproduced in the accompanying notebook II, at tab 25].

However, comparisons between the two tribunals as to their respective capacities to transfer indictees to domestic jurisdictions are of a limited value.

From the moment of their respective inceptions, the relationship between the tribunals and domestic jurisdictions has been different. In the case of the ICTR, it was conceived and developed to function with Rwandan local courts. Certainly, it has always had primacy over the domestic courts of Rwanda, but as discussed above, the Rwandan domestic court system was re-built with an eye towards to handling some of the cases associated with the genocide.

By comparison, the ICTY was originally conceived and developed to exist as a wholly supra-national device. Importantly, the discussion of transferring ICTY cases to domestic jurisdiction has been limited to transfers of States of the former Yugoslavia.[40] In the Ninth Report to the United Nations, the possible transfer of certain cases is

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40 Ninth Report to the United Nations on the ICTY, U.N. Doc. S/2002/985, para 326-327 (Sept. 4, 2002). **"**326. In addition, during the period, the Tribunal, mindful of its ad hoc status, entered into a process of joint reflection involving its three principal organs in order to honour the commitments it made to the Security Council, that is, to complete the investigations in 2004 and first instance trials in 2008. In that regard, the gradual re-establishment of democratic institutions in the States of the former Yugoslavia and the reforms of the judicial systems undertaken with the international community's assistance made it possible to contemplate the implementation of a process of referral of certain cases to national courts. From this perspective, the Tribunal intends to concentrate its activity on trying the major political and military leaders and referring cases involving intermediary-level accused to national courts, in particular, those of Bosnia and Herzegovina. Thus, the President and Prosecutor advocated the establishment of a chamber with jurisdiction to try the accused whose cases the International Tribunal will refer within the State Court of Bosnia and Herzegovina. They also proposed that the local court personnel, prosecutors and judges receive training in international humanitarian law since this law is constantly evolving and becoming increasingly complex. Since they must ensure that the national courts operate in all fairness with respect for the international norms for the protection of human rights and in keeping with the Statute of the Tribunal, the President and the Prosecutor considered the possibility of international observers and judges participating in the work of the national courts.

327. The International Tribunal cannot perform alone the work of justice and memory required for rebuilding a national identity. Consequently, it encouraged the States of the former Yugoslavia to take parallel action so that they fully participate in bolstering the work of justice accomplished and, by the same token, building peace and reconciliation in the region, a vital process. The reforms related to the Tribunal's completion strategy thus put forward a model of complementary justice which involves domestic courts in the work of international courts." [Reproduced in the accompanying notebook III, at tab 50]

discussed.[41] The report speaks to "building peace and reconciliation," through encouragement of the "States of the former Yugoslavia to take a parallel track."[42]

This is important for two reasons. Under the theories of universal jurisdiction, all ICTY indictees would have a legally cognizable connection to the new States.[43]

In contrast, if the ICTR were to transfer indictees to domestic jurisdictions, it would almost assuredly include transfers to States that have far more limited, if not non-existent ties to the Rwandan genocide. This means that a discussion of transferring cases from the ICTR to other State jurisdictions must be based upon a different legal background.

F. The Role of Security Council Resolutions

The completion strategy was written and its deadlines established by looking to two Security Council Resolutions that call upon the ICTR to finish its work by 2010.[44] Also contained within these resolutions are passages that mention the utilization of other national jurisdictions to aid in the completion of the ICTR's work. Resolution 1503 reads on relevant part: "Urging the ICTR to formalize a detailed strategy…to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, as appropriate, including Rwanda…"[45] Additionally, resolution 1534 "calls on the…ICTR

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[41] *Id.*

[42] *Id.*

[43] *See also* Michael Bohlander, *Last Exit Bosnia – Transferring War Crimes Prosecution From the International Tribunal To Domestic Courts*, 14 Crim. L.F. 59 (2003). The article does not discuss legal issues as is done here, but rather discusses the practical and pragmatic concerns that are inherent in efficiently and ethically transferring prosecution to states scarred by the conflicts that those charged were a part of. [Reproduced in accompanying notebook II, at tab 28]

[44] S.C. Res. 1503, U.N. SCOR 4817th mtg.at 7, U.N. Doc. S/RES/1503 (2003) [Reproduced in accompanying notebook II, at tab 19]; S.C. Res. 1534, U.N. SCOR 4935th mtg.at 3, U.N. Doc. S/RES/1534 (1994) [Reproduced in accompanying notebook II, at tab 34].

prosecutor to review the case load…with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions."[46]

III. Legal Analysis.

A. Security Council Resolutions Under U.S. law.

The United States, with its well developed legal system, can serve as a model for understanding the kinds of demands that will be placed upon resolutions before they can be incorporated into U.S. law. Although different States around the world react and implement treaties (e.g. the UN Charter) and subsequent products of those treaties (e.g. resolutions of the Security Council) in different ways, the standards that the U.S would apply can still be useful as a limited guide to what a similarly situated State would require.

Under the laws of the United States, a ratified treaty to which the U.S. is a signatory is considered part of the supreme law of the land.[47] Subject to the doctrine of self-execution, a treaty need not require additional government action to become law.[48]

1. Doctrine of Self-Execution

Current case law articulates three parts to the doctrine of self-execution. That is, three case specific ways to establish whether or not a given treaty is self-executing.[49] The

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[45] *Id.*

[46] *Id* at 4.

[47] U.S. Const. art 4. "All treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land…" [Reproduced in the accompanying notebook I, at tab 1].

[48] Edwin F. Feo, *Self-execution of United Nations Security Council Resolutions Under United States Law*, 24 UCLA L. Rev. 387, 390 (1976-1977) [Reproduced in accompanying notebook II, at tab 32]
See Also James R. Nafzinger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 Am. J. Comp. L. 421 (1998). [Reproduced in accompanying notebook II, at tab 31]

[49] *Id.*

first of these tools of interpretation looks to the language of the document. If the document requires a "future action," by the executive or legislative branches, then it can reliably be considered to not be self-executing.[50] The intent of the signatories has been held to be controlling when it comes to deciding if a treaty was meant to be construed as self-executing.[51]

2. The Need For Self-Executing Legislation

Secondly, it is important to look for the existence of any implementing legislation.[52] If a treaty is made the subject of domestic legislation, then the passing of that legislation must take place before the treaty can be considered implemented.[53] However, non-ratified treaties are often used to aid courts in the process of statutory interpretation.[54] While use of a non-ratified treaty to interpret a statute does afford even non-ratified treaties a modicum of power in the U.S. system, the power of a ratified treaty is clearly preferable,

3. Portions Left to Congress

Thirdly, if the treaty concerns an area of law that is traditionally left to Congress. Specifically, "treaties on patents, criminal offenses,[55] and appropriations have been held

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[50] *Id*.

[51] *Id*. at 391.

[52] *Id*.

[53] *Id*.

[54] Beharry v. Reno 183 F.Supp.2d 584, *593 (E.D.N.Y.,2002) [Reproduced in the accompanying notebook III, at tab 42].

[55] The Over the Top, 5 F.2d 838, 845. Containing the following relevant language: "Now the grant by one sovereign to another of the right to seize its nationals upon the high seas without process and by force majeure for crimes committed by those nationals against the offended sovereign, by no means declares that those acts when committed on the high seas constitute such crimes. If, before this treaty was contracted, the

to be non-self-executing."[56] It is worthy to note that only the appropriation of funds is constitutionally forbidden to be dealt with via treaty.[57]

The treatment of Security Council resolutions in domestic U.S. courts is often premised on the notion that because the UN Charter is not entirely self-executing, products of Security Council must also be scene as not inherently self-executing.[58]

However, if a Security Council Resolution is paired with a concurrent executive order to enforce it, the resolution would then be considered a federal statute and subject to constitutional guarantees.[59] The case from which this conclusion can be derived is *Diggs v. Schultz.*[60] Which in relevant part reads: "in 1966, the Security Council of the United Nations, with the affirmative vote of the United States, adopted Resolution 232 directing that all member States impose an embargo on trade with Southern Rhodesia -- a step which was reaffirmed and enlarged in 1968. In compliance with this resolution, the Executive Orders 11322 and 11419 were issued, establishing criminal sanctions for violation of the embargo under 22 U.S.C.S. § 287c."[61] The text of the resolutions and the accompanying executive order are in this case irrelevant. For the present purpose, it is

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unlading of merchandise by a ship of British registry at a point more than four leagues removed from the coast of the United States did not constitute a crime against the United States (and there appears to be no contention that it did), then *the treaty could not and did not make it a crime* (emphasis added).

[56]*Supra* note 40, at 399.

[57]*Supra* note 47, "all bills raising revenue shall originate in the House of Representatives."

[58] People of Saipan v. United States Dep't of Interior, 502 F.2d 90, 100 (9th Cir. 1974), *cert denied,* 420 U.S. 1003 (1975) Reproduced in the accompanying notebook III, at tab 43]; Pauling v. McElroy, 164 F. Supp. 390, 393 (D.D.C. 1958), *aff'd*, 278 F. 2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960) [Reproduced in the accompanying notebook III, at tab 44]; Sei Fujii v. State, 38 Cal 2d 718, 242 P.2d 617 (1952). As cited by Supra note 39. at 410.[Reproduced in the accompanying notebook III, at tab 40].

[59]*Supra* note 48. at 407.

[60]Diggs v. Schultz 470 F.2d 461. [Reproduced in the accompanying notebook III, at tab 52]

[61]*Id*. at 461.

sufficient to note that the court imputed the force of a statute to the resolutions on the grounds that the executive order had removed the need to consider whether they were self executing or not.[62]

B. A Textual Analysis of the Resolutions[63]

Additionally, the language of the resolutions can be examined to establish if they are self-executing or not.[64] In *Sei Fujii v. State*, the court looked to the language of the UN Charter in article 104 to show when the framers wanted something to be self-executing. Article 104 reads: "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes."[65] This requirement can be read as a test for "specificity."[66]

1. Resolution 1503

Analyzing the applicable Security Council resolutions yields a mixed result. The first mentioning of help from other States contained in Resolution 1503 calls the "full cooperation by all States" an "essential prerequisite to achieving all objectives of the…ICTR."[67] This language is then partially qualified by the following: "especially in

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[62] *Supra* note 48. at 407.

[63] The International Court of Justice has also noted the importance of the text of a resolution in establishing its binding force, "The language of a resolution of the Security Council should be carefully analysed (sic) before a conclusion can be made as to its binding effect." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) 1971 I.C.J. 16, *53

[64] *Supra* note 48. at 412, Pauling v. McElroy, 164 F. Supp. 390

[65] *Supra* note 48, at Sei Fujii v. State, 38 Cal. 2d 718 at 724.

[66] *Supra* note 64.

[67] *Supra* note 44.

apprehending all remaining at large persons indicted by the…ICTR."[68] This first portion does not seem to be able to pass the specificity test. To note that "full cooperation," is required does not provide the reader with a detailed idea of what is required. It may be implicit that the expansion of domestic jurisdictions is entailed in the idea of "full cooperation," but it is by no means incontrovertibly present in that statement. Further, the last subordinate clause of the quoted paragraph could be read to limit the idea of "full cooperation," to assisting the ICTR in apprehending those that have already been indicted. The expansion of domestic jurisdictions can be read into the cited portion, but it is not explicitly there.

Later in the same resolution the Security Council "Urges the ICTR to formalize a detailed completion strategy…to transfer cases to competent national jurisdictions."[69] Here. The operative word is "competent." Appropriate jurisdiction is no doubt a part of judicial competency, but the requirement of competency does not include within it an affirmative command for the expansion of jurisdictions. If it compels anything, it instructs the ICTR to the carefully examine the domestic court systems where they would propose to transfer some of their cases.

The next part of the Resolution invokes the powers granted to the UN under Chapter 7 of the charter. Importantly, under Chapter 7, "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions"[70] At least in theory, if Resolution 1503 were interpreted to be

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[68] *Id.*

[69] *Id.*

[70] U.N. CHARTER art. 41, para. 1. [Reproduced in accompanying notebook II, at tab 17]

binding in its requests from member nations, the Security Council could apply sanctions to noncompliant States.[71] An analysis of possible actions of the Security Council under such a circumstance is beyond the scope of this memorandum.

With that in mind, the following portions of the resolution could be interpreted to carry the force of UN action behind them in the face of non-compliance. The Resolution "calls upon the international community to assist national jurisdictions…"[72] The implicit presumption of this section is that some nations have already expanded their national jurisdictions to include persons indicted by the ICTR. It carries with it no affirmative command for other jurisdictions to likewise expand their capacity. Additionally, calling upon the international community to "assist," national jurisdictions is line with the presumption that some other nations have already expanded their jurisdiction, but is hardly a command for nations that have not expanded their jurisdiction to do so.

The most compelling language that appears in the resolution "calls on all States, specifically Rwanda, Kenya, the Democratic Republic of the Congo, and the Republic of the Congo to intensify cooperation with and *render all necessary assistance* to the ICTR (emphasis added.)"[73] The all inclusive nature of the phrase, "all necessary assistance," if read literally, by default would include the expansion of domestic jurisdictions if such assistance were deemed necessary. Yet this too is potentially limited by a very specific qualifier in the attendant subordinate clause. The relevant text reads as follows; "including on investigations of the Rwandan Patriotic Army and efforts to bring Felician

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[71] *Id.*

[72] *Supra* note 44. at 1.

[73] *Id* at 3.

Kabuga and all other such indictees to the ICTR."[74] To the author of this memo, there are two ways to interpret the addition of this specific requirement to the broad idea of "all necessary assistance."

First, it can be seen, not as a limitation on the idea of "all necessary assistance," but simply as an addendum to harp on one of the pressing needs of the ICTR. The fact that the specific language is attached to the rest of the statement with the word "including," lends support to this idea. A dictionary investigation as to the scope of the meaning of the word "include," yields the following relevant information.[75] The word 'include,' most probably is being used to denote a partial list of what is being requested and of whom. In effect, that the word "include," joins the broad idea of "all necessary assistance," to the much narrower specific request to aid in the investigation and procurement of idictees might have been a conscious effort by the drafters not to limit the scope of the former with an all inclusive notion of what type of aid was to be rendered. Put another way, if the cited passage had read been written with a construction based upon the word 'comprise,' and not 'include,' then the clause could more readily be interpreted to limit the scope of the idea of aid to rendering investigative assistance. As it is written, it is at best a non-exhaustive mentioning of a form of aid to be rendered. At

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[74]*Id.*

[75]THE AMERICAN HERITAGE COLLEGE DICTIONARY 687 (3d ed. 1997) "Some writers insist that *include* be used only when it is followed by a partial list of the contents of the referent of the subject. Therefore, one may write *New England includes Connecticut and Rhode Island*, but one must use *comprise* or *consist of* to provide full enumeration: *New England comprises (not includes) Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine.* This restriction is too strong. *Include* does not rule out the possibility of a complete listing. Thus the sentence *The bibliography should include all the journal articles you have used* does not entail that the bibliography must contain something other than journal articles, though it does leave that possibility open. The use of *comprise* or *consist of*, however, will avoid ambiguity when a listing is meant to be exhaustive. Thus the sentence *The task force includes all of the Navy units on active duty in the region* allows for the possibility that Marine and Army units are also taking part, where the same sentence with *comprise* would entail that the task force contained only Navy forces." [Reproduced in the accompanying notebook III, at tab 57].

worst, it is an ambiguous addendum that may or may not limit the scope of the aid to be rendered.

The second way to read the addition of a specific qualifier to the broad statement that opens the passage is that it was meant only to apply to the countries mentioned. With this interpretation, the aid requested of States not specifically mentioned is as written "all necessary aid." It seems unlikely that this language would satisfy the aforementioned specificity test. As such, in US courts, resolution 1503 would likely not be seen as self-executing.

2. Resolution 1534

Resolution 1534,[76] likely does not pass the specificity requirement either. It contains largely the same assertions as resolution 1503 with the following addition. Prior to the phrase, "render all necessary assistance,"[77] it calls upon "all States to *intensify cooperation* (emphasis added)…with the ICTR."[78] If the idea of "all necessary asisstance," does not on its face include the idea of intensive cooperation, it seems as though it should be read as facially meaningless. Under this interpretation, the cited Security Council resolutions do not on contain language specific enough to expand the jurisdictions of other States. Under this interpretation, jurisdictional expansion could only take place if the cited resolutions had included something like the following text:

> "*Reaffirms* the necessity of trial of persons by the ICTR and reiterates its call on all states especially, but not limited to, Rwanda, Kenya, the Democratic Republic of the Congo and the Republic of the Congo to render all necessary assistance to the ICTR, including, but not limited to, whatever jurisdictional expansion is

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[76] *Supra* note 44.

[77] *Id* at 2.

[78] *Id*.

necessary to try inditess that the ICTR seeks to transfer in accordance with its completion strategy."[79]

This language would succeed in two principle areas where the actual text is too ambiguous to conclusively expand the jurisdictions of other nations. First, the emphasis on cooperation by other African countries in the region of the ICTR is preserved, but it avoids the interpretation that those countries were supposed to be the exclusive focus of the text.

Additionally, the scope of the assistance cannot be read to be limited to the apprehension and transfer of indictees found abroad. If these textual changes were included in a subsequent resolution, the troublesome ambiguities mentioned would not be present.

C. Security Council Resolutions that Have Changed Laws.

The Security Council has previously passed resolutions that have compelled member States to take very pointed steps to be in compliance. After the bombing of Pan Am flight 103, the Security Council passes resolutions that required Libya to respond in a way that was arguably incompatible with its domestic responsibilities under a pre-existing treaty. More recently, after the terrorist attacks against the U.S. on September 11, 2001, resolutions were passed which required States to, *inter alia*, criminalize acts of terrorism.

1. Resolutions Surrounding the Libyan bombing of Pan Am 103

After a three year investigation into the bombing of Pan American Flight 103 led investigators from the U.S. and U.K. to conclude that the terrorists were Libyan agents, the investigating governments demanded that Libya extradite the suspects so they could

[79] Suggested text based on the text of Res. 1534 at 2.

be brought to trial.[80] In the face of Libyan non-cooperation, the Security Council passed a number of resolutions that became increasingly direct in their language.[81]

First among these was Resolution 731 passed on January 21, 1992.[82] The language of this first Resolution, suffers from many of the language based inadequacies discussed above. In lieu of demanding a form of specific compliance (i.e., extradition of the suspects), it "Strongly deplores the fact that the Libyan government has not yet responded effectively…"[83] The Resolution then goes on to "urge," the government of Libya to "immediately provide a full and effective response…"[84] An even more oblique responsibility is levied upon the international community as a whole, where all States are "urged…individually and collectively to encourage the Libyan Government to provide a full and effective response…"[85] Three days prior, Libya sought relief with the International Court of Justice.[86] This request for provisional measures was premised on alleged violations of the Montreal convention by the U.S. and the U.K.., this request was denied by the court.[87]

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[80] Eric Zubel, *The Lockerbie Controversy: Tension between the International Court of Justice and the Security Council.* 5 Ann. Surv. Int'l Comp. L. 259, 261. (1999). [Reproduced in accompanying notebook II, at tab 30]

[81] *Id* at 263,264.

[82] U.N. SCOR, 3033d mtg., U.N. Doc. S/RES 731 (1992). [Reproduced in the accompanying notebook III, at tab 48]

[83] *Id* at 2.

[84] *Id* at 3.

[85] *Id* at 5.

[86] *Supra* note 80 at 262.

[87] *Id*.

2. Domestic Law v. Resolutions

Subsequent Security Council Resolutions are important to the matter at hand for the following two reasons. 1). They order the government of Libya to take actions which may violate its domestic extraditions laws, and 2) the Security Council points to article VII of the UN Charter for the authority to do so. [88]

Resolution 748 builds on the language of Resolution 731 and "*Decides* that the Libyan Government must now comply without further delay with paragraph 3 of resolution 731…"[89] and severely limits the capacity of other States to engage with Libya.[90]

The language most important to the task at hand appears at paragraph 7, which reads:

> "…all States, including States not members of the United Nations, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit…"[91]

Here, the Security Council is asserting a power very similar to that which would be required to compel States to alter their jurisdiction to try cases assigned to them from the ICTR. In this case, the Security Council is calling upon states to disregard pre-existing international obligations to comply with a very pointed resolution. To the extent that domestic jurisdictional laws can be considered analogous to obligations arising from

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[88] U.N. SCOR, 3036d mtg., U.N. Doc. S/RES 748 (1992); U.N. SCOR, 3312d mtg., U.N. Doc. S/RES 883 (1993). [Reproduced in the accompanying notebook III, at tab 49]

[89] *Id* Resolution 748 at 1.

[90] *Id* at 4,5,6.

[91] *Id* at 7.

international agreements, the power of the UN to craft a resolution demanding States to expand the scope of their domestic jurisdiction would seem manifest.

Indeed, Libya continued to pursue its claim through the ICJ. In its opinion refusing to grant provisional measures, the ICJ provides some very useful language. In the portion of the opinion written by judge Oda, the following appears:

> I do not deny that under the positive law of the United Nations Charter a resolution of the Security Council may have binding force, irrespective of the question whether it is consonant with international law derived from other sources. There is certainly nothing to oblige the Security Council, acting within its terms of reference, to carry out a full evaluation of the possibly relevant rules and circumstances before proceeding to the decisions it deems necessary. The Council appears, in fact, to have been acting within its competence when it discerned a threat against international peace and security in Libya's refusal to deliver up the two Libyan accused.[92]

Here, there are two points worthy of mention. The cited portion, acknowledges the Security Council's power to create an obligation that may require a State to act in violation of pre-existing, though inferior international obligations. Additionally, the authority to do so comes from the Council's article VII of the charter.

D. Resolutions Passed in response to the terrorist attacks of 9/11/2001

1. Key differences between this resolution and previous resolutions.

On September 28, 2001, the Security Council passed a resolution that "establish(ed) new binding rules of international law."[93] In contrast to the previously

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[92] 31 I.L.M. 662, *673, INTERNATIONAL COURT OF JUSTICE: ORDER WITH REGARD TO REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES IN THE CASE CONCERNING QUESTIONS OF INTERPRETATION AND APPLICATION OF THE 1971 MONTREAL CONVENTION ARISING FROM THE AERIAL INCIDENT AT LOCKERBIE (LIBYA V. UNITED STATES) [Reproduced in the accompanying notebook III, at tab 41]

[93] Paul C. Szasz, *The Security Council Starts Legislating.* 96 A.J.I.L. 901, 902. (2002) (The article examines the scope of UN SC res. 1373, and concludes it to have been a pioneering act by the Security Council. It exists without the typical limitations of time that are usually affixed to binding resolutions, it

cited resolutions, Security Council Resolution 1373 is written with much more specific requirements for a State to be in compliance.[94] The resolution begins the operative portion of the text by invoking the article VII[95] powers of the Security Council under which the council is given broad latitude to "restore international peace and security."[96]

The resolution, quickly and in certain terms, specifies what States are to do to combat global terrorism. The language used to introduce the actions that are to be taken, is clear and concise. It reads: "[A]ll states shall." [97] The list of what States are required to do per the resolution is longer than need be discussed here. There is however, a portion extremely relevant to the instant question. States are required to "criminalize the willful provision or collection, by any means, directly or indirectly, of fund by their nationals or in their territories with the intention that the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts."[98] Further on in the resolution, the following text appears, all States are to "ensure…[that] terrorist acts are established as serious criminal offenses in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts."[99] On its face, the resolution appears to do something very similar to what can, only with difficulty, be read into the resolutions that have been discussed previously.

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also has a broader scope in that it is not limited to the requiring actions (or inaction) with respect to specific country.) [Reproduced in the accompanying notebook III, at tab 58]

[94] S.C. Res. 1373, U.N. SCOR 4385th mtg., U.N. Doc S/RES/1373 (2001) [Reproduced in the accompanying notebook III, at tab 54]

[95]UN CHARTER arts 39-41. [Reproduced in accompanying notebook II, at tab 17]

[96]*Id.*.

[97]*Supra* note 93. at 1.

[98]*Id* at 1(b).

[99] *Id* at 2(e).

Resolution 1373 requires all States to make specific, and potentially, very significant changes to domestic laws.

Is the question then settled? Can the jurisdiction of all States be changed by an appropriately direct edict from the Security Council? The answer, it would appear is 'yes,' and 'no,' or perhaps a heavily qualified 'maybe.' The rules put forth in resolution 1373 were not created in an instant and in fact were promulgated in various resolutions passed by the General Assembly. While this point is not legally significant,[100] it does suggest that the Security Council was building on a pre-existing global desire to codify criminally acts of terrorism. Of course, a similar point could be made with respect to human rights law. Beginning with the Genocide Convention of 1949 up through the present, the United Nations has always had the protection of human rights as a goal.[101]

B. The Legality of Such Resolutions Under the UN Charter

The capacity of the Security Council to pass resolutions that bind Member States to a specific course of action can hardly be disputed. Both the resolutions dealing with the Libyan situation and the anti-terrorism resolution speak to that idea. But were those actions legal? Would a resolution expanding the jurisdiction of domestic courts fall within the powers granted to the Security Council under article VII? The answer appears to be yes.

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[100] *Supra* note 93 at 903.

[101] One of the myriad of ways in which Human Rights can be seen as deeply rooted in the core UN mission is in the adoption and proclamation of the Universal Declaration of Human Rights in 1948.

1. Under Chapter VII[102]

The larger question is does the UN have the power to expand the power of domestic State statutes to include crimes that would fall into the idea of universal jurisdiction. At least one commentator in looking to a similar question has said 'yes.'[103] Further, with the end of the cold war, a consensus has arisen in the Security Council that destructive, but internal, affairs of States fall within the scope the Council's power.[104]

The foundation of a discussion about the scope of the power of the Security Council is an examination of the mandate that created it.[105] The UN Charter article 39 provides the following language: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[106] It was on the basis of this power that the ICTR and the ICTY were created.[107] As such, the argument that the Security Council has the power to make jurisdictional changes to the domestic court

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[102]Sheila O'Shea, *Interaction Between International Criminal Tribunals and National Legal Systems*, 28 N.Y.U. J. Int'l L. & Pol. 367, n. 23 (Fall 1995-Winter 1996). This footnote summarizes some of the objections to using Art. VII to create a tribunal. As these arguments did not prevent the creation of the tribunal, they are not discussed here. [Reproduced in accompanying notebook II, at tab 27]

[103]Kenneth S. Gallant, *Jurisdiction to adjudicate and jurisdiction to prescribe in international criminal courts*, 48 Vill. L. Rev. 763, 827 (2003). (The question posed in the article is as follows: "Does the Security Council have jurisdiction to prescribe international criminal law by defining crimes that do not exist in customary international law, if proscription of the non-customary crimes would be a step towards the restoration and maintenance of international peace and security in a specific situation?") [Reproduced in the accompanying notebook III, at tab 53]

[104]Jeffrey S. Morton, *The International Legal Adjudication of the Crime of Genocide*, 7 ILSA J. Int'l & Comp. L. 329, 351 (2001). [Reproduced in accompanying notebook I, at tab 8]

[105]*Supra* note 102 at 828.

[106] *Supra* note 94, at art. 39, para. 1.

[107] *Supra* note 102 at 828.

system would read like this. In order to avoid a breach of the peace, it is essential that those charged in connection with the Rwandan genocide are brought to justice in a timely manner, consistent with the completion strategy of the ICTR.

Even though it could be argued that an action to expand the jurisdiction of member States was not considered as part of the mission of the Security Council, in looking at the Security Council's capacity to create novel solutions to problems that are judged to threaten the peace, that argument does not carry enough weight to be viable.[108] A similar argument was raised and dismissed in an attempt to discredit the ICTY, on the grounds that the Security Council has broad powers under Art. VII. Specifically, the tribunal noted that no good reason had been advanced as why the creation of a tribunal to adjudicate crimes against humanity should be read as excluded from the power found in Art. 41 of the Charter. Article 41 presents a limited list of what the Security Council may do in the face of an ascertained threat to the peace, it states that action "may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations**."[109]** Once the existence of a threat to the peace has been determined, the only real limitation applied by Art. 41, is that armed forces may not be used. The tribunal goes on

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[108]Prosecutor v. Dusko Tadic, Case No. XX-XX-X-XXXX, para 27. (Aug. 10, 1995) "That it was not originally envisaged that an ad hoc judicial tribunal might be created under Chapter VII, even if that be factually correct, is nothing to the point. Chapter VII confers very wide powers upon the Security Council and no good reason has been advanced why Article 41 should be read as excluding the step, very appropriate in the circumstances, of creating the International Tribunal to deal with the notorious situation existing in the former Yugoslavia. This is a situation clearly suited to adjudication by a tribunal and punishment of those found guilty of crimes that violate international humanitarian law. This is not, as the Defence puts it, a question of the Security Council doing anything it likes; it is a seemingly entirely appropriate reaction to a situation in which international peace is clearly endangered." [Reproduced in accompanying notebook II, at tab 33]

[109]*Supra* note 95.

to assert that the punishment of those found guilty of violations of "international humanitarian law,"[110] is helping to ensure international peace and security.

A parallel line of logic could be applied here. If, the creation of the ICTR was necessary for the protection of international peace and security, then the functionality of the ICTR would be a critical component. At present, the ICTR has indicated that in order to comply with its own completion strategy a portion of its caseload must be transferred to competent domestic jurisdictions. To the extent that the ICTR was created to protect peace, any and all UN powers that were invoked to allow for its creation, would be equally applicable to measures designed to ensure its success.

2. Under Chapter V, Art. 25

If the widely used powers found in chapter VII of the UN Charter are deemed insufficient to authorize the expansion of domestic jurisdictions, the Security Council could also exercise the general implied powers found in Art. 25.[111] In a 1971 opinion, the International Court of Justice found that States were bound by actions taken by the Security Council pursuant to Art. 25.[112]

The ICJ concluded that when the Security Council adopts a resolution pursuant to its powers under Art. 25, "it is for Member States to comply with that decision, including those members of the Security Council that voted against it and those Members of the

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[110] *Supra* note 95.

[111] U.N. CHARTER ch. V, Art. 25. "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." [Reproduced in accompanying notebook II, at tab 17]

[112] 1971 I.C.J. 16, 54. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) [Reproduced in accompanying notebook I, at tab 14]

United Nations who are not Members of the Council.[113] To hold otherwise would be to deprive this principle organ of its essential functions under the Charter."[114]

The ICJ's broad interpretation of the Security Council's powers has not been universally accepted.[115] It has been argued that the notions of state sovereignty and the power of Security Council conflict with one another in instances such as these. That is to say that both concepts are reaching for a place of dominance over the other and that an increase in the power of one must be met by a corresponding decrease in power by the other.[116] Thus, if one reads the expansion of domestic jurisdiction by order of the Security Council as an abrogation of State sovereignty, it would have to have been done by a grant (either implicit or explicitly) of increased authority to the Security Council. My research has indicated that the tension between traditional notions of state sovereignty and the power of the UN is far from settled as such a resolution as has been discussed here would likely be contentious in some states.[117]

Part III: In the age of Universal Jurisdiction, are Security Council Resolutions needed to Expand the jurisdiction of other states?

On its face, if universal jurisdiction were truly valid and accepted through the world, then resolutions requiring States to expand their domestic jurisdiction would be redundant. For a variety of reasons, this is simply not the case. While an examination of

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[114] *Id.*

[115] *See* Tadashi Mori, *Article & Essay: Namibia Opinion Revisited: A Gap in the Current Arguments on the Power of the Security Council,* 4 ILSA J Int'l & Comp L 121 (1997). [Reproduced in the accompanying notebook II, at tab 26]. *See also* P.H. Kooijmans, *The Advisory Opinion of Namibia of the International Court of Justice,* 20 Neth. Int'l L Rev. 17 (1973) [Reproduced in the accompanying notebook I, at tab 29].

[116] *Id.* 139.

[117] *See generally:* Anne-Marie Slaughter, *COMMEMORATIVE ISSUE: Balance of Power: Redefining Sovereignty in Contemporary International Law: ARTICLE: Sovereignty and Power in a Networked World Order,* 40 Stan. J Int'l L 283 (2004). [Reproduced in accompanying notebook I, at tab 12]

every States jurisprudence is beyond the scope of this memorandum, a carefully chosen look to the reality of universal jurisdiction in some States is not. This section begins with a brief discussion of universal jurisdiction in the world as a whole. This is followed by a look at the status of universal jurisdiction in the courts of Switzerland and Australia. The varied interpretations of universal jurisdiction at both the State and academic levels shows both the necessity and the opportunity for unifying UN action.

A. Universal Jurisdiction and the ICTR.

As a preliminary formality, it seems necessary to point out that the ICTR has invoked the idea and power of universal jurisdiction to aid in its prosecutorial efforts. Specifically, in the case of The Prosecutor v. Ntuyhahga, the trial chamber stated:

> "[T]he tribunal wishes to emphasize, in line with the General Assembly and the Security Council of the United Nations, that it encourages all States, in application of the principle of Universal Jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law."[118]

The quoted passage contains several presumptions worthy of examination. The scope of this memorandum being limited, my investigation will be limited to the viability of universal jurisdiction to prosecute like those cited, paying specific attention to those States that have tried or attempted to try individuals connected with the Rwandan genocide.

Additionally, the annual reports issued by the ICTR to the UN have indicated an intention to assign indictees to domestic jurisdictions.[119] However, the language of the

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[118] THE PROSECUTOR v. BERNARD NTUYAHAGA, Case No. ICTR-98-40-T (Mar. 18, 1999). [Reproduced in the accompanying notebook II, at tab 24].

[119]Ninth Annual Report to the United Nations on the ICTR, U.N. Doc. S/2004/601, para. 79. "The tribunal recommends that: (b) Member States remain receptive to discussions relating to the possible transfer of cases to their respective jurisdictions." (July 27, 2004).

reports has not always been consistent. In the most recent report, the Prosecutor "recommends that Member States remain receptive to discussions relating to the transfer of cases to their respective jurisdictions." Earlier reports that speak to the notion of transferring cases to domestic jurisdictions do so in a much more certain manner stating that a portion of those indicted, and being considered for transfer, were already "in countries that have adopted the principle of universal jurisdiction…[and] they could be tried there."[120] No explanation is given for the change in language.

B. A Brief Discussion of Universal Jurisdiction

The concept of universal jurisdiction allows for the prosecution of war crimes regardless of the nationality of the victim, the place where the crime was committed or the time that the war had begun.[121] It has been said that "some offenses, due to their very nature, affect the interests of all States."[122] The London Conference of the International Law Association concluded that the primary rationale for universal jurisdiction was justice and not deterrence as some other commentators had suggested.[123]

Previous reports contain language more like what appears in the Eighth Annual Report to the United Nations on the ICTR, U.N. Doc. S/2003/707, para. 10 "The Prosecution has also identified 40 suspects whose prosecution it intends to defer to national jurisdictions. Of these persons, 15 are in countries that have adopted the principal of universal jurisdiction, which means they could be tried there…" [Reproduced in the accompanying notebook III, at tab 55].

[120] *Id.*

[121] Willard B. Cowles, *Universal Jurisdiction over War Crimes,* 33 Cal. L. Rev. 177, (1945) [Reproduced in the accompanying notebook I, at tab 18]; as cited by: *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses,* International Law Association, London Conference. at 3(2000). [Hereinafter: London Conference]. [Reproduced in accompanying notebook I, at tab 2]

[122] Konstantinos Karountzos, *Universalality Principle, an Orientation for International Criminal Law.* 5 Griffin's View on Int'l & Comp L. 128, 130. (2004). [Reproduced in accompanying notebook I, at tab 5]

[123] *Supra* note 121. London Conference at 4.

In a move relevant to the task at hand, the London Conference concluded that the crime of genocide as defined by the 1948 genocide convention (the convention) would be eligible for prosecution within the framework of universal jurisdiction. Universal jurisdiction is not specifically addressed in the convention, however the convention cited widespread acceptance of the customary international law that allowed for genocide to be subject to universal jurisdiction.[124]

The London Conference credits the creation and relative success of both the ICTR and the International Criminal Tribunal for Yugoslavia with being "the principle motivating force behind the increased willingness of states to try perpetrators of war crimes."[125]

However, the London Conferences enthusiasm does seem a bit misplaced. In the appendix that follows the article, a summary of the status of genocide/crimes against humanity in the thirteen States that have included the crimes in their laws shows a very mixed picture.[126] In Australia (as will be discussed below) no person can be tried for genocide.[127] Austrian courts, on the other hand have jurisdiction to try cases brought through universal jurisdiction.[128] It points to the expansive jurisdiction asserted by Belgium that has led to no prosecutions as evidence that the power of the Belgian law is on par to that of a "paper tiger."[129] Denmark prosecuted and convicted a Bosnian Serb

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[124] *Id*. at 5.

[125] *Id* at 9.

[126] *Supra* note 121. London Conference at 23-29.

[127] *Id.*

[128] *Id.*

that was seeking asylum. Denmark based their claim to jurisdiction on breaches of various articles of the third Geneva Convention.[130] Canada, presents a mixed picture. There is a well-staffed office to handle war crimes, but a recent ruling of the Canadian Supreme Court laid down standards of proof so exacting as to make prosecution an unrealistic option. Further, the stated policy of the government is to deport those suspected of human rights violations rather than bring them to justice.[131] France has brought at least one individual associated to justice who was associated with the Rwandan genocide. Interestingly, the jurisdiction for this was found in a law which France had passed to give effect to Resolution 955 (the Resolution that created the ICTR).[132] Germany has been quite active in prosecuting individuals associated with the former Yugoslavia, with four convictions on record as of the year 2000.[133] The Supreme Court of the Netherlands ruled that those accused of war crimes could be tried by a Dutch military court on the basis of universal jurisdiction.[134] As mentioned in footnote 140, Senegal indicted the former leader of Chad on charges of torture.[135] Spain, relying on the passive personality principle of universal jurisdiction, has stated that Spanish courts have jurisdiction try individuals connected with the violence of former governments in Argentina and Chile.[136] As discussed below, Switzerland has used a somewhat narrower

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[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

definition of universal jurisdiction, asserting that its courts cannot try cases on grounds of genocide and crimes against humanity as those crimes are not recognized by Swiss penal codes.[137] The United Kingdom has law in place that would allow it to try those charged with torture.[138] The U.S. has similar law on its books.[139]

That several of the States discussed above have successfully incorporated some form of universal jurisdiction into their laws is a sign of the growing acceptance of the concept, but the inconsistency of its application and the effective preclusion of universal jurisdiction to the legal system of some States speaks to its still uncertain place in the world.

Indeed, other commentators have taken far more critical views of universal jurisdiction. Some find its foundation to be seriously flawed.[140] Many point to laws against piracy as the conceptual beginning of universal jurisdiction. The argument is made that piracy was treated as universally cognizable because it was such a heinous crime.[141] If this idea is accepted, it becomes fairly easy to apply similar logic to current war criminals; the heinous nature of their crimes should make their crimes universally cognizable. However dissenting voices call to holes in the conceptual framework that would have piracy be the crime that birthed universal jurisdiction. Objections are based on historical context. At the time that piracy became universally cognizable, state

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[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *See* Eugene Kontorovich. *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation,* 45 Harv. Int'l L.J. 183. (2004). [Reproduced in accompanying notebook II, at tab 37]

[141] *Id* at 185.

sponsored piracy existed in the form of privateering.[142] The only difference between piracy and privateering was that the privateer first secured permission sovereign to rob civilian ships (and subsequently split the booty with the authorizing sovereign).[143] If universal jurisdiction is to be a viable force within international criminal law, it needs the support of a solid foundation.

Others have pointed out the inconsistency in the application of Universal Jurisdiction as a danger to the future of the idea and to the legitimacy of current proceedings.[144] Additionally, the fact that universal jurisdiction over the crime of genocide is not explicitly recognized by the Genocide Convention places states in the position of having to rely on customary international should they try to criminalize genocide.[145]

1. Australia

Australian courts have illustrated the problem of genocide in their domestic courts, in no uncertain terms stating:

> "[T]he first issue for determination is whether an offense of genocide is known to Australian law. It was submitted that offenses must now be recognized as a consequence of the United Nations Convention on the Prevention of and Punishment of the Crime of Genocide by the Genocide Convention Act of 1949 (Commonwealth). I am unable to accept this submission. It is clear that while the Act effectively ratifies the Convention it does not purport to incorporate the provisions of the Convention into Australian municipal law. Consequently its provisions cannot operate as a direct source of individual rights and obligations

[142] *Id* at 186.

[143] *Id* at 187.

[144] *See* Anthony Sammons. *The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 Berkeley J. Int'l L. 111. (2003). [Reproduced in accompanying notebook I, at tab 6]

[145] Jon B. Jordon, *Universal Jurisdiction in a Dangerous World: A Weapon For All Nations Against International Crime*, 9 MSU-DCL J. Int'l L. 1, 17. (2000). [Reproduced in accompanying notebook I, at tab 3]

> within Australia. The ratification of such a Convention may give rise to a legitimate expectation or assist in the construction of an apparently ambiguous statutory provision. Furthermore, an international law may be a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. However, the enactment of a statute ratifying a Convention cannot, of itself, give rise to the implied creation of a new statutory offense, even though the Convention provides that the contracting undertake to enact legislation to create offenses of that character. [146]

Additionally, the Court "acknowledged that international law might influence the development of common law in Australia…common law does not necessarily conform to international law."[147]

The reluctance of Australia to adapt its common law to international law may also be indicative of the difficulty built into making such substantive changes in a domestic system. In order to comply with a resolution altering long held jurisdictional boundaries, each State would have to follow their own processes to change their laws, in the event that such a change would require constitutional changes, the implementation would almost certainly be slow.[148] At the same time, the slow process of change built into the systems of many governments suggests that a resolution may be the only solution. It is quite possible that even those governments that would like to ease the burden of the ICTR need a pointed resolution to serve as a catalyst and justification for rapid change.

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[146] Re Thompson; Ex parte Nuyarima and others (1998) 139 ACTR 9, 17. The Australian case is also interesting for another reason. The question of genocide was reached as it related to claims brought by the aborigines. Many States have less than stellar histories when it comes to the treatment of native peoples. As such any resolution purporting to expand the jurisdiction of States to crimes of or relating to genocide would do well to be narrowly tailored to as to only include referrals from the ICTR. [Reproduced in accompanying notebook I, at tab 7]

[147] *Id.* at 18.

[148] Helen Duffy, *National Constitutional Compatibility and the International Criminal Court,* 11 Duke J. Comp. & Int'l L. 5, 6-7 (2001). [Reproduced in accompanying notebook I, at tab 9]

While the London Conference points to a greater global willingness to try war criminals, that State acceptance is still not a given. Indeed, political considerations help to explain the small number of genocide cases being brought pursuant to universal jurisdiction.[149] Here, Australia's stance may place them in violation of international law.[150]

2. Switzerland

Swiss courts in attempting to try a Rwandan war criminal encountered a different but equally relevant situation.[151]

In Nyonteze v. Public Prosecutor,[152] Swiss authorities apprehended a Rwandan national (Nyonteze) on their soil[153] and charged him with the following violations of the

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[149]William A. Schabas, *NATIONAL COURTS FINALLY BEGIN TO PROSECUTE GENOCIDE, THE 'CRIME OF CRIMES'* 1 J. Int'l Crim. Just. 39, *60 (2003). [Reproduced in accompanying notebook II, at tab 25]

[150]Ben Saul, *The International Crime of Genocide in Australian Law*, 22 Sydney L. Rev. 527, 532. (2000) [Reproduced in accompanying notebook I, at tab 10]

[151] See also Reed Brody, *SYMPOSIUM: UNIVERSAL JURISDICTION: MYTHS, REALITIES, AND PROSPECTS: The Prosecution of Hissene Habre An "African Pinochet,"* 35 New Eng. L. Rev. 321 (2001). "In February 2000, a Senegalese court indicted Chad's exiled former dictator, Hissene Habre, on torture charges and placed him under virtual house arrest. ... On February 18, Habre's lawyers filed a motion to dismiss the case before the Indicting Chamber (Chambre d'Accusation) of Dakar's Court of Appeals, asserting that Senegalese courts had no competence over crimes committed in Chad, that crimes committed before Senegal's 1986 ratification of the Torture Convention could not be taken into account and that the prosecution was barred by the statute of limitations. ... At the same time, Habre reportedly began spending large sums of money to build his support in Senegal. ... Habre's lawyers, supported by the prosecutor, argued that under the Senegalese penal code, Senegalese courts had no competence to try crimes committed by Chadians in Chad, and that 1984 United Nations Convention against Torture, which Senegal ratified in 1986, was not followed by implementing legislation until 1996, and even the 1996 legislation did not expand the courts' competence to torture committed abroad. ... After the arrest of Hissene Habre in Senegal, we realized that we can demand that justice be done here, in our own country. ... The Habre case in Senegal is now before the Cour de Cassation. ... " [Reproduced in the Accompanying Notebook III, at tab 39]

[152]Luc Reydams, *Nyonteze v. Public Prosecutor*, 96 Am J. Int'l L. 231 (2002) [Reproduced in accompanying notebook I, at tab 11]. [Original French language cases Reproduced in the accompanying notebook III, at tabs 45, 46].

[153]*Id* at 231. The Swiss denied a Rwandan request for extradition. Nonetheless the Rwandan government fully supported the Swiss efforts.

Swiss Penal Code: "murder (Article 116), incitement to murder (Articles 22 and 116) and violations of the laws and customs of war (Article 109). Counts of war crimes were brought under Common Article 3 of the 1949 Geneva Convention and Article 4(2)(a) of the Additional Protocol II."[154]

The prosecutor sought and failed to amend the indictment to include genocide and incitement to genocide, complicity in genocide, crimes against humanity, incitement to commit crimes against humanity, and complicity in crimes against humanity.[155] The Swiss tribunal granted a defense motion to quash the proposed amendments on the grounds that genocide and crimes against humanity as prescribed by customary international were not "directly applicable in the Swiss legal order."[156]

Nyonteze was initially convicted on the majority of the crimes he was charged with and sentenced to life a term.[157] However, on appeal the convictions for "common crimes," (murder and incitement to murder), were overturned due to lack of jurisdiction.[158] As such, a substantially lighter fifteen year sentence was handed down.[159]

Even if the trial of Nyonteze cannot be defined as an unqualified success, it serves to demonstrate the willingness and the capacity of some States to apply the concept of

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[154] *Id* at 232.

[155] *Id.*

[156] *Id.*

[157] *Id.* at 234.

[158] *Id.*

[159] *Id*

universal jurisdiction.[160] A binding Security Council resolution could serve as the tool by which the concept of universal jurisdiction is standardized.

CONCLUSION

If the ICTR is to finish its work in time to be in line with its own completion strategy, transference of some indictees to competent national jurisdictions is essential. However, the global community is awash with different approaches to jurisdictional definition. The UN Resolutions drafted to endorse the completion strategy do not provide the necessary language or impetus for States to alter their laws.

Resolutions 1503 and 1534 do not contain language specific enough to compel Member States to expand their jurisdiction.

However, there is precedent for resolutions that require States to change their laws to be in compliance. Specifically, the resolutions passed pursuant to the investigation that followed the bombing on Pan Am flight 103 and those passed after the terrorist attacks of September 11, 2001 required changes in State laws.

Universal jurisdiction, in its origins, application and status is too nebulous to be relied upon. As such in lieu of an intervening act, its development is apt to languish in some countries and develop haltingly in others.

The Security Council is endowed with broad powers. In the fulfillment of its obligations under the UN charter, it could legally craft a resolution that authorizes or, if need be, one compels States to expand their domestic jurisdictions, this would allow the ICTR to finish its work on time and also greatly aid in the global development of universal jurisdiction.

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[160] *Id.* at 236.