

THE NEED FOR NEW U.S. LEGISLATION FOR PROSECUTION OF GENOCIDE AND OTHER CRIMES AGAINST HUMANITY

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INTRODUCTION

Increasing attention has been paid to the need for more effective sanctions against those who authorize, order, commit, or abet genocide and other crimes against humanity and what are sometimes related war crimes that are proscribed under both customary and treaty-based international law. In recent years, a growing number of criminal and civil cases have been brought outside the territory of states where such international crimes have occurred, but actual sanction efforts within domestic legal fora have not always proven to be effective. The customary principle of universal jurisdiction has been applied for more than two hundred years to a variety of international crimes—including piracy, war crimes, and breaches of neutrality—and appears today in a variety of international criminal law instruments and domestic legislation. However, use of such a jurisdictional competence with respect to acts of genocide and other crimes against humanity has not been adequate and threatens to undermine respect for the rule of law. Present U.S. legislation is particularly unhelpful in that it only criminalizes some forms of genocide, and no U.S. legislation criminalizes crimes against humanity as such. It is time for states like the United States to enact adequate legislation and make a greater effort to end any form of impunity with respect to genocide and crimes against humanity.

I. THE INTERNATIONAL COMMUNITY'S COMMITMENT TO END IMPUNITY FOR GENOCIDE AND OTHER CRIMES AGAINST HUMANITY

When 160 states met in Rome in 1998 to create the International Criminal Court (ICC), they emphasized that there is a lack of immunity for international crimes such as genocide, other crimes against humanity, and war crimes.¹ They affirmed the need to end impunity and prosecute alleged perpetrators of such *crimen contra omnes* in international and domestic courts.² For example, the preamble to the Statute of the ICC declares emphatically “that the most serious crimes of concern to the international

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1. Rome Statute of the International Criminal Court, prmb., July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Statute of the ICC].

2. *Id.*

community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level.”³ The preamble also expresses the determination of the community “to put an end to impunity for the perpetrators of these crimes,” and recalls the fact “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”⁴

A striking feature of every international criminal law treaty is that there is no recognition of any form of immunity for official elites. In fact, Article 27 of the Statute of the ICC expressly affirms that “official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility.”⁵ The article also affirms that “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction.”⁶

In April 2006, the United Nations Security Council stressed “the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law.”⁷ In 2000, the Security Council had also reiterated “its strong condemnation of the deliberate targeting of civilians or other protected persons in situations of armed conflict” and reaffirmed “the need to bring to justice individuals who incite or otherwise cause such violence.”⁸ Such targetings could also constitute genocide and crimes against humanity in certain circumstances. Therefore, the Security Council’s reaffirmation is also relevant to the need to bring to justice those who incite or otherwise cause related forms of genocide and other crimes against humanity.

3. *Id.*

4. *Id.*

5. *Id.* art. 27(1).

6. *Id.* art. 27(2).

7. S.C. Res. 1674, ¶ 8, U.N. Doc. S/RES/1674 (Apr. 28, 2006). *See also* S.C. Res. 1820, *prmb.*, U.N. Doc. S/RES/1820 (June 19, 2008) (reaffirming “the resolve expressed in the 2005 World Summit Outcome Document to eliminate all forms of violence against women and girls, including by ending impunity”); *id.* ¶ 4 (noting “that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide,” calling upon “Member States to comply with their obligations for prosecuting persons responsible for such acts,” and stressing “the importance of ending impunity for such acts”); S.C. Res. 1261, ¶ 4, U.N. Doc. S/RES/1261 (Aug. 25, 1999) (“[T]he responsibility of all States [is] to bring an end to impunity and their obligation to prosecute those responsible for grave breaches of the Geneva Conventions . . .”).

8. S.C. Res. 1296, ¶¶ 2, 17, U.N. Doc. S/RES/1296 (Apr. 19, 2000).

II. THE NEED FOR NEW U.S. LEGISLATION

U.S. federal legislation criminalizing genocide nearly guarantees that prosecution will not occur,⁹ and the United States does not have federal legislation that would allow U.S. prosecution of crimes against humanity as such. Therefore, the United States is presently unable to comply with its obligations to end impunity and to exercise its criminal jurisdiction over such core international crimes. Necessarily, U.S. compliance requires the enactment of new legislation.

Enactment of such legislation will also provide the United States a needed flexibility to prosecute while fulfilling U.S. responsibility under customary international law. It will allow the U.S. to initiate prosecution, or alternatively, to extradite all persons reasonably accused of crimes under customary international law—the customary and universal responsibility often termed *aut dedere aut judicare*.¹⁰ This mandatory but alternative duty under customary international law is also reflected in United Nations Security Council and General Assembly resolutions,¹¹ opinions of Judges of

9. See *infra* Part III (outlining the inadequacies of present U.S. legislation). Article V of the Genocide Convention expresses the duty of parties to the treaty such as the United States “to enact . . . the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other [criminal] acts enumerated” in the Convention. Convention on the Prevention and Punishment of the Crime of Genocide art. V, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. Since U.S. legislation does not cover all crimes of genocide, the legislation is inadequate and the United States is in violation of its duty under Article V of the treaty.

10. See, e.g., M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 3 (1995) (describing throughout the language typically used in a treaty adopting the principle of “*aut dedere aut judicare*” and its customary nature—the duty to extradite or prosecute); M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 35–37 (4th ed. 2002) (exploring the foundations of the duty to extradite and its implications on current international law); JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* 10, 12, 17–19, 27, 131–32, 134–35, 138–41, 143–44, 155, 169 (3d ed. 2007) [hereinafter *INTERNATIONAL CRIMINAL LAW*] (describing the customary international law of *aut dedere aut judicare*, or the duty to extradite or prosecute); JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 395, 404 n.2, 421–22, 443–45, 449 n.1, 450 nn.2–6, 451 nn.7–17 (2d ed. 2003) (explaining the principle of *aut dedere aut judicare*); JORDAN J. PAUST ET AL., *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 52, 143, 147, 560, 566, 569–71, 836–37 (2d ed. 2005) [hereinafter *INTERNATIONAL LAW AND LITIGATION*] (explaining the relationship between *aut dedere aut judicare* and the United States); Rudiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 675, 683–84 (Dieter Fleck ed., 2d ed. 2008) (noting that “the home state of the offender, instead of conducting a prosecution itself, can hand [the offender] over for trial to another state interested in the prosecution” and that “[t]he principle of *aut dedere aut judicare* is thus valid”); see also Genocide Convention, *supra* note 9, arts. I, IV, V, VII (explaining that the “Contracting Parties confirm that genocide . . . is a crime under international law” and that they shall punish genocide, enact legislation, and grant extradition).

11. See, e.g., *supra* note 7 and accompanying text (discussing state obligations according to the

the International Court of Justice,¹² and resolutions of the U.N. Human Rights Commission¹³ and private legal associations.¹⁴ It is also consistent

United Nations Security Council); G.A. Res. 62/148, ¶¶ 5, 7, U.N. Doc. A/RES/62/148 (Mar. 4, 2008) (calling upon states to “fulfil their obligation to submit for prosecution or extradite those alleged to have committed acts of torture”); G.A. Res. 61/153, ¶¶ 5–6, U.N. Doc. A/61/153 (Feb. 14, 2007) (emphasizing that “acts of torture are serious violations of international humanitarian law and in this regard constitute war crimes . . . and that the perpetrators of all acts of torture must be prosecuted and punished”); G.A. Res. 60/147, Annex, art. III, ¶ 4, U.N. Doc. A/RES/60/147/Annex (Dec. 16, 2005) (“States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations . . .”); G.A. Res. 49/60, Annex, art. II, ¶ 5, U.N. Doc. A/RES/49/60/Annex (Dec. 9, 1994) (urging that “States must . . . ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts”); G.A. Res. 47/133, arts. 3, 14, U.N. Doc. A/RES/47/133 (Feb. 12, 1993) (explaining measures to be taken to “prevent and terminate acts of enforced disappearance,” including extradition); U.N. Doc. A/46/654, ¶ 4(b) (Nov. 15, 1991) (urging States to “ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts”); E.S.C. Res. 1989/65, U.N. Doc. E/1989/89 (May 24, 1989) (calling upon governments to investigate “extra-legal, arbitrary and summary executions” and to “punish those found guilty and to take all other measures necessary to prevent those practices”); G.A. Res. 3074 (XXVIII), prmb., U.N. Doc. A/9030 (Dec. 3, 1973) (declaring that it is a principle of international cooperation to arrest, extradite, and punish “persons guilty of war crimes and crimes against humanity”); G.A. Res. 2840 (XXVI), ¶ 5, U.N. Doc. A/8429 (Dec. 18, 1971) (requesting “the Commission on Human Rights to consider the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes against humanity and to submit a report on this question to the General Assembly”); G.A. Res. 96(I), U.N. Doc. A/64 (Dec. 1, 1946) (inviting states to enact legislation to punish the crime of genocide); *see also* G.A. Res. 60/1, ¶¶ 58(f), 118, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (explaining measures to protect women and children, including “ending impunity” and “ensur[ing] accountability and compliance”); S.C. Res. 579, ¶ 5 (Dec. 18, 1985) (urging “the further development of international co-operation among States in devising and adopting effective measures . . . to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction”). The U.N. General Assembly has also often expressly approved adoption of the many newer international criminal law treaties that consistently contain the mandatory duty to initiate prosecution or extradite. *See infra* note 15 and accompanying text (providing examples of international criminal law treaties).

12. *See, e.g.*, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), 1992 I.C.J. 114 (Apr. 14) (separate opinion of Judge Weeramantry), *reprinted in* 86 AM. J. INT’L L. 638, 652, 666 (1992) (explaining that the Montreal Convention “does not interfere with the principle of customary international law *aut dedere aut judicare*” and every state has an obligation to prosecute or extradite).

13. *See, e.g.*, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Comm’n H.R. Res. 1999/32, ¶ 1, U.N. Doc. E/CN.4/RES/1999/32 (Apr. 26, 1999) (calling upon states to punish and prosecute cruel, inhumane, and degrading treatment); Situation of Human Rights in Sierra Leone, Comm’n H.R. Res. 1999/1, ¶ 2, U.N. Doc. E/CN.4/RES/1999/1 (Apr. 6, 1999) (reminding “all factions and forces in Sierra Leone that in any armed conflict, . . . the taking of hostages, wilful killing and torture or inhuman treatment of persons not taking an active part in the hostilities constitute grave breaches of international humanitarian law”).

14. A 1985 resolution of the International Law Association affirms: “States must try or extradite (*aut judicare aut dedere*) persons accused of acts of international terrorism. No state may refuse to try or extradite a person accused of an act of international terrorism, war crime . . . , or a crime against humanity” INT’L LAW ASS’N, REPORT OF THE SIXTY-FIRST CONFERENCE HELD AT PARIS 7 (1985); *see also* Committee on International Human Rights Law and Practice, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, in INT’L LAW ASS’N, REPORT OF THE SIXTY-NINTH CONFERENCE HELD IN LONDON 406–07, 409, 412, 422–23 (2000) (addressing

with the international community's insistence at the Rome Conference, mirrored in requirements under the Statute of the ICC, that states end impunity and prosecute accused criminals. Additionally, most international criminal law treaties expressly include the obligation to either initiate prosecution or extradite and stress that such an international obligation is without exception whatsoever and applies whether or not an offense is committed within the state's territory.¹⁵ This reflects a continual affirmation of the customary and mandatory duty *aut dedere aut judicare* with respect to international crime and mirrors consistent patterns of *opinio juris* (or patterns of legal expectation) relevant to the formation and continuation of customary international legal obligations.

If a state does not have legislation that is adequate for prosecution of a particular criminal accused, its obligation under international law shifts to the duty to extradite the accused person to another state for fair prosecution or to render the accused person to an international criminal tribunal that has jurisdiction, such as the ICC. It would seem to be in the interest of a state to have adequate domestic legislation reaching all forms of genocide and other crimes against humanity committed by its nationals at home or abroad in order to provide the option to prosecute its nationals in its domestic courts as opposed to the alternative duty of extraditing or rendering its nationals to foreign states or international tribunals with varied procedures, although customary human rights to due process such as those reflected in Article 14 of the International Covenant on Civil and Political Rights provide

universal jurisdiction for human-rights offenses).

15. For examples of international criminal law treaties that include this obligation, see International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, Annex, prmb., arts. 9(2), 11(1), U.N. Doc. A/RES/61/177 (Dec. 20, 2006); International Convention for Suppression of Financing of Terrorism, G.A. Res. 54/109, Annex, arts. 7(4), 9, 10, U.N. Doc. A/RES/54/109 (Feb. 25, 2000); International Convention for Suppression of Terrorist Bombings, G.A. Res. 52/164, Annex, arts. 6(4), 7(2), 8(1), U.N. Doc. A/RES/52/164 (Jan. 9, 1998); Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, Annex, arts. 10(4), 14, U.N. Doc. A/RES/49/59 (Feb. 17, 1995); International Convention Against the Recruitment, Use, Financing and Training of Mercenaries arts. 9, 10, 12, Dec. 4, 1989, 2163 U.N.T.S. 96; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation arts. 6(4), 7(1), 10(1), Mar. 10, 1988, 1678 U.N.T.S. 221; Inter-American Convention to Prevent and Punish Torture arts. IV, VI, Dec. 9, 1985, O.A.S. Treaty Series No. 67; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 5, 7, Dec. 10, 1984, 1465 U.N.T.S. 85; International Convention Against the Taking of Hostages arts. 5(2), 8(2), Dec. 17, 1979, 1316 U.N.T.S. 205; European Convention on the Suppression of Terrorism art. 7, 1137 U.N.T.S. 93; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents arts. 3(2), 6(1), 7, Dec. 14, 1973, 1035 U.N.T.S. 167; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation arts. 5(2), 6(1), 7, Sept. 23, 1971, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Seizure of Aircraft arts. 4(2), 6(1), 7, Dec. 16, 1970, 860 U.N.T.S. 105; Genocide Convention, *supra* note 9.

minimum due process guarantees for all accused.¹⁶ Furthermore, in case one of its nationals is arrested abroad, a state without adequate legislation (if such is needed to prosecute) cannot rightly request extradition for prosecution in its courts and the request can be denied under the dual criminality principle because the offense is not prosecutable under the laws of the requesting and requested states.¹⁷ It is apparent that the lack of a flexible option to prosecute domestically does not serve recognizable interests of any state and, in any event, a state party to the Genocide Convention that is without adequate domestic legislation is in violation of its duty under the Convention to enact such legislation.¹⁸

With respect to the United States, because present U.S. legislation does not cover all forms of genocide and there is no legislation covering crimes against humanity as such, a U.S. request for extradition of a foreign national or U.S. person who is being held in a foreign state and who is accused of having committed either crime against foreign or U.S. victims could be denied. With respect to genocide, when the present U.S. legislation does not reach the aspects of a particular crime of genocide that are covered under the Genocide Convention and the foreign state's legislation, a U.S. request for extradition can be denied because of the lack of dual criminality (i.e., because the alleged offense is not a crime that is prosecutable under the laws of the requested foreign state and the U.S. as the requesting state). The same lack of dual criminality would necessarily apply with respect to crimes against humanity as such.

Moreover, if a U.S. accused is rendered to the International Criminal Court by a foreign state, the principle of complementarity that is documented in Article 17 of the Statute of the ICC may not apply because present U.S. legislation criminalizing genocide does not cover all forms of genocide addressed in the Genocide Convention and the customary international law reflected therein and mirrored in Article 6 of the Statute of the ICC. When it applies, the principle of complementarity allows the United States to proceed with prosecution instead of the ICC. Complementarity would not pertain to crimes against humanity because no U.S. legislation proscribing crimes against humanity as such exists. This gap in U.S. law is of current interest even though the United States has not ratified the Statute of the ICC because U.S. nationals can be prosecuted before the ICC in certain circumstances. For example, the ICC can prosecute a U.S. national if the crime of genocide or a crime against

16. International Covenant on Civil and Political Rights art. 14, Dec. 19, 1966, 999 U.N.T.S. 171.

17. Concerning the customary dual criminality principle, see, e.g., INTERNATIONAL CRIMINAL LAW, *supra* note 10, at 142, 331–32, 334, 348, 351, 353–56, 377.

18. Genocide Convention, *supra* note 9, art. V.

humanity is committed in the territory of a state that is a party to the Statute of the ICC, such as Afghanistan, and (1) either that state or another state party has referred the matter to the Prosecutor or (2) the Prosecutor has decided on his or her own initiative to investigate.¹⁹ If the United States would like to assure the option of U.S. prosecution in accordance with the ICC Statute's principle of complementarity, then it would be in the interest of the United States to adopt legislation to cover all forms of genocide and related crimes as they appear in the Genocide Convention and customary international law.

III. INADEQUACIES OF PRESENT U.S. LEGISLATION REGARDING GENOCIDE

Present U.S. legislation concerning genocide is significantly incomplete in several respects. Section 1091(d) of the legislation was amended in 2007 to include jurisdiction over a foreign person alleged to be an offender if “after the conduct required for the offense occurs, the alleged offender is brought into, or found in, the United States, even if that conduct occurred outside the United States.”²⁰ The amendment filled a glaring gap in prior coverage. Under previous legislation, jurisdiction existed only when the offense was committed within the United States or by a national of the United States.²¹ Yet, the definition of genocide set forth in section 1091(a) of the federal legislation still severely limits the ability of the United States to prosecute. Instead of using the broader phrase from the Genocide Convention and customary international law addressing a specific intent to destroy “in whole or in part,”²² the federal legislation adds the word

19. Statute of the ICC, *supra* note 1, arts. 12(2)(a), 13(a) & (c); *see, e.g.*, Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT'L L. 1, 5–8, 14–15 (2000) (discussing in greater detail the situations in which the ICC can exercise jurisdiction).

20. 18 U.S.C. § 1091(d)(5), *amended by* Genocide Accountability Act of 2007, Pub. L. 110–151, § 2, 121 Stat. 1821.

21. For the text of the older legislation, 18 U.S.C. § 1091(d)(1)–(2), *see, e.g.*, INTERNATIONAL CRIMINAL LAW, *supra* note 10, at 799.

22. Genocide Convention, *supra* note 9, art. II. The Convention's definition of genocide is the definition under customary international law as well as the customary and peremptory prohibition *jus cogens*. *See* INTERNATIONAL CRIMINAL LAW, *supra* note 10, at 14–15, 786 n.1, 800–02 (“Most contemporary scholars and states also expect that some of these crimes, like . . . genocide . . . are now part of customary *jus cogens*.”); *see, e.g.*, Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT'L L.J. 286, 319–20 (1999) (arguing that peremptory prohibitions that have become part of international law, such as genocide, are *crimen contra omnes*—crimes against all—and should be subject to universal jurisdiction). It is the exact definition that is set forth in the Statute of the ICC, *supra* note 1, art. 6, the Statute of the International Criminal Tribunal for Former Yugoslavia, S.C. Res. 827, art. 4, U.N. Doc. S/RES/827 (May 25, 1993), and the Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex, art. 2, U.N. Doc. S/RES/955 (Nov.

“substantial” to read: “in whole or in substantial part.”²³ As a result, unless the legislation is changed, a U.S. prosecutor will be unable to successfully prosecute the genocidal targeting of U.S. nationals abroad when a perpetrator did not intend to destroy a “substantial part” of the U.S. national group of persons who are situated here and abroad. For example, Osama bin Laden’s targeting of merely a few thousand U.S. nationals on 9/11 arguably would not fit under the Act. To ensure greater flexibility to prosecute in U.S. courts and compliance with the treaty-based duty to enact appropriate legislation, the word “substantial” should be deleted from section 1091(a).

Of far greater limiting effect is a special definition of “substantial part” contained in section 1093(8).²⁴ This nearly guarantees that the United States will be unable to prosecute most forms of genocide. The special definition states that “‘substantial part’ means a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part.”²⁵ It requires that the alleged perpetrator of genocide have the specific intent to destroy not merely part of a relevant group (as is the case under Article II of the Genocide Convention and customary international law), and not merely what common sense might indicate is a “substantial part” of a relevant group, but the destruction of “a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity.”²⁶ In other words, if a perpetrator within the United States intentionally kills forty-one of some forty-two million persons making up one racial group, and targeting them because they are members of that racial group, then prosecution under present U.S. legislation is not possible if the survival of one million persons from that group does not destroy the group “as a viable entity” within the United States.²⁷ Astonishingly, under the special definition it may not be possible to prosecute perpetrators of the Holocaust for genocide. Clearly, the special definition of “substantial part” should be removed from the legislation.

It is of interest that the President ratified the Genocide Convention after the legislation had been enacted. Therefore, in case of a clash between the

8, 1994). Obviously it would be an outrageous abuse of judicial responsibility for any judge in any court to attempt to rewrite the customary definition of genocide.

23. 18 U.S.C. § 1091(a) (2006).

24. 18 U.S.C. § 1093(8) (2006).

25. *Id.*

26. *Id.*

27. See INTERNATIONAL CRIMINAL LAW, *supra* note 10, at 801–03 (explaining the potential repercussions of the statute’s use of “in substantial part”).

treaty and the legislation, the treaty should prevail as law of the United States because, in accordance with the last-in-time rule, it was created more recently.²⁸ The unilateral U.S. understanding upon ratification that the word “substantial” should be included as a limitation of the treaty’s reach²⁹ was false and the “understanding” was therefore of no binding effect.³⁰ Moreover, the U.S. understanding did not contain the far more limiting special definition of “substantial part” that appeared in the legislation enacted prior to ratification. Therefore, under the last-in-time rule the treaty (without the false understanding) should prevail over the special definition as law of the United States.³¹ Primacy of the treaty creates the possibility of prosecution directly under the treaty, which is a form of direct incorporation of treaty law for purposes of criminal prosecution that occurred early in our history and rarely thereafter, but that is not widely expected to occur today.³² In any event, the legislation should be changed to mirror the definition of genocide contained in the treaty and customary international law and comply with the treaty-based duty to enact appropriate legislation.

Also limiting is the legislation’s addition of the word “permanent” in section 1091(a)(3),³³ which limits the Convention’s coverage of “serious . . . mental harm”³⁴ to the legislation’s coverage of merely “permanent impairment of the mental faculties of members of”³⁵ a relevant group. To

28. See, e.g., *id.* at 803 (asking whether the United States’ ratification of the Genocide Convention makes the “treaty ‘last in time’ for the United States as opposed to U.S. legislation”).

29. See *id.* at 796 (quoting the 1986 Lugar/Helms/Hatch Provisos as Approved by the Foreign Relations Committee, which state that the “Senate’s advice and consent is subject to the . . . understanding[]” that intent in the Convention “means the specific intent to destroy, in whole or in substantial part”).

30. The unilateral understanding is not part of the treaty and does not change U.S. treaty obligations. See INTERNATIONAL LAW AND LITIGATION, *supra* note 10, at 80, 84 (indicating the difference between an “understanding” and a “reservation” in United States foreign relations law). If it had been, it would have been trumped because of the *jus cogens* nature of the prohibition of genocide as defined in Article II of the Convention. See *supra* note 22 (noting that genocide is defined under customary international law as well as the customary and peremptory prohibition *jus cogens* and that it would be an abuse of judicial responsibility to rewrite that definition); see also Vienna Convention on the Law of Treaties arts. 53, 64, May 23, 1969, 1155 U.N.T.S. 331 (explaining that *jus cogens* norms void any inconsistent portion of a treaty).

31. INTERNATIONAL LAW AND LITIGATION, *supra* note 10, at 221, 803. Concerning the last-in-time rule and its exceptions, see, e.g., *id.* at 100–07.

32. See, e.g., INTERNATIONAL CRIMINAL LAW, *supra* note 10, at 217–30, 239–41 (providing excerpts from early U.S. cases and opinions that show direct incorporation of treaty law); INTERNATIONAL LAW AND LITIGATION, *supra* note 10, at 134–47, 150–52 (providing more examples of early U.S. cases and opinions that use direct incorporation of treaty law).

33. 18 U.S.C. § 1091(a)(3) (2006).

34. Genocide Convention, *supra* note 9, art. II (b).

35. 18 U.S.C. § 1091(a)(3).

assure flexibility to prosecute as well as compliance with the treaty-based duty to enact appropriate legislation, the federal statute should be amended to delete the word “permanent.”³⁶

One final change to the older legislation relates to the possibility of civil sanctions for acts of genocide. Section 1092 declares that nothing contained in the genocide statute “shall . . . be construed as creating any substantive . . . right enforceable by law by any party in any proceeding.”³⁷ Thus, it would not be possible to construe the legislation as creating a cause of action for genocide. Since genocide and related acts are actionable under other legislation for alien plaintiffs,³⁸ it seems peculiar and not preferable to deny a cause of action for U.S. plaintiffs. For this reason, it seems preferable to change section 1092 to expressly provide a cause of action for the victims of genocide and related conduct.

It is of interest that in 2004, in declaring that conduct in Darfur, Sudan was “genocide,” the U.S. Senate and House of Representatives used the definition of genocide exactly as it appears in the Genocide Convention.³⁹ In other words, Congress used the treaty-based and customary definition without the various limitations set forth in present federal legislation that only criminalizes certain forms of genocide. This, of course, is preferable.

36. INTERNATIONAL CRIMINAL LAW, *supra* note 10, at 801.

37. 18 U.S.C. § 1092 (2006).

38. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring) (“[U]niversal jurisdiction [for] . . . torture, genocide, crimes against humanity, and war crimes . . . necessarily contemplates a significant degree of civil tort recovery as well.”); *Khulumani v. Barclay Nat’l. Bank, Ltd.*, 504 F.3d 254, 270 n.5, 273, 283 (2d Cir. 2007) (Katzmann, J., concurring) (stating that United States case law “has consistently relied on criminal law norms in establishing the content of customary international law for purposes of the [Alien Tort Claims Act]”); *Kadic v. Karadzic*, 70 F.3d 232, 241–42 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (recognizing civil sanctions for genocide through the Alien Tort Claims Act); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 270–71, 274–78, 289, 293 (E.D.N.Y. 2007) (“Acts of genocide and crimes against humanity violate the law of nations and these norms are of sufficient specificity and definiteness to be recognized under the [Alien Tort Claims Act.]”); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 306 n.18 (S.D.N.Y. 2003) (explaining *jus cogens* norms such as the prohibition of genocide and the relationship between *jus cogens* norms and the Alien Tort Claims Act); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1354–55 (N.D. Ga. 2002) (discussing why the defendant committed genocide and thereby violated international law); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000) (setting forth the elements and prerequisites of the ATCA regarding genocide). Concerning customary patterns of expectation with respect to customary roots of the right to an effective remedy in domestic courts for violations of human rights and other rights under international law, *see, e.g., INTERNATIONAL CRIMINAL LAW, supra* note 10, at 224–29.

39. S. Con. Res. 133, 108th Cong. § 1 (2004); H.R. Con. Res. 467, 108th Cong. § 1 (2004).

IV. THE NEED FOR NEW LEGISLATION REGARDING
CRIMES AGAINST HUMANITY

As noted, the United States has no legislation allowing prosecution of crimes against humanity as such and this shortcoming can limit U.S. options with respect to prosecution and extradition of U.S. and foreign nationals. This problem can easily be resolved, since the Supreme Court recognizes the constitutional propriety of incorporating international law “by reference” (i.e., by merely referring to relevant international law without defining the crime or identifying its elements).⁴⁰ A new U.S. statute, with a proper judicial application, could allow prosecution of all types of crimes against humanity by simply stating:

§ 1098. Crimes Against Humanity.

(a) Whoever commits a crime against humanity as defined by customary international law shall be fined not more than \$10,000,000, or imprisoned not more than fifty years, or both, unless subsection (b) is applicable.

(b) Whoever commits such an offense in such a way that the death of another human being results therefrom shall be subject to a penalty of life imprisonment.

(c) Whoever commits such an offense shall be liable to pay damages to any victim of such an offense and whoever is alleged to have committed such an offense shall not be entitled to any form of immunity from civil remedies.⁴¹

Incorporation of all crimes against humanity by reference will also avoid problems posed by the use, in some international instruments, of limiting words such as “widespread” or “systematic” that are not currently among the limitations under customary international law.⁴² In my opinion, such legislation is long overdue.

40. See, e.g., INTERNATIONAL CRIMINAL LAW, *supra* note 10, at 230–33, 242–43, 248–49 (providing examples of incorporation by reference); INTERNATIONAL LAW AND LITIGATION, *supra* note 10, at 157–64, 267 (providing additional examples of incorporation by reference).

41. This draft was suggested during a 1995 symposium on Critical Perspectives on the Nuremberg Trials and State Accountability. Jordan J. Paust, *Threats to Accountability After Nuremberg: Crimes Against Humanity, Leader Responsibility and National Fora*, 12 N.Y.L. SCH. J. HUM. RTS. 547, 568 n.83 (1995).

42. See, e.g., INTERNATIONAL CRIMINAL LAW, *supra* note 10, at 702–03, 711, 729–31, 744–48, 753 (discussing the addition of terms like “widespread” and “systematic” in certain cases and tribunals).

CONCLUSION

As demonstrated, new U.S. legislation is needed to ensure prosecution of all forms of genocide and related crimes under the Genocide Convention and all forms of crimes against humanity. New legislation can serve at least four purposes. It will allow the United States: (1) to fulfill its duty to end impunity and to prosecute alleged perpetrators of two core crimes under international law; (2) to fulfill its duty under the Genocide Convention to enact appropriate legislation; (3) to have flexibility concerning U.S. prosecution and extradition of U.S. and foreign nationals; and (4) to have a related flexibility with respect to the principle of complementarity under the Statute of the International Criminal Court.