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# Immigration Fraud: A Pretext in Domestic Prosecutions for the Crime of Genocide

Tiangay M. Kemokai

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# Immigration Fraud: A Pretext in Domestic Prosecutions for the Crime of Genocide

Tiangay M. Kemokai\*

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I. INTRODUCTION

*The West's post-Holocaust pledge that genocide would never again be tolerated proved to be hollow, and for all the fine sentiments inspired by the memory of Auschwitz, the problem remains that denouncing evil is a far cry from doing good.*<sup>1</sup>

There are acts so heinous as to constitute “the worst crime known to humankind.”<sup>2</sup> A crime that makes comrades out of the “unemployed, the delinquents, and the gangs of thugs in the militia,”<sup>3</sup> and exhorts them to “exterminate the cockroaches”<sup>4</sup> The plan was simple: “kill every Tutsi without exception.”<sup>5</sup>

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1. PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 170 (1998). In Article II of Genocide Convention, the crime of genocide is defined as: “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group.” Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260, U.N. Doc. A/RES/260 (Dec. 9, 1948) (hereinafter “Genocide Convention”).

2. Michael P. Scharf & Brianne M. Draffin, *Foreword: To Prevent and to Punish: An International Conference in Commemoration of the Sixtieth Anniversary of the Genocide Convention*, 40 CASE W. RES. J. INT’L L. 1, 1 (2007-2008) [hereinafter *To Prevent and to Punish*].

3. *Hate Radio*, RWANDAN STORIES, [http://www.rwandanstories.org/genocide/hate\\_radio.html](http://www.rwandanstories.org/genocide/hate_radio.html) (last visited Dec. 1, 2014).

4. See Russell Smith, *The Impact of Hate Media in Rwanda*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/3257748.stm> (last updated Dec. 3, 2003) (detailing the incitement of genocide towards the Tutsis using coded language).

5. *A Simple Plan*, RWANDAN STORIES, [http://www.rwandanstories.org/genocide/simple\\_plan.html](http://www.rwandanstories.org/genocide/simple_plan.html) (last visited Dec. 1, 2014).

And, without exception, the machete wielding perpetrators hacked men, women, and children to death.<sup>6</sup> “Women were splayed on public roads” with mutilated genitalia exposed.<sup>7</sup> Tutsis attempting to flee were met with sudden death when their identity cards were checked and seized at roadblocks.<sup>8</sup> In the aftermath, some 800,000 people (Tutsis and moderate Hutus) were massacred in what the international community has come to recognize as the 1994 Rwandan Genocide.<sup>9</sup>

In response to the Rwandan Genocide, the United Nation’s Security Council created the International Criminal Tribunal for Rwanda (ICTR) in November 1994, based in Arusha, Tanzania.<sup>10</sup> In addition, domestic courts in Rwanda launched prosecutions.<sup>11</sup> In conjunction with domestic prosecutions in Rwanda, community-based *Gacaca* courts addressed the backlog of domestic prosecutions and tried suspects in villages throughout the country.<sup>12</sup> But, how have the States parties to the Convention on the Prevention and the Punishment of the Crime of Genocide (Genocide Convention) responded to the Rwandan Genocide in terms of prosecution in national courts *outside* of Rwanda?<sup>13</sup>

This inquiry is timely because “the mechanisms created to bring accountability for the Rwandan Genocide are wrapping up their work.”<sup>14</sup> As of June 2012, the *Gacaca* courts<sup>15</sup> finished their work, and the ICTR is scheduled to complete its work by the end of 2014.<sup>16</sup> Thus, domestic prosecutions for the crime of genocide are increasingly important.<sup>17</sup>

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6. Susan Sontag, *Preface* to JEAN HATZFELD, *MACHETE SEASON: THE KILLERS IN RWANDA SPEAK*, vii (Farrar et. Al. eds. 2005).

7. Nancy Sail, *Rwanda, Women Under Siege* (Feb. 8, 2012, 9:40AM), <http://www.womenundersiegeproject.org/conflicts/profile/rwanda>.

8. *Roadblocks*, RWANDAN STORIES, [http://www.rwandanstories.org/genocide/simple\\_plan.html](http://www.rwandanstories.org/genocide/simple_plan.html) (last visited Dec. 1, 2014).

9. *Rwanda: How the Genocide Happened*, BBC NEWS, <http://news.bbc.co.uk/2/hi/1288230.stm> (last updated Dec. 18, 2008) (presenting an in-depth treatment on the causes of the 1994 Rwandan Genocide).

10. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994). *See also* Karen Corrie, *Beyond Arusha: The Global Effort to Prosecute Rwanda’s Genocide*, Comment to *Voices*, OPEN SOCIETY FOUNDATION (Apr. 17, 2013, 10:20PM), <http://www.opensocietyfoundations.org/voices/beyond-arusha-global-effort-prosecute-rwandas-genocide>.

11. Corrie, *supra* note 10.

12. *Id.*

13. *See generally id.*

14. *Id.*

15. *See* Linda M. Keller, *The False Dichotomy of Peace Versus Justice and the International Criminal Court*, 3 HAGUE JUST. J. 12, 41 (2008), available at [http://www.issafrica.org/anicj/uploads/Keller\\_Dichotomy\\_of\\_Peace\\_versus\\_Justice.pdf](http://www.issafrica.org/anicj/uploads/Keller_Dichotomy_of_Peace_versus_Justice.pdf) (arguing that alternative justice mechanisms can provide adequate “punishment by incorporating local beliefs and customs as accountability measures for a larger number of offenders.”). For a more in-depth treatment of the *Gacaca* trials *see* Linda E. Carter, *Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda*, 14:1 NEW ENG. INT’L & COMP. L. 42 (2007).

16. Corrie, *supra* note 10.

17. *Id.*

This Comment posits that there is a legal obligation under the Genocide Convention to bring an end to impunity for the crime of genocide.<sup>18</sup> To that end, this article evaluates States parties' (United States, Canada, France, and the Netherlands) compliance with the ancillary obligations under the Genocide Convention: enactment of legislation and punishment by way of persecution or holding génocidaires accountable through extradition.

Part II of this Comment introduces the principle of universal jurisdiction as applied during the Nuremberg International Military Tribunal (Nuremberg Tribunal). Part III provides a comparative study of the aforementioned States parties' paths towards ratification and enactment of domestic legislation to implement the Genocide Convention. Part IV provides a case study of domestic prosecutions in relation to the Rwandan Genocide. Part V provides an analysis of political considerations, legal interpretations of international instruments, and policies that may factor into States parties' legal decisions to forego prosecution under domestic laws criminalizing genocide. Part VI argues that employing immigration remedies as a pretext for domestic prosecutions for the crime of genocide minimizes the gravity of the crime of genocide. To that end, Part VII evaluates the economic costs versus the societal costs of domestic prosecutions. Lastly, Part VIII concludes that domestic prosecutions are a deterrence mechanism that should be employed in the fight against impunity for the crime of genocide.

## II. THE CONCEPT OF GENOCIDE: FROM NUREMBERG TO PARIS

The concept of genocide is derived from the atrocities that occurred during Nazi occupation of Germany.<sup>19</sup> Genocide is a neologism<sup>20</sup> coined by Raphael Lemkin in 1944 by combining *genos*, the Greek word for race, and *cide*, the Latin word for killing.<sup>21</sup> Lemkin introduced the term in his book titled, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government Proposals for Redress*, which demonstrated profound foresight into the “darker purpose for Hitler’s war.”<sup>22</sup>

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18. Juan E. Méndez, *The United Nations and the Prevention of Genocide*, in *THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS* 226, 226 (Ralph Henham & Paul Behrens eds., 2007).

19. William A. Schabas, *Origins of the Genocide Convention: From Nuremberg to Paris*, 40 CASE W. RES. J. INT'L L. 35, 41 (2007-2008).

20. William A. Schabas, *Genocide in International Law: The Crime of Crimes* (2000), <http://catdir.loc.gov/catdir/samples/cam032/99087924.pdf> (last visited Dec. 1, 2014).

21. *To Prevent and to Punish*, *supra* note 2.

22. Michael Ignatieff, *The Unsung Hero Who Coined the Term Genocide*, THE NEW REPUBLIC (Sept. 21, 2013), <http://www.newrepublic.com/article/114424/raphael-lemkin-unsung-hero-who-coined-genocide>.

Shortly thereafter, the term was included in the indictments during the Nuremberg Tribunal;<sup>23</sup> however, the term genocide was not included in the final judgment.<sup>24</sup> In fact, Henry T. King, Jr., a former war crimes prosecutor, recalled that Lemkin “was very upset that the [Nuremberg Tribunal] did not go far enough in dealing with genocide actions . . . because it limited its judgment to wartime genocide and [excluded] peacetime genocide.”<sup>25</sup> Lemkin’s displeasure with the Nuremberg Tribunal’s judgment resonated with Cuba, India, and China<sup>26</sup>, three United Nations member states.<sup>27</sup> Thus, a few days after the Nuremberg Tribunal’s judgment was issued, on September 30 and October 1, 1946, the three member states proposed a resolution to include peacetime genocide at the first session of the General Assembly.<sup>28</sup> This resolution eventually led to the adoption of the Genocide Convention.<sup>29</sup> Hence, Lemkin is largely recognized as the “Father of the Genocide Convention.”<sup>30</sup>

A. *Universal Jurisdiction under Customary International Law*

The principle of universal jurisdiction is rooted in customary international law.<sup>31</sup> While Lemkin is recognized as the “Father of the Genocide Convention,”<sup>32</sup> the principle of universal jurisdiction, as it relates to the crime of genocide, can be attributed to Supreme Court Justice Robert H. Jackson.<sup>33</sup> Justice Jackson proposed the elimination of the defense of sovereign immunity and superior orders, which later became a part of the London Charter of August 8, 1945 upon which the Nuremberg trial was based.<sup>34</sup> This recommendation led to the “recognition of genocide as a crime against humanity.”<sup>35</sup> Once genocide was internationally recognized as a crime against humanity, Jackson advocated for the principle of universal jurisdiction to hold those who carried out the genocidal

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23. The Nuremberg International Military Tribunal was held from 1945 to 1949 and consisted of a series of 13 trials conducted in Nuremberg, Germany, in an effort to bring Nazi war criminals to justice.

24. *To Prevent and to Punish*, *supra* note 2, at 1-2.

25. Schabas, *supra* note 19; Henry T. King Jr., *Genocide and Nuremberg*, in *THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS* 29 (Ralph Henham & Paul Behrens eds., 2007).

26. As an aside, “In 1945, the leaders of the Nationalist and Communist parties, Chiang Kai-shek and Mao Zedong, met for a series of talks on the formation of a post-war government,” but a civil war broke out in 1946. U.S. Dep’t of State, *Milestones 1945-1952: The Chinese Revolution of 1949*, <http://history.state.gov/milestones/1945-1952/chinese-rev> (last visited Feb. 14, 2013).

27. Schabas, *supra* note 19.

28. *Id.* at 35-36.

29. *Id.*

30. *Id.* at 36-37.

31. Henry T. King Jr., *supra* note 25.

32. Schabas, *supra* note 19, at 36-37.

33. Henry T. King Jr., *supra* note 25.

34. *Id.* at 32.

35. *Id.* at 34-35.

acts responsible.<sup>36</sup> Although, the “concept of universal jurisdiction is long standing in international law stemming from its application from the seventeenth century onwards to pirates,”<sup>37</sup> Jackson’s opening statement, in which he announced that “the real complaining party at your bar is civilization,”<sup>38</sup> made universal jurisdiction “the most important principle derived from Nuremberg.”<sup>39</sup>

*B. The Genocide Convention: Universal Jurisdiction?*

The concept of universal jurisdiction is essentially the “international recognition of [an] offense that is of universal concern.”<sup>40</sup> While, what constitutes universal concern is debatable, as stated previously, universal jurisdiction has its origins in piracy.<sup>41</sup> By extension, genocide, like piracy, is an offense against the law of nations.<sup>42</sup> Furthermore, the Restatement of Foreign Relations Law recognizes that a State has “jurisdiction to define and prescribe punishment for . . . genocide, war crimes, and . . . terrorism.”<sup>43</sup> Indeed, the United States has invoked universal jurisdiction in the context of several of its criminal statutes. For example, in the case of terrorism, the United States can exercise universal jurisdiction over conduct that materially supports terrorism.<sup>44</sup> Also, the Convention Against Torture provides for universal jurisdiction.<sup>45</sup>

Likewise, in practice, the principle of universal jurisdiction has been exercised in criminal cases.<sup>46</sup> In 1962, The Israeli Court sentenced Adolf Eichmann to death for the crime of genocide on the basis of universal jurisdiction upon rejection of his argument that Israel was not a state when the crimes were committed.<sup>47</sup> Moreover, the Sixth Circuit Court of Appeals extradited John

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36. *Id.* at 33.

37. *Id.*

38. King, *supra* note 25, at 33 (quoting Justice Jackson).

39. *Id.* (quoting Richard Goldstone, the first prosecutor at the Hague proceedings).

40. Zachary Pall, Note, *The Genocide Accountability Act and U.S. Law: The Evolution and Lessons of Universal Jurisdiction for Genocide*, 3 INTERDISC. J. HUM. RTS. L. 13, 15 (2008-2009).

41. 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).

42. 18 U.S.C. § 1651 (2008) (provides that Congress may “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”).

43. Restatement (Third) of Foreign Relations Law of the United States § 404 (1987).

44. 18 U.S.C. § 2339B(d)(1)(C) (exercising universal jurisdiction when “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.”).

45. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 5-8, Dec. 10, 1984, 1465 U.N.T.S. 85, 115.

46. *See* cases cited *infra* note 47-48.

47. *See* The Attorney-General of the Government of Israel v. Eichmann, District Court of Jerusalem, Criminal Case No. 40/61, Judgment (Dec. 15, 1961), I.L.R. 1968 §§ 19-21.

Demjanjuk, an Ukrainian immigrant, who had become a naturalized United States citizen, to Israel on the basis of universal jurisdiction for war crimes.<sup>48</sup>

But, even supposing “that . . . genocide is an international crime so heinous that [génocidaires] can be subject [to] trials in any court that is willing to take jurisdiction over them,”<sup>49</sup> the question remains whether the Genocide Convention codifies the principle of universal jurisdiction.<sup>50</sup> A textualist reading of the treaty would conclude that the Genocide Convention did not contemplate universal jurisdiction over acts of genocide.<sup>51</sup> 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.<sup>52</sup>

Nevertheless, State parties to the Genocide Convention have roundly adhered to the principle of universal jurisdiction, under customary international law, when implementing legislation to give effect to the provisions of the Genocide Convention.<sup>53</sup>

### III. A COMPARATIVE STUDY ON RATIFICATION OF THE GENOCIDE CONVENTION AND IMPLEMENTING LEGISLATION

Article V of the Genocide Convention provides as follows:

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide

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48. *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985). The United States does not have a war crimes statute. However, the Sixth Circuit found support in exercising universal jurisdiction in the Restatement of Foreign Law. But, since the decision was later vacated, there are questions as to whether the reasoning in applying universal jurisdiction is valid.

49. King, *supra* note 25, at 33.

50. For a more in-depth treatment of universal jurisdiction and the Genocide Convention see Zachary Pall, Note, *The Genocide Accountability Act and U.S. Law: The Evolution and Lessons of Universal Jurisdiction for Genocide*, 3 INTERDISC. J. HUM. RTS. L. 13-17 (2008-2009).

51. Pall, *supra* note 40, at 13-17.

52. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260, U.N. Doc. A/RES/260 (Dec. 9, 1948) (hereinafter “Genocide Convention”).

53. See *infra* Part III.



effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.<sup>54</sup>

Unsurprisingly, States have followed different paths in implementing legislation criminalizing genocide.<sup>55</sup> Ultimately, however, a survey of statutes criminalizing genocide appear to affirm the broad acceptance of universal jurisdiction over the crime of genocide.<sup>56</sup> Indeed, universal jurisdiction is not dependent upon the Genocide Convention, as a *jus cogens*<sup>57</sup> crime it is subject to universal jurisdiction just like piracy.<sup>58</sup>

A. *The United States' Path Towards Ratification and Enacting Legislation Implementing The Genocide Convention*

The United States' road to ratification of the Genocide Convention is long and paved with apprehension.<sup>59</sup> Although the United States was a signatory to the Genocide Convention in 1948, the Genocide Convention was not ratified until 1988,<sup>60</sup> after the passage of the implementing legislation.

There are several reasons why the passage of the Genocide Convention languished for nearly forty years. The United States feared their racial policies might be prosecuted as genocide, suspected that trials of service personnel would be legitimized, and believed that the United States' sovereignty would be diluted.<sup>61</sup> Thus, the United States registered the following reservations upon ratification:

- (1) That with reference to article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

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54. Reservations on the Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260, U.N. Doc. A/RES/260 (Dec. 9, 1948). (hereinafter "Reservations").

55. There are four paths that States have followed in implementing legislation criminalizing genocide: 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. Pall, *supra* note 40.

56. See *infra* Part III.B-D.

57. STEPHEN MCCAFFREY, UNDERSTANDING INTERNATIONAL LAW ix (2006)

58. Méndez, *supra* note 18.

59. Pall, Note, *supra* note 40, at 13.

60. *Id.*

61. United Nations Treaty Collection, *Status of Treaties*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg\\_no=IV-1&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en#EndDec) (last visited Oct. 27, 2013) [hereinafter *Status of Treaties*].

(2) That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.<sup>62</sup>

As a consequence, the Lugar-Helms-Hatch Sovereignty Package (Sovereignty Package), which weakened the Genocide Convention and guaranteed that the United States maintained its full sovereignty, accompanied the Senate ratification.<sup>63</sup> The Sovereignty Package also required the passage of implementing legislation before Congress would deposit the instruments of ratification with the United Nations.<sup>64</sup> The implementing legislation became known as the Proxmire Act.<sup>65</sup>

### *1. The Proxmire Act*

As written, the Proxmire Act did not contemplate the exercise of universal jurisdiction.<sup>66</sup> Prosecution was only permitted when “the offense is committed within the United States”<sup>67</sup> or where “the alleged offender is a national of the United States . . .”<sup>68</sup>

### *2. The Genocide Accountability Act*

In contrast, the Genocide Accountability Act of 2007 (GAA) expands the jurisdictional reach of the Proxmire Act to 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.<sup>69</sup>

Thus, as written the GAA establishes “federal criminal jurisdiction over the crime of genocide, wherever the crime is committed.”<sup>70</sup>

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62. *Id.*

63. Resolution of Ratification (Lugar-Helms-Hatch Sovereignty Package), S. Exec. Rep. 2, 99th Cong., 1st sess. (1985).

64. *Id.*

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

66. Pall, *supra* note 40, at 23.

67. 18 U.S.C. § 1091(d)(1).

68. 18 U.S.C. § 1091(d)(2).

69. Genocide Accountability Act of 2007, Pub. L. No. 110-151, 121 Stat. 1821.

70. 18 U.S.C. § 1091 (2008); Pall, *supra* note 40, at 25.

B. Canada's Path

Canada ratified the Genocide Convention on September 3, 1952.<sup>71</sup> Unlike the United States, Canada did not register any reservations.<sup>72</sup> However, it was only as recent as 2000 that Canada incorporated universal jurisdiction, as an over-arching principle, over the crime of genocide into its domestic legal system.<sup>73</sup> Under the Crimes Against Humanity and War Crimes Act of 2000, Canada enjoys a broad application of universal jurisdiction over any person who commits the crime of genocide and is present in Canada, regardless of their nationality.<sup>74</sup>

C. France

France ratified the Genocide Convention on October 14, 1950.<sup>75</sup> While, France, like Canada, has not registered a reservation or objection to the Genocide Convention,<sup>76</sup> its “position with respect to genocide is . . . rather paradoxical.”<sup>77</sup> For example, on March 1, 1994, France introduced Article 211-1 *Code pénal* to penalize genocide which adopts a more objective criterion to the Genocide Convention’s intent element, and enlarges the scope of the definition of genocide.<sup>78</sup> But, it appears at first blush that universal jurisdiction over the crime of genocide is only applied in limited cases.<sup>79</sup> In accordance with Article 113-6 every crime committed abroad by a French national is punishable in France.<sup>80</sup> Also, Article 113-7 permits the application of French law in cases where the victim is of French nationality at the time of the violation.<sup>81</sup> In summary, “France has jurisdiction to prosecute acts of genocide committed abroad if the perpetrator or victim have French nationality.”<sup>82</sup> However, “in such cases, criminal

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71. *Status of Treaties*, *supra* note 61; Canadian Heritage, GOVERNMENT OF CANADA, <http://www.pch.gc.ca/ddp-hrd/docs/treat-trait/un-eng.cfm#table1> (last visited Feb. 2, 2014).

72. *Status of Treaties*, *supra* note 61.

73. Crimes Against Humanity and War Crimes Act of 2000, SC 2000, c. 24 (Can), *available at* <http://laws-lois.justice.gc.ca/PDF/C-45.9.pdf> (last visited Feb. 2, 2014).

74. *Id.*

75. *Status of Treaties*, *supra* note 61.

76. *Id.*

77. Caroline Fournet, *Reflection on the Separation of Powers: The Law of Genocide and the Symptomatic French Paradox*, in *THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS* 212 (Ralph Henham & Paul Behrens eds., 2007).

78. *Id.*

79. See Jan Wouters & Sten Verhoeven, *The Prosecution of Genocide—in Search of A European Perspective*, in *THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS* 200 (Ralph Henham & Paul Behrens eds., 2007) [hereinafter *The Prosecution of Genocide*].

80. CODE PÉNAL [C. PÉN.] art. 113-6 (Fr.).

81. *Id.* at art. 113-8.

82. *The Prosecution of Genocide*, *supra* note 79.

proceedings can only be initiated by the public prosecutor, following a complaint of the victim or his legal successor.”<sup>83</sup>

Notwithstanding, Article 689 *Code de Procédure Pénale* allows for universal jurisdiction over offenses committed abroad if the perpetrator can be found on French territory, regardless of a link to France, providing that the international conventions, to which France is a party, allows extraterritorial jurisdiction.<sup>84</sup> Although genocide is not enumerated in the conventions that are subject to universal jurisdiction,<sup>85</sup> under the framework of acts incorporating the United Nations Security Council Resolution 827 and 955, creating the International Criminal Tribunal for the Former Yugoslavia (ICTY) and ICTR, respectively, France can exercise universal jurisdiction over genocide<sup>86</sup>

#### *D. The Netherlands*

On June 20, 1966, The Netherlands ratified the Genocide Convention.<sup>87</sup> Interestingly, the Netherlands registered objections to the United States reservations concerning Article IX (submission to the International Court of Justice).<sup>88</sup> Thus, the Netherlands refused to recognize the United States as a party to the Genocide Convention.

In terms of enacting legislation to implement the Genocide Convention, Article 3, of the Dutch Law on International Crimes (*Wet Internationale Misdrijven*) of June 19, 2003,<sup>89</sup> closely aligns with the language of the Genocide Convention and the Rome Statute of the International Criminal Court.<sup>90</sup> Article 2.a. permits the Dutch court to exercise universal jurisdiction over genocide “when the alleged perpetrator is present on Dutch territory.”<sup>91</sup>

But, even under Dutch law, universal jurisdiction has its limitations.<sup>92</sup> For instance, “Dutch courts will only prosecute if the alleged perpetrator cannot be extradited to another country on whose territory the acts are committed or whose national is the perpetrator or the victim of the crimes concerned or surrendered to

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83. *Id.*

84. CODE DE PROCÉDURE PÉNAL [C. PR. PÉN.] art. 689 (Fr.).

85. *The Prosecution of Genocide*, *supra* note 79.

86. *Id.*

87. UNITED NATIONS TREATY COLLECTION, *Status of Treaties*, [https://treaties.un.org/Pages/ViewDetails.aspx?mtmsg\\_no=IV-1&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?mtmsg_no=IV-1&chapter=4&lang=en#EndDec) (last visited Feb. 12, 2014).

88. *Id.* (Netherlands did not consider the United States, among other State parties, a party to the Genocide Convention because of its reservations concerning Article IX. *See also infra* Part III.A.

89. *Wet Internationale Misdrijven*, June 19, 2003, *Staatsblad*, 2003, No. 270.

90. *The Prosecution of Genocide*, *supra* note 79.

91. *Id.*

92. *Id.*

an international tribunal.”<sup>93</sup> Further, prosecution is under the sole discretion of the prosecutor.<sup>94</sup>

To be sure, this is not an exhaustive list of State parties that have ratified and enacted legislation to implement the Genocide Convention.<sup>95</sup> But, what emerges from this brief comparative study is a consensus among State parties, at least judging from the language of domestic legislation, that the principle of universal jurisdiction should be applied to the crime of genocide.<sup>96</sup> Thus, the central inquiry is whether the aforementioned State parties to the Genocide Convention enforce domestic legislation criminalizing genocide as a means to end impunity. In answer to this question, case studies of recent cases involving the Rwandan Genocide are presented below.<sup>97</sup>

#### IV. CASE STUDIES: RWANDAN GENOCIDE CASES IN DOMESTIC COURTS

Whatever one’s position is regarding whether or not the Genocide Convention codifies the principle of universal jurisdiction, States have increasingly responded in the affirmative when one considers the enactment of domestic legislation to implement the Genocide Convention.<sup>98</sup> However, holding persons accused of genocide accountable, under domestic legislation criminalizing genocide, has yielded varying results. This section explores the various cases brought before domestic courts.

##### A. *The Netherlands: Universal Jurisdiction Not Retroactive?*

In 1998, Joseph Mpambara, a Rwandese, applied for asylum in the Netherlands.<sup>99</sup> Mpambara was arrested on August 7, 2006, by Dutch authorities under the principle of universal jurisdiction.<sup>100</sup> Mpambara was “accused of attacking a church, kidnapping, torture, and the murder of two mothers and their four children in Rwanda.” While Joseph Mpambara was sentenced to 20 years

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93. See the preparatory works of the Dutch Law on International Crimes in Memoire van Toelichting bij de Wet Internationale Misdrijven, Kamerstukken II 2001-2002, 28 337, No. 3, p. 18.

94. *The Prosecution of Genocide*, *supra* note 79.

95. For a more exhaustive treatment on State parties that have ratified the Genocide Convention see UNITED NATIONS TREATY COLLECTION, *Status of Treaties*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtmsg\\_no=IV-1&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtmsg_no=IV-1&chapter=4&lang=en#EndDec) (last visited Oct. 27, 2013). See also *The Prosecution of Genocide*, *supra* note 79 (study on the practice of criminal jurisdiction over genocide in seven EU member States); REDRESS/FIDH, *Universal Jurisdiction in the European Union*, <http://www.redress.org/downloads/conferences/country%20studies.pdf> (last visited Oct. 27, 2013).

96. See *infra* Part III.A-D.

97. See *infra* Part IV.

98. See *infra* Part III.A-D.

99. Joseph Mpambara, TRIAL, <http://www.trial-ch.org/en/ressources/trial-watch/trial-watch/profils/profile/757/action/show/controller/Profile.html> (last visited on Feb. 12, 2014).

100. *Id.*

imprisonment for torture on March 23, 2009,<sup>101</sup> the Dutch court held that it had no jurisdiction to try him for genocide.<sup>102</sup> Similarly, the Dutch courts did not find jurisdictional ground to prosecute Michel Bagaragaza.<sup>103</sup> In the *Bagaragaza* case, the ICTR charged Mihcel Bagaragaza, the head of the entity that controlled the Rwandan tea industry, with complicity in committing genocide.<sup>104</sup> The ICTR prosecutor sought to transfer the case to Norway after Bagaragaza voluntarily surrender in 2005.<sup>105</sup> But in the courts view original jurisdiction did not lie because Dutch law did not provide for universal jurisdiction over genocide at the time of the Rwandan genocide in 1994.<sup>106</sup>

Finally, in the case of Yvonne Basebya, a Rwanda-born Dutch citizen, the Dutch court prosecuted her as a Dutch citizen.<sup>107</sup> Basebya was accused of inciting “youngsters to commit murder against Tutsis during meetings, as evidenced by the song she sang, ‘Tuba Tsembe Tsembe’, which means let’s exterminate them all.”<sup>108</sup> On March 1, 2013 the Dutch court convicted Basebya of inciting genocide.<sup>109</sup> As a consequence, Basebya was sentenced to six years and eight months in jail.<sup>110</sup>

#### *B. France: A Slow Path to Prosecution*

“France has been accused of being slow to prosecute those allegedly linked to the genocide,” as evidenced in various cases.<sup>111</sup> For instance, Laurent Serubuga was arrested in July 2013, under an international arrest warrant issued by Rwanda.<sup>112</sup> The 77-year-old Hutu served as deputy army chief-of-staff during the

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101. Chris Morris, *Dutch court sentences Rwandan Hutu to Life in Prison over 1994 Genocide*, JURIST (July 7, 2011, 12:22 PM ET), <http://jurist.org/paperchase/2011/07/dutch-court-sentences-rwandan-hutu-to-life-in-prison-over-1994-genocide.php>.

102. *Hague Court Finds Genocide Complaint Inadmissible*, THE HAGUE JUSTICE PORTAL (Aug. 8, 2007), <http://www.haguejusticeportal.net/index.php?id=8037>.

103. Cedric Ryngaert, *The Failed Referral of Michel Bagaragaza from the ICTR to the Netherlands*, THE HAGUE JUSTICE PORTAL (Oct. 14, 2009), <http://www.haguejusticeportal.net/index.php?id=11116>.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Dutch Court Hand Basebya Six Years for Genocide*, THE NEW TIMES (Mar. 2, 2013), <http://www.newtimes.co.rw/news/index.php?i=15284&a=64478>.

108. *Id.*

109. Karen Corrie, *Beyond Arusha: The Global Effort to Prosecute Rwanda’s Genocide*, Comment to Voices, OPEN SOCIETY FOUNDATION (Apr. 17, 2013), <http://www.opensocietyfoundations.org/voices/beyond-arusha-global-effort-prosecute-rwandas-genocide>.

110. *Dutch Court Hand Basebya Six Years for Genocide*, THE NEW TIMES (Mar. 2, 2013), <http://www.newtimes.co.rw/news/index.php?i=15284&a=64478>.

111. *Rwandan Ex-spy Chief Tried in Paris on Genocide Charges*, BBC NEWS, (Feb. 4, 2014, 11:04ET), <http://www.bbc.co.uk/news/world-europe-26030493>.

112. *Rwandan genocide: France to release suspect Serubuga*, BBC NEWS (Sept. 12, 2013), <http://www.bbc.co.uk/news/world-europe-24064089>.

Rwandan Genocide.<sup>113</sup> “Serubuga was part of a group of officers known as “The Juvenal Habyarimana comrades of July 5, 1973,” who had helped him overthrow former President Kayibanda.”<sup>114</sup> As such, he was considered “one of the brains behind the killings.”<sup>115</sup> However, the court in Douai, France, ordered the release of the suspect.<sup>116</sup> The court’s rationale for its refusal to grant Rwanda’s extradition request was due to the fact that genocide did not exist as a crime under Rwandan criminal code at the time the atrocities occurred.<sup>117</sup> Further, the court found that the statute of limitations expired since the arrest warrant was issued ten years after the alleged crimes.<sup>118</sup> The judges did not indicate that the allegations were baseless, but rather that the suspect would not be granted a fair trial in Rwanda.<sup>119</sup> Ironically, “France has repeatedly refused to extradite Genocide suspects to Rwanda, but has sent some to Tanzania to face trial at the ICTR. Yet, the ICTR has made transfers of genocide suspects to Rwanda.”<sup>120</sup>

Prosecutors in the Serubuga case are seeking an appeal and express frustration with the French law.<sup>121</sup> Alan Gautier, the head of Collective of Civil Parties for Rwanda, a French-based rights group, said it is the 15th or 16th time that France had turned down an extradition to Rwanda.<sup>122</sup> For example, “[t]he Court of Appeal of Paris in 2011, rejected the extradition of Agathe Habyarimana, the widow of the former Rwandan president Habyarimana. In 2010, it refused to extradite Eugene Rwamucyo, a Rwandan doctor.”<sup>123</sup>

Notwithstanding, on November 13, 2013, a French Appeals Court finally approved the extradition of both Claude Muhayimana and Innocent Musabyimana for their suspected involvement in the 1994 Rwandan Genocide.<sup>124</sup> And as the twentieth anniversary of the Rwandan Genocide approaches, France has begun its first trial. On February 4, 2014, Paul Simbikangwa was accused of financing the genocide and inciting genocide through radio and television broadcast.<sup>125</sup> Soon thereafter, on March 14, 2014,

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113. *Id.*

114. Edwin Musoni, *Fury as France Releases Another Genocide Suspect*, THE NEW TIMES, (Sept. 14, 2013), <http://www.newtimes.co.rw/news/index.php?a=70423&i=15480>.

115. *Id.*

116. *Rwandan genocide*, *supra* note 112.

117. Musoni, *supra* note 114.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Musoni, *supra* note 114.

123. *Court in France orders release of man held in Rwandan genocide*, CNN WORLD (Sept. 15, 2010), <http://www.cnn.com/2010/WORLD/europe/09/15/france.rwanda.release/>.

124. Samuel Franklin, *France Appeals Court Approves Extradition of Rwandan Genocide Suspects*, JURIST (Nov. 13, 2013), <http://jurist.org/paperchase/2013/11/france-appeals-court-approves-extradition-of-rwanda-genocide-suspects.php>.

125. Alexandria Sage, *Rwanda genocide trial begins in French Court*, Reuters (Feb. 4, 2014), <http://www.reuters.com/article/2014/02/04/us-france-rwanda-trial-idUSBREA130VC20140204>.

Simbikangwa was sentenced to 25 years in prison for his role in the 1994 Rwandan genocide.<sup>126</sup>

C. Canada: To Extradite or to Prosecute

In its first Rwandan Genocide case, Canada chose to use immigration remedies rather than domestic legislation criminalizing genocide.<sup>127</sup> Léon Mugesera fled to Canada after an arrest warrant was issued by Rwandan authorities for a speech that he gave in Kabaya before a 1,000 people, in his official capacity as Vice President of the National Republican Movement for Development and Democracy, “in which he threatened that Tutsis would be forcibly returned to Ethiopia.”<sup>128</sup> On June 28, 2005, after several legal proceedings in the lower courts, the Supreme Court of Canada ultimately found that Mugesera was guilty of inciting genocide, and therefore, subject to deportation under immigration statutes.<sup>129</sup> Yet, Mugesera was not deported to Rwanda until January 23, 2012, during which time authorities took to ascertain whether deportation posed a risk to his safety.<sup>130</sup> Finally, Musegera was charged in Rwanda with genocide, incitement of genocide, and distribution of arms,<sup>131</sup> and his trial began in substance on January 17, 2013.<sup>132</sup>

However, Canada has convicted a perpetrator of genocide under the Crimes Against Humanity and War Crimes Act of 2000.<sup>133</sup> *Désiré Munyaneza* was accused of “committing murder, psychological terror, physical attacks and sexual violence with intent to wiping out the Tutsi.”<sup>134</sup> In 2009, “*Munyaneza, a leader of a Rwandan militia . . . , was the first person to be convicted under the Act, and sentenced to life in prison for genocide, crimes against humanity, and war crimes.*”<sup>135</sup>

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126. Kim Willsher, *Rwandan Former Spy Chief Pascal Simbikangwa Jailed over Genocide*, THE GUARDIAN (Mar. 14, 2014), <http://www.theguardian.com/world/2014/mar/14/rwanda-former-spy-chief-pascal-simbikangwa-jailed-genocide>.

127. *Mugesera v. Canada* (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40.

128. Léon Mugesera, TRIAL, <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/696/action/show/controller/Profile/tab/fact.html> (last visited Feb. 12, 2014) [hereinafter Léon Mugesera]; *Mugesera v. Canada* (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40.

129. *Mugesera v. Canada* (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40; Immigration Act, R.S.C. 1985, c. I-2, s. 27(1)(a.1)(ii), (a.3)(ii).

130. Léon Mugesera, *supra* note 128.

131. Alysia Lau, *Léon Musegera: A Lesson in Trying Judicial Deference*, THE COURT BLOG, (Feb. 27, 2012), <http://www.thecourt.ca/2012/02/27/leon-mugesera-a-lesson-in-trying-judicial-deference/>.

132. Léon Mugesera, *supra* note 128.

133. Lau, *supra* note 131. See also *Canadian Court Acquits Refugee Jacques Mungwarere of Genocide in Rwanda*, CTV NEWS, <http://www.ctvnews.ca/canada/canadian-court-acquits-refugee-jacques-mungwarere-of-genocide-in-rwanda-1.1354895#ixzz2tFVxfCvP> (last updated July 5, 2013) (“Jacques Mungwarere was found not guilty Friday in Canada’s second trial under the Crimes Against Humanity and War Crimes Act”).

134. *Désiré Munyaneza*, TRIAL, <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/423/action/show/controller/Profile/tab/legal-procedure.html>.

135. Lau, *supra* note 131.



D. *The United States: Immigration Fraud Cases*

Analogous to Canada, the United States has approached Rwandan genocide cases through immigration remedies. Thus, although the United States Congress passed the GAA in 2007 with broad bipartisan support, the GAA, like its predecessor the Proxmire Act, remains a sword in a sheath.<sup>136</sup> The GAA attempts to go where the Proxmire Act did not dare to<sup>137</sup> in that it expands the U.S. jurisdiction over genocidal actions committed by any perpetrator found in the U.S.<sup>138</sup> However, the U.S. has been reluctant to exercise its expanded jurisdictional reach.<sup>139</sup> Certainly, the opportunity to exercise jurisdiction presented itself in 2009 when Lazare Kobagaya, a Wichita, Kansas man, was accused of participating in acts of genocide in Rwanda.<sup>140</sup>

Lazare Kobagaya was indicted in January 2009 for immigration fraud.<sup>141</sup> Although Kazare was accused of participation in the 1994 Rwandan Genocide, he was indicted for lying on immigration forms.<sup>142</sup> The charges alleged that Kobagaya fraudulently stated on his visa application that he was living in Rwanda until 1993, when the actual date he moved was in 1994.<sup>143</sup> Kobagaya's attorney, Kurt Kerns, insists that his client was associated with the genocide in Rwanda only after testifying on behalf of a former neighbor being tried for genocide in Finland (the Francois Bazaramba case).<sup>144</sup>

However, the Prosecutors contended that they had witnesses that insist that Kobagaya worked in concert with Bazaramba in the planning and execution of the killings.<sup>145</sup> Further, the United States authorities stated in a letter addressed to Finnish officials, requesting information on the Bazaramba case, that "witnesses alleged that Kobagaya incited others to commit arson, assault and murder by

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136. See generally Zachary Pall, Note, *The Genocide Accountability Act and U.S. Law: The Evolution and Lessons of Universal Jurisdiction for Genocide*, 3 INTERDISC. J. HUM. RTS. L. 13 (2008-2009).

137. The Proxmire Act limited jurisdiction to crimes of genocide committed in the U.S. or by a perpetrator that is a U.S. national.

138. See generally Pall, *supra* note 40.

139. *Id.*

140. Ron Sylvester, *Case Dismissed Against Wichita Man Accused of Rwandan Crimes*, THE WICHITA EAGLE (August 25, 2011, 5:01PM), <http://www.kansas.com/2011/08/25/1988025/prosecutors-dismiss-case-against.html>.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* See also *Finland Sentences Rwanda Preacher to Life for Genocide*, BBC NEWS, (June, 11, 2010), <http://www.bbc.co.uk/news/10294529> (case of Francois Bazaramba a Rwandan Baptist preacher was sentenced to life in prison for the crime of genocide by a Finnish Court).

145. Sylvester, *supra* note 140.

directing people to commit those acts and threatening those who tried to decline to participate.”<sup>146</sup>

Nonetheless, after two and a half years and over fifty witnesses brought from Africa to testify, the case was dismissed on August 25, 2011.<sup>147</sup> The Department of Justice federal prosecutors filed a motion to dismiss the charges because they failed to disclose a witness which would have been favorable to the defense.<sup>148</sup> The missing witness was a woman who processed Kobagaya’s visa in September 2008.<sup>149</sup> The witness had informed the prosecutors’ investigators that discrepancy in the move date on the visa application would not have resulted in a denial of his visa application.<sup>150</sup>

Recently, another case of immigration fraud involving the Rwandan Genocide arose in New Hampshire.<sup>151</sup> Beatrice Munyenyezi was convicted in February 2013, “of entering the United States and securing citizenship by masking her role as a commander of one of the notorious roadblocks where Tutsis were singled out for slaughter.”<sup>152</sup> The United States District Judge Steven McAuliffe found that the “defendant was actively involved, actively participated, in the mass killing of men, women and children simply because they were Tutsis.”<sup>153</sup> This ruling was supported by evidence that the defendant “checked national identification cards at a roadblock in Butare, instructing Tutsis to sit and wait for Hutu militia armed with machetes and crude garden tools to hack and beat them to death.”<sup>154</sup> Nevertheless, on July 15, 2013, the defendant was sentenced to ten years in prison for immigration fraud and *not* for her role in the Rwandan Genocide.<sup>155</sup> Despite the prosecutors insistence on the maximum sentence because “she is as guilty as if she wielded the machete herself,”<sup>156</sup> the GAA was never implicated in this case.<sup>157</sup> So, although the Assistant United States Attorney Alope Chakravarty proclaimed that “tolerating genocide was not

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146. Ron Sylvester, *Case Linked to Rwandan Genocide has Wichita Lawyer Crisscrossing Africa*, THE WICHITA EAGLE, (April 11, 2010), <http://www.kansas.com/2010/04/11/1264342/case-linked-to-rwanda-genocide.html>.

147. Sylvester, *supra* note 140..

148. *Id.*

149. *Id.*

150. *Id.*

151. Lynne Tuohy, *U.S. Woman Gets 10 years in Rwanda Fraud Case*, USA TODAY (July 15, 2013), <http://www.usatoday.com/story/news/world/2013/07/15/us-woman-rwanda/2518713/>.

152. *New Hampshire Woman Sentenced for Lying about role in Rwanda Genocide*, DAILY NEWS, (July 16, 2013), <http://www.nydailynews.com/news/national/nh-woman-sentenced-rwanda-genocide-role-article-1.1399860>.

153. Tuohy, *supra* note 151.

154. *New Hampshire Woman Sentenced for Lying about role in Rwanda Genocide*, *supra* note 152.

155. *Id.*

156. Tuohy, *supra* note 151.

157. *See generally New Hampshire Woman Sentenced for Lying about role in Rwanda Genocide*, *supra* note 152.

an option,”<sup>158</sup> the question remains whether immigration fraud is sufficient to hold génocidaires accountable.<sup>159</sup>

## V. OBSTACLES TO DOMESTIC PROSECUTIONS OF GENOCIDE

This case study reveals the different legal mechanisms that have been employed by some domestic courts in an attempt to hold génocidaires accountable.<sup>160</sup> However, in order to recommend a clearer path towards ending impunity, it is important to understand the political considerations, legal interpretations of international instruments, and policies that may factor into State parties’ legal decisions to forego prosecution under domestic laws criminalizing genocide. The following section explores these issues more in-depth.

### A. *United States*

In the context of political considerations in the prevention and punishment of genocide, the thorny issue surrounding universal jurisdiction is the concept of State sovereignty.<sup>161</sup> A look at the United States policies from ratification to the establishment of the ICC demonstrates the role politics have played in fashioning policies on domestic prosecutions for the crime of genocide.

#### 1. *United States State Sovereignty Considerations in Ratification of the Genocide Convention*

The United States path towards ratification of the Genocide Convention was laden with political posturing. The reason the Proxmire Act failed to contemplate universal jurisdiction could best be explained by the lack of political will to include universal jurisdiction in the Proxmire Act because of the political capital gained from opposing the ratification of the Genocide Convention.<sup>162</sup> In the mid-1980’s, the terms in which the Genocide Convention were debated was largely framed by Conservative groups such as the Liberty Lobby.<sup>163</sup> The pro-sovereignty

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158. Tuohy, *supra* note 151.

159. Rwandan officials have complained that genocide suspects are free to live in Europe and North America because their requests to extradite suspects have been ignored. See Daniel Nasaw, *US Government to try African in Kansas on Rwanda-linked Charges*, THE GUARDIAN (Apr. 24, 2009), <http://www.theguardian.com/world/2009/apr/24/rwanda-genocide-us-trial-kansas>.

160. *Supra* Part IV.A-D.

161. See U.N. Doc. A/C.6/SR.100 (1948) (United States and the Federation of Russia (formerly U.S.S.R. objections to universal jurisdiction)).

162. Pall, *supra* note 40, at 24.

163. Senator William Proxmire, Cong. Rec. 99th Cong. 2nd Sess., 1986, 132, pt. 15:S1355, quoted in Samantha Power, *A Problem From Hell* 156 (2002) (“The only time we hear the Genocide Treaty brought up,

voices were concerned with the dilution of United States sovereignty abroad.<sup>164</sup> Namely, “the perception that the U.S. would be subordinate to the International Court of Justice or would be required to extradite accused American citizens for trial in foreign courts.”<sup>165</sup> Thus, the ratification included the Lugar-Helms-Hatch Sovereignty Package.<sup>166</sup>

Contrastingly, the Genocide Accountability Act of 2007 (GAA) passed with very little fanfare.<sup>167</sup> The 2006 elections ushered in Democratic Congressional leadership, the status quo was challenged and the GAA was passed in 2007.<sup>168</sup> The GAA was introduced by Senator Dick Durbin (D-IL).<sup>169</sup> The GAA garnered significant bipartisan support, and it appears the fears around universal jurisdiction did not rise to the forefront during the negotiations.<sup>170</sup> This may be due in part to the 2006 elections that left Democrats in control of both chambers.<sup>171</sup> Thus, legislative action on international human rights issues became a possibility.<sup>172</sup> Further, a lobbyist such as the Liberty Lobby who opposed the ratification of the Genocide Convention no longer exists.<sup>173</sup> Also, in the 1970’s the American Bar Association went from opposing universal jurisdiction to being a proponent.<sup>174</sup> In addition, Senator Helms (R-NC), an arch-critic of the Genocide Convention, has since retired.<sup>175</sup>

But, what is more notable is the Republican co-sponsors of the GAA: Senator Coburn (R-OK) and Senator Cornyn (R-TX).<sup>176</sup> Their support may have been in part because the GAA was presented as a minor amendment to existing law.<sup>177</sup> In addition, the support of the GAA may be due in part to tying the issue of Darfur to jurisdiction over genocide for which conservatives expressed considerable concern about the atrocities that were being committed in Darfur.<sup>178</sup> Overall, the passage of the GAA was a reality because of a combination of political factors.<sup>179</sup>

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it’s by intense, bitter people who know the treaty only through what they read in the Liberty Lobby’s Spot- light or some publication of the John Birch Society”).

164. LAWRENCE J. LEBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* 128 (1991).

165. *Id.* at 201-230.

166. Resolution of Ratification (Lugar-Helms-Hatch Sovereignty Package), S. Exec. Rep. 2, 99th Cong., 1st sess. (1985).

167. Pall, *supra* note 40, at 26.

168. *Id.*

169. *Id.* at 24.

170. *Id.*

171. *Id.* at 25.

172. Pall, *supra* note 40, at 26.

173. Andrea Billups, *Liberty Lobby goes under, ends Spotlight publication*, WASHINGTON TIMES, (July 10, 2001), available at <http://www.rense.com/general11/spot.htm>.

174. Pall, *supra* note 40, at 25.

175. *Id.* at 26.

176. *Id.* at 25-26.

177. *Id.*

178. *Id.*

179. Pall, *supra* note 40, at 26.

In comparison, as previously indicated, Canada and France did not register reservations or objections to the Genocide Convention.<sup>180</sup> While the Netherlands did register an objection, it was in opposition to the United States isolationist rhetoric as proposed in its reservations to Article IX of the Genocide Convention.<sup>181</sup> Thus, as a matter of sovereignty considerations, the United States path towards ratification appears more politically calculated than the other State parties that are the subject of this article.<sup>182</sup>

2. *United States' Political Consideration in the Ratification of the Rome Statute of the ICC*

In fact, the political consideration around state sovereignty is further reflected in the United States' refusal to ratify the Rome Statute of the ICC.<sup>183</sup> On December 31, 2000, President Bill Clinton signed the Rome Statute of the International Court on the last day it was open for signature.<sup>184</sup> However, President Clinton "did not submit the treaty to the Senate for advice . . . because he did not want U.S. citizens to be subject to the jurisdiction of the Court."<sup>185</sup> Subsequently, President George Bush's administration repudiated the signing of the treaty declaring that the United States has no legal obligation under the treaty.<sup>186</sup>

While the United States has failed to sign or else re-sign the Rome Statute, President Barack Obama's administration has taken a more positive approach towards the ICC.<sup>187</sup> As a sign of diplomatic engagement, the United States has participated "as an Observer in the meetings of the ICC's governing body, the Assembly of States Parties, since November 2009."<sup>188</sup> In addition, Ambassador Susan Rice has acknowledged that the ICC is set to be a viable instrument to hold senior leaders responsible for international crimes.<sup>189</sup>

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180. *See infra* Part III.A-D.

181. *See infra* Part III.A-D.

182. *See infra* Part V.A.

183. *See supra* Part V.A.

184. Aurélie Coppin, *Status of the U.S. Signature of the Rome Statute of the International Criminal Court*, AMICC, available at [http://www.amicc.org/docs/US\\_Signature.pdf](http://www.amicc.org/docs/US_Signature.pdf) (last updated Sept. 11, 2008).

185. Aurélie Coppin, *Status of the U.S. Signature of the Rome Statute of the International Criminal Court*, AMICC, available at [http://www.amicc.org/docs/US\\_Signature.pdf](http://www.amicc.org/docs/US_Signature.pdf) (last updated Sept. 11, 2008).

186. *Id.*

187. *General Approach to the ICC, US & ICC: Administration Update*, AMICC, <http://www.amicc.org/usicc/administration> (last visited Feb. 12, 2014).

188. *Id.*

189. *Id.*

### 3. *The Consequences of Pursuing an Isolationist Sovereignty Policy*

The United States' initial hostility towards the ICC and reservations in regards to applying universal jurisdiction has not subsided with the passage of the GAA. For while the passage of GAA purports to codify universal jurisdiction, the impetus for its enactment appears to be for a limited purpose: the situation in Darfur.<sup>190</sup> As evidenced by the fact that the United States abstained from the vote to adopt United Nations Security Council Resolution 1593, referral of the Darfur situation to the ICC, instead of outright voting against the resolution because it "was confident that the . . . resolution protected US nationals and members of the armed services of other non-State Parties to the Rome Statute from the ICC's jurisdiction."<sup>191</sup>

The United States' continued reluctance to apply universal jurisdiction over the crime of genocide has left the federal judiciary bereft of a framework in which to try genocide cases under its current law (GAA).<sup>192</sup> Indeed, the Supreme Court held in *Medellin v. Texas*<sup>193</sup> and *Sanchez-Llamas v. Oregon*<sup>194</sup> that "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts." In addition, the international ad hoc tribunals provide little guidance in terms of universal jurisdiction over the crime of genocide.<sup>195</sup> While it is true that the United States played a leading role in designing and establishing the Nuremberg Tribunal, the ICTY, and the ICTR, United States nationals and citizens of its allies were immune from prosecution.<sup>196</sup> Furthermore, ad hoc tribunals rely on cooperation from nation states to successfully prosecute génocidaires, not universal jurisdiction.<sup>197</sup>

Arguably, the United States has a federal judiciary that is competent to try cases of first impression.<sup>198</sup> Veritably, that is the position the United States District Court found itself in when it tried Chuckie Taylor Jr. under the Torture Victim Protection Act for the first time in 2009.<sup>199</sup> The Torture Victim Protection

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190. See 110 Cong. Rec. S.4149 (Mar. 29, 2007).

191. Zachary D. Kaufman, *Sudan, the United States, and the International Court: A Tense Triumvirate in Transitional Justice for Darfur*, in *THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS* 51 (Ralph Henham & Paul Behrens eds., 2007).

192. See *supra* Part IV. and V.A-C.

193. 552 U.S., 128 S. Ct. 1346 (2008).

194. 548 U.S. 331, 126 S. Ct. 2669 (2006).

195. See *infra* note 194.

196. Kaufman, *supra* note 191.

197. See, e.g., Press Release, Amnesty International, Liberia: New president Must act Now on Taylor, Taylor's Surrender to Special Court Critical for Justice, Rule of Law in West Africa (Jan. 27, 2006), <http://www.amnesty.org/fr/library/asset/AFR34/003/2006/fr/66775e7b-d464-11dd-8743-d305bea2b2c7/afr340032006en.html> (expressing expediency on the part of the Liberian president to request that Nigeria surrender Charles Taylor to the jurisdiction of the Special Court for Sierra Leone).

198. See *infra* note 194.

199. *Taylor's Son Jailed for 97 Years*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/7820069.stm> (last updated January 9, 2009).

Act<sup>200</sup> “criminalizes torture and provides U.S. courts jurisdiction to hear cases involving acts of torture committed outside the United States if the offender is a U.S. national or is present in the United States, regardless of nationality.”<sup>201</sup> Thus, it appears that the United States is not reluctant to exercise universal jurisdiction.<sup>202</sup>

But, to view Chuckie’s prosecution as a shift in the United States position on exercising universal jurisdiction over *jus cogens* crimes is to misread the political climate at the time of Chuckie’s conviction.<sup>203</sup> The case involves a United States citizen who is the son of warlord Charles Taylor Sr.<sup>204</sup> Chuckie was taken into US custody on March 30, 2006, a day after his father was surrendered for trial to the Special Court for Sierra Leone, after attempting to enter the United States from Trinidad at Miami International Airport.<sup>205</sup> Unfortunately, at the time of Chuckie’s arrest, Liberia did not have the judicial capacity to try serious crimes after fourteen years of civil war; nor was there an existing international tribunal mandated to prosecute past crimes.<sup>206</sup>

As it were, the United States had a political interest in prosecuting Chuckie Taylor.<sup>207</sup> After the United States failed attempt to lobby members of the Security Council to adopt a resolution to establish an ad hoc tribunal to address the situation in Darfur,<sup>208</sup> this may have been an attempt to undercut the ICC’s legitimacy created by the precedent of referring the Darfur situation.<sup>209</sup> At minimum, it was an opportunity to add substance to the United States’ insistence that it would hold its citizens accountable for violations of international law through domestic legislation when it obtained exemption from the ICC’s jurisdiction during the adoption of Resolution 1593.<sup>210</sup> Thus, foregoing the prosecution of Chuckie Taylor, a United States citizen, would have reinforced the growing sentiment among the international community that the United States is hypocritical in that it insists on shielding American citizens from being tried by the ICC while simultaneously allowing the ICC to try other non-State parties

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200. 28 U.S.C. § 1350 (2006) (implements US obligations as a state party to the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment).

201. Press Release, Department of Justice, Roy Belfast Jr. A/K/A Chuckie Taylor Convicted on Torture Charges: Conviction Is First Under Torture Statute (Oct. 8, 2008) (on file with author).

202. *Id.*

203. *See infra* note 201.

204. Q & A: Charles ‘Chuckie’ Taylor, Jr.’s Trial in the United States for Torture Committed in Liberia, HUMAN RIGHTS WATCH (Sept. 23, 2008), <http://www.hrw.org/news/2008/09/23/q-charles-chuckie-taylor-jr-s-trial-united-states-torture-committed-liberia>.

205. *Id.*

206. *U.S. First Trial for Overseas Torture*, Human Rights Watch (Sept. 23, 2008), <http://www.hrw.org/news/2008/09/23/us-first-trial-overseas-torture>.

207. *See infra* note 206.

208. Kaufman, *supra* note 191, at 54-55.

209. *See, e.g., Id.*

210. *Id.*; Press Release, Security Council, Security Council refers Situation in Darfur, Sudan to Prosecutor of International Court (Mar. 31, 2005), <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>.

such as in the case of Sudan.<sup>211</sup> Hence, the Chuckie Taylor Jr. case appears to be an exception rather than an emerging trend.

*B. Canada, France, and the Netherlands*

In comparison, Canada, France, and the Netherlands have all ratified the Rome Statute.<sup>212</sup> But, arguably, at first glance ratification of the Rome Statute, or the lack of reservations regarding sovereignty in the ratification of the Genocide Convention, has not necessarily hindered or advanced the domestic prosecutions for the crime of genocide.<sup>213</sup> In fact, with the exception of the Netherlands, domestic prosecutions are relatively on par.<sup>214</sup> However, a deeper look into the policy positions surrounding France's misapprehension of universal jurisdiction as announced during the Nuremberg Trials,<sup>215</sup> or Canada's de facto grant of immunity to Nazi war criminals,<sup>216</sup> illustrates the difficulty with which these State parties have encountered in conducting domestic prosecutions for genocide.<sup>217</sup>

*1. Canada*

History demonstrates that a failure to embrace universal jurisdiction, a norm in international law, results in an inability to effectively deal with *jus cogens* crime in general, and genocide specifically. The *Finta* case in Canada provides an illustration. After World War II, Canada permitted immigrants suspected of war crimes to take up residence and obtain citizenship.<sup>218</sup> The Deschênes Commission was established to conduct an enquiry into the accusations and criticisms that Canada harbored Nazi War criminals.<sup>219</sup> The report concluded that 744 persons guilty of Nazi war crimes were living in Canada.<sup>220</sup> Therefore, the Deschênes Commission recommended modifications to Canada's criminal codes and immigration statutes, to permit prosecution and extradition.<sup>221</sup>

As a result, on December 1, 1987, Imre Finta was the first to be tried under the new enacted legislation for war crimes.<sup>222</sup> However, Finta was acquitted on all

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211. Kaufman, *supra* note 191, at 57.

212. See *Rome Statute Ratification Chart by Region*, CICC, <http://www.iccnw.org/?mod=download&doc=4352> (last visited Feb. 12, 2014).

213. See *supra* Part IV.

214. See *supra* Part IV.

215. See *infra* Part V.B.2.

216. See *infra* Part V.B.1.

217. See *supra* Part IV.

218. Imre Finta, TRIAL, <http://www.trial-ch.org/en/ressources/trial-watch/trialwatch/profils/profile/599/action/show/controller/Profile/tab/legal-procedure.html> (last visited Feb. 13, 2013).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*



eight counts of war crimes and crimes against humanity. The newly enacted legislation was a severe test for the judiciary, the trial judge guidelines for each accusation were difficult to follow.<sup>223</sup> The last appeal in 1994 resulted in a final judgment and acquittal of Finta.<sup>224</sup> The Finta trial left the Canadian government skittish.<sup>225</sup> Therefore, it developed a policy to pursue perpetrators of international crimes through immigration remedies. It was only after the enactment of the Crimes Against Humanity and War Crimes Act of 2000 that the Canadian government resumed prosecution for international crimes.<sup>226</sup>

## 2. France

As a result of misinterpreting the concept of universal jurisdiction for the crime of genocide as presented in the Nuremberg trials,<sup>227</sup> evidence demonstrates that the French Courts have also experienced considerable difficulty conducting domestic prosecutions for the crime of genocide.<sup>228</sup> The Cour de Cassation's decision on December 20, 1985, in the *Barbie* case,<sup>229</sup> interpreted the Nuremberg definition Article 6(c), 'within the jurisdiction of the tribunal,' narrowly, in that it only applied to Nazism.<sup>230</sup> As a consequence, "no other crime could be qualified as a crime against humanity, simply because it would necessarily be exterior, in time and circumstance, to the European Axis Powers."<sup>231</sup> It was only after the passage of the New Penal Code in 1994 that a crime could be classified as a crime against humanity.<sup>232</sup> Even still, acts conducted between 1945 and 1994 cannot be characterized as crimes against humanity.<sup>233</sup> However, as stated previously, the procedural law adopting the French legislation to the Security Council Resolution 955 creating the ICTR provides the French courts with a means in which to exercise universal jurisdiction over international crimes.<sup>234</sup>

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223. Imre Finta, *supra* note 218 .

224. *Id.*

225. *Id.*

226. See *Désiré Munyaneza*, *TRIAL*, <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/423/action/show/controller/Profile/tab/legal-procedure.html>.

227. See Jan Wouters & Sten Verhoeven, *The Prosecution of Genocide – in Search of A European Perspective*, in *THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS 200* (Ralph Henham & Paul Behrens eds., 2007).

228. See *supra* IV.B.

229. Klaus Barbie case (Chambre criminelle de la Cour de Cassation, judgment of 20 December 1985).

230. *The Prosecution of Genocide–in Search of A European Perspective*, in *THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS 200* (Ralph Henham & Paul Behrens eds., 2007).

231. *The Prosecution of Genocide*, *supra* note 79.

232. *Id.*

233. *Id.*

234. *Id.*

### 3. The Netherlands

In contrast, the Netherlands who registered strong objections and essentially a rebuke to the United States, among other nation states, in regards to its reservations on Article IV of the Genocide Convention,<sup>235</sup> has effectively conducted domestic prosecutions.<sup>236</sup> This is not to suggest that the United States should ratify the Rome Statue, but rather to underscore the difficulty domestic courts have in prosecuting the crime of genocide when they equivocate on their legal obligation.<sup>237</sup> For the “requirement of responsibility should clearly encompass [States parties to the Genocide Convention] acknowledgment of the crime of genocide, through its unequivocal prosecution and punishment.”<sup>238</sup>

## VI. IMMIGRATION REMEDIES: A PRETEXT IN DOMESTIC PROSECUTIONS FOR GENOCIDE

Equivocation on the legal obligation to prosecute the crime of genocide results in fashioning policies that prefer pursuing immigration remedies as a pretext in regards to the crime of genocide.<sup>239</sup> On the one hand, pursuing immigration remedies that results in extradition would meet the legal obligation under the Genocide Convention. As a matter of fact, Article VII of the Genocide Convention requires “Contracting Parties [to] pledge to . . . grant extradition in accordance with their laws and treaties in force.”<sup>240</sup> On the other hand, the problem with charging persons accused of genocide with immigration fraud, as opposed to the specific crime of genocide under domestic legislation, is that it does not always result in extradition.

The Kobagaya case illustrates this point.<sup>241</sup> The prosecutors aimed to establish Kobagaya’s participation in the Rwandan Genocide through immigration fraud by proving that Kobagaya lied on his visa application which indicated that he lived in Rwanda until 1993 when he actually moved in 1994.<sup>242</sup> Thus, although the United States prosecution planned to use evidence and witnesses to establish that Kobagaya participated in the Rwandan genocide, Kobagaya was charged with lying to immigration officials *not* genocide.<sup>243</sup>

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235. See *supra* Part III.D.

236. See *supra* Part IV.D.

237. See *supra* Part IV.A-C.

238. *The Prosecution of Genocide*, *supra* note 79.

239. See *supra* Part IV.A-C.

240. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260, U.N. Doc. A/RES/260 (Dec. 9, 1948) (hereinafter “Genocide Convention”).

241. See *supra* III.A.

242. Ron Sylvester, *Case Dismissed Against Wichita Man Accused of Rwandan Crimes*, THE WICHITA EAGLE, (August 26, 2011), <http://www.kansas.com/2011/08/25/1988025/prosecutors-dismiss-case-against.html>.

243. James McKinley Jr., *In Kansas Courtroom, Echoes of Rwanda Genocide*, THE NEW YORK TIMES (May 8, 2011), <http://www.nytimes.com/2011/05/09/us/09wichita.html?pagewanted=all>.

Consequently, the charges were dismissed when the prosecutors failed to disclose a witness favorable to the defendant that would have testified that a change in date would not have influenced the decision to approve the visa application. Hence, the strategy of pursuing suspected génocidaires through immigration remedies does not always result in prosecution or extradition.<sup>244</sup>

Rwanda's government drew a similar conclusion in regards to the *Munyenyezi* case.<sup>245</sup> When the New Hampshire judge declared a mistrial on March 15, 2012 because the jury was deadlocked,<sup>246</sup> Rwanda's prosecutor general, Martin Ngoga, stated that "Western jurisdictions [do not] understand the gravity of the case before them."<sup>247</sup> He went on to say, "The cases are handled in a very simplistic way."<sup>248</sup> According to Ngoga, "in the past [Rwanda] applauded trials abroad because [it was believed] that they would substitute extradition," but that has not been the case.<sup>249</sup> Thus, ultimately, immigration remedies, as a pretext for prosecution of genocide appears to minimize the gravity of the crime.<sup>250</sup>

## VII. DOMESTIC PROSECUTION: COST ANALYSIS

While developing the framework to try genocide cases in domestic courts is a necessary component towards ending impunity for the crime of genocide, there are significant challenges in prosecuting human rights abuses committed abroad.<sup>251</sup> Conservation of legal resources is a serious consideration for national judicial systems that cannot be easily dismissed.<sup>252</sup> However, the economic costs must be weighed against the societal costs of impunity. The following section provides a cost analysis.

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244. Sylvester, *supra* note 140.

245. *See infra* note 246.

246. *On the Munyenyezi Trial*, DEMOCRACY WATCH (Mar. 26, 2012), <http://democracywatch-rwanda2010.blogspot.com/2012/03/on-munyenyezi-trial.html>.

247. *Id.*

248. *Extradite Genocide Suspects or Drop Investigations—Ngoga*, THE NEW TIMES, [http://www.newtimes.co.rw/news/views/article\\_print.php?i=14936&a=51484&icon=Print](http://www.newtimes.co.rw/news/views/article_print.php?i=14936&a=51484&icon=Print) (last visited on Feb. 13, 2014); *On the Munyenyezi Trial*, DEMOCRACY WATCH (Mar. 26, 2012), <http://democracywatch-rwanda2010.blogspot.com/2012/03/on-munyenyezi-trial.html>

249. *Id.*; *On the Munyenyezi Trial*, DEMOCRACY WATCH (Mar. 26, 2012), <http://democracywatch-rwanda2010.blogspot.com/2012/03/on-munyenyezi-trial.html>

250. *Extradite Genocide Suspects or Drop Investigations—Ngoga*, THE NEW TIMES, [http://www.newtimes.co.rw/news/views/article\\_print.php?i=14936&a=51484&icon=Print](http://www.newtimes.co.rw/news/views/article_print.php?i=14936&a=51484&icon=Print) (last visited on Feb. 13, 2014); *On the Munyenyezi Trial*, DEMOCRACY WATCH (Mar. 26, 2012), <http://democracywatch-rwanda2010.blogspot.com/2012/03/on-munyenyezi-trial.html>

251. Q & A: Charles 'Chuckie' Taylor, Jr.'s Trial in the United States for Torture Committed in Liberia, HUMAN RIGHTS WATCH (Sept. 23, 2008), <http://www.hrw.org/news/2008/09/23/q-charles-chuckie-taylor-jr-s-trial-united-states-torture-committed-liberia>.

252. *Id.*

A. *Judicial Economy: The Price of Ending Impunity*

Setting aside political considerations, legal misinterpretations, and policy determinations that may present obstacles to domestic prosecutions, conservation of limited resources of national legal systems may explain the apprehension to prosecute suspected génocidaires under domestic laws criminalizing genocide.<sup>253</sup> Certainly, addressing issues such as “language barriers, the need to evaluate complex and unfamiliar political and historical contexts, the difficulty of gaining access to the necessary evidence, and risks to potential witnesses” come at an economic cost.<sup>254</sup>

This cost is reflected in the recent cases tried before domestic courts.<sup>255</sup> The *Kobagaya* case is a prime example.<sup>256</sup> The cost of the trial was over \$1 million dollars.<sup>257</sup> There is reason to believe the *Munyenzezi* case, which initially resulted in a mistrial and then a subsequent conviction, was significantly higher in costs.<sup>258</sup> Conceivably, the fifteen-year fight to deport Léon Mugesera was a costly endeavor.<sup>259</sup>

But, there is nothing, by way of the facts, to suggest that the cost of litigation would dramatically increase for prosecutions brought under domestic laws criminalizing genocide. Indeed, since immigration fraud cases are a mere pretext to prosecutions for the crime of genocide, the same evidence to prove genocide is proffered. “In the *Kobagaya* case, American prosecutors [used] witness statements and evidence collected by the Finnish government against Francois Bazaramba.”<sup>260</sup> The witnesses in the *Munyenzezi* case consisted of “experts on the genocide, who gave details of the violence, and residents of Butare.”<sup>261</sup> Finally, in the *Mugesera* case, Canadian prosecutors lined up twenty-eight witnesses to testify regarding Mugesera’s involvement in the Rwandan Genocide.<sup>262</sup> Hence,

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253. See *supra* V.

254. Q & A: Charles ‘Chuckie’ Taylor, Jr.’s Trial in the United States for Torture Committed in Liberia, HUMAN RIGHTS WATCH (Sept. 23, 2008), <http://www.hrw.org/news/2008/09/23/q-charles-chuckie-taylor-jr-s-trial-united-states-torture-committed-liberia>.

255. See *supra* V.

256. See *supra* III.A.

257. Ron Sylvester, *Case Dismissed Against Wichita Man Accused of Rwandan Crimes*, THE WICHITA EAGLE, (August 26, 2011), <http://www.kansas.com/2011/08/25/1988025/prosecutors-dismiss-case-against.html>.

258. See *supra* V.C.

259. Leon Mugesera, TRIAL, <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/696/action/show/controller/Profile/tab/fact.html> (last visited Feb. 12, 2014).

260. Daniel Nasaw, *US Government to try African in Kansas on Rwanda-linked Charges*, THE GUARDIAN (Apr. 24, 2009), <http://www.theguardian.com/world/2009/apr/24/rwanda-genocide-us-trial-kansas>.

261. Tom Haines, *Did This New Hampshire Woman Take Part in the Rwandan Genocide?*, THE ATLANTIC (Feb. 20, 2013), <http://www.theatlantic.com/national/archive/2013/02/did-this-new-hampshire-woman-take-part-in-the-rwandan-genocide/273328/>

262. Ostine Arinaitwe Gashugi, *Rwanda: Witness Pins Mugesera On Infamous Speech*, ALLAFRICA (Oct. 30, 2013), <http://allafrica.com/stories/201311010098.html>.

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there are no economic savings to be garnered in pursuing immigration remedies as opposed to prosecutions under domestic criminal statutes.<sup>263</sup>

### B. Societal Costs: Impunity for the Crime of Genocide

A candle was lit at the genocide memorial in Kigali on January 7, 2014, during commemorations marking the 20th Anniversary of the Rwandan Genocide.<sup>264</sup> The flame will be carried by young people. Young people who became heads of households<sup>265</sup> when their parents were massacred during the 90 days of genocidal hell.

Since the 1994 Genocide, a new word has appeared in the Rwandan vocabulary to describe the psychological manifestations of the children who are victims of the genocide: Ihahamuka.<sup>266</sup> The term Ihahamuka joins two words: haha, which means lungs or respiration, and Muka, which means without.<sup>267</sup> In fact, “genocide is one of the most pressing threats to the health of populations in the twenty-first century.”<sup>268</sup> Genocidal violence produces mortality rates that far exceed “other public health emergencies including malaria and HIV/AIDS.” Unsurprisingly, “the impact of genocide on local health economies is catastrophic, and the opportunity costs of diverting scarce global health dollars toward ameliorating genocide related outcomes are substantial.”<sup>269</sup> Thus, the societal costs of impunity, which includes economic costs, surpasses the economic costs of prosecution.<sup>270</sup>

Despite the international community’s affirmation in 1948 that “genocide is a crime under international law . . . and condemned by the civilized world,” mankind has yet to be liberated from its odious scourge. There are significant societal costs to bear when State parties to the Genocide Convention fail to live up to their legal obligation to prevent and punish the crime of genocide.<sup>271</sup> As such, State parties should adhere to one of the foremost basic principles of

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263. *See supra* V.

264. *Rwanda Marks 20th Anniversary of Genocide*, THE INDEPENDENT (Jan 13, 2014), <http://www.independent.co.ug/rwanda-ed/rwanda/8603-rwanda-marks-20th-anniversary-of-genocide>.

265. *Rwanda: Ten Years After Genocide*, UNICEF, [http://www.unicef.org/infobycountry/rwanda\\_genocide.html](http://www.unicef.org/infobycountry/rwanda_genocide.html) (last visited Feb. 14, 2014).

266. *Id.*

267. *Id.*

268. Reva N. Adler et. al., *To Prevent, React, and Rebuild: Health Research and the Prevention of Genocide*, NIC, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1361111/> (last visited Feb. 14, 2014).

269. *Id.*

270. *Id.*

271. *See* Athanase Hagengimana, *After Genocide in Rwanda: Social and Psychological Consequences*, INSTITUTE FOR THE STUDY OF GENOCIDE, <http://www.instituteforthestudyofgenocide.org/oldsite/newsletters/25/athanse.html> (last visited on Feb. 14, 2014).

criminal law: punishment as means of deterrence.<sup>272</sup> Thus, the punishment of the crime must meet the gravity of the offense in order to deter would be génocidaires.<sup>273</sup> As it stands, immigration fraud, while morally questionable, is an insufficient tool in the fight against impunity for genocide.<sup>274</sup> The crime among all crimes necessitates a punishment that carries a stigma.<sup>275</sup> Therefore, State parties should prosecute genocide suspects under their existing domestic laws criminalizing genocide.

## VIII. CONCLUSION

Finally, the adoption of the Genocide Convention was the first and necessary step in denouncing the crime of genocide.<sup>276</sup> However, post-Nuremberg, State parties have equivocated on the application of universal jurisdiction for the crime of genocide.<sup>277</sup> This equivocation has led to pursuing policies that undermine the fight against impunity in two central ways.<sup>278</sup> First, State parties have struggled with developing a framework in which to effectively prosecute perpetrators of genocide in domestic courts.<sup>279</sup> Second, equivocation on the principle of universal jurisdiction has caused State parties to fashion immigration remedies that are inadequate to address the crime of genocide.<sup>280</sup> In the final cost analysis, the societal cost in allowing impunity for genocide far out-weighs the financial cost of prosecuting génocidaires in domestic courts.<sup>281</sup> Thus, State parties must adhere to the basic principles of criminal law, deterrence, and prosecute génocidaires, specifically for genocide, in order to end impunity for the crime of genocide.<sup>282</sup>

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272. Linda M. Keller, *The False Dichotomy of Peace Versus Justice and the International Criminal Court*, 3 HAGUE JUST. J. 12, 38 (2008), [http://www.issafrica.org/anicy/uploads/Keller\\_Dichotomy\\_of\\_Peace\\_versus\\_Justice.pdf](http://www.issafrica.org/anicy/uploads/Keller_Dichotomy_of_Peace_versus_Justice.pdf).

273. *Id.* at 44.

274. *See supra* Part VI.

275. Keller, *supra* note 15, at 41 (arguing that alternative justice mechanisms can provide adequate “punishment by incorporating local beliefs and customs as accountability measures for a larger number of offenders.”).

276. Michael P. Scharf & Brianne M. Draffin, *Foreword: To Prevent and to Punish: an International Conference in Commemoration of the Sixtieth Anniversary of the Genocide Convention*, 40 CASE W. RES. J. INT’L L. 1, 1 (2007-2008).

277. *See supra* Part V.

278. *See supra* Part V.

279. *See supra* Part V.

280. *See supra* Part VI.

281. *See supra* Part VII.

282. *See supra* p. 55.

