



THE GENOCIDE ACCOUNTABILITY ACT AND U.S. LAW: THE EVOLUTION AND LESSONS OF UNIVERSAL JURISDICTION FOR GENOCIDE

Zachary Pall*

INTRODUCTION

On December 21, 2007, President Bush signed the Genocide Accountability Act of 2007¹ into law. The bill had broad bipartisan support² and passed the House of Representatives by voice vote.³ The Genocide Accountability Act (GAA) expands the jurisdictional bases of the U.S. law criminalizing genocide, the Proxmire Act,⁴ to allow prosecution of any perpetrator of genocide found in the U.S. The GAA incorporates into U.S. law, nearly sixty years after the Convention for the Prevention and Punishment for the Crime of Genocide (Genocide Convention or Convention) was originally introduced,⁵ a form of universal jurisdiction for genocide.

Though the GAA is an amendment to the Proxmire Act, the enacting legislation of the Genocide Convention, the bipartisan support that has marked its passage stands in contrast to the history of the Genocide Convention in the U.S. While the U.S. was instrumental in drafting the Genocide Convention in 1948,⁶ the U.S. Senate waited until 1986 to ratify the Convention. To ensure ratification, the Senate also passed a “sovereignty package”⁷ which has been criticized as watering down the Genocide Convention, making it a symbolic document without any binding legal force.⁸ The Proxmire Act as originally enacted,⁹ only allowed for prosecution where “the offense is committed within the United States”¹⁰ or where “the alleged offender is a national of the United States...”¹¹ The GAA is, thus, a major expansion to the previous form of the Proxmire Act.

The story of the 2007 passage of the GAA is instructive for four principal reasons. First, the GAA is a significant addition to the list of areas where the

* ZACHARY PALL, JD candidate (2009), Benjamin N. Cardozo School of Law, thanks Professor Sheri Rosenberg, Professor William Schabas, Ms. Gerda Visser of the ICTR, Jeremy Benjamin, Alison Brill, Sojeong Hong, and Aidan Leonard for their advice and encouragement.

¹ Pub. L. No. 110-151; 121 Stat 1821.

² 110 Cong. Rec. S3603 (daily ed., 22 Mar. 2007).

³ H.R. 2489, 110th Cong. § 1; 153 Cong. Rec. H14207 (5 Dec. 2007).

⁴ 18 U.S.C. § 1091 (2008).

⁵ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (hereinafter “Genocide Convention”).

⁶ Warren Kimball, *AMERICA UNBOUND: WORLD WAR II AND THE MAKING OF A SUPERPOWER* 161 (1992).

⁷ Resolution of Ratification (Lugar-Helms-Hatch Sovereignty Package), S. EXEC. REP. 2, 99th Cong., 1st sess. (1985).

⁸ Jordan J. Paust, *Congress and Genocide: They’re Not Going to Get Away With It*, 11 MICH. J. INT’L L. 90, 94-95 (1989).

⁹ Pub. L. No. 100-606 (codified as amended at 18 U.S.C. § 1091).

¹⁰ 18 U.S.C. § 1091(d)(1).

¹¹ 18 U.S.C. § 1091(d)(2).

U.S. has endorsed universal jurisdiction. Second, the GAA offers a new tool for the U.S. to initiate or encourage prosecutions of international human rights violations. Third, the passage of the GAA may provide indications for the successful passage of other legislation concerning international human rights. Finally, and related to all of the above, the GAA's passage and its contrast to the history of the Genocide Convention in the U.S. is an illustration of the country's complex relationship with international human rights law. Along with passing the GAA, the U.S. has been a major supporter of international tribunals for Yugoslavia, Rwanda, and Cambodia,¹² and has passed the Torture Victims Protection Act.¹³ Yet the U.S. also waited nearly forty years to ratify the Genocide Convention,¹⁴ has opposed the International Criminal Court,¹⁵ and has never ratified the U.N. Convention on the Rights of the Child¹⁶ (a status shared only with Somalia).¹⁷

This paper addresses the history and implications of the Genocide Accountability Act. The first section discusses the principles of universal jurisdiction as they relate to the Genocide Convention and contrasts the provisions of the Proxmire Act, as enacted in 1988, with other areas of U.S. law that have provided for universal jurisdiction. Second, the paper discusses the political processes surrounding the Genocide Convention, first addressing the U.S.'s history regarding ratification and implementation of the Convention and then discussing the passage of the GAA. The paper concludes with a discussion of the ramifications of the amendment, discerning the extent of the GAA's coverage and any lessons it provides for future human rights legislation.

I. UNIVERSAL JURISDICTION, U.S. LAW, AND THE GENOCIDE CONVENTION¹⁸

A. Universal Jurisdiction and the Genocide Convention

Universal jurisdiction allows the exercise of jurisdiction "over a limited category of offenses generally recognized as being of universal concern, regardless of the *situs* of the offense and the nationalities of the offender and the

¹² Terree Bowers, *Process And Function of the International Criminal Court*, 8 UCLA J. INT'L L. & FOREIGN AFF. 3, 15 (2003).

¹³ 28 U.S.C. § 1350 (2008).

¹⁴ Lawrence LeBlanc, *THE UNITED STATES AND THE GENOCIDE CONVENTION* 1-2 (1991).

¹⁵ See generally John R. Bolton, Former U.S. Ambassador to the United Nations and Former Under Secretary for Arms Control and International Security, Remarks to the Federalist Society (14 Nov. 2002).

¹⁶ Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3.

¹⁷ *Roper v. Simmons*, 543 U.S. 551, 576, 125 S.Ct. 1183, 1199 (2005).

¹⁸ The scope of this paper only permits a brief discussion of the theoretical, historical, and international contexts of universal jurisdiction to provide a basis for the discussion of universal jurisdiction as enacted in the GAA. In section I.B., *infra*, many of the legal and procedural issues are necessarily omitted in the interests of space, especially with regard to the Alien Tort Claims Act.

offended.”¹⁹ The key element of universal jurisdiction is the *international* recognition of the offense being “of universal concern.” The definition of what constitutes (or should constitute) universal concern is debated.²⁰ However, those offenses that meet the criterion may be prosecuted even if no nexus exists between that offense and the state undertaking the prosecution.²¹ Universal jurisdiction thus falls outside of other traditional bases for jurisdiction: territorial (exercising jurisdiction over activities within the territory of a state); nationality (exercising jurisdiction over the nationals of a state); passive nationality (exercising jurisdiction over aliens for acts harmful to nationals of the state); and protective (exercising jurisdiction “over aliens for acts done abroad which affect the security of a state”).²²

The exercise of universal jurisdiction has traditionally been rooted in prohibitions against piracy,²³ as pirates have been regarded as *hostis humanis generis*²⁴ (enemies of all mankind) and subject to prosecution and punishment wherever they are found. While commentators have debated whether universal jurisdiction for piracy and genocide should be equated,²⁵ the practice of states has been to apply universal jurisdiction to “certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, ... [and] genocide...”²⁶

Historically, applying universal jurisdiction to genocide is not as well established as the Restatement of the Law of Foreign Relations suggests. Article VI of the Genocide Convention provides:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.²⁷

¹⁹ Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788 (1988).

²⁰ Mugambi Jouet, *Spain's Expanded Universal Jurisdiction To Prosecute Human Rights Abuses In Latin America, China, And Beyond*, 35 GA. J. INT'L & COMP. L. 495, 498 (2007) (“[T]here is neither a consensus on what universal jurisdiction is or should be, nor a consensus regarding the crimes covered by the doctrine.”).

²¹ Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL. F. 323, 324 (2001).

²² Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 6TH ED., 299-303 (2003).

²³ Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183 (2004).

²⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2nd Cir. 1980).

²⁵ See, e.g., Kontorovich, *supra* note 23; Joshua Michael Goodwin, *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part*, 39 VAND. J. TRANSNAT'L L. 973 (May 2006).

²⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404.

²⁷ Genocide Convention, *supra* note 5, Art. VI.

This language indicates that universal jurisdiction was not generally contemplated when the Genocide Convention was drafted, and, as described in Section II below, the U.S. opposed including any endorsement of universal jurisdiction in the Convention.

Advocates support the use of universal jurisdiction for crimes such as genocide on a number of grounds. First, as the term “of universal concern” indicates, branding a crime as subject to universal jurisdiction serves to mark its “heinous nature and disruptive impact on peace and security...”²⁸ Second, because these crimes are often committed by states or with state support, universal jurisdiction can “fashion a jurisdictional structure that circumvents obstruction by perpetrator regimes while still maintaining legitimate foundations for the exercise of judicial power.”²⁹ Similarly, because states with a nexus to the crime are often unwilling to seek extradition, universal jurisdiction serves to provide another route to ending impunity for international human rights crimes.³⁰

Of course for each of the points stressed by universal jurisdiction’s defenders, critics raise arguments against it. The expansion of universal jurisdiction certainly can not encompass all universally condemned crimes and few would suggest that murder, while certainly universally condemned, is a crime that should fall under universal jurisdiction.³¹ Critics also note that expanding universal jurisdiction makes it more difficult to reach political agreements that encourage those who have committed atrocities to step down.³² Finally, critics argue that prosecutions based on universal jurisdiction are particularly prone to be politically motivated.³³ Yet despite these criticisms, universal jurisdiction for genocide and other international human rights crimes is well-recognized and has gradually expanded over time.

²⁸ M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 153 (2001).

²⁹ Madeline H. Morris, *Symposium: Universal Jurisdiction: Myths, Realities, And Prospects: Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 337 (2001).

³⁰ Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF., Sept./Oct. 2001, at 150.

³¹ Gabriel Bottini, Note, *Universal Jurisdiction After the Creation of the International Criminal Court*, 36 N.Y.U. J. INT’L L. & POL. 503, n.40 (2004) (“The severity of the offense is clearly not the only significant factor. Piracy is the obvious example of a crime subject to universal jurisdiction and it is not necessarily more severe than ordinary murder, which by definition entails the death of the victim and is not subject to universal jurisdiction.”).

³² Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF. July/Aug. 2001, at 86, 90-91.

³³ *Id.*, at 94 (crimes of genocide, crimes against humanity and war crimes are “vague and highly susceptible to politicized application.”); Anthony J. Colangelo, *Constitutional Limits On Extraterritorial Jurisdiction: Terrorism And The Intersection of National and International Law*, 48 HARV. INT’L L.J. 134 (2007) (“[T]he criticism is not so much that universal crimes ought not to be prohibited and prosecuted, but rather that states might subjectively stretch the definitions of the crimes to encompass frivolous cases in order to pursue their own political agendas.”).

Following the ratification of the Genocide Convention, states have tended to follow one of four paths regarding criminal statutes on genocide³⁴: (1) passing no additional statutes to specifically address genocide; (2) criminalizing genocide and granting jurisdiction over acts of genocide falling under the traditional bases of jurisdiction; (3) criminalizing genocide and allowing jurisdiction where the accused is in the territory of the state; or (4) allowing universal jurisdiction regardless of the location of the accused.

Within an analysis of the U.S.'s implementation of the Convention, the first and fourth categories are of less concern. The passage of the Proxmire Act makes irrelevant any argument about the self-executing nature of the Convention. Similarly, given the U.S.'s criticism of Belgium's attempts to exercise universal jurisdiction,³⁵ it is highly unlikely that the U.S. will adopt a form of universal jurisdiction that allows for extraterritorial indictments for genocide.

The Proxmire Act, as enacted in 1988, falls into the second category, criminalizing genocide and granting jurisdiction over acts of genocide falling under the traditional bases of jurisdiction. The rationales for this form of jurisdiction vary. The Proxmire Act conforms to the mandates of Article VI and it makes a public statement against genocide. At the same time, the legislation avoids potential conflicts with other states and distances the U.S. from potentially political prosecutions.

However, to be effective in deterring and punishing acts of genocide, legislation limited to nationality or territorial jurisdiction assumed either that an international criminal court would be established or that all states would pass and enforce equivalent legislation. For much of the history of the Genocide Convention, the failure to create an international criminal court made those assumptions questionable.³⁶ Alternatively, such legislation can be seen as largely symbolic, simply supporting the international community in its opposition to genocide. As discussed in more depth in Section II.A, for the U.S., this symbolism has traditionally been the most important factor in formulating its criminal anti-genocide statute.³⁷

B. Universal Jurisdiction in the United States: Non-Genocide Contexts

While the Genocide Convention does not clearly endorse universal jurisdiction and the original form of the Proxmire Act did not provide for it, U.S. law has invoked universal jurisdiction in a few other contexts. Currently, U.S. law has provided for universal jurisdiction within its statutes criminalizing pi-

³⁴ An overview of state practice with regard to universal jurisdiction over crimes including genocide can be found in Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation* (2001).

³⁵ Malvina Halberstam, *Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?* 25 CARDOZO L. REV. 247, 251 (2003).

³⁶ See Steven R. Ratner, *The International Criminal Court and the Limits of Global Judicialization*, 38 TEX. INT'L L.J. 445, 446 (2003) (describing the historical difficulties in creating an international criminal court).

³⁷ James S. Gifford, *Jus Cogens and Fourteenth Amendment Privileges or Immunities: A Framework of Substantive, Fundamental Human Rights in a Constitutional Safe-Harbor*, 16 ARIZ. J. INT'L & COMP. L. 481, 484 (Spring 1999).

racy, material support for terrorism, and torture as well as having addressed it in the context of extradition and in the civil proceedings authorized by the Alien Tort Claims Act. A brief discussion of these areas is instructive regarding the place of the Genocide Accountability Act within U.S. law.

Just as the discussion of universal jurisdiction tended to expand from the discussion of piracy as a universal crime, the U.S. has implemented universal jurisdiction for piracy.³⁸ The basis for Federal jurisdiction over piracy is found in Article I, Section 8 of the U.S. Constitution. It provides that Congress may “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”³⁹ As formulated, the clause indicates a constitutional basis for universal jurisdiction in prosecuting at least some criminal offenses.

The U.S.’S criminalization of material support for terrorism is a second instance where the U.S. provides for universal jurisdiction.⁴⁰ Like the GAA, 18 U.S.C. § 2339B provides for jurisdiction where, “after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States.”⁴¹ The Ninth Circuit recently found the law unconstitutional⁴² but the ability to institute universal jurisdiction was not at issue. There have been few cases, however, where this universal jurisdiction provision has been utilized.⁴³ The statute criminalizing torture makes a similar provision for universal jurisdiction⁴⁴ but in that case the Convention Against Torture specifies that universal jurisdiction should apply.⁴⁵ As noted above, that is not the case with regard to the Genocide Convention.

The Sixth Circuit Court of Appeals, in *Demjanjuk v. Petrovsky*,⁴⁶ allowed extradition for a prosecution based on universal jurisdiction. *Demjanjuk* involved a Ukrainian immigrant who had been naturalized by the U.S. and who was later accused by the State of Israel of committing a variety of war crimes during World War II.⁴⁷ The Sixth Circuit found that the U.S.’s lack of a war crimes statute did not “necessarily rule out extradition.”⁴⁸ Because the underlying crime of murder was included in both U.S. and Israeli law, extradition

³⁸ 18 U.S.C. § 1651 (2008) (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”). See also 18 U.S.C. § 1653 (2008).

³⁹ U.S. CONST. art. I, § 8, cl. 10. Oddly, the authority cited in the House Report on the Genocide Accountability Act mentions only the “necessary and proper” clause (U.S. CONST. art. I, § 8, cl. 18). H. REP. 110-468 at 5.

⁴⁰ 18 U.S.C. § 2339B (2007).

⁴¹ 18 U.S.C. § 2339B(d)(1)(C).

⁴² *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007).

⁴³ One of the few citations is the indictment of arms dealer Viktor Bout. *U.S. v. Bout*, 2008 WL 601849 (S.D.N.Y. 27 Feb 2008) Sealed Complaint (NO. 08MAG0386) available at <http://www.justice.gov/opa/pr/2008/March/bout-complaint.pdf>.

⁴⁴ 18 U.S.C. § 2340A (2008).

⁴⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Punishment arts. 5-8, 10 Dec. 1984, S. Treaty Doc. No. 100-20, at 21 (1988), 1465 U.N.T.S. 85, 115.

⁴⁶ *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985).

⁴⁷ *Id.*, at 575.

⁴⁸ *Id.*, at 581.

could be allowed. The court went on to address the issue of universal jurisdiction. It cited U.S. law on extradition,⁴⁹ finding that extradition may proceed where an “extradition complaint...charge[s] the person sought to be extradited with having committed crimes ‘within the jurisdiction of any such foreign government.’”⁵⁰ Turning to the 1984 draft Restatement of the Law of Foreign Relations, it noted that Section 404 recognized universal jurisdiction, including over the crimes at issue.⁵¹ By invoking the Restatement’s approval of universal jurisdiction, the *Demjanjuk* decision implied that universal jurisdiction would be a valid basis for U.S. law on genocide or war crimes. However, the *Demjanjuk* decision was vacated after the Israeli courts acquitted Demjanjuk and, upon rehearing, the U.S. Court of Appeals found that the extradition proceedings were marred by numerous procedural errors.⁵² The decision’s findings regarding universal jurisdiction are, therefore, questionable.

Finally, the U.S. has been a leader in the use of universal jurisdiction in civil cases. The revival of the Alien Tort Claims Act (ATCA)⁵³ and its subsequent expansion in the form of the Torture Victims Protection Act⁵⁴ both allow federal courts to hear claims exercising universal jurisdiction.⁵⁵ These statutes create a private right of action for suits brought by aliens against anyone, including other aliens, for crimes committed abroad. Of the various areas of universal jurisdiction, ATCA claims have been the most widely used with around 100 claims filed since 1980.⁵⁶ The Supreme Court has limited the use of the ATCA, stating that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [ATCA] was enacted [in 1789].”⁵⁷ Still, despite the limitations the Supreme Court has placed on ATCA, U.S. courts accept and apply universal jurisdiction to a large number of cases. These numbers stand in sharp contrast to the relatively few international criminal prosecutions based on universal jurisdiction.

The current uses of universal jurisdiction all differ from the GAA. Piracy does not involve the potential for another state to exercise jurisdiction, as the crime is committed outside of territorial boundaries. Extradition to states that will invoke universal jurisdiction only requires that the U.S. court accept universal jurisdiction as a valid basis for prosecution by courts outside of the U.S. The *Demjanjuk* court did not have to examine the constitutionality of a U.S.

⁴⁹ 18 U.S.C. § 3184 (2008).

⁵⁰ *Demjanjuk* at 580 (quoting 18 U.S.C. § 3184).

⁵¹ *Id.*, at 582 (quoting RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, TENTATIVE DRAFT NO. 5 § 404 (1984)).

⁵² *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993).

⁵³ 28 U.S.C. § 1350 (2008).

⁵⁴ P. L. 102-256, 106 Stat. 73, codified at 28 U.S.C. § 1350 nt. (2007).

⁵⁵ See COMM. ON INT’L HUMAN RIGHTS LAW AND PRACTICE, INT’L LAW ASS’N, FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENSES, at 3 n.6 (2000) (“In the United States universal jurisdiction has been exercised with some success for the purpose of obtaining civil law remedies under the Alien Tort Claims Act and the Torture Victim Protection Act.”).

⁵⁶ Beth Stephens, *Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 177 (2004).

⁵⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732, 124 S. Ct. 2739, 2766 (2004).

statute simply because no such U.S. statute was at issue. Civil claims do not involve the same due process rights that would accompany a criminal claim. The most similar accepted uses of universal jurisdiction are those contained in the statutes criminalizing torture and material support for terrorism, but those have been little used and, in the case of the statute criminalizing torture, universal jurisdiction is endorsed by the Torture Convention. Despite these distinctions, however, the combination of forms where the U.S. has applied universal jurisdiction suggests that provisions for universal jurisdiction over genocide will meet any constitutional challenges.

II. THE POLITICS OF UNIVERSAL JURISDICTION FOR GENOCIDE IN THE UNITED STATES

A. The Drafting, Ratification, and Implementation of The Genocide Convention in the United States

Commentators supporting the use of universal jurisdiction have regularly drawn on the International Military Tribunal at Nuremberg.⁵⁸ Robert Jackson, as prosecutor at Nuremberg, famously noted that “[t]he real complaining party at your bar is Civilization.”⁵⁹ However, the Nuremberg Tribunal itself stated a more limited, territorial basis for its jurisdiction: “the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.”⁶⁰ While the International Military Tribunal was an innovative judicial body in numerous respects, the jurisdiction wielded by the Tribunal made no clear endorsement of universal jurisdiction.⁶¹

During the drafting of the Genocide Convention, the U.S. and U.S.S.R. both objected to the exercise of universal jurisdiction.⁶² The U.S. representative noted that “it was dangerous to include the punishment of offenses committed on the territory of other States”⁶³ and that, if universal jurisdiction

⁵⁸ See, e.g., Johan D. van der Vyver, *Prosecuting Offenses Against The Law of Nations in the United States*, 20 EMORY INT’L L. REV. 473 (2006); Regina Horton, *The Long Road To Hypocrisy: The United States and the International Criminal Court*, 24 WHITTIER L. REV. 1041 (2003).

⁵⁹ Opening Statement for the United States of America by Robert H. Jackson, Chief of Counsel for the United States at the Palace of Justice, Nuremberg, Germany, 21 November 1945, reprinted in Robert H. Jackson, *THE NUREMBERG CASE* 30, 94 (1947) (suggesting that any civilized country would have a basis to try the crimes in question); see also, Henry T. King, Jr., *To Prevent and Punish: Commemorating the Sixtieth Anniversary of the Negotiations of the Genocide Convention*, 40 CASE W. RES. J. INT’L L. 13, 19 (2007-2008) (linking Jackson’s statement to universal jurisdiction).

⁶⁰ International Military Tribunal, Judgment (Nuremberg), 41 AM. J. INT’L L. (supplement) 216 (1947).

⁶¹ However, other decisions by post-war tribunals did invoke universal jurisdiction. Henry T. King, Jr., *Universal Jurisdiction: Myths, Realities, Prospects, War Crimes and Crimes Against Humanity: The Nuremberg Precedent*, 35 NEW ENG. L. REV. 281, 284 (2001) (citing *United States v. List*, Case No. 7, 11 Trials Of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No. 10 (1948)).

⁶² U.N. Doc. A/C.6/SR.100 (1948).

⁶³ *Ibid.*

were included, the Genocide Convention would become a “theoretically perfect but politically ill-advised”⁶⁴ document. The provisions for universal jurisdiction included in the original, U.N.-authored draft of the Genocide Convention⁶⁵ were stripped and replaced with the language in Article VI. Despite the U.S.’S objections, other states viewed Article VI as permissive⁶⁶ and went on to adopt various forms of universal jurisdiction.⁶⁷

In 1948, the Truman administration submitted the Genocide Convention to the Senate,⁶⁸ beginning a nearly forty-year effort to ratify and implement it. During this period, universal jurisdiction was rarely alluded to and even more rarely mentioned in positive terms. Senate Judiciary Committee or Subcommittee hearings were held in 1950, 1970, 1971, 1973, 1977, 1981, 1984, and in 1985-86.⁶⁹ Universal jurisdiction was ignored throughout. This omission is best explained by the fears of those opposed to the Genocide Convention: first, that it would enable racial policies in the U.S. to be prosecuted as genocide; second, that it would legitimate trials of U.S. service personnel; and third, that it would dilute U.S. sovereignty.

At the 1950 Senate hearings, “most of the criticism of Article VI focused on...the creation of an international criminal court. In fact, no one seemed concerned about the matter of jurisdictional principles regarding domestic courts.”⁷⁰ Opposition was most clearly enunciated by the American Bar Association (ABA)⁷¹ whose representative “insisted that [intent to destroy a group in whole or in part] could mean a single individual, which could make the convention applicable even to racially motivated lynchings.”⁷² The opponents invoked the International Court of Justice or an international criminal court⁷³ to suggest that U.S. racial policies would be placed in the hands of foreign courts.

⁶⁴ *Ibid.*

⁶⁵ United Nations, Economic and Social Council, Draft Convention on the Crime of Genocide at 8, U.N. Doc. E/447 (1947).

⁶⁶ *Attorney-General of the Government Of Israel v. Adolf Eichmann* 36 I.L.R. 18, 36 (Dist. Ct., 12 Dec. 1961) (1968) (“It is clear that the reference in Article 6 to territorial jurisdiction, apart from the jurisdiction of the non-existent international tribunal, is not exhaustive, and every sovereign state may exercise its existing powers within the limits of customary international law, and there is nothing in the adherence of a state to the Convention to waive powers which are not mentioned in Article 6.”); see also William Schabas, *National Courts Finally Begin to Prosecute Genocide, the “Crime of Crimes,”* 1(1) J. INT’L CRIM. J. 39 (2003) (noting that “beginning with the *Eichmann* decision there has been a tendency to treat Article VI as being merely permissive...”).

⁶⁷ See generally, Bassiouni, *supra* note 28 (describing state practice with regard to adoption of universal jurisdiction, including for genocide).

⁶⁸ S. Comm. on the Judiciary, Report on the Genocide Convention Implementation Act of 1988 (The Proxmire Act), S. REP. NO. 100-333, at 2 (1988).

⁶⁹ LeBlanc, *supra* note 14, at 5-6.

⁷⁰ *Id.*, at 182.

⁷¹ The ABA is notable for having been one of the most prominent and reputable opponents of U.S. ratification of the Genocide convention before changing its position in 1976. *Id.*, at 5, 110.

⁷² *Id.*, at 40.

⁷³ Genocide Convention, *supra* note 5, art. VI.

The Senate hearings of the early 1970s focused on concerns about subjecting U.S. citizens to the courts of other nations and, specifically, the possibility of American service personnel being tried abroad. Given that this occurred against the backdrop of U.S. involvement in Vietnam, this concern is not especially surprising. Nevertheless, it does explain why even strong advocates of the Genocide Convention, such as Senator Frank Church (D-ID) could have the following exchange with Eberhard Deutsch of the ABA:

Deutsch: [W]e are taking frightful chances...by submitting our Armed Forces...[to the possibility of being charged with] genocide because they have acted under orders of their military commanders in doing this, that or the other, and subjecting them to trial in those areas. We are going to regret Nuremberg.

Senator Church: I could agree with you there.... I think that departed considerably from the precedent of Anglo-Saxon law.⁷⁴

Finally, senators, from Senator Bricker (R-OH) in the 1950 hearings⁷⁵ to Senators Helms (R-NC) and Thurmond (R-SC) in the mid-1980s,⁷⁶ displayed an ongoing hostility to anything they saw as threatening the U.S.'s sovereignty. This included the perception that the U.S. would be subordinate to the International Court of Justice⁷⁷ or would be required to extradite accused American citizens for trial in foreign courts.⁷⁸ While both Republican and Democratic administrations supported the convention and argued that the Convention was entirely constitutional,⁷⁹ groups such as the Liberty Lobby were the most vocal and defined the terms under which the Genocide Convention was debated.⁸⁰

The Genocide Convention's eventual ratification was due in large part to the support of the Reagan administration. However, during most of its first term, the Reagan administration never pushed for ratification. Reagan announced his support on the eve of the 1984 election,⁸¹ and only after the public relations disaster of his appearance at Bitburg cemetery did the administration expend serious effort to support ratification.⁸² This context highlights

⁷⁴ *Hearing on the Genocide Convention Before a Subcomm. Of the S. Comm. on Foreign Relations*, 92nd Cong., 1st sess., 85 (1971) (statements by Eberhard Deutsch and Senator Frank Church) (quoted in LeBlanc, *supra* note 14, at 196).

⁷⁵ LeBlanc, *supra* note 14, at 128.

⁷⁶ *Id.*, at 148, 228, 233-34.

⁷⁷ See *id.*, at 201-30.

⁷⁸ *Id.*, at 182-98.

⁷⁹ *Id.*, at 133.

⁸⁰ "The only time we hear the Genocide Treaty brought up, it's by intense, bitter people who know the treaty only through what they read in the Liberty Lobby's Spotlight or some publication of the John Birch Society." Senator William Proxmire, Cong. Rec. 99th Cong. 2nd Sess., 1986, 132, pt. 15:S1355, quoted in Samantha Power, *A PROBLEM FROM HELL* 156 (2002).

⁸¹ Power, *supra* note 80, at 160.

⁸² *Id.*, at 161-63.

Reagan's political interests in ratification, which did not include an interest in universal jurisdiction.

Senate ratification was accompanied by the Lugar-Helms-Hatch Sovereignty Package.⁸³ Opponents of the Convention designed the Sovereignty Package to guarantee that the U.S. would retain its full sovereignty⁸⁴ and weaken the overall implementation of the Convention.⁸⁵ Among other things, it provided that the President would not deposit the instruments of ratification with the U.N. until Congress had passed implementing legislation.⁸⁶ It also announced a reservation for the U.S. with regard to the jurisdiction of the International Court of Justice.⁸⁷

The implementing legislation, the Proxmire Act, only included jurisdiction over acts committed on the territory of the U.S. or acts committed by U.S. nationals. The possibility of wider jurisdiction was discussed during the Proxmire Act hearings. John Murphy of the ABA noted that "one can envisage a situation where [someone who had committed genocide abroad] might come to the United States and be apprehended" who could not then be prosecuted.⁸⁸ Without including universal jurisdiction, he claimed that the genocide statute would be "so narrow in scope as to be dysfunctional with respect to prosecuting and punishing this crime."⁸⁹ However, given the ongoing hostility to the Genocide Convention by various members of Congress, universal jurisdiction was never seriously considered.

A Westlaw search of citations to the Proxmire Act lists only 21 citations in federal case law, none of which is a prosecution for genocide.⁹⁰ It is difficult to draw a causal relationship between the jurisdictional bases of the Proxmire Act and the use of the Act, especially since there have been so few prosecutions for genocide in any national courts (including those with universal jurisdiction).⁹¹ However, commentators have tended to hold out hope that universal jurisdiction can provide a basis for increased prosecutions.⁹² As enacted, no similar hopes could be raised for the Proxmire Act.

For U.S. Presidents, the Genocide Convention provided an important tool in domestic politics.⁹³ Similarly, the failure to ratify the Convention pro-

⁸³ Lugar-Helms-Hatch Sovereignty Package, *supra* note 7.

⁸⁴ Cherif Bassiouni et al., *Genocide: The Convention, Domestic Laws, and State Responsibility*, AM. SOC'Y INT'L L. PROC. 314, 316 (1989).

⁸⁵ Gifford, *supra* note 37, at 484.

⁸⁶ Lugar-Helms-Hatch Sovereignty Package, *supra* note 7, at 26.

⁸⁷ *Id.*, at 18.

⁸⁸ John Murphy, statement in Hearing on S. 1851 Before the Senate Comm. on the Judiciary, 100th Cong., 2nd sess. 17 (1988) (quoted in LeBlanc, *supra* note 14, at 187).

⁸⁹ *Ibid.*

⁹⁰ Search performed 18 Dec. 2007.

⁹¹ See, e.g., Kenneth C. Randall, Book Review, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, 99 AM. J. INT'L L. 293, 296 (2005) ("[T]here have been relatively few invocations of 'pure' universal jurisdiction...").

⁹² Bassiouni, *supra* note 28, at 154 (noting that "the policy arguments...support its application" although it must not be "uncontrolled in its application and destructive of the international legal processes.")

⁹³ See nn. 80-81 *supra*, and accompanying text.

vided the Soviet Union with, as Ambassador Jeanne Kirkpatrick put it, “fuel” for “anti-American propaganda.”⁹⁴ However, U.S. provisions for universal jurisdiction did not particularly advance the interests of these different administrations. This dynamic did not change with the end of the Cold War. Other instruments of international human rights, such as international tribunals,⁹⁵ were available to the U.S. in ways that had less potential to aggravate pro-sovereignty forces in Congress.⁹⁶ In sum, universal jurisdiction was never seriously on the table, and the interests of all parties involved seemed to reinforce the status quo.

B. The Genocide Accountability Act

That status quo might have continued indefinitely, yet change has occurred with the passage of the Genocide Accountability Act. Senator Durbin (D-IL) introduced the Act, which struck the then-current subsection (d) of 28 U.S.C. § 1091 (providing only for jurisdiction where “(1) the offense is committed within the United States; or (2) the alleged offender is a national of the United States...”⁹⁷) and added jurisdiction where:

- (3) the alleged offender is an alien lawfully admitted for permanent residence in the United States (as that term is defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101));
- (4) the alleged offender is a stateless person whose habitual residence is in the United States; or
- (5) 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.⁹⁸

The GAA passed both houses of Congress with significant bipartisan support, and there has been almost none of the isolationist rhetoric that marked the battles over the Convention’s ratification. This section discusses the content

⁹⁴ LeBlanc, *supra* note 14, at 227.

⁹⁵ See, e.g., *United Nations: Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law*, UN S/Res/9827 (1993), reprinted in 32 I.L.M. 1203 (1993) (recording unanimous support for the tribunal); *United Nations: Security Council Resolution 955 (1994) Establishing the International Tribunal for Rwanda*, UN S/Res/955 (1994), reprinted in 33 I.L.M. 1598 (1994) (recording the United States’ vote in favor); Ambassador Pierre-Richard Prosper and Michael A. Newton, *Responding To Rogue Regimes; From Smart Bombs To Smart Sanctions; The Bush Administration View of International Accountability*, 36 NEW ENG. L. REV. 891, 894-95 (2002).

⁹⁶ It did not completely silence the critics, of course. Henry Kissinger, for example, spoke out loudly against the expansion of universal jurisdiction, specifically criticizing Louise Arbour’s preliminary investigations of potential war crimes during NATO military actions in Kosovo. Kissinger, *supra* note 32, at 93-94 (2001).

⁹⁷ 28 U.S.C. § 1091(d) (2007).

⁹⁸ 28 U.S.C. § 1091(d)(3)-(5) (2008).

and legislative history of the GAA and attempts to explain why this amendment could become a political reality in 2007.

As put forward, the GAA will “strengthen [...] the ability of the United States to prosecute perpetrators of genocide by amending title 18 of the United States Code to establish Federal criminal jurisdiction over the crime of genocide, wherever the crime is committed.”⁹⁹ At a hearing of the Subcommittee on Human Rights and the Law in early February 2007, Professor Diane Orentlicher testified. As part of her statement, Professor Orentlicher urged

the Subcommittee to consider amending the Proxmire Act to enable the United States to prosecute crimes of genocide not only when committed in the United States or by a U.S. national, but also when the victim is a U.S. national and, wherever the crime occurs, if the perpetrator is present in the United States, subject to the important caveat that the person will not be prosecuted fairly and vigorously before another court.¹⁰⁰

Notably, the GAA does not include that caveat. In introducing the GAA in the Senate, Senator Durbin stated that it “would close a legal loophole that prevents the U.S. Justice Department from prosecuting people in our country who have committed genocide.”¹⁰¹

This Congressional leadership in amending internationally-focused human rights laws is atypical but not surprising. The 2006 elections that switched party control in the House and Senate gave Democrats interested in international human rights issues new possibilities for legislative action. In addition, the major opponents of the Genocide Convention have largely faded from public view. The Liberty Lobby is now bankrupt as the result of a lawsuit brought by another far-right organization, the Institute for Historical Review.¹⁰² As noted above, the ABA changed its position in the mid-1970s and supported universal jurisdiction in 1987. The Congressional “arch-critic”¹⁰³ of the Genocide Convention in the 1980s, Senator Helms (R-NC), has retired. One might have expected other critics to take their places but that has not happened.

In fact, Senators Coburn (R-OK) and Cornyn (R-TX), both conservative Republicans,¹⁰⁴ were co-sponsors of the GAA. Part of the rationale for coming

⁹⁹ H. REP. 110-468, at 6.

¹⁰⁰ *Hearing before the Subcomm. on Human Rights and the Law of the Comm. on the Judiciary, “Genocide and the Rule of Law” United States Senate, 100th Cong., 1st Sess., S. Hrg. 110-46 (5 Feb. 2007), at 19 (testimony of Professor Diane Orentlicher, American University) (hereinafter “Genocide and the Rule of Law Hearing”).*

¹⁰¹ 110 Cong. Rec. S.4149 (29 Mar. 2007).

¹⁰² Andrea Billups, *Liberty Lobby goes under, ends Spotlight publication; Founder Carto lost lawsuit over a diversion of funds*, WASH. TIMES, A11 (10 July 2001).

¹⁰³ LeBlanc, *supra* note 14, at 9.

¹⁰⁴ See Simon Lazarus, *Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court’s Federalism Revolution?* 56 DEPAUL L. REV. 1, 49 (2006) (“Oklahoma’s Senator Tom Coburn, a particularly vocal social conservative...”); Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U.L. REV. 553, 558 (2007) (Noting “some

on-board seems to have been the perception that this was a very minor amendment to the coverage of the Proxmire Act.¹⁰⁵ It has been consistently presented as “closing a loophole” in the existing law, rather than an expression of American support for universal jurisdiction. Indeed, in the statements introducing the legislation, the term “universal jurisdiction” is never mentioned.¹⁰⁶ Instead, it has been paired with the move towards disinvestment from Sudan¹⁰⁷ that has also garnered significant bipartisan support.¹⁰⁸ Combined with the fact that the Congressional Budget Office has stated that the GAA “will have no significant cost to the federal government,”¹⁰⁹ the GAA was proposed as an amendment with little cost to its supporters.

The Darfur issue has been especially important in bringing in bipartisan support. Religious conservatives have played a major role in the peace process in Sudan¹¹⁰ and have continued their support for efforts in Darfur.¹¹¹ By tying the issue of jurisdiction over genocide to Darfur, an issue with significant Republican support, the GAA both muted potential critics of the amendment and brought in additional supporters.

In addition, the GAA was one of the outcomes of the first hearing of the Subcommittee on Human Rights and the Law, a newly formed subcommittee of the Senate Judiciary Committee. That hearing, “Genocide and the Rule of Law,”¹¹² featured testimony by Hon. Sigal P. Mandelker, Lt. Gen. Hon. Romeo A. Dallaire, Don Cheadle, and Orentlicher.¹¹³ During the 1950 hearings Alfred Scheppe of the ABA said that he “took a back seat to no one in being opposed to genocide” but nonetheless vociferously opposed ratification.¹¹⁴ But the focus of the 2007 Subcommittee hearing was merely on genocide and the rule of law. No one would be interested in attending to oppose legislation that was not the subject of the hearing. There was simply no room for viewpoints such as Scheppe’s to be aired.

The GAA was introduced based on that Subcommittee hearing and the Senate did not hold any additional hearings that might have brought in opponents.¹¹⁵ The House Crime, Terrorism, and Homeland Security Subcommit-

of the Judiciary Committee’s more conservative members, includ[e] Senator [...] John Cornyn...”).

¹⁰⁵ Off-the-record interview with a senate aide (18 Dec. 2007).

¹⁰⁶ 110 Cong. Rec. S3603-3605 (daily ed., 22 Mar. 2007), Introduction of S. 888, 110th Cong. § 1.

¹⁰⁷ *Id.*, Remarks by Senator Durbin (“The purpose of the hearing on Darfur was to try to finally spark some action by this Congress and by this administration to do something. After 4 years of declaring a genocide, it is about time we rolled up our sleeves and did something. And there are things we can do.”).

¹⁰⁸ See, e.g., Comprehensive Peace In Sudan Act Of 2004, 108 Pub. L. No. 497; 118 Stat. 4012; codified at 50 U.S.C. § 1701 (passed by unanimous consent).

¹⁰⁹ *Congressional Budget Office Cost Estimate*, H.R. REP. NO. 100-468, at 4.

¹¹⁰ See, e.g., Charles W. Colson and James S. Bell, *LIES THAT GO UNCHALLENGED IN POPULAR CULTURE* 283 (2005).

¹¹¹ See, e.g., Nicholas D. Kristof, *When the Right Is Right*, Op-Ed, N.Y. TIMES (22 Dec. 2004).

¹¹² *Genocide and the Rule of Law Hearing*, *supra* note 99.

¹¹³ *Ibid.*

¹¹⁴ LeBlanc, *supra* note 14, at 41.

¹¹⁵ Bill Tracking Rep., S. 888, 100th Cong. § 1 (2007).

tee did conduct a hearing regarding the GAA on October 23, 2007.¹¹⁶ That hearing occurred after the Senate had already approved the GAA by unanimous consent¹¹⁷ and, again, only featured testimony from groups and individuals supporting the legislation.¹¹⁸

In sum, the GAA appears to have been made possible by a variety of procedural elements, political changes, and astute political calculations. The format of the hearings allowed potential opponents to be sidelined. Likewise, the encouragement of Republican co-sponsors made the amendment much more attractive to conservatives who, in the mid-1980s, would have been opposed to the provision. In contrast to Senator Proxmire's daily speech on the subject of genocide,¹¹⁹ the work of Senator Durbin has encouraged bipartisan support behind the scenes. Of course the GAA is an amendment to existing law rather than ratification of a new treaty, which has also lowered the profile of the proposed change. However, while that amendment was in theory possible before, the other factors discussed have made it a reality.

III. IMPLICATIONS AND LESSONS FOR THE FUTURE

The passage of the Genocide Accountability Act raises a variety of questions regarding the GAA's impact on U.S. law. This section addresses, first, the scope of the GAA's implementation and, second, the political lessons to be learned from its passage. In Section III.A., the GAA's implementation is approached through an historical example: the possibility, raised in the mid-1990s, of the capture and trial of Pol Pot under U.S. law. Supposing that the GAA had been in place at the time, this section considers whether the GAA would provide a valid basis for trying Pol Pot or someone like him. Section III.B. assesses the lessons offered by the GAA's legislative history. It asks whether the GAA offers insight into repeatable strategies to pass other U.S. human rights legislation.

A. Could Pol Pot Now Be Tried in the United States?

In the mid-1990s, reports of Pol Pot's reappearance in Cambodia were followed by the possibility that the U.S. military might capture him.¹²⁰ At that point, members of the Department of State tried to determine how to hold him accountable for the acts of the Khmer Rouge.¹²¹ Due to the jurisdictional

¹¹⁶ H.R. REP. 110-468

¹¹⁷ Bill Tracking Rep., S. 888, 110th Cong.

¹¹⁸ *Hearing on H.R. 2429 Before the H. Subcomm. on Crime, Terrorism, and Homeland Sec.*, 110th Cong. (23 Oct. 2007) (testimony by Eli Rosenbaum, Director, Office of Special Investigations, United States Department of Justice, Professor Dianne Orentlicher, Jerry Fowler, United States Holocaust Memorial Museum, and Gayle Smith, Senior Fellow, Center for American Progress).

¹¹⁹ Jeffery Huffines, *The Role of N.G.O.s in U.S. Ratification of Human Rights Treaties*, 3 ILSA J. INT'L & COMP. L. 641, 643 (1997) ("Senator William Proxmire submitted statements into the Congressional Record every day for years calling for the United States ratification of the Genocide Convention.")

¹²⁰ Seth Mydans, *For Pol Pot, An Endgame*, N.Y. TIMES (13 Apr. 1998), at A1.

¹²¹ Barbara Crossette, *China Refuses to Go Along With Creation of Pol Pot Tribunal*, N.Y. TIMES (25 June, 1997), at A6.

bases of the Proxmire Act, the U.S. would have been unable to try him in federal court. China's opposition in the U.N. Security Council removed the possibility of creating a new, separate, International Criminal Tribunal.¹²² The Clinton administration then attempted to negotiate with various countries to extradite and try Pol Pot using provisions for universal jurisdiction.¹²³ Canada, apparently due to its requirements for presence in the country, refused to accept extradition¹²⁴ and negotiations with other countries including the Netherlands and Germany¹²⁵ were unsuccessful before Pol Pot's death was reported.

The question then is whether, had the GAA been in effect at that time, the U.S. could have tried Pol Pot in federal court for genocide. There are three ancillary questions regarding the application of the GAA. First, whether the trial of a foreign leader, found and captured outside the U.S. and charged with genocide, could be brought into the country for trial with jurisdiction based on the GAA. Second, to what extent legal definitions of genocide enunciated by international tribunals, the International Court of Justice, and other international bodies would bind U.S. courts. As there has been debate over whether the atrocities committed by the Khmer Rouge meet the definition of genocide,¹²⁶ the extent to which U.S. courts would be bound by those definitions remains open. Finally, the Pol Pot hypothetical raises the question of the extent to which the GAA will, in fact, be used by the U.S. at all.

As noted above, in her testimony before the Subcommittee on Human Rights and the Law, Professor Dianne Orentlicher stated that the "United States should not provide a forum of first recourse for genocide committed abroad."¹²⁷ On some level, this caveat need not be in conflict with a broad grant of universal jurisdiction. The application of any criminal statute is, to some extent, left to the discretion of prosecutors and the executive branch. However, the GAA, as enacted, provides no clear barriers to the U.S. acting as a "forum of first recourse."¹²⁸

The GAA provision for jurisdiction where "the alleged offender is brought into, or found in, the United States, even if that conduct occurred

¹²² Philip Shenon, *U.S. to Ask for a U.N. Tribunal to Prosecute the Khmer Rouge*, N.Y. TIMES (30 Apr. 1998) ("China has indicated in the past that it would use its veto in the Council to prevent a tribunal on the ground that justice for the guerrillas was a matter for Cambodia to decide.")

¹²³ David Scheffer, *Opening Address, Universal Jurisdiction: Myths, Realities, and Prospects*, NEW ENG. L. REV. 233, 234-35 (2001).

¹²⁴ Anthony De Palma, *Canadians Surprised by Proposal to Extradite Pol Pot*, N.Y. TIMES (24 June 1997), at A10.

¹²⁵ Steven Erlanger, *Death of Pol Pot: The Inner Circle; U.S. Wants to Try Khmer Rouge Leaders*, N.Y. TIMES (18 Apr. 1998).

¹²⁶ See, e.g., William Schabas, GENOCIDE IN INTERNATIONAL LAW 119 (2000) ("Confusing mass killing of the perpetrators' own group with genocide is inconsistent with the purpose of the Convention..."); Barbara Harff, GENOCIDE AND HUMAN RIGHTS: INTERNATIONAL LEGAL AND POLITICAL ISSUES 17 (1984) ([Cambodia] can not properly be called genocide...). But see Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82 (1989) (arguing that the acts of the Khmer Rouge meet the legal definition of genocide).

¹²⁷ *Genocide and the Rule of Law Hearing*, *supra* note 99, at 19.

¹²⁸ *Ibid.*

outside the United States,¹²⁹ indicates that the GAA could easily apply to the case of Pol Pot. Especially the language “brought into” indicates that the President could bring a suspect into the country specifically for trial.¹³⁰ The amended statute provides no guarantee that the U.S., if it wished, could not first capture and then try any suspected *genocidaire*. This approach is not limited to the U.S. and the amended statute. The various attempts to charge members of the Bush administration by using provisions for universal jurisdiction indicate a similar willingness to act as the “first recourse.”¹³¹ Nevertheless, the GAA’s only statutory barrier to prosecution is the ability to bring a suspect into the country.

The barriers to prosecution, as in cases where U.S. officials have been charged abroad, are as likely to be practical or political as legal.¹³² The U.S. Attorney’s Manual, even before the GAA’s passage, specified that “[p]rior, express approval of the Assistant Attorney General (AAG) of the Criminal Division (or his or her designee) is required for [a variety of] court actions involving a torture, war crimes, or genocide matter...”¹³³ There is thus significant oversight over prosecutions of genocide and, given the political dimensions of genocide prosecutions,¹³⁴ the caveat that the suspect not be prosecuted elsewhere is likely to be met. However, the important note here is that that oversight is currently within the prerogative of the Executive and no structural barrier exists to prosecution. In a case like that of Pol Pot, the Executive could certainly bring a foreign leader into the country solely in order to try him for genocide.¹³⁵

The potential for trial in the U.S. may prompt other international bodies to accept greater responsibility. In the case of Pol Pot, the possibility of a U.S. trial might well spur countries such as China to support an international forum for trial.¹³⁶ Notably, the 1994 amendments to the Proxmire Act¹³⁷ would also make this a crime eligible for the death penalty.¹³⁸ The added possibility of a death sentence could increase the pressure for an international alternative to trial in the U.S. Thus, even where the GAA does not lead directly to U.S. prosecutions, it may still encourage prosecutions where genocide has been committed.

¹²⁹ S. 888, 110th Cong. § 1.

¹³⁰ This conclusion was confirmed in an off-the record interview with a senate aide. Off-the-record interview with a senate aide (19 Dec. 2007).

¹³¹ Halberstam, *supra* note 35, at 263-64.

¹³² *Id.*, at 261-4.

¹³³ U.S. Attorneys’ Manual 9-2.139 (2007).

¹³⁴ See nn. 32-33 *supra* and accompanying text.

¹³⁵ Sovereign immunity will not apply in this case given that “[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” Genocide Convention, *supra* note 5, at art. IV; see also Brad R. Roth, *Abusive Treatment and the Limits of International Criminal Justice*, 6 J. INT’L CRIM. JUST. 215, 228 (2008) (“International criminal responsibility...reaffirms states’ renunciation of the legal capacity to authorize the pursuit of inadmissible objectives...”).

¹³⁶ Crossette, *supra* note 120.

¹³⁷ Pub. L. No. 103-322, Title VI, § 60003(a)(13), 108 Stat. 1970.

¹³⁸ 28 U.S.C. § 1091(b)(1).

The second set of questions raised by the passage of the GAA regards the relationship between this law and the rulings of international courts on the matter of genocide. The Pol Pot hypothetical highlights this question as, despite common reference to the “Cambodian Genocide,” many commentators have questioned whether the legal definition of genocide is really met in the case of Cambodia. Professor William Schabas notes that “the fundamental difficulty with using the term genocide to describe the Cambodian atrocities lies with the group that is the victim of genocide. Destruction of Khmers by Khmers simply stretches the definition too much.”¹³⁹ While Professor Schabas argues for the application of crimes against humanity to the atrocities of the Khmer Rouge,¹⁴⁰ the problem for the hypothetical trial of Pol Pot is that the U.S. has no separate statute criminalizing crimes against humanity.¹⁴¹

The definition of genocide leaves two possible routes for prosecution. The first would be to prosecute only some subset of the atrocities committed. A prosecution of Pol Pot might rest on the atrocities committed against the Hmong, Cham Muslims or other minority populations of Cambodia.¹⁴² As Marko Milanovic notes

the fact that the killings of Cham Muslims or ethnic Vietnamese in Cambodia might legally qualify as genocide, while the (more numerous) killings of ethnic Khmer who were targeted by other ethnic Khmer because of their social status might not so qualify, could to the average lay person seem completely bizarre. Policy considerations aside, this distinction is nevertheless what the law requires.¹⁴³

Another approach, one that would reach the atrocities committed against the Khmer, would be to read the definition contained within the Genocide Convention and the Proxmire Act broadly. The “specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such”¹⁴⁴ would, on this reading, include instances of “autogenocide.” Professor Hurst Hannum argues that

it is not consistent with the purpose, wording, or preparatory work of the Convention simply to define one-seventh to one-third of the population as ‘political’ and thus beyond the Convention’s scope. Nor is it consistent with the purpose of the Convention to equate geographic residency, language, religion, race, ethnicity, social status, or occupation with

¹³⁹ William Schabas, *Problems of International Codification--Were the Atrocities in Cambodia and Kosovo Genocide?* 35 NEW ENG. L. REV. 287, 291 (2001).

¹⁴⁰ *Id.*, at 288-89.

¹⁴¹ William J. Aceves and Paul L. Hoffman, *Pursuing Crimes Against Humanity in the United States: The Need for a Comprehensive Liability Regime*, in Mark Lattimer & Phillippe Sands (eds.), *JUSTICE FOR CRIMES AGAINST HUMANITY* 237, 239 (2003).

¹⁴² Gregory H. Stanton, *The Cambodian Genocide and International Law*, in Ben Kiernan (ed.), *GENOCIDE AND DEMOCRACY IN CAMBODIA* 141 (1993)

¹⁴³ Marko Milanović, *State Responsibility for Genocide*, 17 EUR. J. INT’L L. 553, n.21 (2006).

¹⁴⁴ 18 U.S.C. § 1091(a) (2008).

membership in a political group, solely in order to avoid the Convention's proscriptions.¹⁴⁵

Any U.S. court that read the statute in this way would have to address those international judgments that might conflict with this reading, particularly those that have enunciated a high threshold for the necessary specific intent. The recent judgment of the International Court of Justice in the *Bosnia v. Serbia* case¹⁴⁶ has found that “save in the case of Srebrenica [Bosnia] has not established that any of the widespread and serious atrocities, complained of as constituting violations...of the Genocide Convention, were accompanied by the necessary specific intent (*dolus specialis*) on the part of the perpetrators.”¹⁴⁷ This has come under criticism for, among other things, “its unrealistically high standard of proof for finding Serbia to have been legally complicit in genocide.”¹⁴⁸ Similarly, the U.N. reported that Sudan’s “policy of attacking, killing and forcibly displacing members of some tribes [in Darfur] does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds.”¹⁴⁹ Again, commentators have argued that the report was either insufficient or simply wrong.¹⁵⁰ Because the situation in Darfur was a particular impetus for the passage of the GAA,¹⁵¹ it seems particularly odd for definitions of genocide not to apply to the precise situation for which the legislation was passed.

For U.S. courts charged with trying a case under the Proxmire Act, the recent Supreme Court decisions in *Medellin v. Texas*¹⁵² and *Sanchez-Llamas v. Oregon*¹⁵³ have stated that “[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.”¹⁵⁴ For a case involving Darfur, the opinion of a U.N. report would have even less weight. Given that the international criminal tribunals for Yugoslavia and Rwanda have had substantial support from the U.S.¹⁵⁵ and

¹⁴⁵ Hannum, *supra* note 125, at 112.

¹⁴⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 2007 I.C.J. 91, 26 February 2007, available at: <http://www.icj-cij.org/docket/files/91/13685.pdf> (hereinafter “Judgment of 26 February 2007”).

¹⁴⁷ *Id.*, at ¶376.

¹⁴⁸ Antonio Cassese, *A Judicial Massacre: The International Court Has Set an Unrealistically High Standard of Proof for Finding Serbia Complicit in Genocide*, Op-Ed, GUARDIAN (27 Feb. 2007).

¹⁴⁹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 Sept. 2004 (25 Jan. 2005), at ¶518, available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf (hereinafter “U.N. Report on Darfur”).

¹⁵⁰ Nsongurua J. Udombana, *An Escape from Reason: Genocide and the International Commission of Inquiry on Darfur*, 40 INT’L L. 41 (2006) (finding the report to be “convoluted and contrived.”).

¹⁵¹ 110 Cong. Rec. S.4149 (29 Mar. 2007).

¹⁵² 552 U.S., 128 S. Ct. 1346 (2008).

¹⁵³ 548 U.S. 331, 126 S. Ct. 2669 (2006).

¹⁵⁴ *Id.*, at 344, 126 S. Ct. at 2684.

¹⁵⁵ *Genocide and the Rule of Law Hearing*, *supra* note 99, at 7 (Testimony of Sigal P. Mandelker, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

have created a sizable body of case law on genocide,¹⁵⁶ the judgments of the tribunals may well be found to be more persuasive than some other sources, perhaps including the ICJ's judgment. U.S. courts, while they may find international precedents relevant and persuasive in defining genocide, would not be bound by those precedents.

In the case of Pol Pot, the definition of the Proxmire Act could, at the very least, include the persecution of various Cambodian minority groups. However, in light of U.S. legislation such as the Cambodian Genocide Justice Act,¹⁵⁷ U.S. courts could also adopt the findings of the Chairman of the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities and determine that the atrocities against the Khmer constituted an "auto-genocide."¹⁵⁸ Not only does the term describe "what the Genocide Convention defines as the destruction 'in part' of a 'national group'"¹⁵⁹ but the destruction of one-seventh to one-third of the population surely also constitutes the "significant part" necessary for the terms of the Proxmire Act. Similarly, in a case involving atrocities in Darfur, a court could well find that the Darfuri tribal groups constitute a "racial, ethnic, or religious group" that were targeted "as such" for purposes of the Proxmire Act.¹⁶⁰

Finally, there is the question of whether the GAA will be used at all. While it is too early to forecast the future use of the law, commentators have noted how few prosecutions have been brought using existing laws that invoke universal jurisdiction outside the U.S.¹⁶¹ There would seem to be four different types of cases where the GAA could possibly be employed, either directly or indirectly. First, there are those, like Enos Kagaba,¹⁶² where someone accused of genocide is found inside the U.S. without being a U.S. national, accused of committing the genocide abroad. The legislative history of the GAA indicates the Act is primarily directed at this kind of prosecution.¹⁶³ Second, there are those cases, such as the example of Pol Pot, where the accused is

¹⁵⁶ Indeed, commentators have noted the American influence on the Tribunals' structures. See, e.g., William Schabas, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* 348 (2006) (Quoting Louise Arbour as stating that "the International Criminal Tribunal for the former Yugoslavia was originally staffed by twenty-five US attorneys who donated their time... Many European countries were outraged by the large number of Americans and felt that the United States had basically hijacked the institution culturally.").

¹⁵⁷ Pub. L. No. 103-236, §§ 571 to 574, 30 Apr. 1994, 108 Stat. 486.

¹⁵⁸ U.N. Doc. UCN 41SR.1510 (1979), at 7.

¹⁵⁹ Hurst Hannum, *supra* note 125, at 112.

¹⁶⁰ This would be supported by Secretary of State Colin Powell's conclusion regarding Darfur that "the evidence corroborates the specific intent of the perpetrators to destroy "a group in whole or in part..." *The Crisis in Darfur: Hearing Before the Sen. Foreign Relations Comm.*, 108th Cong. (2004) (statement of Secretary of State Colin L. Powell).

¹⁶¹ See n.90 *supra* and accompanying text.

¹⁶² *Genocide and the Rule of Law Hearing*, *supra* note 99, at 19 (Testimony of Professor Dianne Orentlicher) ("Thus when U.S. authorities discovered that a prominent suspect in the 1994 [Rwandan] genocide, Enos Kagaba, was in Minnesota, they undertook assertive action to ensure that he would face justice for his crimes, but they could not prosecute Kagaba for genocide here.").

¹⁶³ 110 Cong. Rec. S3603 (Introduction of S. 888, 110th Cong. § 1) (listing the Senate co-sponsors of the GAA).

found abroad and brought into the U.S. As discussed above, the GAA allows for prosecution in these cases although there are likely to be relatively few cases where the political willpower is significant enough to prompt this sort of action. Only figures widely recognized to have directed large-scale atrocities, such as Pol Pot, would fit this description, thus limiting the practical use of the GAA in this way. Third, as also discussed above, there are cases like the Pol Pot example where the threat of prosecution under the GAA reduces international obstruction of other avenues for prosecution. Finally, the U.S. may also accept referrals for genocide prosecution from international tribunals such as the International Criminal Tribunal for Rwanda. Under Rule 11 *bis* of the ICTR's Rules of Procedure and Evidence,¹⁶⁴ the Tribunal may refer cases to national courts for prosecution. While the ICTR prohibits referrals where the death penalty may result,¹⁶⁵ the U.S. could still accept extradition with the condition that the death penalty will not be imposed.¹⁶⁶

None of these possibilities is likely to be regularly applied. Given the relatively few cases and political ramifications, each case will depend on the political willingness to initiate prosecution. Nevertheless, the GAA has opened a variety of opportunities for the U.S. to directly prosecute and to indirectly encourage the prosecution of genocide. These provide far more than just the closing of a loophole in the previous iteration of the Proxmire Act.

B. Lessons for Future Human Rights Legislation

As a general matter, the GAA is unlikely to spur a wave of new international human rights legislation. The perception of the GAA as a statute with limited scope and the way in which it was tied to the efforts surrounding the situation in Darfur suggest that the GAA's passage is a unique situation. However, a few lessons can be learned.

First, the procedural maneuvering that gave the GAA its bipartisan support can be duplicated. Rather than stressing the international commitments and the potential for foreign propaganda which accompanied the battle over the Genocide Convention's ratification, stressing the "loophole closing" nature of the GAA appears to have much greater resonance for individuals who might otherwise be lukewarm towards human rights legislation.¹⁶⁷ This suggests that an incrementalist approach towards human rights legislation, while perhaps less sweeping in its changes, still has significant potential to affect American involvement in international human rights.

Second, the procedural process of the GAA is instructive. It certainly indicates that the creation of a Subcommittee for Human Rights and the Law can have more than rhetorical effects in the future. It also indicates the ability

¹⁶⁴ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda: Rules of Procedure and Evidence, rule 11 *bis*, U.N. Doc. ITR/3/Rev.1 (1995).

¹⁶⁵ *Ibid.*

¹⁶⁶ The U.S. regularly allows countries to seek assurances that the death penalty will not be imposed in extradition proceedings. See, e.g., Extradition Treaty, 8 June 1972, U.S.-U.K., art. 4, 28 U.S.T. 227, 230; Extradition Treaty, 13 Oct. 1983, U.S.-Italy, art. 9, 35 U.S.T. 3023, 3031; Extradition Treaty, 3 Dec. 1971, U.S.-Canada, art. 6, 27 U.S.T. 983, 989.

¹⁶⁷ Off-the-record interview with a senate aide (18 Dec. 2007).

to tie broadly applicable human rights legislation to other issues with significant support like Darfur, even if that other issue has a narrow geographic basis. Utilizing these tactics may allow supporters to push through legislation that would be unable to pass independently.

The passage of the GAA is unlikely to have much effect on some human rights issues such as the potential for the U.S. to join the International Criminal Court (ICC). While both the GAA and U.S. participation in the ICC are moves towards international engagement, the perceived threats to U.S. sovereignty are much starker with regard to the ICC. Likewise, the inherently international nature of treaty ratification will inevitably bring those issues to the fore.

However, were senators to propose a criminal statute against crimes against humanity in peacetime, that could legitimately be viewed as filling another loophole in existing law. Again, tying the legislation to Darfur, one could cite the U.N. report on the situation in Darfur.¹⁶⁸ One could suggest that, again, there would be a loophole prohibiting prosecution of those who had committed atrocities against the people of Darfur. Given the public perception of genocide as the “crime of crimes,”¹⁶⁹ expanding U.S. law to also include crimes against humanity might generate more ire than the GAA. However, if developed through a procedural process akin to the GAA, it could have a legitimate chance of success.

IV. CONCLUSION

Based on the history of the Genocide Convention and the U.S.’S attitudes towards international law, one could reasonably have expected the Proxmire Act, in its previous and limited form, to remain little used and unchanged for the indefinite future. Yet the combination of effective coalition building and effective presentation has served to make legislation broadly appealing where it was previously not even suggested. It may be that, even in this new form, the Proxmire Act will be little used. Nevertheless, the GAA provides an important additional endorsement of universal jurisdiction as well as providing an additional tool for the U.S. both in directly prosecuting genocide and in pressuring the international community to take effective action.

¹⁶⁸ *U.N. Report on Darfur*, *supra* note 148.

¹⁶⁹ William A. Schabas, *Symposium: The Nuremberg Trials: A Reappraisal and Their Legacy: Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry’s Findings on Genocide*, 27 *CARDOZO L. REV.* 1703, 1716 (2006) (“[T]here remains a popular perception that genocide is the ‘crime of crimes,’ and any description that falls short of genocide amounts to betrayal of the victims.”).